

**TESTIMONY OF**

**ROBERT S. PECK,  
President,  
Center for Constitutional Litigation, P.C.**

**before the**

**SUBCOMMITTEE ON THE CONSTITUTION**

**of the**

**COMMITTEE ON THE JUDICIARY**

**U.S. HOUSE OF REPRESENTATIVES**

**regarding**

**POTENTIAL CONGRESSIONAL RESPONSES TO**

***STATE FARM MUTUAL AUTOMOBILE INSURANCE CO.***

**v.**

***CAMPBELL***

**SEPTEMBER 23, 2003**

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**I. Introduction**

Mr. Chairman and Members of the Subcommittee:

I thank the Subcommittee for its invitation to testify today on the topic of punitive damages. To begin, allow me provide the Committee with a little of my background. I am president of the Center for Constitutional Litigation, P.C., a Washington, D.C. law firm that limits its practice to constitutional cases in furtherance of access to justice. One of our firm's clients is the Association of Trial Lawyers of America, for whom I serve as Senior Director for Legal Affairs and Policy Administration.

In addition to being a practitioner, I also serve as an adjunct professor of constitutional law at the law schools of both American University and George Washington University. I am as well a member of the Board of Overseers of the RAND Institute for Civil Justice, the Lawyers Committee of the National Center for State Courts, and the Council of the American Bar Association's Tort Trial and Insurance Practice Section.

Of most immediate relevance to the Subcommittee's topic today, I argued a punitive damage case, *Rhyne v. K-Mart, Inc.*, in the North Carolina Supreme Court just two weeks ago. The case involved the constitutionality of a state statute limiting punitive damages and, alternatively, the application of *State Farm Mutual Automobile Insurance*

*Co. v. Campbell*. I am also Counsel of Record in *Philip Morris v. Williams*, where the defendant has sought review of a punitive damage judgment in the United States Supreme Court on the issue of excessiveness. My law firm also represents the Smith family in *Estate of Smith v. Ford Motor Co.*, which will be argued in the Kentucky Supreme Court in a few weeks on remand from the U.S. Supreme Court in light of *Campbell*.

The *Campbell* decision has also figured in other activities of mine. On Friday of last week, I participated on a panel with the two lawyers who will be arguing the remand of the *Campbell* case before the Utah Supreme Court in a few weeks. I have also chaired a continuing legal education program for the Practising Law Institute on “Punitive Damages after *State Farm v. Campbell*,” and will participate in a second program of the same title for them in New York on October 7. Finally, I am the author of the upcoming American Jurisprudence Proof of Facts 3d on Punitive Damages. I come to this hearing with a close and thorough appreciation of *Campbell*.

## **II. The Landscape of Punitive Damages**

### **A. Legal Treatment of Punitive Damages**

It is useful to begin with an understanding of the development and law of punitive damages. Punitive damages originated in the common law.<sup>1</sup> In 1763, English courts firmly established the legitimacy of punitive, or exemplary, damages as a common-law

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<sup>1</sup> Linda L. Schlueter & Kenneth R. Redden, *Punitive Damages* § 1.0, at 1 (4<sup>th</sup> ed. 2000) (finding that punitive damages “evolved from the common law . . . to meet certain societal needs such as compensation for mental anguish or other intangible harms, punishment and deterrence of wrongdoers, and as a substitute for revenge”). Schlueter and Redden also note that use of multiple damages for these purposes existed at least as far back as the Code of Hammurabi in 2000 B.C. *Id.*

device within the jury's province.<sup>2</sup> In *Wilkes*, one of the most important and influential cases of English law to the American founders,<sup>3</sup> Lord Chief Justice Pratt announced: "[A] jury shall have it in their power to give damages for more than the injury received as a punishment to the guilty, to deter from any such proceeding for the future, and as a proof of the detestation of the jury to the action itself."<sup>4</sup>

Soon after *Wilkes*, American courts began to award punitive damages, with South Carolina being the first in 1784.<sup>5</sup> Typical of these cases was a 1791 New Jersey case in which the jury was instructed "not to estimate the damage by any particular proof of suffering or actual loss; but to give damages for example's sake, to prevent such offenses in [the] future."<sup>6</sup> Typically, if the jury's punitive verdict was either insufficient or excessive, the appropriate remedy was a choice between a judge-chosen number (remittitur) or a new jury trial.<sup>7</sup> Given this history, the U.S. Supreme Court has observed that punitive damages "have long been a part of traditional state tort law."<sup>8</sup>

From those early days, the practice was not without criticism. Still, while acknowledging that "some writers" had questioned the "propriety" of punitive damages,

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<sup>2</sup> *Huckle v. Money*, 95 Eng. Rep. 768 (C.P. 1763); *Wilkes v. Wood*, 98 Eng. Rep. 489 (C.P. 1763).

