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The End Of An Era: The Supreme Court (Finally) Butts Out of Punitive Damages For Good

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THE END OF AN ERA: THE SUPREME COURT (FINALLY)
BUTTS OUT OF PUNITIVE DAMAGES FOR GOOD

*Jim Gash**

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INTRODUCTION

It is finally over. The Supreme Court’s incursion into punitive damages jurisprudence has unceremoniously ended, but not before the Court, under the guise of substantive due process, erected a complex and constitutionally dubious set of rules in an effort to fix the heretofore-intractable multiple punishments problem.¹ As is often the case, the incrementalist approach taken by the Court allowed this conquest to occur somewhat quietly. Professor Pamela Karlan observes that “most constitutional law scholars have hardly noticed that the most significant innovation in substantive due process during the Rehnquist and Roberts Court years” has been the Court’s punitive damages jurisprudence.²

This “innovation” has been accomplished through an unusual coalition of liberal and conservative Justices in the various closely divided decisions along the way.³ With the addition of four new Justices since the last case the Court decided on substantive due process grounds⁴—two appointed by President George W. Bush and two appointed by President Barack Obama—it is unsurprising that many Court followers claim that the status of punitive damages jurisprudence is “unstable and uncertain” and that what will happen in the future is “impossible to tell.”⁵ As demonstrated in

1. See, e.g., David G. Owen, *A Punitive Damages Overview: Functions, Problems and Reform*, 39 VILL. L. REV. 363, 406 (1994) (referring to the multiple punishments problem as “the most momentous question as yet unresolved by the Court”); see also *infra* note 218.

2. Pamela S. Karlan, *Some Thoughts on Autonomy and Equality in Relation to Ruth Bader Ginsburg*, 70 OHIO ST. L.J. 1085, 1087 (2009).

3. In fact, of the five current members of the Court who participated in the last case purportedly decided on substantive due process grounds, *State Farm Mutual Automobile Insurance Co. v. Campbell*, 538 U.S. 408 (2003), Reagan-appointee Justice Anthony Kennedy and Clinton-appointee Justice Stephen Breyer were in the majority, while the conservative Justices Antonin Scalia and Clarence Thomas and the liberal Justice Ruth Bader Ginsburg were together in dissent.

4. See *infra* Part IV.C.

5. See, e.g., Tom Goldstein, *How Could the Supreme Court Shift After Stevens?*,

this Article, however, precisely the opposite is true. Contrary to outward appearances, a careful review of the Court's most recent activity in this area—*Philip Morris USA v. Williams*⁶—reveals that the Court is almost certainly entering an extended silent phase in its punitive damages jurisprudence and will not be reviewing any more punitive damages awards in the foreseeable future.

The Court's recent foray into punitive damages has, however, left the dissenting Justices and punitive damages scholars complaining that the Court's jurisprudence is "insusceptible of principled application."⁷ While *Philip Morris* made some progress toward clarifying much of the lingering ambiguity,⁸ it still left ample room for continued criticism of whether the approach it has adopted is principled. Along the way, however, the Court did make significant progress toward addressing its primary animating concern with punitive damages—the multiple punishments problem. Simply stated, this problem occurs when "a defendant, who has injured multiple potential plaintiffs by a single act or course of conduct, faces multiple punitive damages awards for that conduct."¹⁰ While this persistent problem would be best remedied by Congress,¹¹ the Court's attempts at a fix have led to awkward and highly questionable opinions that expose the Court to increasing criticism that its punitive damages jurisprudence consists of nothing more than results-oriented, substantive due process decisions that simply reflect the individual Justices' senses of fairness.¹²

SCOTUSBLOG (Apr. 18, 2010, 11:59 AM), <http://www.scotusblog.com/2010/04/how-could-the-supreme-court-shift-after-stevens> (basing a conclusion of unpredictability on the fact that three Justices who favor the current framework have retired while three who oppose it have not).

6. 549 U.S. 346 (2007).

7. *State Farm*, 538 U.S. at 429 (Scalia, J., dissenting); see also *Philip Morris*, 549 U.S. at 364 (Ginsburg, J., dissenting) (characterizing the Supreme Court's recent punitive damages jurisprudence as "less than crystalline"); *McClain v. Metabolife Int'l, Inc.*, 259 F. Supp. 2d 1225, 1228–29 (N.D. Ala. 2003) (lamenting that while the court delayed ruling on post-judgment motions until *State Farm* was decided, it "is not sure that the wait was worth it" and declaring, "[T]he court is not sure that it fully comprehends all of the possible lessons in *State Farm*."); Jim Gash, *Punitive Damages, Other Acts Evidence, and the Constitution*, 2004 UTAH L. REV. 1191, 1239 ("By, in essence, failing to show his work, Justice Kennedy *does* guarantee that much ink and effort will be expended by lower courts, commentators, and ultimately the Supreme Court in an effort to understand and apply the *State Farm* opinion.").

8. See *infra* Part IV.A.

9. See, e.g., Jim Gash, *Solving the Multiple Punishments Problem: A Call for a National Punitive Damages Registry*, 99 NW. U. L. REV. 1613, 1613–14 (2005) (declaring the multiple punishments problem to be "major and growing" and widely recognized as having "currently no satisfactory solution"); Owen, *supra* note 1, at 406.

10. Gash, *supra* note 9, at 1613–14.

11. *Id.* at 1644 app. (arguing that federal legislation is necessary to fully and finally resolve this problem and offering statutory language that would do just that).

12. See, e.g., *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 613 n.5 (1996) (Ginsburg, J., dissenting) (observing that the substantive due process question of whether the punitive damages award is "[t]oo big" comes down to "the amount at which five Members of the Court bridle").

Judicial conservatives and punitive damages scholars critical of the Supreme Court's adverse possession of important aspects of punitive damages jurisprudence¹³ had good reason to hope that the substantive due process power grab by the Court in the realm of punitive damages would be reversed soon after Chief Justice John Roberts and Justice Samuel Alito were confirmed. They were sorely disappointed, however, when Roberts and Alito rejected pleas from, inter alia, conservative stalwarts Antonin Scalia and Clarence Thomas urging the Court to butt out of punitive damages.¹⁴ Instead, Roberts and Alito seemed to accelerate the Court's encroachment by joining the majority in the Court's 5–4 decision in *Philip Morris*.¹⁵ This case was the eighth in a series of closely divided cases over the last two decades¹⁶ whereby the Court constitutionalized this area of law, previously reserved to the several states.¹⁷

13. See Stacey Obrecht, Case Note, *Punitive Damage Determinations: A Jury's Factual Inquiry or a Court's Mathematical Leash*, *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408 (2003), 5 WYO. L. REV. 637, 650–51 (2005) (“The *State Farm* Court has given the opponents of ‘activist judges’ additional ammunition for their arguments because this holding ‘disregard[ed] the Court’s own considered reluctance to expand the open-ended reach of substantive due process and hearkens back to the discredited Lochner era of judicial activism.’ It took the power from the states and ‘merely place[d] . . . [the Supreme] Court in the position of a Court of Additional Appeals from state courts.’” (quoting Amicus Curiae Brief of the Ass’n of Trial Lawyers of Am. in Support of the Respondents at 2–3, *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408 (2003) (No. 01-1289), 2002 WL 31387416)); see also *Gore*, 517 U.S. at 607 (Ginsburg, J., dissenting) (arguing that the Court “unwisely ventures into territory traditionally within the States’ domain”); *id.* at 598 (Scalia, J., dissenting) (“[T]he Court’s activities in [the area of punitive damages] are an unjustified incursion into the province of state governments.”).

14. See Douglas W. Kmiec, *Up in Smoke: The Supreme Court Loses Its Unanimity*, SLATE (Feb. 21, 2007, 6:03 PM), <http://www.slate.com/id/2160286> (“For originalists who look to the Constitution’s text, the discovery of limits on punitive damages in the due process clause is of dubious pedigree. . . . Yet Roberts and Alito were in the limits-imposing majority. . . . Is it disappointing that in this instance Roberts and Alito boarded the Constitution-can-mean-anything train? Yes. Every disregard of principle here is likely to be played back elsewhere.”); see also Vikram David Amar, *The Supreme Court’s Recent Philip Morris Punitive Damages Decision: What It Reveals About How Constitutional Law Gets Made, and How the Court Functions*, FINDLAW’S WRIT (Mar. 2, 2007), <http://writ.news/findlaw.com/amar/20070302.html> (“Interestingly, Chief Justice Roberts and Justice Alito, both of whom—especially Justice Alito—seemed during confirmation somewhat skeptical of substantive due process in the abortion and same-sex conduct settings, felt comfortable applying (at least a variant of) the concept to strike down the jury award in *Philip Morris*. Perhaps Justice Breyer’s (not quite convincing, to me) use of the adjective ‘procedural’ in his majority opinion allowed these two newcomers to sleep a little easier after joining the opinion.”).

15. The majority opinion was written by Justice Breyer and joined by Chief Justice Roberts and Justices Kennedy, Alito, and David Souter. Justices Stevens, Thomas, and Ginsburg each filed separate dissenting opinions, with Thomas and Scalia joining Ginsburg’s dissent. See *Philip Morris USA v. Williams*, 549 U.S. 346, 348 (2007).

16. See *infra* Part I.

17. See, e.g., Michael L. Rustad, *Happy No More: Federalism Derailed by the Court That Would Be King of Punitive Damages*, 64 MD. L. REV. 461, 468 (2005) (“For more than two hundred years, the Court deferred to the states’ choice of substantive, procedural, and evidentiary

A ray of hope emerged a few months later, however, when the Court agreed to review another case (regarding the Exxon Valdez oil spill) involving a huge punitive damages award.¹⁸ But this hope quickly faded when the Court strictly limited its review to matters of federal maritime law, expressly refusing to evaluate the punitive damages award on due process grounds.¹⁹

Another ray of hope emerged with the successive retirements of Justices John Paul Stevens and David Souter, both of whom fully subscribed to and supported the Court's substantive due process jurisprudence. But an examination of the available writings and records of President Obama's replacements for Stevens and Souter (Justices Sonia Sotomayor and Elena Kagan) reveals no reason to believe that *both* would adopt the view shared by Justices Ginsburg, Scalia, and Thomas that the size of punitive damage awards should be left to the states.²⁰ Although Justice Kagan's lack of judicial experience makes it impossible to divine her jurisprudential methodology with anything approaching certainty,²¹ and while Justice Sotomayor's track record on punitive damages simply reflects her application of Supreme Court precedent without betraying her

rules for assessing and awarding punitive damages.”).

18. *Exxon Shipping Co. v. Baker*, 552 U.S. 989 (2007) (granting certiorari).

19. The petition for certiorari sought review on the following three questions:

1. May punitive damages be imposed under maritime law against a shipowner (as the Ninth Circuit held, contrary to decisions of the First, Fifth, Sixth, and Seventh Circuits) for the conduct of a ship's master at sea, absent a finding that the owner directed, countenanced, or participated in that conduct, and even when the conduct was contrary to policies established and enforced by the owner?
2. When Congress has specified the criminal and civil penalties for maritime conduct in a controlling statute, here the Clean Water Act, but has not provided for punitive damages, may judge-made federal maritime law (as the Ninth Circuit held, contrary to decisions of the First, Second, Fifth, and Sixth Circuits) expand the penalties Congress provided by adding a punitive damages remedy?
3. Is this \$2.5 billion punitive damages award, which is larger than the *total* of all punitive damages awards affirmed by all federal appellate courts in our history, within the limits allowed by (1) federal maritime law or (2) if maritime law could permit such an award, constitutional due process?

Petition for a Writ of Certiorari at i, *Exxon*, 552 U.S. 989 (No. 07-219), 2007 WL 2383784, at *i. The Court limited its review to questions 1, 2, and 3(1) only. *Exxon*, 552 U.S. 989.

20. See *infra* Part IV.C.2–3.

21. See Paul Campos, *Blank Slate*, THE NEW REPUBLIC (May 8, 2010, 12:00 AM), <http://www.tnr.com/article/politics/blank-slate> (“Unfortunately, nobody seems to know what Kagan's views are on most political issues, nor does anyone know what she believes about how judges ought to interpret the Constitution, how much deference courts should give to Congress and state legislatures, and what role the judiciary should play in checking the powers of the executive branch. We don't know because she hasn't told us.”).

personal beliefs,²² the fact that the newest Justices are widely viewed as left-leaning centrists²³ makes it highly unlikely that *both* would choose to adopt either Justice Ginsburg's atypical (to liberals) line of reasoning²⁴ or the approach of famously conservative Justices Scalia and Thomas. Accordingly, it is exceedingly unlikely that the addition of Justices Sotomayor and Kagan will hasten the reversal of the Court's substantive due process jurisprudence in the punitive damages realm.

Part I of this Article chronicles and summarizes the development of the Supreme Court's punitive damages jurisprudence.²⁵ Over the past two decades, the Court has increasingly constitutionalized various aspects of punitive damages jurisprudence, using both procedural²⁶ and substantive²⁷ due process rationales. A set of three "guideposts" has emerged that courts are to use in determining whether a punitive damages award runs afoul of constitutional guarantees.²⁸

Part II outlines the multiple punishments problem that is currently facing courts throughout the country and provides a brief overview of the various failed attempts and current proposals to remedy this problem.²⁹ Part III provides the factual and procedural background of *Philip Morris*, culminating with the Oregon Supreme Court's affirmance of the \$79.5 million jury verdict.³⁰

Part III then analyzes and critiques the United States Supreme Court's opinion in *Philip Morris*, including Justice Breyer's majority opinion and

22. See Greg Stohr, *Sotomayor on High Court May Mean Looser Limits on Damage Awards*, BLOOMBERG (June 5, 2009), http://www.bloomberg.com/apps/news?pid=20601070&sid=ay2_LzqaXiQY ("Sotomayor's views on damages . . . are largely a mystery, with her few rulings on the topic offering limited insight as to how she would rule as a justice. As with other business issues, she has eschewed sweeping legal theories, instead taking a case-by-case approach.").

23. See, e.g., Josh Gerstein, *Memos Reveal Elena Kagan's Centrist Side*, POLITICO (May 12, 2010, 4:48 AM), <http://www.politico.com/news/stories/0510/37119.html> (reporting that Kagan encouraged President Bill Clinton to take centrist positions during her work in the Clinton administration); Steve LeVine & Theo Francis, *Sotomayor: A Moderate on Business Issues*, BUSINESSWEEK (May 26, 2009, 11:12 AM), http://www.businessweek.com/bwdaily/dnflash/content/may2009/db20090526_819200.htm (claiming that Sotomayor "has earned a centrist reputation in business cases").

24. See, e.g., *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 607 (1996) (Ginsburg, J., dissenting). Justice Ginsburg's federalism concern is atypical of liberal appointees and apparently stems from the same methodological concern that prompted her to be critical of *Roe v. Wade*, 410 U.S. 113 (1973), claiming that an already-moving political process is preferable to "[h]eavy-handed judicial intervention" in establishing a specific substantive due process framework. Ruth Bader Ginsburg, Essay, *Some Thoughts on Autonomy and Equality in Relation to Roe v. Wade*, 63 N.C. L. REV. 375, 385–86 (1985).

25. See *infra* Part I.

26. See *infra* Part I.B.

27. See *infra* Part I.C.

28. See *infra* Part I.C.2.a.i–iii.

29. See *infra* Part II.

30. See *infra* Part III.A.

the three dissenting opinions, the Oregon Supreme Court's ruling on remand, and the telling response of the United States Supreme Court to Philip Morris' subsequent writ of certiorari.³¹ Part III also briefly analyzes *Exxon Shipping Company v. Baker* and explains why what did *not* happen in that case is quite significant.³²

Part IV then deconstructs and reconstructs the Court's current punitive damages jurisprudence, examining the current makeup of the Court and analyzing whether there is reason to believe that the addition of Justices Roberts, Alito, Sotomayor, and Kagan might provide any restraining influence on the Court's punitive damages jurisprudence.³³ Part IV then concludes that given the balance of power on the Court, and given the Court's indirect "fix" of the multiple punishments problem, the Court is unlikely to take any more punitive damages cases in the near future.³⁴

I. CONSTITUTIONALIZING PUNITIVE DAMAGES

Punitive damages have long been an important fixture in tort law, tracing their origins back to the Code of Hammurabi, which was written nearly 4,000 years ago.³⁵ Likewise, punitive damages have long been accepted as a part of the American common law.³⁶ There is universal agreement that their purpose is to punish and deter reprehensible conduct.³⁷ These objectives have historically been served exclusively by the states,³⁸ with little or no discussion of federal constitutional considerations, and without involvement by the United States Supreme Court. This all changed in the late 1980s.

31. *See infra* Part III.B.2.–D.

32. *See infra* Part III.E.

33. *See infra* Part IV.

34. *See infra* Part IV.C.

35. *See Owen, supra* note 1, at 368 (explaining that this earliest form of punitive damages was calculated through the use of a predetermined scale and called "multiple damages").

36. *See, e.g.,* DAVID G. OWEN, PRODUCTS LIABILITY LAW 1123–24 (2005).

37. *See Philip Morris USA v. Williams*, 549 U.S. 346, 352 (2007) (citing *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 568 (1996)) (stating that the Court has "long made clear" that a state may use punitive damages for the purposes of punishment and deterrence); 1 LINDA L. SCHLUETER, PUNITIVE DAMAGES § 2.2(A)(1), at 29–30 (5th ed. 2005) (claiming that the most frequent purposes of punitive damages cited by courts, legislatures, commentators, and plaintiffs' counsel are punishment and deterrence). *But see Owen, supra* note 1, at 373–74 (suggesting a total of *five* objectives of punitive damages: (1) retribution; (2) education; (3) deterrence; (4) compensation; and (5) law enforcement).

38. *See Rustad, supra* note 17, at 468 (lamenting that the Court has now federalized the punitive damages remedy through its substantive due process jurisprudence after two hundred years of deference to the states).

A. *The Excessive Fines Clause Does Not Apply to Punitive Damages*

The first time the Supreme Court grappled at any level with the constitutionality of punitive damages was in 1989 in *Browning-Ferris Industries of Vermont, Inc. v. Kelco Disposal, Inc.*³⁹ In that case, the Court was presented with the question of whether a punitive damages award in a civil case implicated the Excessive Fines Clause of the Eighth Amendment.⁴⁰ After reviewing the history and development of the Excessive Fines Clause,⁴¹ the Court concluded that “[w]hatever the outer confines of the Clause’s reach may be, we now decide only that it does not constrain an award of money damages in a civil suit when the government neither has prosecuted the action nor has any right to receive a share of the damages awarded.”⁴² As it had done twice previously,⁴³ the Court side-stepped the question as to whether the Due Process Clause of the Fourteenth Amendment imposes any constraints on punitive damages awards,⁴⁴ and it concluding that the petitioner had waived this argument by failing to raise it below.⁴⁵

39. 492 U.S. 257 (1989).

40. *Id.* at 259. The Eighth Amendment provides: “Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.” U.S. CONST. amend. VIII.

41. *Browning-Ferris*, 492 U.S. at 262–68.

42. *Id.* at 263–64. This language suggests that when the punitive damages award (or a portion thereof) goes to the government (as opposed to private litigants), the Excessive Fines Clause *might* be implicated. *Accord id.* at 298–99 (O’Connor, J., concurring in part and dissenting in part) (“I also note that by relying so heavily on the distinction between governmental involvement and purely private suits, the Court suggests (despite its claim . . . that it leaves the question open) that the Excessive Fines Clause will place some limits on awards of punitive damages that are recovered by a governmental entity.”); *id.* at 275 n.21 (majority opinion) (citing *United States v. Halper*, 490 U.S. 485 (1989) (“While our opinion in *Halper* implies that punitive damages awarded to the Government in a civil action may raise Eighth Amendment concerns, that case is materially different from this one, because the *Government* was exacting the punishment in a civil action, whereas here the damages were awarded to a private party.”); *see also* Margaret Meriwether Cordray, *Contempt Sanctions and the Excessive Fines Clause*, 76 N.C. L. REV. 407, 422–28 (reviewing the Supreme Court’s interpretation of the Excessive Fines Clause); *Philip Morris*, 549 U.S. at 359 n.1 (Stevens, J., dissenting) (“I continue to agree with Justice O’Connor and those scholars who have concluded that the Excessive Fines Clause is applicable to punitive damages awards regardless of who receives the ultimate payout.”). *But see Browning-Ferris*, 492 U.S. at 262 (“Given that the [Eighth] Amendment is addressed to bail, fines, and punishments, our cases long have understood it to apply primarily, *and perhaps exclusively*, to criminal prosecutions and punishments.” (emphasis added)); *id.* at 268 (“[T]he history of the Eighth Amendment convinces us that the Excessive Fines Clause was intended to limit only those fines directly imposed by, and payable to, the government.”).

43. *See Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813, 828–29 (1986); *Banker’s Life & Cas. Co. v. Crenshaw*, 486 U.S. 71, 76–80 (1988).

44. *Browning-Ferris*, 492 U.S. at 259 n.1 (noting that while the petitioners challenged the award on due process grounds, the Court declined to reach that issue).

45. *Id.* at 277. Justices William J. Brennan and Thurgood Marshall, however, indicated how

B. *Procedural Due Process Places Constitutional Limits on Punitive Damages Awards*

1. *Pacific Mutual Life Insurance Co. v. Haslip*

It took only two years for the Court to revisit the issue it declined to address in *Browning-Ferris*. In *Pacific Mutual Life Insurance Co. v. Haslip*,⁴⁶ the Court squarely addressed the question of whether the Fourteenth Amendment's Due Process Clause constrained punitive damages awards. In *Haslip*, the Court explained that because the common law approach, whereby the jury's initial determination of whether to impose punitive damages (and in what amount) was reviewable for reasonableness by both trial and appellate courts,⁴⁷ pre-dated the Fourteenth Amendment itself,⁴⁸ and because no state or federal court had ever found this approach violated due process,⁴⁹ the common law approach was not per se unconstitutional.⁵⁰ The Court did caution, however, that vesting either the jury or a judge with *unlimited discretion* in setting a punitive damages award could cause "extreme results that jar one's constitutional sensibilities."⁵¹

they would ultimately resolve this question. *See id.* at 280 (Brennan, J., joined by Marshall, J., concurring) ("I join the Court's opinion on the understanding that it leaves the door open for a holding that the Due Process Clause constrains the imposition of punitive damages in civil cases brought by private parties."). These Justices even previewed the test the Court would eventually adopt:

Several of our decisions indicate that even where a statute sets a range of possible civil damages that may be awarded to a private litigant, the Due Process Clause forbids damages awards that are "grossly excessive," or "so severe and oppressive as to be wholly disproportioned to the offense and obviously unreasonable."

Id. at 280–81 (internal citations omitted) (quoting *Waters-Pierce Oil Co. v. Texas*, 212 U.S. 86, 111 (1909); *St. Louis, Iron Mountain & S. R.R. v. Williams*, 251 U.S. 63, 66–67 (1919)); *see also* OWEN, *supra* note 36, § 18.6, at 1211 & n.92 (citing *Browning-Ferris*, 492 U.S. at 275 n.21 (majority opinion); *id.* at 298–99 (O'Connor, J., concurring in part and dissenting in part); Calvin R. Massey, *The Excessive Fines Clause and Punitive Damages: Some Lessons from History*, 40 VAND. L. REV. 1233 (1987) (questioning the constitutionality, in light of *Browning-Ferris*, of whether large punitive damages violate the Eighth Amendment); Stephen R. McAllister, *A Pragmatic Approach to the Eighth Amendment and Punitive Damages*, 43 U. KAN. L. REV. 761 (1995). For a discussion of whether it is unconstitutional for the state to take a portion of the punitive damages awarded to the plaintiff, see Sharon G. Burrows, *Apportioning a Piece of a Punitive Damages Award to the State: Can State Extraction Statutes Be Reconciled with Punitive Damages Goals and the Takings Clause?*, 47 U. MIAMI L. REV. 437, 455–66 (1992).

46. 499 U.S. 1 (1991).

47. *Id.* at 15.

48. *Id.* at 17 (citing *Day v. Woodworth*, 54 U.S. (13 How.) 363, 369–73 (1851)).

49. *Id.*

50. *Id.*

51. *Id.* at 18.

The Court disclaimed an interest in precisely differentiating between “constitutionally acceptable and [] constitutionally unacceptable” levels of discretion,⁵² observing instead that “general concerns of reasonableness and adequate guidance from the court when the case is tried to a jury properly enter into the constitutional calculus.”⁵³ The Court then turned its attention to the jury instructions given by the trial court and found that they appropriately counseled the jury (1) to use punitive damages to punish and deter the defendant; and (2) not to use punitive damages to compensate the plaintiff for injury.⁵⁴ The Court also found that Alabama’s post-verdict review process comported with due process because it ensured that the punitive damages award was “not grossly out of proportion to the severity of the offense and ha[d] some understandable relationship to compensatory damages.”⁵⁵

Both Justices Scalia and Sandra Day O’Connor were sharply critical of the Court’s opinion—Scalia protesting that it went too far,⁵⁶ and O’Connor objecting that it did not go far enough.⁵⁷ As would become a recurring theme in the Court’s punitive damages cases,⁵⁸ Justice Scalia (though concurring in the result of the case) chided the Court for providing insufficient guidance to lower courts,⁵⁹ and he offered the following prescient lamentation: “We have expended much ink upon the due-process implications of punitive damages, and the fact-specific nature of the Court’s opinion guarantees that we and other courts will expend much more in the years to come.”⁶⁰ In a lone dissent, Justice O’Connor complained that the lack of “meaningful standards” given to the jury

52. *Id.*

53. *Id.*

54. *Id.* at 19; *see also id.* at 20 (“As long as the discretion is exercised within reasonable constraints, due process is satisfied.”).

