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Causation's Due Process Dimensions

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For decades, courts have grappled with the tension between compensating victims of mass harms and maintaining fairness to defendants when causation is difficult to prove. This Article argues that the Supreme Court's due process jurisprudence provides a relevant framework for navigating this tension. We contend that the Court over the last three decades has established a consistent due process approach in punitive damages and personal jurisdiction cases, which is rooted in antecedents tracing to the nineteenth century and relies on a nexus of interests that balances individual rights, state interests, and federalism concerns. This framework, we argue, has significant implications for evaluating the constitutionality of tort doctrines like market-share liability and innovator liability, which challenge traditional notions of causation. Our analysis reveals that these doctrines may be vulnerable in some applications to constitutional challenge under the Court's modern due process approach. We trace the evolution of the Court's jurisprudence, demonstrating how it emphasizes the relationship between plaintiff's harm, defendant's conduct, and the forum state's interest. Applying this framework to market-share and innovator liability, we suggest that causation itself may have constitutional dimensions. This finding has far-reaching implications for mass tort litigation and could reshape how courts approach cases involving multiple actors and attenuated chains of causation. By bridging the gap between due process jurisprudence and tort law, this Article offers a new perspective on longstanding debates about liability in complex cases and provides a roadmap for courts navigating these challenging waters.

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I. INTRODUCTION

Thirty-five years ago, a nearly defunct pharmacy chain filed a petition for certiorari making what seemed like an obvious claim: that holding the company liable for "for injuries suffered by a person with whom it never came into contact and caused by a product it did not make" would violate due process.[1] The company was seeking review of a New York court opinion that applied market-share liability for harm caused by the drug DES.

DES, short for diethylstilbestrol, was a synthetic form of estrogen that was widely prescribed to pregnant women in the mid-twentieth century.[2] In 1971, the FDA banned DES's use in pregnancy after the drug was linked to cancer and reproductive abnormalities in the offspring of women who took the drug.[3] A wave of lawsuits followed. However, because numerous companies manufactured the generic drug and because the harms became apparent only after individual purchase records had long since been lost, plaintiffs had a difficult time identifying the specific companies whose products they consumed. In response, courts in DES cases developed the doctrine of market-share liability. This doctrine allowed consumers to hold manufacturers of fungible products liable for harms according to the manufacturers' share of the product market even when consumers could not prove which manufacturer's product harmed them.[4]

The New York court extended the doctrine further. Not only did it relieve the plaintiff of the need to prove a causal link to particular defendants, but it also forbade defendants from exculpating themselves from liability by *disproving* causation. The court wrote that "there should be no exculpation of a defendant who, although a member of the market producing [the pharmaceutical product], appears not to have caused a particular plaintiff's injury."[5] Instead, the court concluded, liability was based

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[1] Petition for Writ of Certiorari, Rexall Drug Co. v. Tigue, 493 U.S. 944 (1989) (No. 89-168), at *i.

[2] Richard C. Ausness, *Causation and Apportionment Issues in Opioid Litigation*, 49 CAP. UNIV. L. REV. 535, 555 (2021).

[3] Ausness, *supra* note 2, at 556.

[4] Sindell v. Abbott Labs., 607 P.2d 924 (Cal. 1980); Martin v. Abbott Labs., 689 P.2d 368 (Wash. 1984); Collins v. Lilly & Co., 342 N.W.2d 37 (Wis. 1984).

[5] Hymowitz v. Eli Lilly & Co., 539 N.E.2d 1069, 1078 (N.Y. 1989).

on "the culpability of a defendant for marketing the product," not the causation of the plaintiff's particular harm.[6] The court did offer the defendants one bit of solace, holding that defendants would be liable only for a percentage of harm that matched their individual market share, even if that meant that plaintiffs would obtain less than the full recovery, explaining that "we eschewed exculpation to prevent the fortuitous avoidance of liability, and thus, equitably, we decline to unleash the same forces to increase a defendant's liability beyond its fair share of responsibility."[7]

By 1989, the United States Supreme Court had denied certiorari in the DES market-share cases, including the New York case that denied defendants the chance to exculpate themselves from liability by disproving causation. With DES taken off the market, litigation over the drug petered out. Despite the opening left by the Supreme Court, state courts proved generally reluctant to apply market-share liability principles.[8] Even within the DES context, some state courts disavowed the doctrine completely, often with reference to the interests protected by due process.[9] Outside of the DES context, the doctrine was applied to litigation over blood products that were contaminated with HIV.[10] However, even courts that otherwise recognized the market-share liability doctrine

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[6] *Id.*

[7] *Id.*

[8] Douglas A. Kysar, *The Constitutional Claim to Individuation in Tort—A Tale of Two Centuries, Part 2*, 18 BROOK. J. CORP. FIN. & COM. L. 155, 160 (2023) ("Despite initial enthusiasm, market share liability has not been adopted widely outside the context of the drug diethylstilbestrol (DES), where it was initially developed.").

[9] Gorman v. Abbott Lab., 599 A.2d 1364, 1364 (R.I.1991) ("We are not willing to adopt the market-share doctrine which has been accepted in the State of California. . . . We are of the opinion that the establishment of liability requires the identification of the specific defendant responsible for the injury."); Smith v. Eli Lilly & Co., 560 N.E.2d 324, 338 (Ill. 1990) (concluding that market share liability would result in "arbitrary" and "speculative" outcomes); Mulcahy v. Eli Lilly & Co., 386 N.W.2d 67, 76 (Iowa 1986) ("Plaintiffs request that we make a substantial departure from our fundamental negligence requirement of proving causation, without previous warning or guidelines. The imposition of liability upon a manufacturer for harm that it may not have caused is the very legal legerdemain…"); Zafft v. Eli Lilly & Co., 676 S.W.2d 241, 247 (Mo.1984) (en banc) ("There is insufficient justification at this time to support abandonment of so fundamental a concept of tort law as the requirement that a plaintiff prove, at a minimum, some nexus between wrongdoing and injury.").

[10] Smith v. Cutter Biological, Inc., a Div. of Miles Inc., 823 P.2d 717 (Haw. 1991).

rejected its application in cases involving lead paint, asbestos, and handguns, concluding that those industries' contextual factors made such liability inappropriate.[11] Overall, market-share liability thus remained as a relatively fringe tort theory in the two decades after it was first adopted.

More recently, however, there have been some indications that market-share liability could move from the fringe to a more central position in tort law.[12] First, the New Hampshire Supreme Court applied the doctrine when faced with MTBE contamination of groundwater.[13] There are growing calls to move it from the periphery in an increasing variety of contexts, including data-

[11] Alexandra L. Preece and Beth A. Wendle, *Applying Market Share Liability to the Opioid Crisis?*, NAMWOLF Newsletter, Sept. 2018, *at* https://namwolf.org/june-2018-newsletter-2/#opioid; *see also* Gaulding v. Celotex Corp., 772 S.W.2d 66, 68 (Tex. 1989) ("A fundamental principle of traditional products liability law is that the plaintiff must prove that the defendants supplied the product which caused the injury."); Santiago v. Sherwin-Williams Co., 782 F. Supp. 186, 192-195 (D. Mass. 1992) (explaining that market share could not be accurately calculated when companies moved in and out of the market during the half-century in which lead paint was sold, and further that the defendants' lead pigment products were sold to paint manufacturers who controlled the amount of lead pigment in the products); Sholtis v. American Cyanamid Co., 568 A.2d 1196, 1204 n.10 (N.J. 1989) ("The two reasons most often cited for refusing to recognize market-share liability are the nonfungibility of asbestos and the difficulty of identifying the relevant market."); Hamilton v. Beretta U.S.A. Corp., 750 N.E.2d 1055, 1067-1068 (N.Y. 2001) ("Unlike DES, guns are not identical, fungible products.").

[12] Recent scholarship on status of market-share liability includes David A. Dana, *Market Share Liability and Climate Litigation in the United States* (forthcoming 2025); Richard A. Epstein, *Whither Market Share Liability: Pareto Improvement or Covert Redistribution?* (forthcoming 2025); Murat C. Mungan, *Market Share Liability versus (Random) Strict Liability* (forthcoming 2025); Lars Noah, *"Market Shift Liability": Market Share Theory's Still More Radical New Cousin*, 92 TENN. L. REV. (forthcoming 2025); Eric Posner, *Market Share Liability and Anticompetitive Behavior: A Perspective from Antitrust Law*, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4923302 (forthcoming 2025); George L. Priest, *The Deep Contradiction between Product Liability and Market Share Liability And the Ultimate Failing of the Market Share Liability Theory* (forthcoming 2025).