<sup>3</sup> *See City of West Covina v. Perkins*, 525 U.S. 234, 247 (1999).

<sup>4</sup> *Wilkes*, 98 Eng. Rep. at 498-99.

<sup>5</sup> *See Genay v. Norris*, 1 S.C.L. (1 Bay) 6 (S.C. 1784).

<sup>6</sup> *Coryell v. Colbaugh*, 1 N.J.L. 77, 77 (N.J. 1791).

<sup>7</sup> *See, e.g., Harton v. Reavis*, 4 N.C. 256 (N.C. 1815).

<sup>8</sup> *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 255 (1984).

the U.S. Supreme Court in 1851, ruled that this “well-established principle of the common law” was too much a part of the fabric of the law to undo.<sup>9</sup> In fact, the Court said:

if repeated judicial decisions for more than a century are to question will not admit of argument. By the common law as well as by statute law, men are often punished for aggravated misconduct or lawless acts, by means of civil action, and the damages inflicted, by way of penalty or punishment, given to the party injured. . . . the damages assessed depend on the circumstances, showing the degree of moral turpitude or atrocity of the defendant’s conduct, and may properly be termed exemplary or vindictive rather than compensatory . . . This has been always left to the discretion of the jury, *as the degree of punishment to be thus inflicted must depend on the peculiar circumstances of each case.*<sup>10</sup>

As the Court’s opinion indicates, the jury was vested with broad discretion to determine the amount of punitive damages without limitations and respecting only the circumstances of the case. Early caselaw also recognized that the punishment of wealthy defendants often required a larger punitive amount than poorer defendants because “a thousand dollars may be a less punishment to one man than a hundred dollars to another.”<sup>11</sup> Authority to determine that a punitive award was excessive rested with the trial judge, who had “a unique opportunity to consider the evidence in the living courtroom context” and would only be overruled for an abuse of discretion.<sup>12</sup>

Recently, another wrinkle was added to punitive damages – constitutional considerations of due process. In *Pacific Mutual Life Insurance Co. v. Haslip*,<sup>13</sup> the Supreme Court held that the Fourteenth Amendment’s Due Process Clause applies to a

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<sup>9</sup> Day v. Woodworth, 54 U.S. (13 How.) 363, 371 (1851).

<sup>10</sup> *Id.* (emphasis added).

<sup>11</sup> Pendleton v. Davis, 46 N.C. 98, 1853 WL 1452, at 1 (1853).

<sup>12</sup> Worthington v. Bynum, 290 S.E.2d 599, 606 (N.C. 1982).

<sup>13</sup> 499 U.S. 1 (1991).

punitive damage award between private litigants, but that the Alabama procedures at issue in that case satisfied due process. The *Haslip* Court, much like the *Campbell* Court, offered a ratio as guidance to the lower courts. Although not creating any hard and fast rule, it said “an award of more than four times the amount of compensatory damages might be close to the line of constitutional impropriety.”<sup>14</sup>

In its next decision, the Court showed how little that ratio mattered. In *TXO Production Corp. v. Alliance Resources*,<sup>15</sup> the Court was asked to rule that \$10 million in punitive damages was unconstitutionally excessive when compared to an award of \$19,000 in compensatory damages, which consisted entirely of the cost of defending a declaratory judgment action. The Court ruled that the 526:1 ratio was not excessive considering the potential loss to the plaintiff if the fraudulent scheme had succeeded, the bad faith of the defendant, the fact that the scheme was part of a “larger pattern of fraud, trickery and deceit, and [the defendant’s] wealth.”<sup>16</sup>

Next, rather than consider issues of excessiveness, the Supreme Court found that judicial review of punitive damages was needed and the standard employed had to be more than whether there was evidence to support the verdict.<sup>17</sup> Then, in *BMW of North America, Inc. v. Gore*,<sup>18</sup> the Court found, for the first time, that a punitive award violated due process by being grossly excessive. To make that determination, the Court established three guideposts, the most important of which was the extent of reprehensibility of the defendant’s conduct, which in turn is measured, in large part, by

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<sup>14</sup> *State Farm Mut. Auto. Ins. Co. v. Campbell*, 123 S. Ct. 1513, 1524 (2003), characterizing *Haslip*, 499 U.S. at 23-24.

<sup>15</sup> 509 U.S. 443 (1993).

<sup>16</sup> *Id.* at 18 (footnote omitted).

<sup>17</sup> *Honda Motor Co., Ltd. v. Oberg*, 512 U.S. 415 (1994).

<sup>18</sup> 517 U.S. 559 (1996).

the presence of up to five aggravating factors.<sup>19</sup> These guideposts remain the means of measuring constitutional excessiveness.

The last of the pre-*Campbell* punitive damage cases is *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*<sup>20</sup> *Cooper* established that punitive verdicts in federal court are subject to *de novo* review and that the Seventh Amendment jury trial right does not reexamine punitive damages, even though it left that subject untouched when it comes to state constitutional law in state courts.

