

THE SUPREME COURT, PUNITIVE DAMAGES AND STATE SOVEREIGNTY

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INTRODUCTION

“[T]his case is neither close nor difficult.”¹ So Justice Anthony Kennedy described the matter before the Supreme Court in *State Farm Mutual Automobile Insurance Company v. Campbell*.² In *Campbell*, the Court struck down a Utah state court jury award of \$145 million in punitive damages against an insurer charged by one of its insureds with bad faith settlement practices.³ Justice Kennedy’s almost flippant description of the case has the potential to obscure the importance of the decision. However, *Campbell* is highly significant, both in terms of the Court’s continuing process of crafting the parameters of federal constitutional review of punitive damage awards as well as for its potential broader implications.

This Article concerns a largely ignored aspect of the Supreme Court’s developing constitutional jurisprudence relating to punitive damage awards.⁴ *Campbell*’s core, as well as those of its modern-day Supreme Court compatriots,⁵ is the principle that the Due Process Clause of the Fourteenth Amendment provides a check on the amount of punitive damages that may properly be awarded against a defendant.⁶ I do not intend to critique the Court’s decisions in this regard. This Article proceeds on the assumption that the Court’s decisions recognizing that principle are basically correct.⁷ Instead, I seek to address here a neglected aspect of the

¹ *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 418 (2003).

² *Id.* at 408.

³ *Id.* at 412. *Campbell* is discussed in detail below. See *infra* Part I.B.2.b.

⁴ See *infra* Part I.B. (discussing evolution of the Supreme Court’s punitive damages jurisprudence).

⁵ See, e.g., *Cooper Indus., Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424 (2001); *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559 (1996); *Honda Motor Co. v. Oberg*, 512 U.S. 415 (1994); *TXO Prod. Corp. v. Alliance Res. Corp.*, 509 U.S. 443 (1993); *Pac. Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1 (1991); *Browning-Ferris Indus. v. Kelco Disposal, Inc.*, 492 U.S. 257 (1989); *Bankers Life & Cas. Co. v. Crenshaw*, 486 U.S. 71 (1988).

⁶ See, e.g., *Campbell*, 538 U.S. at 416 (“The Due Process Clause of the Fourteenth Amendment prohibits the imposition of grossly excessive or arbitrary punishments on a tortfeasor.”); *Gore*, 517 U.S. at 574 (“Elementary notions of fairness enshrined in our constitutional jurisprudence dictate that a person receive fair notice not only of the conduct that will subject him to punishment, but also of the severity of the penalty that a State may impose.”) (citation omitted); see also *infra* Part I.B.1 (discussing Due Process rationale in greater detail).

⁷ This issue has been debated in the academic literature for some time. Some commentary is critical of these doctrinal developments. See, e.g., Steven L. Chanenson & John Y. Gotanda, *The Foggy Road for Evaluating Punitive Damages: Lifting the Haze from the BMW/State Farm Guideposts*, 37 U. MICH. J.L. REFORM 441, 466, 477 (2004) (criticizing *Gore* and *Campbell*); Kimberly A. Pace, *Recalibrating the Scales of Justice Through National Punitive Damage Reform*, 46 AM. U. L. REV. 1573,

Court's punitive damage jurisprudence, one that first appeared in the 1996 landmark decision *BMW of North America, Inc. v. Gore*⁸ and which has become more prominent in *Campbell*: state sovereignty as a limitation on punitive damage awards.⁹ This issue is no mere sideshow in the Court's

1605-06 (1997) (criticizing *Gore* and *Campbell*); *Recent Cases, Developments in the Law: The Paths of Civil Litigation*, 113 HARV. L. REV. 1755, 1788-89 (2000) (criticizing *Gore* and *Campbell*); John M. Bodenhauser, Note, *BMW of North America v. Gore: Tort Reform Won the Battle but Did They [sic] Lose the War?*, 41 ST. LOUIS U. L.J. 691, 712-17 (1997) (criticizing *Gore*); Michelle J. Carey, Note, *BMW of North America v. Gore: A Misplaced Guide for Punitive Damage Awards*, 18 N. ILL. U. L. REV. 219, 234-38 (1997) (criticizing *Gore*); Neil B. Stekloff, Note, *Raising Five Eyebrows: Substantive Due Process Review of Punitive Damage Awards After BMW v. Gore*, 29 CONN. L. REV. 1797, 1816-23 (1997) (criticizing *Gore*). Other authors praise the Court's actions in this area. See, e.g., Meghan A. Crowley, *From Punishment to Annihilation: Engle v. R.J. Reynolds Tobacco Co.—No More Butts—Punitive Damages Have Gone Too Far*, 34 LOY. L.A. L. REV. 1513, 1526-28 (2001) (generally supportive of *Gore* Due Process approach); Son B. Nguyen, Note, *BMW of North America Inc. v. Gore: Elevating Reasonableness in Punitive Damages to a Doctrine of Substantive Due Process*, 57 MD. L. REV. 251, 264-71 (1998) (also generally supportive of the *Gore* approach). No doubt the debate will continue in the wake of *Campbell* in which the Court at least appeared to provide more specific guidance concerning the federal constitutional limits on the size of awards. See, e.g., *Gore*, 538 U.S. at 425 (noting that “single-digit” ratios of punitive and compensatory damages are likely the limit under the Due Process Clause); *id.* at 427 (strongly suggesting that the wealth of a defendant is not relevant in the imposition of punitive damages, at least as a basis for the award). For present purposes, I do not take any position on the wisdom of such guidance or whether the Court has been correct as a matter of constitutional law in articulating them. Rather, I proceed on the basis that there is a federal due process limit on punitive damage awards.

⁸ *Gore*, 517 U.S. at 572. The facts underlying *Gore* as well as the Court's legal analysis concerning the issues in that case are discussed in detail below. See *infra* Part I.B.2.a.

⁹ *Campbell*, 538 U.S. at 418-22; *Gore*, 517 U.S. at 568-74; see also *infra* Part I.B.2. (discussing development of state sovereignty doctrine in *Gore* and *Campbell* in greater detail). To be sure, there has been criticism of the Court based on principles of “federalism.” See, e.g., Martin H. Redish & Andrew L. Mathews, *Why Punitive Damages are Unconstitutional*, 53 EMORY L.J. 1, 10 (2004) (criticizing *Gore* as usurping state power); Christine D'Ambrosia, Note, *Punitive Damages in Light of BMW of North America, Inc. v. Gore: A Cry for State Sovereignty*, 5 J.L. & POL'Y 577, 625 (1997) (generally supporting the *Gore* decision, but stating that “the Court is exceeding its power to regulate state tort law by setting punitive damage limits”); Jim Davis II, Note, *BMW v. Gore: Why States (Not the U.S. Supreme Court) Should Review Substantive Due Process Challenges to Large Punitive Damage Awards*, 46 KAN. L. REV. 395, 413-14 (1998) (arguing that *Gore*, while well intentioned, actually serves to retard state control of punitive damages by discouraging state legislative efforts to address punitive damage awards); Glen R. Whitehead, Note, *BMW of North America v. Gore: Is the Supreme Court Initiating Judicial Tort Reform?*, 16 QUINNIPIAC L. REV. 533, 575-76 (1997) (arguing that *Gore* undermines state legislative control of punitive damages as well as the jury system). But see Sabrina C. Turner, Note, *The Shadow of BMW of North America, Inc. v. Gore*, 1998 WISC. L. REV. 427, 446-48 (noting federalism concerns but ultimately rejecting them based on an analysis under the Commerce Clause). This “federalism” discussion has also taken place within the Court itself. See, e.g., *Campbell*, 538 U.S. at 438-39 (Ginsburg, J., dissenting) (criticizing the Court's decision as showing a disrespect for state court decisions and resembling “marching orders” to the states); *Gore*, 517 U.S. at 599 (Scalia, J., dissenting) (“The Constitution provides no warrant for federalizing yet another aspect of our Nation's culture . . .

recent efforts in this area. Indeed, it has been described by Columbia University law Professor Catherine Sharkey as “perhaps [one of the two] most vexing—and certainly the most current—issues in punitive damages doctrine.”¹⁰

I have three goals for this Article: (1) to parse closely the Court’s reasoning in this area to demonstrate that it has articulated, albeit without serious analysis, a state sovereignty limitation on punitive damages awards that is separate from the other constitutional grounds it has marshaled for reviewing such awards; (2) to critique the Court’s rationale; and (3) to suggest the potentially serious and far-reaching consequences of this evolving area of federal constitutional jurisprudence both as to punitive damages and other unrelated issues. None of the limited commentary on this doctrinal development has articulated a full argument against it or, perhaps more

.”); *id.* at 607 (Ginsburg, J., dissenting) (“The Court, I am convinced, unnecessarily and unwisely ventures into territory traditionally within the States’ domain . . .”).

The gist of these criticisms is that the Court’s decisions usurp state power by interpreting the constitutional guarantee of due process as a check on state punitive damage awards. As Justice Scalia bluntly put this argument: “Since the Constitution does not make that concern [i.e., the size of punitive damage awards] any of [the Supreme Court’s] business, the Court’s activities in this area are an unjustified incursion into the province of state governments.” *Gore*, 517 U.S. at 598 (Scalia, J., dissenting). Thus, the debate has centered on the relationship between the states on the one hand and the federal government on the other, a *vertical* federalism consideration. Another vertical federalism critique of the Court’s punitive damages jurisprudence the Court has, in many respects, taken it upon itself to define the purposes that punitive damages are designed to serve. *See infra* Part I.A. To put the matter mildly, it is not readily apparent what gives the Court the power to make this decision on behalf of the several states. By not addressing this concern in a focused manner in this Article I do not wish to diminish its seriousness. My treatment—or largely my lack of treatment—of this issue is designed to allow more targeted discussion of different issue.

The different, albeit related matter I address in this Article is one focused on the relationship among the states, a more *horizontal* federalism concern. There has been comparatively little discussion of this distinct question and none of that discussion has seriously questioned the Court’s reasoning or explored the consequences of its decisions. *See infra* Part II.A (discussing limited commentary in this area). The horizontal relationship of the states may also come into play in yet another way. Professors Baker and Young have argued forcefully that a justification for judicial review of matters touching on federalism, broadly defined, is “the problem of horizontal aggrandizement” in which one group of states is able to “harness the federal lawmaking power to impose their policy preferences on *other states* to the former states’ own advantage.” Lynn A. Baker & Ernest A. Young, *Federalism and the Double Standard of Judicial Review*, 51 DUKE L.J. 75, 117 (2001). This type of horizontal federalism issue is not related to the point I address in this Article concerning how the power relationship among the states is affected by *federal* action, here that of the judicial branch.

¹⁰ Catherine M. Sharkey, *Punitive Damages as Societal Damages*, 113 YALE L.J. 347, 355 (2003). Professor Sharkey’s article sets out an innovative way in which to reconceptualize punitive damages as a remedial device. *Id.* at 389-402. I discuss her proposal in more detail below as well as highlight the implications for that proposal of the state sovereignty ruling in *Campbell*. *See infra* Part III.A.1.

significantly, considered its potential consequences. This Article fills those gaps.

After establishing its independent pedigree,¹¹ I argue that the Supreme Court's state sovereignty based punitive damages decisions are flawed as a matter of precedent and logic.¹² But the fact that these decisions are not objectively correct, while important, is not the most troubling aspect the Court's work in this area. Instead, the effects of those decisions are what makes *Campbell*, and to a lesser extent *Gore*, so significant. It is not hyperbolic to say that, if taken to their logical extreme, the reasoning underlying these decisions could lead not only to a dramatic shift in the utility of punitive damages as a remedy¹³ but also to a reassessment of a range of doctrines well-beyond punitive damages. For example, the seeds planted in these cases could lead to the undermining of the class action as a device to address national problems, handicap state enforcement actions in a number of areas, or presage a significant change in personal jurisdiction doctrine.¹⁴

Part I provides the relevant background concerning the Supreme Court's approach to punitive damages. This section is partly used to set the stage for later discussion by briefly summarizing the Court's punitive damage due process holdings and articulating the Court's view of the purposes of punitive damages. More importantly, Part I sets forth an in-depth examination of the state sovereignty rationale found in *Campbell* and *Gore*. I unravel the Court's often Delphic-like opinions to demonstrate both that the Court views state sovereignty principles as an *independent* constitutional limitation on punitive damages as well as to articulate what the Court has said thus far concerning the parameters of that limitation.

Part II lays out why the Court is incorrect in its state sovereignty based rulings. First, given my later discussion of potential consequences, understanding the flaws in the Court's reasoning may serve as a basis for restricting the growth of the doctrine. Moreover, it appears unlikely that the Court's decisions in *Gore* and *Campbell* have finally resolved the issue of federal constitutional review of punitive damage awards. Both cases involved a close split on the Court¹⁵ and at least two justices have indicated that they do not feel bound to give stare decisis effect to the Court's punitive damages decisions.¹⁶

¹¹ See *infra* Part I.B.2.b.i.

¹² See *infra* Part II.

¹³ See *infra* Part III.

¹⁴ See *infra* Part IV.

¹⁵ *Campbell* was decided by a vote of 6-3. 538 U.S. at 408. *Gore* was decided by a vote of 5-4. 517 U.S. at 559.

¹⁶ *Gore*, 517 U.S. at 599 (Scalia, J., dissenting, joined by Thomas, J.) ("When, however, a constitutional doctrine adopted by the Court is not only mistaken but also insusceptible of principled applica-

Finally, Parts III and IV address the potential implications of the Court's state sovereignty rationale. Part III focuses on punitive damages themselves while Part IV expands the discussion to include broader implications. These parts together lead me to conclude that the Court has done a disservice by adopting a doctrine without a firm foundation in constitutional law, without the appropriate articulation of the bases for its decisions and without sufficient (or really any) consideration of the side-effects of the decision. In the end, I suggest that the Court should retreat from its current position or, at the very least, limit the damage that the undeveloped doctrine could do.¹⁷

I. THE LANDSCAPE OF FEDERAL CONSTITUTIONAL PUNITIVE DAMAGES REVIEW

It is necessary to understand the general background of the Court's evaluation of punitive damages jurisprudence to evaluate the propriety and effects of the Supreme Court's reliance on principles of state sovereignty in *Campbell* and *Gore*. Section A therefore begins with a consideration of the Court's understanding of the role of punitive damages, an issue central to the way in which the Court has dealt with the federal constitutional limitation on punitive damage awards.¹⁸ Section B then addresses the constitutional issues directly. The Court has certainly not been shy about suggesting possible ways in which the United States Constitution could limit punitive damage awards. I briefly consider the full range of these constitutional issues and consider in-depth the two most important strands of constitutional analysis for present purposes. First, I touch on due process constraints on punitive damages, the centerpiece of the Court's jurisprudence in this area.¹⁹ Thereafter, I set out a detailed explanation of the Court's developing state sovereignty jurisprudence.²⁰

tion, I do not feel bound to give it stare decisis effect—indeed, I do not feel justified in doing so.”); see also *Campbell*, 538 U.S. at 429 (Scalia, J., dissenting) (“I am also of the view that the punitive damages jurisprudence which has sprung forth from *BMW v. Gore* is insusceptible of principled application; accordingly I do not feel justified in giving the case stare decisis effect.”).

¹⁷ See *infra* Part V (setting forth a summary of my conclusions).

¹⁸ See *infra* Part I.A.

¹⁹ See *infra* Part I.B.1.

²⁰ See *infra* Part I.B.2.

A. *The Role of Punitive Damages, According to the Supreme Court*

Punitive damages have had a long and often controversial history, one that continues to be written today.²¹ This history and its import for the present uses of and possible restrictions on punitive damages have been the subject of much scholarly attention over the past several years.²² I do not intend to cover this well-worn ground yet again. Nor do I intend to engage in the debate concerning the proper purpose of punitive damages as a normative matter.²³ Instead, I focus on the Supreme Court's professed view of the purposes of punitive damages.

The Court has maintained that punitive damages serve two related, but apparently distinct, functions: punishment of the defendant for the act in question and deterrence of similar future misconduct.²⁴ For the Court, there

²¹ For a general discussion of the history of punitive damages, see RICHARD L. BLATT ET AL., PUNITIVE DAMAGES: A STATE-BY-STATE GUIDE TO LAW AND PRACTICE § 1.2 (2004); LINDA L. SCHLUETER & KENNETH R. REDDEN, PUNITIVE DAMAGES §§ 1.0-1.4 (4th ed. 2000).

²² See, e.g., Thomas B. Colby, *Beyond the Multiple Punishment Problem: Punitive Damages as Punishment for Individual, Private Wrongs*, 87 MINN. 583, 602-43 (2003) (discussing both historical conception of punitive damages and modern views); Michael Finch, *Giving Full Faith and Credit to Punitive Damages Awards: Will Florida Rule the Nation?*, 86 MINN. L. REV. 497, 530-37 (2002) (discussing punitive damages "both then and now"); David F. Partlett, *Punitive Damages: Legal Hot Zones*, 56 LA. L. REV. 781, 783-87, 792-806 (1996) (discussing historical and current-day rationales for punitive damages); Anthony J. Sebok, *What Did Punitive Damages Do? Why Misunderstanding the History of Punitive Damages Matters Today*, 78 CHI.-KENT L. REV. 163, 164-65 (2003) (noting that "the real story of what punitive damages were supposed to do in the nineteenth century is complex and rich with possibilities that could inform contemporary analysis"). There have also been several recent symposia concerning punitive damages in which these issues play a prominent part. See, e.g., Symposium, *Punitive Damages*, 87 GEO. L. J. 285-471 (1998); Symposium, *Punitive Damages Awards in Product Liability Litigation*, 39 VILL. L. REV. 353-523 (1994); Symposium, 40 ALA. L. REV. 687-1261 (1989).

²³ For recent pieces rehearsing these issues, see Colby, *supra* note 22, at 613-43; Thomas G. Galligan, Jr., *Disaggregating More-Than-Whole Damages in Personal Injury Law: Deterrence and Punishment*, 71 TENN. L. REV. 117, 119-28 (2003); Sharkey, *supra* note 10, at 356-78. See also DAN B. DOBBS, LAW OF REMEDIES §§ 3.11(2)-(3) (1993) (discussing various justifications for punitive damage awards); David Crump, *Evidence, Economics, and Ethics: What Information Should Jurors Be Given to Determine the Amount of a Punitive Damage Award?*, 57 MD. L. REV. 174 (1998) (discussing purpose of punitive damages as a means to fill the gap between compensatory damages and the amount of damages necessary for optimal deterrence); Dorsey D. Ellis, Jr., *Fairness and Efficiency in the Law of Punitive Damages*, 56 S. CAL. L. REV. 1, 3 (1982) (suggesting seven possible justifications for punitive damages); Cass R. Sunstein et al., *Assessing Punitive Damages (with Notes on Cognition and Valuation in Law)*, 107 YALE L.J. 2071, 2082-86 (1998) (discussing various rationales put forth for punitive damages).

²⁴ See *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 416 (2003). The Court's view in this regard has been long held. See, e.g., *Cooper Indus., Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 432 (2001); *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 568 (1996); *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 266-67 (1981); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 350 (1974);

is no compensatory role for punitive damages.²⁵ Pulling together discussion of the issue from prior cases, the Court noted in *Campbell*:

[I]n our judicial system compensatory and punitive damages, although usually awarded at the same time by the same decisionmaker, serve different purposes. Compensatory damages are intended to redress the concrete loss that the plaintiff has suffered by reason of the defendant's wrongful conduct. By contrast, punitive damages serve a broader function; they are aimed at deterrence and retribution.²⁶

This conception of punitive damages, whether it is correct or complete as a normative matter, is important in several respects for purposes of this Article. First, it provides the proper context for evaluating *Campbell* and *Gore*. One cannot read either of these decisions unmoored from the Court's rather focused, and perhaps limited, view of the appropriate role of punitive damages. Second, a consideration of the potential impact of the Court's state sovereignty rationale shows that the rationale may actually undermine the very purposes the Court itself identifies for awarding punitive damages in the first place.²⁷ To understand this potential, one must first understand the constitutional backdrop the Court has woven in this area.

B. *Constitutional Constraints on Punitive Damages*

In a number of decisions from the early part of the Twentieth Century, the United States Supreme Court suggested, albeit without serious analysis, that there were federal constitutional limits on the size of state punitive damages awards.²⁸ The Court turned in earnest, however, to the issue of

Day v. Woodworth, 54 U.S. 363, 371 (1852). Once again, I leave aside the potentially quite powerful argument that the Court is acting beyond its constitutional role in our federal system by itself articulating the "proper" role for punitive damages.

²⁵ *Campbell*, 538 U.S. at 419 (quoting *Gore*, 517 U.S. at 575) ("It should be presumed a plaintiff has been made whole for his injuries by compensatory damages, so punitive damages should only be awarded if the defendant's culpability, after having paid compensatory damages, is so reprehensible as to warrant the imposition of further sanctions to achieve punishment and deterrence."). While I indicated that I would not address the matter in this Article, I cannot pass up the opportunity to note that for a Court purportedly concerned with the sovereignty of the states a strong argument can be made that the Court's decisions in this area have, for all practical purposes, "constitutionalized" the very nature of punitive damages. See *infra* note 112.

²⁶ *Campbell*, 538 U.S. at 416 (citations and internal quotation marks omitted).

²⁷ See, e.g., *infra* Part III.A.2.

²⁸ See, e.g., *St. Louis Iron Mountain & S. Ry. v. Williams*, 251 U.S. 63, 66-67 (1919) (upholding \$75 penalty for a \$.66 overcharge but noting that the Fourteenth Amendment "places a limitation on the power of the states to prescribe penalties for violations of their laws . . . where the penalty prescribed is so severe and oppressive as to be wholly disproportionate to the offense and obviously unreasonable");

punitive damages and the federal Constitution only in the past fifteen years.²⁹ The import of these decisions is in one sense clear: the Court has shown that it will aggressively police punitive damage awards, principally through the rubric of the Due Process Clause.³⁰ But in another quite important respect more confusion than clarity has flowed from the Court's jurisprudence. Some of this confusion was to be expected as the Court essentially began its development of constitutional doctrine in largely virgin territory. Moreover, initial confusion is not uncommon in any area where the Court declines, as here, to adopt bright line rules.³¹

There is a potentially more significant reason for confusion in this doctrine. There has been a veritable constitutional cacophony in which the Court has thrown out, often without any meaningful analysis, a wide variety of constitutional doctrines that potentially could serve to check awards. For example, in addition to the procedural and substantive due process bases for federal constitutional review of punitive damage awards,³² the Court has also referred to state sovereignty,³³ the Dormant Commerce Clause,³⁴ and perhaps even the due process rights of non-parties.³⁵ And this

Southwestern Telegraph & Tel. Co. v. Danaher, 238 U.S. 482, 491 (1915) (striking down \$6,300 penalty against phone company for violation of state statute as being "so plainly arbitrary and oppressive as to be nothing short of a taking of its property without due process of law"); Mo. Pac. Ry. v. Tucker, 230 U.S. 340, 350-51 (1913) (statutory fine of \$500 for violating state schedule of maximum rates to be charged by common carriers struck down as "not only grossly out of proportion to the possible actual damages but [also as] so arbitrary and oppressive that its enforcement would be nothing short of a taking of property without due process of law and therefore in contravention of the Fourteenth Amendment"); Seaboard Air Line Ry. v. Seegers, 207 U.S. 73, 78 (1907) (noting that "[w]e know there are limits beyond which penalties may not go . . ." but upholding a \$50 penalty for \$1.75 shipping overcharge under facts of the case).

²⁹ See *supra* note 5 (citing cases). I do not intend to provide a detailed account of all of the Supreme Court's punitive damages decisions in this time period. Detailed descriptions of these cases can be found elsewhere. See, e.g., Chanenson & Gotanda, *supra* note 7, at 449-65; Paul DeCamp, *Beyond State Farm: Due Process Constraints on Noneconomic Compensatory Damages*, 27 HARV. J. L. & PUB. POL'Y 231, 268-90 (2003); John Zenneth Lagrow, Comment, BMW of N. Am., Inc. v. Gore: *Due Process Protection Against Excessive Punitive Damages Awards*, 32 NEW ENG. L. REV. 157, 167-86 (1997).

³⁰ *Id.*

³¹ See, e.g., State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 425 (2003) ("We decline again to impose a bright-line ratio which a punitive damages award cannot exceed.").

³² See *infra* Part I.B.1 (summarizing due process jurisprudence).

³³ See *infra* Part I.B.2 (summarizing state sovereignty jurisprudence).