[13] State v. Exxon Mobil Corp., 126 A.3d 266, 297–98 (N.H. 2015) (stating that "[g]iven the evidence presented, the State faced an impossible burden of proving which of several MTBE gasoline producers caused New Hampshire's groundwater contamination," and therefore holding that "the trial court did not unsustainably exercise its discretion in allowing the State to use the theory of market share liability to determine the portion of the State's damages caused by Exxon's conduct").

breach liability,[14] environmental contamination,[15] gene-editing technology,[16] and even damage from falling space junk.[17] Meanwhile, litigation over the harms from lead paint contamination, opioid litigation, and gun violence continue to raise thorny issues of causation and liability, as plaintiffs continue to raise new claims.[18]

Finally, some courts have accepted a new offshoot of market-share liability in pharmaceutical cases that pushes causation even

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[14] Michael Hooker, Guy P. McConnell, and Jason A. Pill, *Have We Reached The Tipping Point? Emerging Causation Issues In Data-Breach Litigation*, FLORIDA BAR JOURNAL, May/June 2020, *at* https://www.floridabar.org/the-florida-bar-journal/have-we-reached-the-tipping-pointemerging-causation-issues-in-data-breach-litigation/ (identifying market-share liability as one of the emerging issues in data-breach litigation, though ultimately concluding that the doctrine is not a good fit for such cases).

[15] Graham C. Zorn, Casey T. Clausen, Eric L. Klein, *Going Backward? Environmental Regulation Through Tort Litigation*, 33 NAT. RES. & ENV. 22, 23 (Spring 2019) (explaining that "plaintiffs successfully argued for a reduced burden of proving causation," allowing "even plaintiffs who were able to trace MTBE from a specific leaking underground storage tank to a specific tainted well to nevertheless hold the entire industry responsible for the contamination").

[16] Note, *The Price Tag on Designer Babies: Market Share Liability*, 59 B.C. L. REV. 319, 352–53 (2018) ("[E]mbracing a broad concept of alternative liability, such as market share liability, may alleviate public policy concerns that fuel the regulatory roadblocks preventing the commercialization of gene-editing technology.").

[17] Mark J. Sundahl, Note, *Unidentified Orbital Debris: The Case for A Market-Share Liability Regime*, 24 HASTINGS INTL. & COMP. L. REV. 125 (2000) (proposing an amendment to the United Nations Convention on International Liability for Damage Caused by Space Objects that would apply "a form of market-share liability when unidentified debris causes damage in orbit," so that "each state would be liable for any damage caused by unidentified debris in proportion to its contribution to the debris hazard").

[18] *See, e.g.*, Donald G. Gifford & Paolo Pasicolan, *Market Share Liability Beyond DES Cases: The Solution to the Causation Dilemma in Lead Paint Litigation?*, 58 S.C. L. REV. 115, 119 (2006) ("Market share liability has thus awoken from its long slumber. Will it be the vehicle to circumvent the traditional element of particularized causation, enabling the judiciary to solve the financing issues associated with the lead poisoning epidemic?"); Justine S. Hastings & Michael A. Williams, *Market Share Liability: Lessons from* New Hampshire v. Exxon Mobil, 34 J. ENVTL. L. & LITIG. 219, 251 (2019) ("In many instances . . . tracking a pollutant back to its source can be difficult or impossible. In such circumstances, market share liability may serve as a viable method with which to assign damages."); The Daily, *A Novel Legal Strategy for Mass Shooting Victims' Families*, NY Times, June 18, 2024 *at* https://www.nytimes.com/2024/06/18/podcasts/the-daily/uvalde-victims-families.html (exploring claims by family members of gun-violence victims against video game developers, gun makers, and social media companies).

further aside.[19] The doctrine of "innovator liability" holds the manufacturers of brand-name medications liable for harms that arise from the labeling of generic drugs—meaning that "an innovating company, which has spent billions of dollars in the research and development of a drug and has undergone a lengthy FDA approval process, must pay damages to consumers of a competing company whose drug did not go through the same process."[20]

The continued push to relax the causation requirement in litigation against high-profile industries necessitates that the question raised more than three decades ago in Rexall's cert petition must soon be answered: to what extent does due process require a causal nexus between the defendant's conduct and the plaintiff's harm? When Rexall first presented the question in 1989, there was little Supreme Court authority addressing the contours of causality in due process. However, that is no longer the case. In the decades since, the Supreme Court has explored the issue of due process causal's nexus in two other areas at the intersection of substantive and procedural due process: punitive damages and personal jurisdiction. After overviewing the normative and historical foundations for the connection between due process and adjudicative liability outcomes, this Article scrutinizes the Court's punitive damages and personal jurisdiction decisions to consider how the Court's growing due process doctrine has developed into a coherent framework that protects a nexus of interests across various areas of law.

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[19] *See* Lars Noah, *"Market Shift Liability": Market Share Theory's Still More Radical New Cousin*, 92 TENN. L. REV. (forthcoming 2025) ("[M]arket shift liability threatens far greater disruption of the pharmaceutical sector (as well as tort doctrine) than market share liability ever did."); Jenny Ange, *Am I My Competitor's Keeper? Innovator Liability in the Fifty States*, 21 COLUM. SCI. & TECH. L. REV. 1, 43 (2019) ("[I]nnovator liability has been adopted by five states and rejected by twenty. Furthermore, five other states are likely to adopt the doctrine and twenty-one other states and the District of Columbia are likely to reject it due to their existing product liability laws."); Allen Rostron, *Prescription for Fairness: A New Approach to Tort Liability of Brand-Name and Generic Drug Manufacturers*, 60 DUKE L.J. 1123, 1163 (2011) ("In other words, a manufacturer could be sued not because it made or might have made the product in question but because it was simply an additional tortfeasor liable for some form of wrongdoing other than making and selling the product the plaintiff received.").

[20] *See* Ange, *supra* note 19, at 3; *see also* Wesley E. Weeks, *Picking Up the Tab for Your Competitors: Innovator Liability After* Pliva, Inc. v. Mensing, 19 GEO. MASON L. REV. 1257 (2012).

For both doctrines, the Article explores how the Court has analyzed the intersection of federalism and procedural justice, addressing how states' efforts to protect citizens may conflict with other states' rights under the shadow of market-share liability's extraterritorial reach. This Article further examines how the Supreme Court's due process jurisprudence would likely respond to tort doctrines such as market-share liability and innovator liability that either relax or eliminate the need to establish causation.

Through this analysis, we aim to shed light on the normative need to connect tort liability to a larger causal nexus, striking a balance between the plaintiff's interest in recovery, the state's interest in protecting its residents, and the due-process rights of defendants.

II. EARLY FOUNDATIONS OF DUE PROCESS CAUSATION LIMITS

At first glance, the Due Process Clause might appear not to be a good fit to establish a substantive causation floor for tort liability. In addition to the clause's focus on *process*, the Supreme Court has cautioned against incorporating tort rules to create constitutional claims.[21] But we consider here a converse proposition: whether the Due Process Clause demands in tort claims some form of causal nexus between the plaintiff's harm and the defendant to ensure defendants may predict and have fair notice of the contours of their liability. These due process liability limits would prevent tort law from becoming a subterfuge for redistributing wealth, by "taking from A and giving to B," in the absence of any connection between A's conduct and B's harm.[22]

[21] *See, e.g.*, Daniels v. Williams, 474 U.S. 327, 332 (1986) ("Our Constitution . . . does not purport to supplant traditional tort law in laying down rules of conduct to regulate liability for injuries that attend living together in society."); Paul v. Davis, 424 U.S. 693, 701 (1976) (rejecting argument that the Due Process Clause is "a font of tort law to be superimposed upon whatever systems may already be administered by the States").

[22] *See* Davidson v. New Orleans, 96 U.S. 97, 102 (1878) ("It seems to us that a statute which declares in terms, and without more, that the full and exclusive title of a described piece of land, which is now in A., shall be and hereby is vested in B., would, if effectual, deprive A. of his property without due process of law . . . ."); Calder v. Bull, 3 U.S. (3 Dall.) 386, 388 (1798) (Chase, J., seriatim opinion) (contending a law that "takes *property* from A and gives it to B" violates the first principles of the social compact and is outside legislative authority). *See also* John V. Orth, *Taking from A and Giving to B: Substantive Due Process and the Case of the Shifting Paradigm*, 14 CONST. COMMENTARY 337, 339-44 (1997) (discussing the phrase "taking from A and giving to B" as "a powerful linguistic weapon against regulatory legislation" during the Supreme Court's *Lochner* era).

