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CONSTITUTIONAL TORT-REFORM

Mark Geistfeld[*]

Twentieth century developments in tort law can be roughly described as having involved either the expansion or the contraction of liability. As the century progressed, the scope of tort liability expanded dramatically and tort law became increasingly friendly to plaintiffs.[1] By the close of the century, the scope of liability was being significantly curtailed as tort law developed in a manner more favorable to defendants.[2]

A dynamic of pro-plaintiff expansion or pro-defendant contraction no longer adequately describes the process of tort reform.

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1. As Lawrence Friedman explains:

> In essence, nineteenth-century tort law was a law of limitation: a law that set boundaries to the liability of enterprise; a law that made it difficult . . . to collect for personal injury. In the twentieth century, the old tort system was completely dismantled; the courts and the legislatures limited or removed the obstacles that stood in the way of plaintiffs; and a new body of law developed, law which favored the plaintiffs—to the point where people spoke about a liability "explosion." Some of the changes were slow and incremental; some were dramatic. Some were inventions of judges; some were embodied in complicated statutes.

LAWRENCE M. FRIEDMAN, AMERICAN LAW IN THE TWENTIETH CENTURY 349–50 (2002).

2. The reforms that state legislatures enacted during the 1980s routinely restricted liability, such as by imposing caps on damages and limiting joint and several liability. *See* Joseph Sanders & Craig Joyce, *"Off to the Races": The 1980s Tort Crisis and the Law Reform Process*, 27 HOUS. L. REV. 207, 218–23 (1990) (providing charts summarizing state tort law reforms). For studies concluding that changed judicial attitudes were partially responsible for the pro-defendant trend that emerged during the 1980s, see Theodore Eisenberg & James A. Henderson, Jr., *The Quiet Revolution in Products Liability: An Empirical Study of Legal Change*, 37 UCLA L. REV. 479 (1990); Theodore Eisenberg & James A. Henderson, Jr., *Inside the Quiet Revolution in Products Liability*, 39 UCLA L. REV. 731 (1992).

In a line of relatively recent cases, the U.S. Supreme Court has held that a tort award of punitive damages must satisfy the procedural and substantive requirements of the Due Process Clause of the U.S. Constitution.[3] These requirements have significantly reformed punitive damages practice. So far, constitutional tort-reform has been limited to punitive damages, but Part I explains why such reform is not necessarily limited to this area of tort law. Other important tort practices raise the same sort of due process concerns that the Court has relied upon to justify the constitutional tort-reform of punitive damages practice. The Court's punitive damages jurisprudence may thus provide the foundation for a new type of broad-based tort reform.

Regardless of what one may think about the Court's foray into tort reform, constitutional tort-reform has desirable characteristics. Rather than addressing the substantive aims of tort liability, constitutional tort-reform is supposed to reduce or eliminate any unreasonable legal uncertainty generated by the tort practice in question. But as Part II explains, the neat distinction between substance and process cannot be attained in practice. Any reform designed to reduce legal uncertainty will depend upon a contestable conception of tort liability, a characteristic of constitutional tort-reform clearly present in the Court's punitive damage jurisprudence. The Court, though, does not have to reach the correct substantive outcome in order to make constitutional tort-reform desirable. If the Court adopts a reform that depends upon the wrong substantive conception of tort law, the states retain the power to adopt a different substantive objective for the tort practice. Constitutional tort-reform therefore can serve the valuable role of forcing state courts and legislatures to identify more clearly the substantive objectives of tort law, an issue of critical importance that has not been adequately addressed by the reform movements of the last century.

3. In 1989, the Court left open the question of "whether due process acts as a check on undue jury discretion to award punitive damages in the absence of any express statutory limit." Browning-Ferris Indus. v. Kelco Disposal, Inc., 492 U.S. 257, 277 (1989). A decisive, affirmative answer to that question was provided by the Court a few years later in *BMW of N. Am. v. Gore*, 517 U.S. 559 (1996).

I. THE DUE PROCESS CONSTRAINTS ON THE TORT SYSTEM ARE NOT LIMITED TO PUNITIVE DAMAGES

In its most recent case addressing the constitutionality of a punitive damages award, the Court in *State Farm Mutual Automobile Insurance Co. v. Campbell* identified four different constitutional "concerns" that justify constraining those awards as a matter of due process.[4] None of these concerns are unique to punitive damages, implying that due process also constrains any other tort practice implicating the same set of concerns.

A. The First Constitutional Concern: The Nature of the Defendant's Interests

Under *Mathews v. Eldridge*, the "specific dictates of due process" depend upon three factors, including "the private interest that will be affected by the official action."[5] Consistent with this test, the Court's first constitutional concern with punitive damages addresses the nature of the defendant's interests:

> Although these awards serve the same purposes as criminal penalties, defendants subjected to punitive damages in civil cases have not been accorded the protections applicable in a criminal proceeding. This increases our concerns over the imprecise manner in which punitive damages systems are administered.[6]

A defendant's private interest in liberty is at stake in a criminal prosecution. This justifies procedural safeguards that are more demanding than those required for civil actions, which impose monetary liability on the defendant. By concluding that punitive damages "serve the same purposes as criminal penalties," the Court apparently can justify procedural safeguards for punitive damages that would seem to be more demanding than the safeguards required for other forms of tort liability. A similarity of purpose implies that punitive damages and criminal liability implicate similar interests of the defendant, thereby requiring similar procedural safeguards for the analogous forms of liability.

4. 538 U.S. 408, 417-18 (2003).
5. 424 U.S. 319, 335 (1976).
6. *State Farm*, 538 U.S. at 417.

The Court bases this constitutional concern entirely on the fact that both criminal penalties and punitive damages "are aimed at deterrence and retribution."[7] The Court clearly assumes that the criminal law and tort law identically interpret the purposes of deterrence and retribution. Upon scrutiny, the assumption is unwarranted. Criminal penalties can further aims of deterrence and retribution that are fundamentally different than those furthered by punitive damages.

"The broad aim of the criminal law is, of course, to prevent harm to society. . . . This it accomplishes by punishing those who have done harm and by threatening with punishment those who would do harm, to others."[8] Criminal liability punishes the defendant for the wrong suffered by the public.[9] So too, criminal penalties are formulated to deter members of the public from committing crimes—a purpose commonly called "general deterrence."[10]

Unlike the criminal law, tort law is based upon individual rights and a corresponding set of individual duties.[11] Due to this individual right-duty nexus, tort law can tailor punitive damages to punish the defendant duty-holder for the way in which she violated the plaintiff's right, while also deterring the defendant from violating the

7. *Id.* at 416.