55. *Id.* at 22. In particular, the Alabama Supreme Court had previously identified its criteria for assessing “whether a punitive award is reasonably related to the goals of deterrence and retribution.” *Id.* at 21. These criteria were:

- (a) whether there is a reasonable relationship between the punitive damages award and the harm likely to result from the defendant’s conduct as well as the harm that actually occurred; (b) the degree of reprehensibility of the defendant’s conduct, the duration of that conduct, the defendant’s awareness, any concealment, and the existence and frequency of similar past conduct; (c) the profitability to the defendant of the wrongful conduct and the desirability of removing that profit and of having the defendant also sustain a loss; (d) the “financial position” of the defendant; (e) all the costs of the litigation; (f) the imposition of criminal sanctions on the defendant for its conduct, these to be taken in mitigation; and (g) the existence of other civil awards against the defendant for the same conduct, these also to be taken in mitigation.

Id. at 21–22.

56. *Id.* at 24–25 (Scalia, J., concurring).

57. *Id.* at 44 (O’Connor, J., dissenting).

58. *See, e.g., infra* note 205 and accompanying text.

59. *Haslip*, 499 U.S. at 24 (Scalia, J., concurring).

60. *Id.* at 39.

violated due process.⁶¹ Foreshadowing the Court's later move into the substantive due process realm, Justice O'Connor criticized the majority approach, declaring that Alabama's "standardless discretion to juries is not remedied by post hoc judicial review," rather, at best, it "tests whether the award is grossly excessive. This is an important *substantive* due process concern, but our focus here is on the requirements of *procedural* due process."⁶²

2. *Honda Motor Co. v. Oberg*⁶³

In what has been described as a "trivial case,"⁶⁴ the Court again revisited procedural due process in *Honda Motor Co. v. Oberg*,⁶⁵ which dealt with appellate review of punitive damages awards. In *Oberg*, the Court invalidated as violative of procedural due process an amendment to Oregon's constitution prohibiting "judicial review of the amount of punitive damages awarded by a jury 'unless the court can affirmatively say there is no evidence to support the verdict.'"⁶⁶ Observing that judicial review of the amount of punitive damages has existed for as long as punitive damages themselves,⁶⁷ and finding that Oregon's minimal review of such awards falls dramatically short of the scope of such review afforded at common law,⁶⁸ the Court concluded that the essentially "unreviewable discretion" given to the jury in setting the amount of punitive damages was a violation of procedural due process.⁶⁹

C. *Substantive Due Process Mandates that Punitive Damages Awards Not Be Grossly Excessive*

1. *TXO Production Corp. v. Alliance Resources Corp.*

In a move that has been widely criticized,⁷⁰ the Court veered into the realm of substantive due process when it addressed whether a punitive

61. *Id.* at 43 (O'Connor, J., dissenting).

62. *Id.* at 55–56 (emphasis added).

63. Chronologically speaking, this was not the Court's next punitive damages case. It is analyzed at this point in the Article because, prior to *Philip Morris*, it was the Court's only other procedural due process case.

64. See OWEN, *supra* note 36, at 1220.

65. 512 U.S. 415, 418 (1994).

66. *Id.* (quoting OR. CONST. art.VII, § 3 (amended 1910)).

67. *Id.* at 421.

68. *Id.* at 426–27.

69. *Id.* at 435. For a detailed analysis of this case, see Matthew J. Macario, *Constitutional Law—Punitive Damage Awards and Procedural Due Process in Products Liability Cases—Honda Motor Co. v. Oberg*, 114 S. Ct. 2331 (1994), 68 TEMP. L. REV. 409 (1995).

70. See, e.g., *Philip Morris USA v. Williams*, 549 U.S. 346, 361 (2007) (Thomas, J., dissenting) (reiterating his belief that the Constitution does not control the amount of punitive damages and that the substantive due process framework is a creation of the Court); *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 429 (2003) (Scalia, J., dissenting) (stating that "the Due Process Clause provides no substantive protections against 'excessive' or 'unreasonable'").

damages award was “grossly excessive” in *TXO Production Corp. v. Alliance Resources Corp.*,⁷¹ decided only two years after *Haslip*.⁷²

In *TXO*, the jury awarded Alliance \$19,000 in compensatory damages and \$10 million in punitive damages after finding TXO liable for common law slander of title.⁷³ On appeal, TXO challenged the constitutionality of the punitive damages award, arguing that it violated due process because the amount awarded was unconstitutionally excessive.⁷⁴ Relying on a series of cases nearly a century old,⁷⁵ the plurality opinion declared that “grossly excessive” punitive damages awards violate due process.⁷⁶ As it had previously done in *Haslip*, the Court again disclaimed an ability to “draw a mathematical bright line between the constitutionally acceptable and the

awards of punitive damages” and that the Court’s jurisprudence in this area “is insusceptible of principled application”); *TXO Prod. Corp. v. Alliance Res. Corp.*, 509 U.S. 443, 470–71 (1993) (Scalia, J., concurring) (expressing his refusal to recognize “the existence of a so-called ‘substantive due process’ right that punitive damages be reasonable” despite his concurrence in the judgment); Martin H. Redish & Andrew L. Mathews, *Why Punitive Damages Are Unconstitutional*, 53 EMORY L.J. 1, 10 (2004) (“A federalized democratic system should not tolerate so blatant a usurpation of state legislative and judicial prerogatives by an unaccountable federal judicial body.”); Rustad, *supra* note 17, at 517 (“The constitutionalization of punitive damages is an unprecedented project to convince the Court to ‘unmake’ the tort law remedy of punitive damages.”); A. Benjamin Spencer, *Due Process and Punitive Damages: The Error of Federal Excessiveness Jurisprudence*, 79 S. CAL. L. REV. 1085, 1088–89 (2006) (arguing that the Court’s move to substantive due process is unsupported by history and precedent and is inconsistent with principles of construction found in the Ninth and Tenth Amendments).

71. 509 U.S. 443, 446, 454 (1993).

72. *TXO* was the Court’s next punitive damages case after *Haslip*. See *supra* Part I.B.1.

73. *TXO*, 509 U.S. at 446.

74. *Id.* at 452. TXO also sought reversal on the grounds that (1) West Virginia did not recognize a claim for slander of title; and (2) admission of out of state conduct to show TXO’s wrongful intent violated West Virginia evidence law. *Id.*; see also *id.* at 462 n.28 (“TXO . . . [further] contend[ed] that the admission of evidence of its alleged wrongdoing in other parts of the country, as well as the evidence of its impressive net worth, led the jury to base its award on impermissible passion and prejudice.”). TXO also sought reversal on *procedural* due process grounds. See *id.* at 446 (“The question we granted certiorari to decide is whether that punitive damages award violates the Due Process Clause of the Fourteenth Amendment, either because its amount is excessive or because it is the product of an unfair procedure.”).

75. See, e.g., *St. Louis, Iron Mountain & S. R.R. v. Williams*, 251 U.S. 63, 66–67 (1919) (recognizing some authority that the Due Process Clause limits civil damages awarded pursuant to statutory scheme); *Sw. Tel. & Tel. Co. v. Danaher*, 238 U.S. 482, 490 (1915) (noting that the monetary penalty could not be “imposed without departing from the fundamental principles of justice embraced in the recognized conception of due process of law”); *Standard Oil Co. v. Missouri*, 224 U.S. 270, 286 (1912) (explaining the ability to fix an amount of fines is limited by obligation to administer justice); *Waters-Pierce Oil Co. v. Texas*, 212 U.S. 86, 111 (1909) (“We can only interfere with such legislation and judicial action of the States enforcing it if the fines imposed are so grossly excessive as to amount to a deprivation of property without due process of law.” (citing *Coffey v. Harlan Cnty.*, 284 U.S. 659, 665 (1907))); *Seaboard Air Line R.R. v. Seegers*, 207 U.S. 73, 78 (1907) (“We know there are limits beyond which penalties may not go . . .”).

76. *TXO*, 509 U.S. at 458 (pointing out that there was a clear majority of Justices that agreed there was a substantive component to the due process clause that limited the size of a punitive damages award).

constitutionally unacceptable that would fit every case.”⁷⁷ Relying upon (1) the amount of harm the plaintiff actually suffered; (2) the amount of harm that TXO’s conduct could have potentially caused the plaintiff;⁷⁸ and (3) the wealth and conduct of TXO, the Court concluded that the size of the punitive damages award was not “so ‘grossly excessive’ as to be beyond the power of the State to allow.”⁷⁹

Observing that the case was “close and difficult,”⁸⁰ Justice Anthony Kennedy provided the pivotal fifth vote in a separate concurrence, though not without articulating his serious concern with the evolution of the Court’s punitive damages jurisprudence:

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. This type of review, far from imposing meaningful, law-like restraints on jury excess, could become as fickle as the process it is designed to superintend. Furthermore, it might give the illusion of judicial certainty where none in fact exists, and, in so doing, discourage legislative intervention that might prevent unjust punitive awards.⁸¹

To Justice Kennedy, TXO’s “pattern and practice of fraud, trickery and deceit”⁸² overcame the massive 524:1 ratio of compensatory to punitive damages.⁸³

Justice Scalia, joined by Justice Thomas, concurred in the judgment only.⁸⁴ While Justice Scalia allowed that the Fourteenth Amendment’s Due Process Clause “incorporates certain substantive guarantees specified in the Bill of Rights,” he steadfastly refused to accept that the Due Process Clause “contains the substantive right not to be subjected to excessive punitive damages.”⁸⁵

77. *Id.* at 458 (quoting *Pac. Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 18 (1991)).

78. *Id.* at 460 (“It is appropriate to consider the magnitude of the *potential harm* that the defendant’s conduct would have caused to its intended victim if the wrongful plan had succeeded, as well as the possible harm to other victims that might have resulted if similar future behavior were not deterred.”). The Court in *Philip Morris* later clarified that the jury could only consider potential harm *to the plaintiff*, and not to third parties. *Philip Morris USA v. Williams*, 549 U.S. 346, 354 (2007).

79. *TXO*, 509 U.S. at 462. The Court also summarily dismissed TXO’s procedural due process claim. *See id.* at 465–66. For a detailed analysis of this case, see Nancy G. Dragutsky, *Walking the Invisible Line of Punitive Damages: TXO Prod. Corp. v. Alliance Res. Corp.*, 21 PEPP. L. REV. 909 (1994).

80. *TXO*, 509 U.S. at 468 (Kennedy, J., concurring).

81. *Id.* at 466–67.

82. *Id.* at 468–69 (quoting *TXO Prod. Corp. v. Alliance Res. Corp.*, 419 S.E.2d 870, 890 (W. Va. 1992)) (internal quotation marks omitted).

83. *Id.* at 467–68.

84. *Id.* at 470 (Scalia, J., concurring).

85. *Id.* at 470–71. Justice Scalia further complained,

Justice O'Connor, joined by Justices Bryon White and Souter, dissented, though not because the plurality had recognized a substantive due process right.⁸⁶ To the contrary, Justice O'Connor made it clear that there existed "common ground that an award may be so excessive as to violate due process."⁸⁷ She dissented because she disagreed with the plurality's method for determining whether such a violation existed and from the result reached in the case.⁸⁸ Justice O'Connor, however, decried the plurality's failure to "erect[] . . . a single guidepost to help other courts find their way through this area"⁸⁹ and accused the plurality of "abandon[ing] all pretense of providing instruction and mov[ing] directly into the specifics of this case."⁹⁰ Justice O'Connor further declared:

Our inability to discern a mathematical formula does not liberate us altogether from our duty to provide guidance to courts that, unlike this one, must address jury verdicts such as this on a regular basis. On the contrary, the difficulty of the matter imposes upon us a correspondingly greater obligation to provide the most coherent explanation we can.⁹¹

2. *BMW of North America, Inc. v. Gore*

Three years later, the Court responded to Justice O'Connor's plea for "guideposts" to help lower courts navigate the developing punitive damages jurisprudence. In *BMW of North America, Inc. v. Gore*,⁹² a majority of the Court for the first time seemed to take seriously the criticisms leveled by some of its members in prior decisions, particularly concerning its failure to provide lower courts with adequate guidance on how to apply those decisions.⁹³ What ultimately emerged from *Gore* is the

It is particularly difficult to imagine that 'due process' contains the substantive right not to be subjected to excessive punitive damages, since if it contains *that* it would surely also contain the substantive right not to be subjected to excessive fines, which would make the Excessive Fines Clause of the Eighth Amendment superfluous in light of the Due Process Clause of the Fifth Amendment.

Id.

86. *Id.* at 480 (O'Connor, J., dissenting).

87. *Id.*

88. *Id.*

89. *Id.*

90. *Id.*

91. *Id.*

92. 517 U.S. 559 (1996).

93. See, e.g., *TXO*, 509 U.S. at 480 (O'Connor, J., dissenting); *id.* at 466–67 (Kennedy, J., concurring) (explaining that the "grossly excessive" standard is unhelpful and leaves reviewing courts to their own subjective reasoning); *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 37 (1990) (Scalia, J., concurring) ("[T]he 'guidance' to the jury provided by the admonition that it 'take into consideration the character and the degree of the wrong as shown by the evidence and

basic template that both trial and appellate courts now apply when determining whether a jury's punitive damages award is "grossly excessive."

In *Gore*, a doctor sued BMW for fraud and deceptive trade practices in Alabama state court after discovering that the "new" BMW he bought from a BMW dealer had actually been repainted prior to sale.⁹⁴ BMW admitted that the car had been repainted prior to sale and acknowledged its nationwide policy of non-disclosure of pre-sale repairs not exceeding 3% of the purchase price of the car.⁹⁵ At trial, Dr. Gore sought to focus the jury on BMW's conduct beyond his individual case and introduced, over BMW's objections, evidence that BMW had sold 983 cars nationwide as "new" even though the cars had been repainted prior to sale; fourteen of these 983 sales had occurred in Alabama.⁹⁶ Even though BMW introduced evidence that its disclosure policy complied with the most stringent statutory requirements in the country,⁹⁷ the jury awarded Gore \$4,000 in compensatory damages⁹⁸ and \$4 million in punitive damages.⁹⁹

On appeal, the Alabama Supreme Court held that the jury had impermissibly calculated the punitive damages award by multiplying Gore's \$4,000 in compensatory damages by the number of cars BMW had sold *nationwide* without disclosing they had been repainted.¹⁰⁰ The Alabama Supreme Court then determined that a constitutionally reasonable amount of punitive damages was \$2 million and issued a remittitur.¹⁰¹ Declaring that "a review of this case would help to illuminate 'the character of the standard that will identify unconstitutionally excessive awards' of punitive damages,"¹⁰² the United States Supreme Court granted review.

Writing for a bare five-Justice majority,¹⁰³ Justice Stevens first acknowledged that states have "considerable flexibility" in deciding the amount of punitive damages allowable in individual cases,¹⁰⁴ and only

necessity of preventing similar wrong.' That is not guidance but platitude.").

94. *Gore*, 517 U.S. at 563. The car had apparently been damaged by acid rain while in transit from Germany to the United States. *Id.* at 563 n.1.

95. *Id.* at 563–64. This policy stemmed from BMW's internal survey of state law, which revealed that no state statutorily required disclosure of pre-sale repairs costing less than 3% of the purchase price of the car. *Id.* at 565.

96. *Id.* at 564.

97. *Id.* at 565.

98. *Id.* This amount equaled the reduction in value Gore claimed his car suffered due to the repainting. *Id.* at 564.

99. *Id.* at 565.

100. *Id.* at 567.

101. *Id.*

102. *Id.* at 568 (quoting *Honda Motor Co. v. Oberg*, 512 U.S. 415, 420 (1994)).

103. Justice Stevens was joined by Justices O'Connor, Kennedy, Souter, and Breyer. *Id.* at 561.

104. *Id.* at 568.

when the punitive damages award is “grossly excessive” in relation to the state interest sought to be vindicated by the award “does it enter the zone of arbitrariness that violates the Due Process Clause of the Fourteenth Amendment.”¹⁰⁵ Therefore, explained Justice Stevens, “the federal excessiveness inquiry appropriately begins with an identification of the state interests that a punitive award is designed to serve.”¹⁰⁶ Once the state interests are identified, the inquiry then turns to whether the punitive damages award is “grossly excessive” in relation to those interests.¹⁰⁷

The Court readily identified and approved of Alabama’s state interest in protecting its citizens from deceptive trade practices.¹⁰⁸ And if the jury had punished BMW only for failing to disclose that Gore’s car had been repainted, or perhaps only for non-disclosure *in Alabama*, that very well might have ended the state interest inquiry. But the jury was instead allowed, even encouraged, to punish BMW for each instance in which it sold a repainted car as “new” *nationwide*.¹⁰⁹ Because Alabama’s state interest is limited to protecting *Alabama citizens*, its punishment of *extraterritorial* conduct, the Court decided, impermissibly infringed upon the sovereignty of other states.¹¹⁰

This is true, reasoned Justice Stevens, because the wide-ranging, pre-sale disclosure requirements among the various states¹¹¹ created a substantial risk that the Alabama jury’s punitive damages award based upon nationwide sales punished conduct that was actually *lawful* where it occurred.¹¹² Inflicting such punishment plainly exceeded a state’s legitimate authority.¹¹³ “To punish a person because he has done what the law plainly allows him to do is a due process violation of the most basic sort.”¹¹⁴ Consequently, punitive damages awards “must be supported by

105. *Id.*

106. *Id.*

107. *Id.* at 574.

108. *Id.* at 568–69, 573–74.

109. *Id.* at 572–74. In fact, the size of the punitive damages award, \$4 million, was almost exactly the mathematical product of the amount of compensatory damages awarded Gore (\$4,000) multiplied by the total number of repainted cars sold as “new” throughout the United States (983). *Id.* at 564.

110. *Id.* at 572–74; *see also* *Huntington v. Attrill*, 146 U.S. 657, 669 (1892) (“Laws have no force of themselves beyond the jurisdiction of the State which enacts them, and can have extra-territorial effect only by the comity of other States.”).

111. *Gore*, 517 U.S. at 569 n.13. The Court, in footnote 13, summarized a “patchwork of rules representing the diverse policy judgments of lawmakers in 50 states.” *Id.* at 569 n.13, 570.

112. *Id.* at 572–73.

113. *Id.* (“Alabama does not have the power . . . to punish BMW for conduct that was lawful where it occurred and that had no impact on Alabama or its residents.”).

114. *Id.* at 573 n.19 (quoting *Bordenkircher v. Hayes*, 434 U.S. 357, 363 (1978)). The Court also noted that not only may Alabama not use punitive damages awards to *punish* conduct lawful in other states, it is also not permitted to use punitive damages “to *deter* conduct that is lawful in other jurisdictions.” *Id.* at 573 (emphasis added).

the State's interest in protecting its own consumers and its own economy."¹¹⁵ Having limited the scope of the conduct that could be legitimately considered in determining whether the punitive damages award was sufficiently tethered to Alabama's state interest so as not to be "grossly excessive" in relation to that interest, the Court then turned its attention to the important task of describing how to determine whether the award is "grossly excessive."¹¹⁶

a. Establishment of Guideposts

Starting with the premise that a due process challenge to the size of a punitive damages award arises out of the defendant's claim of lack of adequate notice, the Court cobbled together various statements made in some of its earlier punitive damages opinions to erect three "guideposts" to assist in determining whether a defendant had adequate notice of the fact that the conduct engaged in is punishable and that the punishment is potentially severe.¹¹⁷ If the defendant does not receive adequate notice, there may be a due process violation.¹¹⁸ The three guideposts the Court erected are (1) the degree of reprehensibility of the defendant's conduct; (2) the ratio between the compensatory damages and punitive damages; and (3) the difference between the authorized civil and criminal penalties for such conduct and the punitive damages award.¹¹⁹

i. Degree of Reprehensibility

With respect to the first guidepost, the Court stated that the degree of reprehensibility of the defendant's conduct is the "most important indicium of the reasonableness of a punitive damages award."¹²⁰ As guidance for this guidepost, the Court enumerated a variety of factors to be considered when assessing reprehensibility, including (1) whether the harm suffered was economic versus physical; (2) whether the defendant's conduct evinced a reckless disregard for the health and safety of others; (3) whether the conduct was intentional, malicious, deceitful, or performed through trickery (as opposed to merely negligently or innocently); (4) whether the

115. *Id.* at 572. As found by the Alabama Supreme Court, however, the punitive damages award in *Gore* was "based in large part on conduct that happened in other jurisdictions." *Id.* at 573 (quoting *BMW of N. Am., Inc. v. Gore*, 646 So. 2d 619, 627 (Ala. 1994)). To its credit, the Alabama Supreme Court had recognized that such reliance upon extraterritorial conduct was improper, and purported to base its remittitur (from \$4 million to \$2 million) solely upon conduct occurring within Alabama. *Id.* at 573–74.

116. *Id.* at 574.

117. *Id.* at 574–75.

118. *Id.*

119. *Id.* For a detailed analysis of *Gore* and its guideposts, see Sabrina C. Turner, Note, *The Shadow of BMW of North America, Inc. v. Gore*, 1998 WIS. L. REV. 427, 438–445.

120. *Gore*, 517 U.S. at 575.

target of the conduct was vulnerable; and (5) whether the defendant had repeatedly engaged in the conduct while knowing it was wrongful.¹²¹

ii. Ratio

Relying on the “long pedigree” of the “principle that exemplary damages must bear a ‘reasonable relationship’ to compensatory damages,”¹²² the second guidepost was the ratio between the size of the compensatory damages and the size of the punitive damages.¹²³ Adhering to its prior rejection of any binding mathematical formula, the Court did attempt to provide some additional guidance in distinguishing between permissible and impermissible ratios. Generally speaking, offered the Court, when compensatory damages are low, it is permissible for the ratio to be higher than otherwise would be allowed, and higher ratios are constitutionally permissible when either the injury is difficult to detect or when monetary damages are difficult to determine.¹²⁴ The Court then (unhelpfully) added that when the amount of a punitive damages award is “breathtaking,” it “must surely ‘raise a suspicious judicial eyebrow.’”¹²⁵

iii. Other Sanctions

The third guidepost instructs courts to evaluate “the civil or criminal penalties that could be imposed for comparable misconduct” in relation to the size of the punitive damages award at issue.¹²⁶ The rationale behind

121. *Id.* at 575–77. The Court’s approach to determining whether punitive damages are appropriate parallels that of the *Restatement (Second) of Torts*, which counsels juries to consider “the character of the defendant’s act, the nature and extent of the harm to the plaintiff that the defendant caused or intended to cause and the wealth of the defendant.” RESTATEMENT (SECOND) OF TORTS § 908(2). The *Restatement (Second)* approach is followed by most states. *See* OWEN, *supra* note 36, at 1187.

122. *Gore*, 517 U.S. at 580.

123. *Id.* The Court also clarified that the appropriate measure of compensatory damages includes not only those *actually* suffered but also those *potentially* suffered due to the defendant’s conduct. *Id.* at 582. This statement by the Court would later become a point of controversy in *Philip Morris*, causing the Court to once again attempt to clarify the scope of potential damages that could be considered in calculating the ratio. *See infra* note 344 and accompanying text.

124. *Gore*, 517 U.S. at 582.

125. *Id.* at 583 (quoting *TXO Prod. Corp. v. Alliance Res. Corp.*, 509 U.S. 443, 481 (1993) (O’Connor, J., dissenting)); *see also* *Philip Morris USA v. Williams*, 549 U.S. 346, 364 (2007) (Ginsburg, J., dissenting) (characterizing the Supreme Court’s punitive damages jurisprudence as “less than crystalline”). *See generally* Neil B. Stekloff, Note, *Raising Five Eyebrows: Substantive Due Process Review of Punitive Damages Awards After BMW v. Gore*, 29 CONN. L. REV. 1797 (1997) (arguing that *Gore* represents an ad hoc, constitutionally unsound decision by the Court); F. Patrick Hubbard, *Substantive Due Process Limits on Punitive Damages Awards: “Morals Without Technique”?*, 60 FLA. L. REV. 349, 351 (2008) (arguing that the framework the Court introduced in *Gore* “has made the process less fair and reliable because the Court’s decisions have shown a lack of clarity and consistency, an inadequate basis in terms of theory and policy, and an ad hoc approach to the application and construction of the framework.”).