This comports with the Supreme Court's traditional articulation of the role of due process in ensuring and protecting fundamental fairness, fair notice, and inalienable rights.

The Supreme Court has long held due process consists of multiple dimensions along two poles. At one end, the Due Process Clause requires procedural regularity: this generally requires that a person confronting the loss of a protected life, liberty or property interest is entitled to notice and a hearing, or some other fair opportunity to be heard by a neutral decisionmaker.[23] The necessary safeguards depend on a balance of the private interests at stake, the risk under existing procedures of erroneous deprivation of these interests and the benefit of additional safeguards, and the accompanying interests of and any burdens imposed on the government.[24] The goal is to minimize efficiently under a cost-benefit analysis the risk of error inherent in searching for the truth in the presented context by demanding adequate notice of the proceedings and a fundamentally fair resolution process.[25]

At the other end of the spectrum, the Due Process Clause guarantees individual autonomy from unwarranted government regulations of certain fundamental rights deeply rooted in the Nation's history and implicit in the concept of ordered liberty.[26] Arbitrary assertions of governmental power to deprive persons of their vital essential freedoms and liberties contravene longstanding Anglo-American understandings of due process.[27] Regardless of the procedural safeguards employed, the government cannot interfere with certain substantive fundamental freedoms.[28]

These two poles share a common foundation: the Due Process Clause "centrally concerns the fundamental fairness of

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[23] *See* Cleveland Bd. of Ed. v. Loudermill, 470 U.S. 532, 542-43 (1985); Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 313 (1950).

[24] *See* Mathews v. Eldridge, 424 U.S. 319, 335 (1976).

[25] *See id.* at 340-49.

[26] *See* Timbs v. Indiana, 586 U.S. 146, 150 (2019); Washington v. Glucksberg, 521 U.S. 702, 721 (1997).

[27] *See* Loving v. Virginia, 388 U.S. 1, 12 (1967); Rochin v. California, 342 U.S. 165, 172 (1952).

[28] *See* ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 233 (2d ed. 1986).

governmental activity."[29] The Due Process Clause restrains legislative, executive, and judicial governmental power, preventing such power from being "used for purposes of oppression."[30]

This cardinal concern with protecting the individual from the government's arbitrary and oppressive power manifests in numerous due-process applications between the purely procedural and purely substantive.[31] Helen Hershkoff and Judith Resnik denominate doctrines that guard against unfettered assertions of judicial and enforcement power "substantive-procedural due process," their terminology recognizing the admixture of concepts capable of characterization as both substance and procedure.[32] Laurence Tribe's conception of "structural due process" similarly refers to restrictions on the methods by which legislative "policies are both formed and applied," requiring that government power and individual rights be addressed through procedural structures resulting in meaningful dialogue.[33] Regardless of the preferred terminology, due process intermixes substantive and procedural concepts to govern a wide range of adjudicative behavior.

These due process limitations on arbitrary adjudicative and enforcement authority have well established roots in Anglo-American jurisprudence. Early writers such as Sir Edward Coke viewed the "Ancient Constitution" of England as a fundamental law establishing and regulating the government's political and social

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[29] N.C. Dep't of Rev. v. The Kimberley Rice Kaestner 1992 Family Trust, 588 U.S. 262, 268 (2019) (quotation omitted).

[30] Daniels v. Williams, 474 U.S. 327, 331 (1986); Murray's Lessee v. Hoboken Land & Improvement Co., 59 U.S. (18 How.) 272, 276-77 (1856).

[31] *See, e.g.*, Rosalie Berger Levinson, *Reining in Abuses of Executive Power Through Substantive Due Process*, 60 FLA. L. REV. 519, 522 (2008) ("Determining what is an arbitrary exercise of power that violates substantive due process has never been an easy task."); Jane R. Bambauer & Toni M. Massaro, *Outrageous and Irrational*, 100 MINN. L. REV. 281, 310–11 (2015) ("The modern Due Process Clauses plainly protect substantive rights any time they are used to enforce enumerated or fundamental rights. They also protect against substantively arbitrary and irrational and outrageous government conduct, not merely deprivations that violate process rights.").

[32] Helen Hershkoff & Judith Resnik, *Constraining and Licensing Arbitrariness: The Stakes in Debate about Substantive-Procedural Due Process*, 76 SMU L. REV. 613, 614-17 (2023).

[33] Laurence H. Tribe, *Structural Due Process*, 10 HARV. C.R.-C.L. L. REV. 269, 269, 301 (1975).

institutions.[34] Magna Carta and natural law tradition ensured both fair procedures and meaningful remedies for wrongful deprivations of life, liberty, and property, with "remedy by the course of the Law . . . and right for the injury done to him."[35] John Locke viewed this right to "reparation" as preventing arbitrary governmental denial of judicial redress to those (although only to those) suffering injury.[36]

In the years after the ratification of the Fourteenth Amendment, the Supreme Court laid the foundations for various dimensions of due process along these procedural and substantive poles. The Court hinted, in *Munn v. Illinois*, that the Due Process Clause limited legislative regulatory power, even though the Court upheld the challenged statute establishing maximum grain storage rates because the common law, "from whence came the right the Constitution protects," had long authorized such regulations of businesses imbued with a public interest.[37] *Pennoyer v. Neff* articulated (at least in dicta) that the Due Process Clause limited jurisdictional adjudicative power over nonresident defendants.[38] And the Court's early Fourteenth Amendment decisions further indicated that the Due Process Clause "set a ceiling over, and a floor under, state tort law," with the ceiling banning laws effecting "a naked redistribution of wealth under the guise of expanding redress."[39]

The connection between due process and tort redress presented in a series of Supreme Court decisions from 1870 to 1920. Although the rules of the common law were neither property

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[34] John C.P. Goldberg, *The Constitutional Status of Tort Law: Due Process and the Right to a Law for the Redress of Wrongs*, 115 YALE L.J. 524, 532-33 (2005).

[35] *See* EDWARD COKE, THE SECOND PART OF THE INSTITUTES OF THE LAWES OF ENGLAND (1642).

[36] JOHN LOCKE, THE SECOND TREATISE OF GOVERNMENT: TWO TREATISES OF GOVERNMENT 268-74 (1690).

[37] 94 U.S. 113, 125-26, 133-34 (1877). This suggestion blossomed into holdings beginning in 1897 in the so-called *Lochner* era that legislative acts arbitrarily interfering with the inalienable and fundamental liberty rights protected by the Due Process Clause, such as the right to contract, were unconstitutional. *See* Allgeyer v. Louisiana, 165 U.S. 578, 589-90 (1897).

[38] 95 U.S. 714, 733 (1878) (stating "proceedings in a court of justice to determine the personal rights and obligations of parties over whom the court has no jurisdiction do not constitute due process of law").

[39] Goldberg, *supra* note __, at 559.

nor vested rights,[40] the Court during this time evaluated whether statutory departures from longstanding legal principles were arbitrary or oppressive, partly through comparisons to the pre-existing common-law rules. Some of these cases involved new statutory administrative regimes replacing an injured person's right to redress, as in *New York Central Railroad Co. v. White*, which upheld a workers' compensation scheme as a reasonably just substitute for dispensing with judicial redress from both the employer's and the employee's perspective.[41] While upholding this scheme, the Court doubted "the State could abolish all rights of action, on the one hand, or all defenses, on the other, without setting up something adequate in their stead."[42] Other cases considered statutory authorizations for new forms of liability imposed on defendants. *Missouri Pacific Railway Co. v. Humes* upheld a statutory double penalty for railroads injuring livestock by failing to erect required fences, reasoning in part the penalty was comparable to the jury's common-law authority to award damages in excess of pecuniary loss for malice or gross neglect.[43] Other cases upheld the abolition of the fellow servant rule and the imposition of strict liability for fire damage against defendants' due process arguments, with the Court relying in part on comparisons to common-law doctrines.[44]

The Supreme Court also struck down arbitrary and oppressive statutory penalties against corporations as takings of property without due process of law. *Southwestern Telegraph & Telephone Co. v. Danaher* held the imposition of $6,300 in statutory

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[40] *See Munn*, 94 U.S. at 134 ("A person has no property, no vested interest, in any rule of the common law.").

[41] 243 U.S. 188, 200-02 (1917); *see also* Mountain Timber Co. v. Washington, 243 U.S. 219, 234-46 (1917) (upholding state authority to recover workers' compensation premiums against employer's challenge that the law violated the due process rights of its employees and its right not to be deprived of its property by required exactions irrespective of fault).