³⁴ See BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 571 (1996) (stating that "one State's power to impose burdens on the interstate market for automobiles is not only subordinate to the federal power over interstate commerce, but it is also constrained by the need to respect the interests of other States") (citations omitted); see also Heather Burgess, Comment, *State Limits: Can One State Rule the Country? One State Awarding Punitive Damages for Nationwide Conduct*, 31 PEPP. L. REV. 477, 491 (2004) (discussing interstate commerce rationale based on *Gore*). Certain lower courts also picked up on the commerce reference in *Gore* as a constitutional factor limiting awards. See, e.g., Cont'l Trend Res., Inc.

list does not even take into account those constitutional provisions that the Court has, at least for now, rejected as a means of limiting punitive damages.³⁶

v. OXY USA Inc., 101 F.3d 634, 636 (10th Cir. 1996). The *Gore* Court appeared to mix the Commerce Clause and state sovereignty rationales, or at least to link them closely. See *Gore*, 517 U.S. at 571. Commentators have also done so. See, e.g., Margaret Meriwether Cordray, *The Limits of State Sovereignty and the Issue of Multiple Punitive Damages Awards*, 78 OR. L. REV. 275, 294-97 (1999); D'Ambrosia, *supra* note 9, at 623-25; Turner, *supra* note 9, at 446-48.

While there is overlap between the state sovereignty rationale I am discussing and Dormant Commerce Clause analysis, these concepts are different. First, *Gore* and *Campbell* read side-by-side make clear that the Dormant Commerce Clause was not a necessary ingredient in the Court's state sovereignty discussion. See *infra* text accompanying notes 99-101. Second, the Court certainly did not follow its own Dormant Commerce Clause precedent in *Gore*, making one wonder how seriously it took the argument. For example, the Court never conducted a balancing of the local benefits of the punitive damages award versus the burdens on interstate commerce flowing from the award, a signature piece of dormant commerce clause doctrine. See *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970); see also I LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 1059 (3d ed. 2000) (describing Dormant Commerce Clause balancing test). Finally, as with the critique I provide below of the Court's state sovereignty rationale in particular, see *infra* Part II.A., the Dormant Commerce Clause cases the *Gore* Court cites are largely irrelevant. Both of those cases deal with an attempt by one state to *directly* regulate conduct that occurs outside its borders. See, e.g., *Healy v. Beer Inst.*, 491 U.S. 324, 339-41 (1989) (Connecticut statute at issue in the case was unlawful under Dormant Commerce Clause principles both because it attempted to regulate directly commerce outside of the state and because it was facially discriminatory against out-of-state entities); *Edgar v. MITE Corp.*, 457 U.S. 624, 640-43 (1982) (Illinois law held to violate Dormant Commerce Clause principles because it was a direct attempt to regulate interstate commerce). The problem with such comparisons is that they do not fit within the confines of the paradigm in which punitive damages are awarded. See *infra* Part II.A. (discussing environment in which punitive damages are awarded and why that environment does not reflect an attempt to regulate extraterritorial conduct).

This is not to say that one could not construct an argument against certain punitive damage awards based on Dormant Commerce Clause principles. See, e.g., Paul H. Rubin et al., *BMW v. Gore: Mitigating the Punitive Economics of Punitive Damages*, 5 SUP. CT. ECON. REV. 179, 205 (1997) (suggesting that a punitive damage award should be found to violate the Dormant Commerce Clause if there is an attempt at what the authors term "interstate appropriation." This occurs when it is "impracticable for the subject firm [the defendant] to charge the costs of the awards in the legal jurisdiction that awarded the damages"). But the fact remains that the Supreme Court did not develop this argument or even purport to engage in a true Dormant Commerce Clause analysis. Instead, it crafted the state sovereignty rationale at issue here as an independent federal limitation on punitive damage awards, apparently referring to Dormant Commerce Clause doctrine only by analogy. See *infra* Part I.B.2. (outlining the state sovereignty rationale after *Gore* and *Campbell*). Indeed, to the extent that the rationale truly has anything to do with interstate commerce, it seems closer to mark to say that the Court was attempting to affirmatively exercise the commerce power itself, something that it cannot and should not do. See U.S. CONST. art. I, § 8 cl. 3 (granting Congress, not the federal courts, the power "[t]o regulate Commerce . . . among the several States").

³⁵ See, e.g., *Campbell*, 538 U.S. at 421-22 ("Any proper adjudication of conduct that occurred outside Utah to other persons would require their inclusion . . .").

³⁶ The Court has rejected attacks on punitive damages awarded in civil cases between private

In the following two sub-parts, I consider the two most important strands of constitutional doctrine for purposes of this Article: the Due Process Clause, which provides the Court's most significant constraint on punitive damage awards,³⁷ and principles of state sovereignty, which may be the most dangerous of the Court's pronouncements in this area.³⁸

1. Due Process Limitations Concerning Punitive Damages

The touchstone of the Court's current punitive damages jurisprudence is that "[t]he Due Process Clause of the Fourteenth Amendment prohibits the imposition of grossly excessive or arbitrary punishments on a tortfeasor."³⁹ The Court continued:

The reason is that elementary notions of fairness enshrined in our constitutional jurisprudence dictate that a person receive fair notice not only of the conduct that will subject him to punishment, but also of the severity of the penalty that the State may impose.⁴⁰

parties under the Eighth Amendment's excessive fines clause. *Browning-Ferris Indus. v. Kelco Disposal, Inc.*, 492 U.S. 257, 260 (1989) (rejecting excessive fines challenge to a punitive damage award because the Court's "concerns in applying the Eighth Amendment have been with criminal process and with direct actions initiated by government to inflict punishment. Awards of punitive damages do not implicate these concerns"). The Court has also, in dicta, indicated that "[t]he protections of [the Fifth Amendment's] Double Jeopardy Clause are not triggered by litigation between private parties." *United States v. Halper*, 490 U.S. 435, 451 (1988).

³⁷ See *infra* Part I.B.1.

³⁸ See *infra* Part I.B.2.

³⁹ *Campbell*, 538 U.S. at 417. Some of the Court's rulings fall comfortably within the rubric of procedural due process. See, e.g., *Cooper Indus. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 431 (2001) (application of abuse-of-discretion standard to jury punitive damages awards violated due process); *Honda Motor Co. v. Oberg*, 512 U.S. 420-35 (1994) (system of denial of meaningful judicial review of punitive damage awards violates right to due process). Other of the Court's decisions, such as *Campbell* and *Gore*, find their home more comfortably in the substantive realm of the Due Process Clause. The use of "Substantive Due Process" has drawn particular criticism. See, e.g., Redish & Mathews, *supra* note 9, at 9 ("Thus, as framed in *Gore*, the Court's inquiry is entirely one of economic substantive due process—a constitutional inquiry traditionally associated with the Court's infamous and long discredited decision in *Lochner v. New York*." (emphasis in original) (footnotes omitted)). I leave for another day a discussion of the propriety of these due process holdings as well as consideration of whether the *Campbell/Gore* rationale could (or should) actually be better grounded in the procedural branch of due process.

⁴⁰ *Campbell*, 538 U.S. at 418 (quoting *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 562 (1996) (internal quotation marks omitted)). To be sure, the notion that the Due Process Clause provided some limitations on punitive damage awards did not begin with *Gore*. See, e.g., *TXO Prod. Corp. v. Alliance Res. Corp.*, 509 U.S. 443, 462 (1993) (applying due process analysis in rejecting a challenge to a punitive damage award); *Pac. Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 21-23 (1991) (same); *Bankers Life &*

Thus, in this strand of constitutional analysis the Court is focused on the defendant and its rights.

In order to make the due process determination, the *Gore* Court formulated what it termed three “guideposts” to assist lower courts. The propriety of a punitive damage award under the Due Process Clause was to be judged by evaluating the: (1) degree of reprehensibility of the defendant’s conduct; (2) ratio of the actual or potential harm suffered by the plaintiff (i.e., compensatory damages) to punitive damages awarded in the given case; and (3) sanctions that could be imposed on the defendant for comparable conduct.⁴¹ *Campbell* refined the *Gore* guideposts, but they remain the essential framework for the constitutional due process analysis.⁴²

2. State Sovereignty Issues and Punitive Damages

While the due process rationale is based on a *defendant’s individual right*, the state sovereignty ground purportedly is rooted in the existence of the federal union as reflected in the very structure of the Constitution. This sub-part traces the development of the state sovereignty rationale as well as explores its contours. Part II provides a critique.

Gore was the Court’s first real foray into the area of state sovereignty as it relates to punitive damages.⁴³ *Campbell* picked up where *Gore* left off

Cas. Co. v. Crenshaw, 486 U.S. 71, 86-89 (1988) (O’Connor, J., concurring) (arguing that the Due Process Clause provides a limit to punitive damage awards). The importance of *Gore* was that it was the first time the Court actually struck down an award of punitive damages in a private civil action based on a due process analysis. *Gore*, 517 U.S. at 599 (Scalia, J., dissenting).

⁴¹ *Id.* at 575-76.

⁴² *Campbell*, 538 U.S. at 418.

⁴³ With the possible exception of one case discussed below in this note, the Court was not faced with a situation involving any extraterritorial conduct in the punitive damages context before *Gore*. See, e.g., *Honda Motor*, 512 U.S. at 420 (review limited to “whether Oregon’s limited judicial review of the size of punitive damages awards” was consistent with Court precedent); *Haslip*, 499 U.S. at 4-7 (no suggestion in description of facts and proceedings below that there was any extraterritorial conduct at issue in the case); *Browning-Ferris Indus. v. Kelco Disposal, Inc.*, 492 U.S. 257, 276-77 (1989) (declining to reach due process challenge to punitive damage awards because of petitioner’s failure to raise such challenges below). It is not particularly surprising that the Court had not faced a situation in which it might have been required to address extraterritoriality before *Gore*. The last twenty-five years have seen an explosion of litigation in the United States in which extraterritorial matters likely will be presented either because of the scope of conduct of the defendant or the use of procedural devices such as the class action. As one commentator noted: “*State Farm* represents an emerging paradigm in punitive damages cases: a single or multiplaintiff case in which, in effect, ‘classwide’ punitive damages are assessed on a statewide or nationwide scale.” Sharkey, *supra* note 10, at 350.

The one case prior to *Gore* in which the Court was faced with a situation in which it could have addressed state sovereignty issues was *TXO Production Corp. v. Alliance Resources Corp.* concerning a

and amplified the importance of the sovereignty-based rationale in significant ways. This Part begins by addressing *Gore* and then moves on to consider the state of the law after *Campbell*.

a. A Doctor, a Car, and Some Acid Rain: *BMW v. Gore*

The Supreme Court's journey into state sovereignty and punitive damages began in an unlikely way when Dr. Ira Gore, Jr. brought his nine month old BMW sports sedan to a repair shop for some detail work.⁴⁴ As a result of this work, Dr. Gore learned that his car had been repainted before he bought it, probably, to repair damage due to acid rain sustained during shipment of the car from Germany.⁴⁵ After learning of the repainting, Dr. Gore brought suit against a number of entities in Alabama state court claiming that the failure to disclose the repainting before purchase amounted to actionable misrepresentation under Alabama law.⁴⁶

Defendant BMW admitted that it had not disclosed the repainting to Dr. Gore before he purchased the car.⁴⁷ BMW had in place a "nationwide policy" under which it would disclose repairs made to a car only if those

claim in West Virginia for slander of title based on a complex series of transactions involving oil and gas rights. 509 U.S. at 446-47. The Court appeared to recognize that evidence of TXO's conduct beyond West Virginia with respect to parties other than the plaintiff had been part of the plaintiff's case. *See, e.g., id.* at 450-51 (plaintiff "introduced evidence showing . . . that TXO had engaged in similar nefarious activities in business dealings in other parts of the country"). *See also* TXO Prod. Corp. v. Alliance Res. Corp., 187 W. Va. 457, 468-70 (1992) (describing in detail the evidence of TXO's conduct outside West Virginia that was admitted at trial). Far from striking down the award at issue based on state sovereignty or the inappropriate consideration of extraterritorial conduct, the Court appeared to approve of the plaintiff's litigation approach. *See, e.g., TXO Prod. Corp.*, 509 U.S. at 462 n.28. TXO could be seen as inconsistent with *Gore* and *Campbell* as a result of its essentially implicit approval of consideration of extraterritorial conduct in setting the appropriate amount of punitive damages. On the other hand, it could also be seen as consistent with those cases if the extraterritorial conduct is viewed as merely establishing intent as opposed to setting the level of the penalty itself. And still another explanation is that the parties simply did not raise the issue of extraterritoriality/state sovereignty in the correct way. *Id.* (indicating that the issue of conduct in states other than West Virginia was raised as a matter of evidentiary rulings under West Virginia law and not as a matter of federal constitutional law). In any event, at a minimum TXO has been surpassed by *Gore* and *Campbell* to the extent it could be read to approve the consideration of extraterritorial conduct as a means to set the appropriate level of punitive damages. *See supra* Part I.B.2. (detailing state sovereignty rationale as developed in *Campbell* and *Gore*).

⁴⁴ *Gore*, 517 U.S. at 563.

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *Id.* at 563-64.

repairs “exceeded 3 percent of the car’s suggested retail price.”⁴⁸ In Dr. Gore’s case, the repainting amounted to only about 1.5 percent of the car’s retail price and pursuant to its policy, BMW did not disclose the repair.⁴⁹

At trial, a jury awarded Dr. Gore \$4,000 in compensatory damages.⁵⁰ The jury also returned \$4 million in punitive damages finding that “nondisclosure policy constituted ‘gross, oppressive or malicious fraud.’”⁵¹ BMW argued both in post-trial motions and on appeal to the Alabama Supreme Court that the punitive damage award was inappropriate because any actions BMW took outside of Alabama were irrelevant.⁵² In particular, BMW argued that “its nondisclosure policy was consistent with the laws of roughly twenty-five states defining the disclosure obligations of automobile manufacturers, distributors, and dealers.”⁵³ While the trial court rejected BMW’s arguments concerning sales outside of Alabama, the Alabama Supreme Court cut the punitive damage award in half (to \$2 million) to account for the non-Alabama transactions.⁵⁴

The United States Supreme Court addressed BMW’s extraterritorial argument in Part II of its opinion.⁵⁵ The Court began by noting that “the

⁴⁸ *Id.*

⁴⁹ *Id.* at 564.

⁵⁰ *Gore*, 517 U.S. at 565. The jury based its compensatory damages decision on expert testimony that due to the repainting Dr. Gore’s car was worth \$4,000 less than what he paid for it. *Id.* at 564.

⁵¹ *Id.* at 565 (quoting ALA. CODE §§ 6-11-20-21 (1993)). It appears that the jury reached its verdict concerning the amount of punitive damages by multiplying the compensatory damages it had awarded Dr. Gore (\$4,000) by the number of cars BMW sold in the United States for which the company did not disclose pre-sale repairs when the cost of such repairs was less than 3 percent of the suggested retail price of the car (983 cars). *Id.* at 564-65. There had been only fourteen such sales in Alabama. *Id.* at 564. After the verdict in *Gore*, BMW altered its policy to require disclosure of all pre-sale repairs. *Id.* at 566.

⁵² *Id.* at 565.

⁵³ *Id.* One of the other grounds BMW raised was that the punitive damage award was excessive as a matter of due process. *Id.* at 566. The Alabama Supreme Court rejected that argument. *Id.* at 566-67. The U.S. Supreme Court reversed the Alabama Supreme Court on this point. *Id.* at 574-86. This aspect of the decision was discussed above. *See supra* Part I.B.1.

⁵⁴ *Id.* at 566-67. As the Supreme Court of the United States recounted:

[The Alabama Supreme Court’s] discussion of the amount of its remitted award expressly disclaimed any reliance on “acts that occurred in other jurisdictions”; instead, the court explained that it had used a “comparative analysis” that considered Alabama cases, “along with cases from other jurisdictions, involving the sale of an automobile where the seller misrepresented the condition of the vehicle and the jury awarded punitive damages to the purchaser.”

Id. at 567 (quoting *BMW of N. Am., Inc. v. Gore*, 646 So. 2d 619, 628 (Ala. 1994)).

⁵⁵ *Id.* at 568-74. An initial—and obvious—criticism of *Gore* is that, by the Court’s own description, the state sovereignty issue was not present in the case. The Supreme Court of the United States recognized that “[t]he Alabama Supreme Court properly eschewed reliance on BMW’s out-of-state conduct and based its remitted award solely on conduct that occurred within Alabama.” *Id.* at 573-74 (citations omitted). Thus, as Justice Scalia noted in his dissent, the extraterritorial issues on which the

federal excessiveness inquiry appropriately begins with an identification of the state interests that a punitive award is designed to serve.”⁵⁶ Here, the Court considered the legitimate state interest to be “punishing unlawful conduct and deterring its repetition.”⁵⁷ According to the Court, punitive damages are a proper means to advance these legitimate state goals.⁵⁸

As argued below, the Court’s error was not in ensuring that the state has a legitimate interest when it acts. Rather, its error came by interpreting the concept of state sovereignty broadly enough to unduly restrict a state when it is, in fact, pursuing the legitimate interests the Court had just identified.⁵⁹ As I will discuss below, the *Campbell* Court’s reasoning must be unbundled in order to truly appreciate the impact of state sovereignty as an independent constitutional limitation on punitive damage awards.⁶⁰ The same cannot be said of *Gore* in which the Court unambiguously stated that its decision was based in part on “principles of state sovereignty and comity.”⁶¹

The Court reached its sovereignty conclusion by first extolling the virtues of a federal system in which states are allowed to determine for themselves the best manner in which to address a social problem, in this case, deceptive trade practices.⁶² As the Court put it, “the result is a patchwork of rules representing the diverse policy judgments of lawmakers in 50 states.”⁶³ Alabama’s transgression of this patchwork principle came because the Court viewed the punitive damage award at issue as a means of

Court opined were “not remotely presented for resolution.” *Id.* at 603 (Scalia, J., dissenting); *see also id.* at 607-08 (Ginsburg, J., dissenting) (“No impermissible ‘extraterritoriality’ infects the judgment before us; the excessiveness of the award is the sole issue genuinely presented.”). Given the potential serious consequences of the Court’s foray into the sovereignty arena, *see infra* Parts III and IV, the Court should have contained its discussion to those issues necessary for resolution of the case. Indeed, this situation is a prime example of when making incremental decisions is the best course to take. *See generally* CASS R. SUNSTEIN, ONE CASE AT A TIME (1999) (advocating “judicial minimalism” when the Supreme Court makes decisions). But the reality is that the Court did reach out and decide the issue.

⁵⁶ *Gore*, 517 U.S. at 568.

⁵⁷ *Id.* Again, one could question of the legitimacy of the Court’s identification of these interests, an identification that led to the restriction of state power and sovereignty, under vertical federalism principles.

⁵⁸ *Id.*

⁵⁹ *See infra* Part II (detailing argument that the Supreme Court’s state sovereignty rationales in *Gore* and *Campbell* are not well-founded).

⁶⁰ *See infra* Part I.B.2.b.

⁶¹ *Gore*, 517 U.S. at 572.

⁶² *Id.* at 568-69.

⁶³ *Id.* at 570.

trying to impose its own policy choices on other states, thus invading their sovereignty.⁶⁴ In the Court's words:

[B]y attempting to alter BMW's nationwide policy, Alabama would be infringing on the policy choices of other States. To avoid such encroachment, the economic penalties that a State such as Alabama inflicts on those who transgress its laws, whether the penalties take the form of legislatively authorized fines or judicially imposed punitive damages, must be supported by the State's interest in protecting its own consumers and its own economy. Alabama may insist that BMW adhere to a particular disclosure policy in that State. Alabama does not have the power, however, to punish BMW for conduct that was lawful where it occurred and that had no impact on Alabama or its residents. Nor may Alabama impose sanctions on BMW in order to deter conduct that is lawful in other jurisdictions.⁶⁵

Two important, and potentially doctrinally limiting, factors could be taken from this passage. First, the Court appeared to recognize that Alabama's interest was *not* tied *only* to Dr. Gore as the named plaintiff. Instead, Alabama was said to have punishment and deterrent-based interests related to other BMW customers in Alabama as well as in the state's economy more generally.⁶⁶ Second, the Court based its holding on the premise that BMW's conduct was lawful in some jurisdictions and unlawful in others, including Alabama.⁶⁷ As such, it specifically left open whether princi-

⁶⁴ *Id.* at 570-72. The Court did not tie this sovereignty rationale to any particular constitutional provision. The closest it came was its reference to Congress' power to regulate interstate commerce and the concomitant restriction on state regulation that unduly burdens such commerce, the so-called Dormant Commerce Clause. *See, e.g., id.* at 571-72. As I discuss, however, the Commerce Clause did not actually provide the underpinning for the Court's sovereignty-based comments. *See supra* note 34; *infra* Part I.B.2.b.

⁶⁵ *Gore*, 517 U.S. at 572-73 (footnote omitted). Out-of-state conduct is not, however, totally out of bounds in the punitive damages calculus. The Court also ruled that evidence of out-of-state conduct, even if lawful where it occurred, "may be relevant to the determination of the degree of reprehensibility of the defendant's conduct." *Id.* at 574 n.21. The Court reiterated this point in *Campbell*. *See, e.g., State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 422 (2003). Thus, juries are given the responsibility, in the first instance at least, of using out-of-state conduct for some purposes but ignoring it for others. While the assignment of such a metaphysical task may not be enough standing alone to reject a rule, it certainly adds another factor to consider in conjunction with the other matters discussed in this Article. Other commentators have noted the tension in the Court's rulings on this point. *See, e.g., Cordray, supra* note 34, at 313 ("[T]he distinction is a fine one, and it is questionable whether juries will be able to understand and apply it properly."); Laura J. Hines, *Due Process Limitations on Punitive Damages: Why State Farm Won't Be the Last Word*, 37 AKRON L. REV. 779, 810-11 (2004) [hereinafter, Hines, *Due Process Limitations*] (noting the likelihood of juror "confusion and uncertainty" as a result of the Court's position). *But see* Burgess, *supra* note 34, at 493-95 (generally favorably discussing the variables of out-of-state conduct). I return to a discussion of this issue below in connection with *Campbell*. *See infra* Part II.B.2.b.ii.

⁶⁶ *Gore*, 517 U.S. at 572 (noting the imposition of punitive damages "must be supported by the State's interest in protecting its own consumers and its own economy").

⁶⁷ *Id.* at 569-70. In fact, it was not entirely clear that the conduct at issue in *Gore* was lawful in

ples of state sovereignty would preclude consideration of conduct in other states that was unlawful in that other state.⁶⁸

In sum, as matters stood after *Gore*,⁶⁹ the Court had established that some element of state sovereignty inherent in our federal union acted as a constraint on the size of punitive damage awards. The specific contours of this sovereignty-based rationale were not clearly defined. What *was* clear was that a defendant could not be punished for (or be deterred from engaging in) conduct in another state that was legal in that other state. These matters remained until *Campbell*.

b. A Car Accident and an Insurer Whose “Conduct Merits No Praise”: *State Farm v. Campbell*⁷⁰

State Farm provided automobile insurance to Curtis Campbell.⁷¹ In 1981, Mr. Campbell was passing six vans behind which he and his wife had been driving.⁷² As result of the manner and timing of Mr. Campbell’s passing attempt, there was a serious accident in which one person was killed and another person seriously injured.⁷³ “Early investigations supported differing conclusions as to who caused the accident, but ‘a consensus was reached early on by the investigators and witnesses that Mr. Campbell’s unsafe pass had indeed caused the crash.’”⁷⁴ Despite this eventual consensus, State Farm elected to contest liability and declined settlement offers

other states. *See, e.g., id.* at 577 n.27 (discussing potential dispute among states concerning whether state disclosure laws provided a safe harbor for non-disclosure claims). I return to the lawful/unlawful distinction in general terms later in this Article. *See infra* Part II.

⁶⁸ *Gore*, 517 U.S. at 573 n.20. Several lower courts interpreting *Gore* correctly predicted the tack the Court would take in *Campbell* that the state sovereignty rationale applied to unlawful extraterritorial conduct as well. *See, e.g., White v. Ford Motor Co.*, No. 99-15185, 2002 U.S. App. LEXIS 28133, at *47-*52 (9th Cir. Dec 3, 2002); *Cont’l Trend Res., Inc. v. OXY USA, Inc.*, 101 F.3d 634, 637 (10th Cir. 1996).