8. WAYNE R. LAFAVE, 1 SUBSTANTIVE CRIMINAL LAW § 1.2(e) (2d ed. 2003).

9. *See, e.g.*, 21 AM. JUR. 2d *Criminal Law* § 474 (1998) (stating that "a crime is by definition a public wrong, one against all people of the state"). For a good discussion on the importance of limiting criminal liability to public punishment rather than private punishment, see GEORGE P. FLETCHER, BASIC CONCEPTS OF CRIMINAL LAW 35–40 (1998).

10. General deterrence is "the tendency of people who have not yet been sanctioned to be deterred by the prospect of sanctions for committing an illegal act." STEVEN SHAVELL, FOUNDATIONS OF ECONOMIC ANALYSIS OF LAW 515 (2004). Criminal liability necessarily involves general deterrence, because criminal penalties must be set prospectively for any given category or class of conduct. *See* LAFAVE, *supra* note 8, § 1.2(d) (describing necessity of prescribed criminal penalties).

11. *See, e.g.*, Palsgraf v. Long Island R.R., 162 N.E. 99 (N.Y. 1928) (holding that a tort plaintiff can recover only by showing that the defendant's breach of duty constitutes a "'wrong' to herself, i.e., a violation of her own right, and not merely a wrong to someone else, nor conduct 'wrongful' because unsocial").

plaintiff's right in the future—a purpose commonly called "individual or specific deterrence."[12]

Thus, criminal liability and punitive damages can each serve the aims of punishment and deterrence without sharing a similarity of purpose, contrary to what the Court has assumed. Criminal liability provides retribution for public wrongs and the necessary incentives for general deterrence, whereas punitive damages can provide retribution for private wrongs and the necessary incentives for individual deterrence.

To illustrate this difference, consider a case involving a defendant who repeatedly drove her truck over the plaintiff's land in order to reduce considerably the travel distance between the defendant's property and her desired destination. Each trespass did not otherwise damage the land, so the defendant knew she would only have to pay nominal damages to the plaintiff landowner as compensation for each trespass. Reasoning that the nominal damages for trespass are less costly than the added travel time otherwise required for the trip, the defendant decided to commit trespass on an ongoing basis. The defendant's behavior warrants punitive damages. By behaving in this manner, the defendant has tried to convert the plaintiff's right to exclusive possession of the land into an easement without obtaining the requisite consent from the plaintiff. As the defendant's behavior reveals, the plaintiff's right to exclusive possession cannot be adequately protected by compensatory damages. Protection of the right requires punitive damages. This extra-compensatory damages award punishes the defendant for not previously respecting the plaintiff's right to exclusive possession, while further protecting the right by giving the defendant an incentive not to trespass in the future. The punitive damages award is tailored to protect the plaintiff's right and nothing else. In effect, these damages force the defendant to stay off the property or otherwise obtain the plaintiff's consent for the easement, the result required by the plaintiff's right to exclusive possession of the land.

12. "[T]he notion of *individual deterrence* (sometimes called *particular deterrence* or *special deterrence*) . . . is the tendency of a person who has been penalized for committing an illegal act to be more deterred from in the future from committing that act than he had been beforehand by the prospect of sanctions." SHAVELL, *supra* note 10, at 515 (sentence structure omitted).

Punitive damages therefore can be justified exclusively as a means of protecting the plaintiff's individual tort right from wrongful infringements by the defendant, just as other forms of tort liability can be justified as a means of protecting the plaintiff's tort right.[13] Like any form of tort liability, punitive damages can be formulated to redress a private wrong fundamentally different than the public wrongs of concern to the criminal law.

To be sure, the trespassing defendant may also be subject to criminal liability, but that possibility provides another reason for concluding that punitive damages are not a criminal sanction. After all, if punitive damages were a criminal penalty for the trespass, then imposing criminal liability on the defendant for the same trespass would involve double punishment. In addressing this issue, the majority of courts have "avoided the double jeopardy problem by holding that punitive damages are punishment, not for the improper act in the abstract, or the wrong that the defendant has caused to society, but for the legal wrong to the individual plaintiff."[14]

> The Iowa Supreme Court, for example, concluded that
>
> the clear weight of authority is . . . that the damages allowed in a civil case by way of punishment, have no necessary relation to the *penalty* incurred for the *wrong done to the public:* but are called punitive damages by way of distinction from pecuniary damages, and to characterize them as a punishment for the *wrong done to the individual.* In this view, the awarding of punitive damages can in no just sense be said to be in conflict with the constitutional or common law inhibition against inflicting two punishments for the same offense.[15]

Hence the mere fact that punitive damages serve the purpose of retribution and deterrence does not necessarily turn these damages into a form of criminal liability, a conclusion with ample historical

13. The important tort doctrines can all find justification in terms of the individual right to physical security. *See* Mark Geistfeld, *Negligence, Compensation, and the Coherence of Tort Law*, 91 GEO. L.J. 585 (2003).

14. Thomas B. Colby, *Beyond the Multiple Punishment Problem: Punitive Damages as Punishment for Individual, Private Wrongs*, 87 MINN. L. REV. 583, 622 (2003).

15. Hendrickson v. Kingsbury, 21 Iowa 379, 391 (1866).

and contemporary support.[16] Retribution and deterrence can have different meanings in tort law and criminal law, contrary to the Court's assumption that these two purposes are shared by the two bodies of law.

Indeed, the Court has implicitly recognized as much, which should come as no surprise given that the Court's punitive damages jurisprudence relies upon tort practice.[17] In *State Farm*, for example, the Court concluded that the amount of a punitive damages award cannot be justified on the ground that the "harm to the individual is minor but massive in the aggregate"[18] By holding that the punishment meted out by a punitive damages award cannot be justified by the aggregate harm suffered by the public, the Court has effectively recognized that punitive damages must punish private wrongs ("harm to the individual") and not the public wrong addressed by criminal liability ("harm . . . massive in the aggregate").

This conclusion is fully consistent with the Court's recognition that a punitive damages award for an individual right-holder can be based upon harms that the defendant's course of conduct has inflicted upon similarly situated right-holders.[19] Under certain conditions, tort law can only protect the individual right by considering the duty-holder's behavior towards the relevant group of right-holders. For example, the manufacturer of a mass-marketed product owes an individual duty to each consumer of its product, but does not give individualized treatment to each one. The manufacturer instead treats each individual consumer as being a member of a group (those individuals whose aggregate demand determines the most profitable characteristics of the product). Under

16. For an excellent discussion and thorough analysis of the historical issues, see generally Colby, *supra* note 14. For a contemporary example, see, e.g., *Romo v. Ford Motor Co.*, 113 Cal. App. 4th 738, 746–47 (2003) ("There is a fundamental difference between parking fines and drug forfeitures, on the one hand, and punitive damages on the other. In the case of punitive damages, the exaction arises from a 'private' wrong: if there is no wrong resulting in compensable injury to *this* plaintiff, there can be no exaction of punitive damages.").