[42] *N.Y. Cent. RR Co.*, 243 U.S. at 201.

[43] 115 U.S. 512, 521-23 (1885).

[44] *See* St. Louis & S.F. Ry. Co. v. Mathews, 165 U.S. 1, 22-27 (1897) (comparing common-law liability rules for fires to uphold reasonableness of statutory strict liability on railroads for fire damage against due process and other constitutional challenges); Mo. Pac. Ry. Co. v. Mackey, 127 U.S. 205, 207-09 (1888) (comparing vicarious common-law liability to passengers to uphold statutory abolition of fellow-servant rule in employee negligence claims against railroads).

penalties for allegedly "discriminating" against a customer—by impartially enforcing its regulations that refused service and discounts to customers in arrears—departed "from the fundamental principles of justice embraced in the recognized conception of due process of law."[45] The Court emphasized the fundamental fairness and fair notice concerns when the defendant's actions did not violate the express terms of the anti-discrimination statute, no state judicial decision held or indicated the actions were discriminatory, and the company adopted and enforced such service limitations for many years.[46]

But this due process review of statutory torts and penalties did not last. As the Supreme Court retreated from other substantive interpretations of due process during the Depression and its aftermath,[47] it also dispatched due process review of tort legislation.[48] The Court announced in *Silver v. Silver*, a due process and equal protection challenge to a state guest statute, that "the Constitution does not forbid the creation of new rights, or the abolition of old ones recognized by the common law, to attain a permissible legislative object."[49] This analysis was then transported to other substantive aspects of due process to support employing minimal rationality judicial review of legislation, with the Supreme Court expressing that the Due Process Clause no longer concerned itself with the "wisdom, need, or appropriateness of the legislation."[50]

Yet despite the apparent finality of this New Deal switch, the Court in the 1960s and 1970s began to revive searching review for a more limited class of substantive components of due process—those involving specified fundamental rights and preferred

[45] 238 U.S. 482, 490 (1915).

[46] *Id.* at 490-91.

[47] *See* Charles W. "Rocky" Rhodes, *Liberty, Substantive Due Process, and Personal Jurisdiction*, 82 TUL. L. REV. 567, 594-98 (2007) (detailing the Supreme Court's retreat from meaningful substantive due process limitations in the New Deal era).

[48] *See* Goldberg, *supra* note34, at 577-79.

[49] 280 U.S. 117, 122-24 (1929).

[50] Olsen v. Nebraska, 313 U.S. 236, 246 (1941); *see also* Williamson v. Lee Optical of Ok., Inc., 348 U.S. 483, 488 (1955) ("The day is gone when this Court uses the Due Process Clause . . . to strike down state laws, regulatory of business and industrial conditions, because they may be unwise, improvident, or out of harmony with a particular school of thought.").

liberties.[51] This heightened scrutiny has been extended to Hershkoff and Resnik's "substantive-procedural due process" guarantees that safeguard against unfettered assertions of governmental judicial and enforcement power.[52] Consider, as one example, court-fee waivers for indigent litigants seeking judicial access to pursue fundamental rights, a due-process interest combining the procedural entitlement to an opportunity to be heard with the substantive commitment to guard certain rights from oppressive infringement.[53] But due process does not require such waivers for all indigents,[54] which demonstrates that pure procedural due process is not performing alone. Rather, uniting a substantively protected liberty with the guarantee of procedural regularity ensures protection from undue government oppression.

III. SUCH A REVIVED UNDERSTANDING OF THE SYNERGY BETWEEN THE SUBSTANTIVE AND PROCEDURAL ASPECTS OF DUE PROCESS HAS PRESENTED NEW—AND REINFORCED OLD—CONSTITUTIONAL LIMITS ON ADJUDICATIVE POWER. IN A NEW EXTENSION, THIS UNDERSTANDING BECAME THE FOUNDATION FOR THE COURT'S DECISIONS OVER THE LAST THREE DECADES ON EVALUATING THE EXCESSIVENESS OF PUNITIVE DAMAGE AWARDS.[55] THIS UNDERSTANDING HAS ALSO REINFORCED DUE PROCESS RESTRICTIONS ON THE JUDICIARY'S EXERCISE OF ADJUDICATORY POWER, WITH THE COURT'S MODERN RESTRICTIONS EERILY REMINISCENT OF NINETEENTH CENTURY JURISDICTIONAL DOCTRINE.[56] DUE PROCESS LIMITS ON PUNITIVE DAMAGES

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[51] *See* Rhodes, *Liberty*, *supra* note 47, at 598-601.

[52] Hershkoff & Resnik, *supra* note 32 at 614-17.

[53] *E.g.*, M.L.B. v. S.L.J., 519 U.S. 102, 116-21 (1996) (indigent fee waiver for appellate record preparation fees after termination of parental rights constitutionally required under due process and equal protection); Boddie v. Connecticut, 401 U.S. 371, 382-83 (1971) (indigent fee waiver for divorce).

[54] *See* United States v. Kras, 409 U.S. 434, 444-46 (1973) (holding fee waiver for indigents not constitutionally required in bankruptcy proceedings).

[55] Lars Noah, *Does the U.S. Constitution Constrain State Products Liability Doctrine?*, 92 TEMP. L. REV. 189, 191 (2019) (noting that nearly a quarter century "has elapsed since the Court began using the Due Process Clause to rein in what it viewed as excessive punitive damage awards").

[56] *See* Charles W. "Rocky" Rhodes, *Nineteenth Century Personal Jurisdiction Doctrine in a Twenty-First Century World*, 64 Fla. L. Rev. 387 (2012) (detailing connections between modern and nineteenth century jurisdictional rules).

Beginning in the early 1990s, the Supreme Court decided a series of cases that brought a due process analysis to the question of punitive damages. In one of the earlier cases, the defendants argued that a $6 million punitive damage award in an unfair business practice case with only $51,000 in compensatory damages was so high that it violated the Eighth Amendment's prohibition on excessive fines.[57] The Court held that the Eighth Amendment did not apply and thus declined to strike the award, while leaving open room for a challenge under the Due Process Clause.[58] Thereafter, in a trio of cases decided between the mid-1990s and 2000s, the Court articulated a theory of due process that required two substantial relationships: one between the plaintiff's harm and the defendant's conduct, and another between the defendant's conduct and the state's regulatory interests.[59]

A. Development of the Due Process Approach

The Supreme Court first struck down a punitive-damage award for violating due process in the 1996 case of *BMW of North America, Inc. v. Gore*.[60] Dr. Ira Gore Jr. had sued BMW of North America for fraud, alleging that BMW sold him a car as new without disclosing that it had been repainted due to damage during delivery. The jury awarded $4,000 in compensatory damages and $4 million in punitive damages; the Alabama Supreme Court reduced the award to $2 million before the Supreme Court reversed.[61]

The Supreme Court reasoned that a punitive damage award violates due process when it is "grossly excessive" considering the state's interests in punishing and deterring reprehensible conduct

[57] Browning-Ferris v. Kelco, 492 U.S. 257 (1989).

[58] Browning-Ferris v. Kelco, 492 U.S. 257 (1989) ("Given that the Amendment is addressed to bail, fines, and punishments, our cases long have understood it to apply primarily, and perhaps exclusively, to criminal prosecutions and punishments."); *but see* Austin v. United States, 509 U.S. 602 (1993) (holding that the Eighth Amendment applies to civil forfeiture actions); N. William Hines, *Should the Recent* Timbs *and* Dobbs *Decisions Revive Interest in the Excessive Fines Clause As the Constitutional Basis for Federal Regulation of Punitive Damages?*, 109 Iowa L. Rev. Online 46 (2024) (arguing that the Supreme Court should reconsider *Browning-Ferris* and apply the Eighth Amendment to excessiveness review in punitive damages cases).

[59] *See infra* Subparts II.A & II.B.

[60] 517 U.S. 559 (1996).