⁶⁹ On remand, the Alabama Supreme Court remitted the punitive damages award to \$50,000. *BMW of N. Am., Inc. v. Gore*, 701 So.2d 507, 515 (Ala. 1997). This award underscores what seemed acceptable in *Gore*, namely that it was proper for a state to consider potential harm to other citizens beyond the named plaintiff. *See Sharkey, supra* note 10, at 448 (recognizing this feature of the *Gore* remand). This aspect of *Gore* was left in doubt after *Campbell*. *See infra* note 112 (discussing this aspect of *Campbell*).

⁷⁰ *Campbell*, 538 U.S. at 419 (“[W]e must acknowledge that State Farm’s handling of the claims against the Campbells merits no praise.”).

⁷¹ *Id.* at 413.

⁷² *Id.* at 412.

⁷³ *Id.* at 412-13.

⁷⁴ *Id.* at 413 (quoting *Campbell v. State Farm Mut. Auto. Ins. Co.*, 65 P.3d 1134, 1141 (Utah 2001)).

made at its policy limits (\$50,000).⁷⁵ After reassuring the Campbells,⁷⁶ State Farm directed that the case proceed to trial, the result of which was a verdict in which Mr. Campbell was determined to be 100 percent at fault for the accident.⁷⁷ The jury awarded damages of \$185,849 against Mr. Campbell, an amount more than three times the pre-trial settlement offer.⁷⁸

State Farm initially refused to indemnify Mr. Campbell beyond the \$50,000 policy limits or to post the bond necessary to allow Mr. Campbell to appeal the judgment.⁷⁹ Mr. Campbell retained his own counsel to appeal the verdict and began settlement negotiations with the plaintiffs.⁸⁰ As a result of these negotiations, Mr. Campbell agreed that he and his wife, represented by the plaintiffs' attorneys, would pursue a bad faith action against State Farm, the proceeds of such action to be split 90 percent to the claimants and 10 percent to the Campbells.⁸¹ In exchange, the plaintiffs agreed not to seek to collect on the judgment against Mr. Campbell.⁸²

Pursuant to the settlement agreement, and after the judgment had been affirmed on appeal, the Campbells filed a lawsuit against State Farm alleging bad faith, fraud, and intentional infliction of emotional distress.⁸³ At State Farm's request, the trial in that case took place in two stages, the first addressing liability generally and the second concerning liability specifically for fraud and intentional infliction of emotional distress as well as the assessment of compensatory and punitive damages, if appropriate.⁸⁴ The jury ruled for the Campbells in phase one as well as in the liability portion of phase two.⁸⁵ The jury awarded the Campbells \$2.6 million in compensa-

⁷⁵ *Id.* at 413.

⁷⁶ *Campbell*, 538 U.S. at 413 (“State Farm. . . [assured] the Campbells that ‘their assets were safe, that they had no liability for the accident, that [State Farm] would represent their interests, and that they did not need to procure separate counsel.’”) (quoting *Campbell*, 65 P.3d at 1142)).

⁷⁷ *Id.* at 413.

⁷⁸ *Id.*

⁷⁹ *Id.* The evidence at trial showed that the attorney State Farm retained to defend Mr. Campbell told him: “You may want to put for sale signs on your property to get things moving.” *Id.*

⁸⁰ *Id.* at 413.

⁸¹ *Id.* at 413-14.

⁸² *Campbell*, 538 U.S. at 413-14.

⁸³ *Id.* at 414. The complaint was filed even though State Farm had, by this point, agreed to pay the entire judgment against Mr. Campbell. *Id.* State Farm moved for summary judgment on the ground that it could not be liable for the Campbells' claims because, however tardy, it had eventually paid the entire judgment at issue. *Id.* The trial court agreed with this theory, but the Court of Appeals of Utah reversed and remanded for trial. *See Campbell v. State Farm Mut. Auto. Ins. Co.*, 840 P.2d 130 (Utah Ct. App. 1992).

⁸⁴ *Campbell*, 538 U.S. at 414.

⁸⁵ *Id.* at 414-15.

tory damages and \$145 million in punitive damages.⁸⁶ The trial court remitted these amounts to \$1 million in compensatory damages and \$25 million in punitive damages.⁸⁷ On appeal, the Utah Supreme Court left undisturbed the remitted compensatory award but reinstated the jury's original punitive damages award.⁸⁸ Thus, when the United States Supreme Court heard the case, State Farm faced a \$145 million punitive damage award based on a \$1 million compensatory damages judgment. The Supreme Court reversed the Utah Supreme Court and remanded for a proper assessment of punitive damages.⁸⁹

There are some points of clarity in *Campbell*. Perhaps most significantly, the Court reaffirmed that the centerpiece of the constitutional calculus concerning punitive damages awards is the defendant and its due process rights.⁹⁰ In this regard, the Court applied, and refined in certain respects, the three *Gore* guideposts.⁹¹ The Court had little trouble concluding that the award at issue amounted to a violation of State Farm's due process rights.⁹² But there is much in *Campbell* that is not clear.⁹³ There are two critical points of obscurity for present purposes: the independent effect of state sovereignty issues in *Campbell*; and the scope of the sovereignty rationale if there is such an independent effect.

⁸⁶ *Id.* at 415.

⁸⁷ *Id.*

⁸⁸ *Campbell*, 65 P.3d at 1171-72.

⁸⁹ *Campbell*, 538 U.S. at 429. On remand, the Utah Supreme Court remitted the punitive damages award to \$9,018,780.75. *Campbell v. State Farm Mut. Auto. Ins. Co.*, 98 P.3d 409, 410 (Utah 2004).

⁹⁰ *See, e.g., Campbell*, 538 U.S. at 416-28.

⁹¹ *Id.* For example, while continuing to eschew an absolute bright-line rule, the Court provided more guidance concerning the ratio between compensatory and punitive damages. *Id.* at 424-25.

⁹² *See, e.g., id.* at 429 ("The punitive award of \$145 million, therefore, was neither reasonable nor proportionate to the wrong committed, and it was an irrational and arbitrary deprivation of the property of the defendant.").

⁹³ Other commentators have also commented on this general lack of clarity. *See, e.g.,* Galligan, *supra* note 23, at 149; Sharkey, *supra* note 10, at 361-62, 369 n.60, 389; Semra Mesulam, Note, *Collective Rewards and Limited Punishment: Solving the Punitive Damages Dilemma with Class*, 104 COLUM. L. REV. 1114, 1128 (2004); accord *McClain v. Metabolife Int'l, Inc.*, 259 F. Supp. 2d 1225, 1228-29 (N.D. Ala. 2003) ("Before ruling on Metabolife's post-judgment motions, the court deliberately waited for the Supreme Court to decide [*Campbell*] The court hoped that [*Campbell*] would provide help for ruling on Metabolife's claim that the punitive damages imposed in these cases are excessive. Now the court is not so sure that the wait was worth it. In the first place, the court is not sure that it fully comprehends all of the possible lessons in [*Campbell*].").

i. The Independent Effect of State Sovereignty Principles

A significant failure of the *Campbell* Court is its failure to identify the precise constitutional precepts it found the Utah award to violate. Beyond the reaffirmation of the *Gore* due process guideposts, one must closely read Justice Kennedy's opinion in order to tease out the various strands of constitutional analysis. With effort, it is possible to distill the various constitutional concepts at play in addition to the defendant-centered *Gore* due process rationale. When one does so, it is clear that state sovereignty principles continue to play an important and free-standing role as a limitation on punitive damage awards;⁹⁴ indeed, in many ways, state sovereignty has taken on greater importance in the analysis.

The place to begin is with the Court's own language indicting the Utah Supreme Court for inappropriately doing more than punishing State Farm for its conduct towards the Campbells or deterring such conduct *in Utah*:

While we do not suggest that there was error in awarding punitive damages based on State Farm's conduct towards the Campbells, a more modest punishment for this reprehensible conduct could have satisfied the State's legitimate objectives, and the Utah courts should have gone no further.

This case, instead, was used as a platform to expose, and punish, the perceived deficiencies of State Farm's operations throughout the country.⁹⁵

The Court then extended *Gore*'s state sovereignty principle in a significant respect. After setting forth the *Gore* rule that "[a] State cannot punish a defendant for conduct that may have been lawful where it occurred,"⁹⁶ the Court continued, "Nor, as a general rule, does a State have a legitimate concern in imposing punitive damages to punish a defendant for unlawful acts committed outside of a State's jurisdiction."⁹⁷ Thus, one could read

⁹⁴ See *Campbell*, 538 U.S. at 419-22 (setting forth sovereignty based analysis, albeit intertwined with discussion of other constitutional principles).

⁹⁵ *Id.* at 419-20; see also *id.* at 422 ("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.").

⁹⁶ *Id.* at 421. The Court continued to hold that: "Lawful out-of-state conduct may be probative when it demonstrates the deliberateness and culpability of the defendant's action in the State where it is tortious, but that conduct must have a nexus to the specific harm suffered by the plaintiff." *Id.* at 422. I discuss the confusion surrounding this issue below. See *infra* Part I.B.2.b.ii.

⁹⁷ *Campbell*, 538 U.S. at 421. As with how the matter began in *Gore*, see *supra* note 55, this statement was dicta, pure and simple. The Court itself recognized that at the very least, "much of the out-of-state conduct was lawful where it occurred." *Id.* at 422; see also *Boyd v. Goffoli*, No. 31671,

Campbell as holding that sovereignty principles preclude states from basing the level of punishment or the level of deterrence of a defendant's conduct on a defendant's extraterritorial conduct, whether such conduct was lawful or unlawful where it occurred. But the opinion is not as precise in this regard as one might hope. It is also possible to read *Campbell* as treating the state sovereignty rationale as merely a subsidiary to other constitutional principles such as the limits imposed on awards by the Due Process Clause for example.⁹⁸ A close consideration of the opinion, however, makes clear that is not the case.

First, it is worth underscoring that *Campbell* contains no reference to Dormant Commerce Clause principles.⁹⁹ Recall that in *Gore* the Court had in some respect blurred the distinction between state sovereignty as an independent constitutional force and dormant commerce principles.¹⁰⁰ Thus, it might have been possible to conclude that the sovereignty rationale was bound up with the Commerce Clause analysis. Such a reading is not tenable after *Campbell* in which state sovereignty principles remain—and have grown stronger—but the Commerce Clause does not even make an appearance.¹⁰¹

But difficulties still remain in sorting through the opinion's constitutional analysis, particularly with respect to defining the roles of the state sovereignty principle and the due process analysis. For example, in *Gore* the Court conducted the state sovereignty analysis separately from its consideration of the due process guideposts.¹⁰² In fact, at least one court apply-

2004 W. Va. LEXIS 198, at *19 (W. Va. Nov. 29, 2004) (characterizing *Campbell* Court's discussion of unlawful extraterritorial conduct as "broadly worded dictum"); *Campbell v. State Farm Mut. Auto. Ins. Co.*, 98 P.3d 409, 418-20 (Utah 2004) (recognizing that much of the extraterritorial conduct at issue in *Campbell* may be classified as lawful); *Lincoln v. Case*, 340 F.3d 283, 292 n.8 (5th Cir. 2003) (same); *S. Union Co. v. Southwest Gas Corp.*, 281 F. Supp. 2d 1090, 1096 (D. Ariz. 2003) (same). As with *Gore*, however, the Court did decide the issue, unnecessary as that action may have been.

⁹⁸ Several commentators have read *Campbell* in this respect, essentially suggesting that the decision incorporates state sovereignty principles within a due process analysis. See, e.g., Anthony J. Franze & Sheila B. Scheurman, *Instructing Juries on Punitive Damages: Due Process Revisited After State Farm*, 6 U. PA. J. CONST. L. 423, 515 (2004); Charles W. "Rocky" Rhodes, *Clarifying General Jurisdiction*, 34 SETON HALL L. REV. 807, 908-09 (2004); see also Sunstein at al, *supra* note 23, at 2089 (mentioning in passing that *Gore* included "federalism" as a "sub-theme"). I disagree with such assessments for the reasons developed in this sub-part of this Article.

⁹⁹ See *Campbell*, 538 U.S. at 419-28.

¹⁰⁰ *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 570-72 (1996).

¹⁰¹ One reason the Court may not have referred to dormant commerce clause principles in *Campbell* is that regulation of the insurance industry is exempt from Commerce Clause restrictions. See *Metro. Life Ins. Co. v. Ward*, 470 U.S. 869, 880 (1985).

¹⁰² Compare *Gore*, 517 U.S. at 568-74 (discussing state sovereignty issue) with *id.* at 574-86 (discussing due process guideposts).

ing *Gore* held that because the Supreme Court had discussed these principles separately, and in the order that it did, lower courts were required to conduct the state sovereignty analysis before taking into account any due process considerations.¹⁰³ The *Campbell* Court took a different path by addressing state sovereignty issues as part of its discussion of the due process reprehensibility guidepost.¹⁰⁴

The question is what, if anything, are we to take from this shift? I think not much. First, it seems unlikely that the Court would have moved away from its *Gore* position in such a fundamental way without any comment or explanation. Second, other than combining the two lines of analysis, the Court's discussion in *Campbell* is most consistent with two separate strands of constitutional limitation. For example, the *Campbell* Court cites the same state sovereignty cases as it did in *Gore* for the principle that "a State cannot punish a defendant for conduct that may have been lawful where it occurred."¹⁰⁵ These citations would make little sense if the Court had shifted its rationale for the statement to a pure due process ground. Third, courts attempting to apply *Campbell* have read the case to apply both an extraterritorial limitation as well as a more traditional due process analysis.¹⁰⁶ Finally, the due process rationale would not adequately account for the extraterritorial analysis in *Campbell*. While the prohibition on punishing lawful conduct in another state fits comfortably within (and in my view should be situated in) the rubric of due process,¹⁰⁷ there should be no similar due process problem with respect to increasing the punishment for someone who has performed unlawful acts. The person performing such an illegal act will have no reasonable expectation protected by either the sub-

¹⁰³ *White v. Ford Motor Co.*, No. 99-15185, 2002 U.S. App. LEXIS 28133, at *37 n.55 (9th Cir. Dec. 3, 2002) ("Because the Court said the inquiry 'begins' with this federalism inquiry, this is where we begin. We reject the dissent's assumption that we ought to begin elsewhere, with the three criteria for excessiveness that the Court sets out subsequently in its opinion."); *id.* at *56 ("Because we reverse on the ground that the punitive damages award unconstitutionally allowed a Nevada jury to punish Ford for out-of-state conduct, we do not need to address *de novo* whether these punitive damages were unconstitutionally excessive under the *BMW* guideposts, as is normally required of us . . ."); *cf.* *Smith v. Ingersoll-Rand Co.*, 214 F.3d 1235, 1252-53 (10th Cir. 2000) (describing state sovereignty concerns as merely the first part of the substantive due process analysis itself).

¹⁰⁴ *Campbell*, 538 U.S. at 421-22; *see also* Burgess, *supra* note 34, at 511-17 (commenting critically on the Court's discussion of state interest analysis as part of the reprehensibility guidepost).

¹⁰⁵ *Compare Campbell*, 538 U.S. at 421, *with Gore*, 517 U.S. at 571 & n.16.

¹⁰⁶ *See, e.g.*, *Boyd v. Goffoli*, No. 31671, 2004 W. Va. LEXIS 198, at *13 - *42 (W. Va. Nov. 29, 2004); *White*, 2003 U.S. App. LEXIS 28133, at * 37; *Williams v. Philip Morris Inc.*, 92 P.3d 126, 141-45 (Or. Ct. App. 2004); *Campbell v. State Farm Mut. Auto Ins. Co.*, No. 981564, 2004 Utah LEXIS 62, at *10-*33 (Apr. 23, 2004), *cert denied*, 73 U.S.L.W. 3211 (2004).

¹⁰⁷ *See, e.g.*, *Bordenkircher v. Hayes*, 434 U.S. 357, 363 (1978) ("To punish a person because he has done what the law plainly allows him to do is a due process violation of the most basic sort . . .").

stantive or procedural branches of due process that its decision to engage in a prohibited course of conduct is free from direct or collateral consequences. At the end of the day, the best explanation for the collapse of the two strands of authority in *Campbell* is that the Court shifted its analytical framework to better reflect where the question of out-of-state activity will usually arise—in connection with determining the reprehensibility of a defendant’s conduct.

There is an additional ambiguity in *Campbell* related to due process that could lead one to undervalue the independent import of the state sovereignty limitation. After stating that neither lawful nor “as a general rule” unlawful extraterritorial conduct may form a legitimate basis for a state’s imposition of punitive damages, the Court commented that the extraterritorial evidence at issue in *Campbell* “bore no relation to the Campbell’s harm.”¹⁰⁸ It is possible to read *Campbell* as *only* dealing with the dissimilar conduct point. In other words, it is conceivable that the constitutional defect with which the Court was concerned was the use of dissimilar evidence that only happened to be extraterritorial. The better reading, however, is that the Court found the award in *Campbell* constitutionally deficient for both reasons. In fact, this is apparent from the language Justice Kennedy used to introduce his discussion on dissimilar acts. He wrote that the fact that the jury, in his view, relied on dissimilar acts was “a *more* fundamental reason” for rejecting the award than the state sovereignty rationale he had just been discussing.¹⁰⁹ The implication, of course, is that the state sovereignty rationale alone was a “fundamental reason” for rejecting the award.¹¹⁰

In sum, the best reading of *Campbell*’s less-than-clear language is that principles of state sovereignty are independent constitutional constraints on

¹⁰⁸ *Campbell*, 538 U.S. at 421-22. Justice Ginsburg in her dissent argued otherwise. *Id.* at 431-36. I will assume that the Court was correct in its assessment.

¹⁰⁹ *Id.* at 422-23 (emphasis added).

¹¹⁰ To the extent lower courts have recognized this issue, they have reached the same conclusion. See, e.g., *Daka, Inc. v. McCrae*, 839 A.2d 682, 698 (D.C. 2003) (noting that the restriction from *Campbell* concerning “conduct that [bears] no relation to the [plaintiffs’] harm” was a broader concept than the *Campbell* Court’s “concern with improper use of ‘out-of-state conduct’”) (insertions in original); *Henley v. Philip Morris, Inc.*, 114 Cal. App. 4th 1429, 1478 (Cal. Ct. App. 2004) (acknowledging concepts as separate), *rev. granted*, 88 P.3d 497 (Cal. 2004); *Wohlwend v. Edwards*, 796 N.E.2d 781, 786 (Ind. Ct. App. 2003) (same); *TVT Records v. The Island Def Jam Music Group*, 257 F. Supp. 2d 737, 744 (S.D.N.Y. 2003) (same); *Motherway, Glen & Napleton v. Tehin*, No. 02 C 3693, 2003 U.S. Dist. LEXIS 10928 at *19 (N.D. Ill. June 25, 2003) (same).

the size of punitive damage awards.¹¹¹ That leads to the next question: what is the scope of that principle?¹¹²

¹¹¹ I discuss below why recognizing state sovereignty as an independent constitutional limitation on punitive damages awards and not as a mere subset of a due process analysis is significant. *See infra* Part III.B.1.

¹¹² There is also potentially another strand of constitutional analysis in *Campbell* that is tied in some ways to the due process and state sovereignty rationales, but that is distinct from both of them. Recall that in *Gore* the Court appeared to sanction consideration of the defendant's conduct towards non-party, in-state victims when a jury set an award of punitive damages. *See* *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 572 (1996). It is possible to discern in *Campbell*, however, a serious concern in doing so. *See, e.g., Campbell*, 538 U.S. at 421-22. As with much else, however, the scope of the Court's ruling here is unclear. *See, e.g., Galligan, supra* note 23, at 149; Hines, *Due Process Limitations, supra* note 65, at 809-11; Sharkey, *supra* note 10, at 361-62, 369 n.60, 389. One part of the opinion suggests that this "other persons" logic is simply another way to phrase the state sovereignty point. *See, e.g., Campbell*, 538 U.S. at 421-22 ("Any proper adjudication of conduct that occurred outside of Utah to other persons would require their inclusion, and, to those parties, the Utah courts, in the usual case, would need to apply the laws of their relevant jurisdictions."). But the Court also articulated this principle without any caveat that the "other persons" argument is restricted to those non-parties not citizens of the state in question. *See, e.g., id.* at 423 ("Due process does not permit courts, in the calculation of punitive damages, to adjudicate the merits of other parties' hypothetical claims against a defendant under the guise of the reprehensibility analysis . . ."). As an initial matter, it is not readily apparent why the Court is correct regardless of how one construes this "other persons" issue. Taking the defendant's actions towards non-parties into account in setting the appropriate level of deterrence or punishment in one case does nothing to adjudicate those non-parties' claims. They will not be bound by any "determinations" made in that first suit. Moreover, as I discuss below, any due process concerns related to the defendant and multiple punishments for the same act or series of acts could adequately be dealt with in a second suit, if one were ever to take place. *See infra* Part II.D; *see also* Colby, *supra* note 22 (discussing the impact before *Campbell* of an award of punitive damages in one case on non-party potential plaintiffs).

This issue, however, may be of far greater import than first meets the eye. While a full discussion of this point is beyond the scope of this Article, it is possible to read *Campbell* as essentially constitutionalizing the nature of punitive damages as being limited to a bilateral consideration in which only the defendant's actions towards the named plaintiff are relevant. *See, e.g., Campbell*, 538 U.S. at 423 ("A defendant should be punished for the conduct that harmed the plaintiff, not for being an unsavory individual or business. Due process does not permit courts, in the calculation of punitive damages, to adjudicate the merits of other parties' hypothetical claims against a defendant under the guise of the reprehensibility analysis . . ."). If this is what the Court did in *Campbell*, there may be quite far ranging effects on matters such as the constitutionality of state statutes requiring a prevailing plaintiff to share its recovery with the state as well as the utility of the class action device as a means to address punitive damage claims, to name just a few consequences. In fact, some courts have already read *Campbell* as adopting as a matter of federal constitutional law an extraordinarily narrow view of the appropriate use of punitive damages. *See, e.g., Williams v. ConAgra Poultry Co.*, 378 F.2d 790, 796-98 (8th Cir. 2004) (court reduces punitive damages award in a racial discrimination case in part because the award was based on racially discriminatory conduct directed at persons other than the plaintiff); *Stogsdill v. Healthmark Partners*, 377 F.3d 827, 832 (8th Cir. 2004) (reading *Campbell* to require reduction in punitive damage award in part because the jury in a nursing home neglect case may have considered "general conditions" at the home and not only the conduct specifically directed at the plaintiff); *Romo v.*

Ford Motor Co., 6 Cal. Rptr. 3d 793, 801 (Cal. Ct. App. 2003) (taking position that *Campbell* had adopted a narrow view of punitive damages as dealing solely with the bilateral relationship between the defendant and the named plaintiff); *Wohwend*, 796 N.E.2d at 786-87 (reversing punitive damages award in a drunk driving case in part because the trial judge had allowed testimony concerning the defendant's other drunk driving cases and this resulted in "[a] danger that the jury would . . . punish [the defendant] for his subsequent acts instead of the conduct which gave rise to the [plaintiff's] actual damages"). The *Romo* court noted that, in its view, *Campbell* had essentially adopted the narrow view of punitive damages Professor Colby had articulated in his law review article appearing in print shortly before the Supreme Court decided *Campbell*. *Romo*, 6 Cal. Rptr. 3d at 801 (citing Colby, *supra* note 22, at 667-73); *see also* Lindsay J. Efting, Note, *Punitive Damages: Will the Courts Still Punish the Wrongdoer After State Farm Mutual Automobile Insurance Co. v. Campbell*, 49 S.D. L. REV. 67, 96 (2003) ("It is now clear that the only instances in which punitive damages can be awarded for tortious conduct that was not directed at the plaintiff is if those individuals are joined as parties and thereby bound to [sic] the Court's decision."); Franze & Scheurman, *supra* note 98, at 500 ("[T]he [*Campbell*] Court determined that punitive damages should be awarded only to vindicate the rights of the plaintiff, not nonparties who also may have been injured by the defendant's conduct."); Anthony J. Sebok, *A Recent California Appellate Decision Underlines the Importance of the Supreme Court's 2003 Pronouncements on Punitive Damages* (Dec. 29, 2003) (discussing *Romo* and generally concurring with its view of *Campbell*'s import), at <http://writ.news.findlaw.com/sebok/20031229.html> (last visited Jan. 1, 2005); Evan M. Tager, *The Implications of State Farm v. Campbell for the Future of Punitive Damages in Bad Faith Litigation*, MEALEY'S LITIG. REP.: INS., Apr. 22, 2003, at 28, 32-33 (arguing that the *Campbell* court greatly limited the ability of courts to consider conduct beyond that directed against the plaintiff); David A. Yudelson, Note, *Like a Good Neighbor: The United States Supreme Court Ignored Malicious Conduct and Precedent to Ratchet Down Punitive Damages in State Farm Mutual Automobile Insurance Co. v. Campbell*, 37 CREIGHTON L. REV. 759, 809, 822-23 (2004) (reading *Campbell* as incorrectly limiting the proper scope of punitive damage awards); *see also* Colleen P. Murphy, *National Interest: The "Bedbug" Case and State Farm v. Campbell*, 9 ROGER WILLIAMS U. L. REV. 579, 582-86 (2004) (discussing the lack of clarity in *Campbell* concerning the consideration of harm to non-parties).