### **B. Empirical Data on Punitive Damages**

Before briefly reviewing the *Campbell* decision, it is worth reviewing the relevant empirical research on punitive damages. First, it is important that this Subcommittee understand that punitive damage awards remain the most rare of results. When awarded, the numbers are simply not eye-popping. A study conducted by the U.S. Department of Justice, using 1996 statistics from 75 of the Nation's largest counties found that only three percent of plaintiffs who won their cases were awarded punitive damages and that the median punitive damage award was \$38,000.<sup>21</sup> More recent empirical studies conducted by researchers at the National Center for State Courts confirm those findings.<sup>22</sup> These figures represent a decline, rather than an upward trend. The previous Justice Department study, using 1992 data, showed about six percent of plaintiffs received an award and that the median award was \$50,000.<sup>23</sup> The trend is downwards.

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<sup>19</sup> *Id.* at 575-76.

<sup>20</sup> 532 U.S. 424 (2001).

<sup>21</sup> U.S. Dep't of Justice, Bureau of Justice Statistics, TORT TRIALS AND VERDICTS IN LARGE COUNTIES, 1996 (NCJ 179769), at 1 (Aug. 2000).

<sup>22</sup> Theodore Eisenberg, *et al.*, *Juries, Judges, and Punitive Damages: An Empirical Study*, 87 CORNELL L. REV. 743 (2002).

<sup>23</sup> U.S. Dep't of Justice, Bureau of Justice Statistics, CIVIL JUSTICE SURVEY OF STATE COURTS, 1992: CIVIL JURY CASES AND VERDICTS IN LARGE COUNTIES, at 1 (1995).

Statewide studies similarly show punitive damages are insignificant. The most recent Georgia study, for example, concludes “punitive damages currently are not a significant factor in personal injury litigation.”<sup>24</sup> In Florida, the statistics show punitive damage verdicts to be “strikingly low.”<sup>25</sup> A comprehensive study by Jury Verdict Research (JVR) found that for the period 1992-97 North Carolina punitive damage awards represented only four percent of all plaintiff verdicts.<sup>26</sup>

In fact, as one researcher put it after surveying the academic literature, “[e]very empirical study of punitive damages demonstrates that there is no nationwide punitive damages crisis.”<sup>27</sup> Even an 11-state study of 25,627 civil jury verdicts concluded claims of a punitive damage crisis were “unfounded, and perhaps manufactured.”<sup>28</sup>

Punitive awards in medical malpractice and products liability also tend to be sparse. Duke law professor and sociologist Neil Vidmar reviewed 1,300 medical malpractice cases in North Carolina, finding only two cases awarded punitive damages.<sup>29</sup> In demographically important Franklin County, Ohio, which is a microcosm of the entire U.S. population, researchers reviewed every verdict issued over a twelve-year period and found not a single punitive award in a medical malpractice or product liability case.<sup>30</sup>

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<sup>24</sup> Thomas A. Eaton, *et al.*, *Another Brick in the Wall: An Empirical Look at Georgia Tort Litigation in the 1990s*, 34 GA. L. REV. 1049, 1094 (2000).

<sup>25</sup> Neil Vidmar & Mary R. Rose, *Punitive Damages by Juries in Florida: In Terrorem and in Reality*, 38 HARV. J. LEGIS. 487, 487 (2001).

<sup>26</sup> Jury Verdict Research, 1998 North Carolina Verdict Survey 9 (1998).

<sup>27</sup> Michael L. Rustad, *Unraveling Punitive Damages: Current Data and Further Inquiry*, 1998 WIS. L. REV. 15, 69.

<sup>28</sup> Stephen Daniels & Joanne Martin, *Myth and Reality in Punitive Damages*, 75 MINN. L. REV. 1, 64 (1990) (footnotes omitted).

<sup>29</sup> Neil Vidmar, *MEDICAL MALPRACTICE AND THE AMERICAN JURY* 254 (1995).

<sup>30</sup> Deborah Jones Merritt & Kathryn Ann Barry, *Is the Tort System in Crisis? New Empirical Evidence*, 60 OHIO ST. L.J. 315, 388 (1999).

The Florida researchers found that, “with the exception of asbestos cases, punitive damages were almost never given in products liability cases.”<sup>31</sup> Incidentally, when punitive damages have been awarded in medical malpractice cases, a shockingly high number of the cases involved sexual assault and battery on patients by the medical provider.<sup>32</sup>

Nor do the studies show a difference between awards made by judges and awards made by juries. The National Center for State Courts study found that “[j]uries and judges award punitive damages at about the same rate, and their punitive awards bear about the same relation to their compensatory awards.”<sup>33</sup> Study after study demonstrates that punitive verdicts correlate closely with the seriousness of the misconduct. One study of medical malpractice cases over a period of 30 years found “punitive damages were awarded in only the most egregious cases involving healthcare practitioners.”<sup>34</sup> Judge Richard Posner and Professor William Landes reviewed products liability cases to conclude “the cases as a whole are generally congruent with the formal legal standard for awarding punitive damages.”<sup>35</sup> Even when awards appear on their face to be disproportionate, the underlying facts often reveal them to be warranted.<sup>36</sup>

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<sup>31</sup> Vidmar & Rose, *supra* note 25, 38 HARV. J. LEGIS. at 487.

