AMERICAN CONSTITUTIONALISM

VOLUME II: RIGHTS AND LIBERTIES

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Supplementary Material

Chapter 11: The Contemporary Era—Individual Rights/Property/Due Process

**BMW of North America,** [**Inc**](http://web2.westlaw.com/find/default.wl?rs=WLW9.09&ifm=NotSet&fn=_top&sv=Split&findtype=l&docname=CIK(LE00213229)&db=CO-LPAGE&vr=2.0&rp=%2ffind%2fdefault.wl&mt=Westlaw)**. v. Gore, 517 U.S. 559** (1996)

*Dr. Ira Gore discovered in late 1990 that his new BMW had been damaged and repainted by the dealer to cover up the scratches. BMW at that time did not disclose to buyers that a new car had been damaged when the repairs were less that 5% of the total value of the vehicle. Gore sued BMW, claiming that the failure to disclose repairs constituted fraud. The company responded that they were not obligated to disclose small repairs under Alabama law and that the car sold to Gore was as good as new. The Alabama trial court sided with Gore. The jury awarded him $4,000 in compensatory damages and $4,000,000 in punitive damages. After the Alabama Supreme Court reduced the punitive damage award to $2,000,000, BMW appealed to the Supreme Court of the United States.*

*Punitive damages became the subject of increased national controversy during the late twentieth century. Such damages assess tortfeasers for the outrageousness of their conduct as well as out-of pocket damages. Consider Dr. Gore’s circumstances. He would hardly find suing BMW worthwhile if all he could collect was $4,000 in actual damages. If, however, the jury sought to punish BMW for hiding flaws from numerous customers, then Dr. Gore would have greater incentive to bring a lawsuit. He would be a private attorney general, entitled to reap a financial reward for bringing an outlaw company to justice. Proponents of large punitive damage awards insisted that, in the American legal system, permitting persons to act as private attorneys general was the best way to ensure that large companies were appropriately sanctioned for outrageous actions that imposed relatively small costs on many individual citizens. Opponents of large punitive damages insisted that jury verdicts were excessive and arbitrary, often reflecting outrage at big business in general rather than at any specific conduct.*

*Various organizations of practicing lawyers, a group of legal historians, and a group of scholars affiliated with the law and society movement filed amicus briefs asking the justices to uphold the punitive damage award. The brief for the Law and Economics scholars stated the conventional case for punitive damages when asserting,*

*Consumer fraud not only cheats individuals, it also injures society by subverting the efficiency of the market system. Because of the inherent likelihood of underenforcement against the perpetrators of consumer fraud, punitive damages in large amounts are essential to deter such misconduct.*

*Numerous American businesses, the Chamber of Commerce, and the Pacific Legal Foundation filed amicus briefs urging the justices to place constitutional limits on punitive damages. The brief for the Pharmaceutical Research and Manufacturers of America stated the conventional case for capping punitive damages when noting that*

*its members are among the victims of unpredictable and arbitrary punitive damage verdicts that have been awarded without adequate procedural safeguards, with increasing frequency and in dramatically larger sums in recent years. Of even greater impact is the mere specter of unbridled punitive damages, which has deterred development of potentially life-saving vaccines and medicines and dramatically driven up their costs.*

*The Supreme Court by a 5-4 vote declared that the due process clause imposed limits on punitive damages. Justice Stevens’s majority opinion held that BMW did not have fair notice that they could be sued for millions of dollars for what the justices believed was a relatively minor failing. The amicus briefs suggest that Gore pitted trial lawyers, normally associated with the Democratic Party, against businesses generally thought to be associated with the Republican Party. Justice Ginsburg aside, however, the justices seemed to be voting against their alleged sponsors. Why does tort reform produce different alliances on the Court than in legislatures? On what basis did Justice Stevens declare the punitive damage award in this case unconstitutional? Was the problem that the damages were excessive, such that Alabama could not pass a law that permitted the jury to impose such large awards for fraud? Is the problem merely that Alabama law gave BMW no notice that they might be subject to such an award and the jury no standards for determining the appropriate award? What was the constitutional basis for each claim? Was Justice Scalia correct when he insisted that no constitutional provision forbids large punitive damage awards? Consider whether his dissent is better directed at the excessive argument than the lack of fair notice argument? What is the maximum award that you believe constitutional in this case?*

JUSTICE STEVENS delivered the opinion of the Court.