There is by no means agreement in the academic community on what *Campbell* did in this regard. *See, e.g.*, Erwin Chemerinsky & Ned Miltenberg, *The Need to Clarify the Meaning of U.S. Supreme Court Remands: The Lessons of Punitive Damages' Cases*, 36 ARIZ. ST. L.J. 513, 521-22 (2004) (arguing that *Campbell* did not fundamentally alter the appropriate use of punitive damages to consider the defendant's acts towards non-parties when awarding punitive damages); Galligan, *supra* note 23, at 149-50 (arguing that *Campbell* leaves open the possibility for "augmented" awards in certain circumstances); Sharkey, *supra* note 10, at 361-62, 369 n.60, 389 (arguing that, while not a model of judicial clarity, the *Campbell* opinion leaves open the possibility of basing punitive damages on factors beyond the bilateral relationship between the defendant and the named plaintiff); Mesulam, *supra* note 98, at 1128 ("*Campbell* thus supports an expansive reading of harm, interpreting the *Gore* calculus to encompass factors that extend beyond an individual plaintiff."). The same can be said of the courts. *See, e.g.*, *Campbell v. State Farm Mut. Auto. Ins. Co.*, 98 P.3d 409, 417-18 (Utah 2004), *cert denied*, 73 U.S.L.W. 3211 (2004) (implying that the Supreme Court's decision allowed consideration of deterrence based on the interests of the "citizens of Utah" and other "Utah insureds."); *Boeken v. Philip Morris Inc.*, 19 Cal. Rptr. 3d 101, 140 (Cal. Ct. App. 2004) (suggesting that it is appropriate to consider similar conduct to others in setting a punitive damage award); *Williams v. Philip Morris Inc.*, 92 P.3d 126, 145 (Or. Ct. App. 2004) (holding that jury was entitled to consider harm to other Oregon citizens when setting the appropriate level of punitive damages); *Bocci v. Key Pharms., Inc.*, 76 P.3d 669, 674 (Or. Ct. App. 2003) (*Campbell* "does not, by its terms, limit the scope of the evaluation to the single person in favor of whom punitive damages were available."). The debate concerning this issue is

ii. What Is the Scope of the State Sovereignty Limitation?

There are significant questions remaining after *Campbell* as to the scope of the Court's state sovereignty limitation on punitive damage awards. In this sub-part, I highlight several of the more significant of these questions. First, despite the impression one might take from reading the opinion generally, the Court did not adopt a bright-line rule that a state can never have a constitutionally legitimate interest in punishing a defendant for or deterring it from engaging in unlawful acts done outside that state. Instead, the Court described its decision in this regard as "a *general* rule."¹¹³ The Court does not tell us what situations might justify an exception to the general rule.

Nonetheless, the Court has built into its ruling a significant caveat, one with the potential to create a power imbalance among the states. The Court's opinion may make it possible for a handful of states to have considerably more power than others to punish and deter—or refrain from punishing and deterring—national misbehavior. I leave the matter here for now and will return to it when I discuss the potential implications of *Campbell*'s focus on state sovereignty for punitive damages jurisprudence generally.¹¹⁴

Second, although early on in the opinion the Court indicated that both punishment *and* deterrence are legitimate state interests in terms of awarding punitive damages,¹¹⁵ its sovereignty-based comments mentioned only the punishment rationale.¹¹⁶ Like much of *Campbell*, it is not clear what the import is of this apparent shift in focus. It could simply be a case of sloppy drafting or the use of a shorthand reference to a concept earlier discussed with more precision. On the other hand, the particular phrasing used may portend a limitation on the applicability of state sovereignty principles as a restriction on punitive damages awards (i.e., the limitation applies only to the extent a state seeks to advance the punishment rationale and not if it seeks to deter unlawful conduct).¹¹⁷ Of course, if the state sovereignty rationale is so limited, it would greatly restrict its impact.

important and should continue in earnest elsewhere. For present purposes, it is sufficient that whatever the Court meant to do concerning the nature of punitive damages, its state sovereignty rationale was a separate endeavor.

¹¹³ *Campbell*, 538 U.S. at 421 (emphasis added).

¹¹⁴ See *infra* Part III.A.3.

¹¹⁵ *Campbell*, 538 U.S. at 416.

¹¹⁶ See *id.* at 421.

¹¹⁷ Several prominent commentators have advanced this basic argument as a possible reading of *Campbell*. See, e.g., Galligan, *supra* note 23, at 149-50; Sharkey, *supra* note 10, at 429-31.

While not agreeing with the Court on its state sovereignty rationale, I believe it is difficult to faithfully read *Campbell* to apply only to punitive damage awards based on the punishment rationale. First, whether correctly or not, the Court has historically treated “punishment and deterrence” almost as if they represent a unitary concept. Indeed, in the context of punitive damages, I am unaware of any decision in which the Court has treated the concepts as distinct for purposes of analyzing any issue. It would be surprising for the Court to do so in *Campbell* without any analysis or explicit recognition that one justification for the award allowed consideration of extraterritorial conduct while the other one did not. Moreover, the logic behind the Court’s state sovereignty jurisprudence, assuming it is correct, would support its application to deterrence (or any other purpose for that matter) equally as well as punishment. As far as the Court is concerned, it is difficult see why Utah would have engaged in any less constitutionally infirm action by seeking to deter State Farm from acting in a certain way in Texas than it would if Utah were seeking to punish State Farm for such action.

A third scope question concerns the implementation of the Court’s prohibition on punishment of extraterritorial conduct along with its simultaneous blessing of the consideration of such conduct for other purposes.¹¹⁸ While the practicality of this jury task was questioned after *Gore*,¹¹⁹ those questions appear to be even more prominent after *Campbell*. To begin with, there is already a split developing in the lower courts concerning how to apply these twin dictates.¹²⁰ Courts are making divergent judgments as to which of these commands they should heed if they believe they cannot do both. For example, in a mass tort situation, it is difficult to see how evidence concerning victims in the non-forum state¹²¹ could be introduced without running an unacceptably high risk of improper jury use of those facts.¹²² Moreover, if one is to apply the Court’s ruling with due regard for

¹¹⁸ See, e.g., *Campbell*, 538 U.S. at 422 (“Lawful out-of-state conduct may be probative when it demonstrates the deliberateness and culpability of the defendant’s action in the State where it is tortious, but that conduct must have a nexus to the specific harm suffered by the plaintiff. A jury must be instructed, furthermore, that it may not use evidence of out-of-state conduct to punish a defendant for action that was lawful in the jurisdiction where it occurred.”).

¹¹⁹ See, e.g., Cordray, *supra* note 34, at 313.

¹²⁰ Certain courts have read *Campbell* as severely restricting the consideration of out-of-state conduct. See, e.g., *Campbell v. State Farm Mut. Auto. Ins. Co.*, 98 P.3d 409, 415-18 (Utah 2004). Other courts have taken a more liberal view when considering extraterritorial matters. See, e.g., *Williams*, 92 P.3d at 141-42.

¹²¹ For this purpose, I leave aside the question discussed above concerning the import of the Court’s discussion of non-parties more generally. See *supra* note 112.

¹²² *Romo* perhaps best illustrates this point. That case concerned an accident involving a Ford

the constitutionally significant matters it has said are at stake, those courts taking a more absolutist stand on the extraterritorial issue are probably correct. After all, if one believes the Court, the state sovereignty principle is one that is rooted in the fabric of the Constitution itself.¹²³ Thus, one would suspect it cannot be waived by the parties and should be independently enforced by the court.¹²⁴ The tension between these two views of extraterritorial conduct is an issue that can be expected to continue to divide the lower courts, at least until the Supreme Court revisits this area.¹²⁵

While the doctrinal landscape is far from clear, after *Gore* and *Campbell* one can say with some confidence that the Supreme Court has articu-

Explorer in which three members of a family were killed and three members severely injured. *Romo v. Ford Motor Co.*, 113 Cal. App. 4th 738, 743-44 (Cal. Ct. App. 2003). On remand after *Campbell*, the Court of Appeals of California remitted a punitive damages award from \$290 million to just under \$24 million. *Id.* A significant reason for the court's decision was that the jury had apparently used evidence of out-of-state conduct not as a means of establishing Ford's intent or other state of mind but rather as a means of determining how much to punish Ford. *Id.* at 753. Thus, the court reasoned, the jury had gone beyond the appropriate role of punitive damages in that case: punishing Ford for what it had done to the *Romo family*. *Id.* In order to address this issue, the court essentially felt compelled to ignore Ford's out-of-state conduct because the court viewed *Campbell* as restricting the appropriate punishment to the specific conduct towards the named plaintiff and not the same type of conduct towards others. *Id.* If that is the correct reading of *Campbell* in a mass tort or product defect case, it is nearly impossible to see how evidence of other injuries could be properly admissible. *But see* *Henley v. Philip Morris, Inc.*, 114 Cal. App. 4th 1429, 1478 (Cal. Ct. App. 2004) (suggesting that scope of evidence allowed in that case should be broader precisely because the plaintiff's claims "rest on a quintessential 'mass tort,' i.e., a course of more-or-less uniform conduct directed at the entire public and maliciously injuring, through a system of interconnected devices, an entire category of persons to which plaintiff to which squarely belongs") (emphasis in original). This issue will almost certainly be a major battleground in the coming years.

¹²³ See, e.g., *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 571-73 (1996).

¹²⁴ See *infra* Part III.B.1. (discussing implications of classifying a matter as one of structural constitutional law).

¹²⁵ A possible means of reconciling these two principles may be found in a recent decision in the long-running battle involving the Exxon Valdez oil spill. In reconsidering after *Campbell* Exxon's motions to remit a punitive damages award, the district court rejected Exxon's argument that the award was defective because it was impermissibly based on conduct occurring outside Alaska. *In re The Exxon Valdez*, 296 F. Supp. 2d 1071, 1093 (D. Alaska 2004). The specific facts at issue did not concern other accidents or Exxon's conduct directed at persons other than the Alaska citizens and residents. *Id.* Instead, the conduct was Exxon's inaction that, in the court's view, was tied directly to the plaintiff's claims before the court. *Id.* The court's decision seems like a logical means to implement the Supreme Court's commands. Under this logic, defendant's actions specifically directed against non-parties would normally not be admissible while general conduct such as corporate decision-making or design activities would be proper evidence. But even this view does not resolve all the questions about how the Supreme Court's rules should properly be enforced. For example, as the *Romo* court apparently viewed the matter, even such general conduct evidence could pose problems if the jury used it as a basis for setting the level of the award at issue. 113 Cal. App. 4th at 753; see also *supra* note 112 (discussing *Romo* on this point). In the end, how lower courts resolve this question is a matter worth following.

lated a federal constitutional limitation on punitive damage awards that flows from principles of state sovereignty. And while there are certainly questions concerning its scope, that limitation operates as an independent check on such awards and is not dependant on the due process line of analysis for its content.

II. A CRITIQUE OF THE STATE SOVEREIGNTY LIMITATION ON PUNITIVE DAMAGE AWARDS

This Part critiques the state sovereignty rationale identified by the Supreme Court as a limitation on punitive damage awards. This critique serves two purposes. First, it sets forth a unified response to the Court's reasoning on this significant issue, something that has not been done by any court or academic commentator. Second, it further lays the groundwork for appreciating the potential consequences of the Court's rulings, a topic I address in the balance of the Article.

A. *The Flawed Fundamental Premise on Which the State Sovereignty Rationale Is Based*

The foundation upon which the Court built its State sovereignty limitation on punitive damages is that when a decision-maker takes a defendant's out-of-state conduct into account when determining the amount of the award, the State in which the award is rendered is attempting to regulate conduct beyond its territorial borders.¹²⁶ Such extraterritorial regulation is anathema to the structure of the federal system that the Constitution establishes, the Court reasoned, and thus is an affront to the sovereignty of the

¹²⁶ See, e.g., *Campbell*, 538 U.S. at 421-22; *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 571 (1996). The four cases cited in both *Gore* and *Campbell* to directly support the state sovereignty rationale concern attempts by one state to regulate conduct occurring in another state (and having no impact in the first state). See *Bigelow v. Virginia*, 421 U.S. 809 (1975) (Virginia attempted to regulate conduct occurring in New York State); *New York Life Ins. Co. v. Head*, 234 U.S. 149 (1914) (Missouri used its choice of law rules as a means of regulating conduct in New York State concerning non-citizens of Missouri); *Huntington v. Attrill*, 146 U.S. 657 (1892) (refusal of Maryland to give full faith and credit to a New York State judgment amounted to an attempt to essentially apply Maryland law to a New York transaction); *Bonaparte v. Tax Court*, 104 U.S. 592 (1881) (one state is not bound by another state's regulation that certain securities are not included in taxable property). Perhaps significantly, two of these cases dealt with the Full Faith and Credit Clause of the Constitution. *New York Life Ins. Co.*, 234 U.S. at 161; *Huntington*, 146 U.S. at 686. Thus, their use to support a state sovereignty principle untethered from their constitutional moorings is questionable at best. See *infra* note 151 (discussing the ill fit of this clause for purposes of the Court's decisions in *Gore* and *Campbell*).

states.¹²⁷ Accordingly, punitive damage awards based on out-of-state conduct cannot stand, quite apart from any concern related to the excessiveness of the award under a straight due process analysis.¹²⁸

The Court is most certainly on firm ground in reaching its conclusion *if* one accepts the starting premise that punitive damage awards based at least in part on out-of-state conduct are extraterritorial regulation.¹²⁹ The problem is that this premise is not accurate. Instead, the situation is better viewed as a state determining an appropriate *level* of punishment for an in-state harm based on the totality of the defendant's conduct related to that in-state wrong.¹³⁰ Thus, contrary to the Court's view, the situation is more akin to an increase in the level of punishment.¹³¹

¹²⁷ In addition, in the most significant commentary to date concerning the use of extraterritorial conduct Professor Cordray grounds her support for the exclusion of out-of-state conduct as a basis for punitive damage awards in the elicited regulatory effect of such awards. *See* Cordray, *supra* note 34, at 293-94, 302-08. Although as I discuss in this Part of the Article, I disagree with her conclusions, I acknowledge that Professor Cordray develops the argument far better than does the Court in either *Gore* or *Campbell*. Although her article was published before *Campbell*, Professor Cordray rightly predicted the Court's extension of state sovereignty principles to unlawful extraterritorial conduct. *Id.* at 305-09. To the extent other commentators have discussed the issue, they have largely adopted the Supreme Court's improper extraterritorial regulation mantra as one of their grounds for supporting the restriction on basing awards on out-of-state conduct. *See, e.g.,* Victor E. Schwartz et al., *Reining in Punitive Damages "Run Wild": Proposals for Reform by Courts and Legislatures*, 65 BROOK. L. REV. 1003, 1023-28 (1999); Burgess, *supra* note 34, at 517-18. *But cf.* Finch, *supra* note 22, at 554 (noting in discussing, and eventually rejecting, an argument that punitive damage awards should not be entitled to full faith and credit that "[n]or does the potential impact of punitive judgments on other states' regulatory authority justify a generic exception to full faith and credit"). Professor Finch eventually concludes that due process provides a better means to address excessive punitive damage awards. *Id.* In fact, he reads *Gore* as offering "the rudiments of a due process theory that may prevent state courts from using punitive remedies to regulate conduct outside their borders." *Id.* at 555. To the extent this statement can be taken to mean that the Court's extraterritorial-based ruling in *Gore* (*Campbell* had not yet been decided when Professor Finch published his article) is actually based on due process principles, I have explained above why I do not accept that reading. *See supra* Part I.B.2.b.i. As I discuss in this sub-part, I certainly agree that due process principles provide a *better* means to address lawful, and even questionably lawful, extraterritorial conduct. I part ways with Professor Finch, however, to the extent his article could be viewed as advocating that there is a due process based rationale for prohibiting the use of unlawful conduct in the punitive damages calculus.

¹²⁸ *Campbell*, 538 U.S. at 421-22; *Gore*, 517 U.S. at 571.

¹²⁹ For purposes of this analysis, I accept that an award of damages rendered in a private civil action can amount to the exercise of state power. *Gore*, 517 U.S. at 573 n.17 ("State power may be exercised as much by a jury's application of a state rule of law in a civil lawsuit as by a statute.").

¹³⁰ In his *Gore* dissent, Justice Scalia articulated the same point:

As Part II of the Court's opinion [discussing the state sovereignty rationale] unfolds, it turns out to be directed, not to the question "How much punishment is too much?" but rather to the question "Which acts can be punished?" "Alabama does not have the power," the Court says, "to punish BMW for conduct that was lawful where it occurred and that had no impact on Alabama or its residents." That may be true, though only in a narrow sense that a person cannot be *held liable to be punished* on the basis of a lawful act. But if a person has been

Certain elements will always be present whenever there is a proper award of punitive damages against a defendant. As an initial matter, there is a sufficient connection between the parties and the forum state¹³² such that the exercise of judicial jurisdiction over the defendant is proper.¹³³ Second, when a jury makes such an award, it has determined that the defendant has harmed the plaintiff in some legally cognizable way;¹³⁴ if that were not the case, there would be no basis for the recovery of any damages. Third, the plaintiff will have established that the defendant's conduct was sufficiently egregious to warrant the imposition of a sanction beyond compensatory

held subject to punishment because he committed an *unlawful act*, the *degree* of his punishment assuredly *can* be increased on the basis of any other conduct of his that displays his wickedness, unlawful or not.

Id. at 602-03 (emphasis in original) (quoting *Gore*, 517 U.S. at 572-73). My views are slightly different than Justice Scalia's in terms of use of lawful or questionably lawful conduct as a basis for increasing punishment. See *infra* Part II.C. But this difference is one of due process and not state sovereignty.

¹³¹ See *infra* Part II.B. There is no question that the debate about what is happening in basing punitive damage awards on out-of-state conduct is, at some level, an example of what Professor Colby has called "semantic gymnastics." Colby, *supra* note 22, at 669. But the fact that one has to make difficult judgments about the nature of an award does not mean that those judgments cannot—or should not—be made. So long as the Supreme Court's decisions make the distinction between extraterritorial regulation and an increase in the level of punishment for in-state wrongs a constitutional matter, one must engage in the effort. Professor Colby's specific discussion of this issue concerns the broader question of whether punitive damage awards should take into account the defendant's actions with respect to non-parties, whether or not those actions took place in the same state in which the award is rendered. See, e.g., *id.* at 667-71; see also *supra* note 112 (discussing this broader question). Nonetheless, the same gymnastics must be done when discussing the more specific issue of out-of-state activities. At the end of the day, Professor Colby and I differ in how we view the nature of punitive damage awards that take into account conduct as to others, whether that conduct is in-or-out-of state. Professor Colby views such awards as a means to "punish the wrongs done to all victims," see Colby, *supra* note 22, at 669, while, as I explain above, I view them as an appropriate means of setting the punishment for the conduct before the court. As matters stand today, it may be that the Court in *Campbell* in particular has largely adopted Professor Colby's view. See *supra* note 112 (discussing Court's likely adoption of Professor Colby's narrow view of the appropriate role of punitive damages).

¹³² I assume for purposes of this description that the punitive damage award is based on a violation of state, not federal law.

¹³³ See, e.g., *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945) ("[D]ue Process requires only that in order to subject a defendant to a judgment *in personam*, if he is not present within the territory of the forum, he have certain minimum contacts with it such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'" (quoting *Milliken v. Meyer*, 311 U.S. 457, 463 (1940)). I have described the growth of jurisdictional doctrine in detail elsewhere. See Michael P. Allen, *In Rem Jurisdiction from Pennoyer to Shaffer to the Anti-Cybersquatting Consumer Protection Act*, 11 GEO. MASON L. REV. 243, 254-64 (2002).

¹³⁴ See DOBBS, *supra* note 23, at 341 ("Many cases have said, in one form or another, that punitive damages may not be recovered unless the plaintiff first shows actual loss or damages. Other courts have rejected the rule in this bald form and have required only that the plaintiff show a breach of a legal duty by the defendant.") (footnotes omitted).

damages.¹³⁵ Finally, the forum state has applied the correct substantive law to resolve the plaintiff's claim.¹³⁶ Thus, the award of punitive damages comes only after a jury has concluded that a defendant with sufficient contacts with the forum state has transgressed the substantive law that may constitutionally be applied. It is in this environment that the jury sets the award with its collective eye on deterrence and punishment, both of which the Court recognized as legitimate goals.¹³⁷ And so if the jury considers a defendant's out-of-state actions, it is doing so in connection with harm inflicted on an in-state plaintiff, or at the very least some other person with whom the defendant has sufficient forum-related contacts.¹³⁸ The situations presented in the cases on which the Supreme Court relied in *Gore* and *Campbell* to establish the state sovereignty limitation are a far cry from this scenario.

None of the cases the Court cites could faithfully be said to involve a wrongful act in or affecting the state engaging in the prohibited extraterritorial regulation.¹³⁹ At the very least, the cases used by the Court are all qualitatively different than a situation in which there has unquestionably been a

¹³⁵ See BLATT ET AL., *supra* note 21, at 159-62. The particular description of the level of egregiousness varies from jurisdiction to jurisdiction. *Id.* at 162-72.

¹³⁶ For example, in order to apply its own substantive law, a state "must have a 'significant contact or significant aggregation of contacts, creating state interests, such that choice of its law is neither arbitrary nor fundamentally unfair.'" See, e.g., *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 818 (1985) (quoting *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 312-13 (1981)).

¹³⁷ See *supra* Part I.A.

¹³⁸ I do not mean to suggest that such use of out-of-state conduct may not result in an extraterritorial effect in a "but for" causative sense. For example, after the *Gore* case, BMW changed its national policy to require disclosure of all repairs done to new cars pre-sale. *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 566 (1996). But the mere fact of some extraterritorial effect cannot be the guiding light by which state sovereignty issues are judged. Cf. Donald H. Regan, *Siamese Essays: (I) CTS Corp. v. Dynamics Corp. of America and Dormant Commerce Clause Doctrine; (II) Extraterritorial State Legislation*, 85 MICH. L. REV. 1865, 1878 (1987) ("It is clear that the Court cannot flatly prohibit all state laws that have extraterritorial effects, or even all state laws that have substantial extraterritorial effects. Such a prohibition would invalidate much too much legislation."). The fact that the Court did not make such an argument in *Gore* suggests that it agrees that the causation of an extraterritorial effect is insufficient in this regard.

¹³⁹ See *Bigelow v. Virginia*, 421 U.S. 809, 822-23 (1975) (Virginia's attempt to regulate the advertising in Virginia of a lawful abortion service to be performed in New York State was improper attempted extraterritorial regulation of the abortion service); *New York Life Ins. Co. v. Head*, 234 U.S. 149, 164-65 (1914) (Missouri's application of its laws to a dispute involving a New York insurance company and a citizen of New Mexico concerning a contract not made in Missouri was unlawful in part because of Missouri's attempt to regulate extraterritorial conduct); *Huntington v. Attrill*, 146 U.S. 657, 686 (1892) (Maryland's refusal to enforce a judgment rendered in New York State because it could not have been rendered in Maryland was an attempt at extraterritorial regulation); *Bonaparte v. Tax Court*, 104 U.S. 592, 594-95 (1881) (One state's attempt to prevent another state from taxing property present by operation of law in the other state was unconstitutional attempt at extraterritorial regulation).

wrong committed in, or with a constitutionally sufficient nexus to, the forum state, as is the case when punitive damages are awarded. In sum, these cases are a poor fit with the punitive damages paradigm into which the Court seeks to squeeze them.¹⁴⁰ The quartet of cases is better seen as reflecting a concern with one state actually making a policy judgment and then through some device attempting to force its will onto other states.¹⁴¹

Once the façade of the Court's "inappropriate regulation" premise has been stripped away, the Court's vision of the nature of the "sovereignty" interest retained by the individual states¹⁴² is unclear at best and profoundly unsettling at worst.¹⁴³ Before *Campbell*, one could have been fairly clear as to the essential attributes of the states' retained sovereignty. At its core, that sovereignty encompassed the broad power to legislate with respect to conduct occurring in or having an effect on the state and to enforce those laws.¹⁴⁴

¹⁴⁰ The same can also be said of the Court's cases concerning taxation of multistate enterprises, a topic that some commentators have argued also supports the state sovereignty rationale. *See* Cordray, *supra* note 34, at 298-99. In the interstate taxation cases, the Court formulated a principle allowing states to tax interstate activities so long as "[a]ny formula used [for allocating property values] . . . bear[s] a rational relationship, both on its face and in its application, to property values connected with the taxing State." *Norfolk & W. Ry. v. Mo. State Tax Comm'r*, 390 U.S. 317, 325 (1968); *see also* *Allied-Signal, Inc. v. Dir., Div. of Taxation*, 504 U.S. 768, 772 (1992) (articulating same basic principle in context of a unitary business); *Conn. Gen. Life Ins. Co. v. Johnson*, 303 U.S. 77, 80-81 (1938) (a state may not tax "property and activities" outside of its jurisdiction). As discussed above in connection with the extraterritorial regulation point, a punitive damage award fits comfortably within the confines of an apportionment-like principle. First, it does not raise the specter of taxing something outside of the state's jurisdiction. Instead, in something akin to apportionment, it concerns the appropriate level of punishment for a defendant based on an in-state wrong. It is true that the level of punishment could be excessive, but this consideration is far better dealt with under due process principles.