<sup>32</sup> Michael Rustad & Thomas Koenig, *Reconceptualizing Punitive Damages in Medical Malpractice: Targeting Amoral Corporations, Not “Moral Monsters,”* 47 RUTGERS L. REV. 975, 1034-35 (1995).

<sup>33</sup> Eisenberg, *supra* note 22, 87 CORNELL L. REV. at 779.

<sup>34</sup> Rustad & Koenig, *supra* note 32, 47 RUTGERS L. REV. at 1027.

<sup>35</sup> William M. Landes & Richard A. Posner, *THE ECONOMIC STRUCTURE OF TORT LAW* 185 (1987).

<sup>36</sup> *See, e.g.,* Eisenberg, *supra* note 22, 87 CORNELL L. REV. at 756; Vidmar & Rose, *supra* note 25, 38 HARV. J. LEGIS. at 500-05.

Surprisingly, while so much legislative attention is paid to these unremarkable physical harm cases, the real action appears to be in financial injury cases, where punitive awards are increasing in number and size.<sup>37</sup> In fact, all of the punitive-damage excessiveness cases reviewed in the U.S. Supreme Court have involved pure economic harm, rather than physical harm. Simply put, punitive damages in personal injury matters are being handled sensibly by juries and judges. They remain infrequent, are generally modest in size, correlate closely with the severity of the misconduct, and are vigilantly reviewed by courts for excessiveness. No crisis warranting congressional attention is evident.

### **III. What *State Farm v. Campbell* Held**

Critics of punitive damages engage in wishful thinking when they claim the Supreme Court's opinion in *Campbell* established that a ratio of punitive to compensatory damages in excess of single digits is presumptively unconstitutional. It clearly does not. Instead, *Campbell* reiterated:

“‘[W]e have consistently rejected the notion that the constitutional line is marked by a simple mathematical formula, even one that compares actual *and potential* damages to the punitive award.’ We decline again to impose a bright-line ratio.”<sup>38</sup>

In fact, the Court stated the ratios it articulated “are not binding, [instead] they are instructive.”<sup>39</sup> Still, it said, “*there are no rigid benchmarks that a*

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<sup>37</sup> Erik Moller, *et al.*, *Punitive Damages in Financial Injury Jury Verdicts*, 28 J. LEGAL STUD. 283 (RAND 1999).

<sup>38</sup> *Campbell*, 123 S. Ct. at 1524, quoting *BMW*, 517 U.S. at 582 (emphasis in original, citation omitted).

<sup>39</sup> *Id.*

*punitive damages award may not surpass.*”<sup>40</sup> The Court did suggest that a 9 to 1 ratio was “more likely to comport with due process . . . than awards with ratios in range of 500 to 1.”<sup>41</sup> However, the Court’s use of “more likely” signals that there will be circumstances where a 500:1 ratio would be appropriate. The ‘precise award in any case, of course, must be based upon the facts and circumstances of the defendant’s conduct and the harm to the plaintiff.’<sup>42</sup>

*Campbell* acknowledges, for example, that “ratios greater than those we have previously upheld may comport with due process where ‘a particularly egregious act has resulted in only a small amount of economic damages’”<sup>43</sup> The Court further noted that a higher ratio *might* be necessary where “‘the injury is hard to detect or the monetary value of noneconomic harm might have been difficult to determine.’”<sup>44</sup>

Justice Stevens, the author of the *BMW v. Gore* decision, explained another of the circumstances warranting a high ratio:

It is appropriate to consider the magnitude of the potential harm that the defendant’s conduct would have caused to its intended victim if the wrongful plan had succeeded, *as well as the possible harm to other victims* that might have resulted if similar future behavior were not deterred.<sup>45</sup>

A plain reading of *Campbell*, contrary to the fevered accounts that imaginative advocates have penned, indicates that there is nothing magical about the ratios.

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<sup>40</sup> *Id.* (emphasis added).

<sup>41</sup> *Id.*

<sup>42</sup> *Id.* (there is no “bright-line ratio which a punitive damage award cannot exceed”).

<sup>43</sup> *Id.* (citation omitted).

<sup>44</sup> *Id.* (citation omitted).

<sup>45</sup> *TXO*, 509 U.S. at 460 (emphasis added).

