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## THE CONSTITUTIONALIZATION OF TORTS?

*Thomas B. Colby\**

### INTRODUCTION

The 21st Annual Clifford Symposium on Tort Law and Social Policy, hosted by the *DePaul Law Review*, explored the outsized influence that business interests have had on the U.S. Supreme Court in recent years. The panel on which I served addressed, among other things, one aspect of that influence—the assertion that the U.S. Supreme Court’s decisions concerning business interests have “changed the tort law landscape despite the traditional anchoring of tort principles in state legislation and judicial precedent.”<sup>1</sup>

The Court has altered the tort law landscape, to some degree, in a number of subtle ways, including: (1) the expansion of arbitration; (2) the growth of federal preemption; and (3) the funneling of class actions into federal courts combined with prodefendant interpretations of the Federal Rules of Civil Procedure. These and the various other legal developments that have been catalogued in this symposium have all been quietly and indirectly changing the landscape of state tort law.

But, what about obvious and candid changes? Has the U.S. Supreme Court openly and directly changed the landscape of tort law? To the extent that it has, it has done so largely through the mechanism of constitutional law. Tort law is, generally speaking, state law.<sup>2</sup> The U.S. Constitution is a form of federal law. And, under the Supremacy Clause, federal constitutional law trumps contrary state tort law.<sup>3</sup> Thus, if we “constitutionalize” tort law, we federalize it.<sup>4</sup> And, to the

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1. 21ST ANNUAL CLIFFORD SYMPOSIUM ON TORT LAW AND SOCIAL POLICY: THE SUPREME COURT, BUSINESS AND CIVIL JUSTICE (2015) [hereinafter CLIFFORD SYMPOSIUM BROCHURE] (on file with the *DePaul Law Review*).

2. See John C.P. Goldberg & Benjamin C. Zipursky, *The Supreme Court’s Stealth Return to the Common Law of Torts*, 65 DEPAUL L. REV. (forthcoming 2016) (manuscript at 1–3) (on file with authors) (discussing *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938)).

3. U.S. CONST. art. VI, cl. 2.

4. Unless, of course, we constitutionalize tort law through state constitutions, a phenomenon that—although not the subject of this Article—does, indeed, have a long historical pedigree. See John Fabian Witt, *The Long History of State Constitutions and American Tort Law*, 36 RUTGERS L.J. 1159, 1196 (2005).

extent that the U.S. Supreme Court is currently doing that at the behest of business interests, the business community is, indeed, openly and directly changing “the tort law landscape despite the traditional anchoring of tort principles in state legislation and judicial precedent.”<sup>5</sup>

This Article discusses that phenomenon: the constitutionalization of torts.<sup>6</sup> Albeit briefly, it seeks to accomplish three objectives. First, this Article explicates the potential for substantial constitutionalization of tort law.<sup>7</sup> In short, the potential is there in spades; existing constitutional doctrine provides ample opportunities for the U.S. Supreme Court to make massive forays into the traditional territory of state tort law—virtually all of them through the operation of the Due Process Clause of the Fourteenth Amendment.<sup>8</sup> Second, this Article explores the extent to which that enormous potential has, or has not, been realized. My conclusion is that while the Court has admittedly taken some significant steps in the realm of punitive damages,<sup>9</sup> the degree of constitutionalization of tort law generally is far short of what it could be—even though the business community is constantly pushing the Court to go much further. Indeed, outside of the punitive damages arena, the Court has barely constitutionalized tort law at all.<sup>10</sup> Third, and finally, this Article explores why it is that this appar-

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5. CLIFFORD SYMPOSIUM BROCHURE, *supra* note 1.

6. This phenomenon is not to be confused with the field of constitutional torts—federal “tort” law causes of action against government officials for violating the Constitution. *See generally* SHELDON H. NAHMOD ET AL., *CONSTITUTIONAL TORTS* (3d ed. 2012) (describing federal tort law). However, there is a relationship between the two because constitutional torts “involve the use of the fourteenth amendment’s due process clause to convert state common law tort claims involving governmental agents into federal civil rights cases.” *See* Mark R. Brown, *De-Federalizing Common Law Torts: Empathy for Parratt, Hudson and Daniels*, 28 B.C. L. REV. 813, 815 (1987). This use of the Due Process Clause has the potential to “effectively federalize all personal injury or property damage claims against governmental employees.” *Id.*

7. The practice of constitutionalizing private tort law actually began in the 1960s with *New York Times Co. v. Sullivan*, which held that the First Amendment, incorporated against the states through the Fourteenth Amendment’s Due Process Clause, places limits on the common law tort of defamation. 376 U.S. 254, 283 (1964). But, *Sullivan* and its progeny were prompted by the interests of the civil rights community rather than the business community. *See* Christopher W. Schmidt, *New York Times v. Sullivan and the Legal Attack on the Civil Rights Movement*, 66 ALA. L. REV. 293, 310 (2014). And, they represent a much more narrow phenomenon: the imposition of constitutional limits on the substantive content of a particular branch of tort law, in the name of a particular substantive constitutional right. My primary concern in this Article is with constitutionally imposed procedural and substantive limits on all torts, which are advanced by the defense bar at the insistence of the business community.

8. *See infra* Part III; *see generally* U.S. CONST. amend. XIV, § 1 (“[N]or shall any state deprive any person of life, liberty, or property, without due process of law . . .”).

9. *See infra* Part II.

10. *See infra* Part IV.

ently probusiness Court<sup>11</sup> has not seized the opportunity to engage in more substantial constitutional tort reform. The answer, I think, is multifaceted; but, I see three factors that are most likely responsible for the Court's reluctance. First, the Court's decision to extend due process protections to punitive damages was likely primarily motivated by the fact that those damages are a form of punishment—a concern that does not extend to other aspects of tort law.<sup>12</sup> Second, the Court may be hesitant to expand due process any further into the economic arena for fear of drawing uncomfortable comparisons to the long-discredited *Lochner* era.<sup>13</sup> Lastly, the Court's reluctance can be further explained by the fact that the Justices who are most likely to sympathize with the tort reform movement are also the Justices who are most committed to preserving the institution of constitutional federalism—and, thus, are disinclined to engineer a massive foray into the traditional territory of state law.<sup>14</sup>

## II. DUE PROCESS AND THE CONSTITUTIONALIZATION OF PUNITIVE DAMAGES

Punitive damages have long been a feature of state tort law inherited from the English practice.<sup>15</sup> Before the Civil War, it was generally understood that the U.S. Constitution did not protect fundamental, individual rights from state intrusion.<sup>16</sup> As such, although there were many critics of punitive damages throughout the nineteenth century—many of whom vociferously charged that punitive damages were grossly and fundamentally unfair—there was no serious argument that their imposition in state court violated the Constitution.<sup>17</sup>

After the war, the newly adopted Fourteenth Amendment changed the landscape of federalism by granting, for the first time, federal constitutional protection against state intrusion on fundamental rights.<sup>18</sup> Of particular import, the Fourteenth Amendment expanded the Fifth

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11. See Lee Epstein et al., *How Business Fares in the Supreme Court*, 97 MINN. L. REV. 1431, 1449–50, 1451 tbl.7 (2013).

12. See *infra* Part IV.A.

13. See *infra* Part IV.B.

14. See *infra* Part IV.C.

15. Note, *Exemplary Damages in the Law of Torts*, 70 HARV. L. REV. 517, 518 (1957).

16. *Barron v. City Council of Balt.*, 32 U.S. 243, 250–51 (1843).

17. Thomas B. Colby, *Beyond the Multiple Punishment Problem: Punitive Damages as Punishment for Individual, Private Wrongs*, 87 MINN. L. REV. 583, 643–47 (2003) (discussing the arguments of the nineteenth century critics like Simon Greenleaf).

18. See 1 BRUCE ACKERMAN, *WE THE PEOPLE: FOUNDATIONS* 81–82 (1991).

Amendment's due process guarantee<sup>19</sup> to protect against due process violations by state governments.

The constitutional guarantee of due process has long been read to protect two (largely) distinct categories of rights, which are generally referred to as rights of "procedural" and "substantive" due process. First, the Clause "require[es] the government to follow appropriate procedures when its agents decide to 'deprive any person of life, liberty, or property.'"<sup>20</sup> "This is the concept of procedural due process, which is [generally] concerned with giving fair notice and a fair hearing before the government deprives individuals of their liberty or property."<sup>21</sup> Second, the Clause "bar[s] certain government actions regardless of the fairness of the procedures used to implement them."<sup>22</sup> "This is the concept of substantive due process, which is [generally] concerned with preventing governmental oppression and with protecting fundamental rights from governmental interference."<sup>23</sup>

Early on, in both their substantive and procedural capacities, the Due Process Clauses were primarily interpreted in a backward looking fashion to only guarantee adherence to the historical baseline of the common law.<sup>24</sup> That is to say, the content of the due process guarantee was determined by reference "to those settled usages and modes of proceeding existing in the common and statute law of England."<sup>25</sup> As such, the U.S. Supreme Court held the view that "a process of law, which is not otherwise forbidden, must be taken to be due process of law, if it can show the sanction of settled usage both in England and in this country."<sup>26</sup>

By that measure, the Fourteenth Amendment's imposition of due process constraints on the states had no effect on punitive damages. Not long after the Amendment's ratification, the Court declared that because the "propriety and legality [of punitive damages] have been recognized . . . by repeated judicial decisions for more than a century[.]" the "imposition of punitive or exemplary damages in [tort]

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19. See U.S. CONST. amend. V ("[N]or shall any person . . . be deprived of life, liberty, or property, without due process of law . . .").

20. *Daniels v. Williams*, 474 U.S. 327, 331 (1986) (quoting U.S. CONST. amend. XIV, § 1).

21. Thomas B. Colby, *Clearing the Smoke from Philip Morris v. Williams: The Past, Present, and Future of Punitive Damages*, 118 YALE L.J. 392, 400 (2008).

22. *Daniels*, 474 U.S. at 331.

23. Colby, *supra* note 21, at 401 (footnote omitted).

24. See Cass R. Sunstein, *Sexual Orientation and the Constitution: A Note on the Relationship Between Due Process and Equal Protection*, 55 U. CHI. L. REV. 1161, 1170-71 (1988).

25. *Murray's Lessee v. Hoboken Land & Improvement Co.*, 59 U.S. 272, 277 (1855).

26. *Hurtado v. California*, 110 U.S. 516, 528 (1884).

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cases cannot be opposed as in conflict with the prohibition against the deprivation of property without due process of law.”<sup>27</sup>

But, in recent decades, the Court—although it still places great weight on history and tradition—has expanded due process, in both its procedural and substantive aspects, to extend beyond the strict historical baseline. On the procedural side, the Court now believes that “history must be considered as supporting the proposition that [a particular practice] satisfies the demands of due process, but it is not decisive” because due process “can be as readily offended by the perpetuation of ancient forms that are no longer justified as by the adoption of new procedures that are inconsistent with the basic values of our constitutional heritage.”<sup>28</sup> And, on the substantive side, the Court now believes that “the specific practices of States at the time of the adoption of the Fourteenth Amendment [do not mark] the outer limits of the substantive sphere of liberty, which the Fourteenth Amendment protects.”<sup>29</sup> In sum, on both the procedural and the substantive fronts, the Court has held that “continuing re-examination of the constitutional conception of Fourteenth Amendment ‘due process’ of law is required, and that development of the community’s sense of justice may in time lead to expansion of the protection which due process affords.”<sup>30</sup>

Thus, freed from the rigid constraints of history, the modern Court has employed both substantive and procedural due process to place constitutional limits on the venerable institution of punitive damages. In 1989, the Court noted the issue but chose not to decide “whether due process acts as a check on undue jury discretion to award punitive damages in the absence of any express statutory limit.”<sup>31</sup> Justice Brennan, in a concurring opinion that tipped his hand on the unanswered question, raised both procedural and substantive due process concerns regarding punitive damages. He first suggested that “the Due Process Clause forbids damages awards that are ‘grossly excessive,’ or ‘so severe and oppressive as to be wholly disproportioned to

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27. *Minneapolis & St. Louis Ry. Co. v. Beckwith*, 129 U.S. 26, 36 (1889) (citing *Day v. Woodworth*, 54 U.S. 363, 371 (1851)).