126. *Gore*, 517 U.S. at 583. Later, in *State Farm*, the Court downplayed the importance of

this guidepost is that courts should afford state legislatures a degree of deference in setting appropriate penalties for various types of conduct.¹²⁷

b. Analysis of Guideposts

The Court's application of the three guideposts to the facts was straightforward. With respect to the degree of BMW's reprehensibility, the Court found BMW's conduct to be not particularly reprehensible, noting that (1) Gore's harm was "purely economic," and not physical;¹²⁸ (2) the fact that Gore's car had been repainted did not affect its safety or performance;¹²⁹ (3) BMW's failure to disclose was not properly characterized as a "deliberate false statement[],"¹³⁰ (4) while BMW's nondisclosure policy was intentional, it complied with the strictest state disclosure statutes;¹³¹ and (5) the policy was immediately changed after being found wrongful for the first time.¹³² Consequently, the Court determined that BMW's conduct exhibited "none of the circumstances ordinarily associated with egregiously improper conduct," and thus "was not sufficiently reprehensible to warrant imposition of a \$2 million exemplary damages award."¹³³

As to the ratio guidepost, the Court hearkened back to an observation in *Haslip* that "a punitive damages award of 'more than 4 times the amount of compensatory damages' might be 'close to the line'"¹³⁴ as the foundation for its conclusion that the 500:1 ratio presented in this case was so "breathtaking" as to "raise a suspicious judicial eyebrow."¹³⁵

Finally, with respect to the comparable sanctions guidepost, the Court concluded that BMW had insufficient notice that its nondisclosure policy could subject it to a multimillion-dollar punishment because Alabama's maximum authorized civil penalty for the conduct at issue was a mere \$2,000.¹³⁶

criminal penalties by stating that although the existence of a criminal penalty can demonstrate how seriously a state considers an act, it has little usefulness in determining dollar amounts. *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 428 (2003).

127. *Gore*, 517 U.S. at 583 (citing *Browning-Ferris Indus. of Vt., Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 301 (1989) (O'Connor, J., concurring in part and dissenting in part)).

128. *Id.* at 576.

129. *Id.*

130. *Id.* at 579.

131. *Id.* at 578.

132. *Id.* at 579.

133. *Id.* at 580.

134. *Id.* at 581 (quoting *Pac. Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 23 (1991)).

135. *Id.* at 583 (quoting *TXO Prod. Corp. v. Alliance Res. Corp.*, 509 U.S. 443, 481 (1993) (O'Connor, J., dissenting)).

136. *Id.* at 584.

In light of the preceding application of the guideposts to the facts of *Gore*, the Court, for the first time in its history,¹³⁷ invalidated a punitive damages award on substantive due process grounds.¹³⁸

Though he joined the majority opinion, Justice Breyer wrote a separate concurrence, explaining that it was “important to explain why [the State’s entitlement to a strong] presumption of validity [was] overcome in this instance.”¹³⁹ In his view, the presumption of validity otherwise afforded to the award was overcome because the legal standards in place in Alabama, as interpreted by the Alabama Supreme Court, “provided no significant constraints or protection against arbitrary results.”¹⁴⁰

Justice Scalia, joined by Justice Thomas, unsurprisingly wrote a blistering dissent, accusing the majority of “federalizing yet another aspect of our Nation’s legal culture,” and adopting a “new rule of constitutional law [that] 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.”¹⁴¹ Justice Scalia also criticized the majority for giving “virtually no guidance to legislatures, and to state and federal courts, as to what a ‘constitutionally proper’ level of punitive damages might be.”¹⁴² He further mocked that the three guideposts “mark a road to nowhere” and “provide no real guidance at all.”¹⁴³

Justice Ginsburg, joined by Chief Justice Rehnquist, also filed a dissenting opinion,¹⁴⁴ complaining that the Court improperly invaded state territory, offered only vague standards, and characterized the ultimate guidance given to lower courts as nothing more than “a ‘raised eyebrow’ test.”¹⁴⁵

137. *Id.* at 586; *id.* at 599 (Scalia, J., dissenting) (“[T]oday’s judgment represents the first instance of this Court’s invalidation of a state-court punitive assessment as simply unreasonably large . . .”); *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 430–31 (2003) (Ginsburg, J., dissenting) (noting that *Gore* was the first time the Court “invalidated a state-court punitive damages assessment as unreasonably large”).

138. The Court found that while both compensatory and punitive damages were justified in this case, the \$2 million punitive damages award was grossly excessive in relation to the state interest the award was designed to serve. *Gore*, 517 U.S. at 585. For an interesting economic analysis of the reasonableness of the jury’s punitive damages award in *Gore*, see A. Mitchell Polinsky & Steven Shavell, *Punitive Damages: An Economic Analysis*, 111 HARV. L. REV. 869, 901–02 (1998) (concluding that the award was grossly excessive).

139. *Gore*, 517 U.S. at 586–87 (Breyer, J., concurring). Justices O’Connor and Souter joined Justice Breyer’s concurrence. *Id.* at 586.

140. *Id.* at 588. This could, in fact, be an attempt by Justice Breyer to add a *procedural* due process element to the analysis, foreshadowing his majority opinion in *Philip Morris USA v. Williams*, 549 U.S. 346, 353 (2007).

141. *Gore*, 517 U.S. at 599 (Scalia, J., dissenting).

142. *Id.* at 602.

143. *Id.* at 605.

144. *Id.* at 607 (Ginsburg, J., dissenting).

145. *Id.* at 612–13. Interestingly, Chief Justice Rehnquist seems to have grown more comfortable with this substantive due process approach over time, as he joined the majority opinion

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

The Court's first opportunity to apply the guideposts it announced in *Gore* came in *State Farm Mutual Automobile Insurance Co. v. Campbell*,¹⁴⁶ a Utah case involving a bad faith claim arising out of a car accident. In *State Farm*, Curtis Campbell caused an accident that killed one and seriously injured another.¹⁴⁷ In the ensuing wrongful death and personal injury lawsuits against its insured, State Farm contested liability and refused to settle the claims for Campbell's policy limits, even though Campbell was clearly at fault.¹⁴⁸ As expected, the jury found Campbell liable and awarded the plaintiffs nearly \$200,000.¹⁴⁹ Though they had previously promised otherwise,¹⁵⁰ State Farm initially refused to pay the amount of the award that exceeded the policy limits,¹⁵¹ instead advising the Campbells to sell their house to pay the excess judgment.¹⁵²

Though ultimately State Farm agreed to pay the judgment in full,¹⁵³ in the meantime, the Campbells reached a settlement with the plaintiffs in the underlying suit whereby the Campbells agreed to pursue a bad faith claim against State Farm and to pay the plaintiffs most of what was recovered in such an action.¹⁵⁴ In exchange, the plaintiffs agreed not to collect on the verdict against the Campbells.¹⁵⁵

In the ensuing bad faith case, the trial court bifurcated the trial into two different phases, with the first phase focusing upon whether State Farm had acted in bad faith in the underlying case.¹⁵⁶ The second phase, if necessary, would decide the amount of compensatory and punitive damages, if any, that would be awarded to the Campbells.¹⁵⁷ During discovery, the Campbells gathered evidence of other alleged bad acts by State Farm,

striking down a punitive damages award on substantive due process grounds in *State Farm*. See *infra* note 169.

146. 538 U.S. 408 (2003).

147. *Id.* at 412–13. In the accident, Todd Ospital was killed and Robert Slusher was permanently disabled, though Campbell and his wife were uninjured. *Id.*

148. *Id.* at 413.

149. *Id.*

150. *Id.* State Farm had previously assured the Campbells that “their assets were safe, that they had no liability for the accident, that [State Farm] would represent their interests, and that they did not need to procure separate counsel.” *Id.* (alteration in original) (quoting *Campbell v. State Farm Mut. Auto. Ins. Co.*, 65 P.3d 1134, 1142 (Utah 2001)) (internal quotation marks omitted).

151. *Id.* The Campbells' policy provided that State Farm would pay up to \$50,000, leaving the Campbells responsible for the remainder of the award. *Id.*

152. *Id.*

153. *Id.* at 414.

154. *Id.* at 413–14.

155. *Id.* at 413. Specifically, the Campbells agreed to pay the plaintiffs 90% of what was recovered in the bad faith action and to allow the plaintiffs to play a major role in the decision making in the bad faith case. *Id.* at 413–14.

156. *Campbell v. State Farm Mut. Auto. Ins. Co.*, 65 P.3d 1134, 1142 (Utah 2001).

157. *Id.*

many of which were outside of Utah.¹⁵⁸ The trial court granted State Farm's motion to exclude this evidence from Phase I of the trial¹⁵⁹ but ruled that it could be admitted in Phase II if Phase II proved necessary.¹⁶⁰

In Phase I, the jury found that State Farm's decision not to settle the underlying case was unreasonable given the likelihood of a verdict in excess of the Campbells' policy limits.¹⁶¹ In Phase II, State Farm contended that its decision to take the underlying case to trial was an "honest mistake."¹⁶² In contrast, the Campbells argued that State Farm's decision was part of a "national scheme" to defraud its policy holders and to support their claim, thus presented evidence of numerous acts committed by State Farm nationally.¹⁶³ This evidence was admitted pursuant to Rule 404(b) of the Utah Rules of Evidence,¹⁶⁴ which is substantially identical to Rule 404(b) of the Federal Rules of Evidence.¹⁶⁵ At the close of Phase II, "[t]he jury awarded the Campbells \$2.6 million in compensatory damages and \$145 million in punitive damages."¹⁶⁶ Though "the trial court reduced [the damages] to \$1 million and \$25 million, respectively," the Utah Supreme Court reinstated the \$145 million punitive damages award after applying the guideposts previously announced in *Gore*.¹⁶⁷

The United States Supreme Court reversed, finding that the \$145 million award was grossly excessive.¹⁶⁸ Writing for the six-member majority,¹⁶⁹ Justice Kennedy declared the case to be "neither close nor difficult."¹⁷⁰ Apparently dispensing with *Gore*'s directive to carefully identify and define Utah's governmental interest in the case,¹⁷¹ Justice

158. *Id.* at 1143.

159. *Id.* at 1156. The trial court carefully examined this evidence over the course of fifteen days in conjunction with no less than ten pretrial hearings. *See id.* at 1157.

160. *Id.*

161. *State Farm*, 538 U.S. at 414. Between Phases I and II, the Supreme Court decided *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996). *State Farm*, 538 U.S. at 14. State Farm again moved to exclude the evidence of other acts that occurred outside of Utah but was once again denied. *Id.*

162. *Campbell*, 65 P.3d at 1143.

163. *Id.* at 1143.

164. UTAH R. EVID. 404(b); *Campbell*, 65 P.3d at 1157.

165. UTAH R. EVID. 404(b) advisory committee's note; *see also* Gash, *supra* note 7, at 1226 n.293.

166. *State Farm*, 538 U.S. at 415.

167. *Id.* (citing *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 574–575 (1996)). The compensatory damages remained at \$1 million. *Id.* at 426.

168. *Id.* at 429.

169. *Id.* at 411. Joining Justice Kennedy were Chief Justice Rehnquist and Justices Stevens, O'Connor, Souter, and Breyer. *Id.*

170. *Id.* at 418. This language is apparently used to contrast *State Farm* with *TXO*, in which Justice Kennedy cast the deciding vote in favor of affirming the punitive damages award, even while describing that case as both "close and difficult." *TXO Prod. Corp. v. Alliance Res. Corp.*, 509 U.S. 443, 468–69 (1993) (Kennedy, J., concurring).

171. *See Gore*, 517 U.S. at 571 ("[J]udicially imposed punitive damages . . . must be supported

Kennedy delved directly into the three guideposts identified in *Gore*. In the context of the reprehensibility analysis, Justice Kennedy reiterated what was made clear in *Gore*: “A State cannot punish a defendant for conduct that may have been lawful where it occurred.”¹⁷² Unlike in *Gore*, however, the Campbells conceded that much of the conduct reflected in the evidence introduced in the bad faith case was lawful where it occurred.¹⁷³ Nevertheless, Justice Kennedy rendered moot the lawful/unlawful distinction, the importance of which had been left uncertain in *Gore*,¹⁷⁴ by declaring “[n]or, as a general rule 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.”¹⁷⁵ Using principles of federalism as the foundation, Justice Kennedy declared that “each State may make its own reasoned judgment about what conduct is permitted or proscribed within its borders, and each State alone can determine what measure of punishment, if any, to impose on a defendant who acts within its jurisdiction.”¹⁷⁶ Therefore, whether or not the extraterritorial conduct was lawful or unlawful is irrelevant—the only conduct for which State Farm could be legitimately *punished* in Utah state court is conduct that took place in Utah. Unfortunately, however, this pronouncement did not fully dispense with the case.¹⁷⁷

Because the evidence introduced in Phase II of the bad faith case was admitted pursuant to Rule 404(b), which allows for introduction of other acts that are probative of, for example, motive or intent,¹⁷⁸ the Court was still faced with determining whether this evidence was admitted for purposes other than punishment of State Farm. Though not clearly framed by the Court, the simple question it had to decide was whether the evidence of other acts was used to ascertain the level of reprehensibility of State Farm’s conduct *vis-à-vis* the Campbells, or was, instead, used to punish State Farm.¹⁷⁹ Justice Kennedy encountered little difficulty in determining that “[t]his case . . . was used as a platform to expose, and punish, the perceived deficiencies of State Farm’s operations throughout the country.”¹⁸⁰ While acknowledging that even “[l]awful out-of-state

by the State’s interest in protecting its own consumers and its own economy.”); *supra* notes 106–07 and accompanying text.

172. *State Farm*, 538 U.S. at 421 (citing *Gore*, 517 U.S. at 572).

173. *Id.* at 422.

174. *See supra* notes 111–16 and accompanying text; *see also* Gash, *supra* note 7, at 1234.

175. *State Farm*, 538 U.S. at 421 (emphasis added).

176. *Id.* at 422 (citing *Gore*, 517 U.S. at 569). This means, of course, that a punitive damages award of *any* size that punishes a defendant for extraterritorial acts is per se unconstitutional as a violation of federalism principles. Such a violation could, however, still be harmless error.

177. *Id.*

178. *See supra* note 164 and accompanying text.

179. *See* Gash, *supra* note 7, at 1234.

180. *State Farm*, 538 U.S. at 420; *see also id.* (“The Utah Supreme Court’s opinion makes

conduct may be probative when it demonstrates the deliberateness and culpability of the defendant's action in the State where it is tortious,"¹⁸¹ Justice Kennedy insisted that such conduct "must have a nexus to the specific harm suffered by the plaintiff."¹⁸²

Of critical importance to the later-decided *Philip Morris* case (and more generally), Justice Kennedy then acknowledged, albeit somewhat obliquely, that the lurking presence of the multiple punishments problem¹⁸³ was driving the decision. In the wake of his discussion of why principles of federalism prohibit state courts from punishing extraterritorial conduct, Justice Kennedy seized hold of what he characterized as "a more fundamental reason" for the decision.¹⁸⁴ A full understanding and appreciation of this "reason" that is "more fundamental" than federalism is critical to an understanding of the *Philip Morris* case decided a few years later.

Justice Kennedy began with the implied (though mistaken) premise that only prior bad acts that are *similar* to the conduct at issue in the case can be properly admitted as other acts evidence.¹⁸⁵ Consequently, reasoned Justice Kennedy, *dissimilar* acts cannot serve as the basis for a punitive damages award.¹⁸⁶ His explicit rationale for this conclusion was that "[a] defendant should be punished for the conduct that harmed the plaintiff, not for being an unsavory individual or business."¹⁸⁷ Adding a constitutional exclamation point, Justice Kennedy continued: "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

explicit that State Farm was being condemned for its nationwide policies rather than for the conduct directed toward the Campbells."); *id.* ("[T]he Campbells introduced evidence that State Farm's decision to take the case to trial was a result of a national scheme to meet corporate fiscal goals by capping payouts on claims company wide." (alteration in original) (quoting *Campbell v. State Farm Mut. Auto. Ins. Co.*, 65 P.3d 1134, 1143 (Utah 2001)) (internal quotation marks omitted)); *id.* ("This was, as well, an explicit rationale of the trial court's decision in approving the award."); *id.* ("[T]he Campbells demonstrated, through the testimony of State Farm employees who had worked outside of Utah, and through expert testimony, that this pattern of claims adjustment under the PP&R program was not a local anomaly, but was a consistent, nationwide feature of State Farm's business operations, orchestrated from the highest levels of corporate management." (alteration in original) (quoting *Petition for Writ of Certiorari at 120a, State Farm*, 538 U.S. 408 (No. 01-1289) (internal quotation marks omitted)).

181. *Id.* at 422.

182. *Id.*

183. *See generally infra* Part II.

184. *State Farm*, 538 U.S. at 422–23.

185. *State Farm*, 538 U.S. at 422 ("A defendant's dissimilar acts, independent from the acts upon which liability was premised, may not serve as the basis for punitive damages."); *id.* at 423 ("[E]vidence of other acts need not be identical to have relevance in the calculation of punitive damages . . ."); *see also* Gash, *supra* note 7, at 1246 (explaining that the language of Federal Rule of Evidence 404(b) "does not require other acts to be similar in order to be admissible . . . because other acts are occasionally highly probative for a proper purpose *even in the absence of similarity*").

186. *State Farm*, 538 U.S. at 422–23.

187. *Id.* at 423.

guise of the reprehensibility analysis”¹⁸⁸ Due process does not allow this, declared Justice Kennedy, because “[p]unishment on these bases creates the possibility of *multiple punitive damages awards for the same conduct*.”¹⁸⁹ As authority for this critically important constitutional pronouncement, Justice Kennedy cited a concurrence in *Gore* written by Justice Breyer¹⁹⁰—the author of the majority opinion in *Philip Morris*.¹⁹¹

Concluding that the Campbells were unable to identify much, if any, evidence of repeated misconduct that was *similar* to that which injured them,¹⁹² Justice Kennedy declared the conduct that harmed the Campbells to be “the only conduct relevant to the reprehensibility analysis.”¹⁹³ And while finding State Farm’s handling of the Campbells’ case justified an award of punitive damages, Justice Kennedy concluded that a “more modest” award would have satisfied Utah’s legitimate interests.¹⁹⁴

Foreshadowing its decision in *Philip Morris*, the Court also explained that in order to prevent a jury from using evidence of out-of-state conduct to punish a defendant, it must be instructed on the proper use of such evidence.¹⁹⁵

On the second *Gore* guidepost, the Court once again disclaimed an interest in drawing a bright line between the constitutionally permissible and impermissible ratios between punitive damages and compensatory damages.¹⁹⁶ The Court did, however, come closer than it ever previously had to drawing such lines, declaring that “few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process.”¹⁹⁷ Backpedaling a bit, the Court allowed that such ratios (1) can be higher when particularly reprehensible conduct causes only modest compensatory damages, and (2) may not constitutionally exceed even a one to one ratio when compensatory damages are substantial.¹⁹⁸ Because the punitive damages award in this

188. *Id.*

189. *Id.* (emphasis added).

190. *Id.* (citing *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 593 (1996) (Breyer, J., concurring)).

191. *Philip Morris USA v. Williams*, 549 U.S. 346, 349 (2007).

192. *State Farm*, 538 U.S. at 423.

193. *Id.* at 424.

194. *Id.* at 419–20.

195. *Id.* at 422.

196. *Id.* at 424–25 (citing *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 582 (1996); *TXO Prod. Corp. v. Alliance Res. Corp.*, 509 U.S. 443, 458 (1993)).

197. *Id.* at 425.

198. *Id.*

case was 145:1,¹⁹⁹ there was a strong presumption against its constitutional validity.²⁰⁰

With respect to the final guidepost, the Court noted that it “need not dwell long” on it because “[t]he most relevant civil sanction” in Utah was a \$10,000 sanction for fraud.²⁰¹ When the conduct under consideration was limited to that which harmed the Campbells, the Court concluded that a single fine of \$10,000 was “dwarfed by the \$145 million punitive damages award.”²⁰²

When the conduct at issue was properly limited to that which harmed the Campbells, the Court concluded that each of three guideposts pointed toward a punitive damages award in the ballpark of the \$1 million compensatory damages award.²⁰³ Accordingly, the Court reversed and remanded the case to the Utah courts.²⁰⁴

Justice Scalia was brief (but not kind) in dissent, pronouncing the Court’s punitive damages jurisprudence to be “insusceptible of principled application.”²⁰⁵ Justice Thomas also filed a brief dissent, reiterating his view that “the Constitution does not constrain the size of punitive damages awards.”²⁰⁶ Justice Ginsburg filed a more substantial opinion in dissent, taking issue with the Court’s recitation of the facts and its application of the *Gore* guideposts.²⁰⁷

As demonstrated below, the prospect of defendants having to pay multiple punitive damages awards for the same act or course of conduct has been the driving force behind the Supreme Court’s recent substantive

199. *Id.* at 426. While the jury’s verdict originally consisted of \$2.6 million in compensatory damages and \$145 million in punitive damages, the Utah Supreme Court upheld the trial court’s reduction of the compensatory damages to \$1 million. *Id.* at 408, 420, 426.

200. *Id.* at 426.

201. *Id.* at 428 (stating that a comparison to criminal penalties has little usefulness in determining dollar amounts but that the existence of a criminal penalty does demonstrate how serious a state considers an act).

202. *Id.*

203. *Id.* at 429.

204. *Id.* On remand, the Supreme Court of Utah reduced the punitive damage award to approximately \$9 million, utilizing the maximum nine-to-one ratio that the Supreme Court seemed to allow in *State Farm*. *Campbell v. State Farm Mut. Auto. Ins. Co.*, 98 P.3d 409, 410 (Utah 2004). As was instructed by the Supreme Court in *State Farm*, the Utah Supreme Court based its award solely on State Farm’s “behavior that affected the Campbells and took place within Utah.” *Id.* at 413. The United States Supreme Court denied a writ of certiorari filed following the Utah case. *State Farm Mut. Auto. Ins. Co. v. Campbell*, 98 P.3d 409 (2004), *cert. denied*, 543 U.S. 874 (Oct. 4, 2004) (No. 04–116).

205. *State Farm*, 538 U.S. at 429 (Scalia, J., dissenting).

206. *Id.* (Thomas, J., dissenting) (quoting *Cooper Indus., Inc. v. Leatherman Tool Grp., Inc.*, 532 U.S. 424, 443 (2001) (Thomas, J., concurring)).

207. *See id.* at 430–39 (Ginsburg, J., dissenting). Specifically, Ginsburg emphasized the details of State Farm’s wrongdoing and agreed with the Utah Supreme Court that State Farm’s conduct was “egregious and malicious.” *Id.* at 436. She further took issue with the Court’s dismissal of these relevant facts. *Id.* at 437. Unlike in *Gore*, however, Chief Justice Rehnquist did not join Justice Ginsburg’s dissent. *Id.* at 430.

due process punitive damages jurisprudence. Indeed, as demonstrated in Part III, the so-called “multiple punishments problem” directly led to the questionable opinion in *Philip Morris*.²⁰⁸ Accordingly, a full understanding of the nature and extent of this problem is vital to understanding *Philip Morris* and why this author is convinced that the Supreme Court is done tinkering with punitive damages.

II. THE MULTIPLE PUNISHMENTS PROBLEM²⁰⁹

State and federal courts, state and federal legislatures, a substantial number of legal commentators, and countless lawyers representing both plaintiffs and defendants all recognize that our torts system has a major problem—how to deal with the multiple punishments problem.²¹⁰ This topic has prompted (1) a great number of majority and dissenting opinions in both state²¹¹ and federal²¹² courts; (2) a wide variety of publications,

208. See *infra* Part III.

209. This problem is also occasionally referred to as “the multiple punitive damages problem.” See, e.g., Victor E. Schwartz et al., *Reining in Punitive Damages “Run Wild”: Proposals for Reform by Courts and Legislatures*, 65 BROOK. L. REV. 1003, 1032 n.123 (1999).

210. For a comprehensive analysis of this problem and a proposed comprehensive solution, see generally Gash, *supra* note 9. Much of the discussion and many of the citations in this section outlining the contours of this problem closely resembles my earlier research on this subject contained in the cited article.

211. See, e.g., *Ex parte Holland*, 692 So. 2d 811, 816–19 (Ala. 1997) (pointing out the potential for the first plaintiff in a multiple-claimant tort case to impair the ability of the remaining members to protect their interests but refusing to use mandatory class actions to deal with the problem); *Ferguson v. Lieff, Cabraser, Heimann & Bernstein*, 69 P.3d 965, 972 (Cal. 2003) (recognizing the unfairness of multiple punishment and suggesting a “non-opt out” class action solution); *Loitz v. Remington Arms Co., Inc.*, 563 N.E.2d 397, 403 (Ill. 1990) (expressing concern for the imposition of multiple punitive damages and its effect on manufacturers and their economic contributions to society); *Spaur v. Owens-Corning Fiberglass Corp.*, 510 N.W.2d 854, 865 (Iowa 1994) (recognizing the seriousness of multiple punitive damages and calling for a national solution); *Fischer v. Johns-Manville Corp.*, 512 A.2d 466, 478, 480 (N.J. 1986) (stating there should be safeguards against multiple punitive damages, including offering evidence of prior punitive damages award to the jury); *Owens-Corning Fiberglass Corp. v. Malone*, 972 S.W.2d 35, 48 (Tex. 1998) (holding that other impositions of punitive damages should be considered when assessing punitive damage awards but stopping short of declaring multiple punitive damages unconstitutional); *Jackson v. State Farm Mut. Life Ins. Co.*, 600 S.E.2d 346, 361 (W. Va. 2004) (discussing the potential problems with multiple impositions of punitive damages); *Wangen v. Ford Motor Co.*, 294 N.W.2d 437, 457–61 (Wis. 1980) (emphasizing the need for close judicial control of multiple punitive damages awards).