Punitive damages may properly be imposed to further a State’s legitimate interests in punishing unlawful conduct and deterring its repetition. . . . Only when an award can fairly be categorized as “grossly excessive” in relation to these interests does it enter the zone of arbitrariness that violates the Due Process Clause of the Fourteenth Amendment. . . . For that reason, the federal excessiveness inquiry appropriately begins with an identification of the state interests that a punitive award is designed to serve. We therefore focus our attention first on the scope of Alabama’s legitimate interests in punishing BMW and deterring it from future misconduct.

No one doubts that a State may protect its citizens by prohibiting deceptive trade practices and by requiring automobile distributors to disclose presage repairs that affect the value of a new car. . . .

We may assume . . . that it would be wise for every State to adopt Dr. Gore’s preferred rule, requiring full disclosure of every presale repair to a car, no matter how trivial and regardless of its actual impact on the value of the car. But while we do not doubt that Congress has ample authority to enact such a policy for the entire Nation, it is clear that no single State could do so, or even impose its own policy choice on neighboring States. . . .

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. Before this Court Dr. Gore argued that the large punitive damages award was necessary to induce BMW to change the nationwide policy that it adopted in 1983. But by attempting to alter BMW’s nationwide policy, Alabama would be infringing on the policy choices of other States. . . . 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.

. . . The Alabama Supreme Court therefore properly eschewed reliance on BMW’s out of state conduct . . . and based its remitted award solely on conduct that occurred within Alabama. The award must be analyzed in the light of the same conduct, with consideration given only to the interests of Alabama consumers, rather than those of the entire Nation. When the scope of the interest in punishment and deterrence that an Alabama court may appropriately consider is properly limited, it is apparent—for reasons that we shall now address—that this award is grossly excessive.

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. Three guideposts, each of which indicates that BMW did not receive adequate notice of the magnitude of the sanction that Alabama might impose for adhering to the nondisclosure policy adopted in 1983, lead us to the conclusion that the $2 million award against BMW is grossly excessive: the degree of reprehensibility of the nondisclosure; the disparity between the harm or potential harm suffered by Dr. Gore and his punitive damages award; and the difference between this remedy and the civil penalties authorized or imposed in comparable cases. . . .

*Degree of Reprehensibility*

Perhaps the most important indicium of the reasonableness of a punitive damages award is the degree of reprehensibility of the defendant’s conduct. . . . This principle reflects the accepted view that some wrongs are more blameworthy than others. . . .

In this case, none of the aggravating factors associated with particularly reprehensible conduct is present. The harm BMW inflicted on Dr. Gore was purely economic in nature. The presale refinishing of the car had no effect on its performance or safety features, or even its appearance for at least nine months after his purchase. BMW’s conduct evinced no indifference to or reckless disregard for the health and safety of others. . . .

. . .

BMW’s decision to follow a disclosure policy that coincided with the strictest extant state statute was [not] sufficiently reprehensible to justify a $2 million award of punitive damages.

. . . There is no evidence that BMW acted in bad faith when it sought to establish the appropriate line between presumptively minor damage and damage requiring disclosure to purchasers. For this purpose, BMW could reasonably rely on state disclosure statutes for guidance. In this regard, it is also significant that there is no evidence that BMW persisted in a course of conduct after it had been adjudged unlawful on even one occasion, let alone repeated occasions.

Finally, the record in this case discloses no deliberate false statements, acts of affirmative misconduct, or concealment of evidence of improper motive. . . . We accept, of course, the jury’s finding that BMW suppressed a material fact which Alabama law obligated it to communicate to prospective purchasers of repainted cars in that State. But the omission of a material fact may be less reprehensible than a deliberate false statement, particularly when there is a good faith basis for believing that no duty to disclose exists.

. . .

*Ratio*

The second and perhaps most commonly cited indicium of an unreasonable or excessive punitive damages award is its ratio to the actual harm inflicted on the plaintiff. . . .

The $2 million in punitive damages awarded to Dr. Gore by the Alabama Supreme Court is 500 times the amount of his actual harm as determined by the jury. . . .

Of course, we have consistently rejected the notion that the constitutional line is marked by a simple mathematical formula, even one that compares actual *and potential* damages to the punitive award. . . . Indeed, low awards of compensatory damages may properly support a higher ratio than high compensatory awards, if, for example, a particularly egregious act has resulted in only a small amount of economic damages. A higher ratio may also be justified in cases in which the injury is hard to detect or the monetary value of noneconomic harm might have been difficult to determine. . . .