Moreover, because due process is a two-edged sword, there may be a due process violation of the plaintiff's rights by the creation of a rigid ratio that is less than necessary to serve the punishment and deterrence purposes of punitive damages in relation to the harm caused by the conduct.

So, then, what did *Campbell* do that is new? Certainly, it did nothing new with respect to gross excessiveness. The Court found the excessiveness issue in *Campbell* "neither close nor difficult" while applying the well-established "principles set forth in *BMW of North America, Inc. v. Gore*."<sup>46</sup> It did not change or further explain the guideposts established in *BMW*, although it could be argued that the third guidepost (comparability to civil or criminal fines or other punitive damage awards) is less relevant now.

What it did do, however, is limit the use of out-of-state conduct to determine punitive damages. Previously, the Court prohibited punitive damages based on out-of-state conduct that was lawful in other states.<sup>47</sup> In *Campbell*, the Court ruled that a State does not have a "legitimate concern in imposing punitive damages to punish a defendant for *unlawful* acts committed outside of the State's jurisdiction."<sup>48</sup> In other words, when Utah levies punitive damages against a company for acts that are also illegal in other states, it must only concern itself with the impact in Utah and leave it to other states' courts to award appropriate punitive damages for the effects in those states. By doing so, the Court endorsed the multiple punitive damage approach that Mr. Schwartz has asked this Subcommittee to prohibit by law. Thus, his proposal is not an implementation of *Campbell*, but a repudiation of it.

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<sup>46</sup> *Campbell*, 123 S.Ct. at 1521.

<sup>47</sup> *BMW*, 517 U.S. at 572.

<sup>48</sup> *Campbell*, 123 S.Ct. at 1522.

Second, while acknowledging that wealth may be offered into evidence, the Court said that it alone may not justify the size of a punitive damage verdict.<sup>49</sup> Finally, to the extent evidence is introduced to demonstrate recidivism, the Court found that the prior acts must be similar on all points.<sup>50</sup> Thus, the bad-faith insurance claim at issue in *Campbell* had to be paired with similar bad-faith automobile insurance instances, rather than instances involving, for example, earthquake, hurricane or flood damage.

#### **IV. Federalism Concerns Limit Congressional Authority over Punitive Damages**

Before Congress acts, it must come to terms with the very serious federalism concerns that indicate that there is a very circumscribed role for Congress in the area of punitive damages. Congressional authority is limited to federal causes of action that justify punitive damages, for punitive damages have no existence independent of the underlying cause of action, and to certain taxation issues. Federal actions in which punitive damages are authorized are largely civil rights actions. For example, the Civil Rights Act of 1991 authorizes punitive damages in Title VII cases where an employer intentionally discriminates “with malice or with reckless indifference to the federally protected rights.”<sup>51</sup> Even so, Congress has seen fit to limit the amounts of such awards on a sliding scale based on the employer’s size. The limits apply to the “sum of the amount of compensatory damages awarded . . . for future pecuniary losses, emotional

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<sup>49</sup> *Id.*

<sup>50</sup> *Id.*

<sup>51</sup> 42 U.S.C. § 1981a(b)(1).

pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, and other nonpecuniary losses, and the amount of punitive damages awarded.”<sup>52</sup>

Civil rights cases, however, are not the types of cases that have brought the proponents of legislative action before this committee. They instead have focused their attention entirely on state-based personal injury causes of action. This is curious because, as I indicated earlier, there is no punitive damage crisis in this area. It is instead in financial injury cases where there has been a growth in the number and amounts of punitive damage verdicts.<sup>53</sup> Each of the excessiveness cases heard in the U.S. Supreme Court – *Haslip*, *TXO*, *BMW*, *Cooper* and *Campbell* – have involved economic injuries, which the Court has repeatedly indicated are less reprehensible as a rule than those that involve physical harm.

In asking for a federal regulatory overlay on punitive damage judgments, advocates for the change are asking Congress to exceed its constitutional authority and intrude into a realm that the Constitution reserves to the States. The Supreme Court warned that Congress bears a “very heavy burden when affecting areas of traditional state concern.”<sup>54</sup> To understand why that burden cannot be met here, one need look little further than the Supreme Court’s punitive damage decisions. Nearly twenty years ago, the Supreme Court recognized that punitive damages “have long been a part of traditional state tort law.”<sup>55</sup> They serve the purpose of “further[ing] a State’s legitimate interests in

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<sup>52</sup> *Id.* at § 1981a(b)(3).

<sup>53</sup> See Moller, *supra* note 37.

<sup>54</sup> *United States v. Lopez*, 514 U.S. 549, 577 (1995).