212. See, e.g., *Dunn v. Hovic*, 1 F.3d 1371, 1386 (3d Cir. 1993) (“[B]oth state and federal courts have recognized that no single court can fashion an effective response to the national problem flowing from mass exposure to asbestos products.”), *modified*, 13 F.3d 58 (3d Cir. 1993); *Racich v. Celotex Corp.*, 887 F.2d 393, 399 (2d Cir. 1989) (declaring that a national rule on the issue of multiple punitive damages is necessary); *Roginsky v. Richardson-Merrell, Inc.*, 378 F.2d 832, 841–42 (2d Cir. 1967) (explaining the problem of multiple punitive damages and recognizing courts’ limits in solving the problem); *In re N. Dist. of Calif. “Dalkon Shield” IUD Prod. Liab. Litig.*, 526 F. Supp. 887, 895, 899–900 (N.D. Cal. 1981) (pointing out “[t]he potential abuse

including law review articles from leading commentators;²¹³ (3) numerous state statutes;²¹⁴ (4) multiple failed attempts at federal legislation;²¹⁵ and (5) a telling note of caution from the United States Supreme Court.²¹⁶

implicit in repeated awards of punitive damages”), *vacated on other grounds*, 693 F.2d 847 (9th Cir. 1982); *McBride v. Gen. Motors Corp.*, 737 F. Supp. 1563, 1569–70 (M.D. Ga. 1990) (struggling with a resolution to the multiple punitive damages against the same defendant); *Campbell v. ACandS, Inc.*, 704 F. Supp. 1020, 1023 (D. Mont. 1989) (“[T]he continued imposition of punitive damages serves no purpose within the contemplation of the statutory or common law of Montana authorizing punitive damages.”); *Juzwin v. Amtorg Trading Corp.*, 718 F. Supp. 1233, 1234–35 (D.N.J. 1989) (holding that multiple punitive damages violate due process in certain circumstances); *Leonen v. Johns-Manville Corp.*, 717 F. Supp. 272, 284–85 (D.N.J. 1989) (recognizing that “awarding exemplary damages in successive asbestos litigations are thus nationwide problems and call for a uniform solution.”); *In re “Agent Orange” Prod. Liab. Litig.*, 100 F.R.D. 718, 728 (E.D.N.Y. 1983) (calling for a limit on the amount of times one defendant can be punished for a single act or course of conduct), *aff’d*, 818 F.2d 145 (2d Cir. 1987); *Maxey v. Freightliner Corp.*, 450 F. Supp. 955, 962 (N.D. Tex. 1978) (recognizing the problem with unlimited exemplary damages in the design defect context), *modified, reh’g denied*, 727 F.2d 350, 353 (5th Cir. 1984).

213. *See, e.g.*, WILLIAM L. PROSSER, *HANDBOOK OF THE LAW OF TORTS* § 2, at 13 (4th ed. 1971) (warning that the multiple punitive damages problem “might well lead to a re-examination of the whole basis and policy of awarding punitive damages”); Thomas B. Colby, *Beyond the Multiple Punishment Problem: Punitive Damages as Punishment for Individual, Private Wrongs*, 87 MINN. L. REV. 583, 594 (2003) (“Numerous commentators have bemoaned this risk of unfair piling on, dubbing it the ‘multiple punishment’ problem.”); Howard A. Denemark, *Seeking Greater Fairness When Awarding Multiple Plaintiffs Punitive Damages for a Single Act by a Defendant*, 63 OHIO ST. L.J. 931, 932–34 (describing the multiple punitive damages problem and pointing out the inadequacy of any single court or state legislature to combat it); Gash, *supra* note 9, at 1624–26 (arguing that the effects of the multiple punishments problem may include bankruptcy of defendants, under compensation of future plaintiffs, and ill effects to employees and stockholders of the defendant company); John Calvin Jeffries, Jr., *A Comment on the Constitutionality of Punitive Damages*, 72 VA. L. REV. 139, 142 (1986) (recognizing the threat multiple punitive damage awards pose on the viability of business entities); David G. Owen, *Problems in Assessing Punitive Damages Against Manufacturers of Defective Products*, 49 U. CHI. L. REV. 1, 44–47, 50 (1982) (explaining the problems of measurement and control of punitive damages especially in products liability litigation); Richard A. Seltzer, *Punitive Damages in Mass Tort Litigation: Addressing the Problems of Fairness, Efficiency and Control*, 52 FORDHAM L. REV. 37, 51–52 (1983) (discussing the emergence and existing problem of multiple punitive damages); Malcolm E. Wheeler, *The Constitutional Case for Reforming Punitive Damages Procedures*, 69 VA. L. REV. 269, 285 (1983) (bemoaning the lack of jury instruction and cogent standards for assessing punitive damages).

214. *See, e.g.*, FLA. STAT. § 768.73(2)(a)–(b) (2010) (disallowing punitive damages in situations where the defendant has previously been assessed punitive damages for the same act or single course of conduct, except when the court determines the prior award was insufficient punishment); GA. CODE ANN. § 51-12-5.1(e)(1) (2011) (allowing only one award of punitive damages for any act or omission arising from products liability); MINN. STAT. § 549.20(3) (2010) (using other punitive and compensatory awards against a defendant as a factor in determining a punitive damage award); MO. ANN. STAT. § 510.263(4) (West 2010) (requiring that defendant be credited with a prior punitive damage award by the amount previously paid for the same conduct); OHIO REV. CODE ANN. § 2307.80(B)(7) (LexisNexis 2011) (directing that when assessing punitive damage awards, courts consider the total effect of other punitive damages award against the same defendant for the same conduct giving rise to the claim); OR. REV. STAT. § 31.730(3) (2009)

Judge Henry Friendly first identified and articulated the multiple punishments problem in the 1960s, recognizing that “[t]he legal difficulties engendered by claims for punitive damages on the part of hundreds of plaintiffs are staggering.”²¹⁷ Nearly a half century later, the problem remains every bit as “staggering” in breadth. Professor David Owen, a leading commentator on punitive damages, identified the question of whether due process restrains multiple punitive damages awards as “the most momentous question as yet unresolved by the Court.”²¹⁸ Utah Senator Orrin Hatch, an outspoken proponent of tort reform, has declared the multiple punitive damages problem “one of the most egregious and unconscionable . . . abuses and excesses in our civil justice system.”²¹⁹ Even Professor Laurence Tribe, an equally outspoken supporter of punitive damages,²²⁰ confesses that due process *ought* to limit the recovery of

(directing that when reviewing punitive damage awards, courts consider previous judgments for punitive damages against the same defendant for the same conduct giving rise to the claim).

215. An early attempt to introduce punitive damages reform occurred in 1984. *See Product Liability Act: Hearing on S. 44 Before the Subcomm. on the Consumer of the Committee on Commerce Science, and Transportation*, 98th Cong. 28 (1983). Members of the American Bar Association criticized this proposal declaring, “[W]e have rejected much more radical suggestions that have been made, such as allowing only one punitive damages award and then deeming the company sufficiently punished. Such a provision was at one time part of proposed federal product legislation but eventually dropped as patently unfair, since the first verdict might be a small one or one maneuvered by the defendant.” SPECIAL COMM. ON PUNITIVE DAMAGES SEC. OF LITIG., AMER. BAR ASS’N., PUNITIVE DAMAGES: A CONSTRUCTIVE EXAMINATION 7-2 (1986) [hereinafter A.B.A. REPORT] (citing the 1984 proposal). Still, later attempts were unsuccessfully made. *See Multiple Punitive Damages Fairness Act of 1995*, S. 671, 104th Cong. (1995); *Multiple Punitive Damages Fairness Act of 1997*, S. 78, 105th Cong. (1997).

216. *See State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 423 (2003) (strongly implying that due process imposes limits on multiple punitive damages awards).

217. *Roginsky v. Richardson-Merrell, Inc.*, 378 F.2d 832, 839 (2d Cir. 1967).

218. Owen, *supra* note 1, at 406; *see also BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 612 n.4 (1996) (Ginsburg, J., dissenting) (confirming the open status of the multiple punishment problem by saying, “Petitioner invites the Court to address the question of multiple punitive damages awards stemming from the same alleged misconduct. The Court does not take up the invitation, and rightly so, in my judgment, for this case does not present the issue.”); Colby, *supra* note 213, at 587 (characterizing the multiple punishment problem as “the single most discussed and debated issue in the law of punitive damages”); Catherine M. Sharkey, *Punitive Damages as Societal Damages*, 113 YALE L.J. 347, 432 (2003) (“The multiple punishments problem has confounded jurists and scholars for the better part of the past three decades.”); Victor E. Schwartz & Leah Lorber, *Death by a Thousand Cuts: How to Stop Multiple Imposition of Punitive Damages*, BRIEFLY . . . : PERSP. ON LEGIS, REG, AND LITIG, Dec. 2003, at 1, 8–9 (“A major problem in our liability system is the multiple imposition of punitive damages.”).

219. 143 CONG. REC. S454 (daily ed. Jan. 21, 1997) (statement of Sen. Orrin Hatch).

220. Professor Tribe has argued numerous cases in support of punitive damages awards. *See, e.g.*, Transcript of Oral Argument at 33–35, *State Farm Mut. Auto. Ins. Co. v. Campbell*, 583 U.S. 408 (2003) (No. 01-1289) (arguing for the respondent that punitive damages were not excessive); Transcript of Oral Argument, *Honda Motor Co., Ltd. v. Oberg*, 512 U.S. 415 (1994) (No. 93-644), 1994 U.S. Trans. LEXIS 150, at *30–31 (arguing for respondents seeking to uphold the punitive damage award); Transcript of Oral Argument, *TXO Prod. Corp. v. Alliance Res. Corp.*, 509 U.S. 443 (1993) (No. 92-479), 1993 U.S. Trans. LEXIS 178, at *25–26 (arguing for respondents seeking

multiple punitive damages awards for the same conduct through “some double jeopardy-like doctrine.”²²¹ The American Law Institute,²²² the American Bar Association,²²³ and the American Association of Trial Lawyers have all gone on the record agreeing that this is a significant problem.²²⁴ Nevertheless, the solution to this ongoing problem has proven elusive.²²⁵ There is a clear consensus that any comprehensive solution must be accomplished on a national, rather than state, level.²²⁶

The multiple punishments problem has only emerged in the latter half of the 20th Century because it was during this time that legal and technological changes combined to give rise to the modern mass tort claim. By definition, the multiple punishments problem can only arise when the possibility of multiple punitive damages awards against a defendant for a

to uphold the punitive damage award).

221. See Transcript of Oral Argument at 46–47, *State Farm*, 583 U.S. 408 (No. 01-1289) (colloquy between Justice Stevens and Professor Tribe).

222. 2 AM. LAW INST., REPORTERS’ STUDY, ENTERPRISE RESPONSIBILITY FOR PERSONAL INJURY 260–65 (1991).

223. A.B.A. REPORT, *supra* note 215, at 7-1.

224. AM. COLL. OF TRIAL LAWYERS, REPORT ON PUNITIVE DAMAGES OF THE COMMITTEE ON SPECIAL PROBLEMS IN THE ADMINISTRATION OF JUSTICE 20–26 (1989).

225. See Owen, *supra* note 1, at 383 (lamenting that, “[T]his very serious problem of repetitive punitive damage awards remains to date a problem without a satisfactory judicial or legislative resolution.”). For a thorough discussion of this problem and a proposed comprehensive solution to this problem, see generally Gash, *supra* note 9.

226. See, e.g., *Dunn v. Hovic*, 1 F.3d 1371, 1386 (3d Cir. 1993) (“[B]oth state and federal courts have recognized that no single court can fashion an effective response to the national problem flowing from mass exposure to asbestos products.”), *modified in part*, 13 F.3d 58, 62 (3d Cir. 1993); *Racich v. Celotex Corp.*, 887 F.2d 393, 398–99 (2d Cir. 1989) (declaring that a national rule on the issue of multiple punitive damages is necessary); *Leonen v. Johns-Manville Corp.*, 717 F. Supp. 272, 284–85 (D.N.J. 1989) (recognizing that “awarding exemplary damages in successive asbestos litigations are thus nationwide problems and call for a uniform solution”); *In re N. Dist. of Calif. “Dalkon Shield” IUD Prod. Liab. Litig.*, 526 F. Supp. 887, 895, 899–900 (N.D. Cal. 1981) (discussing the potential for abuse implicit in a multiplicity of punitive damages awards and calling for nationwide solution to remedy this abuse), *vacated on other grounds*, 693 F.2d 847 (9th Cir. 1982); *Spaur v. Owens-Corning Fiberglass Corp.*, 510 N.W.2d 854, 865 (Iowa 1994) (recognizing the seriousness of multiple punitive damages and calling for a national solution); Multiple Punitive Damages Fairness Act of 1997, S. 78, 105th Cong. (1997); 143 CONG. REC. S454 (daily ed. Jan. 21, 1997) (“The only effective means of addressing these problems is through a nationwide solution, which the legislation I introduce today would provide.”) (Statement of Sen. Hatch); A.B.A. REPORT, *supra* note 215, at 7-2, 7-8 (concluding that national legislation is needed with respect to the multiple punitive damages problem); AM. COLL. OF TRIAL LAWYERS, *supra* note 224, at 20–21 (calling for a national solution to the problem); Schwartz & Lorber, *supra* note 218, at 10, 17–20 (“[A] uniform remedy for the problems posed by multiple punitive damages awards can be effectively achieved only at the federal level”); Denmark, *supra* note 213, at 932–33 (proposing common law solution from the judiciary); Owen, *supra* note 1, at 406 n.152 (“In the absence of Supreme Court guidance, lower courts continue to struggle with the problem as best they can.”); Owen, *supra* note 213, at 50 (arguing for increased judicial control over multiple punitive damages awards); Wheeler, *supra* note 213, at 276 (bemoaning the absence of clear Supreme Court guidance on “whether the procedures by which punitive damages have been awarded to private plaintiffs satisfy the dictates of due process”).

single act or course of conduct exists. In the vast majority of tort cases, one plaintiff sues one defendant for injuries arising out of the defendant's actions; for example, a car accident.²²⁷ Even if the defendant's conduct is sufficiently reprehensible to give rise to punitive damages, once the underlying case is resolved, the defendant cannot be sued or otherwise punished civilly again for that same conduct. It is only when a defendant's act or course of conduct injures *multiple* plaintiffs that the defendant is exposed to the risk of multiple lawsuits and multiple punitive damages awards. While it cannot be questioned that there were cases involving multiple punitive damages awards prior to the latter half of the 20th Century,²²⁸ those awards were very unusual and did not raise the level of concern that such awards now raise. The largest factor in the substantial rise in the number of cases implicating the multiple punishments problem was the advent of products liability and other mass tort claims.²²⁹

One of the largest and most controversial types of mass tort claims involves the potential liability of tobacco manufacturers for the injuries and deaths of thousands, if not millions, of cigarette smokers. Though brought as an individual action in the wake of the death of a cigarette smoker, the case of *Philip Morris USA v. Williams*²³⁰ has deep and far-reaching consequences for mass tort law; it also placed before the United States Supreme Court, once again, the multiple punishments problem.

III. *PHILIP MORRIS USA v. WILLIAMS*

Philip Morris USA v. Williams arose when the widow and personal representative of Jesse Williams' estate (Williams) brought an action against cigarette manufacturer Philip Morris, Inc., seeking compensatory and punitive damages for the death of her husband.²³¹

227. See Seltzer, *supra* note 213, at 40 ("Typically, punitive damages claims arose from a single incident involving only two parties, making it possible for a jury to determine an appropriate award without considering the possibility of additional awards by other juries."). Accord Owen, *supra* note 213, at 15 ("Punitive damages were developed largely as a punishment and deterrent for trespassers, oxen thieves and other such human malefactors. When the device is transferred to the complex bureaucracy of a modern manufacturing concern, the fit is awkward in many respects."); cf. Schwartz & Lorber, *supra* note 218, at 2 ("Multiple punishment for the same or similar conduct did not exist at the time the Constitution was drafted and certainly cannot be sustained on the grounds of 'historical correctness.'").

228. See, e.g., *Reutkemeier v. Nolte*, 161 N.W. 290, 291, 294 (Iowa 1917) (affirming punitive damages awards in favor of both a young woman seduced by the defendant and her father and declaring that, "The fact that a defendant has or may be held liable for exemplary damages in one case has never been held as a defense in his favor against liability for exemplary damages to another plaintiff."); *Luther v. Shaw*, 147 N.W. 18, 20 (Wisc. 1914) (affirming punitive damages awards in favor of both a young woman seduced by the defendant and her father).

229. The first series of products liability lawsuits to gain national attention occurred in the 1960s and involved a drug used to treat arteriosclerosis, which had the known but undisclosed side effects. See 1 SCHLUETER, *supra* note 37, § 9.5(A), at 558.

230. 549 U.S. 346 (2007).

231. 48 P.3d 824, 828 (Or. Ct. App. 2002).

A. Factual and Procedural History

Williams began smoking Philip Morris cigarettes in the 1950s and continued until his death in 1997.²³² Williams died of lung cancer, which a jury found was primarily caused by his years of smoking.²³³ Despite his family's efforts to the contrary, Williams continued to smoke the defendant's cigarettes because "he had heard on television that cigarettes do not cause cancer."²³⁴ Williams responded to his family's pleas for him to stop "by finding published assertions showing that cigarette smoking is not dangerous."²³⁵ Upon learning he had cancer, Williams said, "those darn cigarette people finally did it. They were lying all the time."²³⁶

Despite a Surgeon General's report in 1964 that highlighted the connection between smoking and lung cancer, Philip Morris continued to "encourage the impression that there was a genuine and continuing controversy" that the dangers of smoking were not clear.²³⁷ Williams asserted that this type of publicity was fraudulent because Philip Morris "knew that there was no legitimate controversy about the health effects of smoking and that defendant itself had no doubt that cigarette smoking carried serious health risks, including the risk of lung cancer."²³⁸

After a full trial, the jury found in favor of Williams on both negligence and fraud grounds,²³⁹ awarding \$21,485.80 in economic damages and \$800,000 for each claim in non-economic damages.²⁴⁰ With respect to the negligence claim, the jury found Williams to be 50% at fault, and no punitive damages were awarded for this claim.²⁴¹ As for the fraud claim, the jury awarded \$79.5 million in punitive damages.²⁴² The trial court

232. *Id.* at 829.

233. *Id.* at 829 n.4.

234. *Id.* Williams' wife and children repeatedly told him that cigarettes were bad for his health, and his son attempted to give him articles that highlighted the dangers of smoking. *Id.*

235. *Id.* Williams "insisted that the cigarette companies would not sell cigarettes if they were as dangerous as his family claimed." *Id.*

236. *Id.*

237. *Id.* at 833. "In an internal memorandum shortly after the 1964 report, a Philip Morris vice president explained that it was necessary to 'provide some answers which will give smokers a psychological crutch and a self-rationale to continue smoking.'" *Id.* Furthermore, in the late 1970s and 1980s, a director of research for Philip Morris said it was his job to "fuel the controversy" as to whether cigarettes were harmful. *Id.* at 834 (internal quotation marks omitted).

238. *Id.* at 831. Although Philip Morris and other tobacco companies conducted research on tobacco, they purposefully avoided such research in the United States where they would have had to document the results of the biological effects of tobacco use, instead opting to conduct their research in Europe where results could be destroyed. *Id.* at 834, 839. This research was designed to carefully avoid answering the question of whether cigarettes are harmful. *Id.* at 834. In the 1990s, the tobacco industry was "forced to agree" that tobacco may be a "risk factor" associated with numerous diseases. *Id.* Additionally, and despite evidence to the contrary, Philip Morris publicly professed a belief that cigarettes were not addictive. *Id.*

239. *Id.* at 828.

240. *Id.*

241. *Id.*

242. *Id.*

reduced that amount to \$32 million, finding the amount to be “excessive under the United States Constitution.”²⁴³ The trial court also reduced the non-economic damages to \$500,000 pursuant to Oregon state law.²⁴⁴

Both parties appealed.²⁴⁵ The Oregon Court of Appeals reversed the trial court’s remittitur, reinstating the original amount of punitive damages.²⁴⁶ It rejected Philip Morris’ claims that (1) the trial court failed to instruct the jury not to punish Philip Morris for harm to nonparties and that the “award should bear a reasonable relationship to the harm caused to Williams”; and (2) that the trial court’s instruction that the maximum amount that the jury could award was \$100 million was flawed.²⁴⁷

In its decision to reinstate the \$79.5 million punitive damages award, the Court of Appeals evaluated Oregon’s statutory “criteria for an award of punitive damages” to determine whether a punitive damages award of any size was justified under the facts of the case.²⁴⁸ In this regard, Oregon law established seven specific criteria for deciding in a products liability action whether the plaintiff has proven by “clear and convincing evidence that the party against whom punitive damages are sought has acted with malice or has shown a reckless and outrageous indifference to a highly unreasonable risk of harm and has acted with a conscious indifference to the health, safety and welfare of others.”²⁴⁹ These seven criteria are:

- (a) The likelihood at the time that serious harm would arise from the defendant’s misconduct; (b) The degree of the defendant’s awareness of that likelihood; (c) The profitability of the defendant’s misconduct; (d) The duration of the misconduct and any concealment of it; (e) The attitude and conduct of the defendant upon discovery of the misconduct; (f) The financial condition of the defendant; and (g) The total deterrent effect of other punishment imposed upon the defendant as a result of the misconduct, including, but not limited to, punitive damage awards to persons in situations similar to the claimant’s and the severity of the criminal penalties to which the defendant has been or may be subjected.²⁵⁰

The court briefly analyzed these seven factors, finding that each of them supported a punitive damages award. First, the court concluded that the jury could have found that it was very likely that Philip Morris’

243. *Id.*

244. *Id.* The reduction of the non-economic damages was in accordance with OR. REV. STAT. ANN. § 18.560(1) (West 1987), which has since been renumbered as OR. REV. STAT. § 31.710 (West 2011). *See Williams v. Philip Morris, Inc.*, 127 P.3d 1165, 1171 (Or. 2006).

245. *Williams*, 48 P.3d at 828.

246. *Id.* at 843.

247. *Id.* at 837–38.

248. *Id.*

249. OR. REV. STAT. § 31.730(1) (West 2010).

250. *Id.* § 30.925(2).

“fraudulent statements” would be harmful.²⁵¹ Second, the court determined that the jury could have found that Philip Morris was aware of the potential for harm by 1958 and was definitely aware of it by the 1970s.²⁵² Third, the court concluded that Philip Morris’ scheme was highly advantageous to its business because it was a lucrative industry, ultimately earning billions of dollars.²⁵³ “There is evidence that defendant believed, in fact, that its misrepresentation of the dangers of smoking was important to its ability to continue in the cigarette business.”²⁵⁴ Fourth, the court noted that Philip Morris’ misconduct lasted more than forty years, and the defendant concealed it for as long as possible.²⁵⁵ Fifth, the court found no evidence that Philip Morris regretted its actions.²⁵⁶ Sixth, there was no dispute that Philip Morris is quite wealthy.²⁵⁷ And seventh, there was no evidence that Philip Morris had been previously punished for this misconduct.²⁵⁸

Having satisfied itself that an award of punitive damages was appropriate, the court then proceeded to analyze whether the award was excessive under either state or federal law.²⁵⁹ After chronicling the evidence Williams introduced in support of the punitive damages claim,²⁶⁰ the court readily found sufficient evidence under Oregon’s own “rational juror” standard to support the jury’s original \$79.5 million award.²⁶¹ This evidence included, inter alia, the fact that Philip Morris knew that smoking was harmful while stating publicly that the issue was “unresolved.”²⁶²

251. *Williams*, 48 P.3d at 839.

252. *Id.* at 840.

253. *Id.*

254. *Id.*

255. *Id.*

256. *Id.*

257. *Id.*

258. *Id.*

259. Curiously, the court actually performed much of the state law excessiveness analysis before first determining whether the punitive damages award itself was legitimate. *See id.* at 838–39.

260. *Id.*

261. *Id.* at 836–38 (citing *Parrott v. Carr Chevrolet, Inc.*, 17 P.3d 473, 477 (Or. 2001)). The Oregon Supreme Court decided *Parrott* after the jury in *Williams* had reached its decision; therefore, the trial court did not have the benefit of the Court’s *Parrott* analysis to consider in its determination to issue a remittitur. *Id.* at 836 n.16. The *Parrott* criteria are:

“(1) the statutory and common-law factors that allow an award of punitive damages for the specific kind of claim at issue * * *; (2) the state interests that a punitive damages award is designed to serve * * *; (3) the degree of reprehensibility of the defendant’s conduct * * *; (4) the disparity between the punitive damages award and the actual or potential harm inflicted * * *; and (5) the civil and criminal sanctions provided for comparable misconduct[.]”

Id. at 836 (alteration in original) (quoting *Parrot*, 17 P.3d at 484) (internal quotation marks omitted).