¹⁴¹ Even with respect to this principle there has been vigorous dissent on the Court. *See Bigelow*, 421 U.S. at 834 (Rehnquist, J., dissenting) ("The source of this rigid territorial limitation on the power of the states in our federal system to safeguard the health and welfare of their citizens is not revealed. It surely cannot be found in cases from this Court.").

¹⁴² It has been long recognized that the United States is a nation of dual and divided sovereignties in that both the federal government and the individual states possess elements of sovereignty that, in a unitary system, would generally be held by a single government. *See, e.g., McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 410 (1819) ("[In] America, the powers of sovereignty are divided between the government of the Union, and those of the States. They are each sovereign, with respect to the objects committed to it, and neither sovereign with respect to the objects committed to the other."). This divided sovereignty is also reflected, at least in part, by the Tenth Amendment. *See* U.S. CONST. amend. X ("The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.").

¹⁴³ I address the potentially disturbing nature of the Court's apparent view of state sovereignty below when I consider the possible consequences of the Court's reasoning in areas beyond punitive damages. *See infra* Part IV.

¹⁴⁴ *See, e.g., Heath v. Alabama*, 474 U.S. 82, 93 (1985) ("Foremost among the prerogatives of

The notion of sovereignty reflected in *Campbell* does not fit within these traditional bounds and could, actually, transgress them. *Campbell* is not based on the preservation of the right to legislate or to enforce laws in any way that has been understood to date. States in which a defendant had engaged in conduct that another state used as means of setting an appropriate punitive damage award still retain the right to legislate and, most importantly, to enforce their own laws by independently punishing the defendant.¹⁴⁵ Thus, no traditional sovereignty principle is at stake here.¹⁴⁶ Moreover, by adopting a purportedly expanded conception of sovereignty, the Court has actually diminished the sovereignty the states retained. Each state will now have less ability to effectively enforce its laws, a core component of sovereignty.¹⁴⁷

One might be able to understand the Court's stretching of its extraterritorial regulation precedent if there were no other line of authority relevant to the question. However, the Court had a ready alternative to the approach it took by turning to its precedent concerning factors that are permissible to consider when determining the appropriate punishment for a criminal defendant. Those cases fit the punitive damages situation almost exactly. It is to that analysis to which I now turn.¹⁴⁸

sovereignty is the power to create and enforce a criminal code.”). This is not to suggest that there are no other retained attributes of sovereignty. *See, e.g., In re Ayers*, 123 U.S. 443, 505 (1887) (“The very object and purpose of the 11th Amendment [is] to prevent the indignity of subjecting a State to the coercive process of judicial tribunals at the instance of private parties.”). But the sovereignty attributes that could conceivably be implicated in the punitive damages arena are the core functions of legislating and enforcing. Of course, there are limits under the Constitution on even these attributes of retained sovereignty. *See, e.g., U.S. CONST. art. I* (setting forth legislative power of Congress).

¹⁴⁵ *See* Part II.C.

¹⁴⁶ In fact, the closest the decision comes to reflecting a “traditional” conception of sovereignty is its strong territorial rhetoric. *See, e.g., Campbell*, 538 U.S. at 422 (“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.”). Such strong territorialism is, however, reminiscent of a now largely discredited constitutional doctrine that restricted a state’s ability to exercise personal, or judicial, jurisdiction over an absent defendant. *See Pennoyer v. Neff*, 95 U.S. 714 (1878). I explore the potential implications of the state sovereignty rationale for personal jurisdiction doctrine in more depth below. *See infra* Part IV.B. For now, it is sufficient to note that an appeal to a largely discredited notion of sovereignty is not a ringing endorsement for the Court’s approach.

¹⁴⁷ It is perhaps for this reason that the Attorneys General of twelve states filed an *amici* brief in *Campbell* in support of the Utah Supreme Court’s judgment. *See* Brief Amici Curiae of the State of Minnesota et al., at *3, 2001 U.S. Briefs 1289, *Campbell* (No. 01-1289) (“The Utah Court’s judgment does not invade the prerogatives of other states. To the contrary, the Utah Court’s ruling recognizes the ability of every state to protect its citizens by considering all evidence relevant to a defendant’s reprehensibility and the amount necessary to deter wrongdoing that causes harm to its citizens.”).

¹⁴⁸ Even though the Court does not formally rely on it (except to the extent certain cases it cites

concern it, *see supra* Part II.A (discussing cases the Court relies on to support its decision)), the sovereignty rationale is no better supported—and is in fact weaker—by articulating it as one emanating from the Full Faith and Credit Clause. *See* U.S. CONST. art. IV, § 1 (“Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State.”). There is no question that, as the Court recently held, “States’ sovereignty interests are not foreign to the full faith and credit command.” *Franchise Tax Bd. v. Hyatt*, 538 U.S. 488, 499 (2003). Be that as it may, however, the Clause provides little in the way of help. As an initial matter, the issue we are considering here does not implicate what might be thought of as the more “typical” application of the Full Faith and Credit Clause in the punitive damages context, a situation in which a prevailing plaintiff seeks to enforce in State B a judgment rendered in State A. If there were such a situation, the Court would apply its precedent to the effect that “the full faith and credit command ‘is exacting’ with respect to ‘[a] final judgment . . . rendered by a court with adjudicatory authority over the subject matter and persons governed by the judgment.’” *Franchise Tax Bd.*, 538 U.S. at 494 (quoting *Baker v. Gen. Motors Corp.*, 522 U.S. 222, 233 (1998)); *see also* *Finch*, *supra* note 22, at 527-61 (comprehensively discussing arguments concerning denying full faith and credit to punitive damages, and eventually rejecting them). As I described above, a punitive damages judgment would normally meet these requirements. In any event, this judgment enforcement scenario was not at play in either *Gore* or *Campbell*.

A sovereignty analysis based on the Full Faith and Credit Clause would not end there, however, because the Clause also has meaning outside of the judgment enforcing context. *See, e.g., Franchise Tax Bd.*, 538 U.S. at 494 (recognizing that the Clause has application to “choice of law” but that “it is less demanding” in that area). Here, the concern is that a state will intrude on another state’s sovereignty by inappropriately applying forum state law to a given dispute. *See, e.g., Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 821-23 (1985); *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 312-13 (1981). Thus, the question is one of legislative jurisdiction, or the ability to provide the substantive rules by which a given dispute is to be resolved. *See* Terry S. Kogan, *Toward a Jurisprudence of Choice of Law: The Priority of Fairness Over Comity*, 62 N.Y.U. L. REV. 651, 651-52 n. 1 (1987) (contrasting legislative jurisdiction with personal jurisdiction or adjudicative jurisdiction, which concerns the power of a forum to “try a case in its courts” no matter what substantive law is applied) (quoting Willis L.M. Reese, *Legislative Jurisdiction*, 78 COLUM. L. REV. 1587, 1587 (1987)).

Far from leading to the result in *Gore* and *Campbell*, the Court’s reasoning concerning the legislative jurisdiction aspect of the Clause cuts against the rationale. For example, in *Shutts*, the Court summarized its holding as follows:

Neither the Due Process Clause nor the Full Faith and Credit Clause requires Kansas to substitute for its own [laws], applicable to persons and events within it, the conflicting statute of another state, but Kansas may not abrogate the rights of parties beyond its borders having no relation to anything done or to be done within them.

Shutts, 472 U.S. at 822 (citations and internal quotation marks omitted); *see also Allstate*, 449 U.S. at 334 (Powell, J., dissenting) (“[F]or a forum State to further its legitimate public policy by applying its own law to a controversy, there must be some connection between the facts giving rise to the litigation and the scope of the State’s lawmaking jurisdiction.”). As described in the text, in terms of a punitive damage award considering out-of-state conduct, the forum state has the requisite connection to the controversy between the defendant and the named plaintiff. Moreover, the out-of-state conduct is being considered not to regulate the potential claims of out-of-state persons or to substitute the forum state’s law for that of another state, something to which *Shutts* and the other full faith and credit cases would speak, but rather solely to fashion an appropriate remedy with respect to the in-state matter. Thus, the Court’s statement in *Campbell* that “[a]ny proper adjudication of conduct that occurred outside Utah to other persons would require their inclusion, and, to those parties, the Utah courts, in the usual case, would need to apply the laws of their relevant jurisdiction” is correct but totally irrelevant. *Campbell*,

B. *Decisions Concerning Criminal Sentencing Considerations Provide a Better Framework for Evaluating Punitive Damage Awards*

The Court's jurisprudence concerning constitutionally permissible considerations for criminal sentencing provides a nearly perfect template for dealing with the use of out-of-state conduct in the punitive damages context. Indeed, consideration of out-of-state conduct is comparably more likely to violate the principles of state sovereignty in the context of criminal sentencing than in punitive damages awards. Yet, the Court has adopted the opposite view, a tack taken with almost nothing in the way of meaningful analysis.

In the criminal sentencing context, the Court's approach is best summarized by its holding that "[h]ighly relevant—if not essential—to [a judge's] selection of an appropriate sentence is the possession of the fullest information possible concerning the defendant's life and characteristics."¹⁴⁹ In no case did the Court impose—or even suggest the existence of—a sovereignty-based limitation on the use of information concerning a defendant's prior bad acts that had occurred in other states.¹⁵⁰ Indeed, the Court expressly *approved* the use of such extraterritorial conduct when setting a criminal sentence. Over 100 years ago, in *McDonald v. Massachusetts*, the Supreme Court turned aside a defendant's challenge to a Massachusetts recidivism statute that provided:

538 U.S. at 421-22 (citing *Shutts*, 472 U.S. at 821-22). At the end of the day, a punitive damage award that has taken into consideration out-of-state conduct is simply not "a case in which a State has exhibited a policy of hostility to the public Acts of a sister State." *Franchise Tax Bd.*, 538 U.S. at 499 (citation and internal quotation marks omitted); *But see*, Scott Fruehwald, *If Men Were Angels: The New Judicial Activism in Theory and Practice*, 83 MARQ. L. REV. 435, 494 n.339 (1999) (arguing that *Gore's* state sovereignty rationale was correct but that it should have been grounded in the Full Faith and Credit Clause).

¹⁴⁹ *Williams v. New York*, 337 U.S. 241, 247 (1949). The Court has consistently maintained this view of the factors relevant to criminal sentencing. *See, e.g.*, *Witte v. United States*, 515 U.S. 389, 397 (1995) (citing with approval statements from both *Williams v. New York* and *Nichols v. United States* concerning appropriate use by judges of a wide array of information at sentencing); *Nichols v. United States*, 511 U.S. 738, 747 (1994) ("As a general proposition, a sentencing judge may appropriately conduct an inquiry broad in scope, largely unlimited either as to the kind of information he may consider, or the source from which it may come.") (citation and internal quotation marked omitted). It should be noted that Justice Breyer has recently argued that the Court's decision striking down Washington State's sentencing guidelines may cast the constitutionality of such wide consideration of information at sentencing into doubt. *See Blakely v. Washington*, 124 S. Ct. 2531, 2561-62 (2004) (Breyer, J. dissenting).

¹⁵⁰ The Court has approved the consideration not only of prior convictions, but also behavior that did not lead to a finding of guilt. *See, e.g., Nichols*, 511 U.S. at 747-48.

Whoever has been twice convicted of crime, sentenced and committed to prison in this or any other State, or was once in this and once at least in any other State, for terms of not less than three years each, shall, upon conviction of a felony committed in this State after passage of this act, be deemed to be an habitual criminal and shall be punished by imprisonment in the State prison for twenty-five years . . .¹⁵¹

McDonald had been convicted under the statute as an habitual offender with one of his predicate convictions having been a crime committed in New Hampshire.¹⁵² The Court rejected McDonald's constitutional challenges to the act and, significantly for present purposes, held that:

It is within the discretion of the legislature of the State to treat former imprisonment in another State, as having the like effect as imprisonment in Massachusetts, to show the man is an habitual criminal. The allegation of previous convictions is not a distinct charge of crimes, but is necessary to bring the case within the statute, and goes to punishment only.¹⁵³

While *McDonald* is an old precedent, the Court has not retreated from it and has both expressly and implicitly reaffirmed its holding.¹⁵⁴

I submit that as far as state sovereignty principles are concerned, the situation in which a jury uses out-of-state conduct to set the appropriate level of punishment and/or deterrence when awarding punitive damages raises precisely the same issues as that of a judge using out-of-state conduct to set the appropriate sentence for a criminal defendant.¹⁵⁵ In both situations

¹⁵¹ 180 U.S. 311, 311 (1901) (citing MASS. GEN. LAWS ch. 435, § 1 (1887)).

¹⁵² *Id.* at 312.

¹⁵³ *Id.* at 313.

¹⁵⁴ Most prominently, the *Gore* Court recognized that out-of-state convictions were relevant as a means of enhancing a defendant's sentence. *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 573 n.19 (1996). In addition, the Court expressly reaffirmed the salient point from *McDonald*, although it did not cite the case, in *Williams v. Oklahoma* when it rejected a constitutional challenge to the use of prior bad acts, including out-of-state conduct, on which a judge based his sentence. 358 U.S. 576, 580 n.4 & 583 (1959). The Court also implicitly displayed its indifference to the use of out-of-state conduct as recently as 2003. In *Ewing v. California*, the Court rejected challenges to California's "Three Strikes and You're Out" law. 538 U.S. 11 (2003). While the *Ewing* defendant's predicate convictions had all been in California, *id.* at 18-19, the statute on which his conviction was based expressly allowed the consideration of out-of-state conduct, whether resulting in imprisonment or not. *See* CAL. PENAL CODE §§ 667(a)(1)-(2) (West 1999). The Court gave no indication that its conclusion would have been different in any respect if any of Ewing's prior convictions or other bad acts had involved conduct occurring outside of California. If anything, the Court commented favorably on an extraterritorial effect of California's law when it quoted from a document stating that "an unintended but positive consequence of 'Three Strikes' has been the impact on parolees leaving the state. More California parolees are now leaving the state than parolees from other jurisdictions entering California." *Ewing*, 538 U.S. at 27 (quoting OFFICE OF THE ATTORNEY GENERAL, CAL. DEP'T JUSTICE, "THREE STRIKES AND YOU'RE OUT"—ITS IMPACT ON THE CALIFORNIA CRIMINAL JUSTICE SYSTEM AFTER FOUR YEARS 10 (1998)).

¹⁵⁵ The Court has accepted punishment and deterrence as legitimate justifications for both punitive

there is a wrong committed in or otherwise affecting the state rendering judgment. The question in both situations then becomes how much punishment or deterrence is appropriate. It makes no sense to find state sovereignty principles offended in one context but not in the other when out-of-state conduct is used as a means of determining the appropriate level of punishment or deterrence in both of them.¹⁵⁶ Accordingly, the approach the Court has taken in the criminal context provided the most analogous paradigm for approaching the use of extraterritorial conduct in the punitive damages context.¹⁵⁷

If the criminal context provided such a ready answer to the extraterritorial concern, why did the Court reject it? Unfortunately, the Court does not provide any meaningful discussion of its divergent approaches, and what it does say is not particularly persuasive. In *Gore*, the Court recognized that prior extraterritorial conduct, including conduct not resulting in a conviction, could be the basis for increased punishment under a habitual offender statute.¹⁵⁸ The Court's entire explanation for rejecting the same

damages and criminal sanctions. Compare *supra* Part I.A. (discussing approved rationales for an award of punitive damages), with *Ewing*, 538 U.S. at 26-27 (accepting punishment and deterrence as legitimate state interests in the criminal context).

¹⁵⁶ There can certainly be a debate concerning whether due process based proportionality principles should be applied in the same way when considering criminal sanctions on the one hand and punitive damages on the other. See, e.g., Erwin Chemerinsky, *The Constitution and Punishment*, 56 STAN. L. REV. 1049, 1070-79 (2004) (arguing in favor of a "unified theory of the Constitution and punishment" based on proportionality review); Pamela S. Karlan, "Pricking the Lines": *The Due Process Clause, Punitive Damages, and Criminal Punishment*, 88 MINN. L. REV. 880, 910-12 (2004) (suggesting reasons why proportionality review might be heightened in the punitive damages context as opposed to when reviewing criminal punishment); Adam M. Gershowitz, Note, *The Supreme Court's Backwards Proportionality Jurisprudence: Comparing Judicial Review of Excessive Criminal Punishments and Excessive Punitive Damages*, 86 VA. L. REV. 1249, 1285-1301 (2000) (arguing that the Court should apply heightened proportionality in the criminal context as opposed to the review of punitive damage awards). But there is nothing to suggest that a state's interest in its sovereignty should be different in these situations. In fact, one could argue that if state sovereignty principles should play a role in either situation—something I do not advocate—it should be in the criminal context. After all, in the criminal realm it is actually the state taking an action by either choosing not to punish a given act or setting the level of punishment at a certain level. When a later state increases the level of punishment for an act based on activity in the first state, one could more readily perceive state sovereignty interests being implicated. It is more difficult to make this connection concerning punitive damages when actions in both states are taken not by the states themselves but rather by juries in civil lawsuits.

¹⁵⁷ Another commentator has remarked on this similarity. See Rachel A. Van Cleave, "Death is Different," *Is Money Different? Criminal Punishments, Forfeitures, and Punitive Damages—Shifting Constitutional Paradigms for Assessing Proportionality*, 12 S. CAL. INTERDISC. L.J. 217, 271 (2003). Professor Karlan also mentioned this different treatment of out-of-state conduct in her recent article. See Karlan, *supra* note 156, at 913. Given her focus in that piece, she did not explore the tension between these two lines of authority. See *id.*

¹⁵⁸ *Gore*, 517 U.S. at 573 n.19.

approach in the punitive damages area was that the criminal sentencing cases did not stand for the proposition “that a sentencing court could properly *punish* lawful conduct. This distinction is precisely the one we draw here.”¹⁵⁹ But what the Court failed to explain is why the use of such out-of-state conduct should be considered to punish the defendant in the punitive damages context but not when using it to enhance a criminal sanction.¹⁶⁰

Given the precise language in *Gore* used to distinguish the criminal sentencing cases—language suggesting that the real issue could be the punishment of *lawful* conduct¹⁶¹—the *Campbell* Court had to take a different approach when it summarily rejected the sentencing authority for lawful and unlawful extraterritorial conduct alike. Specifically, *Campbell* held that in civil cases as opposed to criminal sentencing “courts must ensure the conduct in question replicates the prior transgressions.”¹⁶² The Court is partially correct in this statement as a matter of *due process*.¹⁶³ It does not follow, however, that this nexus requirement has anything whatsoever to do with state sovereignty principles. The Court does not say why the use of out-of-state conduct to increase a punitive damages award should offend a sister state any less if that conduct is similar to the in-state conduct. I suggest the Court does not provide such an explanation because there is none. The approach the Court has taken in the criminal sentencing context remains the best way to view the use of out-of-state conduct in connection with punitive damage awards. The Court should revisit the area and reverse its course. At the very least, the Court should address in a more forthright manner the incongruity between its treatment of punitive damages and criminal sentencing.

C. *Some Specific Analysis Focusing on Unlawful Extraterritorial Conduct*

The position I have taken concerning the consideration of extraterritorial conduct as a matter of state sovereignty principles applies equally with respect to lawful and unlawful out-of-state actions. There is, however, little difference in the end result between my approach and that of the Court with respect to lawful conduct.¹⁶⁴ The reason is that “[t]o punish a person be-

¹⁵⁹ *Id.* (emphasis in original).

¹⁶⁰ *See, e.g.,* *McDonald v. Massachusetts*, 180 U.S. 311, 313 (1901).

¹⁶¹ *Gore*, 517 U.S. at 573 n.19.

¹⁶² *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 423 (2003).

¹⁶³ *See infra* Part II.C.

¹⁶⁴ My analysis concerning lawful extraterritorial conduct applies equally to conduct that can reasonably be deemed as questionably lawful. *See* Cordray, *supra* note 34, at 303-04 (recognizing that

cause he has done what the law plainly allows him to do is a due process violation of the most basic sort”¹⁶⁵ A person simply will not be on notice that she may be subject to a legal sanction for taking an action that is lawful when and where taken.¹⁶⁶

The same generic, across the board due process analysis is not applicable when an act is unlawful when and where taken. Here, a person should be on notice that her action could lead to a legal sanction of some sort.¹⁶⁷ Thus, it is in the arena of unlawful extraterritorial conduct that there is a significant practical difference between the position I advocate and the one the Court has adopted. But even considering the matter on the Court’s terms—with hypersensitivity about possible violations of sovereignty—the consideration of unlawful extraterritorial conduct should raise no constitutional problem.¹⁶⁸ My task in the balance of this sub-part is to develop a step-by-step explanation of why there is no sovereignty-diminishing effect in this particular situation.

the extraterritorial conduct cannot be divided neatly into two groups, purely lawful and purely unlawful).

¹⁶⁵ *Bordenkircher v. Hayes*, 434 U.S. 357, 363 (1978).

¹⁶⁶ It is in this respect that my approach differs from that Justice Scalia has discussed. *See supra* note 130 (discussing Justice Scalia’s *Gore* dissent).

¹⁶⁷ It is possible to read *Campbell* as articulating a due process based rationale connected with unlawful conduct generally. As with much else in the decision, the Court was not clear about its actions. Nevertheless, the Court held that it was inappropriate to consider certain of State Farm’s conduct that “bore no relation to the Campbells’ harm.” 538 U.S. at 422. It was not clear if the Court meant to restrict this issue to all extraterritorial conduct or whether it was speaking only of lawful conduct. *Id.* at 422-23; *see also supra* Part II.B.2.b.ii; *supra* note 112 (concerning the lack of clarity in this general aspect of *Campbell*). It does appear, however, that the Court’s action in this area was animated by a concern about “the possibility of multiple punitive damages awards for the same conduct.” *Campbell*, 538 U.S. at 423. I address the multiple punishment issue below and suggest a different means to address the problem, be it real or imagined. *See infra* Part II.D.

¹⁶⁸ Before exploring this issue in more detail, there is a preliminary question: Is it possible to have conduct occurring in different states truly be equivalently unlawful? There is a non-frivolous argument that differences in the precise manner in which a legal concept is defined or in the procedures available to litigants essentially make it impossible to compare the unlawfulness of actions across borders. *See, cf.*, *F. Huffman-La Roche Ltd. v. Empagran S.A.*, 124 S. Ct. 2359, 2368 (2004) (noting that the fact that foreign nations have antitrust laws modeled on United States law does not mean that application of U.S. law to conduct occurring in those foreign countries would not interfere with those countries’ legitimate interests). While not beyond the realm of reason, this approach is not the best way to view the situation. Instead, the more reasonable approach is to view conduct at a higher level of abstraction in order to judge lawfulness. So, for example, common law fraud would be unlawful everywhere even if the means of proof varied among jurisdictions. There will certainly be situations in which the line between lawful and unlawful is difficult to draw even at a high level of generality, but I suspect those situations would be the exception rather than the rule. I leave for a later discussion the development of any specific guidelines courts should follow in this endeavor.