[61] *Id.* at 563-67.

that injures the state's citizens and economy.[62] The Court outlined three "guideposts" for evaluating the excessiveness of a punitive damage award, holding that a trial court should examine (1) the degree of reprehensibility of the defendant's conduct; (2) the ratio between punitive and compensatory damages; and (3) the amount of civil or criminal penalties authorized or imposed in comparable cases.[63] Applying these guidelines, the Court held that the $2 million punitive damages award was grossly excessive and violated due process.[64] The Court connected procedural and substantive interests by focusing on the concept of notice, writing that "[e]lementary notions of fairness enshrined in our constitutional jurisprudence dictate that a person receive fair notice not only of the conduct that will subject him to punishment, but also of the severity of the penalty that a State may impose."[65] In the Court's view, the punitive damages award was not proportionate to the reprehensibility of the defendant's conduct, the harm suffered by the plaintiff, and the amount of potential government fines.[66] Without such a proportional connection, the defendant would have no reason to expect such a large damage award. The fact that the defendant might be able to pay such an award without significant difficulty did not sway the Court; instead, the Court wrote, "[t]he 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."[67]

Justice Scalia, joined by Justice Thomas, dissented.[68] Justice Scalia objected to the application of the Due Process clause to protect substantive legal interests, arguing that "[w]hat 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

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[62] *Id.* at 568-74.

[63] *Id.* at 575-85.

[64] *Id.*

[65] *Id.* at 574.

[66] *Id.*

[67] *Id.* at 585.

[68] *Id.* at 598 (Scalia, J., dissenting).

actually *be* reasonable."[69] Yet the dissent acknowledged that "[t]his view, which adheres to the text of the Due Process Clause, has not prevailed in our punitive damages cases."[70] Justice Scalia objected, though, that "if the Court is correct, it must be that every claim that a state jury's award of *compensatory* damages is "unreasonable" (because not supported by the evidence) amounts to an assertion of constitutional injury. And the same would be true for determinations of liability."[71] Justice Ginsburg, joined by Chief Justice Rehnquist also dissented in a separate opinion. Justice Ginsburg would have given the Alabama high court's opinion "a presumption of legitimacy."[72] Similar to Justice Scalia, however, she criticized the majority's "vague concept of substantive due process."[73]

The Supreme Court next struck down a punitive damages award for excessiveness in 2003, in *State Farm Mutual Insurance Co. v. Campbell*.[74] In this case, Curtis Campbell and his wife sued State Farm Mutual Automobile Insurance Company for bad faith, fraud, and intentional infliction of emotional distress after State Farm refused to settle an automobile death and disability claim against Curtis Campbell within his policy limits.[75] The jury originally awarded the Campbells $2.6 million in compensatory damages and $145 million in punitive damages, but the trial court reduced that amount to $1 million and $25 million respectively.[76] On appeal, the Utah Supreme Court reinstated the $145 million punitive damage award.[77]

Again, the Supreme Court held that the $145 million punitive damages award was excessive and violated due process.[78] The Court emphasized the need for punitive damages to be

[69] *Id.*

[70] *Id.*

[71] *Id.* at 607.

[72] *Id.* at 607 (Ginsburg, J., dissenting).

[73] *Id.* at 612.

[74] 538 U.S. 408 (2003).

[75] *Id.* at 413-14.

[76] *Id.* at 415.

[77] *Id.*

[78] *Id.*

reasonably related to the State's legitimate interests in punishment and deterrence, without crossing into arbitrary punishment.[79] As it had in *Gore*, the Court concluded that Campbell's award was disproportionate to the harm caused and far exceeded comparable civil penalties.[80] Significantly, the Court pronounced that although "there are no rigid benchmarks that a punitive damages award may not surpass," as a practical matter "few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process."[81]

The final case in the punitive-damages trilogy was the Court's 2007 decision in *Philip Morris USA v. Williams*.[82] Mayola Williams sued Philip Morris USA for negligence and deceit, claiming that Philip Morris knowingly and falsely led her late husband to believe smoking was safe.[83] The jury awarded $821,000 in compensatory damages and $79.5 million in punitive damages before the trial judge reduced the punitive award to $32 million.[84] On appeal, the Oregon Court of Appeals reinstated the $79.5 million punitive damages award and the Oregon Supreme Court affirmed.[85] The Supreme Court again held that the award violated due process. This time, the Court's central concern was not with excessiveness, but the potential that the jury based its punitive damages award on a desire to punish Philip Morris for harming other smokers who were not parties to the case.[86] "[T]he Constitution's Due Process Clause forbids a State to use a punitive damages award to punish a defendant for injury that it inflicts upon nonparties or those whom they directly represent"; in other words, those who are essentially "strangers to the litigation."[87] Such an award violates the procedural due-process requirement that an individual before punishment must have "'an opportunity to present

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[79] *Id.*

[80] *Id.*

[81] *Id.* at 425.

[82] 549 U.S. 346 (2007).

[83] *Id.* at 350.

[84] *Id.*

[85] *Id.* at 351-52.

[86] *Id.* at 353-55.

[87] *Id.* at 353.

every available defense,'" which was not possible against the claims of nonparty alleged victims.[88]

At a broad level, the Supreme Court's punitive-damages jurisprudence in this trilogy connected both procedural and substantive strands of the due process analysis. On the procedural side, the Court emphasized that the defendant must have fair notice of the potential liability for its conduct,[89] as well as a chance to raise "every available defense" before punishment.[90] On the substantive side, the Court emphasized that the liability could not be arbitrary or grossly excessive.[91] However, the Court did more than merely set out the poles of due process—instead, it also showed how the underlying elements of due process were necessarily linked together. As the Court made clear, due process requires that there be a relationship between the defendant's conduct and the plaintiff's harm, as well as a relationship between the defendant's conduct and the forum state's interest.

B. Relationship Between Harm and Conduct

One of the due process pillars that the Supreme Court identified is the need for a connection between the defendant's actions and the plaintiff's harm, which has both a substantive and procedural dimension. The plaintiff must establish that the punitive damages awarded connect the harm suffered by the plaintiff to the conduct engaged in by the defendant. This presents most clearly in the substantive proportionality requirement, especially in the presumption that the ratio between punitive damages and compensatory damages should generally not exceed a single digit.[92]

But the ratio is not the only required connection between the harm and the conduct. The Supreme Court also drew a careful

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

[89] BMW of North America Inc. v. Gore, 517 U.S. 559, 574 (1996) ("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.").

[90] *Philip Morris*, 549 U.S. at 353.

[91] State Farm Mutual Insurance Co. v. Campbell, 538 U.S. 408, 416 (2003) ("The Due Process Clause of the Fourteenth Amendment prohibits the imposition of grossly excessive or arbitrary punishments on a tortfeasor.").

[92] *See supra* text accompanying note 81.

procedural line regarding the evidence and other information the jury could or could not consider in awarding punitive damages. The jury cannot consider the defendant's "dissimilar acts"—that is, potentially harmful conduct that did not actually affect the plaintiff.[93] The Court warned that consideration of any conduct "independent from the acts upon which liability was premised" could not properly serve a basis for punitive damages, as it would create a risk of the defendant's punishment not for "the conduct that harmed the plaintiff," but rather for "being an unsavory individual or business."[94]

The Supreme Court also limited consideration of the defendant's *similar* acts that happened to harm individuals other than the plaintiff. The Court warned that consideration of similar conduct directed at other parties risks punishing the defendant for conduct unrelated to the lawsuit.[95] The Court explained that the jury could consider such acts only in a limited fashion to determine the reprehensibility of the defendant's conduct, but could not punish the defendant for harms to non-parties:

> Evidence of actual harm to nonparties can help to show that the conduct that harmed the plaintiff also posed a substantial risk of harm to the general public, and so was particularly reprehensible . . . . Yet for the reasons given above, a jury may not go further than this and use a punitive damages verdict to punish a defendant directly on account of harms it is alleged to have visited on nonparties.[96]

Justice Stevens disagreed with this limitation. In a dissent in *Phillip Morris,* he argued that punitive damages were intended to serve a broader social purpose and not merely address to the harm done to the plaintiff. He wrote that "[w]hereas compensatory damages are

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[93] State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 422 (2003) ("The courts awarded punitive damages to punish and deter conduct that bore no relation to the Campbells' harm. A defendant's dissimilar acts, independent from the acts upon which liability was premised, may not serve as the basis for punitive damages.").

[94] *Id.* at 423.

[95] *Id.* at 355.

[96] Philip Morris USA v. Williams, 549 U.S. 346, 355 (2007).

measured by the harm the defendant has caused the plaintiff, punitive damages are a sanction for the public harm the defendant's conduct has caused or threatened."[97] He agreed that compensatory damages could not be based on third-party harm, as that "might well constitute a taking of property without due process."[98] But, he continued, punitive damages "instead of serving a compensatory purpose, serves the entirely different purposes of retribution and deterrence that underlie every criminal sanction."[99] He concluded that "there is no reason why the measure of the appropriate punishment for engaging in a campaign of deceit in distributing a poisonous and addictive substance to thousands of cigarette smokers statewide should not include consideration of the harm to those 'bystanders' as well as the harm to the individual plaintiff."[100]

Nonetheless, Justice Stevens' opinion did not sway the Court. The Court's holding required a tighter nexus between the plaintiff's harm and the defendant's conduct and held firm to the conclusion that "[d]ue 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."[101] To do so violates a defendant's procedural opportunity to present every available defense.[102] Punitive damages exist to punish the defendant—but that punishment is ultimately based on the harm to the plaintiff, not the harm to society at large. And even Justice Stevens agreed that would be the case for a compensatory damage award.