262. *Id.* at 838. Additional evidence presented by the plaintiff included: the defendant knew nicotine was addictive; the defendant created “controversy” to give highly addicted smokers a reason to justify their habit; the defendant conducted research without looking into the relationship

Next, the court of appeals considered the Oregon Supreme Court's decision in *Parrott v. Carr Chevrolet, Inc.*,²⁶³ as well as the *Gore* guideposts.²⁶⁴ In light of all of the evidence, the court concluded that a punitive damages award of \$79.5 million was not unconstitutionally excessive and therefore should not have been reduced by the trial court.²⁶⁵

On reconsideration, the court of appeals adhered to its opinion.²⁶⁶ Philip Morris then sought review from the Oregon Supreme Court, which the court denied.²⁶⁷ The United States Supreme Court granted certiorari, vacated, and remanded the case "in light of *State Farm Mut. Automobile Ins. Co. v. Campbell*."²⁶⁸

On remand, the Oregon Court of Appeals reexamined the case in light of *State Farm* but ultimately concluded that it had been correct when it reinstated the jury's original \$79.5 million punitive damages award.²⁶⁹ Again, the court rejected Philip Morris' argument that the jury should have been instructed not to punish Philip Morris for the harm its misconduct may have caused others.²⁷⁰ In light of the Supreme Court's *State Farm* analysis, the court of appeals declared that Philip Morris' conduct was highly reprehensible²⁷¹ and that the facts justified an award exceeding a single-digit ratio under the Due Process Clause.²⁷² The court also noted that Philip Morris' great wealth²⁷³ could be considered by the jury when determining the amount of the punitive damages award.²⁷⁴ The court ultimately concluded that "an award of punitive damages in the amount of \$79.5 million does not violate the Due Process Clause under the guidelines provided by *State Farm* because the amount of the award is reasonable and proportionate to the wrong inflicted on decedent and the [citizens]" of the state of Oregon.²⁷⁵

between smoking and disease, and if results were unfavorable they were destroyed; "defendant's actions caused harm to many others in Oregon besides Williams"; and cigarettes are fairly inexpensive to manufacture and therefore there is a high profit margin. *Id.* at 838–39.

263. *Id.* at 840. In *Parrott*, the Court affirmed a verdict with a ratio of 87:1 for punitive and compensatory damages because the defendant's acts were "particularly egregious." *Id.* at 841.

264. *Id.* at 840–42.

265. *Id.* at 841–42.

266. *Williams v. Philip Morris Inc.*, 127 P.3d 1165, 1171 (Or. 2006).

267. *Id.*

268. *Id.*

269. *Id.* at 1182.

270. *Williams v. Philip Morris Inc.*, 92 P.3d 126, 142 (Or. Ct. App. 2004). The court adhered to its previous conclusion that, "[T]he potential injury to past, present, and future consumers as the result of a routine business practice is an appropriate consideration in determining the amount of punitive damages." *Id.* (quoting *Williams v. Philip Morris Inc.*, 48 P.3d 824, 837 (Or. Ct. App. 2002)) (internal quotation marks omitted).

271. *Id.* The court noted the "defendant used fraudulent means to continue a highly profitable business knowing that, as a result, it would cause death and injury to large numbers of Oregonians." *Id.* at 143.

272. *Id.* at 145.

273. *Id.* The defendant's net worth was over \$17 billion at the time. *Id.*

274. *Id.*

275. *Id.* at 145–46.

The Oregon Supreme Court then agreed to review the case, but limited its review to two issues: whether the trial court's denial of Philip Morris' requested jury instruction was appropriate, and whether the \$79.5 million punitive damages award violated the Due Process Clause of the Fourteenth Amendment.²⁷⁶

With respect to the jury instruction,²⁷⁷ the court agreed with the trial court and court of appeals that the requested instruction "was incorrect under state law."²⁷⁸ Moreover, the court rejected Philip Morris' contention that its proffered jury instruction was *mandated* by the holding in *State Farm*, declaring instead that the instruction was actually *inconsistent with* the reasoning in *State Farm*.²⁷⁹

With respect to whether the award was "grossly excessive," the court applied the *Gore* guideposts, ultimately concluding that the award was not "grossly excessive."²⁸⁰ When considering the reprehensibility of Philip Morris' conduct,²⁸¹ the court determined that when the facts were construed in favor of Williams, Philip Morris' conduct was "extraordinarily reprehensible" and thus supported a "very significant" punitive damages award.²⁸²

276. *Williams v. Philip Morris Inc.*, 127 P.3d 1165, 1171–72 (Or. 2006). Philip Morris framed the issues as follows:

- A. Is a defendant entitled to have the jury instructed that any award of punitive damages must bear a reasonable relationship to the harm caused to the plaintiff and that punitive damages cannot be imposed for alleged harm to non-parties?
- B. Are the punitive damages assessed in this case unconstitutionally excessive in violation of the Due Process Clause of the Fourteenth Amendment to the United States Constitution?

Id. at 1171. The Oregon Supreme Court denied review on two other questions relating to (1) detrimental reliance, and (2) federal preemption under the Federal Cigarette Labeling and Advertising Act. *Id.* at 1171–72.

277. *See infra* note 300 for the full text of the critical part of Philip Morris' proposed instruction.

278. *Williams*, 127 P.3d at 1175.

279. *Id.* at 1176.

280. *Id.* at 1176–82.

281. *Id.* at 1177. The court considered whether:

"[T]he harm caused was physical as opposed to economic; the tortious conduct evinced an indifference to or a reckless disregard of the health or safety of others; the target of the conduct had financial vulnerability; the conduct involved repeated actions or was an isolated incident; and the harm was the result of intentional malice, trickery, or deceit, or mere accident."

Id. (quoting *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 419 (2003)).

282. *Id.* at 1177–78. The court found the behavior reprehensible because of the "fraudulent scheme" maintained by the defendant to "deliberately . . . keep smokers smoking" while providing them with "false or misleading information" that the harmful effects of cigarettes were still unknown. *Id.* at 1177.

As to the ratio between the punitive and compensatory damage awards, the court found that this guidepost, even when considering the potential compensatory damages that Williams would have had if he had survived longer, was “not met.”²⁸³ Finally, the court found that the comparable civil or criminal sanctions²⁸⁴ “support[ed] a very significant punitive damage award.”²⁸⁵ Thus, the Court concluded that “[u]nder such extreme and outrageous circumstances” the jury’s \$79.5 million punitive damages award was consistent with due process.²⁸⁶

The United States Supreme Court granted certiorari limited to the following issues as presented by Philip Morris: (1) its “claim that Oregon had unconstitutionally permitted it to be punished for harming nonparty victims; and (2) whether Oregon had in effect disregarded ‘the constitutional requirement that punitive damages be reasonably related to the plaintiff’s harm.’”²⁸⁷

B. Before the United States Supreme Court

Those who carefully follow the Supreme Court’s punitive damages jurisprudence would have expected *Philip Morris* to provide the Court with a vehicle to clarify some of the uncertainty and ambiguity lingering in the wake of *State Farm*.²⁸⁸ Court watchers were also anxious to see where newly appointed Justices Roberts and Alito would come out on punitive damages—would they join conservative Justices Scalia and Thomas in refusing to engage in this type of substantive due process analysis, or would they instead side with the more moderate (and pragmatically) conservative Justice Kennedy?²⁸⁹ Paradoxically, the answer turned out to

283. *Id.* at 1181 (“All arguable versions of the ratios substantially exceed the single-digit ratio (9:1) that the Court has said ordinarily will apply in the usual case.”).

284. *Id.* at 1178–80. Here, the court considered only comparable criminal sanctions because no comparable civil sanctions were cited by the parties or discovered through the court’s own research. *Id.* at 1179. However, the court expressly stated that it “must exercise care” when relying on criminal sanctions because of the United States Supreme Court’s instructions in *State Farm*. *Id.* at 1179 (citing *State Farm*, 538 U.S. at 428).

285. *Id.* at 1179–80.

286. *Id.* at 1182.

287. *Philip Morris USA v. Williams*, 549 U.S. 346, 352 (2007).

288. See Carol J. Gatewood, *Philip Morris Case Gives Justices a Chance to Exorcise ‘Phantom’ Plaintiffs*, LAW.COM (Oct. 31, 2006), <http://www.law.com/jsp/llf/PubArticleLLF.jsp?id=900005466263> (“The U.S. Supreme Court is presented today with the opportunity to untangle the web of confusion concerning punitive damages.”); Tony Mauro, *Supreme Court Will Hear Case on High Punitive Damages*, LAW.COM (May 31, 2006), <http://www.law.com/jsp/law/LawArticleFriendly.jsp?id=900005549397> (“[L]ower state and federal courts have varied widely in their interpretations of the *State Farm* decision”); Anthony J. Sebok, *The Upcoming Supreme Court Argument Involving Punitive Damages Awards and Big Tobacco: Can These Awards Be Based on Injury to Persons Other than the Plaintiff? Part Two in a Two Part Series*, FINDLAW (Oct. 24, 2006), <http://writ.lp.findlaw.com/sebok/20061024.html> (stating as one of the issues left unresolved by *Gore* and *State Farm*, “Can punitive damages be used to punish a defendant for conduct that harms anyone other than the plaintiff (or plaintiffs, if there is more than one)?”).

289. See Joan Biskupic, *\$79.5M in Punitive Damages at Core of Supreme Court Case*, USA

be pretty much “yes” to both questions—in joining Justice Breyer’s majority opinion (along with Justice Kennedy and Justice Souter) that purported to resolve the case on *procedural* due process grounds,²⁹⁰ Justices Roberts and Alito were able to sidestep the *substantive* due process issue completely.²⁹¹

From all outward appearances, *Philip Morris* did not appear to be much more than a stripped-down version of *State Farm*—a deep-pocketed member of an unpopular industry seeking to overturn a very large punitive damages award that followed a trial that exposed its misdeeds. Indeed, many of the problems with the evidence in *State Farm* that could otherwise distract from the core substantive due process issue, i.e., whether the punitive damages award was “grossly excessive,” were not present in *Philip Morris*. For example, the trial court in *Philip Morris* did not admit evidence of individuals in other states who were harmed by the defendant, as had been done in *State Farm*.²⁹² Moreover, the evidence admitted at trial in *Philip Morris* did not concern other acts, whether similar or dissimilar, committed by Philip Morris, as had been the case in *State Farm*.²⁹³ Accordingly, conventional wisdom suggested that the Supreme Court’s opinion would focus on the *Gore* guideposts, with particular attention paid to the nearly 100:1 ratio of punitive damages to compensatory damages.²⁹⁴

TODAY, Oct. 27, 2006, at 4A, available at http://www.usatoday.com/news/washington/judicial/2006-10-26-damages_x.htm (quoting Mark Levy, a lawyer who closely monitors punitive damages jurisprudence: “The court is on the knife edge,” Levy says. If Roberts and Alito join the justices who dissented in the *State Farm* case and want to leave the matter to the states, Levy says, there would be ‘a sudden and radical change in this area of the law.’”); Greg Stohr, *Roberts, Alito Will Decide Punitive Damages Caps at High Court*, BLOOMBERG (Oct. 30, 2006), <http://www.bloomberg.com/apps/news?pid=20601070&sid=a11NoJr8Oq2w&refer=politics> (stating that Roberts and Alito are the “wild cards in the case” and must decide whether to side with the conservatives, Scalia and Thomas, or the more centrist Justices: Breyer, Kennedy, Souter, and Stevens).

290. *Philip Morris*, 549 U.S. at 353. In dissent, Justice Thomas rejected the Court’s characterization of the case as resting on procedural due process grounds: “It matters not that the Court styles today’s holding as ‘procedural’ because the ‘procedural’ rule is simply a confusing implementation of the substantive due process regime this Court has created for punitive damages.” *Id.* at 361 (Thomas, J., dissenting).

291. See Linda Greenhouse, *Justices Overturn \$79.5 Million in Punitive Damages Against Philip Morris*, N.Y. TIMES, Feb. 21, 2007, at A14 (explaining that the Court decided the case on procedural rather than substantive grounds and wondering if the reason might be that Roberts and Alito are unwilling to recognize substantive due process in punitive damages cases).

292. *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 420–21 (2003) (stating that the trial court was convinced that there was no limit to the geographic scope of evidence that could be admitted under Court precedent); *Philip Morris*, 549 U.S. at 350 (explaining that the plaintiff’s attorney in *Philip Morris* had asked the jury to “think about how many other Jesse Williams in the last 40 years in the *State of Oregon* there have been”) (emphasis added) (internal quotation marks omitted).

293. *State Farm*, 538 U.S. at 420–21.

294. See Peter B. Rutledge, *Looking Ahead: October Term 2006*, 2006 CATO SUP. CT. REV. 361, 370 (“As it comes to the Supreme Court, *Williams* presents two basic issues: (1) the relationship between the various *Gore* guideposts and (2) whether the Constitution permits a jury to consider non-party conduct as it awards punitive damages.”); *Supreme Court to Hear Philip Morris*

But lurking just beneath the surface was the real issue driving this case—the multiple punishments problem. As noted above,²⁹⁵ while Justice Kennedy’s majority opinion in *State Farm* purported to rely on principles of federalism in deciding that a jury is not permitted to punish a defendant for lawful, out-of-state conduct,²⁹⁶ he also characterized the potential for multiple punishments as “a more fundamental reason” for disallowing the other acts evidence.²⁹⁷

1. *The Briefs*

a. Petition for Certiorari

Philip Morris sought review in the United States Supreme Court on the basis of three questions presented:

1. Whether, in reviewing a jury’s award of punitive damages, an appellate court’s conclusion that a defendant’s conduct was highly reprehensible and analogous to a crime can “override” the constitutional requirement that punitive damages be reasonably related to the plaintiff’s harm.
2. Whether due process permits a jury to punish a defendant for the effects of its conduct on non-parties.
3. Whether, in reviewing a punitive award for excessiveness, an appellate court is permitted to give the plaintiff the benefit of all conceivable inferences that might support a finding of high reprehensibility even if the jury made no such specific factual findings.²⁹⁸

In urging the Court to grant review on the first question presented, Philip Morris chronicled what it argued were numerous splits and conflicts among lower courts relating to the application of the second *Gore* guidepost—the ratio of punitive to compensatory damages.²⁹⁹

With respect to the second question presented, Philip Morris contended that the Oregon Supreme Court’s approval of the trial court’s refusal to

Appeal, CNNMONEY.COM (May 30, 2006) http://money.cnn.com/2006/05/30/news/companies/scotus_philipmorris/index.htm (“The high court set no . . . precise ratio between punitive and actual damages for determining what would be ‘excessive’ in violation of the Constitution’s [D]ue [P]rocess [C]lause. But exceptions could be made, said [Justice] Kennedy, ‘if a particularly egregious act has resulted in only a small amount of economic damages.’ That legal standard will now be tested in this latest appeal.”).

295. See *supra* note 176 and accompanying text.

296. *State Farm*, 538 U.S. at 422.

297. *Id.* at 422–23.

298. See Petition for a Writ of Certiorari in *I, Philip Morris USA v. Williams*, 549 U.S. 346 (2007) (No. 05-1256), 2006 WL 849860, at *I.

299. See *id.* at 8–14.

read an instruction informing the jury that it could not “punish the defendant for the impact of its alleged misconduct on other persons”³⁰⁰ was both contrary to *State Farm* and created a conflict among the lower courts.³⁰¹ The problem with allowing a jury to punish a defendant for harm caused to other persons was, of course, the multiple punishments problem: “It is a recipe for multiple punishments for the same harms,”³⁰² that “creates a grave risk of excessive, multiple punishment.”³⁰³

The third question presented by Philip Morris concerned whether courts reviewing punitive damages for excessiveness should automatically draw all inferences in favor of upholding the verdict, as the Oregon Supreme Court had done.³⁰⁴ While Philip Morris conceded that this approach was perfectly appropriate in addressing the sufficiency of the evidence questions,³⁰⁵ it argued that such an approach was not acceptable in addressing excessiveness questions under the guidance of *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*,³⁰⁶ which mandated a de novo excessiveness review.³⁰⁷ The deferential approach adopted and applied by the Oregon Supreme Court, argued Philip Morris, directly contradicted the approach of the California Supreme Court³⁰⁸ and other federal courts.³⁰⁹

300. *Id.* at 14. The full text of this part of Philip Morris’ proposed jury instruction reads as follows:

The size of any punishment should bear a reasonable relationship to the harm caused to Jesse Williams by the defendant’s punishable conduct. Although you may consider the extent of harm suffered by others in determining what that reasonable relationship is, you are not to punish the defendant for the impact of its alleged misconduct on other persons, who may bring lawsuits of their own in which other juries can resolve their claims and award punitive damages for those harms, as those other juries see fit.

Id. at 14–15.

301. Specifically, Philip Morris contended that both the California Supreme Court and the Eighth Circuit had correctly applied *State Farm*, concluding that while harm to others could be considered in the context of the reprehensibility *Gore* factor, the jury was not permitted to punish the defendant for this harm. *Id.* at 19 (citing *Johnson v. Ford Motor Co.*, 113 P.3d 82, 93 (Cal. 2005) (allowing jury to consider “[t]he scale and profitability of a course of wrongful conduct” in evaluating reprehensibility but prohibiting jury from punishing the defendant for harm to anyone other than the plaintiff); *Williams v. ConAgra Poultry Co.*, 378 F.3d 790, 797 (8th Cir. 2004) (“Punishing systematic abuses by a punitive damages award in a case brought by an individual plaintiff . . . deprives the defendant of the safeguards against duplicative punishment that inhere in the class action procedure.”)).

302. Petition for a Writ of Certiorari, *supra* note 298, at 15.

303. *Id.* at 21.

304. *Id.* at 24.

305. *See id.*

306. 532 U.S. 424 (2001).

307. *See id.* at 436–37.

308. *See* Petition for a Writ of Certiorari, *supra* note 298, at 24 (citing *Simon v. San Paolo U.S. Holding Co.*, 113 P.3d 63, 70 (Cal. 2005)).

309. *See id.* at 25.

In opposition, Williams characterized the questions presented by Philip Morris quite differently:

1. Whether the ratio between compensatory and punitive damages comprises the conclusive and overriding guidepost as to the reasonableness of a punitive damages verdict.
2. Whether due process forbids a state from punishing a defendant for its egregious and profitable misconduct on the basis of the actual and potential effects of that misconduct throughout the state.
3. Whether state law that requires appellate courts to review facts in the light most favorable to the party for whom the jury ruled violates due process of law.³¹⁰

Williams devoted a majority of her opposition brief to the first question, arguing that the Oregon Supreme Court “faithfully” applied *State Farm*, even though the ratio of punitive to compensatory damages far exceeded the single-digit standard suggested by *State Farm*.³¹¹ With respect to the second question, Williams contended that Philip Morris’ proffered jury instruction was not mandated by *State Farm*, was contrary to Oregon law, and was internally self-contradictory.³¹² Finally, with respect to the third question, Williams argued that the Oregon Supreme Court’s deferential review was consistent with Supreme Court precedent and that this argument had been waived by Philip Morris.³¹³

The Supreme Court granted Philip Morris’ petition but limited its review to the first two questions presented.³¹⁴

b. Briefs on the Merits

In its opening brief, Philip Morris recharacterized and reordered its questions presented, choosing to lead with the question that directly raised the multiple punishments problem:

1. Whether the Oregon courts deprived Philip Morris of due process by permitting the jury to punish Philip Morris for harms to non-parties.

310. Brief in Opposition at i, *Philip Morris*, 549 U.S. 346 (No. 05-1256), 2006 WL 1151025, at *i.

311. *Id.* at 10–22.

312. *Id.* at 22–26.

313. *Id.* at 27–29.

314. *See Philip Morris*, 549 U.S. at 352.

2. Whether, in considering a claim that a punitive award is unconstitutionally excessive, a court may disregard the constitutional requirement that punitive damages be reasonably related to the plaintiff's harm whenever it concludes that (i) the jury could have found the defendant's conduct to be highly reprehensible and (ii) the conduct could come within the statutory definition of a crime.³¹⁵

From the very beginning of its discussion of the first question presented, Philip Morris attempted to focus the Court's attention on the multiple punishments problem.³¹⁶ Indeed, throughout its discussion of the first question, Philip Morris repeatedly raised the specter of multiple punishments for the same act or course of conduct, contending that the Oregon Supreme Court's decision would allow juries to punish defendants for harm to those not before the court.³¹⁷ This multiple punishment, argued Philip Morris, is "plainly unconstitutional" in violation of due process.³¹⁸ This is true, complained Philip Morris, because such punishment deprives a defendant of property with no assurance that it will not be punished again for the same conduct.³¹⁹

With respect to the second question, Philip Morris argued that Supreme Court precedent made clear that courts reviewing punitive damages awards for excessiveness must pay careful attention to all three *Gore* guideposts.³²⁰ In light of the Oregon Supreme Court's admission that the second *Gore* factor—the ratio between punitive and compensatory damages—was not met, Philip Morris contended that the punitive damages award against it violated due process and could not stand.³²¹ Philip Morris then asserted that when all three *Gore* factors were properly considered, a ratio no higher than "4:1" would be permissible.³²²

315. Brief for the Petitioner at I, *Philip Morris*, 549 U.S. 346 (No. 05-1256), 2006 WL 2190746, at *I.

316. *Id.* at 10 ("This Court has squarely held that '[d]ue process does not permit courts, in the calculation of punitive damages, to adjudicate the merits of other parties' hypothetical claims against a defendant.' That is because '[p]unishment on these bases creates the possibility of multiple punitive damages awards for the same conduct . . .'" (citation omitted) (quoting *State Farm Mut. Auto. Ins. Co., v. Campbell*, 538 U.S. 408, 423 (2003))).

317. *Id.* at 11 ("Oregon has embraced a procedure that affirmatively promotes excessive, duplicative punishment: a defendant may be punished multiple times for the harms that it allegedly imposed on hundreds or thousands of State residents, without regard to whether it could successfully defend against the claims of some or most of those residents."); *id.* ("Therefore, other Oregonians remain free to sue Philip Morris for smoking-related injuries, and to seek punitive damages for their injuries, even though the punitive award in this case may already punish for those harms. Insofar as any of those plaintiffs succeed, Philip Morris will be punished repeatedly for causing exactly the same injuries to exactly the same people.")

318. *Id.* at 12.

319. *Id.* (citing *W. Union Tel. Co. v. Pennsylvania*, 368 U.S. 71, 75 (1961)).

320. Brief for the Petitioner, *supra* note 315, at 27–28.

321. *Id.*

322. *Id.* at 44.

In opposition, Williams acceded to the change in the order of the questions presented in Philip Morris' opening brief, and modified her version of the questions presented from those articulated in her opposition to certiorari:³²³

1. Whether due process allows a state to impose punitive damages based on the actual and potential effects of the defendant's wrongful conduct throughout the state?^[324]
2. Whether the ratio between compensatory and punitive damages comprises the conclusive and overriding guidepost as to the reasonableness of a punitive damages verdict?³²⁵

Williams did not, however, change the order of the arguments in her brief, opting to lead with her argument that the level of reprehensibility of Philip Morris' conduct justified the very large punitive damages award.³²⁶ Turning to the question of whether it was proper for Philip Morris to be punished for causing harm to individuals other than the plaintiff, Williams argued that because punitive damages are designed to punish the defendant's conduct (rather than to compensate for plaintiff's harm), it was entirely proper for the jury to consider harm caused to others by the conduct in question when determining the appropriate size of a punitive damages award.³²⁷ The Supreme Court's punitive damages jurisprudence, contended Williams, was not to the contrary.³²⁸ Williams addressed the multiple punishments problem head on, declaring that it was "little more than a hypothetical possibility" under Oregon law and not an issue in this case.³²⁹ This is true, contended Williams, because this case was the first and only verdict in Oregon imposing punitive damages against Philip Morris and because Oregon's statutory scheme required juries and reviewing courts to take into account prior punitive damages awards for the same misconduct.³³⁰ Finally, Williams contended that the jury instruction proffered by Philip Morris was properly rejected by the trial court because, as phrased, it was not correct under Oregon state law.³³¹

323. Brief for Respondent at i, *Philip Morris*, 549 U.S. 346 (No. 05-1256), 2006 WL 2668158, at *i.

324. *Id.* The wording of this question presented differs slightly from that used in Williams' opposition to certiorari. See *supra* note 310 and accompanying text.

325. *Id.* The wording of this question presented is identical to that used in Williams' opposition to certiorari. See *supra* note 310 and accompanying text.

326. Brief for Respondent, *supra* note 323, at 4–20 (discussing the reprehensibility factor as it applies to Philip Morris).

327. *Id.* at 35–44.

328. *Id.* at 37–38, 42–44.

329. *Id.* at 45.

330. *Id.* at 45–46.

331. *Id.* at 46–49.

2. The Majority Opinion

Those who hoped the Court would provide additional clarification on the ratio guidepost were sorely disappointed—the Court declined to reach the *Gore* factors at all.³³² Those who hoped the Court would repudiate (or at least abandon) substantive due process in the punitive damages context were also left empty-handed. Writing for a bare five-member majority, Justice Breyer reversed the decision of the Oregon Supreme Court and vacated the \$79.5 million verdict.³³³ From the very beginning of the opinion, Justice Breyer made clear that the Court's eye was on the multiple punishments problem rather than on the *Gore* factors: “The question we address today concerns . . . whether the Constitution's Due Process Clause permits a jury to base [a punitive damages] award in part upon its desire to *punish* the defendant for harming persons who are not before the court.”³³⁴ The “persons who are not before the court” are, of course, others who have been harmed by the defendant's same conduct who could later bring their own claims for punitive (and compensatory) damages. As discussed below, this opening statement in the opinion foreshadows later pronouncements that make clear that the lurking and unresolved multiple punishments problem heavily influences the Court's punitive damages jurisprudence.³³⁵

After summarizing the material facts and the procedural history of the case, Justice Breyer briefly traced the evolution of the Supreme Court's incursion into punitive damages.³³⁶ In doing so, Justice Breyer drew a careful distinction between substantive due process analysis and procedural due process analysis: questions relating to whether a punitive damages award is “grossly excessive” are *substantive* due process questions while (seemingly) all other questions are *procedural* due process questions.³³⁷ Since the Court resolved the case without deciding whether the punitive damages award was “grossly excessive,” reasoned Justice Breyer, then *ipso facto* this was a *procedural* (and not *substantive*) due process case.³³⁸

Justice Breyer then declared that procedural due process “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.”³³⁹ Justice Breyer went on to explain that this was true for at least two reasons. First, punishing a defendant for harm to a nonparty would deprive the defendant of an opportunity to present all available

332. *Philip Morris USA v. Williams*, 549 U.S. 346, 352 (2007).