<sup>55</sup> *Silkwood*, *supra*, 464 U.S. at 255.

punishing unlawful conduct and deterring its repetition.”<sup>56</sup> In *Campbell*, the Court reiterated the connection to a State’s sovereign authority:

A basic principle of federalism is that each State may make its own reasoned judgment about what conduct is permitted or proscribed within its borders, and each State alone can determine what measure of punishment, if any, to impose on a defendant who acts within its jurisdiction.<sup>57</sup>

For these reasons, the *Campbell* Court ruled, a State may not impose “punitive damages to punish a defendant for unlawful acts committed outside the State’s jurisdiction.”<sup>58</sup> Thus, because punitive damages may be assessed only to vindicate the State’s sovereign interests in punishment and deterrence, it is part of the irreducible core of a State’s authority and protected by the Tenth Amendment from congressional interference. It is intimately related to the process of democratic self-government, any interference with which, the Supreme Court has said, “would upset the usual constitutional balance of federal and state powers.”<sup>59</sup>

A further complication is that some states do not permit punitive damages at all.<sup>60</sup> In other states, punitive damages have a compensatory element. For example, in Alabama, punitive damages in wrongful death are compensatory; the usual rules on punitive damages do not apply.<sup>61</sup> This lack of uniformity in the states is a feature of

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<sup>56</sup> *BMW*, *supra*, 517 U.S. at 568.

<sup>57</sup> *Campbell*, *supra*, 121 S.Ct. at 1523.

<sup>58</sup> *Id.* at 1522.

<sup>59</sup> *Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991).

<sup>60</sup> *See, e.g.*, N.H. Rev. Stat. § 507:16 (outlawing punitive damages).

<sup>61</sup> Craig S. Bonnell, *Back and Forth with the I.R.S.: Taxation of Wrongful Death Damages in Alabama*, 17 CUMB. L. REV. 53, 68 (1987).

federalism that the Constitution celebrates, rather than condemns. It poses insuperable obstacles to a federal regulatory scheme.

I am confident that the Court would find congressional interference with the core state function of assessing punishment in the form of punitive damages unconstitutional. Before the *Campbell* decision, multiple awards vindicating interstate interests were possible in a single State's court and logically could have provided a basis for congressional action. After *Campbell*, that is no longer possible. With its disappearance as an issue, whatever congressional authority may have existed also evaporated. Congress may not legislate against multiple punitive damage judgments that vindicate a State's own interests against reprehensible conduct, nor may Congress allocate how such an award is distributed when there is only a State, and not a federal, interest at stake.

The two most likely counterarguments that proponents of such measures might raise are easily dismissed. First, I can imagine these advocates asserting that such a law would be premised on congressional authority over interstate commerce. However, a State's authority to punish and deter egregious misconduct is not a matter of commerce, but a function of their police power; it is not subject to federal preemption.

Nor can a credible argument be formulated that punitive damages place a burden on interstate commerce. A similar argument, supported by detailed legislative findings and voluminous testimony, was insufficient to save the Violence Against Women Act (VAWA) from constitutional invalidation in *United States v. Morrison*.<sup>62</sup> *Morrison* said

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<sup>62</sup> 529 U.S. 598 (2000).

that the scope of the interstate commerce power must respect our system of dual sovereignty, including States' rights.<sup>63</sup>

Punitive damages are similar in that they are “quasi-criminal,”<sup>64</sup> and thus, “by its terms has nothing to do with ‘commerce’ or any sort of economic enterprise, however broadly one might define those terms.”<sup>65</sup> To fall within the commerce power, the law must regulate an economic activity that substantially affects interstate commerce. *Morrison*, the VAWA case, involved noneconomic, criminal conduct.<sup>66</sup> Punitive damages similarly involve some egregious and reprehensible acts that are quasi-criminal and not economic in nature. The Court’s evaluation of the type of conduct being regulated turns on whether the underlying conduct constitutes “some sort of economic endeavor.”<sup>67</sup> Thus, the Court considered whether possession of a gun in a school zone in *Lopez* or the violent sexual assault on a woman in *Morrison* constituted an economic activity within the commerce power. Neither qualified.

The conduct that engenders punitive damages also cannot be regarded as economic activity. There is no commercial market for willful, fraudulent or malicious acts that merit the community’s moral condemnation – for that is what punitive damages punish. No one can seriously claim that encouraging such acts aids economic development or contributes to a stable national economy.

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<sup>63</sup> *Id.* at 608 (citations omitted).

<sup>64</sup> Cooper, *supra*, 532 U.S. at 432.

<sup>65</sup> Lopez, *supra*, 514 U.S. at 561, quoted in Morrison, *supra*, 529 U.S. at 610.

<sup>66</sup> Morrison, *supra*, 529 U.S. at 610.