C. Relationship Between Conduct and State Interest

In addition to the connection between the plaintiff's harm and the defendant's conduct, the Supreme Court also requires a close connection between the defendant's conduct and the forum state's interest. The Court emphasized the role of states' respect and comity for their co-equal sovereigns—what scholars refer to as

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[97] *Id.* at 358 (Stevens, J., dissenting).

[98] *Id.* at 359.

[99] *Id.* at 360.

[100] *Id.*

[101] State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 410 (2003).

[102] *Phillip Morris*, 549 U.S. at 353.

the "horizontal federalism" interest.[103] In short, states may rely on punitive damages to further their own state interests, but constitutional due process steps in to "to restrain a state from imposing punitive damages that regulate beyond its borders, thereby trampling upon other states' legitimate policy aims."[104]

The Supreme Court first raised the comity issue in *BMW*, explaining that the plaintiff sought punitive damages based in part on the fact that BMW had a "nationwide policy" of making minor repairs to cars damaged in transit without revealing those repairs to buyers.[105] The Supreme Court held that such a nationwide policy could not be taken into account in setting punitive damages, as "by attempting to alter BMW's nationwide policy, Alabama would be infringing on the policy choices of other States."[106] Indeed, the Court concluded, "principles of state sovereignty and comity" mean "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."[107]

The Court continued its exploration of horizontal federalism limits on punitive damages in *State Farm v. Campbell*. It highlighted that the Utah Supreme Court explicitly condemned State Farm "for its nationwide policies rather than for the conduct directed toward the Campbells."[108] And it further noted that the Utah court relied on evidence that the decision to deny settlement "was a result of a national scheme to meet corporate fiscal goals by capping payouts on claims company wide."[109]

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[103] *See* James L. Stengel & Michael J. Legg, *On Punitive Damages, Due Process and Horizontal Federalism*, N.Y.L.J., May 28, 2003, at 4 ("[T]he Court has mandated that only conduct similar to that which is the subject of the proceedings be considered and courts refrain from punishing out-of-state conduct."); Michael P. Allen, *The Supreme Court, Punitive Damages and State Sovereignty*, 13 Geo. Mason L. Rev. 1, 4-5 n.9 (2004) ("The different, albeit related matter I address in this Article is one focused on the relationship among the states, a more horizontal federalism concern.").

[104] Catherine M. Sharkey, *Federal Incursions and State Defiance: Punitive Damages in the Wake of* Phillip Morris v. Williams, 46 Willamette L. Rev. 449, 457 (2010).

[105] BMW of N.A., Inc. v. Gore, 517 U.S. 559, 564-65 (1996).

[106] *Id.* at 572

[107] *Id.*

[108] State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 420 (2003).

[109] *Id.*

The Supreme Court was especially concerned that much of the conduct at issue was lawful in the states where it occurred. It held that "[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."[110] As a result, it concluded, "a State cannot punish a defendant for conduct that may have been lawful where it occurred."[111] However, the Supreme Court did not stop at deciding that a state could not punish extraterritorial lawful conduct; instead, it went a step further and held that states lack a legitimate interest even "in imposing punitive damages to punish a defendant for unlawful acts committed outside of the State's jurisdiction."[112]

The Supreme Court reiterated the scope of permissible state interests in *Philip Morris USA v. Williams*, explaining that punitive damages can "further a State's legitimate interests in punishing unlawful conduct and deterring its repetition," but that, when sufficiently large, such damage awards may improperly "impose one State's (or one jury's) 'policy choice,' say, as to the conditions under which (or even whether) certain products can be sold, upon 'neighboring States' with different public policies."[113] Even though *Philip Morris* predominantly focused on due process concerns related to punishing for harm to non-parties, the Court still highlighted the federalism issues. The Court's limitation on punishing for harm to non-parties prevents states from overreaching and punishing for conduct that affected individuals outside their jurisdiction.

D. The Nexus of Interests in Punitive Damages

The Supreme Court's jurisprudence on punitive damages reveals a complex interplay between the interests of defendants, states, and plaintiffs, all of which must be balanced within the framework of due process. This balancing act creates what we call a "due process nexus of interests."

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[110] *Id* at 422.

[111] *Id.* at 421.

[112] *Id.* at 409.

[113] Philip Morris USA v. Williams, 549 U.S. 346, 352–53 (2007)

First, the defendant's interest in fair notice and protection against arbitrary deprivation of property directly intersects with the state's interest in punishment and deterrence. For a punitive damages award to be constitutional, it must be predictable enough that the defendant could have reasonably anticipated such liability based on its conduct. This is why the Court emphasized in *BMW* that "[e]lementary notions of fairness enshrined in our constitutional jurisprudence dictate that a person receive fair notice not only of the conduct that will subject him to punishment, but also of the severity of the penalty that a State may impose."[114]

Second, the Court's emphasis on horizontal federalism demonstrates that one state's interests must not encroach into the legitimate regulatory interests of other states. As highlighted in *Campbell*, "a State cannot punish a defendant for conduct that may have been lawful where it occurred."[115] This limitation may also serve to protect the defendant's interest in predictability of legal consequences across state lines, but is primarily focused on respecting the policy choices of other states.

Third, the Supreme Court's insistence on a close relationship between the harm suffered by the plaintiff and the conduct of the defendant creates another crucial nexus point. This is evident in the Court's limitation on considering harm to non-parties, as articulated in *Philip Morris*. While evidence of harm to others can be used to show reprehensibility, it cannot be the basis for punishment. This balances the plaintiff's interest in vindication with the defendant's interest in being punished only for the harm it caused to the plaintiff in question.

This nexus of interests bridges procedural and substantive due process and requires a careful balancing act. It demands that courts consider the interconnected nature of the defendant's, state's, and plaintiff's interests, always with an eye towards fundamental fairness and the avoidance of arbitrary deprivations of property.

IV. DUE PROCESS LIMITS ON PERSONAL JURISDICTION

Due process has been integral to the personal jurisdiction analysis at least since 1878, when the Supreme Court decided

[114] BMW of N.A., Inc. v. Gore, 517 U.S. 559, 574 (1996)

[115] State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 421 (2003)

Pennoyer v. Neff.[116] In its petition for certiorari, Rexall even quoted *Pennoyer* to buttress its argument that New York's imposition of market share liability violated due process, arguing that a decision that conflicts with "principles which have been established in our systems of jurisprudence for the protection and enforcement of private rights" fails to comport with due process.[117]

The Court established the basics of modern personal jurisdiction in 1945, when *International Shoe Co. v. Washington* famously reframed the jurisdictional analysis away from *Pennoyer*'s focus on the state's power over those present within its territory and toward the fairness or reasonableness of jurisdiction in light of the defendant's forum contacts.[118] *International Shoe* sketched three situations from its prior precedents as illustrations of reasonable jurisdictional assertions: (1) "when the activities of the corporation there have not only been continuous and systematic, but also give rise to the liabilities sued on"; (2) when "the continuous corporate operations within a state were thought so substantial and of such a nature to justify suit against it on causes of action entirely distinct from those activities"; and (3) when "the commission of such [single or occasional] acts, because of their nature and quality and the circumstances of their commission, may be deemed sufficient."[119] The second scenario, which predicates jurisdiction on activities "entirely distinct" from the asserted cause of action, today is termed "general jurisdiction," while the term "specific jurisdiction" encompasses the other two scenarios where adjudicative power depends on a relationship between the suit and the nonresident defendant's in-state activities.[120]

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[116] 95 U.S. 714 (1878). Before that, the limits of a court's adjudicative authority typically arose under the Full Faith and Credit Clause, which incorporated the "well-established rules of international law" that judgments rendered without personal jurisdiction were not entitled to interstate recognition. D'Arcy v. Ketchum, 52 U.S. (11 How.) 165, 174-76 (1851). *See* Charles W. "Rocky" Rhodes, *Liberty, Substantive Due Process, and Personal Jurisdiction*, 82 Tul. L. Rev. 567, 577-73 (2007) [hereinafter Rhodes, *Liberty*]; James Weinstein, *The Federal Common Law Origins of Judicial Jurisdiction: Implications for Modern Doctrine*, 90 Va. L. Rev. 169, 172-73 (2004).