28. *Shaffer v. Heitner*, 433 U.S. 186, 211–12 (1977) (citation omitted).

29. *Planned Parenthood of S.E. Pa. v. Casey*, 505 U.S. 833, 848 (1992).

30. *Malloy v. Hogan*, 378 U.S. 1, 15 (1964).

31. *Browning-Ferris Indus. of Vt. Inc., v. Kelco Disposal, Inc.*, 492 U.S. 257, 277 (1989).

the offense and obviously unreasonable.’”<sup>32</sup> This is a substantive concern.<sup>33</sup> He then went on to argue that

[w]ithout statutory (or at least common-law) standards for the determination of how large an award of punitive damages is appropriate in a given case, juries are left largely to themselves in making this important, and potentially devastating, decision. Indeed, the jury in this case was sent to the jury room with nothing more than the following terse instruction: “In determining the amount of punitive damages, . . . you may take into account the character of the defendants, their financial standing, and the nature of their acts.” Guidance like this is scarcely better than no guidance at all. I do not suggest that the instruction itself was in error; indeed, it appears to have been a correct statement of Vermont law. The point is, rather, that the instruction reveals a deeper flaw: the fact that punitive damages are imposed by juries guided by little more than an admonition to do what they think is best. Because the “touchstone of due process is protection of the individual against arbitrary action of government,” I for one would look longer and harder at an award of punitive damages based on such skeletal guidance than I would at one situated within a range of penalties as to which responsible officials had deliberated and then agreed.<sup>34</sup>

This is a procedural concern.

Subsequently, both of those concerns have found their way into majority opinions of the Court. Just two years later, in *Pacific Mutual Life Insurance v. Haslip*,<sup>35</sup> the Court appeared to answer the substantive due process question in the affirmative, at least in dicta, although it found no violation based on the facts of the case at bar.<sup>36</sup> Two years later, in 1993, the Court more clearly expressed the view “that the Fourteenth Amendment imposes a substantive limit on the amount of a punitive damages award” but again found that the limit was not exceeded in the instant case.<sup>37</sup>

When the Court actually struck down excessive punitive damages awards for the first time in the 1996 case of *BMW of North America*,

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32. *Id.* at 280–81 (Brennan, J., concurring) (citations omitted) (quoting *St. Louis, Iron Mountain & S. Ry. Co. v. Williams*, 251 U.S. 63, 67 (1919) and *Waters-Pierce Oil Co. v. Texas*, 212 U.S. 86, 111 (1909)).

33. See Colby, *supra* note 21, at 403.

34. *Browning-Ferris*, 492 U.S. at 277 (Brennan, J., concurring) (alteration in original) (citations omitted) (quoting *Daniels v. Williams*, 474 U.S. 327, 331 (1986)).

35. 499 U.S. 1 (1991).

36. See *id.* at 23–24 (“We conclude, after careful consideration, that in this case it does not cross the line into the area of constitutional impropriety.”).

37. *TXO Prod. Corp. v. All. Res. Corp.*, 509 U.S. 443, 455, 462 (1993); see also *Honda Motor Co. v. Oberg*, 512 U.S. 415, 420 (1994) (“Our recent cases have recognized that the Constitution imposes a substantive limit on the size of punitive damages awards.” (citing *TXO*, 509 U.S. at 443 and *Haslip*, 499 U.S. 1)).

*Inc. v. Gore*,<sup>38</sup> and then in 2003's *State Farm Mutual Automobile Insurance Co. v. Campbell*,<sup>39</sup> it hesitated to explicitly rely on substantive, rather than procedural, due process, but it is difficult to read those cases as grounded in anything other than substantive due process.<sup>40</sup> In *BMW*, the Court again noted that the "Due Process Clause of the Fourteenth Amendment prohibits a State from imposing a 'grossly excessive' punishment on a tortfeasor" and explained that "when an award can fairly be categorized as grossly excessive in relation to" the state's "legitimate interests in punishment and deterrence," it "enter[s] the zone of arbitrariness that violates the Due Process Clause of the Fourteenth Amendment."<sup>41</sup> The Court then established three "guideposts" to assist courts in determining whether an award is unconstitutionally excessive:<sup>42</sup>

- (1) the degree of reprehensibility of the defendant's misconduct; (2) the disparity between the actual or potential harm suffered by the plaintiff and the punitive damages award; and (3) the difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases.<sup>43</sup>

In *Campbell*, the Court applied those guideposts to invalidate an award as clearly and obviously excessive.<sup>44</sup>

As for procedural due process, the Court has "strongly emphasized the importance of the procedural component of the Due Process Clause" in the realm of punitive damages and has held that because "[p]unitive damages pose an acute danger of arbitrary deprivation of property[,] certain "procedures are necessary to ensure that punitive damages are not imposed in an [unconstitutionally] arbitrary manner."<sup>45</sup> Thus, the Court has held that procedural due process affords the defendant the right to judicial review of the size of a punitive damage award<sup>46</sup> and the right to de novo appellate review of a trial court's determination that a punitive damages award was not constitutionally

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38. 517 U.S. 559 (1996).

39. 538 U.S. 408 (2003).

40. Colby, *supra* note 21, at 403–04; *see* Cooper Indus., Inc. v. Leatherman Tool Grp., Inc., 532 U.S. 424, 433–34 (2001) (citing *TXO* for the proposition that the Due Process Clause imposes substantive limits on awarding "grossly excessive" punitive damages).

41. *BMW*, 517 U.S. at 562, 568 (quoting *TXO*, 509 U.S. at 454).

42. *Id.* at 574–75.

43. *Campbell*, 538 U.S. at 418 (citing *BMW*, 517 U.S. at 575).

44. *Id.* at 418–29.

45. *Honda Motor Co., Ltd., v. Oberg*, 512 U.S. 415, 420, 432 (1994); *see* *Pac. Mut. Life Ins. Co. v. Halsip*, 499 U.S. 1, 9 (1991) ("[I]t is not disputed that a jury award [of punitive damages] may not be upheld if . . . it was reached in proceedings lacking the elements of fundamental fairness." (quoting *Browning-Ferris Indus. of Vt., Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 276 (1989))).

46. *Oberg*, 512 U.S. at 432. In *Oberg*, the Court held that judicial review had been an essential safeguard even at common law. *Id.* at 421–32.

excessive.<sup>47</sup> And in its most recent significant punitive damages decision, *Philip Morris USA v. Williams*,<sup>48</sup> the Court held that procedural due process “forbids a State to use a punitive damages award to punish a defendant for injury that it inflicts upon nonparties.”<sup>49</sup>

### III. THE ENORMOUS POTENTIAL FOR FURTHER CONSTITUTIONALIZATION OF TORTS

Shortly after the U.S. Supreme Court indicated in *Haslip*, which was decided in 1991, that punitive damages awards are constrained by both procedural and substantive due process, Robert Riggs published an insightful article exploring the possible implications of that decision.<sup>50</sup> Riggs’s article was primarily focused on what form the impending constitutionalization of *punitive damages* might take, but he also observed that some of the Court’s reasoning in *Haslip* could be applicable to other aspects of tort law as well.<sup>51</sup> When the Court furthered its project of constitutionalizing punitive damages a dozen years later in *Campbell*, Mark Geistfeld wrote an equally insightful article documenting the extent to which the constitutional concerns raised by the *Campbell* Court<sup>52</sup> were not “unique to punitive damages, implying that due process also constrains . . . other tort practice[s].”<sup>53</sup> And, after the Court in *Williams* imposed still more limitations on punitive damages—this time in the name of a constitutional right to “present every available defense”—<sup>54</sup> observers pointed out the apparent applicability of the Court’s reasoning to other areas of tort law—in particular, class actions for mass torts.<sup>55</sup>

Those insights were, indeed, insightful. Now that the Court has shown a willingness to find due process problems even with long-established common law doctrines and practices (and also with modern attempts to deviate from those practices in potentially unfair ways), there are, indeed, a number of ways in which the Court’s constitutionalization of punitive damages could easily bleed over to other aspects of tort law. In fact, if anything, previous commentators have probably

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

48. 549 U.S. 346 (2007).

49. *Id.* at 353.

50. Robert E. Riggs, *Constitutionalizing Punitive Damages: The Limits of Due Process*, 52 OHIO ST. L.J. 859 (1991).

51. *Id.* at 897–98, 916.

52. *See State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 417 (2003).

53. Mark Geistfeld, *Constitutional Tort Reform*, 38 LOY. L.A. L. REV. 1093, 1095 (2005).

54. *Williams*, 549 U.S. at 353–54 (quoting *Lindsey v. Normet*, 405 U.S. 56, 66 (1972)).

55. *See, e.g.*, Keith N. Hylton, *Reflections on Remedies and Philip Morris v. Williams*, 27 REV. LITIG. 9, 29 (2007) (“[T]he Court’s theory of due process [in *Williams*] implies that class actions are unconstitutional.”).

understated the ripe potential for the constitutionalization of torts. This Part briefly canvases the various possibilities and explicates the extent to which lawyers representing the business community are giving the Court every opportunity to actualize them.

#### A. *Excessive Noneconomic Compensatory Damages*

Let us begin with the most obvious possible avenue for expanding the punitive damages cases—the bridge from punitive to compensatory damages. The U.S. Supreme Court’s campaign to impose substantive due process constraints on punitive damages awards was triggered by its concerns about the growing number of massive punitive awards being meted out by the tort system.<sup>56</sup> Justice O’Connor opened her dissent in the *Browning Ferris* case—the catalyst for constitutionalization—with the alarmist observation that “[a]wards of punitive damages are skyrocketing.”<sup>57</sup>

The same is now arguably true of noneconomic compensatory damages awards. In recent decades, there has been a significant increase in the size of pain-and-suffering and mental anguish awards.<sup>58</sup> Even eight-figure awards, once unheard of, are no longer uncommon.<sup>59</sup> If *punitive* damages awards of this magnitude can violate the defendant’s substantive due process rights when they rise to the level of grossly excessive, then why is it that *compensatory* damages awards cannot do the same?

Indeed, in a contribution to the 11th annual Clifford Symposium, Mark Geistfeld observed that under the logic of the Court’s punitive damages cases, a “defendant can also challenge a pain-and-suffering award as being excessive in violation of substantive due process.”<sup>60</sup> If punitive damages awards are unconstitutional when they are grossly excessive in relation to the state’s legitimate interests in punishment and deterrence,<sup>61</sup> then whatever the state’s interest is in awarding compensatory damages for mental anguish and pain and suffering—whether it is merely ensuring that injured parties are fully compen-

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

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

58. Victor E. Schwartz & Leah Lorber, *Twisting the Purpose of Pain and Suffering Awards: Turning Compensation into “Punishment,”* 54 S.C. L. REV. 47, 64–67 (2002).

59. Paul DeCamp, *Beyond State Farm: Due Process Constraints on Noneconomic Compensatory Damages*, 27 HARV. J.L. & PUB. POL’Y 231, 234 (2003).

60. Mark A. Geistfeld, *Due Process and the Determination of Pain and Suffering Tort Damages*, 55 DEPAUL L. REV. 331, 344 (2006); see Colleen P. Murphy, *Statutory Caps and Judicial Review of Damages*, 39 AKRON L. REV. 1001, 1003–04, 1004 n.12 (2006) (suggesting that due process might be violated without legislative caps and excessiveness reviews).