*Sanctions for Comparable Misconduct*

Comparing the punitive damages award and the civil or criminal penalties that could be imposed for comparable misconduct provides a third indicium of excessiveness. . . .

The maximum civil penalty authorized by the Alabama Legislature for a violation of its Deceptive Trade Practices Act is $2,000. . . . [A]t the time BMW’s policy was first challenged, there does not appear to have been any judicial decision in Alabama or elsewhere indicating that application of that policy might give rise to such severe punishment.

The sanction imposed in this case cannot be justified on the ground that it was necessary to deter future misconduct without considering whether less drastic remedies could be expected to achieve that goal. The fact that a multimillion dollar penalty prompted a change in policy sheds no light on the question whether a lesser deterrent would have adequately protected the interests of Alabama consumers. In the absence of a history of noncompliance with known statutory requirements, there is no basis for assuming that a more modest sanction would not have been sufficient to motivate full compliance with the disclosure requirement imposed by the Alabama Supreme Court in this case.

. . .

The fact that BMW is a large corporation rather than an impecunious individual does not diminish its entitlement to fair notice of the demands that the several States impose on the conduct of its business. Indeed, its status as an active participant in the national economy implicates the federal interest in preventing individual States from imposing undue burdens on interstate commerce. While each State has ample power to protect its own consumers, none may use the punitive damages deterrent as a means of imposing its regulatory policies on the entire Nation.

. . .

JUSTICE [BREYER](http://web2.westlaw.com/find/default.wl?tf=-1&rs=WLW9.09&fn=_top&sv=Split&docname=0254766801&tc=-1&pbc=20AA6D95&ordoc=1996118412&findtype=h&db=PROFILER-WLD&vr=2.0&rp=%2ffind%2fdefault.wl&mt=Westlaw), with whom JUSTICE [O’CONNOR](http://web2.westlaw.com/find/default.wl?tf=-1&rs=WLW9.09&fn=_top&sv=Split&docname=0209675601&tc=-1&pbc=20AA6D95&ordoc=1996118412&findtype=h&db=PROFILER-WLD&vr=2.0&rp=%2ffind%2fdefault.wl&mt=Westlaw) and JUSTICE [SOUTER](http://web2.westlaw.com/find/default.wl?tf=-1&rs=WLW9.09&fn=_top&sv=Split&docname=0263202201&tc=-1&pbc=20AA6D95&ordoc=1996118412&findtype=h&db=PROFILER-WLD&vr=2.0&rp=%2ffind%2fdefault.wl&mt=Westlaw) join, concurring.

The reason [underlying the decision] flows from the Court’s emphasis . . . upon the constitutional importance of legal standards that provide “reasonable constraints” within which “discretion is exercised,” that assure “meaningful and adequate review by the trial court whenever a jury has fixed the punitive damages,” and permit “appellate review [that] makes certain that the punitive damages are reasonable in their amount and rational in light of their purpose to punish what has occurred and to deter its repetition.” . . .

This constitutional concern, itself harkening back to the Magna Carta, arises out of the basic unfairness of depriving citizens of life, liberty, or property, through the application, not of law and legal processes, but of arbitrary coercion. . . . Requiring the application of law, rather than a decisionmaker’s caprice, does more than simply provide citizens notice of what actions may subject them to punishment; it also helps to assure the uniform general treatment of similarly situated persons that is the essence of law itself. . . .

Legal standards need not be precise in order to satisfy this constitutional concern. . . . But they must offer some kind of constraint upon a jury or court’s discretion, and thus protection against purely arbitrary behavior. The standards the Alabama courts applied here are vague and open ended to the point where they risk arbitrary results. . . .

First, the Alabama statute that permits punitive damages does not itself contain a standard that readily distinguishes between conduct warranting very small, and conduct warranting very large, punitive damages awards. . . . The statute . . . authorizes punitive damages for the most serious kinds of misrepresentations, say, tricking the elderly out of their life savings, for much less serious conduct, such as the failure to disclose repainting a car, at issue here, and for a vast range of conduct in between.

Second, the Alabama courts, in this case, have applied the “factors” intended to constrain punitive damages awards in a way that belies that purpose. . . .