I begin by returning to the Court's view of the nature of punitive damages.¹⁶⁹ The Court tells us that punitive damages do not serve a compensatory purpose and are instead meant to serve the independent goals of punishment and deterrence.¹⁷⁰ Given the different goals of punitive damages, a plaintiff is required to show more than she would have to show simply to prove the defendant acted unlawfully and that compensatory damages are warranted.¹⁷¹ Thus, as the Supreme Court summarized, punitive damages

are never awarded as of right, no matter how egregious the defendant's conduct. "If the plaintiff proves sufficiently serious misconduct on the defendant's part, the question whether to award punitive damages is left to the jury, which may or may not make such an award." Compensatory damages, by contrast, are mandatory; once liability is found, the jury is required to award compensatory damages in an amount appropriate to compensate the plaintiff for his loss.¹⁷²

The nature of a plaintiff's "right" to receive punitive damages is critical when considering the sovereignty issue. First, a state can take no refuge in a sovereignty principle concerned with ensuring that its citizens obtain their fair share of punitive damages; there is no share of such damages to which any given plaintiff is entitled.¹⁷³ Moreover, the result remains the same even if the second state has in place a statutory or judicial means of sharing in punitive damages awarded in its courts.¹⁷⁴ The state's "right" to receive a share of a punitive damage award under these schemes is entirely

¹⁶⁹ See *supra* Part I.A.

¹⁷⁰ *Campbell*, 538 U.S. at 416.

¹⁷¹ See DOBBS, *supra* note 134, at 512.

¹⁷² *Smith v. Wade*, 461 U.S. 30, 52 (1983) (quoting DOBBS, LAW OF REMEDIES §3.11(2)-(3) (1993)); see also ELAINE W. SHOEN ET AL., REMEDIES CASES AND PROBLEMS 704 (3d ed. 2002) ("Punitive damages are never awarded automatically, nor are they awarded as a matter of right. The trier of fact has discretion whether to award them at all and, if so, in fixing the amount."); Mesulam, *supra* note 93, at 1140 ("[T]he fact that plaintiffs have no vested right to receive punitive damages is undisputed.") (emphasis in original).

¹⁷³ The plaintiff in a second state would likely be able to seek punitive damages in its own right. Assuming this plaintiff satisfied all appropriate pleading and evidentiary burdens, the only obstacle in its path would be the due process limitation that could be reached concerning multiple punishments for the same course of conduct. See *infra* Part II.D.

¹⁷⁴ The most common means by which states share in punitive damage awards are through so-called split-recovery statutes. See, e.g., Sharkey, *supra* note 10, at 414-22 (discussing a variety of statutes); Clay R. Stevens, Note, *Split-Recovery: A Constitutional Answer to the Punitive Damages Dilemma*, 21 PEPP. L. REV. 857 (1994) (same). For example, California recently enacted a statute requiring, at least until July 1, 2006, that seventy-five percent of punitive damage awards rendered in the state be paid into a Public Benefits Trust Fund. See CAL. CIV. CODE § 3294.5(b)(1) (2004). In some states, however, the sharing is pursuant to court decisions. See, e.g., *Dardinger v. Anthem Blue Cross & Blue Shield*, 781 N.E.2d 121 (Ohio 2002).

derivative of the plaintiff's "right." In other words, the state's right to receive a part of the award is contingent on the plaintiff being entitled to obtain any punitive damages in the first instance. Because the plaintiff has no vested right to obtain the award, no interest of the state is harmed—assuming that these statutes actually involve a sovereignty interest.¹⁷⁵

The state certainly retains the sovereignty interest of seeing that its laws are enforced and that those who violate those laws are punished or otherwise appropriately sanctioned, but allowing another state to consider unlawful extraterritorial conduct when awarding punitive damages does nothing to diminish this sovereignty interest. To begin with, an award of punitive damages in one case does not preclude a second plaintiff from suing the defendant and seeking punitive damages in her own right. And even if the second plaintiff does not—or cannot—seek punitive damages, she can recover compensatory damages, thus enforcing the state's substantive laws. In addition, the state itself retains a number of options with respect to the defendant even if another jurisdiction has somehow taken conduct in the state into account in another proceeding. For example, in most instances the state may proceed criminally against the defendant, attempt to impose fines through a civil enforcement action, or take regulatory action such as stripping the defendant of licenses or other credentials necessary to do business in the state. Nothing done in the first state's punitive damages proceeding would hinder the second state's enforcement interests under current law.¹⁷⁶

D. *The Question of Multiple Punishments for the Same Conduct*

One of the significant issues driving the concern about punitive damages has been the fear that, as punitive damages are sought in product defect and mass tort cases, defendants could be subject to multiple punishments for the same course of conduct.¹⁷⁷ I will not join the debate as to

¹⁷⁵ That is not to say that these statutes may not raise constitutional concerns. *See, e.g.*, Finch, *supra* note 22, at 537-39 (discussing possible constitutional concerns under split-recovery statutes); Sharkey, *supra* note 10, at 433-40 (same). It is just that those potential concerns do not include the protection of state sovereignty.

¹⁷⁶ Even assuming that the award of punitive damages in the first state can be considered the action of that state for constitutional purposes, the punishment imposed by the two states would be different if for no reason other than the fact that it was imposed by different sovereigns. *Cf.* Heath v. Alabama, 474 U.S. 82, 93 (1985) (Fifth Amendment Double Jeopardy Clause not offended by sequential trials by different states based on the same events because the states were different sovereigns).

¹⁷⁷ This concern has been expressed by judges, *see, e.g.*, BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 593 (1996) (Breyer, J., concurring); Roginsky v. Richardson-Merrell, Inc., 378 F.2d 832, 839-40

whether such multiple awards occur or whether if they do, this development represents a true problem. I raise the multiple punishment issue because the state sovereignty rationale has been advanced as a means of addressing the problem.¹⁷⁸

The state sovereignty limitation on punitive damage awards is not necessary to address the perceived multiple punishment issue. First, there are already in place state procedures that address the multiple punishment issue in various ways. For example, in Oregon a jury is required “to consider evidence of punishments already imposed on the defendant when it considers the amount of an award of punitive damages.”¹⁷⁹ Taking a slightly different approach, in Florida punitive damages may not be awarded against a defendant if it establishes that it has been the subject of another award of punitive damages concerning the same course of conduct.¹⁸⁰ The plaintiff in Florida can overcome the preclusive effect of the statute only by establishing “by clear and convincing evidence that the amount of prior punitive damages awarded was insufficient to punish that defendant’s behavior.”¹⁸¹ But even then, any award of punitive damages

(2d Cir. 1969), as well as by commentators. *See, e.g.,* Colby, *supra* note 22, at 584-89; Cordray, *supra* note 34, at 276-88; Howard A. Denemark, *Seeking Greater Fairness When Awarding Multiple Plaintiffs Punitive Damages for a Single Act by a Defendant*, 63 OHIO ST. L.J. 931, 948-55 (2002); Laura J. Hines, *Nigle v. R.J. Reynolds Tobacco Co.: Lessons in State Class Actions, Punitive Damages, and Jury Decision-Making; Obstacles to Determining Punitive Damages in Class Actions*, 36 WAKE FOREST L. REV. 889, 892-97 (2001) [hereinafter Hines, *Obstacles*]; John Calvin Jeffries, Jr., *A Comment on the Constitutionality of Punitive Damages*, 72 VA. L. REV. 139, 140-47 (1986); Richard W. Murphy, *Superbifurcation: Making Room for State Prosecution in the Punitive Damages Process*, 76 N.C. L. REV. 463 542-55 (1998); Richard A. Seltzer, *Punitive Damages in Mass Tort Litigation: Addressing the Problems of Fairness, Efficiency and Control*, 52 FORDHAM L. REV. 37, 39-55 (1983); Sharkey, *supra* note 10, at 432-33; Anthony J. Sebok, *The \$28 Billion Verdict Against Philip Morris: Are Multiple Punitive Damage Verdicts Overpunishing Big Tobacco?* (Findlaw, Oct. 7, 2002), at <http://writ.news.findlaw.com/sebok/20021007.html> (last visited Jan. 1, 2005). *But see* Jerry J. Phillips, Symposium, *Punitive Damages Awards in Product Liability Litigation: Strong Medicine or Poison Pill? Multiple Punitive Damage Awards*, 39 VILL. L. REV. 433, 437-38 (1994) (arguing “that there is no inherent due process problem arising out of multiple punitive damage awards for the same course of conduct, because each of the claimants has been separately injured and, therefore, each may justly claim retribution from the defendant”).

¹⁷⁸ The Supreme Court identified the multiple punishment issue as a concern that the state sovereignty issue was meant to address. *Campbell*, 538 U.S. at 423; *see also* Mesulam, *supra* note 93, at 1132 (“[The] Supreme Court’s punitive damages jurisprudence implicitly forbids multiple awards . . .”). Commentators have made the same connection; *see, e.g.,* Cordray, *supra* note 34, at 276-88; Burgess, *supra* note 34, at 501-02.

¹⁷⁹ *Williams v. Philip Morris, Inc.*, 92 P.3d 126, 142 (Or. Ct. App. 2004) (citing OR. REV. STAT. § 30.925(2)(g) (2004)).

¹⁸⁰ FLA. STAT. § 768.73(2)(a) (2004).

¹⁸¹ *Id.* at 768.73(2)(b).

recovered in the Florida action “must be reduced by the amount of any earlier punitive damage awards rendered”¹⁸² Further, other states take prior awards arising out of the same conduct into account as part of the common law excessiveness inquiry.¹⁸³ Thus, states have acted on their own to address the problem.¹⁸⁴ By adopting a “one size fits all” approach to the perceived problem, the Court unfortunately has diluted one of the benefits of our federal system, experimentation in the “laboratory of the States.”¹⁸⁵

Of course, not all states have acted. If there is a true problem with multiple punishments, a federal solution could be deemed necessary. Even if that is so, there are far more focused means of addressing the issue than through the use of a state sovereignty rationale.¹⁸⁶

The due process excessiveness rationale articulated in *Gore* and reaffirmed in *Campbell* should be extended to address not only one-time awards but also a series of punitive damage awards based on the same course of conduct.¹⁸⁷ A court evaluating a constitutional challenge to the size of an award for punitive damages in a given case would, upon a defendant’s motion, make the excessiveness determination based on the total of all awards rendered against the defendant for the same course of conduct.¹⁸⁸

¹⁸² *Id.*

¹⁸³ See, e.g., *Green Oil Co. v. Hornsby*, 539 So.2d 218, 224 (Ala. 1989); cf. *Grimshaw v. Ford Motor Co.*, 119 Cal. App. 3d 757, 823-24 (Cal. Ct. App. 1981) (holding that the potential of other punitive damage awards arising out of the same course of conduct is support for remittitur in the instant case).

¹⁸⁴ See also Colby, *supra* note 22, at 660-61 (discussing other state innovations in this area). Other commentators have also suggested a variety of approaches to the problem that could be adopted on a state by state basis. See, e.g., Denmark, *supra* note 177, at 971-78 (discussing a common law set-off approach); A. Mitchell Polinsky & Steven Shavell, *Punitive Damages: An Economic Analysis*, 111 HARV. L. REV. 869, 923-26 (1998) (discussing an approach under which the punitive damages awarded in the first case would be placed in an escrow account for use in later cases arising out of the same course of conduct).

¹⁸⁵ See *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

¹⁸⁶ It is not clear that even if there is a problem requiring a national solution that it should be the federal judicial branch to develop one.

¹⁸⁷ See generally Jeffries, *supra* note 177, at 152-58 (advancing the notion of a cumulative limit on punitive damage awards for the same course of conduct).

¹⁸⁸ While it might be difficult to determine whether two awards in fact arose out of the same course of conduct, courts make similar determinations in a number of contexts that could inform the decision-making process. For example, federal courts are often called upon to determine whether two claims arise out of the same transaction or occurrence or series of transactions or occurrences. See, e.g., FED. R. CIV. P. 13(a) (definition of a compulsory counterclaim); *id.* R. 13(g) (definition of an allowable cross-claim); *id.* R. 15(c)(2) (determination of whether an amendment relates back to the filing of the original pleading). The same type of test could be imported into this constitutional review of arguably related punitive damage awards. Other commentators have suggested different approaches to this problem, such as modeling a test on FED. R. EVID. 404(b) concerning “other bad acts” of the defendant. See Sharkey,

The court would apply the *Gore/Campbell* guideposts to make its excessiveness determination, modifying those guideposts to consider matters such as the appropriate base to use as the comparison for the ratio guidepost and the proper mix of comparable sanctions to use for the third guidepost.¹⁸⁹ The growing pains associated with such refinements pale in comparison to the potential difficulties that attend the state sovereignty rationale.¹⁹⁰ The simple fact is that the multiple punishment problem does not provide a reason for adopting a state sovereignty limitation on punitive damage awards given the availability of the far more satisfying due process rationale.¹⁹¹

III. THE POTENTIAL CONSEQUENCES OF (AND SOME OPEN QUESTIONS ABOUT) THE STATE SOVEREIGNTY RATIONALE CONCERNING PUNITIVE DAMAGES IN PARTICULAR

The Court's adoption of the state sovereignty rationale as an independent federal constitutional limitation on the size of punitive damage awards has potentially serious consequences for the utility of punitive damages as a remedial device in the United States. This Part discusses several of the most significant of those potential consequences.¹⁹² In addition, this Part explores some significant open questions that remain after *Campbell* concerning the state sovereignty rationale and punitive damages in particular.¹⁹³

supra note 10, at 406-07.

¹⁸⁹ See *supra* Part I.B.1.

¹⁹⁰ I recognize that certain commentators disagree with my basic position that due process constraints can serve as an effective limitation on multiple punitive damage awards. See, e.g., Cordray, *supra* note 34, at 286-87; Richard A. Nagareda, *Punitive Damage Class Actions and the Baseline of Tort*, 36 WAKE FOREST L. REV. 943, 958 (2001). The thrust, however, of these criticisms tends to be that the due process limitation will be unlikely to have sufficient teeth. As Professor Nagareda wrote, without some formal aggregation device such as a class action, "the constitutional limit upon punitive damages for a single course of conduct is . . . merely a theoretical limit . . ." Nagareda, *supra*, at 958. At base, then, this disagreement is about the utility of the *Gore* approach itself. The topic is beyond the scope of this Article. I will note, however, that both Professor Cordray and Professor Nagareda wrote their articles before *Campbell* and its strong reaffirmation of *Gore*'s central due process holding.

¹⁹¹ Indeed, there is also an argument that the state sovereignty rationale could actually lead to the type of over-deterrence with which the multiple punishment problem is fundamentally concerned. See *infra* Part III.A.2.

¹⁹² See *infra* Part III.A.

¹⁹³ See *infra* Part III.B.

A. *Consequences of the State Sovereignty Rationale*

Campbell's practical consequences concerning punitive damages are only just beginning to be explored by courts and academics alike. This Article does not attempt to cover the entire field. Rather, it focuses in particular on those matters tied directly to the state sovereignty rationale. Thus, the portrayal of punitive damages post-*Campbell* in this Article may very well only be the tip of the proverbial iceberg. When these consequences are combined with other elements of the Supreme Court's jurisprudence, the impact on punitive damages could quite literally be revolutionary.¹⁹⁴

This section explores three consequences.¹⁹⁵ First, the state sovereignty rationale will likely have the effect of restricting state innovation in the realm of punitive damages, thus undermining an important feature of our federal structure of government.¹⁹⁶ Second, there is also a danger that the rationale is at odds with the Court's own conception of the role of punitive damages as implementing punishment and deterrence.¹⁹⁷ Finally, there is a real possibility that the Court's work in this area will concentrate the power to use punitive damages as a serious remedial device in only a few states.¹⁹⁸

1. Stunting State Experimentation with Punitive Damages

As the Court has recognized, punitive damages are largely a creature of state law.¹⁹⁹ As such, the states have taken different approaches to issues

¹⁹⁴ To take just one example, if it is true that *Campbell* adopts a view of punitive damages in which this remedy is restricted to a narrow focus on the harm the defendant has inflicted on the named plaintiff only, *see supra* note 112 (discussing this possibility), then the consequences discussed in this section would be far more significant. Instead of allowing matters to proceed largely free of restraints for matters within a single state, assuming, of course, that there has been no excessive award under the *Gore* guideposts, even purely intrastate uses of punitive damages could be severely restricted.

¹⁹⁵ Another potentially significant consequence of the state sovereignty rationale concerns its impact on the use of the class action device. I address this issue in Part IV below because the reason that the state sovereignty rationale may have an impact on punitive damages class actions is also applicable to class actions more broadly. *See infra* Part IV.C.

¹⁹⁶ *See infra* Part III.A.1.

¹⁹⁷ *See infra* Part III.A.2.

¹⁹⁸ *See infra* Part III.A.3.

¹⁹⁹ *See, e.g.,* *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 255 (1984) ("Punitive damages have long been a part of traditional state tort law."). Even in *Gore* the Court recognized the wide latitude states have in the realm of punitive damages. *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 568 (1996) ("In our federal system, States necessarily have considerable flexibility in determining the level of punitive damages that they will allow in different classes of cases and in any particular case.").

ranging from the definition of the substantive behavior subjecting a defendant to punitive damages to the burden of persuasion a plaintiff must carry in connection with such an award.²⁰⁰ To be sure, the Court has consistently opined that there is a federal component to punitive damages in that the Due Process Clause provides a ceiling beyond which a particular award of punitive damages may not go.²⁰¹ But this constitutional safety net has still allowed wide experimentation among the states in terms of how this particular remedy was to fit within the broader confines of the law. In other words, there was work being done in the “laboratory of the States”²⁰²—work that could benefit all States by allowing them to observe the results of such experimentation.²⁰³

The Court’s state sovereignty rationale restricts this experimentation in ways that the Due Process Clause would not. For example, standing on its own, the state sovereignty rationale will in many respects stop experimentation that has any perceived regulatory effect beyond the state’s borders. Experimentation wholly within the state would be allowed to continue, but one wonders how significant such experimentation can be in the interconnected age in which we live.

To take just one effect of the restriction the Court has imposed, it is likely that several innovative uses for punitive damages suggested by academic commentators in recent years may never be fully explored.²⁰⁴ So, for example, we may never have the opportunity to see Professor Sharkey’s model of punitive damages as a form of “societal compensatory damages” put to the test, at least not on anything other than a purely state-by-state basis.²⁰⁵ And the same can be said for the suggestion of Professors Polinsky and Shavell concerning the use of escrow accounts into which defendants

²⁰⁰ See generally BLATT ET AL., *supra* note 21, at 234-563 (summarizing punitive damages law in all fifty states); SCHLUETER & REDDEN, *supra* note 21, at 338-444 (same).

²⁰¹ See *supra* Part I.B.

²⁰² See *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

²⁰³ The benefits of such state experimentation have been extolled in other areas as well. For example, Justice O’Connor has relied on the metaphor of the “laboratories of the States” as a basis for her decision to uphold as constitutional Missouri’s requirement that the intent of a person to remove life-sustaining treatment be proved by clear and convincing evidence. See *Cruzan v. Dir. Mo. Dep’t of Health*, 497 U.S. 261, 292 (1990) (O’Connor, J., concurring).

²⁰⁴ They may, of course, still be attempted on a totally intrastate basis, at least as far as the state sovereignty rationale is concerned. But state policymakers may ultimately conclude that the Court’s broad view of inappropriate regulatory effects reflected in *Campbell* make such experimentation not worth the effort because of the interconnected nature of modern society. And other portions of *Campbell* could likely even further restrict the utility of such innovations making them even less likely to be adopted. See *supra* note 112 (discussing potentially narrow view of punitive damages *Campbell* adopted).

²⁰⁵ See Sharkey, *supra* note 10, at 389-402.

would pay punitive damages for distribution to persons later obtaining judgments arising out the same course of conduct.²⁰⁶ I do not necessarily endorse either of these views. Rather, my point is that the Court's state sovereignty rationale has, at the very least, made these types of innovative approaches less useful and, therefore, less likely to be adopted. Thus, the rationale—itsself purportedly founded on the structure of the federal union—actually serves to undermine one of the key components of the system.

2. Undermining the Traditional Rationale for Punitive Damages

The Court has accepted that interests in both punishment and deterrence justify the imposition of punitive damages.²⁰⁷ A second potential consequence of the state sovereignty rationale, however, is the undermining of these justifications.²⁰⁸ For purposes of this section, I assume that there is a correct level, or at least a correct range, of punishment or deterrence. A punitive damage award that is too low does not fully comport with the needs justifying the award in the first place. Similarly, an award that is too high is unfair to the defendant and wasteful to society. The issue related to multiple punishments, for example, fundamentally reflects the latter concern.²⁰⁹ The state sovereignty rationale may lead to either too much or too little punishment or deterrence. I will principally use the deterrence²¹⁰ justi-

²⁰⁶ Polinsky & Shavell, *supra* note 184, at 925-26. Another example of a suggested reform that may be less valuable is the suggestion of Professor Sunstein and his co-authors that jurors be given more information concerning comparable cases as a means to enhance the reliability of the amount of punitive damages awarded. *See* Sunstein et al., *supra* note 23, at 2118-20.

²⁰⁷ *See supra* Part I.A.

²⁰⁸ A least one other commentator has expressly made this claim although without much in the way of analysis. *See* Efting, *supra* note 112, at 73 (“Although the Court’s clarifications to the *Gore* guideposts will provide trial and appellate courts with some much needed guidance on the proper application of the guideposts when reviewing punitive damage awards, the Court’s decision may have diluted the lower courts’ ability to impose meaningful punitive damages awards that serve their deterrent and retributive purposes.”).

²⁰⁹ *See supra* Part II.D.

²¹⁰ There are two principal uses of the term “deterrence” for purposes of punitive damages: “complete deterrence” and “optimal deterrence.” Professor Hylton defined these terms in the following passage:

The traditional notion of deterrence in the criminal punishment literature is one of “complete deterrence,” of stopping offenders from committing offensive acts. Generally, complete deterrence is accomplished by eliminating the prospect of gain on the part of the offender. The alternative, more recent notion of deterrence, largely observed in the torts literature, is that of “appropriate or optimal deterrence,” which implies deterring offensive conduct only up to the point at which society begins to lose more from deterrence efforts than from the offenses it deters. Optimal deterrence is generally accomplished by shifting, or “internalizing,” the costs generated by the offender’s conduct to the offender.

fication to illustrate my concern, although punishment would have served equally well.²¹¹

Let's begin with the more obvious of the possibilities: the potential for under-deterrence.²¹² First, even without any action by the Supreme Court in the area, there is likely some amount of under-deterrence built into the system. As others have discussed, not every victim who a potential defendant injures will sue.²¹³ This may occur for any one of a number of reasons, including that the victim does not know that she has been injured or does not know the potential defendant's identity, or that there is no financial incentive to file a suit.²¹⁴ In a system in which the appropriate level of deterrence in one case can be based in part on a consideration of the defendant's conduct directed towards others, such inherent under-deterrence can be ameliorated.²¹⁵ The impact of the Court's state sovereignty rationale is that the presence of state borders will likely decrease the overall ability of punitive damage awards to make up for the systemic and inherent under-deterrence. In order to maintain the same level of deterrence under the state sovereignty regime there will need to be more individual suits in different states because no single suit may adequately capture out-of-state conduct in setting the appropriate level of the award.²¹⁶ While there is no way to predict

Keith N. Hylton, *Punitive Damages and the Economic Theory of Penalties*, 87 GEO L.J. 421, 421 (1998) (footnotes omitted). For purposes of this discussion, it does not matter which form of deterrence one uses as a guide.

²¹¹ I accept that punishment and deterrence are distinct justifications for an award of punitive damages. *See, e.g.*, Galligan, *supra* note 23, at 119-28 (discussing punishment and deterrence as separate rationales for punitive damages); *see also In re The Exxon Valdez*, 296 F. Supp. 2d 1071, 1106 (D. Alaska 2004) (contrasting the "forward-looking" goals of deterrence with the "backward-looking" aims of punishment). For purposes of the discussion in this part, however, the differences between the two rationales are insignificant. In each case, the justification for the award will be reduced if the award is either too high or too low. I use deterrence merely as an example of how the state sovereignty decisions can affect the underlying rationale for punitive damages.

²¹² Prediction is always fraught with peril. It is perhaps especially so when discussing deterrent effects of punitive damage awards. There is an ongoing debate as to whether punitive damages, in fact, deter and even as to such basic matters as the appropriate means of making measurements in this area. *See, e.g.*, Sharkey, *supra* note 10, at 364 n.46 (collecting sources in the debate).

²¹³ *See, e.g.*, Ellis, *supra* note 23, at 25-26; Galligan, *supra* note 23, at 131.

²¹⁴ Several commentators have discussed this state of affairs. *See, e.g.*, Ellis, *supra* note 23, at 25-26; Galligan, *supra* note 23, at 131-32; Sharkey, *supra* note 10, at 366-67. The issue has also recently been comprehensively considered by a prominent federal circuit court judge. *See Ciraolo v. City of New York*, 216 F.3d 236, 243-44 (2d Cir. 2000) (Calabresi, J., concurring).