17. *Cf. infra* Part II (explaining why constitutional tort-reform adopts the substantive conception of tort liability expressed by the existing tort practice).

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

19. *See* BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 572–74 (1996).

these conditions, a punitive damages award can adequately protect the individual right held by a particular consumer only if based upon the manufacturer's behavior towards the group of consumers.

The concept of individual deterrence also explains the Court's holding that due process requires a reasonable ratio between the actual or potential harm suffered by the plaintiff and the punitive damages award, so "that, in practice, few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process."[20] As a matter of individual deterrence, a presumptive ratio between the plaintiff's harm and the punitive damages award makes sense. Ordinarily, a defendant who must pay some single-digit multiple of damages to the plaintiff presumably has a sufficient incentive to avoid future violations of the plaintiff's right. The ratio is presumptive, because in some cases, like those involving low compensatory damages (as in the trespass example) or the potential for large losses, punitive damages must be increased in order to eliminate the benefit the defendant had expected to derive from violating the plaintiff's right. In these circumstances, the Court has allowed for departures from the presumptive single-digit ratio between compensatory and punitive damages.[21]

As a matter of general deterrence, the presumptive ratio is hard to defend. General deterrence depends upon the likelihood that any given wrongdoer within the relevant population will be caught and sanctioned. A wrongdoer who faces a 1 in 50,000 chance of being caught and sanctioned, for example, must pay punitive damages approximately 50,000 times the compensatory award in order to have a sufficient incentive to act lawfully.[22] This exact justification for a punitive damages award was proffered by the plaintiffs in *State Farm* and rejected by the Court the ground that it "ha[s] little to do with the actual harm sustained by [plaintiffs]."[23] By expressly rejecting a

20. State Farm, 538 U.S. at 425.

21. *See* TXO Prod. Corp. v. Alliance Res. Corp., 509 U.S. 443, 460 (1993) (upholding a punitive damages award of $10 million in a case involving $19,000 of compensatory damages because the relevant disparity involved the potential loss to the right-holder that could have occurred if the defendant had fully succeeded in its wrongful scheme).

22. *See, e.g.*, STEVEN SHAVELL, ECONOMIC ANALYSIS OF ACCIDENT LAW 161–62 (1987).

23. *State Farm*, 538 U.S. at 427.

general deterrence rationale for a punitive damages award, this passage further illustrates how the Court has conceptualized punitive damages as a method for redressing private wrongs.

As shown by the Court's jurisprudence on punitive damages, these awards can serve the purposes of punishing the defendant for the private wrongs suffered by the plaintiff while supplying the amount of individual deterrence necessary to protect the plaintiff's right from infringements by the defendant. Punitive damages clearly serve the aims of punishment and deterrence, but these aims can fundamentally differ from the purposes of criminal liability based upon the punishment of public wrongs and general deterrence.

Contrary to what the Court has assumed, the objectives of punishment and deterrence do not necessarily make punitive damages analogous to criminal liability for purposes of due process. The analogy must come from somewhere else. Under the *Mathews* test, the due process inquiry depends upon the nature of the defendant's interests implicated by the form of liability.[24] The Court therefore could draw a defensible due process analogy between punitive damages and criminal liability if each form of liability implicates the same private interests of the defendant. When formulated in this manner, the due process inquiry shows that any constitutional concern generated by punitive damages is also generated by other tort practices.

Criminal liability involves the restriction of the defendant's liberty interest, either directly by confinement or indirectly by the imposition of monetary fines. Tort law also directly restricts the defendant's liberty interests by imposing behavioral requirements on the defendant as duty-holder. The negligence standard of reasonable care, for example, requires certain conduct on the part of the duty-holder with respect to particular forms of risky behavior. Insofar as the direct restriction of the defendant's liberty interest creates a special due process concern as it does in the criminal context, that constitutional concern applies to the duty of care governing negligence liability.[25]

24. Mathews v. Eldridge, 424 U.S. 319, 335 (1978).

25. *Cf.* Geier v. Am. Honda Corp., 529 U.S. 861, 881 (2000) (holding that state tort rules requiring airbags in automobiles are preempted because the tort duty "would have presented an obstacle to the variety and mix of devices that the federal regulation sought").

To be sure, one might conclude that the underlying tort right does not directly restrict the defendant's liberty interest, since it is the imposition of punitive damages that ultimately gives the defendant an incentive to behave in the manner required by the right. So conceptualized, punitive damages still implicate an individual interest that is not fundamentally different than the interest implicated by other forms of tort liability. Ordinarily, the threat of liability for compensatory damages also gives the defendant an incentive to behave in the manner required by the standard of care.[26] Insofar as the incentive effects of a damages award provide the direct restriction of the defendant's liberty interest, there is no fundamental difference between punitive damages and compensatory damages.

The equivalency of interests becomes even more apparent once we recognize that criminal liability can also involve monetary fines, which are an indirect restriction of the defendant's liberty interest. In this respect, both criminal liability and punitive damages involve the same interest of the defendant. But the defendant's private interest pertaining to money is also implicated by any form of tort liability requiring the payment of compensatory damages. Once again, any due process concern posed by punitive damages also applies to other forms of tort liability.[27]

By concluding that the nature of the defendant's private interests creates a due process concern regarding punitive damages, the Court has invoked a constitutional concern that is not limited to punitive damages. The nature of the defendant's private interests that are implicated by punitive damages are also implicated by other forms of tort liability. The constitutional concern the Court has identified with respect to punitive damages implies that other tort practices also raise constitutional concerns, unless there is some other constitutional difference between these forms of tort liability.

26. *See, e.g.*, SHAVELL, *supra* note 22, at 127–28.

27. One could also argue that punitive damages implicate different private interests than those discussed in text because "there is a stigma attached to an award of punitive damages that does not accompany a purely compensatory award." Pac. Mut. Life Ins. Co., v. Haslip, 499 U.S. 1, 54 (O'Conner, J., dissenting). But stigma can also attach to a compensatory award based on the nature of the tortious conduct. Negligent behavior can be morally blameworthy, as are many of the intentional torts such as the intentional infliction of emotional distress.