61. See *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 562 (1996).

sated or something more complex and elusive<sup>62</sup>—if the compensatory award is grossly excessive in relation to that interest, it is unconstitutionally arbitrary and contravenes the due process guarantee.<sup>63</sup>

Justice Scalia—who was a frequent dissenter from the Court’s campaign to constitutionalize punitive damages, especially through the avenue of substantive due process<sup>64</sup>—has made this point as well, albeit indirectly. In his dissent in *BMW*, Justice Scalia remarked that he, unlike the majority, did “not regard the Fourteenth Amendment’s Due Process Clause as a secret repository of substantive guarantees against ‘unfairness’—neither the unfairness of an excessive civil compensatory award, nor the unfairness of an ‘unreasonable’ punitive award.”<sup>65</sup>

Not surprisingly—given that Justice Scalia was on the losing end of the punitive damages cases—lawyers for the business community have frequently asked courts to extend the substantive due process excessiveness principle to compensatory damages.<sup>66</sup>

### B. *Arbitrariness and Excessive Jury Discretion*

A second major avenue for potentially expanding the U.S. Supreme Court’s punitive damages cases into other areas of tort law stems from the notion in the punitive damages cases that the Due Process Clause can be violated by legal doctrines that afford excessive discretion to

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62. See Geistfeld, *supra* note 60, at 343 (“The conception of pain-and-suffering damages . . . involv[es] redress for an ‘incommensurable’ injury . . .”) (citing Margaret Jane Radin, *Compensation and Commensurability*, 43 DUKE L.J. 56, 61 (1993)).

63. Geistfeld further notes that if the very nature of the state’s interest in damages for pain and suffering damages is one that cannot be quantified, then the constitutional concern might be intractable: “If the tort right necessarily implies that the injury cannot be translated into some monetary amount, then a wide range of awards would seem to be appropriate, eliminating any reasonable constraint on jury decisionmaking. The very nature of the tort right would be the source of the constitutional problem.” *Id.* (footnote omitted). It would, after all, be impossible to determine whether the amount of compensatory damages was grossly excessive in relation to the state’s interest if the state’s interest—in, say, “public respect for the existence of certain rights and public recognition of the transgressor’s fault in disrespecting those rights”—was of a sort that was simply not “commensurate with money.” *Id.* (quoting Radin, *supra* note 62, at 61) (internal quotation marks omitted).

64. See, e.g., *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 429 (2003) (Scalia, J., dissenting) (“[T]he Due Process Clause provides no substantive protections against ‘excessive’ or ‘unreasonable’ awards of punitive damages.”).

65. *BMW*, 517 U.S. at 598–99 (Scalia, J., dissenting).

66. See, e.g., Brief of Appellant at 47, *Alcoa, Inc. v. Behringer* 235 S.W.3d 456 (Tx. Ct. App. 2007) (No. 05-06-00136-CV), 2006 WL 2094252 (“Just as punitive damages can be unconstitutionally excessive, so also awards for mental anguish and other nebulous elements of damages can be unconstitutionally excessive.” (citation omitted)); Motion for Leave To File Brief & Brief of Amici Curiae Nat’l Ass’n of Mfrs. et al. in Support of Petitioner at 14–16, *Daniel Measurement Servs. v. Eagle Research Corp.*, 552 U.S. 1056 (2007) (mem.) (No. 07-384), 2007 WL 3101377 [hereinafter Mfrs. et al. Brief].

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juries, raising the risk of arbitrary deprivation of property. The Court has “emphasized time and again that ‘the touchstone of due process is protection of the individual against arbitrary action of government.’”<sup>67</sup> Recall Justice Brennan’s concern that this principle cannot be squared with the fact “that punitive damages are imposed by juries guided by little more than an admonition to do what they think is best.”<sup>68</sup> That concern was eventually picked up by the full Court: “Punitive damages pose an acute danger of arbitrary deprivation of property. Jury instructions typically leave the jury with wide discretion in choosing amounts . . . .”<sup>69</sup>

But, as Geistfeld noted, “that concern is not limited to punitive damages.”<sup>70</sup> The same can be said of noneconomic compensatory damages. Since long before the recent punitive damages cases, commentators have been noting the fact that “[c]ourts have usually been content to [instruct juries] that pain and suffering damages should amount to ‘fair compensation’ or a ‘reasonable amount,’ without any more definite guide.”<sup>71</sup> Shortly after *State Farm*, Paul DeCamp wrote an article in which he detailed the

similarities between punitive damages and noneconomic compensatory damages—including their common history and treatment, the inadequate guidance available to juries, the amorphous nature of the jury’s task, the absence of objective criteria to safeguard against consideration of improper factors, and the lack of clear standards to facilitate meaningful judicial review of verdicts.<sup>72</sup>

Those similarities, DeCamp argued, “logically call for comparable treatment for purposes of procedural due process.”<sup>73</sup>

67. *Cty. of Sacramento v. Lewis*, 523 U.S. 833, 845 (1998) (quoting *Wolff v. McDonnell* 418 U.S. 539, 558 (1974)).

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

69. *Honda Motor Corp. v. Oberg*, 512 U.S. 415, 432 (1994); see also *Philip Morris USA v. Williams*, 549 U.S. 346, 354 (2007) (listing “arbitrariness” as one of “the fundamental due process concerns to which our punitive damages cases refer”).

70. Geistfeld, *supra* note 53, at 1103.

71. DAN B. DOBBS, *HANDBOOK ON THE LAW OF REMEDIES* 545 (1973); see also Stanley Ingber, *Rethinking Intangible Injuries: A Focus on Remedy*, 73 CAL. L. REV. 772, 778 (1985) (“Juries are left with nothing but their consciences to guide them.”).

72. DeCamp, *supra* note 59, at 291.

73. *Id.*; see also Paul V. Niemeyer, *Awards for Pain and Suffering: The Irrational Centerpiece of Our Tort System*, 90 VA. L. REV. 1401, 1415 (2004) (“This dramatic story of the jurisprudence relating to punitive damage awards is equally applicable to awards for pain and suffering. Indeed, awards for pain and suffering are even more vulnerable to constitutional attack.”); *id.* at 1417 (“[W]ithout rational criteria or defined limits, the pain and suffering award becomes the same arbitrary deprivation of property as were punitive damage awards before cases like [BMW].”); Riggs, *supra* note 50, at 907–08 (“[T]he extent and nature of jury discretion in setting noneconomic compensatory damages is so similar to the jury’s discretion in fixing the amount of

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And, these concerns with vague jury instructions that offer little guidance to the jury extend well beyond compensatory damages. They can be applied to many other areas of tort law as well. Geistfeld has explained that model jury instructions regarding issues like negligence, for instance, “give the jury an amount of discretion that is not significantly different than the discretion given by instructions on punitive damages.”<sup>74</sup> Juries are instructed that the degree of care that is reasonable turns on considerations of foreseeability and risk but are not instructed how to weigh or evaluate those considerations, just as juries are instructed that the amount of punitive damages turns on considerations of retribution and deterrence but are not told how to weigh or evaluate those considerations to arrive at an appropriate punitive damages award.<sup>75</sup> Thus, in Riggs’s words:

it is hard to see how the typical instructions in a punitive damages case can be held to violate due process (by leaving the jury with ‘unbridled discretion’) without also putting in doubt the large bodies of tort law that equally rely upon such subjective concepts as negligence, gross negligence, malice, or conduct that is reckless, wanton, willful and malicious.<sup>76</sup>

Riggs’s bottom line is that “if jury instructions in a punitive damages case are too imprecise to satisfy due process, other significant bodies of tort law are also called into question.”<sup>77</sup>

Despite the Court’s early suggestion that perhaps the common law system for instructing juries on punitive damages was simply too arbitrary to survive due process review, the Justices ultimately upheld that system.<sup>78</sup> But, they did impose a number of procedural due process limits on punitive damages in an effort to mitigate this concern.<sup>79</sup> Recognizing the analogy to other aspects of tort law—particularly the awarding of compensatory damages—lawyers for the business community have explicitly asked the Court to mandate “parity of treat-

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punitive damages that the two cannot be analytically distinguished. If leaving the amount of punitive damages to the sound discretion of the jury offends the procedural guarantees of the fifth amendment [sic], logically the common law discretion of juries to fix the amount of noneconomic damages is similarly defective. And, if this is so, the alleged due process objection to punitive damages once again calls into serious question other established rules of tort law.”)

74. Geistfeld, *supra* note 53, at 1104.

75. *See id.*

76. Riggs, *supra* note 50, at 897–98.

77. *Id.* at 916. “If due process is to remake the law of punitive damages by finding these widely used concepts constitutionally infirm, it logically cannot stop until it has changed the whole face of tort law . . . .” *Id.* at 898.

78. *See Pac. Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 17 (1991) (“[W]e cannot say that the common-law method for assessing punitive damages is so inherently unfair as to deny due process and be per se unconstitutional.”).

79. *See supra* Part I.

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ment of punitive and compensatory damages when it comes to the minimum procedural safeguards required by due process.”<sup>80</sup> Probusiness groups, including the National Association of Manufacturers, the U.S. Chamber of Commerce, and the American Tort Reform Association, have begged the Court to “conclu[de] that due process requires courts to provide adequate procedural safeguards against the risk of erroneous deprivations of property through a compensatory damages award inconsistent with the evidence.”<sup>81</sup>

### C. Lack of Fair Notice

A related point can be made regarding the Court’s concern in the punitive damages cases with fair notice. In *BMW*, the Court observed that “[e]lementary notions of fairness enshrined in our constitutional jurisprudence dictate that a person receive fair notice not only of the conduct that will subject him to punishment, but also of the severity of the penalty that a State may impose.”<sup>82</sup> Because juries are given virtually unbridled discretion to fix the amount of punitive damages, the Court has found that defendants who are hit with massive punitive damages verdicts were often not on notice *ex ante* that they were subject to such a substantial award, which violates their due process rights.<sup>83</sup>

Here, again, the Court’s concern is not logically limited to punitive damages.<sup>84</sup> Compensatory damages awards, especially those for noneconomic damages, can also be far higher than might reasonably be anticipated. In addition, judges’ and juries’ resolutions of other fundamental questions of tort law—such as whether the defendant

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80. Motion of the Prod. Liab. Advisory Council, Inc., for Leave To File Brief as Amicus Curiae & Brief in Support of Petitioners at 3, *Daniel Measurement Servs., Inc. v. Eagle Research Corp.* 552 U.S. 1056 (2007) (No. 07-384), 2007 WL 3101378. “The jury’s baseless multimillion-dollar [compensatory] exaction should have been subjected to a ‘definite and meaningful constraint on discretion’ as is required under this Court’s punitive damages cases.” *Id.* at 4 (quoting *Haslip*, 499 U.S. at 22).

81. Mfrs. et al. Brief, *supra* note 66, at 14.

82. *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 574 (1996); *see also* *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 417–18 (2003) (“[T]he Due Process Clause does not permit a State to classify arbitrariness as a virtue. Indeed, the point of due process—of the law in general—is to allow citizens to order their behavior. A state can have no legitimate interest in deliberately making the law so arbitrary that citizens will be unable to avoid punishment based solely upon bias or whim.” (quoting *See Haslip*, 499 U.S. at 59 (O’Connor, J., dissenting)) (alteration in original)).

83. *See, e.g., Philip Morris USA v. Williams*, 549 U.S. 346, 354 (2007) (listing “lack of notice” as one of “the fundamental due process concerns to which our punitive damages cases refer”); *BMW*, 517 U.S. at 574.

84. *See Geistfeld*, *supra* note 53, at 1109 (“The problem of vague tort rules is not limited to punitive damages, nor is this constitutional concern limited to tort issues decided by juries.”).

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owes a duty of care to the plaintiff and whether an activity is abnormally dangerous so as to trigger strict liability—are similarly unpredictable *ex ante* and can likewise be said to lead to the imposition of liability in the absence of fair notice.<sup>85</sup> If the vagueness of tort law, and its concomitant lack of fair notice, raises constitutional concerns, then those concerns would seem to extend well beyond the realm of punitive damages.<sup>86</sup> Indeed, lawyers for the business community have asked the courts to extend this principle into other areas of tort law. For instance, in a product liability case, the Alliance of Automobile Manufacturers has argued that the principle established in *BMW* (that a state may “not enforce an award that is outside the range of damages of which the defendant could reasonably have had notice with respect to the conduct at issue . . .”) “fully applies to the imposition of pain and suffering awards.”<sup>87</sup>

#### D. *The Constitutional Right To Present Every Available Defense*

In *Williams*, the Court held that “the Constitution’s Due Process Clause forbids a State to use a punitive damages award to punish a defendant for injury that it inflicts upon nonparties or those whom they directly represent, i.e., injury that it inflicts upon those who are, essentially, strangers to the litigation.”<sup>88</sup> The Court based this conclusion in part on the proposition that “the Due Process Clause prohibits a State from punishing an individual without first providing that individual with ‘an opportunity to present every available defense.’”<sup>89</sup> Allowing punishment for harm to nonparties contravenes due process rights because “a defendant threatened with punishment for injuring a nonparty victim has no opportunity to defend against the charge, by

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85. *See id.* at 1109–10.