333. *Id.* Joining Justice Breyer were Chief Justice Roberts and Justices Kennedy, Souter, and Alito. *Id.* at 348.

334. *Id.* at 349.

335. *See infra* notes 339–42 and accompanying text.

336. *Philip Morris*, 549 U.S. at 352–53.

337. *Id.* at 353.

338. *Id.* Unsurprisingly, Justice Thomas was less than convinced by what he perceived to be a judicial sleight of hand: “It matters not that the Court styles today's holding as ‘procedural’ because the ‘procedural’ rule is simply a confusing implementation of the substantive due process regime this Court has created for punitive damages.” *Id.* at 361 (Thomas, J., dissenting).

339. *Id.* at 353 (majority opinion).

defenses.³⁴⁰ Second, punishing a defendant for harm to a nonparty “would add a near standardless dimension to the punitive damages equation,” leaving open such questions as the number of victims and the circumstances and seriousness of their injuries.³⁴¹ But the more important, yet here not explicitly stated, reason is what this author believes to be the driving force behind the Court’s prohibition of punishing the defendant for harm to nonparties—the multiple punishments problem. As Justice Kennedy (joined by, *inter alia*, Justice Breyer) noted in *State Farm*, punishing a defendant for harm caused to nonparties “creates the possibility of multiple punitive damages awards for the same conduct.”³⁴² Just why Justice Breyer chose not to mention explicitly the multiple punishments problem here is discussed later in this Article.³⁴³

Justice Breyer then clarified language from earlier opinions that had suggested that punishing a defendant for harm to others was permissible. First, he explained that while the Court had previously stated that it would be permissible to consider “the *potential* harm defendant’s conduct could have caused” when assessing punitive damages, only the potential harm to the *plaintiff* was appropriately considered.³⁴⁴ Second, Justice Breyer corrected a misimpression left by the Court’s suggestion in *Gore* that the Alabama Supreme Court’s punitive damages calculation that likely included a consideration of harm to nonparties was “error-free.”³⁴⁵

Justice Breyer then turned to the difficult task of distinguishing between the proper use of evidence of harm to nonparties and the improper and unconstitutional use of such evidence. Williams argued, and Philip Morris conceded, that harm to nonparties caused by the conduct that harmed the plaintiff was admissible and highly relevant to show the extent of the reprehensibility of the defendant’s conduct.³⁴⁶ Justice Breyer readily agreed: “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”³⁴⁷ And while it may consider such evidence when evaluating a defendant’s reprehensibility, “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.”³⁴⁸ Accordingly, Justice Breyer declared that procedural due process requires that juries be properly instructed on the permissible uses of evidence of harm to nonparties.³⁴⁹

340. *Id.*

341. *Id.* at 354.

342. *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 423 (2003) (citing *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 593 (1996) (Breyer, J., concurring)).

343. *See infra* Part IV.

344. *Philip Morris*, 549 U.S. at 354.

345. *Id.*

346. *Id.* at 355.

347. *Id.*

348. *Id.*

349. *Id.* (“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

Turning to the facts of the instant case, Justice Breyer agreed with Philip Morris that the Oregon Supreme Court upheld the jury's punitive damages award pursuant to a mistaken premise that it was permissible for the jury to punish Philip Morris for the harm it caused to nonparties.³⁵⁰ The Oregon Supreme Court, Justice Breyer determined, had failed to grasp the difference between allowing a jury to *consider* harm to others when evaluating reprehensibility on the one hand and actually *punishing* Philip Morris for such harm on the other hand.³⁵¹ That the Oregon Supreme Court failed to appreciate this distinction was betrayed by its declaration that "[i]f a jury cannot punish for the conduct, then it is difficult to see why it may consider it at all."³⁵² As Justice Kennedy had done in *State Farm*,³⁵³ Justice Breyer analogized to recidivism statutes that permit taking into account a criminal defendant's other misconduct in determining the appropriate punishment for the offense before the court.³⁵⁴

In an attempt to provide practical guidance to lower courts called upon to apply this case, Justice Breyer explained that courts must take care not to "authorize procedures that create an unreasonable and unnecessary risk of any such confusion occurring."³⁵⁵ Consequently, when there is a significant risk that the jury will misunderstand the distinction between using evidence of harm to nonparties in evaluating the defendant's level of reprehensibility and directly punishing the defendant for such harm, a court must put in place procedures (presumably jury instructions) that protect against such a risk, if requested by the defendant to do so.³⁵⁶ While constitutionally mandated to take some precautions, states are afforded some flexibility in determining what those precautions will look like.³⁵⁷

Concluding that the Oregon Supreme Court misunderstood and misapplied the constitutional standard, the Court remanded the case to the Oregon Supreme Court to apply the correct standard.³⁵⁸ In reliance upon the fact that the Oregon Supreme Court might order a new trial or reduce the size of the punitive damages on remand, the Court declined to reach the question of whether the punitive damages award assessed by the jury violated substantive due process as "grossly excessive."³⁵⁹

reprehensibility, but also to punish for harm caused to strangers.").

350. *Id.* at 356–57.

351. *Id.* at 357.

352. *Id.* at 356 (alteration in original) (quoting *Williams v. Philip Morris Inc.*, 127 P.3d 1165, 1175 n.3 (Or. 2006)).

353. *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 423 (2003).

354. *Philip Morris*, 549 U.S. at 357 (citing *Witte v. United States*, 515 U.S. 389, 400 (1995)).

355. *Id.*

356. *Id.*

357. *Id.* ("Although the States have some flexibility to determine what *kind* of procedures they will implement, federal constitutional law obligates them to provide *some* form of protection in appropriate cases.").

358. *Id.* at 357–58.

359. *Id.*

3. The Dissents

The four Justices in dissent authored three opinions. Justices Stevens and Thomas both dissented individually while Justice Ginsburg's dissent was joined by both Justice Scalia and Justice Thomas.

Having authored the majority opinion in *Gore*, and having joined Justice Kennedy's majority opinion in *State Farm*, Justice Stevens found himself in unfamiliar territory as a dissenter, at least with respect to punitive damages. Unlike Justices Scalia, Thomas, and Ginsburg, the source of Justice Stevens's disagreement with the majority in *Philip Morris* was *not* based on whether due process imposed substantive limits on punitive damages awards or whether the Court was improvidently intruding into territory reserved to the states. To the contrary, Justice Stevens fully embraced the Court's prior punitive damages decisions.³⁶⁰ While agreeing with Justice Ginsburg that the Oregon courts committed no procedural errors, Justice Stevens was much more troubled by the majority's prohibition of punishing a defendant for causing harm to nonparties.³⁶¹ Justice Stevens's point of departure from the majority was in the fundamental assumption of what punitive damages are designed to do. While the majority viewed an award of punitive damages as vindication for harm caused to the *individual plaintiff*, Justice Stevens, analogizing to the justification for criminal sanctions, regarded the purpose of punitive damages as vindication of harm caused to the *public*: "Whereas compensatory damages are measured by the harm the defendant caused the plaintiff, punitive damages are a sanction for the public harm the defendant's conduct has caused or threatened."³⁶² Justice Stevens contended that the majority's approach marked a departure from precedent, complaining that "[w]e have never held otherwise."³⁶³

Justice Stevens then took issue with the distinction the majority drew between *punishing* a defendant for harm caused to nonparties on the one hand, and *considering* such harm when evaluating the defendant's level of reprehensibility on the other.³⁶⁴ Claiming that such a "nuance" is a distinction without a difference, Justice Stevens declared that "[w]hen a jury increases a punitive damages award because injuries to third parties enhanced the reprehensibility of the defendant's conduct, the jury is by definition punishing the defendant—directly—for third-party harm."³⁶⁵ Justice Stevens also discounted the majority's analogy to recidivism

360. *Id.* at 358 (Stevens, J., dissenting) ("I remain firmly convinced that the cases announcing those constraints were correctly decided.")

361. *Id.* ("Unlike the Court, I see no reason why an interest in punishing a wrongdoer 'for harming persons who are not before the court' . . . should not be taken into consideration when assessing the appropriate sanction for reprehensible conduct.")

362. *Id.* at 358–59; *see also id.* at 359 ("[A] punitive damages award, instead of serving a compensatory purpose, serves the entirely different purposes of retribution and deterrence that underlie every criminal sanction.")

363. *Id.* at 359. Justice Stevens did allow, however, that awarding "compensatory damages to remedy such third-party harm might well constitute a taking of property from the defendant without due process." *Id.*

364. *Id.* at 360.

365. *Id.*

statutes, reasoning that if permitting past crimes that have already been punished to serve as the basis for enhancing the punishment for the present crime (as was allowed), then surely it was permissible to enhance the size of a punitive damages award assessed for conduct that had never previously been punished based upon the fact that such conduct injured multiple people.³⁶⁶

Finally, Justice Stevens obliquely questioned the Court's characterization of the case as one involving *procedural*, as opposed to *substantive*, due process. While judicial restraint, cautioned Justice Stevens, counseled the Court to exercise extreme care when announcing new substantive due process rules, "[t]oday the majority ignores that sound advice."³⁶⁷

In his dissent, Justice Thomas saw little virtue in being oblique in his attack on the majority opinion: "It matters not that the Court styles today's holding as 'procedural' because the 'procedural' rule is simply a confusing implementation of the substantive due process regime this Court has created for punitive damages."³⁶⁸ And in Justice Thomas's view, the substantive due process regime the Court has created for punitive damages lacks constitutional legitimacy.³⁶⁹ As a parting shot, Justice Thomas reiterated his prior characterization of the Court's punitive damages jurisprudence as "insusceptible of principled application."³⁷⁰

In her dissent, Justice Ginsburg did not directly engage the majority on its pronouncements regarding the contours of due process. Rather, she disputed the majority's *application* of its due process rules to the actions of the Oregon courts.

It is unclear whether Justice Ginsburg accepted the majority's new due process rule to the effect that "when punitive damages are at issue, a jury is properly instructed to consider the extent of harm suffered by others as a measure of reprehensibility, but not to mete out punishment for injuries in fact sustained by nonparties,"³⁷¹ or simply supposed it to be accurate for the purposes of argument. Convinced that "[t]he Oregon courts did not rule otherwise,"³⁷² however, Justice Ginsburg chided the Court for not identifying any evidence or jury charge inconsistent with the due process rule announced by the majority.³⁷³

366. *Id.* at 360 n.2. Importantly, Justice Stevens's rationale is based upon an assumption that the conduct that gave rise to the punitive damages had not previously been punished. It thus appears that if a punitive damages award had, in fact, already been imposed for the same conduct, then the later award might violate due process as an impermissible multiple punishment.

367. *Id.* at 361.

368. *Id.* (Thomas, J., dissenting).

369. *Id.* ("[T]he Constitution does not constrain the size of punitive damages awards." (quoting *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 429–30 (2003) (Thomas, J., dissenting))).

370. *Id.* at 361–62 (quoting *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 599 (1996) (Scalia, J., joined by Thomas, J., dissenting)).

371. *Id.* at 362 (Ginsburg, J., dissenting).

372. *Id.*

373. *Id.* In support of this contention, Justice Ginsburg quoted the Oregon Supreme Court to

The majority opinion, according to Justice Ginsburg, was “all the more inexplicable” given that Philip Morris did not object to (1) the evidence introduced by Williams at trial, (2) the argument made by Williams’ counsel, or (3) the actual instructions given to the jury.³⁷⁴ The only objection Philip Morris raised was to the trial court’s refusal to read the jury instruction it offered—an instruction, contended Justice Ginsburg, correctly refused by the trial court because it would have served to confuse, rather than enlighten, the jury.³⁷⁵ Rather than addressing whether Philip Morris’ proposed instruction was proper, the majority, lamented Justice Ginsburg, “reaches outside the bounds of the case as postured when the trial court entered its judgment.”³⁷⁶ According to Justice Ginsburg, the net result was that lower courts were now left to try to apply the Court’s “changing, less than crystalline precedent.”³⁷⁷

C. Oregon Supreme Court Opinion on Remand

It appeared that Philip Morris had won a significant victory at the United States Supreme Court even though the Court had side-stepped the substantive due process “gross excessiveness” discussion. The importance of a ruling that defendants could not be directly punished through punitive damages for harm caused to nonparties cannot be overstated; this was huge for Philip Morris in this case and for all other defendants in future cases.³⁷⁸ One could not blame Philip Morris for having confidence that the directive to lower courts that they must use sufficient procedural safeguards to prevent this punishment would mean that the massive award against it would likely be reduced dramatically. This was not meant to be.

On remand, the Oregon Supreme Court acknowledged that the mandate of the Supreme Court was “to apply the constitutional standard set by the Supreme Court in our consideration of . . . whether the trial court erred in refusing to give [Philip Morris’] proposed jury instruction.”³⁷⁹ But, before it did so, the Oregon Supreme Court declared that it would *first* have to consider “a preliminary, independent state law standard.”³⁸⁰ That independent state law standard was “a well-understood” Oregon rule to the

the effect that “[t]he jury, in assessing the reprehensibility of Philip Morris’s actions, could consider evidence of similar harm to other Oregonians caused (or threatened) by the same conduct.” *Id.* (quoting *Williams v. Philip Morris, Inc.*, 127 P.3d 1165, 1177 (Or. 2006)) (internal quotation marks omitted).

374. *Id.* at 362–63.

375. *Id.* at 363.

376. *Id.* at 364.

377. *Id.*

378. See Greg Stohr, *Supreme Court Limits Punitive Damages, Backs Altria (Update 6)*, BLOOMBERG, (Feb. 20, 2007), <http://www.bloomberg.com/apps/news?pid=20601103&sid=a.XIFWwNpXJs> (“‘This is a big win for the business community,’ said Robin Conrad, senior vice president of the U.S. Chamber of Commerce’s litigation unit in Washington. ‘Today’s decision correctly addresses business’s concern that punishing defendants for harm to those not involved in the lawsuit denies a company the right to defend claims against it.’”).

379. *Williams v. Philip Morris, Inc.*, 176 P.3d 1255, 1260 (Or. 2008).

380. *Id.*

effect that “[a]n appellate court will not reverse a trial court’s refusal to give a proposed jury instruction, unless the proposed instruction was ‘clear and correct in all respects, both in form and in substance.’”³⁸¹ The court then readily concluded that Philip Morris’ proposed jury instruction was incorrect in two ways. First, the proposed instruction used “may” rather than the statutorily prescribed “shall” in relation to the jury’s consideration of Oregon’s punitive damages factors.³⁸² Second, the proposed instruction’s paraphrasing of one of the factors, concluded the court, rendered it inaccurate under Oregon law, injecting an “intent” element where none existed.³⁸³ Accordingly, the Oregon Supreme Court declared that although the trial court erred in rejecting Philip Morris’ proposed instruction on the grounds upon which the court relied, there were additional, independent reasons grounded in Oregon law that rendered the rejection of the instruction entirely appropriate.³⁸⁴ As a consequence, the court reinstated the \$79.5 million punitive damages award against Philip Morris.³⁸⁵

D. *Certiorari Dismissed as “Improvidently Granted”*

Unsurprisingly, Philip Morris once again sought review in the United States Supreme Court, raising the following two questions in its petition for certiorari:

1. Whether, after this Court has adjudicated the merits of a party’s federal claim and remanded the case to state court with instructions to “apply” the correct constitutional standard, the state court may interpose—for the first time in the litigation—a state-law procedural bar that is neither firmly established nor regularly followed.
2. Whether a punitive damages award that is 97 times the compensatory damages may be upheld on the ground that the reprehensibility of a defendant’s conduct can “override” the constitutional requirement that punitive damages be reasonably related to the plaintiffs harm.³⁸⁶

Notably, the Court granted certiorari as to the first question only,³⁸⁷ declining once again to address the substantive due process “gross excessiveness” question.

381. *Id.* at 1261 (quoting *Beglau v. Albertus*, 536 P.2d 1251, 1256 (Or. 1975)).

382. *Id.* at 1262–63.

383. *Id.* at 1263.

384. *Id.*

385. *Id.* at 1263–64.

386. Petition for Writ of Certiorari at i, *Philip Morris USA v. Williams*, 553 U.S. 1093 (2008) (No. 07-1216), 2008 WL 795148, at *i.

387. *Philip Morris*, 553 U.S. at 1093.

At oral argument, counsel for Philip Morris stressed that the Oregon Supreme Court never applied the standard mandated by the United States Supreme Court, i.e., the need to prevent punitive damages from being based on harm to nonparties.³⁸⁸ In response, counsel for Williams argued that although the Oregon Supreme Court did not know prior to the Court's decision that including harm to nonparties in a punitive damages calculus violated the federal Constitution, it had to limit its review on remand to the proposed jury instruction because it was the only issue preserved by Philip Morris for appeal.³⁸⁹ And since the jury instruction was fatally flawed under Oregon law, the Oregon Supreme Court correctly determined that the award should stand.³⁹⁰

This discussion prompted a pointed question from Justice Souter to counsel for Williams as to how the Court might prevent its constitutional decisions being avoided on remand "by some clever device."³⁹¹ In the ensuing dialogue, Chief Justice Roberts suggested that one way to vindicate the Court's authority in this case would be to address the second question raised by Philip Morris—the substantive due process question.³⁹² But after raising the specter of reaching this question, the Chief Justice made clear that he was not actually proposing a review of the substantive due process question.³⁹³

Ultimately, after the oral arguments, the Court dismissed the writ of certiorari as having been improvidently granted, and the case was finally over.³⁹⁴

E. *A Concurrent Grant of Certiorari: Exxon Shipping Co. v. Baker*

Before analyzing the current state of punitive damages jurisprudence in the wake of *Philip Morris*, a brief discussion of *Exxon Shipping Co. v. Baker*³⁹⁵ is necessary to fully set the stage. After the Oregon Supreme Court's opinion on remand, but before the oral argument discussed immediately above, another rather large punitive damages case, *Exxon*, was brought before the Court. This case arose out of the Exxon Valdez oil spill in Alaska and involved a punitive damages award of \$2.5 billion.³⁹⁶ Since the spill took place in navigable waters, federal statutory and common law applied to the case.³⁹⁷ Exxon sought certiorari on numerous grounds,

388. Transcript of Oral Argument at 3, *Philip Morris*, 553 U.S. 1093 (No. 07-1216), 2008 WL 6524409, at *3.

389. *Id.* at 47.

390. *Id.* at 47–48.

391. *Id.* at 48.

392. *Id.* at 51.

393. *Id.* at 52.

394. *Philip Morris USA Inc. v. Williams*, 129 S. Ct. 1436, 1436 (2009).

395. 128 S. Ct. 2605 (2008).

396. *Id.* at 2611.

397. *Id.* at 2626–27 (stating that the Court's review of punitive damages in the Exxon Valdez oil spill involves "regulating them as a common law remedy for which responsibility lies with this Court as a source of judge-made law in the absence of statute").

including on the question of whether the \$2.5 billion punitive damages award was within the limits allowed by substantive due process.³⁹⁸

While the Court agreed to determine whether the punitive damages award was excessive under federal maritime common law, it declined to review whether the size of the award violated federal substantive due process.³⁹⁹ The Court was able to skirt the constitutional “excessiveness” issue because it decided a nearly identical question under federal maritime law.⁴⁰⁰ Accordingly, this case is significant only to the extent it provides a window into the views of the Justices who had previously abstained from opining on the question of how big of a punitive damages award was too big. This group of abstainers included not only Justices Thomas, Scalia, and Ginsburg, who had previously steadfastly refused to engage in the “gross excessiveness” inquiry,⁴⁰¹ but it also included Chief Justice Roberts, who had ducked this issue (with the rest of the majority in *Philip Morris*) the one time it was presented to him after joining the Court. (Notably, it did not include Justice Alito, even though he had avoided the “gross excessiveness” question in *Philip Morris*, because he recused himself from this case on account of his ownership of Exxon stock.)⁴⁰²

Justice Souter wrote the majority opinion in *Exxon*, which was unanimous as to Parts I, II, & III, but three Justices—Breyer, Ginsburg, and Stevens—dissented from Parts IV & V, which considered the size of punitive damages under federal maritime law.⁴⁰³ In Parts IV & V, the Court concluded that a 1:1 ratio between compensatory and punitive damages was an appropriate limit.⁴⁰⁴ The analytical road to this firm numerical limit began with the idea that a punitive damages award “should be reasonably predictable in its severity” to properly accomplish the deterrence objective.⁴⁰⁵ Then, because a descriptive formulation of a standard was susceptible to divergent interpretations, the Court concluded that a quantified standard was preferable.⁴⁰⁶ After noting that placing numerical caps on punitive awards was not well-suited for judge-made law because of

398. See *id.* Petition for a Writ of Certiorari at i, *Exxon*, 128 S. Ct. 2605 (No. 07-219), 2007 WL 2383784, at *i.

399. *Exxon*, 128 S. Ct. at 2614 (“We granted certiorari to consider whether maritime law allows corporate liability for punitive damages on the basis of the acts of managerial agents, whether the Clean Water Act forecloses the award of punitive damages in maritime spill cases, and whether the punitive damages awarded against Exxon in this case were excessive as a matter of maritime common law.” (internal citation omitted)).

400. *Id.* at 2626–27.

401. See *supra* notes 205–07 and accompanying text.

402. See Greg Stohr, *Pfizer, Exxon Find U.S. Justices as Shareholders May Cost Them*, BLOOMBERG (Mar. 7, 2008), <http://www.bloomberg.com/apps/news?pid=20601070&sid=aQhpG3GxU2TQ&refer=home> (“Alito’s stock holdings in Exxon Mobil were in the \$100,001 to \$250,000 range, according to his 2006 disclosure form.”).

403. See *Exxon*, 128 S. Ct. at 2611, 2619–34.

404. *Id.* at 2633.

405. *Id.* at 2627.

406. See *id.* at 2628 (“Instructions can go just so far in promoting systemic consistency when awards are not tied to specifically proven items of damage . . .”).

the changes wrought by inflation,⁴⁰⁷ Justice Souter and the four who joined his opinion—Chief Justice Roberts and Justices Kennedy, Scalia, and Thomas—held that a ratio between compensatory and punitive damages was the best solution.⁴⁰⁸ To set the ratio, the Court consulted statistics across a wide range of punitive damage awards that set the national median ratio at less than 1:1.⁴⁰⁹ Accordingly, the Court concluded that a 1:1 ratio “is a fair upper limit in such maritime cases.”⁴¹⁰

Justice Stevens’s dissent provided the lengthiest disagreement with the majority.⁴¹¹ Although he acknowledged the Court’s power to set a ratio,⁴¹² he argued that it was more prudent for Congress to take the lead in setting mathematical ratios, quoting a prior case noting that “maritime tort law is now dominated by federal statute.”⁴¹³ While Justice Ginsburg agreed with Justice Stevens that the Court had the power to set a ratio, and while she thought that leaving it for Congress was a better choice, she acknowledged that “the question is close.”⁴¹⁴ Justice Ginsburg also noted the majority’s conclusion that runaway punitive damages awards were not a widespread problem and argued that abuse of discretion review would presumably suffice in dealing with outlier awards.⁴¹⁵ Moreover, Justice Ginsburg added that a firm 1:1 ratio, while appropriate in this case, may not be appropriate in every future case.⁴¹⁶ Finally, Justice Breyer found himself in unfamiliar territory as a dissenter in a punitive damages case.⁴¹⁷ Justice Breyer’s primary objection to the majority’s opinion was its “absolute fixed numerical ratio.”⁴¹⁸ He cited the Court’s prior punitive damages holdings to note that the Court had left the door open in the past for limited exceptions to its numerical ratios,⁴¹⁹ and in this particular case, argued that “a limited exception to the Court’s 1:1 ratio is warranted.”⁴²⁰

407. *See id.* at 2629 (noting also the problem “that there is no ‘standard’ tort or contract injury”).

408. *See id.*

409. *See id.* at 2633 (noting specifically that the appropriate number was around 0.65:1, meaning that compensatory damages awards on average are approximately one-third higher than punitive damage awards).

410. *Id.*

411. *See id.* at 2634 (Stevens, J., dissenting).

412. *See id.* at 2638.

413. *Id.* at 2635 (quoting *Miles v. Apex Marine Corp.*, 498 U.S. 19, 36 (1990)).

414. *See id.* at 2639 (Ginsburg, J., dissenting).

415. *See id.* (“The Court acknowledges that the traditional approach ‘has not mass-produced runaway awards,’ or endangered settlement negotiations. Nor has the Court asserted that outlier awards, insufficiently checked by abuse-of-discretion review, occur more often or are more problematic in maritime cases than in other areas governed by federal law.” (citation omitted)).

416. *See id.* (“In the end, is the Court holding only that 1:1 is the maritime-law ceiling, or is it also signaling that any ratio higher than 1:1 will be held to exceed ‘the constitutional outer limit’? On next opportunity, will the Court rule, definitively, that 1:1 is the ceiling due process requires in all of the States, and for all federal claims?” (citation omitted)).