B. The Second Constitutional Concern: Arbitrary Deprivation of Property

Due process protects the defendant from arbitrary or unreasonable deprivations of property, so the Court in *State Farm* could also invoke this constitutional concern in justifying a due process constraint on the award of punitive damages:

> We have admonished that "[p]unitive damages pose an acute danger of arbitrary deprivation of property. Jury instructions typically leave the jury with wide discretion in choosing amounts, and the presentation of evidence of a defendant's net worth creates the potential that juries will use their verdicts to express biases against big businesses, particularly those without strong local presences."[28]

The concern that open-ended jury instructions can result in arbitrary or unreasonable deprivations of property is sufficient to justify a due process constraint, but that concern is not limited to punitive damages. Jury instructions regarding other forms of tort liability are equally vague, if not more so.

Consider, for example, California jury instructions regarding negligence liability:

> *Negligence And Ordinary Care—Definitions*
>
> Negligence is the doing of something which a reasonably prudent person would not do, or the failure to do something which a reasonably prudent person would do, under circumstances similar to those shown by the evidence.
>
> It is the failure to use ordinary or reasonable care. Ordinary or reasonable care is that care which persons of ordinary prudence would use in order to avoid injury to themselves or others under circumstances similar to those shown by the evidence.
>
> [You will note that the person whose conduct we set up as a standard is not the extraordinarily cautious individual,

28. State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 417 (2003) (quoting Honda Motor Co. v. Oberg, 512 U.S. 415, 432 (1994)).

> nor the exceptionally skillful one, but a person of reasonable and ordinary prudence.][29]

The jury is also instructed that a "test" for determining negligence is whether the risk was foreseeable and "if the action or inaction reasonably could have been avoided."[30] The jury is then instructed that the amount of reasonable care "varies" with the circumstances.[31] Dangerous activities require "extreme caution."[32] Finally, the jury is told that the defendant's conformity or lack of conformity to custom is relevant, but negligence ultimately depends on whether the defendant exercised reasonable care.[33]

These instructions give the jury an amount of discretion that is not qualitatively different than the discretion given by instructions on punitive damages. The jury is told that the amount of reasonable care depends upon considerations of foreseeability and risk, just as it is told that the amount of punitive damages depends upon considerations of retribution and deterrence. The jury, however, is not otherwise told how to formulate the requirements of reasonable care in terms of foreseeability and risk, just as it is not otherwise told how to formulate a punitive damages award in terms of retribution and deterrence. Jury instructions regarding the requirements of reasonable care give jurors at least as much discretion as they have in determining an award of punitive damages.

Like the determination of punitive damages, the determination of reasonable care is a mixed question of law and fact.[34] For

29. CALIFORNIA JURY INSTRUCTIONS—CIVIL, 3.10 (2004) [hereinafter BAJI].

30. *Id.* 3.11.

31. *Id.* 3.12.

32. *Id.* 3.41.

33. *Id.* 3.16.

34. "[T]he function of the jury in fixing the standard of reasonable conduct is so closely related to law that it amounts to a mere filling in of the details of the legal standard." W. PAGE KEETON ET AL., PROSSER AND KEETON ON TORTS § 37, at 238 (5th ed. 1984). This "filling in of the details" involves more than the resolution of disputed facts as applied to a well-specified standard of care. Even if there are no facts in dispute, the jury still determines the requirements of reasonable care. *See* Mark P. Gergen, *The Jury's Role in Deciding Normative Issues in the American Common Law*, 68 FORDHAM L. REV. 407, 434 n.121 (1999). The jury therefore makes some sort of normative decision regarding the requirements of reasonable care, a decision similar to the one juries make with respect to punitive damages. *See* Cooper Indus., Inc.

constitutional purposes, the jury plays the same role for both types of liability, which further supports the conclusion that any constitutional concern generated by punitive damages should also be generated by ordinary negligence liability.[35]

Any concerns the Court has expressed about the "wide discretion" afforded to juries is not limited to the issue of reasonable care. The jury may have even more discretion in determining compensatory damages for pain and suffering. Again, the jury instructions in California are illustrative:

> *Measure Of Damages—Personal Injury—Pain And Suffering*
>
> Reasonable compensation for any pain, discomfort, fears, anxiety and other mental and emotional distress suffered by the plaintiff and caused by the injury [and for similar suffering reasonably certain to be experienced in the future from the same cause].
>
> No definite standard [or method of calculation] is prescribed by law by which to fix reasonable compensation for pain and suffering. Nor is the opinion of any witness required as to the amount of such reasonable compensation. [Furthermore, the argument of counsel as to the amount of damages is not evidence of reasonable compensation.] In making an award for pain and suffering you should exercise your authority with calm and reasonable judgment and the damages you fix must be just and reasonable in the light of the evidence.
>
> [This is non-economic damage.]
>
> [If you conclude that the plaintiff is entitled to recover compensation for future non-economic damages, you should determine that amount in current dollars, that is, the

v. Leatherman Tool Group, Inc., 532 U.S. 424, 437 (2001) (holding that the jury determination of punitive damages does not constitute a finding of fact).

35. A finding of fact by the jury is governed by the Seventh Amendment's reexamination clause, which places limits on the form of appellate review. *See, e.g.*, Gasperini v. Center for Humanities, 518 U.S. 415, 432–39 (1996). Insofar as these limitations affect the type of due process constraints that can be imposed on a tort practice, there may be a relevant constitutional difference between forms of tort liability depending upon whether the liability is based upon a finding of fact by the jury.

> amount paid at the time of judgment that will compensate a plaintiff for future pain and suffering. The method you use in determining future economic losses need not be followed by you in your determination of future non-economic damages.][36]

These instructions give jurors very little guidance on how to calculate the damages award. The absence of well-defined standards for determining pain and suffering damages is well known. The amount of discretion given to juries on the matter largely explains why such damages have been and continue to be a focal point in the debate over tort reform. For example, the United States Department of Justice Tort Policy Working Group recommended in 1986 that caps be placed on pain and suffering awards because they are subjective, unpredictable, and substantial.[37] These same concerns led a large number of states to enact legislative reforms in the 1980s to limit pain and suffering awards.[38] Perhaps the most striking example of this concern is provided by the tort-reform bill passed by the United States House of Representatives in March 1995.[39] Title II of the bill, which caps pain and suffering damages in any health-care liability action and eliminates joint and several liability for noneconomic losses in all tort suits, is called "Limitation on Speculative and Arbitrary Damage Awards."[40]

This concern about pain and suffering damages has empirical support. Studies have found that plaintiffs who suffer more severe injuries tend to receive higher awards, indicating some degree of "vertical equity."[41] However, plaintiffs with similar pain and

36. BAJI, *supra* note 29, 14.13.

37. U.S. DEP'T OF JUSTICE, REPORT OF THE TORT POLICY WORKING GROUP ON THE CAUSES, EXTENT, AND POLICY IMPLICATIONS OF THE CURRENT CRISIS IN INSURANCE AVAILABILITY AND AFFORDABILITY 66–69 (1986).