²¹⁵ I leave aside here any discussion of the independent suggestion in *Campbell* that it is inappropriate to consider the defendant's actions towards others regardless of whether those non-parties are in the same state or not. *See supra* note 112 (discussing this issue).

²¹⁶ A class action could help to solve this problem. Unfortunately, the state sovereignty rationale may cause additional problems with the use of this procedural device. *See infra* Part IV.C.

whether this will occur, there is most certainly a danger that the global deterrent effects of punitive damages awards will be greatly reduced as a result of *Campbell*'s aggressive state sovereignty approach.²¹⁷

While the risk of under-deterrence is easier to see, and more likely to develop, the state sovereignty rationale could also lead to over-deterrence.²¹⁸ Although unlikely, it is possible that there could be a sufficient number of lawsuits in different states to prevent under-deterrence.²¹⁹ The cumulative effect of these state segregated lawsuits could be *more* than necessary to deter (or punish) the defendant with respect to the course of conduct at issue. Moreover, there is no guarantee that, under the current regime, a due process-based cumulative punishment challenge would be successful.²²⁰ In order to succeed, a defendant would need to argue that the cumulative effect of the punishment was too much. But such an argument would seem to be little more than a collateral attack on the integrity of the judgment rendered in the other states. This is because the punishment is only "too much" if the other states had inappropriately taken into consideration out-of-state conduct when setting the level of punishment. Assuming that a challenge to the amount of the award had been rejected in the first state (or states), then there arguably would be no basis on which a defen-

²¹⁷ Professor Cordray has argued that the state sovereignty rationale will, in fact, help avoid under-deterrence because it will force "the judicial system to focus on the proper level of deterrence and punishment that should be imposed within each state" and thus avoid the confusion that can attend a wider consideration of a defendant's conduct. Cordray, *supra* note 34, at 311. I disagree with Professor Cordray for two main reasons. First, there is no guarantee that people will sue in each state in which unlawful conduct took place. Under a rigid territorial approach, if a person in state A does not sue, then there can be no award of punitive damages that considers the defendant's conduct in State A. The same could not be said of a situation in which state borders are overly protected. Second, Professor Cordray wrote her article before *Campbell* at least arguably restricted punitive damage awards not only on the basis of state borders but also based on the narrow vision of punitive damages relating only to the plaintiff's individual claim against the defendant. Thus, it may no longer be accurate to say that a jury may consider conduct in the state when setting the appropriate level of the award. *See supra* note 112.

An additional concern with respect to potential under-deterrence is that a focus on state borders will restrict the ability of court systems to deal with wrongs deserving of punitive damages but occurring in a non-traditional way. For example, punitive damages are becoming more common in connection with wrongs involving Internet activity. *See generally* Michael L. Rustad, *Punitive Damages in Cyberspace: Where in the World is the Consumer*, 7 CHAP. L. REV. 39 (2004). In such situations where the harm can be said to be both everywhere and nowhere, the impact of the state sovereignty rationale is uncertain at best and dangerous at worst.

²¹⁸ Again, I leave aside the possibility that *Campbell* imposes an independent check on awards by limiting them only to addressing the plaintiff's individual claims against the defendant. *See supra* note 112.

²¹⁹ *See* Cordray, *supra* note 34, at 311 (arguing that state sovereignty would prevent under-deterrence).

²²⁰ *See supra* Part II.D.

dant in a later suit could make a cumulative punishment challenge. The bottom line is that the state sovereignty rationale has at least the possibility of introducing over-deterrence or under-deterrence into the punitive damages calculus.

3. The Concentration of Power Concerning Punitive Damages

Recall that the *Campbell* Court did not categorically exclude the possibility that a state could have a constitutionally sufficient interest in punishing a defendant for out-of-state activities. In this regard, the Court held: “Nor, *as a general rule*, does a state have a legitimate concern in imposing punitive damages to punish a defendant for unlawful acts committed outside of the State’s jurisdiction.”²²¹ The Court did not provide any guidance as to what facts could justify such explicit extraterritorial punishment, leaving the lower courts to wrestle with the Court’s Delphic pronouncement.

One possible explanation for the Court’s statement might very well be found in the doctrine of general personal jurisdiction. To simplify matters, a court’s *in personam* jurisdiction over a party may be based, as a federal constitutional matter, on either general or specific jurisdiction.²²² Specific jurisdiction deals with a situation in which the plaintiff’s cause of action arises out of the defendant’s relationship with or activities concerning the forum state.²²³ As to this situation, the familiar *International Shoe* “minimum contacts” test applies.²²⁴ General jurisdiction, on the other hand, concerns a claim not based on the defendant’s forum-related activities.²²⁵ In this situation, due process is satisfied so long as the defendant has “continuous and systemic” contacts with the forum state.²²⁶ While the precise contours of the doctrine are unclear,²²⁷ there is basic agreement that general jurisdiction is appropriate with respect to a non-resident corporate defen-

²²¹ *Campbell*, 538 U.S. at 421 (emphasis added).

²²² *See Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 413-15 (1984).

²²³ *Id.* at 414.

²²⁴ *Id.* (“Due process requirements are satisfied when in personam jurisdiction is asserted over a nonresident corporate defendant that has ‘certain minimum contacts with [the forum] such that the maintenance of the suit does not offend ‘traditional notions of fair play and substantial justice.’”) (quoting *Int’l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945) (quoting in turn *Milliken v. Meyer*, 311 U.S. 457, 463 (1940)).

²²⁵ *Id.* For a recent comprehensive evaluation of general jurisdiction, see Rhodes, *supra* note 98.

²²⁶ *Helicopteros*, 466 U.S. at 415-16.

²²⁷ *See, e.g.*, Rhodes, *supra* note 98, at 808-10.

dant so long as it is either incorporated under the law of or has its principal place of business in the forum state.²²⁸

One could take a page from general jurisdiction doctrine to explain what the Court might have meant by the “as a general matter” qualification in *Campbell*. Assume that a corporation has elected to incorporate under the laws of State A. Further assume that the corporation has been named as a defendant in a suit in State A brought by one of State A’s citizens. The basis for the suit is akin to a mass tort or product defect case. In other words, there are victims of the defendant’s wrongful act located in states other than State A. In such a situation, there is a strong argument that State A would have an interest different than that of other states in ensuring that the corporate-defendant’s punishment as a result of a punitive damage award (or the deterrent effect of such an award) was sufficient to address all of the defendant’s unlawful conduct. After all, the behavior of the corporate-defendant, as a citizen of State A, reflects on the state as a whole and could have a significant impact on State A’s economy. The justification for such extraterritorial punishment would even be stronger when State A is the location of the tortious activity that led to the injuries in the other states, such as the design of a defective product or the locus of significant corporate decision-making.²²⁹

If the incorporation and principal place of business situations do satisfy the Court’s “as a general matter” caveat (as opposed to some more ad hoc approach to giving that language content),²³⁰ certain states will be able to exert greater national influence through either the imposition or restriction of punitive damages.²³¹ Thus, to take just one example, Delaware, as

²²⁸ See, e.g., STEPHEN C. YEAZELL, CIVIL PROCEDURE 125-26 (6th ed. 2004).

²²⁹ Indeed, one court alluded to such reasoning in an opinion issued after *Gore* but before *Campbell*. See *Neibel v. Trans World Assurance Co.*, 108 F.3d 1123, 1131 (9th Cir. 1997) (“Also, since Trans World’s relevant tortious activities occurred in California, we are confident that this punitive award was ‘supported by [California’s] interest in protecting its own consumers and its own economy.’”) (quoting *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 573 (1996)). The Supreme Court of Appeals of West Virginia recently articulated what is perhaps another explanation of *Campbell*’s qualifying language. The court opined that “a state has a legitimate interest in imposing damages to punish a defendant for unlawful acts committed outside of the State’s jurisdiction where the State has a significant contact or significant aggregation of contacts to the plaintiffs’ claims which arise from the unlawful conduct.” *Boyd v. Goffoli*, No. 31671, 2004 W. Va. LEXIS 198, at *23 (W. Va. Nov. 29, 2004). Time will tell if the West Virginia court is correct. What is clear now, however, is that there is a large measure of uncertainty in the scope of *Campbell*’s extraterritoriality principle.

²³⁰ There is also the possibility that the Court had nothing specific in mind in terms of the statement. Seen in this way, the “as a general matter” language would merely be a safety-valve giving the Court the ability to permit an award to stand in some as yet unanticipated situation.

²³¹ Cf. Rubin et al., *supra* note 34, at 202 (discussing economic inefficiencies that can be caused by state punitive damage awards on certain interstate commercial activities).

the state of incorporation of many United States corporations,²³² could become a battleground upon which those for or against punitive damages fight for supremacy. I do not suggest that such concentration of power does not already exist in the system in some sense. For example, a recent study suggests that of the sixty-four “blockbuster” punitive damage awards (awards of at least \$100 million) rendered through the end of 2003, Texas and California accounted for twenty-seven.²³³ What I am suggesting is that the potential concentration of state authority that could occur under the state sovereignty rationale may be more significant than under current law and, because many states will effectively be foreclosed from competing, more subject to abuse.

B. *Open Questions About the State Sovereignty Rationale*

There are certainly a number of issues that the Court left open concerning the state sovereignty rationale, both as to its content and its application. For example, there is the question of what the Court means by leaving a potential opening for states to punish extraterritorial conduct in certain situations.²³⁴ Similarly, one is left to wonder precisely how juries and lower courts are to faithfully apply the Court’s state sovereignty rationale while simultaneously allowing consideration of extraterritorial conduct for approved purposes.²³⁵ Finally, there are questions as to how international conduct fits into the state sovereignty rationale. In short, is it appropriate for a jury in an American state to consider illegal conduct taking place in a foreign country as a means of setting the amount of a punitive damage award?²³⁶

While these questions and others are important, I focus on two issues in particular. First, I contend that the sovereignty rationale is best seen as flowing from the structure of the Constitution. As such, what are the conse-

²³² See, e.g., Sue Reisinger, *States of Comfort: Those with ‘Fair’ Court Systems are More Attractive to Businesses*, NAT. L.J., May 19, 2003, at 14 (“Delaware remains the site most favored for incorporation, with more than half of the companies on the New York Stock Exchange incorporated there . . .”).

²³³ W. Kip Viscusi, *The Blockbuster Punitive Damages Award*, Harvard Law School, John M. Olin Center for Law, Economic, and Business Discussion Paper No. 473 and AEI-Brookings Joint Center for Regulatory Studies Working Paper No. 04-09 at 4-7 (Apr. 2004), at <http://ssrn.com/abstract=535704> (last visited Jan. 1, 2005).

²³⁴ See *supra* Part III.A.3.

²³⁵ See *supra* notes 118-24 and accompanying text.

²³⁶ One court has applied the extraterritorial rationale to international conduct, but did so without considering whether the rationale was, in fact, applicable. See *Eden Elec., Ltd. v. Amana Co.*, 370 F.3d 824, 829 (8th Cir. 2004).

quences of the structural nature of the doctrine?²³⁷ Second, should the state sovereignty rationale apply to cases in *federal* as opposed to state courts?²³⁸

1. The Impact of the Structural Nature of the Rationale

The Court's concern with state sovereignty principles in the context of punitive damage awards is one that flows from the governmental structure created by the Constitution. This can be seen first by the Court's language in *Gore*: "We think it follows from these principles of state sovereignty and comity that a State may not impose economic sanctions on violators of its laws with the intent of changing the tortfeasors' lawful conduct in other States."²³⁹ The cases the Court cited in both *Gore* and *Campbell* confirm that the Court was concerned with the relationship among the states in the federal union rather than any concern in terms of the application of state power against an individual person (whether natural or otherwise) in a fashion that undermined individually protected rights.²⁴⁰ Moreover, approaching the matter from first principles, while the individual due process-based rationale could explain the preclusion of the consideration of lawful extraterritorial conduct, it cannot account for the prohibition on the consideration of unlawful conduct.²⁴¹ Finally, the Court in other contexts has indicated that the Due Process Clause does not include a federalism component.²⁴²

Once the state sovereignty principle is seen as structural in nature, a host of questions arise. First, may a defendant ever waive or otherwise forfeit an objection to an award based on the inappropriate consideration of extraterritorial conduct? While at least one court has deemed a defendant to have forfeited such an objection by failure to object in a timely fashion,²⁴³ such an approach does not seem faithful to a constitutional defect tied to a sovereignty interest held by a state. Rather, such a structural matter is more

²³⁷ See *infra* Part III.B.1.

²³⁸ See *infra* Part III.B.2.

²³⁹ *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 572 (1996).

²⁴⁰ See, e.g., *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 421-22 (2003); *Gore*, 517 U.S. 570-73; see also *supra* Part I.B.2. (discussing in detail the development of the state sovereignty rationale in *Gore* and *Campbell*).

²⁴¹ See *supra* II.C. (explaining why due process principles are applicable in one setting but not in the other).

²⁴² See *Ins. Corp. of Ireland, Ltd. v. Compagnie des Bauxities de Guinee*, 456 U.S. 694, 702 n.10 (1982) ("[The Due Process] Clause is the only source of the personal jurisdiction requirement and the Clause itself makes no mention of federalism concerns.").

²⁴³ See *Waddill v. Anchor Hocking, Inc.*, 78 P.3d 570, 577 (Or. Ct. App. 2003).

akin to a defect in a federal court's subject matter jurisdiction, also arising out of the structure of the Constitution,²⁴⁴ which may be raised at any time by a party or the court.²⁴⁵ Indeed, it was in part for this reason that the Court turned away from its earlier statements that concepts of state sovereignty were implicated as part of the personal jurisdiction calculus.²⁴⁶ As the Court reasoned in that context, state sovereignty concerns could not be a part of the personal jurisdiction analysis partly because:

if the federalism concept operated as an independent restriction on the sovereign power of the court, it would not be possible to waive the personal jurisdiction requirement: Individual actions cannot change the powers of sovereignty, although the individual can subject himself to powers from which he may otherwise be protected.²⁴⁷

The same logic would seem to hold for the state sovereignty rationale in punitive damages. It is based on something that cannot be waived or otherwise forfeited by a party. Courts have yet to grapple with this issue, as well as others that may be implicated by the structural nature of the Court's rationale.²⁴⁸

2. The Rationale in the Federal Courts

A second significant question concerning the operation of the state sovereignty rationale is how it should apply in the federal courts. There is no question that the due process rationale applies in federal courts, although the appropriate constitutional provision is the Fifth Amendment as opposed to the Fourteenth.²⁴⁹ The Supreme Court itself has acted as if the rationale

²⁴⁴ See U.S. CONST. art. III.

²⁴⁵ See, e.g., *United States v. Cotton*, 535 U.S. 625, 630 (2002); see also FED. R. CIV. P. 12(h)(3).

²⁴⁶ I discuss the potential impact of *Campbell* on personal jurisdiction below. See *infra* Part IV.B.

²⁴⁷ *Ins. Corp. of Ireland*, 456 U.S. at 702 n.10.

²⁴⁸ Another such situation could concern the vulnerability of judgments rendered in one state inappropriately based on extraterritorial conduct. While it is generally the case that a judgment entered in a court lacking subject matter jurisdiction is not subject to collateral attack if the defendant appeared in that case and the matter was either resolved against it or never raised, the law in this area is not consistent. See generally YEAZELL, *supra* note 228, at 190-91. Thus, questions in this area too may be open as a result of the state sovereignty rationale.

²⁴⁹ Cf. *Sherman v. Kastotakis*, 314 F. Supp. 2d 843, 871 n.18 (N.D. Iowa 2004) (applying Fifth Amendment Due Process Clause to excessiveness inquiry under a federal statute); *Lowry's Reports, Inc. v. Legg Mason, Inc.*, 302 F. Supp. 2d 455, 460 (D. Md. 2004) ("The *Gore* guideposts may apply to punitive damages awards under federal statutes."); *Deters v. Equifax Credit Info. Servs., Inc.*, 981 F. Supp. 1381, 1389 (D. Kan. 1997) ("The only action at issue in this case is action by the *federal* system. Therefore, defendant asks this court to consider a *Fifth Amendment* substantive due process challenge.") (emphasis in original).

applies with equal force in the federal courts.²⁵⁰ In addition, numerous federal courts have applied the *Gore* guideposts without any special consideration given to the fact that both *Gore* and *Campbell* arose in state court systems.²⁵¹

If the due process guideposts apply equally in federal and state courts, should not the same be true of the state sovereignty rationale? Not necessarily. First, the state sovereignty rationale should have no application whatsoever for those situations in which the federal court is dealing with a federal claim for which punitive damages are implicated.²⁵² In this context, the federal sovereignty interest in enforcing federal law would be sufficient on its own to overcome any state sovereignty objections. Thus, the Court's concern that a state could use punitive damages to regulate conduct in another state has no substance in this context because conduct regulation has already taken place on a national scale.²⁵³

The more interesting question comes in the context of a federal court's adjudication of claims under state law for which there is an award of punitive damages. While some federal courts have applied the rationale in such a context,²⁵⁴ it is far from clear why that result is correct. The concern espoused in *Gore* and *Campbell* rested on the belief that a state court jury was regulating conduct in another state by rendering a verdict imposing punitive damages, the effect of which was regulation *by* the rendering state of conduct that rightfully should be regulated by another state.²⁵⁵ It is possible that this concern may not be at play when a federal court verdict and judgment are at issue because the sovereign imposing the punitive damages is not

²⁵⁰ See *Cooper Indus., Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 440-43 (2001) (discussing application of *Gore* due process guideposts in the context of an appeal from a decision of the United States Court of Appeals for the Ninth Circuit).

²⁵¹ See, e.g., *Mathias v. Accor Econ. Lodging, Inc.*, 347 F.3d 672, 675-78 (7th Cir. 2003); *Cont'l Trend Res., Inc. v. OXY USA Inc.*, 101 F.3d 634, 638-42 (10th Cir. 1996); *McClain v. Metabolife Int'l, Inc.*, 259 F. Supp. 2d 1225, 1228-32 (N.D. Ala. 2003); *TVT Records v. The Island Def Jam Music Group*, 257 F. Supp. 2d 737, 743-46 (S.D.N.Y. 2003).

²⁵² See *Deters*, 981 F. Supp. at 1389-90 (holding that *Gore* state sovereignty rationale has no bearing on a case in federal court based on a federal statute).

²⁵³ The same result may also obtain in those situations in which punitive damages are awarded in a state court action based on the violation of federal law. Again, there is no inappropriate regulatory effect because the judgment at issue could be seen as enforcing nationally enacted norms and not norms adopted only by a single state. On the other hand, the sovereignty defect may be seen not as flowing from the law being applied but rather by the court system applying it. See text accompanying notes 256-60 (discussing similar situation of state law in a federal court).

²⁵⁴ See, e.g., *White v. Ford Motor Co.*, 2002 U.S. App. LEXIS 28133 *35-*57 (9th Cir. Dec 3, 2002); *Cont'l Trend Res., Inc.*, 101 F.3d at 636-39.

²⁵⁵ See, e.g., *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 421-22 (2003); *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 570-74 (1996).

another state but rather the federal government.²⁵⁶ While the argument may seem formalistic, the Court itself has not been shy about resorting to such formalism even when dealing with state sovereignty issues.²⁵⁷ So, while the Court might develop another line of authority that would prevent such conduct (for example, by holding that in the absence of appropriate congressional action an award of punitive damages in this context was an affront to state sovereignty by the federal government or by determining that the key issue is that it is state law at issue), the Court has not yet done so. Thus, the important question of how to reconcile the state sovereignty principle with an action in federal court remains open.²⁵⁸

In sum, the Court's adoption of the state sovereignty rationale as a federal limitation on punitive damage awards will likely have significant consequences on the utility of punitive damages as a remedial device. Courts seeking to apply that rationale should be cognizant of these potential consequences, as well as the significant questions left unexplored as they navigate the largely uncharted waters ahead.

IV. THE POTENTIAL CONSEQUENCES OF THE STATE SOVEREIGNTY RATIONALE BEYOND PUNITIVE DAMAGES

As Part III explained, the state sovereignty rationale will likely have significant consequences for the utility of punitive damages as a remedial device. If that were all that flowed from the Court's creation of this doc-

²⁵⁶ There are also important additional differences when a federal court imposes the punitive damages. For example, while the federal court must apply the substantive law of the state in which it sits, *see Erie Railroad v. Tompkins*, 304 U.S. 64 (1938), federal law can still strongly affect any punitive damages awards. For example, the Federal Rules of Evidence will apply in terms of evidence that is admissible in the action. *See* FED. R. EVID. 101. In addition, federal law governs such important procedural decisions as what pleading burdens a plaintiff must meet to seek punitive damages in the first place. *See* *Cohen v. Office Depot, Inc.*, 184 F.3d 1292, 1298-99 (11th Cir. 1999) (Florida rule prohibiting a plaintiff from including a request for punitive damages in her initial complaint conflicted with Federal Rule of Civil Procedure 8(a)(3) and, thus, the Florida rule is not applicable in federal court actions).

²⁵⁷ *See, e.g., Tenn. Student Assistance Corp. v. Hood*, 124 S. Ct. 1905 (2004) (allowing action to proceed in a bankruptcy court with respect to a state despite a claim of Eleventh Amendment immunity because the action was deemed to be in the nature of an *in rem* proceeding); *Ex parte Young*, 209 U.S. 123 (1908) (allowing action for prospective injunctive relief against a state official to proceed despite claims of Eleventh Amendment immunity by relying, in part, on the fact that the official had been named as a defendant and not the state itself).

²⁵⁸ The same question would also be presented by actions in courts such as those for the District of Columbia and Puerto Rico. These jurisdictions can better be seen as on par with the exercise of federal sovereign power rather than that of a state.

trine, there would be grounds for concern and deep reflection. But the consequences of the doctrine are potentially far broader.

This Part explores three of the most significant consequences. Specifically, I discuss the potential impact of the rationale on: state enforcement activities;²⁵⁹ personal jurisdiction doctrine;²⁶⁰ and class actions.²⁶¹ I do not suggest that the Court meant to bring about changes in these areas or even necessarily that this Court would move in the directions I discuss if presented with a concrete situation. Moreover, I certainly do not suggest that the Court should take these steps. Rather, my point is to show that the logic underlying the state sovereignty rationale cannot easily be cabined to address only punitive damage awards.²⁶²

A. *The Impact on State Enforcement Activities*

The first area beyond punitive damages in which the state sovereignty rationale may have a significant impact is a state's ability to pursue more direct means of enforcing its laws.²⁶³ Such enforcement can take myriad forms, including criminal cases, civil enforcement proceedings, or administrative action. There is no reason to believe that regulation in these areas, in which the state is acting directly, should be any less constitutionally infirm if the state bases its enforcement activities on extraterritorial conduct than when the same consideration is given in the context of a private, civil punitive damage award. Indeed, if anything, one would think that the directness of the state's action in these situations makes the affront to the sovereignty of other states even more serious.

As I discussed above, the Court's current precedent expressly allows the consideration of extraterritorial conduct in connection with criminal

²⁵⁹ See *infra* Part IV.A.

²⁶⁰ See *infra* Part IV.B.

²⁶¹ See *infra* Part IV.C.

²⁶² One can already see the use enterprising lawyers have made of the sovereignty rationale. For example, lawyers representing gun manufacturers in a lawsuit brought by the District of Columbia recently argued that the suit was barred by *Campbell's* logic concerning extraterritoriality even though punitive damages were not yet at issue. See *D.C. v. Berretta, U.S.A., Corp.*, 847 A.2d 1127, 1150-51 (D.C. 2004). The court rejected that contention. *Id.* at 1151 ("One looks in vain in either *Gore* or *State Farm* for a suggestion that a state may not permissibly decide that certain products, whether manufactured within or outside a state, are so dangerous that their manufacturers should face strict liability in tort for injuries the products contribute to within the State."). Nevertheless, this case reflects the potential power—and danger—of the state sovereignty rationale.

²⁶³ I am contrasting the situation of a state's enforcement, for example, of its labor law through civil or administrative action with what the Court deems state regulation through the imposition of punitive damages in a private, civil action. See *Gore*, 517 U.S. at 572 n.17.

sentencing decisions.²⁶⁴ One could read *Campbell* and its state sovereignty rationale as casting doubt on the continued viability of those decisions. However, the Court in both *Campbell* and *Gore* suggested that criminal enforcement is, in some unexplained way, different than punitive damages awarded in a civil lawsuit.²⁶⁵ Thus, let us assume that states will continue to be able to use extraterritorial conduct in criminal enforcement situations under the *Gore/Campbell* state sovereignty rationale.