417. *See id.* at 2640 (Breyer, J., dissenting).

418. *Id.*

419. *Id.* (“In setting forth constitutional due process limits on the size of punitive damages awards, for example, we said that ‘few awards exceeding a single-digit ratio between punitive and

IV. DECONSTRUCTING AND RECONSTRUCTING: WHAT IS THE STATE OF SUBSTANTIVE DUE PROCESS REVIEW OF PUNITIVE DAMAGES, AND WHERE WILL THE COURT GO NEXT?

In the wake of *Philip Morris*, one could not be blamed for wondering whether the dissenting Justices are correct that the Court's "changing, less than crystalline precedent"⁴²¹ is "insusceptible of principled application."⁴²² Several other questions come to mind. Does the Court's decision to dispose of *Philip Morris* on *procedural*, rather than *substantive*, due process signal a shift in the Court's approach to reviewing punitive damages cases? What, if anything, do *Philip Morris* and *Exxon* tell us about the punitive damages jurisprudence of Chief Justice Roberts and Justice Alito? Does the Court's new due process rule that prohibits a defendant from being punished for harm caused to nonparties make any progress toward resolving the multiple punishments problem? What does the Court's decision to avoid the substantive due process question raised by *Philip Morris* on its final petition for certiorari, as well as its ultimate dismissal of the remaining question raised as improvidently granted, say about the future of punitive damages jurisprudence before the Court? Likewise, what, if anything, does the Court's refusal to consider the due process ramifications of the \$2.5 billion punitive damages award in *Exxon* tell us about the future of the Court's involvement in punitive damages cases? Finally, how will the addition of Justices Sotomayor and Kagan influence this future? These and other questions are addressed below.

A. *Procedural v. Substantive Due Process*

As discussed above, *Haslip* was the Court's first due process case in the punitive damages realm.⁴²³ Because the issue in *Haslip* was *how* the jury was instructed, the Court analyzed the case on procedural due process grounds.⁴²⁴ In contrast, in *TXO*, the issue was whether the punitive damages award itself was "grossly excessive," i.e., whether the award was too big.⁴²⁵ Accordingly, *TXO* was analyzed under substantive due process grounds. Therefore, one can divine a dividing line between when *procedural* due process governs and when *substantive* due process

compensatory damages, to a significant degree, will satisfy due process.'" (emphasis added) (quoting *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 425 (2003)).

420. *Id.* (arguing he could "find no reasoned basis to disagree with the Court of Appeals' conclusion that this is a special case, justifying an exception from strict application of the majority's numerical rule").

421. See *supra* note 377 and accompanying text.

422. See *supra* note 205 and accompanying text.

423. See discussion *supra* Part I.B.1.

424. See *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 18–24 (1991).

425. See *TXO Prod. Corp. v. Alliance Res. Corp.*, 509 U.S. 443, 458 (1993).

governs: questions relating to *how* the jury does its work, including how the jury is instructed and what evidence it is allowed to consider, implicate *procedural* due process, whereas questions relating to *how big* the award is (i.e., whether the award was grossly excessive) implicate *substantive* due process. Using this dividing line, then, both *Gore* and *State Farm* might superficially seem to be quintessential substantive due process cases because the opinions seemed to revolve around the three-pronged “gross excessiveness” inquiry. And since *Philip Morris* seemed to involve little more than an extension and clarification of the analysis in both of those previous cases, it too might facially seem to be a substantive due process case, rendering Justice Breyer’s pronouncements to the contrary⁴²⁶ to be disingenuous. A more nuanced look at *Gore* and *State Farm*, however, reveals that, while embedded in a substantive due process framework, the pivotal analysis in both of those cases actually concerned procedural, and *not* substantive, matters. In fact, a strong case can be made for the contention that both *Gore* and *State Farm* could have (and should have) been resolved solely on procedural due process grounds as the Court purported to do in *Philip Morris*.⁴²⁷

As previously discussed, Justice Breyer was careful both at the beginning of the majority opinion⁴²⁸ and at the end⁴²⁹ to make clear that the Court’s decision revolved around *procedural*, rather than *substantive*, due process. In dissent, both Justice Thomas and Justice Stevens were critical of this characterization, arguing that the majority opinion was more properly characterized as a substantive due process case.⁴³⁰ Justice Thomas’s criticism was open, direct, and consistent with his prior criticisms of the Court’s punitive damages jurisprudence⁴³¹ and merits no further discussion. On the other hand, Justice Stevens’s criticism is more tempered and seems to argue a bit too vigorously a point not *openly* in dispute—that the Court’s prior *substantive* due process punitive damages cases are still valid law in the wake of *Philip Morris*.⁴³² So why the dispute about whether procedural or substantive due process is driving the decision? Who is right? Does it matter?

In the view of this author, there are three plausible explanations for how the *Philip Morris* case played out (at least prior to its decision to vacate certiorari on the final appeal as improvidently granted) and why it played out that way. The first is that the status quo was preserved, while

426. See *Philip Morris USA v. Williams*, 549 U.S. 346, 353–55 (2007).

427. See discussion *supra* Part III.B.2.

428. See *Philip Morris*, 549 U.S. at 353 (“Because we shall not decide whether the award here at issue is ‘grossly excessive,’ we need now only consider the Constitution’s procedural limitations.”).

429. See *id.* at 358 (“Because the application of this standard may lead to the need for a new trial, or a change in the level of the punitive damages award, we shall not consider whether the award is constitutionally ‘grossly excessive.’”).

430. See *supra* notes 367–68 and accompanying text.

431. See *supra* notes 368–70 and accompanying text.

432. See *supra* note 367 and accompanying text.

the second and third signal a contraction in the scope of the Court's view of its role in punitive damages jurisprudence in the years to come.

The first explanation is that, notwithstanding the criticisms leveled by Justices Stevens and Thomas, the Court's decision was in fact based solely on procedural due process, and the Court's decision to avoid substantive due process was based upon legitimate prudential considerations.⁴³³ The second is that Justices Roberts and Alito are flatly unwilling to recognize a *substantive* due process limitation on the size of punitive damages awards, placing them squarely in the camp with Justices Scalia, Thomas, and Ginsburg.⁴³⁴ And the third is that while Justices Roberts and Alito are willing to go along with the recognition of such a substantive due process limitation, they are unwilling to expand that limitation beyond the scope of the prior cases.⁴³⁵ Each of these possible interpretations of the Court's due process characterization is discussed below.

1. Substantive Due Process Was Simply Not Implicated and Is Alive and Well

The first possible interpretation of *Philip Morris* is that we should take the case at face value and assume that nothing whatsoever has changed about the Court's approach to substantive due process. This approach to *Philip Morris* would argue that the Court's failure to overrule (or even criticize) *Gore* and *State Farm* should be interpreted to mean that those cases are not only still good law, but that the Court will continue to be vigilant about assuring that juries do not issue (and courts do not affirm) grossly excessive punitive damages awards. Because Justice Stevens remained firmly committed to substantive due process in this context,⁴³⁶ and because Justices Kennedy, Breyer, and Souter were also firmly on board with this concept,⁴³⁷ all it would have taken was for either Chief Justice Roberts or Justice Alito to join this foursome, and there would have been the necessary five votes to continue the Court's jurisprudential approach to punitive damages. And because both Justices joined the majority in *Philip Morris*, which neither overruled nor questioned *Gore* or *State Farm*, one might be tempted to assume that the status quo was preserved. This reading gives credence to Justice Breyer's contention in *Philip Morris* that the Court declines to reach the substantive due process issue solely for prudential reasons.⁴³⁸ But based upon how the case played out after it was remanded, this simply cannot be the case.

As previously discussed, on remand, the Oregon Supreme Court affirmed the \$79.5 million punitive damages award on the ground that procedural due process was not denied to Philip Morris when its proposed

433. See discussion *infra* Part IV.A.1.

434. See discussion *infra* Part IV.A.2.

435. See discussion *infra* Part IV.A.3.

436. See *supra* note 360 and accompanying text.

437. All three Justices had been in the majority in both *Gore* and *State Farm*. See *supra* note 103 and accompanying text; *supra* note 169 and accompanying text.

438. See *supra* note 359 and accompanying text.

jury instruction was rejected.⁴³⁹ It is important to remember that certiorari was initially granted in *Philip Morris* on *both* procedural and substantive due process grounds.⁴⁴⁰ Given the majority's express declaration that it need not reach the substantive due process question because the award needed to be vacated on procedural due process grounds,⁴⁴¹ this squarely placed before the Court the substantive due process issue. But the Court blinked—twice. First, the Court blinked when it declined to re-grant certiorari on substantive due process following the affirmance by the Oregon Supreme Court.⁴⁴² Second, the Court blinked when, during oral argument, Chief Justice Roberts raised the possibility of subjecting the award to substantive due process scrutiny and then quickly backed away.⁴⁴³

Given that the punitive damages award in this case was nearly 100 times greater than the compensatory damages award, and given *State Farm's* admonition that only single-digit multipliers would likely comply with substantive due process, it strains credulity to believe that *Philip Morris* simply maintains the status quo. A simple application of the *Gore* guideposts would surely have led to the award in *Philip Morris* being struck down.

2. Substantive Due Process Review of Punitive Damages Is Dead

Though not immediately apparent from *Philip Morris*, it may be that the best explanation of the majority's decision to characterize the due process problem with the case as *procedural* rather than *substantive* is that there were no longer five Justices willing to continue to recognize *substantive* due process limitations in the punitive damages context.

Prior to being elevated to the Supreme Court, both Chief Justice Roberts and Justice Alito were universally regarded as judicial conservatives.⁴⁴⁴ Among the other seven Justices then on the bench, it is uncontroversial to say that Justices Scalia and Thomas are widely considered the two most conservative members of the Court and are also commonly characterized as judicial conservatives. As discussed previously, both Justice Scalia and Justice Thomas adamantly oppose the Court's *substantive* due process punitive damages jurisprudence,⁴⁴⁵ while both have previously joined opinions recognizing and applying *procedural* due process constraints in punitive damages cases.⁴⁴⁶ (Justice Ginsburg

439. See *supra* Part III.C.

440. See *supra* note 314 and accompanying text.

441. See *supra* note 359 and accompanying text.

442. See *supra* note 387 and accompanying text.

443. See *supra* notes 392–93 and accompanying text.

444. See, e.g., Goodwin Liu, *Roberts Would Swing the Supreme Court to the Right*, BLOOMBERG (July 22, 2005), <http://www.bloomberg.com/apps/news?pid=21070001&sid=aLgK4Jy5eXwc>; Bill Mears, *Alito's Record Shows Conservative Judge*, CNNPOLITICS.COM (Oct. 31, 2005), http://articles.cnn.com/2005-10-31/politics/alito.record_1_abortion-laws-chief-justice-john-roberts-judicial-philosophy?s=PM:POLITICS.

445. See *supra* notes 205–06 and accompanying text.

446. See, e.g., *Honda Motor Co. v. Oberg*, 512 U.S. 415, 434–35 (1994) (invalidating a

also dissented in both *Gore* and *State Farm* and has been sharply critical of the Court's substantive due process punitive damages jurisprudence.)⁴⁴⁷ Accordingly, one might reasonably expect that with the addition of Justices Roberts and Alito, five members of the Court would be ready to scuttle the Court's substantive due process punitive damages jurisprudence in its entirety, which would, of course, mean overruling *Gore* and (at least to some degree) *State Farm*.⁴⁴⁸ Indeed, that Chief Justice Roberts and Justice Alito are uncomfortable with substantive due process in the punitive damages context is perhaps the best explanation of why and how the case unfolded the way it did, and why the majority opinion in *Philip Morris*, which included both Justices Roberts and Alito in its bare five-Justice majority, discussed only procedural due process, avoiding venturing into substantive due process territory. An important lens through which to examine the majority opinion is the dissent of Justice Stevens.

Justice Stevens begins his dissent with a straightforward and seemingly uncontroversial statement to the effect that the Due Process Clause imposes both procedural and substantive limitations on states' power to impose punitive damages, citing each of the Court's punitive damages cases over the past fifteen years.⁴⁴⁹ Curiously, Justice Stevens then declares with unnecessary vigor, "I remain firmly convinced that the cases announcing those constraints were correctly decided,"⁴⁵⁰ as if he were responding to a statement in the majority opinion calling those cases into question. One searches in vain in the text or footnotes of that opinion for any such statement.⁴⁵¹ Later, in the penultimate paragraph of his dissent, Justice Stevens again tilts at the proverbial windmill, declaring "[i]t is far too late in the day to argue that the Due Process Clause merely guarantees fair procedure and imposes no substantive limits on a State's lawmaking power."⁴⁵² It is far too late for *whom* to be arguing this? The majority opinion did not make such a claim; it simply (and expressly) did not reach this question because it resolved the case on procedural due process grounds.⁴⁵³ Not even Williams argued that due process did not contain a substantive element that constrained the size of punitive damages awards. The only ones making this claim are the three other dissenting Justices—Justices Ginsburg, Scalia, and Thomas—and it seems rather unlikely that Justice Stevens would be directing this point at his fellow dissenters.

punitive damages award on procedural due process grounds).

447. *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 607–14 (1996) (Ginsburg, J., dissenting); *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 430–39 (2003) (Ginsburg, J., dissenting); *Honda*, 512 U.S. at 436–51 (Ginsburg, J., dissenting).

448. I say "to some degree" because, as discussed above, *State Farm* easily could have been decided solely on procedural due process grounds. See *supra* notes 172–95 and accompanying text.

449. *Philip Morris USA v. Williams*, 549 U.S. 346, 358–59 (2007) (Stevens, J., dissenting).

450. *Id.* at 358.

451. Indeed, why would there be? The opinion was written by Justice Breyer, who was in the majority in both *Gore* and *State Farm*. See *supra* note 103 and accompanying text; see also *supra* note 169 and accompanying text.

452. *Philip Morris*, 549 U.S. at 360–61 (Stevens, J., dissenting).

453. See *supra* note 438 and accompanying text.

So to whom is he addressing his comments? Because Justices Breyer, Kennedy, and Souter have consistently sided with the majority in the Court's previous punitive damages cases (recognizing *substantive* due process in the punitive damages context), the most logical conclusion is that this was directed at the two new Justices—Roberts and Alito, who had joined the Court since *State Farm*.

While we have no way of knowing this (and we may never know), it is possible (perhaps even likely) that Chief Justice Roberts and Justice Alito made clear to the other Justices that they believed the Court's substantive due process decisions in the punitive damages realm were incorrectly decided and that they would side with Justices Scalia, Thomas, and Ginsburg if forced to decide the case on substantive due process grounds. Both the majority opinion and Justice Stevens' dissent are consistent with this hypothesis. The majority is consistent in that it grounds the case in procedural due process and declines to venture into substantive due process, and Justice Stevens's dissent is consistent because it raises a somewhat spirited defense of substantive due process even though it has not been openly attacked.

Further buttressing this hypothesis (at least to some degree) is the Court's decision, within months of deciding *Philip Morris*, to exclude from its review of the staggering \$2.5 billion punitive damages award in *Exxon* the defendant's challenge that such an award was grossly excessive in violation of substantive due process.⁴⁵⁴ Even more support is found in the fact that the Court denied certiorari in *Philip Morris* after the affirmance on remand by the Oregon Supreme Court on the very same substantive due process question on which it had previously granted review.⁴⁵⁵

Cutting against this hypothesis, however, is the fact that Chief Justice Roberts and Justice Alito signed on to the majority opinion in *Philip Morris* even though it suggested the Court's approval of prior substantive due process cases: "For these and similar reasons, this Court has found that the Constitution imposes certain limits, in respect both to procedures for awarding punitive damages and to amounts forbidden as 'grossly excessive.'"⁴⁵⁶ This facial support for substantive due process, however, seems tepid and carefully worded such that there is room to argue that this was simply an acknowledgement, rather than a reaffirmance, of the prior precedents. The unnatural wording of the very next sentence in the opinion further fuels such speculation: "Because we shall not decide whether the award here at issue is 'grossly excessive,' we need now only consider the Constitution's procedural limitations."⁴⁵⁷ Why "shall not decide"? If substantive due process were alive and well, Justice Breyer seemingly should have reversed the order of the sentence to say instead: "Because we find the punitive damages award to violate procedural due process, we need not decide whether the award here at issue is 'grossly excessive.'"

454. Petition for a Writ of Certiorari, *supra* note 398, at *i.

455. *See supra* note 387 and accompanying text.

456. *Philip Morris*, 549 U.S. at 353 (citing, *inter alia*, *State Farm* and *Gore*).

457. *Id.*

Perhaps cutting once again the other way, but only slightly, is the more natural wording in the final paragraph of the majority opinion: “Because the application of this standard may lead to the need for a new trial, or a change in the level of the punitive damages award, we shall not consider whether the award is constitutionally ‘grossly excessive.’”⁴⁵⁸ Again, why “shall not” rather than “need not”?

It is no answer to argue that if either or both Chief Justice Roberts or Justice Alito had agreed with Justices Scalia, Thomas, and Ginsburg that a substantive due process review of punitive damages awards was improper, all they had to do was join their dissents in *Philip Morris*. It is important to remember that Chief Justice Roberts and Justice Alito disagreed with Justices Scalia, Thomas, and Ginsburg on the *procedural* due process point, and thus, it would have been exceedingly awkward for them to join the majority opinion while at the same time pledging allegiance to a viewpoint expressed in dissent.

In summary, while it is not possible to ascertain from *Philip Morris* with any certainty whether Chief Justice Roberts and Justice Alito consider substantive due process illegitimate in the punitive damages realm, there is ample reason to believe that they are not eager to wield its power more than is absolutely necessary, which suggests that the third alternative of *Philip Morris* is likely the correct one.

3. The Court Has Said All It Cares to Say About Substantive Due Process

The third possible explanation of the majority’s opinion is that, while Justices Roberts and Alito are not fond of the Court’s substantive due process jurisprudence, they (1) are unwilling to overrule the Court’s substantive due process cases, and (2) do not intend to revisit this line of cases.

As discussed in the immediately prior section, there are good reasons to believe that Chief Justice Roberts and Justice Alito are not entirely comfortable with the Court’s substantive due process jurisprudence in the punitive damages realm.⁴⁵⁹ Yet had they affirmatively wanted to overrule this line of cases, either *Philip Morris* or *Exxon* would have provided a perfect vehicle for accomplishing that task. Both involved large punitive damages awards against unpopular defendants (tobacco and oil), and the defendants in both cases sought to have the awards overturned as “grossly excessive” in violation of substantive due process. Yet, the Justices let the opportunity go. Again, it can certainly be argued that they initially sidestepped this issue on prudential grounds.⁴⁶⁰ But there is no immediately obvious reason why cases such as *Philip Morris* should be resolved on *procedural* due process grounds, if possible, so as to avoid deciding them on *substantive* due process grounds. Both grounds are

458. *Id.* at 358.

459. *See supra* notes 454–58 and accompanying text.

460. *See supra* note 438 and accompanying text.

constitutionally based, and no case law seems to exist instructing courts to avoid substantive due process when procedural due process will suffice.

It would have been equally defensible for the Court to avoid the procedural due process grounds by deciding the case solely on substantive due process grounds. Indeed, a straightforward application of the *Gore* factors very well could have led to the award being overturned because the ratio of punitive to compensatory damages (roughly 100:1)⁴⁶¹ was way too high. Such an approach would have obviated the need to create a new constitutional rule, which is precisely what Justice Stevens scolded the majority for doing.⁴⁶²

Accordingly, perhaps the most natural interpretation of *Philip Morris* (and the Court's refusal to review *Exxon* on substantive due process grounds) is that Chief Justice Roberts and Justice Alito are neither inclined to overrule the substantive due process punitive damages cases nor to expand their reach. In fact, it seems fair to say that the Court, given its current makeup,⁴⁶³ will no longer take punitive damages cases even if they do not comply with the *Gore* guideposts.

This conclusion that the Supreme Court is done with substantive due process in the punitive damages realm is supported by at least three points. First, as discussed below, the Court appears to have completed its creation of a punitive damages structure that it believes sufficiently avoids the multiple punishments problem.⁴⁶⁴ If a defendant can be punished only for the harm caused to the plaintiff, or so the argument goes, then there is no longer a risk of multiple punishments for the same conduct. But as also discussed below, this guarantee is illusory, and its premise ignores centuries of punitive damages jurisprudence.⁴⁶⁵ Nevertheless, since the Supreme Court's recent involvement in punitive damages has been driven by its concern with the multiple punishments problem,⁴⁶⁶ there is good reason to believe that the Court will no longer inject itself into this area.

Second, if the Court were at all inclined to continue evaluating punitive damages on substantive due process grounds, why did it excise that issue from *Exxon* at the point it granted certiorari? After all, if the case turned out to be resolvable on other grounds, the Court could have simply declined to reach the substantive due process claim as it did in *Philip Morris*. If, on the other hand, the case had not turned out to be resolvable on other grounds, the Court had prevented itself from invalidating the award on substantive due process grounds. Accordingly, by refusing to allow the parties even to brief this issue, the Court seems to have been

461. See *Philip Morris*, 549 U.S. at 351.

462. See *id.* at 360 (Stevens, J., dissenting). As discussed below, the multiple punishments problem was likely an additional driving force in the Court's decision to avoid substantive due process.

463. At the time of this writing, the Court consists of Chief Justice Roberts, and Justices Scalia, Thomas, Kennedy, Breyer, Ginsburg, Alito, Sotomayor, and Kagan.

464. See *infra* Part IV.B.

465. See *infra* Part IV.B.

466. See *supra* notes 189, 339–43 and accompanying text.

signaling that it had said all it was going to say on substantive due process in the punitive damages realm.⁴⁶⁷

Third, if the addition of Chief Justice Roberts and Justice Alito did not cause a change in the Court's approach, it almost certainly would have reached the merits of the substantive due process claim even though the case was resolvable on procedural due process grounds—just as it had done in both *Gore* and *State Farm*.

In *Gore*, which is widely regarded as a substantive due process case,⁴⁶⁸ the Court explained that punitive damages awards “must be supported by the State's interest in protecting its own consumers and its own economy.”⁴⁶⁹ Because the jury in *Gore* was permitted, indeed encouraged,⁴⁷⁰ to punish BMW for lawful out-of-state conduct,⁴⁷¹ the Court declared that federalism principles did not permit punishment through punitive damages of “conduct that is lawful in other jurisdictions.”⁴⁷² Because this relates to *how* the jury reached its punitive damages award, rather than *how big* that award was, this was a *procedural* due process shortcoming and easily could have served as an independent and adequate basis for invalidating the award and remanding it back to the state from which it came (without ever reaching the substantive due process issue), as was done in *Philip Morris*. But that did not happen.

Instead, the Court proceeded to the next question of whether the punitive damages award, even after it was remitted by the Alabama Supreme Court, was “grossly excessive” in violation of substantive due process.⁴⁷³ As discussed previously, it was at this point that the Court

467. Another important aspect of *Exxon* that made it even less attractive to the Court is that the multiple punishments problem was not, and could not have been, implicated. This is true because in *Exxon*, a class action for punitive damages was certified, *see Exxon Shipping Co. v. Baker*, 128 S. Ct. 2605, 2613 (2008), making it impossible for Exxon to be subject to multiple punitive damages awards for the act or course of conduct that gave rise to that case.

468. *See, e.g., Hayes Sight & Sound, Inc. v. ONEOK, Inc.*, 136 P.3d 428, 443 (Kan. 2006) (“Since 1996, in *Gore* and *Campbell*, the Supreme Court has addressed excessive punitive damages as a matter of substantive due process.”); Erwin Chemerinsky, *Substantive Due Process*, 15 *TOURO L. REV.* 1501, 1509 (1999) (stating that *Gore* “was very much a substantive due process decision”); Redish & Mathews, *supra* note 70, at 9 (“[A]s framed in *Gore*, the Court's inquiry is entirely one of economic *substantive* due process . . .”); Stekloff, *supra* note 125, at 1797 (“In *BMW v. Gore*, the United States Supreme Court struck down a punitive damages award because it was ‘grossly excessive’ and therefore an arbitrary deprivation of property in violation of the substantive component of the Due Process Clause of the Fourteenth Amendment.”).

469. *BMW of N. Am. Inc. v. Gore*, 517 U.S. 559, 572 (1996).

470. *Id.* at 564 (“Dr. Gore introduced evidence that since 1983 BMW had sold 983 refinished cars as new, including 14 in Alabama . . . Using the actual damage estimate of \$4,000 per vehicle, Dr. Gore argued that a punitive award of \$4 million would provide an appropriate penalty for selling approximately 1,000 cars for more than they were worth.”).

471. *Id.* at 572–73.