38. *See, e.g.*, Moore v. Mobile Infirmary Ass'n, 592 So. 2d 156, 166–67 (Ala. 1991) (explaining legislative history of statutory cap).

39. H.R. 956, 104th Cong., 1st Sess. (1995).

40. *Id.* at Title II, §§ 202, 203.

41. *See, e.g.*, AUDREY CHIN & MARK A. PETERSON, DEEP POCKETS, EMPTY POCKETS: WHO WINS IN COOK COUNTY JURY TRIALS 56–57 (1985); Randall R. Bovbjerg et al., *Valuing Life and Limb in Tort: Scheduling "Pain and Suffering,"* 83 NW. U. L. REV. 908, 923 (1989) (finding that severity of injury explains about forty percent of variation); Frank A. Sloan & Chee Ruey Hsieh, *Variability in Medical Malpractice Payments: Is the Compensation*

suffering injuries are often awarded significantly different amounts of damages, indicating a lack of "horizontal equity."[42] The tort system currently achieves some degree of vertical equity because jurors either intuitively understand or are told to consider the severity of injury in calculating the award. The systems fail to achieve horizontal equity because jurors are given no guidance on how to translate injury severity into an appropriate monetary amount. Different methods will produce different awards for the same type of injury, resulting in a large degree of variation within each injury category.[43]

As others have already recognized, any constitutional concerns regarding the amount of jury discretion in the award of punitive damages applies to awards for pain and suffering injuries.[44] Even the Court has recognized that punitive damages involve an amount of discretion similar to that which juries exercise with respect to the determination of pain and suffering damages and the requirements of reasonable care.[45]

System Fair?, 24 LAW & SOC'Y REV. 997, 1007–08 (1990); Mark I. Taragin et al., *The Influence of Standard of Care and Severity of Injury on the Resolution of Medical Malpractice Claims*, 117 ANNALS INTERNAL MED. 780, 781 (1992); W. Kip Viscusi, *Pain and Suffering in Product Liability Cases: Systematic Compensation or Capricious Awards?*, 8 INT'L REV. L. & ECON. 203, 213 (1988) (describing study of over 10,000 products liability claims closed by 23 insurance companies between mid-1976 and mid-1977).

42. For citation to various empirical studies that reach this conclusion, see Bovbjerg et al., *supra* note 41, at 919–21.

43. For example, the jury might determine the tort award by considering how much money the plaintiff would accept in order to suffer the injury in question. That award would differ dramatically from a determination that somehow accounts for the fact that the defendant accidentally caused the harm. *See* Mark Geistfeld, *Placing a Price on Pain and Suffering: A Method for Helping Juries Determine Tort Damages for Nonmonetary Injuries*, 83 CAL. L. REV. 775, 843–52 (1995) (showing how the determination of pain and suffering damages depends upon the probability of injury).

44. *See* Paul DeCamp, *Beyond* State Farm*: Due Process Constraints on Noneconomic Compensatory Damages*, 27 HARV. J. L. & PUB. POL'Y 231 (2003); Robert E. Riggs, *Constitutionalizing Due Process: The Limits of Due Process*, 52 OHIO ST. L.J. 859, 907–08 (1991); *see* also 2 DAN B. DOBBS, THE LAW OF TORTS § 377 (2001) ("The claim of pain is therefore a serious threat to the defendant since, lacking any objective components, it permits juries to roam through their biases in setting an award.").

45. Pac. Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 20 ("The discretion allowed under Alabama law in determining punitive damages is no greater than that pursued in many familiar areas of the law as, for example, deciding . . .

Vague jury instructions pose a due process concern by giving jurors an unreasonable opportunity to base their determinations on extralegal factors like bias or prejudice. Empirical studies have found that that extralegal factors such as gender, race, socioeconomic status, or physical appearance become more influential in jury decisionmaking when the legal standards are the most ambiguous.[46] Insofar as juries have a similar amount of discretion in determining punitive damages, pain and suffering damages, and the requirements of reasonable care, it follows that the possibility of bias applies equally to all three issues. This constitutional concern is generated by vague jury instructions and is not plausibly limited to punitive damages.

C. The Third Constitutional Concern: Fair Notice

Due process requires that individuals be given fair notice of what is required of them by the law, enabling the Court in *State Farm* to identify another constitutional concern posed by punitive damages:

> [T]he Due Process Clause does not permit a State to classify arbitrariness as a virtue. Indeed, the point of due process—of the law in general—is to allow citizens to order their behavior. A State can have no legitimate interest in deliberately making the law so arbitrary that citizens will be unable to avoid punishment based solely upon bias or whim.[47]

This constitutional concern further undermines the ability of punitive damages to pursue general deterrence. When tort rules are vaguely specified, the associated uncertainty usually increases the

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'reasonable care,' . . . or appropriate compensation for pain and suffering or mental anguish.").

46. *See, e.g.*, Martin F. Kaplan & Charles E. Miller, *Group Decision Making and Normative Versus Informational Influence: Effects of Type of Issue and Assigned Decision Rule*, 53 J. PERSONALITY & SOC. PSYCHOL. 306, 310 (1987) (describing study showing that juror discussions regarding punitive damages are more likely to involve normative, value-laden judgments than references to the evidence presented at trial). For a survey of this literature, see Frederick S. Levin, Note, *Pain and Suffering Guidelines: A Cure for Damages Measurement "Anomie,"* 22 U. MICH. J.L. REFORM 303, 321 & nn.63–68 (1989).

47. State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 417–18 (2003) (quoting *Haslip*, 499 U.S. at 59 (O'Connor, J., dissenting).

incentive to exercise care, thereby promoting general deterrence.[48] In this passage, the Court expressly rejects such a rationale for vague liability rules.[49] The state's interest in general deterrence does not justify overly vague legal standards, because such standards do not fairly enable individuals to determine what the law requires of them.

The problem of vague tort rules is not limited to punitive damages, nor is this constitutional concern limited to tort issues decided by juries. Any issue that is decided by judges as a matter of law would pose the identical problem for defendants if the governing legal standard were so vague as to make it unfairly difficult for citizens to order their behavior.