[117] Rexall, *supra* note 1 (quoting American Ry. Express Co. v. Kentucky, 273 U.S. 269, 273 (1927) (quoting Pennoyer v. Neff, 95 U.S. 714, 733 (1878)).

[118] 326 U.S. 310, 316 (1945).

[119] *Id.* at 317-18.

[120] *E.g.*, Daimler AG v. Bauman, 571 U.S. 117, 126-27 (2014). The Supreme Court first employed this terminology in 1984, borrowing the terms from

The Supreme Court further refined the concept of fairness in the jurisdictional context in the mid-twentieth century.[121] The Court specified that such relevant jurisdiction contacts depended upon purposeful forum activity by the nonresident defendant.[122] Then, the Court prohibited jurisdiction over property for unrelated claims and clarified the necessary purposeful forum conduct for both specific and general jurisdiction.[123]

From the 1990s through 2010, the Supreme Court was silent on personal jurisdiction.[124] During this period, state and federal courts continued to develop and apply a jurisdictional framework drawn from Supreme Court case law. Deep splits in result and reasoning emerged.[125] Nevertheless, certain broad jurisdictional precepts enjoyed widespread acceptance. One of these uniform precepts was that general jurisdiction was appropriate anytime a defendant's in-state business activities were substantial,

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an influential law review article. *See* Calder v. Jones, 465 U.S. 783, 787 (1984) (mentioning general jurisdiction); Helicopteros Nacionales de Colom., S.A. v. Hall, 466 U.S. 408, 414 nn.8-9 (1984) (discussing both specific and general jurisdiction); Arthur T. von Mehren & Donald T. Trautman, *Jurisdiction to Adjudicate: A Suggested Analysis*, 79 HARV. L. REV. 1121, 1136 (1966) (coining the terms).

[121] *See* Christine P. Bartholomew, & Anya Bernstein, Ford*'s Underlying Controversy*, 99 WASH. U. L. REV. 1175, 1180 (2022) ("Rather than an abstract or everyday conceptualization of fairness, in the context of due process jurisprudence, fairness is a term of art. It focuses on preserving individual liberty and preventing arbitrary uses of governmental power.").

[122] *See, e.g.*, Hanson v. Denckla, 357 U.S. 235 (1958); McGee v. Int'l Life Ins. Co., 355 U.S. 220 (1957); Perkins v. Benguet Consol. Mining Co., 342 U.S. 437 (1952); Travelers Health Ass'n v. Virginia, 339 U.S. 643 (1950); Mullane v. Cent. Hanover Bank & Trust Co., 339 U.S. 306 (1950).

[123] *See, e.g.*, Burnham v. Superior Court, 495 U.S. 604 (1990); Asahi Metal Indus. Co. v. Superior Court, 480 U.S. 102 (1987); Burger King Corp. v. Rudzewicz, 471 U.S. 462 (1985); *Helicopteros*, 466 U.S. 408; *Calder*, 465 U.S. 783; Keeton v. Hustler Magazine, Inc., 465 U.S. 770 (1984); Rush v. Savchuk, 444 U.S. 320 (1980); World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286 (1980); Kulko v. Superior Court, 436 U.S. 84 (1978); Shaffer v. Heitner, 433 U.S. 186 (1977).

[124] Richard D. Freer, *From Contacts to Relatedness: Invigorating the Promise of "Fair Play and Substantial Justice" in Personal Jurisdiction Doctrine*, 73 ALA. L. REV. 583, 584 (2022) ("After considerable engagement in between 1977 and 1990, the Supreme Court did not decide a personal jurisdiction case between 1990 and 2011.").

[125] *See* Charles W. "Rocky" Rhodes & Cassandra Burke Robertson, *Toward a New Equilibrium in Personal Jurisdiction*, 48 U.C. Davis L. Rev. 207, 230 (2014) [hereinafter Rhodes & Robertson, *New Equilibrium*].

continuous, and systematic.[126] That meant that a national corporation like Wal-Mart, with stores in each state across the nation, was subject to general jurisdiction in each and every state—and this was so well accepted that it routinely went unchallenged.[127] From 1945 until 2011, for instance, Ford Motor Company never challenged its amenability to suit in any United States jurisdiction, even when sued for actions occurring overseas.[128]

But as scholar (and now federal judge) Michael Allen presciently noted, "the seeds planted in [the punitive damages] cases could . . . presage a significant change in personal jurisdiction doctrine."[129] And indeed they did, as the Roberts Court dramatically reshaped the doctrine of personal jurisdiction to incorporate a vision of due process that bears many similarities to the nexus of interests first identified in the punitive damages context.[130]

From 2011 to 2017, the Supreme Court invalidated exercises of adjudicative jurisdiction in six separate cases.[131] These decisions

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[126] Judy M. Cornett & Michael H. Hoffheimer, *Good-Bye Significant Contacts: General Personal Jurisdiction After* Daimler AG v. Bauman, 76 OHIO ST. L.J. 101, 115 (2015) (noting that "[t]reatises printed as black letter law that corporations were subject to general jurisdiction wherever they engaged in a sufficiently high level of business activity" and that a leading casebook presented it as settled law).

[127] *See* Charles W. "Rocky" Rhodes & Cassandra Burke Robertson, *A New State Registration Act: Legislating a Longer Arm for Personal Jurisdiction*, 57 Harv. J. Legis. 377, 384-87 (2020) [hereinafter Rhodes & Robertson, *Longer Arm*]

[128] Charles W. "Rocky" Rhodes, *The Roberts Court's Jurisdictional Revolution within* Ford*'s Frame*, 51 STETSON L. REV. 157, 159 & n.14, 161 (2022).

[129] Michael P. Allen, *The Supreme Court, Punitive Damages and State Sovereignty*, 13 Geo. Mason L. Rev. 1, 6 (2004).

[130] *See, e.g.*, Brad Baranowski, *Discovering the Future of Personal Jurisdiction*, 56 CONN. L. REV. 687, 701 (2024) (explaining that in the Supreme Court's post-2011 personal jurisdiction doctrine, "the recent pattern is notable not just for its emphasis on rules, but for how comprehensive and precise these rules aspire to be").

[131] Bristol-Myers Squibb Co. v. Superior Court, 582 U.S. 255 (2017); BNSF Ry. Co. v. Tyrrell, 581 U.S. 402 (2017); Walden v. Fiore, 571 U.S. 277 (2014); Daimler AG v. Bauman, 571 U.S. 117 (2014); Goodyear Dunlop Tires Ops., S.A. v. Brown, 564 U.S. 915 (2011); J. McIntyre Mach., Ltd. v. Nicastro, 564 U.S. 873 (2011). The Roberts Court's level of appellate oversight in personal jurisdiction contrasted dramatically with it attention to discovery; although discovery is likewise a central facet of civil procedure, the "general absence of discovery decisions from legal education and the Supreme Court's docket is consistent with

had an immediate impact throughout the country, as the Court undermined bases for jurisdiction that had been so well settled by consistent lower court interpretations that multi-state corporate defendants typically did not pursue jurisdictional objections.[132] That strategy pivoted after the Court's jurisdictional retrenchment, as defendants grasped the opportunity to lodge jurisdictional challenges in new contexts.[133]

In conjunction with prior doctrine, these decisions produced three mechanisms by which a state's exercise of personal jurisdiction could contravene the Due Process Clause. First, a state's exercise of jurisdiction could violate principles of procedural due process—that is, it could impose an undue burden so oppressive that it interferes with defendants' ability to have a meaningful opportunity to be heard.[134] While modern litigation in a

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the common perception that the federal appellate courts take a hands-off approach to discovery in civil litigation . . . ." Seth Katsuya Endo, *Discovery Dark Matter*, 101 TEX. L. REV. 1021, 1023 (2023).

[132] *See* Andrew D. Bradt & D. Theodore Rave, *Aggregation on Defendants' Terms:* Bristol-Myers Squibb *& the Federalization of Mass-Tort Litigation*, 59 B.C. L. REV. 1251, 1275 (2018) (recognizing that before 2011 Bristol-Myers did not have "a leg to stand on in contesting jurisdiction"); Alan M. Trammell, *A Tale of Two Jurisdictions*, 68 VAND. L. REV. 501, 503 (2015) (contending Court's recent decisions tightened general jurisdiction over multi-state and multi-national corporations "to an extent that, until quite recently, would have been unfathomable").