Even if that is the case, the use of other non-criminal enforcement techniques requiring the consideration of out-of-state conduct as part of determining the appropriate level of punishment are certainly suspect after *Campbell*. In these actions, a state has determined in a non-criminal setting—either by way of a civil action or an administrative proceeding—that a defendant has violated some provision of law. The same is done in the context of a punitive damages action. Thereafter, the state will determine an appropriate penalty just as a civil jury does. If it is constitutionally inappropriate for a civil jury to base the level of its punishment on out-of-state conduct, one searches in vain for a distinction that would allow a state in a civil or administrative enforcement action to do so.²⁶⁶

My suggestion here is not mere speculation. In a recent California case, an appellate court used much the same approach to apply *Campbell*'s extraterritorial logic in the context of a civil action brought by the state of California against a tobacco company for violating the terms of a settlement agreement.²⁶⁷ In that case, the state argued, and the court agreed, that the defendant Reynolds had violated the settlement agreement by targeting children in its print advertisements.²⁶⁸ The trial court had imposed a sanction of \$20 million based at least in part on evidence concerning the amount the company spent on nationwide advertising.²⁶⁹ The appellate court reversed as to sanctions because it concluded that *Campbell*'s extraterritorial conduct instructions applied in contexts beyond punitive damages.²⁷⁰ Thus, the sanction imposed in the case was held to be beyond constitutional

²⁶⁴ See *supra* Part II.B.

²⁶⁵ See, e.g., *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 423 (2003); *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 573 n.19 (1996).

²⁶⁶ Other commentators have made a similar point concerning the application of *Campbell*'s due process rationale to civil fines. See, e.g., Vikram David Amar & David Reis, *Are Large Civil Fines for Minor Violations Unconstitutional?* (Findlaw June 11, 2004), available at http://writ.news.findlaw.com/commentary/20040611_reis.html (last visited Jan. 1, 2005).

²⁶⁷ See *The People ex rel Lockyer v. R.J. Reynolds Tobacco Co.*, 116 Cal App. 4th 1253 (Cal. Dist. Ct. App. 2004).

²⁶⁸ *Id.* at 1261-65.

²⁶⁹ *Id.* at 1289.

²⁷⁰ *Id.*

bounds even though the court did not find it excessive as a matter of due process.²⁷¹

I expect that we will only see more efforts by defendants in state enforcement proceedings to limit the size or severity of sanctions based on the powerful notion of state sovereignty in *Campbell*.²⁷² Courts will need to tread carefully in this area so as not to restrict the ability of a state to impose effective punishment and achieve effective deterrence. If such care is not taken, the state sovereignty rationale may actually undermine the core sovereignty interest implicated by the effective enforcement of a sovereign's laws.²⁷³

B. *The Impact on Personal Jurisdiction Doctrine*

The Supreme Court's focus on state sovereignty principles may also presage a shift—or perhaps better said, a clarification—in the doctrine of personal jurisdiction. Personal jurisdiction jurisprudence has at its roots a strong notion of state sovereignty. The Supreme Court's landmark 1878 decision in *Pennoyer v. Neff* was firmly grounded in notions of the territorial sovereignty of the several states.²⁷⁴ This territorial model held sway for nearly sixty years until the Court decided *International Shoe* in 1945.²⁷⁵ In *International Shoe*, the Court moved away from the rigid territorial model

²⁷¹ *Id.*

²⁷² So, for example, actions of activist state Attorneys General such as Eliot Spitzer of New York may be curtailed. Attorney General Spitzer has been aggressively utilizing New York State laws to pursue cases with a national bent. For example, his office filed suit against two pharmaceutical manufacturers with respect to alleged misrepresentations made on a national and even international level. See Brooke A. Masters, *N.Y. Sues Paxil Maker over Studies on Children*, WASH. POST, June 3, 2004, at E01, available at <http://www.washingtonpost.com/ac2/wp-dyn/A10979-2204Jun2.html> (last visited Jan. 1, 2005). He has also pursued actions against mutual funds and others in the financial services industry as well as insurance companies for matters that many would consider to be national in scope. See, e.g., Brooke A. Masters, *Eliot Spitzer Spoils for a Fight*, WASH. POST, May 31, 2004, available at <http://www.washingtonpost.com/wp-dyn/articles/A3061-2004May30.html> (last visited Jan. 1, 2005); Joseph R. Treaster, *Spitzer Inquiry Expands to Employee-Benefit Insurers*, N.Y. TIMES, June 12, 2004, available at <http://www.nytimes.com/2004/06/12/business/12insure.html> (last visited Jan. 1, 2005).

²⁷³ See *supra* Part II.A.

²⁷⁴ 95 U.S. 714, 722-33 (1878). As Professor Stein has put it: "Drawing on principles of natural and international law, as well as the federalism element of the full faith and credit clause, the Court constructed the 'territorialist' justification: jurisdiction is justified when a state acts on persons or things within its borders." Allan R. Stein, *Styles of Argument and Interstate Federalism in the Law of Personal Jurisdiction*, 65 TEX. L. REV. 689, 693 (1987).

²⁷⁵ 326 U.S. 310 (1945); see also Allen, *supra* note 133, at 254-58 (discussing growth of doctrine from *Pennoyer* to *International Shoe*); Rhodes, *supra* note 98, at 904-05 (same).

and, instead, adopted a framework based on a non-resident defendant's claim-related contacts with the forum state.²⁷⁶

In the decades following *International Shoe*, the Court refined the jurisdictional framework, at times suggesting that *Pennoyer's* concerns about state sovereignty and federalism remained a critical and independent part of the analysis.²⁷⁷ However, the Court shortly thereafter appeared to retreat from that position and rejected, or at least greatly limited, interstate federalism concerns as a component of the doctrine.²⁷⁸ But, to confuse matters further, after this apparent rejection of interstate federalism and sovereignty as driving jurisdictional forces, the Court has also continued to take the interests of the forum state in the dispute into consideration when determining whether the exercise of jurisdiction is fair to the non-resident defendant.²⁷⁹ The end result of this see-saw jurisprudence is that the true import of state sovereignty principles in the realm of a territorial jurisdictional analysis remains muddled.²⁸⁰

²⁷⁶ *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945).

²⁷⁷ *See, e.g., World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 293-94 (1980).

²⁷⁸ *See, e.g., Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 472 n.13 (1985); *Ins. Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 703 n.10 (1982). Commentators have also noted the Court's apparent rejection of state sovereignty principles in *Shutts*. *See, e.g., Arthur R. Miller & David Crump, Jurisdiction and Choice of Law in Multistate Class Actions After Phillips Petroleum Co. v. Shutts*, 96 YALE L. J. 1 (1986); Stein, *supra* note 274, at 730-31. Professor Rhodes has argued that these types of cases should not be read as a rejection of all notions of sovereignty in the analysis. Rhodes, *supra* note 98, at 906. Instead, he suggests that "an aspect of the liberty interest in the Due Process Clause protects . . . the freedom from assertions of judicial power by a sovereign with whom the defendant has no 'contacts, ties, or relations.'" *Id.* (footnote omitted). This statement is certainly true. My contention, however, is that it matters *why* the assertion of such jurisdiction is troublesome as a matter of constitutional law. If the reason is one of state sovereignty acting as an independent constitutional principle, then we are led back to many of the problems I have suggested in this Article. If, on the other hand, the rationale is limited to due process, we avoid many of those problems. *Cf. Stein, supra* note 274, at 731 (Commenting on the distinction as to the source of the right at issue in the personal jurisdiction inquiry as follows: "*Pennoyer* derived the individual right from limits on sovereign power; *Shutts* derived limits on sovereign power from the individual right. *Shutts* wholly divorced due process rights from interstate sovereign limitations on state authority.").

²⁷⁹ *See, e.g., Asahi Metal Indus. Co. v. Superior Court*, 480 U.S. 102, 114-15 (1987).

²⁸⁰ The appropriate role of federalism as part of the personal jurisdiction analysis has spawned much academic discussion. *See, e.g., Allen, supra* note 133, at 273 n.16; Patrick J. Borchers, *The Death of the Constitutional Law of Personal Jurisdiction: From Pennoyer to Burnham and Back Again*, 24 U.C. DAVIS L. REV. 19, 92-93 (1990); Richard K. Greenstein, *The Nature of Legal Argument: The Personal Jurisdiction Paradigm*, 38 HASTINGS L.J. 855, 860-61 (1987); Rhodes, *supra* note 98, at 903-11; Martin H. Redish, *Due Process, Federalism, and Personal Jurisdiction: A Theoretical Evaluation*, 75 NW. U. L. REV. 1112, 1139-42 (1981); James Weinstein, *The Federal Common Law Origins of Judicial Jurisdiction: Implications for Modern Doctrine*, 90 VA. L. REV. 169, 250-300 (2004); David F. Fanning, Comment, *Quasi in Rem on the Cyberseas*, 76 CHI-KENT L. REV. 1887, 1912 (2001). For an excellent overview of the debate, see Stein, *supra* note 274.

The strong territorialist approach in *Campbell* may indicate a shift in the Court's thinking about the appropriate role of interstate federalism matters in the personal jurisdiction calculus.²⁸¹ This is not to suggest that *Campbell* makes it likely that the Court will return to the *Pennoyer* era.²⁸² Rather, the Court's focus on state sovereignty in terms of punitive damages makes it likely that, when the Court next considers a personal jurisdiction case, it may weigh the interests of the various states implicated in the litigation as a more prominent component of its decision. Depending on the nature of this future case, the broader implications of state sovereignty could be quite significant. For example, one of the issues that has been on the cutting edge of personal jurisdiction analysis of late has been how the *International Shoe* standard—or perhaps some other framework—should address Internet-related claims.²⁸³ One could envision the Court crafting its Internet personal jurisdiction jurisprudence with an eye more directly focused on state sovereignty. Thus, it could be the case that, as in the realm of punitive damages, the authority of any individual state is reduced more than if the Court were not so concerned with sovereignty.²⁸⁴ Of course, only time will tell the full effect of the state sovereignty rationale on personal

²⁸¹ I do not advocate a particular position in this Article, although I have made my more general views known elsewhere. See Allen, *supra* note 133, at 273 n.161. My point in this Article is to suggest that *Campbell* may provide some new information as to where the Court might go when it next confronts a personal jurisdiction case.

²⁸² The Court could have had *Pennoyer* on its radar screen when deciding *Campbell*. For example, *Pennoyer* was cited as part of the discussion of state sovereignty principles in an amicus brief submitted in the case. See Brief of Amici Curiae International Mass Retail Association and American Chemistry Council, 2001 U.S. Briefs 1289, *Campbell* (No. 01-1289). Moreover, one of the cases on which the Court rested its state sovereignty decision cited *Pennoyer* in support of the proposition that a state has no authority to act beyond its borders. See *New York Life Ins. Co. v. Head*, 234 U.S. 149, 162 n.1 (1914).

²⁸³ The matter has been discussed by courts, see, e.g., *Gator.com Corp. v. L.L. Bean, Inc.*, 341 F.3d 1072 (9th Cir. 2003); *Harrods Ltd. v. Sixty Internet Domain Names*, 302 F.3d 214 (4th Cir. 2002); *Panavision Int'l L.P. v. Toeppen*, 141 F.3d 1316 (9th Cir. 1998), as well as commentators. See, e.g., Allen, *supra* note 133; Michael A. Geist, Jr., *Is There a There There? Toward Greater Certainty for Internet Jurisdiction*, 16 BERKELEY TECH. L.J. 1345 (2000); Catherine T. Struve & R. Polk Wagner, *Realspace Sovereigns in Cyberspace: Problems with the Anticybersquatting Consumer Protection Act*, 17 BERKELEY TECH. L.J. 989 (2002); Suzanna Sherry, *Haste Makes Waste: Congress and the Common Law in Cyberspace*, 55 VAND. L. REV. 309, 363-76 (2002).

²⁸⁴ It is not necessarily true, however, that the impact of a more sovereignty-focused personal jurisdiction doctrine would narrow the scope of state action in all contexts. For example, Professor Stein has posited an example under which a greater emphasis on interstate federalism in the personal jurisdiction calculus would actually broaden the jurisdictional reach of certain states. See Stein, *supra* note 274, at 752. Whether the state sovereignty rationale actually expands or contracts state authority will, as a practical matter, depend to a large extent on the way in which the Court constructs the principle in the context of a concrete case.

jurisdiction. It seems a safe bet that there will be an impact, and quite likely a significant one.²⁸⁵

C. *The Impact on Class Actions*

A final consequence of the state sovereignty rationale is a limitation on the utility of the class action device as a means to address nationwide problems. *Campbell* certainly has an impact on class actions in which punitive damages are sought, but the logic of the case extends to all class actions. The ultimate result may be that as to both punitive damages and non-punitive damages claims alike, there will be little room left for nationwide class actions.

Let us first focus on the narrow issue of class claims in which punitive damages are sought. Recall that in addition to due process excessiveness, the Court in *Campbell* identified at least two other problems with the award at issue: state sovereignty and the purported adjudication of the claims of non-parties.²⁸⁶ If a class action were properly certified,²⁸⁷ the Court's non-parties' concern would be resolved because, in a properly certified class action, the unnamed members of the class are treated in most respects as parties.²⁸⁸ Thus, it is safe to assume that any doubts about whether the adjudication of those absent plaintiffs' claims was constitutional as a matter of due process would no longer have merit, whether viewed from the perspective of those absent plaintiffs or the defendant.²⁸⁹

²⁸⁵ Interestingly, after *Gore* one set of commentators recognized the potential connection between the Court's jurisprudence in the areas of punitive damages and personal jurisdiction. See, Rubin et al., *supra* note 34, at 205-10. Professor Rubin and his co-authors argued that the approach taken in *Gore* was equivalent to employing a "clear and realistic 'minimum contacts'" test. *Id.* at 210. Both approaches, they contended, would ameliorate the perceived harmful effects of punitive damage awards. *Id.*

²⁸⁶ See *supra* Part I.B.2.b.i. (dissecting *Campbell* and identifying the various strands of constitutional limitations on punitive damage awards the Court mentioned).

²⁸⁷ By "properly certified" I mean two things. First, I assume that all procedural prerequisites to class certification have been satisfied. See, e.g., FED. R. CIV. P. 23. Many state procedural rules concerning class actions are modeled on federal Rule 23. See Joan Steinman, *Managing Punitive Damages: A Role for Mandatory "Limited Generosity" Classes and Anti-Suit Injunctions*, 36 WAKE FOREST L. REV. 1043, 1045 n.3 (2001). Second, I assume that all relevant constitutional safeguards such as adequacy of representation are in place. See, e.g., *Martin v. Wilks*, 490 U.S. 755, 762 n.2 (1989); *Hansberry v. Lee*, 311 U.S. 32, 40-42 (1940).

²⁸⁸ See, e.g., *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 808-09 (1985).

²⁸⁹ I thus leave aside any arguments concerning the general propriety of certifying national punitive damages class actions, both under the applicable court rules as well as the Constitution's Due Process Clauses. By doing so, I in no way wish to suggest that such issues are unimportant or easy to resolve. On the contrary, they are at the cutting edge of class action practice. See, e.g., Colby, *supra*

But the resolution of the due process issue tells us nothing about the state sovereignty rationale. The gravamen of the Court's state sovereignty concern was that when a jury in State A rendered an award of punitive damages based at least in part on conduct occurring in State B, State A was engaged in an inappropriate form of extraterritorial regulation.²⁹⁰ The fact that a class action brings these non-parties before the court (at least in some sense) does nothing to ameliorate the concern that State A is somehow regulating conduct in State B through the imposition of punitive damages based on conduct occurring in State B. Indeed, the extraterritorial regulation is more blatant in the class action context because there is no question that the award will be based on extraterritorial conduct, assuming the class is properly certified and maintainable.²⁹¹ Moreover, the absent plaintiff

note 22, at 662-66; Cordray, *supra* note 34, at 281-83; Sharkey, *supra* note 10, at 4120-14; Symposium, Engle v. R.J. Reynolds Tobacco Co.: *Lessons in State Class Actions, Punitive Damages, and Jury Decision-Making*, 36 WAKE FOREST L. REV. 871-1179 (2001); *see also* Samuel Issacharoff, *Preclusion, Due Process, and the Right to Opt Out of Class Actions*, 77 NOTRE DAME L. REV. 1057 (2002) (generally discussing due process concerns related to all types of class actions with particular emphasis on opt out rights); Henry Paul Monaghan, *Antisuit Injunctions and Preclusion Against Absent Nonresident Class Members*, 98 COLUM. L. REV. 1148 (1998) (same). There is also disagreement as to what the various due process holdings in *Campbell* mean for the punitive damages class action. Some observers suggest that *Campbell*'s due process holding marks the death knell of the punitive damages class. *See, e.g.,* Liggett Group Inc. v. Engle, 853 So.2d 434, 456 n.26 (Fla. Dist. Ct. App. 2003), *review granted*, 873 So.2d 1222 (Fla. 2004) (Holding that *Campbell*'s due process rationale meant that "punitive damages cannot be assessed in the aggregate. Punitive damages must be assessed on an individual basis, in relation to each class member's compensatory damages if any."). Others have taken a more positive view of the punitive damages class after *Campbell*. *See, e.g.,* Elizabeth J. Cabraser & Michael G. Nast, *A Plaintiffs' Perspective on the Effect of State Farm v. Campbell on Punitive Damages in Mass Torts*, 29 MEALEY'S LITIG. REP.: CLASS ACTIONS 5 (2003) (arguing that *Campbell* "supports the role of class actions in fulfilling the Supreme Court's due process requirements for punitive damages determinations in the mass tort context"); Mesulam, *supra* note 93, at 1118 (arguing that *Campbell* and the other recent Supreme Court cases concerning punitive damages are best read in a way in which "punitive damages class certification under the limited punishment theory is not only permissible, but *necessary* to reconcile the case law, to effect the twin goals of deterrence and retribution, to prevent arbitrary results and overdeterrence, to protect the due process rights of all parties, and to subject punitive damage awards to effective review") (emphasis in original). We may have more information soon on this issue when the Second Circuit issues its ruling on whether Judge Weinstein correctly certified a nationwide non-opt out punitive damages class action in a tobacco litigation. *See In re Simon II Litigation*, 211 F.R.D. 86 (E.D.N.Y. 2002); *2nd Circuit Will Hear Arguments in Nationwide Tobacco Class Action*, 16 MEALEY'S LITIG. REP.: CLASS ACTIONS 20 (2003). My goal in assuming away these issues is to remove the potential due process concerns from the field so that it is possible to focus solely on the state sovereignty rationale.

²⁹⁰ *See, e.g.,* State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 421-22 (2003); BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 570-73 (1996).

²⁹¹ Professor Sharkey has recognized a similar point when she opined that there is nothing in the Court's precedent to suggest that it would look favorably on the extraterritorial imposition of societal compensatory damages as opposed to damages imposed as punishment. *See* Sharkey, *supra* note 10, at

class members need not even have the same level of connection to the forum as would be constitutionally required with respect to a defendant.²⁹² Thus, the structural constitutional issue to which the state sovereignty rationale is addressed remains and is, perhaps, even enhanced.²⁹³

It should also be apparent that the state sovereignty rationale cannot easily be restricted to punitive damages. If extraterritorial state regulation is taboo in the federal system under the Constitution, then such regulation should be off-limits across the board. State A in which a nationwide class action is pending will exert extraterritorial regulation through a judgment in that case whether punitive damages are at stake or not. The Missouri Supreme Court recently recognized this reality when it reversed the certification of a nationwide class action in which punitive damages were not at issue.²⁹⁴ One reason for the court's rejection of the nationwide class was that *Campbell* reflected a *general* concern with extraterritorial state action not restricted to the context of punitive damage awards.²⁹⁵

If, as seems likely, more tribunals will reach the same general conclusion as did the Missouri high court concerning the scope of the state sovereignty rationale, *Campbell* is a highly significant decision in the context of complex class action litigation. The federal courts have been increasingly hostile to nationwide class actions filed in the federal system.²⁹⁶ The result

431-32.

²⁹² See *Shutts*, 472 U.S. at 806-14.

²⁹³ Professor Hines, writing after *Gore* but before *Campbell*, has suggested that the state sovereignty rationale "may curtail multi-state class actions seeking to recover damages for conduct occurring outside the forum state, although inclusion of representatives from each state would likely minimize federalism concerns" in the context of a nationwide class action. See Hines, *Obstacles*, *supra* note 177, at 937. Professor Hines does not, however, further explain her views on that subject. Whatever the merits of the position in the pre-*Campbell* world, it does not seem to me that one can develop a doctrinally consistent reason why the Court's sovereignty related concerns should be any less serious simply because the class action device is employed. By the Court's lights, extraterritorial regulation is occurring in both contexts. Professor Steinman writing in the same symposium issue as Professor Hines appears to agree with my basic conclusion that the state sovereignty rationale makes nationwide class actions more problematic. Steinman, *supra* note 287, at 1078-79. However, she bases her conclusion primarily on the implications for the rationale on choice of law. *Id.* at 1079.

²⁹⁴ State *ex rel.* Am. Family Mut. Ins. Co. v. Clark, 106 S.W.3d 483 (Mo. 2003) (en banc).

²⁹⁵ *Id.* at 487 n.6 ("Although addressing other issues, the recent case of [*Campbell*] indicates the constitutional care that must be taken by state courts in cases that exceed the forum state's borders.").

²⁹⁶ See, e.g., Linda S. Mullenix, *Abandoning the Federal Class Action Ship: Is There Smoother Sailing for Class Actions in Gulf Waters*, 74 TUL. L. REV. 1709, 1709 (2000) ("Since 1995, federal courts have articulated an increasingly conservative class action jurisprudence that has directed federal courts to stringently scrutinize proposed litigation and settlement classes."); Jesse Tiko Smallwood, Note, *Nationwide, State Law Class Actions and the Beauty of Federalism*, 53 DUKE L.J. 1137, 1147 (2003) ("By the mid-1990s, however, the federal courts had become increasingly resistant to certifying nationwide, mass tort class actions and were actively attempting to restrict their use in this context, if

of this hostility has not been the death of such actions but rather their “migration” to state court systems.²⁹⁷ The *Campbell* state sovereignty rationale can be seen as something of a more aggressive movement against nationwide state law-based class actions. The structural constitutional limits on state power on which the rationale is based have full force in state court systems. Thus, the migration of these types of suits to state court system will not prevent federal court decisions from restricting their utility. If that is indeed the case, the state sovereignty rationale may very much have made the nationwide class action based on state law a thing of the past.²⁹⁸

CONCLUSION

First in *Gore* and then in *Campbell*, the Supreme Court began traveling down a doctrinal path that is not faithful to the Constitution or precedent by developing the state sovereignty rationale as a limitation on punitive damage awards. With its due process holdings firmly in place, there was probably no need to even consider the state sovereignty approach. Even if there were, however, neither law nor logic dictated—indeed, they did not even support—the Court’s doctrine. It is a jurisprudence largely crafted out of whole cloth. It should be jettisoned.

The difficulty with the Court’s decisions on this point goes beyond the problems with the Court’s logic. A central concern discussed in this Article is the consequences that may flow from the development and use of the state sovereignty rationale. From a likely limitation of the utility of punitive damages as a remedial device to an unknown impact on areas such as personal jurisdiction doctrine and the use of nationwide class actions, the rationale is one that is not easily confined.

It almost goes without saying that the effect of the Constitution on American life is profound. When the Supreme Court exercises its authority to interpret the Constitution and to say “what the law is,”²⁹⁹ it should be—

not eliminate them entirely. Emphasizing the difficulty of resolving complex choice-of-law issues and stressing the highly individualistic factual and legal determinations on which these cases often turn, federal courts often refused to certify such classes.”).

²⁹⁷ See Smallwood, *supra* note 296, at 1151-52 (discussing migration of actions and providing citations to empirical research).

²⁹⁸ It is possible that the state sovereignty rationale by itself would not preclude a nationwide class maintainable in a federal court. See *supra* Part III.B.2 (suggesting that the state sovereignty rationale may not apply to actions pending in a federal court). But that would make no difference. Any reverse migration of these cases back to federal court would be unavailing due to the federal court’s independent hostility to these cases. See sources cited *supra* note 296.

²⁹⁹ *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803).

and usually is—mindful of that wide-ranging effect. However, it does not appear that the Court has shown such awareness in the context of the development of the state sovereignty rationale as a limitation on punitive damages. That failing is as unfortunate as it is significant.