86. As the Court recognized in *Williams*, the concerns with arbitrary verdicts, lack of notice to the defendant, and excessive jury discretion discussed in this and the preceding Subsection raise particular red flags when it comes to mass torts.

“[T]o permit punishment for injuring a nonparty victim would add a near standardless dimension to the punitive damages equation. How many such victims are there? How seriously were they injured? Under what circumstances did injury occur? The trial will not likely answer such questions as to nonparty victims. The jury will be left to speculate. And the fundamental due process concerns to which our punitive damages cases refer—risks of arbitrariness, uncertainty, and lack of notice—will be magnified.”

*Williams*, 549 U.S. at 354. This observation has obvious implications for class actions and other attempts to address mass torts judicially—implications that are addressed in the following subsection.

87. Brief of Amicus Curiae the All. of Auto. Mfrs. in Support of Appellants at 9–10, *Buell-Wilson v. Ford Motor Co.*, 46 Cal. Rptr. 3d 147 (Ct. App. 2006) (No. D045154), 2006 WL 1286984.

88. *Williams*, 549 U.S. at 353.

89. *Id.* (quoting *Lindsey v. Normet*, 405 U.S. 56, 66 (1972)).

showing, for example” that the nonparty victim was not defrauded, did not rely on the defendant’s statements, had a preexisting injury, or the like.<sup>90</sup>

This passage has potentially massive implications for mass tort cases, which extend even beyond the limits that it places on awarding punitive damages in those cases. If the defendant has a constitutional right to raise and litigate individualized defenses before being held accountable for harming a victim, then it is arguably unconstitutional to resolve mass tort cases through class actions or other forms of collective litigation that do not provide a mechanism for individualized decision making. And, the potential implications extend even further than that: beyond mass tort cases to any procedural rules in *any* tort cases that preclude the defendant from effectively presenting defenses. Indeed, its implications might extend all the way to changes in *substantive* tort law that eliminate traditional common law defenses.<sup>91</sup>

### 1. *The Existence and Nature of the Right To Present Defenses*

The *Williams* Court did not invent the right to present every available defense. That right has been around, in some form or another, for decades. “The Court traditionally has held that the Due Process Clauses protect civil litigants who seek recourse in the courts, . . . as defendants hoping to protect their property . . . .”<sup>92</sup> Thus, a defendant has a due process property interest in retaining the money sought by the plaintiff as damages. And, the Court has traditionally held that “the State may not finally destroy a property interest without first giving the putative owner an opportunity to present her claim of entitlement.”<sup>93</sup> As such, a civil defendant must have a fair opportunity to present her claim that the plaintiff does *not* have a right to the property. It follows that “[d]ue process requires that there be an opportu-

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90. *Id.* at 353–54.

91. John Goldberg has noted the possibility that tort law might be constitutionalized in the other direction—there may be a constitutional right on the part of the *plaintiff* to some form of judicial redress for private wrongs. John C.P. Goldberg, *The Constitutional Status of Tort Law: Due Process and the Right to a Law for the Redress of Wrongs*, 115 *YALE L.J.* 524, 529 (2005). Goldberg argued: “Recognition of this right need not entail the federalization of tort law, or even require that tort law remain a part of our legal system.” *Id.* But, he did assert that “this right can and should be judicially enforced by establishing meaningful but capacious limits on the ways in which, and the reasons for which, legislatures may undertake plaintiff-unfriendly tort reform.” *Id.* Goldberg’s argument is characteristically compelling and well supported. But, if the organizing assumption of this 21st Annual Clifford Symposium is correct—that the U.S. Supreme Court has become unduly beholden to business interests—his argument would seem unlikely to gain much traction with the current Court.

92. *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 429 (1982).

93. *Id.* at 434.

nity to present every available defense.”<sup>94</sup> If the defendant has a defense to liability under the governing substantive law, she must be given a fair opportunity to litigate it. Any procedural rule or device that the court employs to deny her that opportunity—such as rules of waiver or default—must be a constitutionally fair one.<sup>95</sup>

## 2. *The Applicability of the Right to Class Actions*

The right to present defenses, especially as articulated and developed in *Williams*, would seem to have significant implications for class actions—especially those arising out of mass torts. Because a class action, by its very nature, “is a lawsuit in which a representative litigates the common claims of a class of individuals too numerous to join to the case individually[.]”<sup>96</sup> a mass-tort class action defendant runs the risk of being held liable to a large class of alleged victims, only a few of whom are actually present and directly represented in the courtroom. To the extent that the class action is used to find the defendant liable to the entire class based solely on the representative proceedings and without any opportunity for the defendant to raise and litigate individualized defenses that it might have to the claims of individual members of the class,<sup>97</sup> *Williams* calls that practice into question.<sup>98</sup> And, that in turn might threaten the very viability of the mass tort class action in the first place. After all, as Mark Moller noted: “When defendants want to rely on individualized evidence—

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94. *Lindsey*, 405 U.S. at 66 (quoting *Am. Surety Co. v. Baldwin*, 287 U.S. 156, 168 (1932)).

95. See *Riggs*, *supra* note 50, at 869; *cf. Logan*, 455 U.S. at 437 (“And the State certainly accords due process when it terminates a claim for failure to comply with a reasonable procedural or evidentiary rule.”).

96. 1 NEWBERG ON CLASS ACTIONS § 1:2 (5th ed. 2011).

97. Often, class actions make use of bifurcation or other forms of divided trial in which first the common issues are resolved on a class-wide basis and then individual issues are subsequently litigated. Edward F. Sherman, *Segmenting Aggregate Litigation: Initiatives and Impediments for Reshaping the Trial Process*, 25 REV. LITIG. 691, 702–07 (2006). As long as the defendant retains the right to litigate the individual issues, those proceedings would not seem to violate the principle announced in *Williams*, although they may raise other problems under, for instance, the Seventh Amendment. Byron G. Stier, *Now It's Personal: Punishment and Mass Tort Litigation After Philip Morris v. Williams*, 2 CHARLESTON L. REV. 433, 447 (2008). *Williams* has the most obvious effect on mass tort class actions seeking punitive damages. Sometimes, courts adjudicate issues relating to punitive damages—both liability and amount—on a class-wide basis first (either through class-wide evidence or sampling) before turning to issues of individualized liability and compensatory damages. *Williams* “suggests that these punitives-first class trial plans will offend due process” because they do not “allow[ ] the defendant to offer every available defense, nor provide[ ] sufficient information on the extent of harm to those other than the class representatives, such that the punitive award can be said to bear a ‘reasonable relationship’ to compensatory damages.” *Id.* at 446.

98. Actually, because of due process concerns, the courts did not allow this to happen often even before *Williams*. See Colby, *supra* note 17, at 653–56.

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that is, evidence unique to individual claims—it’s simply impossible to lump together large numbers of those claims into a class action and, at the same time, respect defendant’s [sic] rights to present that evidence.”<sup>99</sup>

Not surprisingly, then, ever since the *Williams* decision, class action defendants have inundated the U.S. Supreme Court with requests to extend the *Williams* rule into the class action context.<sup>100</sup> They have insisted that because a “defendant in a class action has a due process right to raise individual challenges and defenses to claims,” a class action “cannot be certified in a way that eviscerates this right or masks individual issues.”<sup>101</sup> Thus, they argued that “it violates due process to facilitate classwide adjudication by permitting the use of extrapolation to relieve individual class members of their burden of proof and by eliminating class-action defendants’ right to raise individualized defenses.”<sup>102</sup>

### 3. *The Applicability of the Right Beyond Class Actions*

Even beyond the mass tort and class action context, the constitutional right to present every available defense has significant potential to unsettle state tort law. This notion suggests that state adjudicatory rules or procedures that limit the ability to effectively raise and litigate defenses could be held to fall below a minimum constitutional threshold of fairness. It even perhaps suggests that there are limits on a state’s ability to cut back on the defenses available to defendants as a matter of *substantive* tort law.

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99. Mark Moller, *Class Action Defendants’ New Lochnerism*, 2012 UTAH L. REV. 319, 319.

100. *See id.* (“[I]n countless briefs filed at the state and federal levels, class action defendants complain that trial courts are ignoring their due process right to a fair hearing.”).

101. Brief of Allergan, Inc. et al. as Amici Curiae in Support of Petitioner at 6, *Allstate Ins. Co. v. Jacobsen*, 134 S. Ct. 2135 (2014) (No. 13-916), 2014 WL 825203 (quoting *Carrera v. Bayer Corp.*, 727 F.3d 300, 307 (3d Cir. 2013)).

102. Petition for a Writ of Certiorari at 16–17, *Wal-Mart Stores, Inc. v. Braun* (No. 14-1124), 2015 WL 1201368 [hereinafter *Braun* Petition]; *see also* Brief of the U.S. Chamber of Commerce et al. as Amici Curiae in support of petitioner at 1–2, *Sears, Roebuck & Co. v. Butler*, 133 S. Ct. 2768 (2013) (mem.) (No. 12-1067), 2013 WL 1342732; Petition for a Writ of Certiorari at 2, *National Union Fire Ins. Co. v. Allen*, 555 U.S. 1085 (2008) (No. 08-557), 2008 WL 4735255 (“Rather than determine these inherently individualized compensatory damages on individual proof, the state court assessed them on the basis of classwide formulas. That end-run around the necessary proof deprives the defendants of the chance to address each plaintiff’s *actual* damages, thus denying them their fundamental due process right ‘to present every available defense.’” (quoting *Philip Morris USA v. Williams*, 549 U.S. 346, 353 (2007))).

## a. Procedural Limits on Presenting Defenses

In its punitive damages cases, the Court has explicitly noted that a state's "abrogation of a well-established common-law protection against arbitrary deprivations of property raises a presumption that its procedures violate the Due Process Clause."<sup>103</sup> That presumption would seem to extend beyond the punitive damages context to the abrogation of any procedures that allow a tort defendant to present its defenses. Imagine, for instance, that a state were to provide—whether by statute, court rule, or judicial precedent—that whenever a defendant raises a legitimate tort defense in a timely and appropriate manner, the judge must flip a coin to decide whether to allow the defense to go forward. That procedure would almost certainly be held to violate the defendant's constitutional right to present every defense.<sup>104</sup> So too, presumably, would a procedural rule that allowed a tort plaintiff to defeat any defense or affirmative defense simply by raising a scintilla of evidence that contradicts it.<sup>105</sup>

It follows that other less draconian limitations on the ability to present an effective defense could be found to violate due process as well. For instance, the Court has held that a "legislative presumption is invalid when it is entirely arbitrary . . . or operates to deprive a party of a reasonable opportunity to present the pertinent facts in his de-

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103. *Honda Motor Co. v. Oberg*, 512 U.S. 415, 430 (1994).

104. *Cf.* *United States v. Raddatz*, 447 U.S. 667, 698 (1980) (Marshall, J., dissenting) (arguing that "flip[ping] a coin" as a mechanism for judicial decision making "is forbidden by the requirements of fair adjudicative procedure that the Due Process Clause reflects"); *Lemke v. Cass Cty., Neb.*, 846 F.2d 469, 472 (8th Cir. 1987) (Arnold, C.J., concurring) (arguing that making zoning decisions by flipping a coin would violate due process).