To find a “reasonable relationship” between purely economic harm totaling $56,000 [what Breyer thought was the actual economic damage in Alabama], without significant evidence of future repetition, and a punitive award of $2 million is to empty the “reasonable relationship” test of meaningful content. As thus construed, it does not set forth a legal standard that could have significantly constrained the discretion of Alabama factfinders.

. . .

Third, the state courts neither referred to, nor made any effort to find, nor enunciated any other standard that either directly, or indirectly as background, might have supplied the constraining legal force that the statute [and past precedents]. . . lack. . . .

The record before us, however, contains nothing suggesting that the Alabama Supreme Court, when determining the allowable award, applied any “economic” theory that might explain the $2 million recovery. . . .

Fourth, I cannot find any community understanding or historic practice that this award might exemplify and which, therefore, would provide background standards constraining arbitrary behavior and excessive awards. A punitive damages award of $2 million for intentional misrepresentation causing $56,000 of harm is extraordinary by historical standards, and, as far as I am aware, finds no analogue until relatively recent times. . . .

Fifth, there are no other legislative enactments here that classify awards and impose quantitative limits that would significantly cabin the fairly unbounded discretion created by the absence of constraining legal standards. . . .

The upshot is that the rules that purport to channel discretion in this kind of case, here did not do so in fact. That means that the award in this case was both (a) the product of a system of standards that did not significantly constrain a court’s, and hence a jury’s, discretion in making that award; and (b) grossly excessive in light of the State’s legitimate punitive damages objectives.

. . .

To the extent that neither clear legal principles nor fairly obvious historical or community-based standards (defining, say, especially egregious behavior) significantly constrain punitive damages awards, is there not a substantial risk of outcomes so arbitrary that they become difficult to square with the Constitution’s assurance, to every citizen, of the law’s protection? The standards here, as authoritatively interpreted, in my view, make this threat real and not theoretical. And, in these unusual circumstances, where legal standards offer virtually no constraint, I believe that this lack of constraining standards warrants this Court’s detailed examination of the award.

. . . The severe lack of proportionality between the size of the award and the underlying punitive damages objectives shows that the award falls into the category of “gross excessiveness” set forth in this Court’s prior cases.

JUSTICE [SCALIA](http://web2.westlaw.com/find/default.wl?tf=-1&rs=WLW9.09&fn=_top&sv=Split&docname=0254763301&tc=-1&pbc=20AA6D95&ordoc=1996118412&findtype=h&db=PROFILER-WLD&vr=2.0&rp=%2ffind%2fdefault.wl&mt=Westlaw), with whom JUSTICE [THOMAS](http://web2.westlaw.com/find/default.wl?tf=-1&rs=WLW9.09&fn=_top&sv=Split&docname=0216654601&tc=-1&pbc=20AA6D95&ordoc=1996118412&findtype=h&db=PROFILER-WLD&vr=2.0&rp=%2ffind%2fdefault.wl&mt=Westlaw) joins, dissenting.

Today we see the latest manifestation of this Court’s recent and increasingly insistent “concern about punitive damages that ‘run wild.’” . . . Since the Constitution does not make that concern any of our business, the Court’s activities in this area are an unjustified incursion into the province of state governments.

. . . I do not regard the Fourteenth Amendment’s Due Process Clause as a secret repository of substantive guarantees against “unfairness”—neither the unfairness of an excessive civil compensatory award, nor the unfairness of an “unreasonable” punitive award. What the Fourteenth Amendment’s procedural guarantee assures is an opportunity to contest the reasonableness of a damages judgment in state court; but there is no federal guarantee a damages award actually be reasonable. . . .

This view, which adheres to the text of the Due Process Clause, has not prevailed in our punitive damages cases. . . . When, however, a constitutional doctrine adopted by the Court is not only mistaken but also insusceptible of principled application, I do not feel bound to give it stare decisis effect—indeed, I do not feel justified in doing so. . . . Our punitive damages jurisprudence compels such a response. The Constitution provides no warrant for federalizing yet another aspect of our Nation’s legal culture (no matter how much in need of correction it may be), and the application of the Court’s new rule of constitutional law is constrained by no principle other than the Justices’ subjective assessment of the “reasonableness” of the award in relation to the conduct for which it was assessed.

. . .