<sup>67</sup> *Id.*

Obviously, punitive damages also affect considerable tortious conduct utterly unconnected to any commercial enterprise, such as particularly malicious intentional torts like assault and battery or injuries that result from a drunk driver's reckless conduct. Because of that, the Supreme Court requires those laws premised on the Commerce Clause to contain jurisdictional restrictions that limit the reach of the regulation to those activities that have "an explicit connection with or effect on interstate commerce."<sup>68</sup>

Here, as was claimed in *Lopez*, one can imagine proponents of legislation alleging that the costs of punitive damages are spread throughout the economy and would adversely affect national productivity and, thus, interstate commerce. The Court, however, rejected those justifications in both *Lopez* and *Morrison*, "because they would permit Congress to 'regulate not only all violent crime, but all activities that might lead to violent crime, regardless of how tenuously they relate to interstate commerce.'"<sup>69</sup> With respect to punitive damages, the same could be said of all civil sanctions for reprehensible misconduct.

The *Morrison* Court then tellingly quoted the *Lopez* decision for its holding that "[u]nder the[se broad aggregate-effect] theories . . . , it is difficult to perceive any limitation on federal power, even in areas such as criminal law enforcement or education where States historically have been sovereign. Thus, if we were to accept the Government's arguments, we are hard-pressed to posit any activity by an individual that

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<sup>68</sup> *Lopez, supra*, 514 U.S. at 562, quoted in *Morrison, supra*, 529 U.S. at 612.

<sup>69</sup> *Morrison, supra*, 529 U.S. at 612-13, quoting *Lopez, supra*, 514 U.S. at 564.

Congress is without power to regulate.”<sup>70</sup> The Court refused to travel down that path, as it undoubtedly would with respect to punitive damages.

The *Morrison* Court’s decision also overrode numerous findings by Congress. Anticipating criticism for that action, the Court said that just because Congress deems that an “activity substantially affects interstate commerce does not necessarily make it so.”<sup>71</sup> Consider the findings the Court found insufficient to sustain VAWA. Congress found gender-motivated violence affects interstate commerce

by deterring potential victims from traveling interstate, from engaging in employment in interstate business, and from transacting with business, and in places involved in interstate commerce, . . . by diminishing national productivity, increasing medical and other costs, and decreasing the supply of and demand for interstate products.<sup>72</sup>

One would imagine that proponents of punitive-damage legislation would advocate quite similar findings. Yet, the findings were rejected because it would allow “the Commerce Clause to completely obliterate the Constitution’s distinction between national and local authority.”<sup>73</sup> One could also easily imagine the Court concluding that the “punishment of [egregious and reprehensible acts of wanton, reckless or willful misconduct] is not directed at the instrumentalities, channels, or goods involved in interstate commerce [but] has always been the province of the States.”<sup>74</sup> Punitive damage regulation does not fall within the Commerce Power.

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<sup>70</sup> *Id.* at 613, quoting *Lopez, supra*, 514 U.S. at 564.

<sup>71</sup> *Id.*, quoting *Lopez, supra*, 514 U.S. at 577 n.2.

<sup>72</sup> *Id.* at 614 (citation omitted).

<sup>73</sup> *Id.*

<sup>74</sup> *Id.* at 618.

A second flawed argument would invoke Section 5 of the Fourteenth Amendment. That section gives Congress the authority to enforce the rights preserved through the Fourteenth Amendment by appropriate legislation. The argument in favor of legislative authority here would assert that legislation was needed to restrain States from violating the due process rights of punitive-damage defendants. However, to make such an assertion of need, proponents must bear a particularly heavy evidentiary burden, one that they simply cannot sustain. After all, VAWA was also justified on grounds that there was a “pervasive bias in various state justice systems against victims of gender-motivated violence,” which a “voluminous congressional record” set out in detail.<sup>75</sup>

The Court, however, found that it was not uniform across the country. It noted that broad remedial measures cannot pass constitutional muster when the due-process violation does not “exist in all States or even most States.”<sup>76</sup> Thus, for example, the Voting Rights Act’s preclearance provisions are confined in operation to those regions of the country where voting discrimination was most flagrant. It is difficult to imagine Congress segregating out States for Section 5 punitive damage reasons for coverage in a regulatory scheme.

In fact, with respect to punitive damages, no compelling case can be made that all or most States violate a defendant’s due process rights. States have enacted laws carefully delineating the necessary proof and level of misconduct to permit a valid punitive damage verdict. States have implemented special and specific jury instructions. Each state requires, should a defendant elect, mandatory appellate review, often, if not

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<sup>75</sup> *Id.* at 619-20.

<sup>76</sup> *Id.* at 626.

uniformly, *de novo*. Criminal sentencing does not receive as much scrutiny and due process. Perhaps the biggest *coup de grace* to allegations of widespread due-process violations comes from the Supreme Court's *TXO* decision:

Assuming that fair procedures were followed, a judgment that is a product of that process is entitled to a strong presumption of validity. Indeed, there are persuasive reasons for suggesting that the presumption should be irrebuttable, or virtually so.<sup>77</sup>

A case for widespread and longstanding due process violations cannot be made.