105. In *Mathews v. Eldridge*, the Court famously held that the appropriate amount of process due before the government deprives someone of a constitutionally protected liberty or property interest should be determined by balancing: (1) the nature of the private interest affected by the official action; (2) the risk of error and the effect of additional procedural safeguards; and (3) the governmental interest. 424 U.S. 319, 335 (1976). The "Court has engaged in a straightforward consideration of the factors identified in *Mathews* to determine whether a particular standard of proof in a particular proceeding satisfies due process." *Santosky v. Kramer*, 455 U.S. 745, 754, (1982). And, the Court has explained that under that test, a preponderance of the evidence standard is constitutionally appropriate for "the typical civil case involving a monetary dispute between private parties." *Addington v. Texas*, 441 U.S. 418, 423 (1979). This is so because although "private parties may be interested intensely in a civil dispute over money damages, application of a 'fair preponderance of the evidence' standard indicates both society's 'minimal concern with the outcome,' and a conclusion that the litigants should 'share the risk of error in roughly equal fashion.'" *Santosky*, 455 U.S. at 755 (quoting *Addington*, 441 U.S. at 423); *cf.* *Valmonte v. Bane*, 18 F.3d 992, 1003 (2d Cir. 1994) (applying the *Mathews* test to conclude that a "some credible evidence" standard of proof for placing names on a child abuse registry does not comport with due process).

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fense.”<sup>106</sup> A state “must not, under guise of regulating the presentation of evidence, operate to preclude [a] party from the right to present his defense.”<sup>107</sup> Thus, “in either criminal or civil cases,” a rule of procedure or evidence may “not shut out from the party affected a reasonable opportunity to submit to the jury in his defense all of the facts bearing upon the issue” else “due process of law has been denied him.”<sup>108</sup>

Having recently revitalized this line of cases in *Williams*, the Court could easily expand it to other areas of tort law. And, in recent years, lawyers for the business community have asked the Court to do just that. For example, in *R.J. Reynolds Tobacco Co. v. Brown*,<sup>109</sup> lawyers argued that a “marked deviation from common law principles of issue preclusion . . . violates due process rights protection by the 14th Amendment”<sup>110</sup> when it has the effect of denying the defendant “an opportunity to present every available defense.”<sup>111</sup> Lawyers have also asked the courts to extend this principle to, for instance, evidentiary decisions that precluded the defendant from introducing evidence proffered in support of a legal defense<sup>112</sup> and state statutes that allegedly preclude the defendant in a products liability case from introducing evidence that would enable it to show that its product was not legally defective.<sup>113</sup> In other words, lawyers have been asking the courts to find both that certain evidentiary and procedural rules themselves violate due process because they prevent the defendant from mounting an effective defense and, also, that particular procedural and evidentiary *rulings*—applications of otherwise acceptable rules—

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106. *Bandini Petroleum Co. v. Superior Court*, 284 U.S. 8, 19 (1931); *see also Vlandis v. Kline*, 412 U.S. 441, 452 (1973) (holding that irrebutable presumptions that are not universally true can violate due process).

107. *Mobile, Jackson & Kan. City R.R. Co. v. Turnipseed*, 219 U.S. 35, 43 (1910).

108. *Id.*; *cf. Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 429–30 (1982) (“[T]he Fourteenth Amendment’s Due Process Clause has been interpreted as preventing the States from denying potential litigants use of established adjudicatory procedures, when such an action would be ‘the equivalent of denying them an opportunity to be heard upon their claimed right[s].’” (second alteration in original) (quoting *Boddie v. Connecticut*, 401 U.S. 371, 380 (1971))).

109. 134 S. Ct. 2726 (2014) (mem.) (denying certiorari).

110. Motion for Leave To File Brief & Brief of Wash. Legal Found. as Amicus Curiae in Support of Petitioner at 12, *Brown*, 134 S. Ct. 2726 (No. 13-1187), 2014 WL 1783197.

111. *Id.* at 13 (quoting *Philip Morris USA v. Williams*, 549 U.S. 346, 353 (2007)).

112. *See, e.g.*, Brief for Appellant Scotwood Indus., Inc. at 13–15, *Scotwood Indus. v. Meats*, 4 N.E.3d 1226 (Ind. Ct. App. 2014) (tbl.) (No. 29A05-1305-SC-229), 2013 WL 5574723; Petition for a Writ of Certiorari at 21–29, *City of New Orleans v. New Orleans Fire Fighters Pension & Relief Fund*, 135 S. Ct. 148 (2014) (mem.) (No. 13-1528), 2014 WL 2858181.

113. *See, e.g.*, Brief of Defendant-Appellant Gen. Motors Corp. at 46–49, *Reynolds v. Gen. Motors Corp.*, 390 F. App’x 961 (2010) (No. 08-16182-CC), 2009 WL 898388.

violate due process whenever they have the effect of excluding essential exculpatory evidence.

b. Due Process Limits on Altering Substantive Tort Law

The Court could even hold that due process imposes constitutional limits not just on a state's alteration or application of its procedural rules, but also on its substantive rules—its ability to abolish certain traditional defenses from its substantive tort law. It is true that the Court has indicated that a “defense, like an element of the tort claim itself, is merely one aspect of the State's definition of [the] property interest.”<sup>114</sup> Because “the legislature may elect not to confer a property interest,” it would appear to follow that although a state “may not constitutionally authorize the deprivation of such an interest, once conferred, without appropriate procedural safeguards[,]”<sup>115</sup> a state should be constitutionally free to abolish the defense, thus revoking the property interest altogether.<sup>116</sup>

Indeed, as far back as 1876, the Court explained that a “person has no property, no vested interest, in any rule of the common law.”<sup>117</sup> Thus, “[r]ights of property which have been created by the common law cannot be taken away without due process; but the law itself, as a rule of conduct, may be changed at the will, or even at the whim, of the legislature, unless prevented by constitutional limitations.”<sup>118</sup>

But, note that last clause: “unless prevented by constitutional limitations.” As John Goldberg has explained, this “passage could be read to endorse unfettered legislative discretion to expand or shrink tort law, but that was not its meaning.”<sup>119</sup> In fact, in the late nineteenth and early twentieth centuries, the Court repeatedly took seriously due process challenges to state attempts to make the substantive law of torts more favorable to plaintiffs.<sup>120</sup> Although it never found a due process violation, the Court insisted that, as a matter of due process, new rules of tort law cannot depart “so substantially from the terms of regulation at common law as to evidence an attempt at out-

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114. *Martinez v. California*, 444 U.S. 277, 282 n.5 (1980).

115. *Logan v. Zimmerman Brush*, 455 U.S. 422, 432 (1982) (quoting *Vitek v. Jones*, 445 U.S. 480, 490 n.6 (1980)).

116. *See id.* (“Of course, the State remains free to create substantive defenses or immunities for use in adjudication—or to eliminate its statutorily created causes of action altogether . . .”).

117. *Munn v. Illinois*, 94 U.S. 113, 134 (1876).

118. *Id.*

119. Goldberg, *supra* note 91, at 569.

120. *See id.* at 569–72; *see, e.g., Mo. Pac. Ry. Co. v. Mackey*, 127 U.S. 205 (1888) (upholding the abolition of the fellow servant rule for suits by railroad employees against employers); *Mo. Pac. Ry. Co. v. Humes*, 115 U.S. 512 (1885) (considering whether a statute mandating double damages for harm to livestock caused by railroads violated due process).

right redistribution” of property.<sup>121</sup> In one case, the Court strongly implied that it would violate due process to craft substantive tort law in a way that would allow for the imposition of liability on a defendant who was not actually responsible for the plaintiff’s injury.<sup>122</sup>

Of course, abolishing traditional tort defenses could have precisely that effect. Thus, some nineteenth century courts struck down state laws that did just that. For instance, many courts invalidated state statutes that made railroad companies liable for injuries to animals run over by trains without any showing of which party—the railroad or the animal owner—was truly at fault.<sup>123</sup> As one court put it, this action violates the Fourteenth Amendment’s Due Process Clause because it “precludes the corporation from exculpating itself or making any defense whatever.”<sup>124</sup> Under such a statute, “not only is the corporation prevented from showing its own care and diligence, and the unavoidable character of the accident, but it is also precluded from showing the contributory negligence, or even design, of a plaintiff in causing the injury.”<sup>125</sup> That preclusion contravenes the due process guarantee: “Any statute that forecloses a defendant, and precludes all defense, and denies the ‘day in court,’ is, and must be, unconstitutional and void.”<sup>126</sup>

Some courts in that era reached the same conclusion in striking down workers’ compensation statutes.<sup>127</sup> The U.S. Supreme Court ultimately disagreed that workers’ compensation laws violate this constitutional principle. But, even so, the Court specifically noted:

Nor is it necessary, for the purposes of the present case, to say that a State might, without violence to the constitutional guaranty of “due process of law,” suddenly set aside all common-law rules respecting liability as between employer and employee, without providing a reasonably just substitute. . . . [I]t perhaps may be doubted whether the State could abolish all rights of action on the one hand, or all defenses on the other, without setting up something adequate in their stead.<sup>128</sup>

In other words, a state could be found in violation of due process if it altered the traditional defenses of substantive tort law in a way that

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121. Goldberg, *supra* note 91, at 569.

122. *See id.* at 571–72 (discussing *Guy v. Donald*, 203 U.S. 399 (1906)); *see also* Witt, *supra* note 4, at 1176, 1184 (noting the extent to which state courts in this era reached the same conclusion as a matter of state constitutional law).

123. *See* Witt, *supra* note 4, at 1177–79.

124. *Denver & Rio Grand Ry. Co. v. Outcalt*, 31 P. 177, 179–80 (Colo. Ct. App. 1892).

125. *Id.* at 180.

126. *Id.*

127. *See* Witt, *supra* note 4, at 1185–88.

128. *N.Y. Cent. R.R. Co. v. White*, 243 U.S. 188, 201 (1917).

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effectively eliminated the defendant's ability to establish that it did not cause the injury.

Armed with *Williams*, and with these old precedents at the ready in the quiver, the modern Court could conclude that a particular rule of substantive tort law that has the effect of allowing liability without causation generates results so arbitrary as to violate due process. After all, it "remain[s] true that the State's interest in fashioning its own rules of tort law is paramount to any discernable federal interest, except perhaps an interest in protecting the individual citizen from state action that is wholly arbitrary or irrational."<sup>129</sup>

Indeed, the business community has urged the Court to do just that. For instance, in *American Cyanamid Co. v. Gibson*,<sup>130</sup> the business community asked the Court to declare that a recent judge-made change to the common law of Wisconsin—the introduction of the so-called "risk contribution" theory<sup>131</sup>—contravenes the principle announced in *Williams*: the Due Process Clause does not allow a defendant to be held liable without being given an opportunity to litigate every available defense. The *Williams* principle, the lawyers claimed, necessarily implies that "the Due Process Clause incorporates a causation requirement."<sup>132</sup>

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129. *Martinez v. California*, 444 U.S. 277, 282 (1980). One could draw an analogy to criminal law because the Court has sometimes suggested that, as a matter of constitutional law, a defendant cannot be held criminally liable without the state establishing that her conduct was genuinely wrongful in some meaningful way. *See, e.g., Robinson v. California*, 370 U.S. 660, 667 (1962) ("Even one day in prison would be a cruel and unusual punishment for the 'crime' of having a common cold."). Thus, some courts have held that "the Constitution prohibits a state from eliminating the justification of self-defense from its criminal law." *See, e.g., Isaac v. Engle*, 646 F.2d 1129, 1140 (6th Cir. 1980) (en banc) (Merritt, J., dissenting), *rev'd*, 456 U.S. 107 (1982); *see also, e.g., Griffin v. Martin*, 785 F.2d 1172, 1187 n.37 (4th Cir. 1986) (en banc) ("It is difficult to the point of impossibility to imagine a right in any state to abolish self defense altogether, thereby leaving one a Hobson's choice of almost certain death through violent attack now or statutorily mandated death through trial and conviction of murder later.").

130. 135 S. Ct. 2311 (2015) (mem.) (denying certiorari).