At the time of adoption of the Fourteenth Amendment, it was well understood that punitive damages represent the assessment by the jury, as the voice of the community, of the measure of punishment the defendant deserved. . . . Today’s decision, though dressed up as a legal opinion, is really no more than a disagreement with the community’s sense of indignation or outrage expressed in the punitive award of the Alabama jury, as reduced by the State Supreme Court. It reflects not merely, as the concurrence candidly acknowledges, “a judgment about a matter of degree,” . . . but a judgment about the appropriate degree of indignation or outrage, which is hardly an analytical determination.

There is no precedential warrant for giving our judgment priority over the judgment of state courts and juries on this matter. . . .

One might understand the Court’s eagerness to enter this field, rather than leave it with the state legislatures, if it had something useful to say. In fact, however, its opinion provides virtually no guidance to legislatures, and to state and federal courts, as to what a “constitutionally proper” level of punitive damages might be.

. . .

“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 the 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 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. . . . Why could the Supreme Court of Alabama not consider lawful (but disreputable) conduct, both inside and outside Alabama, for the purpose of assessing just how bad an actor BMW was?

. . .

Of course it will not be easy for the States to comply with this new federal law of damages, no matter how willing they are to do so. In truth, the “guideposts” mark a road to nowhere; they provide no real guidance at all. . . .

. . . The Court has constructed a framework that does not genuinely constrain, that does not inform state legislatures and lower courts—that does nothing at all except confer an artificial air of doctrinal analysis upon its essentially ad hoc determination that this particular award of punitive damages was not “fair.”

. . .

The relationship between judicial application of the new “guideposts” and jury findings poses a real problem for the Court, since as a matter of logic there is no more justification for ignoring the jury’s determination as to how reprehensible petitioner’s conduct was (i.e., how much it deserves to be punished), than there is for ignoring its determination that it was reprehensible at all (i.e., that the wrong was willful and punitive damages are therefore recoverable). That the issue has been framed in terms of a constitutional right against unreasonably excessive awards should not obscure the fact that the logical and necessary consequence of the Court’s approach is the recognition of a constitutional right against unreasonably imposed awards as well. The elevation of “fairness” in punishment to a principle of “substantive due process” means that every punitive award unreasonably imposed is unconstitutional; such an award is by definition excessive, since it attaches a penalty to conduct undeserving of punishment. Indeed, if the Court is correct, it must be that every claim that a state jury’s award of compensatory damages is “unreasonable” (because not supported by the evidence) amounts to an assertion of constitutional injury. . . . That is a stupefying proposition.

JUSTICE [GINSBURG](http://web2.westlaw.com/find/default.wl?tf=-1&rs=WLW9.09&fn=_top&sv=Split&docname=0224420501&tc=-1&pbc=20AA6D95&ordoc=1996118412&findtype=h&db=PROFILER-WLD&vr=2.0&rp=%2ffind%2fdefault.wl&mt=Westlaw), with whom THE CHIEF JUSTICE joins, dissenting.

The Court, I am convinced, unnecessarily and unwisely ventures into territory traditionally within the States’ domain, and does so in the face of reform measures recently adopted or currently under consideration in legislative arenas. The Alabama Supreme Court, in this case, endeavored to follow this Court’s prior instructions; and, more recently, Alabama’s highest court has installed further controls on awards of punitive damages . . . I would therefore leave the state court’s judgment undisturbed, and resist unnecessary intrusion into an area dominantly of state concern.

. . .

No Alabama authority, it bears emphasis—no statute, judicial decision, or trial judge instruction—ever countenanced the jury’s multiplication of the $4,000 diminution in value estimated for each refinished car by the number of such cars (approximately 1,000) shown to have been sold nationwide. The sole prompt to the jury to use nationwide sales as a multiplier came from Gore’s lawyer during summation. . . . Notably, counsel for BMW failed to object to Gore’s multiplication suggestion, even though BMW’s counsel interrupted to make unrelated objections four other times during Gore’s closing statement. . . .

. . .

In brief, Gore’s case is idiosyncratic. The jury’s improper multiplication, tardily featured by petitioner, is unlikely to recur in Alabama and does not call for error correction by this Court.

. . .

. . . The Court is not well equipped for this mission. Tellingly, the Court repeats that it brings to the task no “mathematical formula,” . . . no “categorical approach,” . . . no “bright line.”. . . It has only a vague concept of substantive due process, a “raised eyebrow” test . . . as its ultimate guide.

. . . For the reasons stated, I dissent from this Court’s disturbance of the judgment the Alabama Supreme Court has made.