Consider the threshold tort question of whether duty exists in any given case. Modern torts jurisprudence has tended to devalue the analytics of duty, treating duty as "a shorthand statement of a conclusion, rather than an aid to analysis in itself."[50] Duty depends on various factors that have been identified by the courts, but these "factors are so numerous and so broadly stated that they can lead to almost any conclusion."[51] Consequently, "no universal test for [duty] ever has been formulated . . . . There is little analysis of the problem of duty in the courts."[52]

If the existence of duty is effectively announced by the court rather than being the predictable result of legal analysis, on what basis can citizens determine whether they will be subject to a tort duty in situations not previously addressed by the case law?

48. *See* SHAVELL, *supra* note 22, at 79–83 (explaining why uncertainty regarding the standard of care leads to the general consequence in which parties "will tend to be led to take more than due care"); *Id*. at 131–32 (explaining why actors ordinarily will have an incentive to take too much care only when courts systematically overestimate damages as a result of uncertainty).

49. The passage quotes from a dissenting opinion by Justice O'Connor, who in turn was responding to an argument that "to best advance the State's interest in deterrence, juries must be given unbridled discretion to render awards that are widely unpredictable." *Haslip*, 499 U.S. at 59 (O'Connor, J., dissenting).

50. KEETON ET AL., *supra* note 34, § 53, at 358. For a good discussion of the modern approach to duty questions, see John C.P. Goldberg & Benjamin C. Zipursky, *The Moral of MacPherson*, 146 U. PA. L. REV. 1733 (1998).

51. DOBBS, *supra* note 44, § 226, at 583 (2000).

52. KEETON ET AL., *supra* note 34, § 53, at 358.

A similar problem arises with respect to the rule of strict liability for abnormally dangerous activities, another issue decided by judges as a matter of law.[53] Whether an activity is governed by this rule of strict liability depends upon six factors under the *Restatement (Second) of Torts*.[54] These factors "are all to be considered, and are all of importance."[55] No one factor, however, is "necessarily sufficient of itself in a particular case, and ordinarily several of them will be required for strict liability. On the other hand, it is not necessary that each of them be present, especially if the others weigh heavily."[56] Other than these vague instructions, the tort rule gives judges no guidance on how to apply the rule.[57] Given the absence of guidance for judges, it logically follows that the rule also does not provide appropriate guidance to citizens.

Insofar as vague tort rules pose a due process concern by making it unreasonably difficult for citizens to order their behavior, the concern is not limited to punitive damages or even to issues resolved by the jury. Other important tort rules create the same constitutional concern.

D. The Fourth Constitutional Concern: Poor Decisionmaking

Vague jury instructions can pose another constitutional concern as the Court in *State Farm* explains:

> Our concerns are heightened when the decisionmaker is presented . . with evidence that has little bearing as to the amount of punitive damages that should be awarded. Vague instructions, or those that merely inform the jury to avoid "passion or prejudice," do little to aid the decisionmaker in
>
> its task of assigning appropriate weight to evidence that is relevant and evidence that is tangential or only inflammatory.[58]

53. RESTATEMENT (SECOND) OF TORTS § 520 cmt. f (1977).
54. *Id.* § 519.
55. *Id.* § 520 cmt. f.
56. *Id.*
57. *See* George C. Christie, *An Essay on Discretion*, 1986 DUKE L.J. 747, 768–69 (1986) (showing how "[a]n enormous range of legal decisions could all be plausibly justified" under the rule).
58. State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 418 (2003) (quoting Appeal to Pet. for Cert. 108a–109a).

This final due process concern essentially restates the problems posed by overly vague tort rules. The problem of vagueness cannot be eliminated by instructing the jury to avoid "passion or prejudice" in awarding punitive damages. So too, the problem cannot be eliminated by instructing jurors to exercise their "authority with calm and reasonable judgment" in determining pain and suffering damages.[59] Whether the decisionmaker is a juror or judge, the need to resolve an issue without sufficient guidance from the law predictably leads to decisions that are not based upon an appropriate weighing of the evidence. Unable to discern the appropriate relevance of evidence, the decisionmaker is also disabled from sorting relevant evidence from "evidence that is tangential or only inflammatory."

Poor decisions presumably increase the likelihood of erroneous impositions of liability, which in turn increase the likelihood that liability involves an unreasonable deprivation of the defendant's property in violation of due process. This constitutional concern need not have anything to do with the motives or character of the decisionmaker, but is an inevitable product of vague legal rules.

II. THE IMPLICATIONS OF DUE PROCESS FOR TORT REFORM

Writing at a time before the Court adopted any express due process constraints on punitive damages, Professor Robert Riggs observed:

> [I]t is hard to see how the typical instructions in a punitive damages case can be held to violate due process (by leaving the jury with "unbridled discretion") without also putting in doubt the large bodies of tort law that equally rely upon such subjective concepts as negligence, gross negligence, malice, or conduct that is reckless, wanton, willful and malicious. If due process is to remake the law of punitive damages by finding these widely used concepts constitutionally infirm, it logically cannot stop until it has changed the whole face of tort law, and perhaps the rest of the law as well.[60]

59. BAJI, *supra* note 29, 14.13.
60. Riggs, *supra* note 44, at 897–98.

In an important respect, this prediction has been borne out by the punitive damage cases decided by the Court. The constitutional concerns the Court has relied upon to justify due process constraints on punitive damages also justify constraining other areas of tort law, an outcome that has been identified and decried by Justices Scalia and Thomas.[61] It is an open question, though, whether constitutional tort-reform will change "the whole face of tort law."

To evaluate this question, we can consider the impact that due process has had on tort practices regarding punitive damages. Under the common law, an award of punitive damages serves the purposes of punishment and deterrence.[62] A wide range of awards would serve these purposes. Punitive damages of $1 million would punish and deter the defendant, and $2 million would provide even more punishment and deterrence. Due to the wide range of awards that would satisfy the common-law requirements for punitive damages, the practice generated a considerable amount of legal uncertainty. This uncertainty underlies the various constitutional concerns that the Court has relied upon to impose due process constraints on punitive damages. These constraints require a court to evaluate a punitive damages award in terms of three factors: "(1) the degree of reprehensibility of the defendant's misconduct; (2) the disparity between the actual or potential harm suffered by the plaintiff and the punitive damages award; and (3) the difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases."[63]

These factors or "guideposts" adopt the common-law objectives of punishment and deterrence and then refine the open-ended common-law inquiry in order to ensure that any given award does not unreasonably exceed the amount required for purposes of punishment and deterrence. The due process inquiry takes this form because it "appropriately begins with an identification of the state interests that a punitive award is designed to serve."[64] By adopting the substantive objectives or purposes to be served by tort liability, constitutional tort-reform will not necessarily change the "whole face

61. *See, e.g.*, BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 606–07 (1996) (Scalia, J., dissenting joined by Thomas, J.).