131. The risk contribution theory has the effect of allowing those injured by lead paint to recover against lead paint manufacturers who were active in the marketplace during the relevant time period without proof that the defendant was the manufacturer of the particular paint that injured the plaintiff.

132. Petition for a Writ of Certiorari at 27–31, *Gibson*, 135 S. Ct. 2311 (No. 14-849), 2015 WL 241883; *see also* Brief for Plaintiffs-Appellants at 39–43, *Bus. for a Better N.Y. v. Angello*, 341 F. App'x 701 (2d Cir. 2009) (No. 07-4415-cv), 2007 WL 6475514 (urging the courts to hold a New York labor law that imposes strict liability on owners and contractors for accidents involving ladders and scaffolding unconstitutional because under that law, "defendants are not able to explain the circumstances of the accident or to establish defenses such as comparative negligence[.]" which denies them "an opportunity to put on a meaningful defense"); Brief for Amici Curiae the Nat'l Ass'n of Mfrs. et al. in Support of Petitioners at 11–14, *Gibson*, 135 S. Ct. 2311 (No. 14-849), 2015 WL 678183; ("The basic guarantee of due process in a civil trial is that a

*E. Individualized Unfairness*

On top of all the arguments previously discussed, if “[t]he touchstone of due process is protection of the individual against arbitrary action of government”<sup>133</sup>—if, that is, the “touchstone of Due Process is fundamental fairness”<sup>134</sup>—then it is possible to imagine the U.S. Supreme Court overturning a tort verdict against a large corporation on the simple ground that the Court believes that the verdict was arbitrary and unfair. This was a point Justice Scalia made in dissenting from the Court’s punitive damages decisions—their reasoning logically extends to all unfair tort verdicts.

Indeed, if the Court is correct, it must be that every claim that a state jury’s award of *compensatory* damages is “unreasonable” (because not supported by the evidence) amounts to an assertion of constitutional injury. And the same would be true for determinations of liability. By today’s logic, *every* dispute as to evidentiary sufficiency in a state civil suit poses a question of constitutional moment, subject to review in this Court. That is a stupefying proposition.<sup>135</sup>

Just as the Court has found that, in criminal law, due process requires judges to review state-imposed jury verdicts to ascertain whether the evidence was sufficient for a rational jury to find liability,<sup>136</sup> it could reach the same conclusion in civil law.<sup>137</sup>

Here too, lawyers representing the business community have asked the Court to take the next step. General Motors, for instance, has petitioned the Court to extend the rules of this sort established in criminal and punitive damages cases to all civil cases. Noting that the “Court has long held that due process forbids a state criminal conviction where there is no evidence, or insufficient evidence, of guilt[.]” and that the Court has found that “if there is insufficient evidence to justify the size of a punitive damage award, the award violates due process[.]” General Motors has asked the Court to “address[ ] the

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defendant will not be held liable for damages without a meaningful opportunity to present every available defense to liability, including a defense based upon lack of causation.”).

133. *Wolff v. McDonnell*, 418 U.S. 539, 558 (1974).

134. *Quill Corp. v. N. Dakota*, 504 U.S. 298, 304 n.2 (1992) (citing *N. Dakota v. Quill*, 470 N.W.2d 203, 214–15 (N.D. 1991)).

135. *BMW of N. Am. Inc. v. Gore*, 517 U.S. 559, 607 (1996) (Ginsburg, J., dissenting) (citation omitted).

136. *See Jackson v. Virginia*, 443 U.S. 307, 319 (1979) (“[T]he relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.”).

137. Analogies might also be drawn to cases like *Bouie v. City of Columbia*, in which the Court held that state court judgments that seem to deviate grossly from any fair interpretation or application of state law violate due process. 378 U.S. 347, 361–62 (1964).

problem in what is probably its most common setting: the threshold determination of liability in civil litigation.”<sup>138</sup>

#### IV. EXPLAINING THE LIMITED SCOPE OF THE CONSTITUTIONALIZATION OF TORTS TO DATE

As discussed in Part II, at the behest of the business community, the U.S. Supreme Court has imposed a variety of constitutional limits of punitive damages awards. And, as further discussed in Part II, much of the logic and reasoning behind the Court’s punitive damages decisions could easily be extended to compensatory damages and to many other aspects of tort law as well. Indeed, as Part III then explained, the business community has been aggressively encouraging the Court to do just that.

Yet, the Court has taken virtually no steps to constitutionalize tort law beyond the realm of punitive damages—despite the ample opportunities and clearly illuminated doctrinal avenues to do so. The closest that the Court has come is in the area of class actions. In *Wal-Mart Stores, Inc. v. Dukes*,<sup>139</sup> the Court refused to allow a class action proceeding to rely on “Trial by Formula” in lieu of affording the defendant “the right to raise any individual affirmative defenses it may have, and to ‘demonstrate’” that particular individual class members were not treated unlawfully.<sup>140</sup> But, that case—which arose in federal court and involved federal antidiscrimination law (not state tort law<sup>141</sup>)—was based on an interpretation of the Rules Enabling Act<sup>142</sup> and Federal Rule of Civil Procedure 23<sup>143</sup> rather than the Constitu-

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138. Petition for a Writ of Certiorari at 14–16, *Gen. Motors Corp. v. Jackson*, 513 U.S. 928 (1994) (No. 94-139), 1994 WL 16042842; *see also* Petition for a Writ of Certiorari at 26, *Sonnenschein Nath & Rosenthal LLP v. Rosenthal*, 562 U.S. 963 (2010) (No. 10-243), 2010 WL 3279297 (“*State Farm* and *Philip Morris* thus establish that it violates due process to impose punitive damages for acts for which liability has not been established. So also does due process preclude the imposition of a compensatory damages award unsupported by a finding of liability.”); Petition for a Writ of Certiorari at i, 19–20, *Garlock, Inc. v. Pool*, 508 U.S. 909 (1993) (No. 92-1502), 1993 WL 13075797 (asking the Court to find, in a products liability case, that an award of compensatory damages made in the absence of evidence of causation violates due process); Petition for a Writ of Certiorari at i, 19–20, 29, *Doughboy Recreational, Inc. v. Fleck*, 507 U.S. 1005 (1993) (No. 92-1305), 1993 WL 13075622.

139. 131 S. Ct. 2541 (2011).

140. *Id.* at 2561 (quoting *Int’l Bhd. of Teamsters v. United States*, 431 U.S. 324, 362 (1977)).

141. For a discussion of how the Court has clumsily imported principles of tort law into federal antidiscrimination law, see Sandra F. Sperino, *Discrimination Law: The New Franken-Tort*, 65 DEPAUL L. REV. (forthcoming 2016) (on file with author). Sperino noted the possibility that the Court’s twisting of tort concepts in antidiscrimination law might migrate back to the realm of tort law, thereby reshaping the underlying tort law itself. *See id.* (manuscript at 51). To the extent that this happens, it represents another form of federalizing tort law.

142. 28 U.S.C. § 2072 (2012).

143. FED. R. CIV. P. 23.

tion.<sup>144</sup> The Court did not cite or rely on *Williams* or any other punitive damages decision.

*Wal-Mart*, no doubt, “lent credence to [the] novel argument from the class action defense bar: that . . . defendants have a due process right to individualized adjudication of liability when plaintiffs differ in any meaningful way.”<sup>145</sup> Lawyers representing the business community have sought to combine *Wal-Mart* with *Williams* to establish that the *Wal-Mart* rule is of constitutional dimension.<sup>146</sup> Still, despite what the business lawyers claim is a substantial split of authority in the lower courts,<sup>147</sup> the U.S. Supreme Court has refused to take up the issue. In 2010, before *Wal-Mart* was even decided, Justice Scalia—subsequently the author of the majority opinion in *Wal-Mart*—declared, in the course of issuing a stay in his capacity as Circuit Justice, that there was a reasonable probability that four Justices would vote to grant certiorari on the issue of whether the Constitution permits a class action to be structured in a way that denies the defendant the opportunity to present every available individualized defense. And Justice Scalia further opined that there was a significant possibility that the Court would ultimately find such a class action unconstitutional.<sup>148</sup> But, the Court ultimately denied certiorari in that case<sup>149</sup> and in every other case presenting the issue thus far.

The question is why not? Why has the Court not seized the opportunity to extend the punitive damages cases into other areas of tort law? The answer is, no doubt, multifaceted. Perhaps it is due in part to a bunch of little things. For instance, the Seventh Amendment might preclude the Court from requiring the same exacting judicial review of the excessiveness of compensatory damages awards, at least those issued by federal juries, that it now requires for punitive dam-

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144. See *Wal-Mart*, 131 S. Ct. at 2561.

145. Joshua A. Rosenthal, Comment, *The Case Against Constitutionalized Commonality Standards for Collective Civil Litigation*, 32 YALE L. & POL’Y REV. 309, 310 (2013); see also Theodore J. Boutrous, Jr. & Bradley J. Hamburger, *Three Myths About Wal-Mart Stores, Inc. v. Dukes*, 82 GEO. WASH. L. REV. ARGUENDO 45, 55–57 (2014) (arguing that because the “Trial by Formula” procedure in *Wal-Mart* violated the Rules Enabling Act, “it was unnecessary for the Court to expressly rule that this deprivation also violated due process[.]” but *Williams* nonetheless makes clear that “there is little doubt that the Court would have found a due process violation if it had been necessary for it to reach the issue”).

146. See, e.g., Petition for a Writ of Certiorari at 24, *Allstate Ins. Co. v. Jimenez*, 135 S. Ct. 2835 (2015) (mem.) (No. 14-910), 2015 WL 350579.

147. See, e.g., Petition for a Writ of Certiorari at 16–21, *La. Citizens Prop. Ins. Corp. v. Oubre*, 133 S. Ct. 30 (2012) (mem.) (No. 11-1252), 2012 WL 1374528 (detailing the alleged split of authority).

148. See *Philip Morris USA Inc. v. Scott*, 131 S. Ct. 1, 3–4 (2010) (Scalia, J., Circuit Justice).

149. See *Philip Morris USA Inc. v. Jackson*, 131 S. Ct. 3057 (2011) (mem.) (denying certiorari).

ages.<sup>150</sup> But, I want to suggest here that there are three principal dynamics that best explain why the Court has not expanded the punitive damages cases into other areas of tort law.

### A. *The Uniqueness of Punishment*

The biggest factor, I think, is that the punitive damages cases were far more focused on what the Court perceived to be the unique constitutional concerns surrounding punishment than commentators have generally acknowledged. As explained *supra*, it is true that much of the logic and reasoning behind the punitive damages cases could, if taken in isolation and out of context, be extended to other tort doctrines.<sup>151</sup> But, it is a mistake to take that reasoning out of context. I believe that in making those connections, commentators and advocates have tended to underestimate the extent to which it is the “punitive” aspect of punitive damages that has been driving the Court’s cases all along.

Geistfeld sagely noted that under the *Mathews v. Eldridge* balancing test, which generally governs procedural due process cases,<sup>152</sup> one of the key factors in the balance is “the private interest that will be affected by the official action.”<sup>153</sup> At the end of the day, the defendant’s interest in avoiding compensatory damages—and tort liability generally—is basically the same as its interest in avoiding punitive damages; it wishes to avoid the restrictions on its liberty that come from the behavioral modifications mandated by the imposition of legal duties, and it wishes to avoid the demands on its property that come from being forced to pay a judgment.<sup>154</sup> “When formulated in this manner,” Geistfeld noted, “the due process inquiry shows that any constitutional concern generated by punitive damages is also generated by other tort practices.”<sup>155</sup>

True enough, but I do not believe that the Court would formulate the inquiry in this manner. I believe that the Court’s due process concerns regarding punitive damages are intimately tied up with the ways

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150. DeCamp, *supra* note 59, at 290–91; Geistfeld, *supra* note 60, at 345. The Court has held that “the measure of actual damages suffered . . . presents a question of historical or predictive fact” that the Seventh Amendment commits to the jury, whereas the level of “punitive damages does not constitute a finding of ‘fact’” and, therefore, “appellate review of the district court’s determination that an award [of punitive damages] is consistent with due process does not implicate . . . Seventh Amendment concerns.” *Cooper Indus., Inc. v. Leatherman Tool Grp., Inc.*, 532 U.S. 424, 437 (2001).