## V. Multiple Punitive Damage Awards

Although I have already expressed the strong constitutional reasons why Congress may not regulate when a State may require punitive damages for the same pattern of conduct that may have merited punitive damages in another State, it is worth examining somewhat further the flawed logic of the anti-multiple punitive damage position.

If a State could punish a defendant for its nationwide conduct, a result foreclosed by *Campbell*, there might be merit to limits on multiple awards. However, *Campbell* makes clear that each punitive award can only be sufficient to punish and deter for what harms the defendant visited upon that State's citizenry. Thus, if an organization that operates nationally engaged in an egregious fraud, the Illinois courts may award punitive damages based on the harm or potential harm the fraud had in Illinois, as well as the illicit Illinois-based profits generated by the fraud. The award may not consider the harms or profits generated by the same illicit fraud in Wisconsin, which alone may exact punishment for that in-state misconduct.

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<sup>77</sup> *TXO*, *supra*, 509 U.S. at 457 (citations omitted).

Still, the law of most States would allow the defendant to introduce evidence of the first punitive award, show that it has effectively caused the defendant to mend its ways, and seek to avoid or limit any subsequent punitive damages because of the earlier award.<sup>78</sup> The problem of multiple damages has been effectively treated by these provisions.

Given that the *Campbell* Court endorsed the multiple punitive damage concept by limiting awards to in-state harms, Congress clearly cannot claim that it is implementing *Campbell* or responding to potential due-process violations.

## **VI. Redistribution of Awards is a State Matter**

I understand there is some interest on the Subcommittee in considering whether an award-splitting bill should be enacted. A number of states have adopted similar statutes that appropriate a percentage of any punitive damage judgment to the state or a public purpose. Utah was the first to enact such a law; there, 50 percent of any award goes to the State.<sup>79</sup> Other states take a higher percentage. For example, Indiana takes 75 percent.<sup>80</sup> Other states have similarly high percentages.<sup>81</sup> In addition, one state supreme court, Ohio's, has imposed a similar regime by judicial decision.<sup>82</sup> And another state

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<sup>78</sup> See, e.g., Restatement (Second) of Torts § 908, Comment e (1977); *Owens-Corning Fiberglas Corp. v. Malone*, 972 S.W.2d 35 (Tex. 1998); *Schaffer v. Edward D. Jones & Co.*, 521 N.W.2d 921 (N.D. 1994); *Tetuan v. A.H. Robins Co.*, 738 P.2d 1210 (Kan. 1987).

<sup>79</sup> Utah Code Ann. § 78-18-1(3).

<sup>80</sup> See *Cheatham v. Pohle*, 789 N.E.2d 467 (Ind. 2003).

<sup>81</sup> See, e.g., Or. Rev. Stat. § 18.540 (60 percent).

<sup>82</sup> *Dardinger v. Anthem Blue Cross & Blue Shield*, 781 N.E.2d 121 (Oh. 2002).

supreme court has found that such a reallocation law constitutes a taking of property without just compensation.<sup>83</sup>

Enacting such a law, to the extent permitted by the State's constitution, is a sovereign choice that a State alone is entitled to make. The federal government cannot require such a choice. Nor may it, outside the tax laws, seek to share in the award, which, after all, exists to vindicate an individual State's interest.

## **VII. Tax Law Treating Punitive Damages Needs to be Changed**

There is one area where Congress can do something about the unfair operation of the law on punitive damages. Punitive damages are taxable. When a state claims a portion of the punitive damages, the federal government still taxes the portion that goes to the State, even though those proceeds are never seen by the plaintiff. Also, under the majority view in the courts, the lawyers' fee is not netted out against the recovery, so the plaintiff must pay taxes on that amount as well. The result, remarkably enough, is that the successful punitive-damage plaintiff may sometimes owe more in taxes than he or she receives from the judgment.

Earlier this year, Senator Hatch offered an amendment to the tax bill to rectify this situation. It was not included in the final bill. I have attached a copy of his proposal, as well as several articles detailing the plight of plaintiffs here. This is one area where Congress does have power to remedy an injustice. I urge that it be passed along to the appropriate committee.

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<sup>83</sup> Kirk v. Denver Publishing Co., 818 P.2d 262 (Colo. 1991)(statute designating one-third of punitive damage award as due to state general fund violated state and federal constitutions' taking clauses).

## **VIII. Conclusion**

Congress has little authority to regulate punitive damages or enact legislation that might control State authority in the realm of punitive damages. Moreover, the empirical evidence on punitive damages strongly suggests that there is no appropriate concern to be pursued here. The *Campbell* decision not only presents no new reason for Congress to act, but actually forecloses areas that once might have been appropriate. The Court endorsed a multiple punitive damage approach; Congress may not change the law in the opposite direction. Still, there is one area where Congress could and should act. It should fix the tax laws, which currently hold the prospect that a punitive damage awardee will end up owing the government more than he or she receives.