472. *Id.*

473. *Id.* at 574–75. It may be plausible to argue that the reason the Court did stop in its analysis after finding what amounts to a procedural due process violation, instead of proceeding to the substantive due process analysis, is that the Alabama Supreme Court, recognizing the procedural due process violation, reduced the punitive damages award, taking into account only

created the guidepost framework designed to measure whether an award is “grossly excessive” in violation of substantive due process.⁴⁷⁴

Following closely on *Gore*’s analytical heels, *State Farm*, another case that is widely viewed as a substantive due process case,⁴⁷⁵ took the judicial baton and expanded upon *Gore*’s procedural due process reasoning. While *Gore* had made clear that *lawful* out-of-state conduct could not be punished through punitive damages,⁴⁷⁶ it did not answer the question of whether *unlawful* out-of-state conduct could be similarly punished.⁴⁷⁷ (Once again, this relates to how the jury reached its punitive damages award—a procedural due process matter.) Justice Kennedy’s opinion in *State Farm* initially skirted this open question by pointing out that the plaintiffs in *State Farm* conceded that much of the out-of-state conduct introduced into evidence at the trial “was lawful where it occurred.”⁴⁷⁸ Then, relying on “basic principle[s] of federalism,” Justice Kennedy effectively closed the door on the prospect of punishment for even *unlawful* out-of-state conduct: “[E]ach State may make its own reasoned judgment about what conduct is permitted or proscribed within its borders, and each State alone can determine what measure of punishment, if any, to impose on a defendant who acts within its jurisdiction.”⁴⁷⁹ But Justice Kennedy did not stop there. He then relied upon “a more fundamental reason” (than even federalism)—due process.⁴⁸⁰ In explaining the due process concerns, Justice Kennedy declared that “[a] defendant’s dissimilar acts, independent from the acts upon which liability was premised, may not serve as the basis for punitive damages.”⁴⁸¹ This declaration does two things that are important here. First, it essentially moots the federalism question by taking the location of the prior conduct out of the equation entirely—if the conduct is dissimilar, it matters not where it occurred because *dissimilar* conduct as a class cannot serve as the basis for punitive damages. Second, it begs the question of whether *similar* conduct may serve as the basis for punitive damages. Because the Court found that the plaintiffs had “shown no conduct by State Farm similar to that which harmed them,”⁴⁸² Justice Kennedy had no occasion to answer this question directly. He did, however, provide a clear

harm to Alabama citizens. Had the Court not been intent on announcing a new substantive due process guidepost framework, however, the Court still could have remanded the case back to the Alabama Supreme Court with instructions for it to order a new trial without the evidence of out-of-state harm.

474. See *supra* Part I.C.2.a.

475. See, e.g., *Hayes Sight & Sound, Inc. v. ONEOK, Inc.*, 136 P.3d 428, 443 (2006) (“Since 1996, in *Gore* and *Campbell*, the Supreme Court has addressed excessive punitive damages as a matter of substantive due process.”); *Redish & Mathews*, *supra* note 70, at 11 (claiming that *State Farm* “added another chapter to the substantive due process story of punitive damages”).

476. *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 572 (1996).

477. See Gash, *supra* note 9, at 1639.

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

479. *Id.* at 422.

480. *Id.* at 422–23.

481. *Id.*

482. *Id.* at 424.

signal as to how this question would be answered—a signal that Justice Breyer received loudly and clearly as he was writing the majority opinion in *Philip Morris*.

This signal came in the form of two critical sentences that would form the basis for the *Philip Morris* decision. These two sentences read as follows:

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.⁴⁸³

While Justice Kennedy did not explicitly identify whether the “due process” to which he refers is *procedural* or *substantive*, it is indisputable that he is referring to *procedural* due process because he is talking about *how* the jury reached its decision on the punitive damages award (i.e., what evidence the jury was allowed to consider), rather than *how big* the award was.

Importantly, however, unlike in *Philip Morris*, the Court did not separate out this procedural due process analysis from the substantive due process analysis. Instead, this discussion was embedded within an analysis of the reprehensibility guidepost of the substantive due process “gross excessiveness” inquiry.⁴⁸⁴

In summary, the Court in both *Gore* and *State Farm* ultimately analyzed whether the size of the punitive damages award was “grossly excessive.”⁴⁸⁵ Once again, this is the quintessential *substantive* due process question, i.e., how big?⁴⁸⁶ But in both cases, the Court addressed the substantive due process question *after* determining that a *procedural* due process error had been committed, i.e., finding that the evidence and instructions given to the respective juries were inappropriate.⁴⁸⁷ In neither case, however, did the Court explicitly announce that its evaluation of the evidence and instructions given to the jury was a *procedural* (rather than *substantive*) due process issue. Nor was there any attempt to disaggregate the procedural due process analysis from the substantive due process analysis.

Reframing the issue then, all three cases (*Gore*, *State Farm*, and *Philip Morris*) involved allegations of both procedural due process violations (how the jury reached its decision, i.e., what evidence it was allowed to consider and what instructions it was given), and substantive due process

483. *Id.* at 423.

484. *See id.* at 422–24.

485. *See supra* Parts I.C.2–3 and accompanying text.

486. *See supra* notes 424–25 and accompanying text.

487. *See supra* Parts I.C.2–3 and accompanying text.

violations (how big the punitive damages award was, i.e., whether the award was “grossly excessive”). In both *Gore* and *State Farm*, the Court found violations of both procedural and substantive due process and explicitly addressed both aspects. In contrast, the Court in *Philip Morris* departed from its custom of analyzing both procedural and substantive due process and decided to stop its analysis after determining there was a procedural due process violation. Indeed, unlike in both *Gore* and *State Farm*, the Court in *Philip Morris* segregated its procedural due process analysis from (rather than embedding such analysis within) its substantive due process analysis so that it would be unnecessary to reach the latter question.

This stark shift in approach can best (perhaps only) be explained by the change in the makeup of the Court, and signals that the Court, while not willing to abandon substantive due process altogether, has said all that it intends to say about substantive due process. This view is once again bolstered by the fact that it (1) declined to consider the substantive due process challenge in *Exxon*; and (2) declined to consider Philip Morris’ substantive due process challenge even after the \$79.5 million award was affirmed by the Oregon Supreme Court.

An even more compelling reason to believe that the Court has entered a prolonged silent phase in its substantive due process jurisprudence is that the Court appears to believe that it has solved the multiple punishments problem, at least to the best of its limited ability.

B. Solving the Multiple Punishments Problem

As previously discussed, the multiple punishments problem has been the unresolved issue driving the Supreme Court’s punitive damages jurisprudence all along.⁴⁸⁸ It was alluded to in *Gore* when, under the substantive due process banner, the Court said that a defendant could not be punished for lawful out-of-state conduct but then left open the question of whether the out-of-state conduct had to be unlawful.⁴⁸⁹ This limitation had the effect of reducing the total number of nonparties harmed by the defendant’s conduct for which the defendant could be punished consistent with due process. In other words, by eliminating those nonparties located out of state who were harmed by defendant’s lawful conduct, the scope of the multiple punishments problem was reduced.

The multiple punishments problem was further addressed in *State Farm* when, once again on substantive due process grounds, the Court clarified that a defendant could not be punished for out-of-state conduct even if it was unlawful.⁴⁹⁰ This limitation also had the effect of diminishing the scope of the multiple punishments problem by further reducing the number of nonparties harmed by the defendant’s conduct for which the defendant could be punished—no longer could a defendant be

488. See generally Gash, *supra* note 9, at 1631–34.

489. See *supra* notes 111–15 and accompanying text.

490. See *supra* note 174 and accompanying text.

punished for harm to out-of-state nonparties regardless of whether or not the defendant's conduct was legal. But the Court in *State Farm* was not done chipping away at the multiple punishments problem. The Court then added that the other acts that harmed nonparties could not be used to punish the defendant if those acts were dissimilar to the conduct at issue in the case before the court. Once again, this limitation further reduced the scope of the multiple punishments problem. In essence, then, a defendant could not be punished for harm caused to nonparties if the nonparties were out of state or (even if they were in state) if they had been injured by dissimilar conduct by the defendant. This prohibition on punishment for *dissimilar* conduct, of course, left open the question as to whether the other conduct could be punished at all, even if it was *similar*.⁴⁹¹

This set the stage for one final assault on the multiple punishments problem in *Philip Morris*. In that case, the Court declared that other acts that harmed nonparties, whether similar or dissimilar, could not be punished at all.⁴⁹² Again, this further reduced the universe of harmed nonparties for which the defendant could be punished in the case before the court. Now, even harm to in-state nonparties caused by similar conduct could not, consistent with due process, be punished.

The final swipe at the multiple punishments problem in *Philip Morris* was even more far reaching—due process did not even permit the defendant to be punished for harm to nonparties *caused by the very same conduct that injured the plaintiff*. Accordingly, when all was said and done, the Court had not only reduced the scope of the conduct for which the defendant could be punished to only the conduct at issue in the case, but it also reduced the universe of individuals whom the defendant could be punished for harming to only the party bringing the action. Needless to say, over the course of three cases, the Court dealt a substantial blow to the multiple punishments problem.

While the Court's solution may serve to reduce the multiple punishments problems, this solution is far from perfect. First, the Court's solution rests on the illusion that juries will be able to follow its proposed limiting instructions. Justice Stevens, in his dissent in *Philip Morris*, stated that the distinction the Court draws between considering harm to nonparties in the reprehensibility analysis and not considering it when computing damages to directly punish the defendant is a "nuance [that] eludes me."⁴⁹³ Practically speaking, if the nuance eludes a Supreme Court Justice, it can be expected to elude the vast majority of jurors as well. This is not a minor point. Before the Court can rest easy knowing its conceptual understanding of how to solve the multiple punishments problem is being implemented, it must necessarily develop a framework "so that courts can

491. See *supra* notes 185–93 and accompanying text.

492. See *supra* notes 344–57 and accompanying text.

493. *Philip Morris USA v. Williams*, 549 U.S. 346, 360 (2006) (Stevens, J., dissenting).

reach consistent and predictable results.”⁴⁹⁴ Accordingly, while the Court’s final word in *Philip Morris* purports to be a solution, it is not a good one.

Second, limiting the scope to the recovery of private wrongs runs counter to other competing theories of punitive damages. As a result, there may be other state interests in allowing punitive damages that the Court’s framework does not take into account. For example, “punitive damages have been used to pursue not only the goals of retribution and deterrence, but also to accomplish, however crudely, a societal compensation goal: the redress of harms caused by defendants who injure persons beyond the individual plaintiffs in a particular case.”⁴⁹⁵ The Court’s solution does not consider that states may have an interest in assessing punitive damages to vindicate public interests. Conversely, the polar opposite theory—that punitive damages should only consider harm to the individual plaintiff⁴⁹⁶—argues against the Court’s idea of allowing the jury to consider harm to nonparties under the *Gore* “reprehensibility” guidepost. Even though the Court distinguishes between considering harm to nonparties to establish reprehensibility and using it to punish the defendant, proponents of this theory of punitive damages still argue that *any* consideration of harm to anyone other than the individual plaintiff should not be considered.⁴⁹⁷ Thus, on both ends of a theoretical spectrum that may periodically describe a particular state’s interest in assessing punitive damages, the Court’s solution is inadequate.

C. *The Balance of Power on the Court*

Court prognosticators claim that the future of punitive damages jurisprudence is “somewhat unstable and uncertain” because “[t]hree Justices who favored the Court’s current doctrine (Stevens, O’Connor, and Souter) have retired, while three who solidly oppose it (Scalia, Thomas, and Ginsburg) remain on the Court.”⁴⁹⁸ In all, there have been four new additions to the Court since the landmark *State Farm* decision, and the possibility that two or more of the newest members could choose to side with the regular punitive damages dissenters is worthy of consideration. But as discussed above, given the positions taken by Chief Justice Roberts and Justice Alito in *Philip Morris* and *Exxon*, there is little reason to believe that either (much less, both) would join fellow conservatives,

494. Gash, *supra* note 7, at 1267.

495. Sharkey, *supra* note 218, at 351–52.

496. See Colby, *supra* note 213, at 613–28; see also Brief for the Petitioner, *supra* note 315, at 17–21.

497. See generally Gash, *supra* note 9, at 1643.

498. Goldstein, *supra* note 5; cf. Abigail Field, *What Would a Justice Elena Kagan Mean For Business?*, DAILYFINANCE.COM (May 10, 2010), <http://www.dailyfinance.com/story/investing/what-would-a-justice-elena-kagan-mean-for-a-business/19470758> (claiming that, “Whatever position Kagan might take [on punitive damages] is strictly a guess at this point.”).

Justices Scalia and Thomas, in reversing the current Court position.⁴⁹⁹ Further, nothing indicates that either of the two newest members—Justice Sotomayor or Justice Kagan—(much less, both) share federalism concerns similar to Justice Ginsburg, and given the fact that both nominees were presented as left-leaning centrists, there is little reason to believe that either would move to reverse the Court’s current position.⁵⁰⁰ These conclusions are reinforced by an understanding that the Court’s current position purports to solve the multiple punishments problem, the issue that drove the Court’s encroachment into punitive damages jurisprudence in the first place.⁵⁰¹

1. Chief Justice Roberts and Justice Alito

As previously discussed, Chief Justice Roberts and Justice Alito have already had the opportunity to join with the three regular punitive damages dissenters and overturn the current framework in *Philip Morris*; instead, both joined the majority in refusing to hear the case on substantive due process grounds.⁵⁰² Moreover, even though Justice Stevens, a supporter of the Court’s punitive damages jurisprudence prior to *Philip Morris*, could not go along with the opinion in *Philip Morris* and filed a dissent,⁵⁰³ both Chief Justice Roberts and Justice Alito signed on to the majority opinion.⁵⁰⁴ Further, when the Oregon Supreme Court refused to reduce the large award on remand, both were a part of the Court’s decision to refuse a hearing on the “gross excessiveness” inquiry, and ultimately to dismiss the entire petition as improvidently granted.⁵⁰⁵ Finally, although Justice Alito did not take part in the opinion set forth by the Court in *Exxon* due to his personal stock holdings in the Exxon Corporation,⁵⁰⁶ Chief Justice Roberts was once again a part of a Court that refused to consider a massive punitive damages award on substantive due process grounds.⁵⁰⁷

In sum, although there is evidence that Justices Roberts and Alito are not wholehearted advocates of the Court’s encroachment into the ability of the states to oversee punitive damages awards,⁵⁰⁸ their actions to date indicate that they are at least de facto supporters of the Court’s overall framework and have no intentions of either reversing course or charting a new one.

499. See *supra* Part IV.A.3.

500. See *infra* Parts IV.C.2–3.

501. See *supra* Part IV.B.

502. See *supra* note 333 and accompanying text.

503. See *supra* Part III.B.3.

504. See *supra* Part III.B.2.

505. See *supra* Part III.D.

506. See Stohr, *supra* note 402.

507. See *supra* Part III.E.

508. See *supra* Part IV.A.

2. Justice Sotomayor

Upon the nomination of Justice Sotomayor to the Supreme Court, those who closely follow punitive damages jurisprudence were understandably interested in her judicial track record on the subject. But the few cases involving punitive damages she heard as a judge in the Southern District of New York and while sitting on the Second Circuit Court of Appeals have led some to conclude that her views “are largely a mystery, with her few rulings on the topic offering limited insight into how she would rule as a justice.”⁵⁰⁹ Nonetheless, a close analysis of her record reveals that Justice Sotomayor will most likely do nothing to upset the punitive damages status quo.

Those concerned about the size of damage awards were troubled to find three decisions in Justice Sotomayor’s past where she upheld punitive damage awards. First, while chief judge in the Southern District of New York, in *Greenbaum v. Svenska Handelsbanken*,⁵¹⁰ Sotomayor upheld a \$1.25 million punitive damages award against a large Swedish banking corporation in a gender discrimination case under the Civil Rights Act of 1964.⁵¹¹ Second, while a member of a three-judge panel on the Second Circuit, in *Moskowitz v. Coscette*,⁵¹² she upheld a \$75,000 punitive damages award in favor of a police officer against the chief of police and city government as a result of employment discrimination and free speech violations.⁵¹³ And third, in *Motorola v. Uzan*,⁵¹⁴ in an opinion written by Judge Guido Calabresi, then-Judge Sotomayor was a member of a three-judge panel that upheld a massive \$1 billion punitive damages award against a Turkish family corporation who successfully swindled \$2 billion from Motorola by securing fraudulent loans.⁵¹⁵

Upon closer examination, however, these cases actually reveal rather little about how Justice Sotomayor would vote in a punitive damages case on the Supreme Court. First, in *Greenbaum*, Sotomayor adhered to the ratio established by the Supreme Court (here, 3.75:1),⁵¹⁶ and after ensuring that the award was “adequately related to the reprehensibility of the conduct,”⁵¹⁷ decided that the punitive award should not be reduced because the goal of deterrence demanded a sizeable award since the company declared it could pay any punitive award.⁵¹⁸ Again, her opinion evidenced a

509. See Stohr, *supra* note 22.

510. 67 F. Supp. 2d 228, 238 (S.D.N.Y. 1999).

511. See *id.*

512. No. 00-7671, 2001 WL 51009, at *1 (2d Cir. Jan. 22, 2001).

513. See *id.*

514. 509 F.3d 74, 76 (2d Cir. 2007).

515. See *id.* at 76–77.

516. See *Greenbaum v. Svenska Handelsbanken*, 67 F. Supp. 2d 228, 270–71 (S.D.N.Y. 1999).

517. *Id.* at 270.

518. See *id.* at 272.

sensitivity to the Court's established framework as applied to the facts of a particular case. Second, in *Moskowitz*, the Second Circuit's award of \$75,000 did not "shock the judicial conscience" in comparison to the \$125,000 compensatory award.⁵¹⁹ There is nothing in *Moskowitz* to indicate an attempt on the part of Justice Sotomayor to push for a large punitive damage agenda. And third, in *Motorola*, the original punitive award was \$2 billion (in addition to another \$2 billion in compensatory damages), and the award was reduced to \$1 billion after the Second Circuit panel, which included Sotomayor, remanded it because the trial court had not demonstrated an analysis of the *Gore* factors.⁵²⁰ This approach not only evidences a commitment to the Court's constitutional analysis but also shows that Justice Sotomayor is not simply intent on maintaining large punitive awards.

In addition to the weakness of the concerns raised by the instances where Justice Sotomayor upheld punitive awards in the past, there are additional reasons to believe that she would not act in a way that would threaten the status quo. First, in her Senate confirmation hearings, Sotomayor expressed her opinion that business needs law to be predictable,⁵²¹ a view that is similar to Justice Souter's majority opinion in *Exxon*.⁵²² Second, in a case rarely mentioned by those who commented about the cases in which she upheld punitive awards in the past, then-District Chief Judge Sotomayor in *Bartlett v. New York State Board of Law Examiners* ruled that the case did not warrant a punitive award at all.⁵²³ In *Bartlett*, where a bar applicant with a learning disability sued for violations of the Americans with Disabilities Act, Sotomayor awarded \$12,500 in compensatory damages but found that "[b]ecause of the 'chaos' in the learning disability field and the ambiguity in the law, I do not find the level of 'malice' or 'reckless indifference' to federally protected rights that would justify an award of punitive damages."⁵²⁴ Third, and perhaps most importantly, there is literally no evidence in any of Justice Sotomayor's articles or opinions to indicate that she believes states should decide cases

519. See *Moskowitz v. Coscette*, No. 00-7671, 2001 WL 51009, at *4 (2d Cir. Jan. 22, 2001).

520. See *Motorola Credit Corp. v. Uzan*, 509 F.3d 74, 86 (2d Cir. 2007).

521. See Greg Stohr & William McQuillen, *Sotomayor Hits Pro-Business Note in Senate Testimony (Update2)* BLOOMBERG (July 16, 2009), <http://www.bloomberg.com/apps/news?pid=20601103&sid=aJ5Kg1jiULuQ> (quoting Sotomayor as saying, "'In business, the predictability of law may be the most necessary' . . .").

522. See Curt Cutting, *More on Sotomayor and Punitive Damages*, CALIFORNIA PUNITIVE DAMAGES: AN EXEMPLARY BLOG (July 16, 2009, 10:07 AM), <http://calpunitives.blogspot.com/2009/07/more-on-sotomayor-and-punitive-damages.html> ("That statement echoes the reasoning of Justice Souter in his opinion for the majority in *Exxon Shipping*, in which he stated that a [sic] imposing a maximum one-to-one ratio of punitive damages to compensatory damages eliminates arbitrary and unpredictable outcomes.").

523. 970 F. Supp. 1094, 1153 (S.D.N.Y. 1997).

524. *Id.* at 1153.

that heretofore have been considered under the federal due process framework.

Finally, a 1996 law review article⁵²⁵ by Justice Sotomayor led some to claim that she rejects limits on punitive damages. In the article, she said that “bills that place arbitrary limits on jury verdicts in personal injury cases” are “inconsistent with the premise of the jury system.”⁵²⁶ However, upon careful reading of the context of the statements, it is clear that her remarks do not communicate an unwillingness to restrain jury verdicts—Justice Sotomayor was simply arguing that properly restraining jury verdicts should be the province of the judiciary as opposed to the legislature.⁵²⁷ In short, her statement is illustrative of her views on the separation of powers instead of a preference for unrestrained punitive awards.

In conclusion, a close examination of Justice Sotomayor reveals very little reason to believe that she would seek to change the course the Court has charted in regard to punitive damages. Instead, as some have already suggested, her position will most likely resemble the approach of Justice Stevens in this area of law.⁵²⁸ This will most likely lead her to be considered a centrist⁵²⁹ who maintains a middle ground on the issue.⁵³⁰

3. Justice Kagan

Unlike Justice Sotomayor, Justice Kagan has no judicial track record to examine, making it more difficult, of course, to predict the position she might take on punitive damages.⁵³¹ In addition, despite a career in academics, she published relatively little, giving very few hints as to where she might stand on substantive legal issues.⁵³²

In trying to read between the lines to predict where she *might* stand on issues affecting “big business” (such as punitive damages), some have noted that during her time as solicitor general, Justice Kagan represented

525. Sonia Sotomayor, *Returning Majesty to the Law and Politics: A Modern Approach*, 30 SUFFOLK U. L. REV. 35 (1996).

526. *Id.* at 46.

527. *See id.* at 46–47.

528. *See* Stohr, *supra* note 22 (citing punitive damages critic, Evan Tager, of Mayer Brown LLP in Washington, DC, in this regard). It is important to remember that although Justice Stevens dissented in *Philip Morris*, he went to great lengths to emphasize his belief that the Court’s substantive due process framework established in both *Gore* and *State Farm* “were correctly decided.” *Philip Morris USA v. Williams*, 549 U.S. 346, 358 (2007) (Stevens, J., dissenting).

529. *See* Levine & Francis, *supra* note 23.

530. *See id.* (“In class actions, Sotomayor has occupied a strict middle ground, her record reflecting sympathy neither for those in favor of such issues, nor skepticism of them. ‘She looks at each case on its unique facts to determine whether a class action is appropriate,’ said [Evan] Tager.”).

531. *See* Field, *supra* note 498 (“Whatever position Kagan might take on the[] issue[] [of punitive damages] is strictly a guess at this point.”).

532. *See id.*

shareholders more often than did her predecessors, lending credibility to the thought that she might seek to defend large punitive damages awards.⁵³³ However, still others have noted that she worked for a corporate law firm early in her legal career where “she had some socialization and training from the pro-big business perspective,” and further pointed out that business lawyers were openly positive about her potential appointment prior to her nomination.⁵³⁴ These mixed signals produce the popular conclusion that any prediction as to what position she would take on punitive damages is “strictly a guess.”⁵³⁵

Justice Kagan’s characterizations as a “consensus builder”⁵³⁶ and a “centrist”⁵³⁷ are worthy of consideration, however. If these characterizations prove to be true, then it would naturally be less likely for her to seek to overturn a long line of precedent and establish a new punitive damages regime. Although a “consensus builder” will discover both liberal and conservative Justices on both sides of punitive damages jurisprudence, it is the tendency to generate peace and stability that might lead a “centrist” to prefer upholding the status quo in this area of the law.

Consequently, although there is no reason to believe that Justice Kagan *would* adopt the positions advocated by Justices Ginsburg, Scalia, and Thomas, the mystery surrounding what Justice Kagan brings to the Court makes her the least predictable of the new Justices in regard to punitive damages. Still, even if she did find reason to join the regular dissenters in this area of the law, the call to return punitive damages to the states would still fall one vote shy of success.

CONCLUSION

Although wagering on the direction the Supreme Court will take on any issue is not an advisable way to earn a living, it still appears safe to characterize the future of the Court’s punitive damages jurisprudence in light of the new composition as *plus ça change, plus c’est la même chose* (“the more things change, the more they stay the same”). The appearance of four new Justices since the landmark *State Farm* decision could obviously change its course if so desired, but a careful analysis of the new Justices along with the Court’s “fix” of the multiple punishments problem in *Philip Morris* combine to create a strong likelihood of a silent phase regarding punitive damages.

533. *See id.*

534. *Id.*

535. *Id.*

536. Bill Mears, *High Court Contender Kagan Brings Reputation for Consensus Building*, CNN.COM (May 10, 2010), <http://www.cnn.com/2010/POLITICS/05/04/scotus.contenders.kagan/index.html> (“It is that reputation as a consensus-builder that has earned the solicitor general positive reviews on the left and right.”).

537. *See Gerstein, supra* note 23.

First, concerning both the substantive due process and procedural due process review frameworks it has created, the Court apparently believes it has nothing left to say on the issue. Second, there is no indication that any of the four new members of the Court (much less the necessary two) have any inclination to adopt the federalism concerns of Justices Ginsburg, Scalia, and Thomas that would necessarily precipitate a reversal of the course the Court has taken.

The Supreme Court has apparently butted in for the last time in punitive damages jurisprudence. Despite witnessing a change in nearly half of the Court's membership, its future in regard to this area of the law will presumably remain the same.