151. *See supra* Part III.

152. *See Mathews v. Eldridge*, 424 U.S. 319, 335 (1976); *supra* note 105.

153. Geistfeld, *supra* note 53, at 1095 (quoting *Mathews*, 424 U.S. at 335).

154. *See id.* at 1101–02.

155. *Id.* at 1101.

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in which those damages can unfairly inflict *punishment*. “Although these awards [ostensibly] serve the same purposes as criminal penalties,” the Court has uneasily noted that “defendants subjected to punitive damages in civil cases have not been accorded the protections applicable in a criminal proceeding.”<sup>156</sup> It is this concern that animates the due process limitations that the Court has imposed on punitive damages—the insistence that “[p]unitive damages are not a substitute for the criminal process.”<sup>157</sup> The constitutional guarantee of due process mandates the provision of a number of important procedural safeguards to those at risk of criminal punishment—including, for instance, the burden of proof beyond a reasonable doubt and the privilege against self-incrimination.<sup>158</sup> In awarding punitive damages, “[g]reat care must be taken to avoid use of the civil process to assess [what are really] criminal penalties that can be imposed only after the heightened protections of a criminal trial have been observed, including, of course, its higher standards of proof.”<sup>159</sup> As I have endeavored to explain in great detail elsewhere, *Williams* in particular is best understood as an attempt to ensure that punitive damages are not, in fact, simply criminal penalties by another name. Criminal penalties are punishment for public wrongs, whereas punitive damages are punishment for *private* wrongs—a form of legalized revenge that is conceptually and procedurally distinct from criminal punishment. That is why the *Williams* Court held that punitive damages may not be imposed to punish a defendant for the harm that it caused to individuals not before the court: because a civil case is solely concerned with the harm to the plaintiffs not the harm done to society as a whole. Due process will not tolerate a court imposing punishment for the full wrong to society—the public wrong—without affording the full panoply of criminal procedural safeguards.<sup>160</sup> In other words, *Williams* prevents tort law from serving as criminal law in disguise. But, as long as tort law is truly tort law, *Williams* does not have much to say about it.<sup>161</sup>

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156. *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 417 (2003).

157. *Id.* at 428.

158. *See United States v. Lovett*, 328 U.S. 303, 317 (1946).

159. *Campbell*, 538 U.S. at 428.

160. *See Colby*, *supra* note 21, at 401–08.

161. The Court’s reliance on the right to present every available defense in *Williams* should be understood in this light. Although in criminal law “there is no due process problem with punishing the defendant for the harm that it did to society as a whole without affording individualized defenses for each and every victim[.]” in civil law, it is “surely unconstitutional to punish a defendant for a series of individual, private, tortious wrongs without providing evidence that it did indeed commit each alleged private wrong, and without affording the defendant the opportunity to raised individualized defenses for each alleged wrong.” *Id.* at 412, 413 n.86.

To a lesser extent, the same can be said of the Court's other punitive damages cases; they were primarily motivated by the fact that punitive damages can be "described as quasi-criminal."<sup>162</sup> For instance, in *Haslip*, the Court favorably quoted this passage from an earlier concurrence by Justice O'Connor, the leader of the charge for punitive damages reform:

Mississippi law gives juries discretion to award any amount of punitive damages in any tort case in which a defendant acts with a certain mental state. In my view, *because of the punitive character of such awards*, there is reason to think that this may violate the Due Process Clause.<sup>163</sup>

"What we are concerned with is the possibility that a culpable defendant may be unjustly *punished* . . . ."<sup>164</sup>

Thus, by way of further example, the Court's concern that the defendant must be given "fair notice" of the potential severity of the damages award<sup>165</sup> was explicitly tied to the punitive character of the award. "Elementary notions of fairness enshrined in our constitutional jurisprudence dictate that a person receive fair notice not only of the conduct that will subject [her] *to punishment*, but also of the severity of the *penalty* that a State may impose."<sup>166</sup> In support of this

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162. *Pac. Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 19 (1991); see Benjamin C. Zipursky, *Punitive Damages, and Preemption*, 125 HARV. L. REV. 1757, 1783–84 (2012) (arguing that the Court's constitutionalization of punitive damages might be explained as a reaction to the ways in which punitive damages have evolved from their private law origins into "something different and closer to criminal law").

163. *Haslip*, 499 U.S. at 11 (emphasis added) (quoting *Bankers Life & Cas. Co. v. Crenshaw*, 486 U.S. 71, 88 (1988) (O'Connor, J., concurring in part and concurring in the judgment)); see also *TXO Prod. Corp. v. All. Res. Corp.*, 509 U.S. 443, 478 (1993) (O'Connor, J., dissenting) ("Judicial intervention in cases of excessive awards also has the critical function of ensuring that another ancient and fundamental principle of justice is observed—that the punishment be proportionate to the offense."); *Haslip*, 499 U.S. at 47–48 (O'Connor, J., dissenting) ("Here, . . . the civil/criminal distinction is blurry. Unlike compensatory damages, which are purely civil in character, punitive damages are, by definition, punishment. They operate as 'private fines levied by civil juries to advance governmental objectives. Because Alabama permits juries' to inflict these potentially devastating penalties wholly at random, the State scheme is void for vagueness." (citation omitted) (quoting *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 350 (1974))).

164. *Honda Motor Co. v. Oberg*, 512 U.S. 415, 429 (1994) (emphasis added); see also, e.g., *Campbell*, 538 U.S. at 421 ("A State cannot punish a defendant for conduct that may have been lawful where it occurred."); *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 562 (1996) ("The Due Process Clause of the Fourteenth Amendment prohibits a State from imposing a 'grossly excessive' punishment on a tortfeasor." (quoting *TXO*, 509 U.S. at 454)); *id.* at 585 ("We cannot, however, accept the conclusion of the Alabama Supreme Court that BMW's conduct was sufficiently egregious to justify a punitive sanction that is tantamount to a severe criminal penalty."); *Orberg*, 512 U.S. at 434–35 ("A decision to punish a tortfeasor by means of an exaction of exemplary damages is an exercise of state power that must comply with the Due Process Clause of the Fourteenth Amendment.").

165. See *supra* Part III.C.

166. *BMW*, 517 U.S. at 574 (emphasis added).

proposition, the Court cited a handful of criminal cases and then stated: “The strict constitutional safeguards afforded to criminal defendants are not applicable to civil cases, but the basic protection against ‘judgments without notice’ afforded by the Due Process Clause, is implicated by civil *penalties*.”<sup>167</sup>

The importance of the punitive nature of the sanction to the Justices’ understanding of the due process limitations imposed on it is perhaps most clearly evinced by *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*,<sup>168</sup> in which the Court held that due process requires *de novo* review of a trial court’s evaluation of the constitutionality of a punitive damages award.<sup>169</sup> The heart of the Court’s reasoning consisted of comparing punitive damages to criminal penalties and contrasting them with compensatory damages.

Although compensatory damages and punitive damages are typically awarded at the same time by the same decisionmaker, they serve distinct purposes. The former are intended to redress the concrete loss that the plaintiff has suffered by reason of the defendant’s wrongful conduct. The latter, which have been described as “quasi-criminal,” operate as “private fines” intended to punish the defendant and to deter future wrongdoing. A jury’s assessment of the extent of a plaintiff’s injury is essentially a factual determination, whereas its imposition of punitive damages is an expression of its moral condemnation.<sup>170</sup>

The Court went on to note that “[d]espite the broad discretion that States possess with respect to the imposition of criminal penalties and punitive damages, the Due Process Clause of the Fourteenth Amendment to the Federal Constitution imposes substantive limits on that discretion.”<sup>171</sup> Repeatedly citing *BMW*, a punitive damages case, interchangeably with death penalty, life imprisonment without the possibility of parole, and excessive criminal fines cases, the Court explained that in all of “these cases, the constitutional violations were predicated on judicial determinations that the punishments were ‘grossly disproportional to the gravity of . . . defendant[s]’ offense[s]” and elucidated that all of these contexts involve the same “relevant constitutional line.”<sup>172</sup> The Court ultimately concluded that its “decisions in [these] analogous cases, together with the reasoning that produced those decisions, thus [convinced them] that courts of appeals should apply a *de novo* standard of review when passing on district

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167. *Id.* at 574 n.22 (citation omitted) (quoting *Shaffer v. Heitner*, 433 U.S. 186, 217 (1977)).

168. 532 U.S. 424 (2001).

169. *Id.* at 436.

170. *Id.* at 432 (citations omitted).

171. *Id.* at 433.

172. *Id.* at 433–34 (alterations in original) (citations omitted).

courts' determinations of the constitutionality of punitive damages awards."<sup>173</sup>

In sum, to a very substantial degree, it is the close analogy to criminal penalties that has been the primary force behind the Court's constitutionalization of punitive damages,<sup>174</sup> and that analogy simply does not carry over to the rest of tort law. That is the best explanation for why, even though logical and compelling doctrinal arguments can be crafted in favor of extending the punitive damages cases into other torts contexts, the Court is not particularly interested in doing so. To be sure, the potential for massive constitutionalization is there, but it is not a potential that the U.S. Supreme Court is likely to actualize any time soon because what has actually been motivating the Court in the punitive damages context is limited to that context alone.<sup>175</sup>

### B. *The Specter of Lochner*

The second major factor that I believe explains the Court's reluctance to further constitutionalize the law of torts is the looming specter of *Lochner v. New York*<sup>176</sup>—the “poster child for the evils of ‘judicial activism’”<sup>177</sup> and the “most widely reviled decision of the last hundred [or so] years.”<sup>178</sup> Even in the punitive damages cases, the Court has been reluctant to rely openly on substantive due process—as distinguished from its procedural cousin—for fear of being accused of *Lochnerizing*: an accusation that hits particularly close to home when it comes to protecting economic rights.<sup>179</sup> Thus, the Court has

173. *Id.* at 436.

174. For an argument that the Court's constitutionalization of defamation law (*see* discussion *supra* note 7) can also be understood as seeking to prevent tort law from being unfairly employed as a form of criminal prosecution in disguise, *see* Goldberg & Zipursky, *supra* note 2 (manuscript at 3–8).

175. It is fair to wonder just how much work *punishment* can and should reasonably be doing here. Why does it matter to a defendant whether it is told to pay one million dollars as “punishment” or as “compensation”? Either way, it is out the same amount of money. It is true that unlike a compensatory damages award, a “jury's . . . imposition of punitive damages is an expression of its moral condemnation.” *Cooper Indus.*, 532 U.S. at 432. But, one wonders whether that difference would matter much to most defendants. Still, the bottom line, I think, is that the Court simply feels more comfortable imposing comparatively relaxed constitutional constraints on the law's ability to require a defendant to make the plaintiff whole—the typical business of the civil justice system—than it does in letting down the due process guard when the law is punishing the defendant by requiring him to pay additional damages above and beyond what is necessary for full compensation as retribution for wantonly violating a legal norm.

176. 198 U.S. 45 (1905), *overruled by* *Ferguson v. Skrupa* 372 U.S. 726 (1963).

177. Colby, *supra* note 21, at 401.

178. David A. Strauss, *Why was Lochner Wrong?*, 70 U. CHI. L. REV. 373, 373 (2003); *see also* Thomas B. Colby & Peter J. Smith, *The Return of Lochner*, 100 CORNELL L. REV. 527, 536–37 (2015).

179. *See* Colby, *supra* note 21, at 401–08.