62. *See id*. at 568.

63. *State Farm*, 538 U.S. at 418.

64. *Gore*, 517 U.S. at 568.

of tort law." Any constitutionally mandated change should only constrain the way in which the tort system functions or attempts to achieve its substantive purposes—the state interests that are supposed to be furthered by tort liability.

Due to this constitutional objective, the Court has tried to avoid taking a position on the appropriate purpose of punitive damages, instead deferring to the substantive purposes expressed by the practice in question.[65] In *Cooper Industries v. Leatherman Tool Group*, for example, the Court was confronted by an argument that the amount of punitive damages for purposes of economically optimal deterrence is "a 'fact' found by the jury and that, as a result, the Seventh Amendment is implicated in appellate review of that award."[66] In addressing this argument, the Court looked to the purpose of punitive damages as expressed by the jury instructions in question, finding that "deterrence was but one of four concerns the jury was instructed to consider when setting the amount of punitive damages. Moreover, it is not at all obvious that even the *deterrent* function of punitive damages can be served *only* by economically 'optimal deterrence.'"[67] The Court accordingly decided the constitutional question while trying to sidestep the substantive question about the appropriate purpose of punitive damages.

Notwithstanding the Court's efforts in this regard, constitutional tort-reform will often have an impact on the substantive objectives of tort law. Again, the punitive damage cases are illustrative. In adopting the criteria for determining whether a punitive damages award satisfies due process, the Court has tried to accept the substantive purposes of punitive damages while ensuring that any given award does not exceed the amount required for these purposes. Nevertheless, the Court's rulings have affected the substantive purposes served by punitive damages.

As previously discussed, in adopting the criteria for evaluating the constitutionality of a punitive damages award, the Court has implicitly assumed that punitive damages serve the purposes of retribution for a private wrong and individual deterrence of the defendant.[68] There is widespread agreement that any punishment

65. DeCamp, *supra* note 44, at 268.
66. 532 U.S. 424, 438 (2001).
67. *Id.* at 439.
68. *See supra* notes 17-24 and accompanying text.

afforded by punitive damages is properly limited to the wrongdoing the defendant inflicted upon the plaintiff.[69] There is not widespread agreement, though, about the type of deterrence that should be promoted by a punitive award. Must it be specific to the defendant or generally directed to the public? The answer to this question will depend upon a substantive, contestable conception of tort liability.

According to a widely held understanding of tort law, tort liability serves the two functions of compensating the individual plaintiff while creating incentives for general deterrence.[70] Within this conception of tort liability, punitive damages serve the objective of general deterrence rather than individual deterrence.[71] This objective means that punitive damages play a "mixed" role of private punishment and general deterrence, but that role is no different than the "mixed" way in which compensatory damages provide private compensation and general deterrence. By effectively limiting the purpose of punitive damages to individual or specific deterrence, the Court has relied upon a conception of tort liability that is not widely shared.[72]

As long as the substantive purposes of tort law remain contentious, any due process constraint on a tort practice is likely to rely upon a contestable conception of tort liability.[73] Constitutional

69. *See, e.g.*, Catherine M. Sharkey, *Punitive Damages as Societal Damages*, 113 YALE L.J. 347, 359 (2003) ("The prevailing justification for punitive damages is individually oriented, retributive punishment.").

70. *See* John C.P. Goldberg, *Twentieth Century Tort Theory*, 91 GEO L.J. 513, 522–31 (2003).

71. *See, e.g.*, RESTATEMENT (SECOND) OF TORTS § 908(1) (1979) (stating that punitive damages are "awarded against a person . . . to deter him *and others like him* from similar conduct in the future") (emphasis added).

72. In particular, the Court's linkage of punishment and specific deterrence relies upon the form of justification required by corrective justice, which maintains that "[i]n specifying the nature of the injustice, the only normative factors to be considered significant are those that apply correlatively to both parties. . . . [T]hus allowing tort law to function as a coherent enterprise in justification rather than as a hodgepodge of factors separately relevant only to one or the other of the parties." Ernest J. Weinrib, *Deterrence and Corrective Justice*, 50 UCLA L. REV. 621, 626–27 (2002).

73. Thus, for example, the Court's decision that the jury determination of punitive damages is not a "finding of fact" for purposes of appellate review also relies upon a contentious conception of punitive damages. *See* Anthony J. Sebok, *What Did Punitive Damages Do? Why Misunderstanding the History of Punitive Damages Matters Today*, 78 CHI. KENT L. REV. 163 (2003).

tort-reform will inevitably have an impact on the substantive objectives of tort law.

This outcome does not necessarily mean that constitutional tort-reform is misguided. As the Court has said, the due process inquiry "appropriately begins with an identification of the state interests that a punitive award is designed to serve."[74] The states determine the interests to be served by the tort practice in question. If the Court adopts due process constraints that implicitly rely upon an erroneous substantive conception of tort liability, the states are free to adopt a different substantive conception. Constitutional tort-reform can serve the valuable role of forcing state courts and legislatures to identify more clearly the substantive objectives of tort liability.

For example, the Court's opinion in *State Farm* may only require that punitive damages be calculated in a manner that does not expose the defendant to future liability for the same injuries caused by the misconduct.[75] Liability in these circumstances is excessive, resulting in the violation of substantive due process. Consequently, as long as a method for awarding punitive damages does not lead to outcomes that "might . . . 'double count' by including in the punitive damages award some of the compensatory, or punitive, damages that subsequent plaintiffs would also recover,"[76] the resultant awards should satisfy due process. Punitive damages based upon individual retribution and individual deterrence clearly satisfy this requirement, but a properly formulated method for determining punitive damages also ensures that such damages can serve general deterrence without involving any "double counting."[77] Hence *State Farm* should give states the option to pursue general deterrence as long as that purpose is explicit and implemented by the appropriate procedures. The availability of such an option directly follows from the principle that constitutional tort-reform is supposed to accept the substantive objectives or purposes to be served by tort liability.

Once constitutional tort-reform is placed within this broader dynamic, its role becomes appealing. Insofar as the vagueness of tort

74. BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 568 (1996).

75. *See* Sharkey, *supra* note 69, at 359–63.

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

77. *See generally* Sharky, *supra* note 69 (proposing such a scheme).

rules stems from vagueness about the underlying purpose of tort liability, constitutional tort-reform is likely to be based upon a contentious conception of tort liability. If that substantive outcome is unacceptable for a state, it retains the option of adopting a different conception of tort liability that may require a different set of due process constraints. The dynamic of constitutional tort-reform has the potential to "change the face of tort law" by forcing the states to clarify the substantive aims of tort liability.

III. CONCLUSION

Constitutional tort-reform can be usefully compared to earlier tort-reform movements, which have largely involved the expansion and subsequent contraction of tort liability. These earlier reforms have had differing distributive impacts on right-holders and duty-holders, whereas constitutional tort-reform has the potential to benefit everyone. This distributive difference can be illustrated by product cases.

During most of the twentieth century, the expansion of tort liability for defective products probably increased product safety, thereby benefiting consumers.[78] The increased liability also increased costs for manufacturers, and the resultant increases in product price have been detrimental to consumers. Whether the expansion in tort liability has conferred a net benefit on consumers is an open question. What is clear, though, is that the increased product prices have presumably reduced aggregate demand and corporate profits. The expansion of tort liability has apparently been detrimental for product sellers (the duty-holders) while having an ambiguous impact on consumers (the right-holders).

By contrast, the tort reforms of the past few decades have typically reduced the scope of liability, presumably creating the converse effects of reducing product safety and price, all else being equal. Perhaps the increased number of product accidents have cost consumers less than the savings they have derived from the reduction of product prices. Perhaps not. Regardless of the impact on consumers, tort reforms that reduce the scope of products liability are

78. The reasoning behind this conclusion and the others described in this paragraph is described more fully in Mark Geistfeld, *The Political Economy of Neocontractual Proposals for Products Liability Reform*, 72 TEX. L. REV. 803, 834–36 (1994).

likely to increase aggregate product demand and corporate profits. The reduction of tort liability has apparently been beneficial for product sellers (the duty-holders) while having an ambiguous impact on consumers (the right-holders).

Outside of the products context, the differing distributive impacts of reforms are more stark. Reductions in the scope of liability benefit duty-holders at the expense of right-holders, while the converse holds true for expansions of liability. In light of these differing distributive impacts, the interest-group dynamics become predictable and largely explain why legislative tort reform has typically involved the scope of liability.[79]

This reform dynamic has failed to address the vagueness inherent in many important liability rules. Again, products liability provides a good illustration. The liability rules governing product design and product warnings have enormous practical significance, as any finding of defect renders the entire product line defective. Nevertheless, the liability rules governing product designs and warnings are unacceptably vague.

After extensively studying the case law, Professors James A. Henderson, Jr., and Aaron Twerski, the Reporters of the *Restatement (Third) of Torts: Products Liability*, have concluded that:

> [N]egligence doctrine in the context of failure-to-warn litigation is little more than an empty shell. In most cases, the elements of the warnings cause of action require plaintiffs to do little more than mouth empty phrases. From the plaintiff's perspective, there is undoubtedly a certain attractiveness to a tort without a meaningful standard of care or any serious requirement of proving causation. From a broader social perspective, however, such a tort is too lawless to be fair or useful.[80]

Matters are not much better with respect to the liability rules governing product design. The appropriate definition of a design defect has long vexed the courts, with most jurisdictions adopting the

79. *See id.*

80. James A. Henderson, Jr. & Aaron D. Twerski, *Doctrinal Collapse in Products Liability: The Empty Shell of Failure to Warn*, 65 N.Y.U. L. REV. 265, 326 (1990).

risk-utility test.[81] Despite the apparent consensus on this issue, on the basis of a national survey Professor David Owen has reached the following conclusions about how courts define the risk-utility test:

> First, there is no single clearly accepted view as to how the design defect balancing test should be described or formulated. A related finding is that there is considerable variation in how the balancing test is formulated among the states, among decisions within the same state, and often even within the same judicial opinion. Another finding is that courts today quite typically cobble together a variety of separate and often conflicting formulations of balancing tests borrowed, without analysis, from earlier opinions. Further, many courts acknowledge that a variety of factors should be balanced but neither discriminate between the various factors nor explain how they should be balanced or otherwise interrelate.[82]

The vague liability rules governing defective product designs and warnings would seem to pose a distinct problem of due process. These rules govern the conduct of manufacturers in national product markets, and the vagueness and variability in the rules raise due process concerns that are not qualitatively different from those posed by punitive damages.[83]

Unlike the tort reforms that have reduced or expanded the scope of liability for defective designs and warnings, constitutional tort-reform has a much greater likelihood of benefiting both consumers and manufacturers. For any given level of desired product safety, a reduction in legal uncertainty will reduce the cost of liability insurance for manufacturers.[84] Reforms of this type enable

81. *See* RESTATEMENT (THIRD) OF THE LAW OF TORTS: PRODUCTS LIABILITY § 2, Reporters' Note cmt. d (1997).

82. David G. Owen, *Risk-Utility Balancing in Design Defect Cases*, 30 U. MICH. J.L. REFORM 239, 242 (1997).

83. *See supra* Part I (showing how vague rules regarding the standard of care pose constitutional concerns greater than those posed by punitive damages).

84. *See* Geistfeld, *supra* note 78, at 839–42 (providing various reasons why "[i]ncreased legal uncertainty . . . translates into higher costs for insurance companies even if the mean value of the loss stays constant"). For more recent studies showing how uncertainty increases the cost of insurance, see J. David Cummins, *Catastrophic Events, Parameter Uncertainty and the Breakdown of Implicit Long-Term Contracting: The Case of Terrorism Insurance*, 26 J. RISK

manufacturers to provide the amount of desired product safety at lower cost. The reduction in product prices benefits consumers, and the resultant increase in aggregate demand should benefit manufacturers. By reducing the legal uncertainty generated by products liability rules, constitutional tort-reform can confer a more widespread distribution of benefits than reforms that contract or expand the scope of liability.

The process of constitutional tort-reform is also likely to affect the substantive content of the liability rules. Any substantive changes, however, ultimately are a matter to be decided by the states rather than the U.S. Supreme Court. Tort law will continue to be a product of state law, with due process potentially providing a much needed impetus for the implementation of reform measures that should be in the best interests of everyone.

& UNCERTAINTY 153 (2003); Kenneth A. Froot & Paul G.J. O'Connell, *The Pricing of U.S. Catastrophe Reinsurance, in* THE FINANCING OF CATASTROPHE RISK 195 (Kenneth A. Froot ed., 1999) (providing and testing model in which the equilibrium price of insurance increases with increased volatility of the policyholder's loss distribution due to the insurer's increased need to raise costly, external capital).