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sometimes tried, although rather unconvincingly, to couch its substantive due process objections to punitive damages in procedural terms.<sup>180</sup> Yet, the comparisons to *Lochner* have been levelled nonetheless.<sup>181</sup>

This fear, no doubt, discourages the Court from cavalierly extending the substantive due process right to be free from excessive punitive damages awards into the much wider realm of compensatory damages. After all, despite the Court's concern about the recent explosion in the frequency and size of punitive damages awards, the fact remains that punitive damages are awarded in only a small fraction of all civil cases.<sup>182</sup> Compensatory damages, on the other hand, are awarded in virtually every civil case. Policing all of those awards for constitutional excessiveness would represent a far greater intrusion of substantive due process into the realm of state law than anything seen even in the heyday of the *Lochner* era.<sup>183</sup>

Even when it comes to the Court's reluctance to extend *procedural* due process rights into other areas of tort law, I suspect that the ghost of *Lochner* is lurking in the background. Any time judges invoke *any* sort of due process in the economic arena—especially to protect business interests—they must contend with accusations of *Lochnerizing*. Thus, for instance, when the *Williams* Court relied on procedural due process to place additional limits on punitive damages, the dissenting Justices simply did not believe that that case was really about procedural due process at all.<sup>184</sup> They insisted that the case was really just an example of *Lochner*-style substantive due process review. “It matters not[,]” declared Justice Thomas, “that the Court styles today's holding as ‘procedural’ because the ‘procedural’ rule is simply a confusing im-

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180. *See id.* at 402–03.

181. *See, e.g.,* TXO Prod. Corp. v. All. Res. Corp., 509 U.S. 443, 470–71 (1993) (Scalia, J., concurring) (“I am willing to accept the proposition that the Due Process Clause of the Fourteenth Amendment, despite its textual limitation to procedure, incorporates certain substantive guarantees specified in the Bill of Rights; but I do not accept the proposition that it is the secret repository of all sorts of other, unenumerated, substantive rights—however fashionable that proposition may have been (even as to economic rights of the sort involved here) at the time of the *Lochner*-era cases the plurality relies upon.” (citations omitted)); Steven G. Calabresi, *The Libertarian-Lite Constitutional Order and the Rehnquist Court*, 93 GEO. L.J. 1023, 1052–53 (2005) (reviewing MARK TUSHNET, *THE NEW CONSTITUTIONAL ORDER* (2003)).

182. Jennifer K. Robbennolt, *Determining Punitive Damages: Empirical Insights and Implications for Reform*, 50 BUFF. L. REV. 103, 161 (2002) (estimating that punitive damages are awarded in 1–8% of civil cases).

183. *Cf.* DAVID E. BERNSTEIN, *REHABILITATING LOCHNER* 3 (2011) (noting that the *Lochner*-era Court actually “upheld the vast majority of laws that had been challenged as infringements on liberty of contract”).

184. *See* Colby, *supra* note 21, at 404–05.

plementation of the substantive due process regime this Court has created for punitive damages.”<sup>185</sup>

In addition, even leaving substantive due process completely to the side, the argument that the procedural due process right to present every available defense should be extended to play a major role in shaping state tort law, including the law of mass-tort class actions,<sup>186</sup> has intimate connections to *Lochnerism*. As Moller explained, in the nineteenth century, which was around the time the Fourteenth Amendment was framed, “[c]ourts could, and did, bar defendants from presenting probative evidence when economy or public policy demanded. . . . That’s not to say there is *no* historical support for class action defendants’ arguments. There is. But it is found in an awkward period: the *Lochner* era.”<sup>187</sup> During that era, “in tandem with its development of substantive due process, the *Lochner* Court developed a new conception of *procedural* due process. Due process, the Court held, guarantees a right to present a ‘full defense’ to a civil liability judgment, based on ‘every [probative] fact and circumstance’ bearing on liability.”<sup>188</sup>

It was that line of reasoning that led the high court of New York in 1911—during the heart of the *Lochner* era—to strike down that state’s workers’ compensation law as a violation of the Fourteenth Amendment due process rights of employers, who were being forced to pay compensation for workplace injuries without regard to whether they were truly at fault.<sup>189</sup> The court explained that “[d]ue process of law implies the . . . right of controverting by proof every material fact which bears upon the question of right in the matter involved. If any question of fact or liability be conclusively presumed against [the defendant] this is not due process of law.”<sup>190</sup> The states are free to alter their procedural and substantive common law, the court insisted, but not to the point of abolishing the defendant’s right to establish that it was not at fault for the injury.<sup>191</sup>

That high-profile and wildly unpopular decision “help[ed] to launch the progressive indictment of due process analysis as the handmaiden

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185. Philip Morris USA v. Williams, 549 U.S. 346, 361 (2007) (Thomas, J., dissenting).

186. See *supra* Part III.D.

187. Moller, *supra* note 99, at 322.

188. *Id.* at 322–23 (alteration in original) (citing Heiner v. Donnan, 285 U.S. 312, 327, 329 (1932)); see also *supra* Part III.D (discussing state and federal cases from that era).

189. See *Ives v. S. Buffalo Ry. Co.*, 94 N.E. 431 (N.Y. 1911); Goldberg, *supra* note 91, at 572–73.

190. *Ives*, 94 N.E. at 439 (quoting Zeigler v. S. & N. R.R. Co., 58 Ala. 594 (1877)).

191. *Id.* at 439–41.

of laissez-faire economics.”<sup>192</sup> I suspect that today’s U.S. Supreme Court rightly fears that endorsing these types of arguments again runs the risk not only of upsetting the post-New Deal settlement and calling back into question established institutions like workers’ compensation but, also, of re-inviting uncomfortable admonishments that the “Fourteenth Amendment does not enact Mr. Herbert Spencer’s Social Statics.”<sup>193</sup>

### C. *The Spirit of Federalism*

Finally, it is not difficult to imagine that the Court’s reluctance to further constitutionalize the law of torts is due in part to the fact that the Justices who are personally and politically most inclined to sympathize with the tort reform movement are also the Justices who are most committed to the institution of federalism and, thus, the least likely to support bold federal judicial intervention into the realm of traditional state tort law. It is, of course, true that those Justices are not always completely consistent in their support for federalism and for reducing federal (and U.S. Supreme Court) intrusion into the realms traditionally controlled by the states.<sup>194</sup> The conservative Justices are often lambasted for abandoning their otherwise firm support for federalism and states’ rights, particularly when it comes to matters of federal preemption.<sup>195</sup> Indeed, the modern Court’s broad support for preemption is responsible for a certain amount of the federalization, although not exactly constitutionalization, of state tort law.<sup>196</sup> Some have even speculated that this phenomenon “suggests that the

192. Goldberg, *supra* note 91, at 572.

193. See *Lochner v. New York*, 198 U.S. 45, 75 (1905) (Holmes, J., dissenting), *overruled by* *Ferguson v. Skrupa*, 372 U.S. 726 (1963). Peter Smith and I have recently argued that the conservative legal movement appears to be on the brink of reembracing some aspects of *Lochnerism*. See Colby & Smith, *supra* note 178. If we are right, then, perhaps, these comparisons will not be enough to scare the Court away forever. But, for now, this particular sort of broad, explicit expansion of economic due process rights is probably not an endeavor that the current Justices are quite prepared to undertake. Indeed, several conservative Justices have sought to link *Lochner* and *Roe v. Wade*, 410 U.S. 113 (1973). See Colby & Smith, *supra* note 178, at 560–64, 596, which helps explain why they are particularly skittish about being seen as reviving *Lochnerism*.

194. See, e.g., *Bush v. Gore*, 531 U.S. 98, 142–43 (2000) (Ginsburg, J., dissenting) (“Were the other Members of this Court as mindful as they generally are of our system of dual sovereignty, they would affirm the judgment of the Florida Supreme Court.”).

195. See, e.g., Erwin Chemerinsky, *Empowering States: The Need To Limit Federal Preemption*, 33 PEPP. L. REV. 69, 72–74 (2005).

196. See Goldberg & Zipursky, *supra* note 2 (manuscript at 14–29) (detailing the extent to which the Court has used the preemption doctrine to federalize tort law seemingly well beyond Congress’s actual intentions); Betsy J. Grey, *The New Federalism Jurisprudence and National Tort Reform*, 59 WASH. & LEE L. REV. 475, 478 (2002) (“Federalization of tort law is also occurring indirectly, as products increasingly are being regulated at the federal level, which leaves

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Court may not view tort law in the same category as other areas like criminal law in terms of representing a core state sovereign interest” that should be protected in the name of federalism.<sup>197</sup>

But, I do not believe that is quite right. I suspect that to the Justices, in terms of constitutional federalism, there is a world of difference between the Court finding, as a matter of statutory interpretation, that *Congress* exercised its unquestioned power to displace state tort law, and the Court choosing to displace state tort law *on its own*, as a matter of constitutional law, thus permanently limiting the ability of the states to govern themselves even in the absence of congressional regulation.<sup>198</sup>

It is more difficult for the Justices who claim to be committed to federalism to get behind actions of the latter sort, even if they would politically approve of the results that would come from doing so. Thus, Justices Scalia and Thomas have generally dissented from the Court’s constitutionalization even of punitive damages, concluding that the “Constitution provides no warrant for federalizing yet another aspect of our Nation’s legal culture (no matter how much in need of correction it may be).”<sup>199</sup> With the Court’s conservative Justices worried about federalism concerns and its liberal Justices, perhaps less likely to perceive profound unfairness in the unreformed tort system in the first place,<sup>200</sup> it is diffi-

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individual tort suits vulnerable to either a preemption defense or a defense of regulatory compliance.”).

197. See, e.g., Grey, *supra* note 196, at 509.

198. Cf. Paul D. Clement & Viet D. Dinh, *When Uncle Sam Steps In*, LEGAL TIMES, June 19, 2000, at 66, 66 (“[T]here is no real clash between the Court’s true federalism decisions . . . and its preemption decisions.”).

199. *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 599 (1996) (Scalia, J., joined by Thomas, J., dissenting); see also *TXO Prod. Corp. v. All. Res. Corp.*, 509 U.S. 443, 472 (1993) (Scalia, J., joined by Thomas, J., concurring) (“State legislatures and courts have ample authority to eliminate any perceived ‘unfairness’ in the common-law punitive damages regime . . . . The plurality’s continued assertion that federal judges have . . . power to impose a standard of ‘reasonable punitive damages’ through the clumsy medium of the Due Process Clause serves only to . . . reduce the incentives for the proper institutions of our society to undertake that task.” (citations omitted)).

200. See, e.g., Mark A. Hofmann, *Supreme Court Nominee’s Tort Reform Stance Praised*, BUS. INS. (May 11, 2010, 2:11 PM), <http://www.businessinsurance.com/article/20100511/NEWS/10051979> (quoting Victor Schwartz, General Counsel of the American Tort Reform Association, who worked with future-Justice Kagan during her time in the Clinton Administration and found that she was “distinctly pro-plaintiff” and “had a clear hand” in the President’s vetoing a tort reform bill); Sonia Sotomayor & Nicole A. Gordon, *Returning Majesty to the Law and Politics: A Modern Approach*, 30 SUFFOLK U. L. REV. 35, 46 (1996) (urging lawyers to “challenge overreactions that undermine the principles of our judicial system” and noting, by way of example, that “legislators have introduced bills that place arbitrary limits on jury verdicts in personal injury cases[,]” which is “inconsistent with the premise of the jury system”).

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cult to count to five votes for the further constitutionalization of torts.<sup>201</sup>

## V. CONCLUSION

The U.S. Supreme Court has, to a substantial degree, constitutionalized the law of punitive damages. But, it has not constitutionalized many other aspects of tort law despite the facts that: (1) the doctrinal framework is in place to do so; and (2) the business community has been vigorously pushing the Court in that direction. The business community will, no doubt, continue to prod. And, if the Justices ever reach the conclusion that the tort system has become profoundly and catastrophically unfair—and that the political branches of government are not going to do anything about the problem—perhaps the Court will take the next step. But, for the reasons discussed in this Article, I do not believe that is likely to happen any time soon.

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201. It does appear that Justice Scalia might have been on board with one expansion of the Constitution into the realm of torts: the use of the right to present every available defense to limit the states' ability to streamline the adjudication of mass tort class actions. *See supra* note 148 and accompanying text. But, with Justice Scalia's recent passing, that vote has been lost.