[133] *See* Kevin D. Benish, *Pennoyer's Ghost: Consent, Registration Statutes, and General Jurisdiction After* Daimler Ag v. Bauman, 90 N.Y.U.L. REV. 1609, 1621 (2015) ("The response to the Court's decision was immediate."); Judy M. Cornett, *The Rulification of General Personal Jurisdiction and the Search for the Exceptional Case*, 89 TENN. L. REV. 571, 610 (2022) ("With the loss of general jurisdiction to underpin jurisdiction against big corporations in products liability cases in the state where an injury occurs, those corporations have successfully argued that their forum-state contacts are not related enough to the cause of action to yield specific jurisdiction."); Haley Palfreyman Jankowski, *The Not-So-Odd Couple: Specific Personal Jurisdiction and Party Joinder*, 89 TENN. L. REV. 261, 313 (2022) (explaining that "Bristol-Myers Squibb alerted defendants not to waive a personal jurisdiction challenge in joinder cases"); Jonathan Remy Nash, *The Rules and Standards of Personal Jurisdiction*, 72 ALA. L. REV. 465, 467 (2020) ("The Court's dramatic reshaping of general jurisdiction has already had a spillover effect on specific jurisdiction--that is, personal jurisdiction as to a defendant where the plaintiff's cause of action arises out of or relates to the defendant's ties to the forum state).

[134] *See* McGee v. Int'l Life Ins. Co., 355 U.S. 220, 224 (1957) (holding a potentially inconvenient litigation forum was not a denial of due process in the absence of inadequate notice or insufficient time to prepare, appear, and defend the suit); Mullane v. Cent. Hanover Bank & Tr. Co., 339 U.S. 306, 313 (1950) (holding that the Due Process Clause requires "that deprivation of life, liberty or

distant forum is rarely that oppressive, it remains a core procedural protection. Second, the state's exercise of jurisdiction could violate historical limits on the "contacts, ties, or relations" necessary to subject nonresident defendants to binding judgments and thereby contravene defendants' expectations about amenability to suit.[135] Protecting the defendant's historically grounded liberty interest from arbitrary assertions of government authority fits between procedural and substantive interests, falling comfortably within the protection of substantive-procedural due process.[136] Finally, the state's exercise of jurisdiction might encroach on the right or authority of sister states, thus putting the defendant in a difficult bind between the regulatory authority of two different sovereigns, and raising an issue of horizontal federalism.[137] The Robert Court's sextet of decisions appeared to emphasize this horizontal federalism interest, placing new restrictions on state judicial authority when the forum state's regulatory authority was minimal compared to other sovereigns.[138]

The Court's two most recent decisions upholding jurisdictional assertions offer additional supporting evidence of this priority. In holding that Ford Motor Company was amenable to suit

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property by adjudication be preceded by notice and opportunity for hearing appropriate to the nature of the case").

[135] *See, e.g.*, Burger King Corp. v. Rudzewicz, 471 U.S. 462, 471-72 (1985) (quoting Int'l Shoe Co. v. Washington, 326 U.S. 310, 319 (1945)); Ins. Corp. of Ir. v. Compagnie des Bauxites de Guinee, 456 U.S. 694, 702 (1982) ("The personal jurisdiction requirement recognizes and protects an individual liberty interest."); *see also* Daniel Wilf-Townsend, *Class Action Boundaries*, 90 FORDHAM L. REV. 1611, 1654 (2022) ("Personal jurisdiction's concerns for horizontal federalism go back to Pennoyer v. Neff,225 which emphasized that the equal dignity of the states implies limitations on the territorial reach of their power.").

[136] *See* Hershkoff & Resnick, *supra* note 32, at 614-17; Rhodes, *Liberty*, *supra* note 116, at 576.

[137] World-Wide Volkswagen, 444 U.S. at 294 (("[T]he Due Process Clause, acting as an instrument of interstate federalism, may sometimes act to divest the State of its power to render a valid judgment"); Allan Erbsen, *Impersonal Jurisdiction*, 60 Emory L.J. 1 (2010) (arguing that horizontal federalism drives much of the personal jurisdiction analysis).

[138] *See* Bristol-Myers Squibb Co. v. Superior Court of Cal., 582 U.S. 255 (2017); BNSF Ry. Co. v. Tyrrell, 581 U.S. 402 (2017); Daimler AG v. Bayman, 571 U.S. 117 (2014); *see also* John F. Coyle & Robin J. Effron, *Forum Selection Clauses, Non-Signatories, and Personal Jurisdiction*, 97 NOTRE DAME L. REV. 187, 240 (2021) ("Over the past decade, the Supreme Court has dramatically cut back on the ability of courts to assert personal jurisdiction over a wide range of corporate defendants.").

in consolidated cases when its allegedly defective vehicles caused injuries in the forum states but were not originally designed, manufactured, or sold there, the Court distinguished its recent decisions disclaiming jurisdiction on the basis that the *Ford* plaintiffs brought their suits "in the most natural State."[139] And while the Supreme Court held that due process did not bar Norfolk Southern Railway Co.'s amenability when it effectively consented to all suits in the forum by registering to do business,[140] Justice Alito's pivotal fifth vote concurring in part and concurring in the judgment highlighted that a "State's assertion of jurisdiction over lawsuits with no real connection to the State may violate fundamental principles that are protected by [other] constitutional provisions or by the very structure of the federal system."[141] With this increased emphasis on state interests vis-à-vis other states, the Roberts Court's jurisprudence extended the jurisdictional analysis to raise the same due process interests that the Court's earlier punitive damages doctrine had identified: fair notice to the defendant, a historically grounded tradition, and deference to horizontal federalism.

This new jurisprudence focuses on joining these different interests at stake in the due process framework. Two connections are paramount: the relationship between the defendant's conduct and the forum state and the relationship between the forum state's interests and the underlying lawsuit.[142]

A. Relationship Between Conduct and Forum State

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[139] Ford Motor Co. v. Montana Eighth Jud. Dist. Ct., 592 U.S. 351, 370 (2021); *see also* Michael Vitiello, *The Supreme Court's Latest Attempt at "Clarifying" Personal Jurisdiction: More Questions Than Answers*, 57 TULSA L. REV. 395, 427 (2022) ("After six losses, plaintiffs finally won a personal jurisdiction decision in Ford."); Elizabeth Pollman, *The Supreme Court and the Pro-Business Paradox*, 135 HARV. L. REV. 220, 237 (2021) ("The shortcomings of personal jurisdiction doctrine to capture modern business and the inequity in treatment between individuals and corporate defendants were brought to light, but the status quo remained.").

[140] Mallory v. Norfolk S. Ry. Co., 600 U.S. 122, 134-36 (2023),

[141] *Id.* at 150 (Alito, J., concurring in part and concurring in the judgment).

[142] *See* Scott Dodson, *Personal Jurisdiction, Comparativism, and Ford*, 51 STETSON L. REV. 187, 199 (2022) ("The federal structure of the United States--with separate state sovereignties and separate state courts--infuses U.S. personal jurisdiction with concerns for interstate federalism that few other countries share.").

One of the most significant steps taken by the Roberts Court was to limit the situations in which a defendant could be subject to general jurisdiction—that is, situations in which there needed to be no connection between the forum state and the lawsuit. Lower courts had uniformly held that general jurisdiction was available when a defendant had a continuous, systematic, and substantial relationship with the state.[143] In spite of the long-standing application of this view by state and federal courts, the Roberts Court jettisoned this approach with its 2014 decision in *Daimler AG v. Bauman*.[144] Instead, the Court held, general jurisdiction was available only in those jurisdictions where the defendant was "at home"—for a corporation like Wal-Mart, that would be its state of incorporation and the state where it had its principal place of business.[145] All jurisdiction in other states would depend on specific jurisdiction's analysis of the relationship between the conduct and forum state.

Specific jurisdiction had long required analysis of the specific connection between the defendant's conduct and the forum state. On one end of the spectrum, a state may not exercise personal jurisdiction over a defendant who has not engaged in any purposeful conduct aimed at the forum state. All other considerations are irrelevant when the defendant lacks purposeful contacts with the forum.[146] On the other hand, when a defendant's deliberate forum contacts give rise to a plaintiff's claim, it is "presumptively not unreasonable to require [the defendant] to submit to the burdens of litigation in that forum."[147] This is such a strong justification for the state's power that the defendant may only defeat the presumption by making a "compelling case that the

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[143] *See* Rhodes & Robertson, *Longer Arm*, *supra* note 127, at 388-94.

[144] 571 U.S. 117 (2014).

[145] *Id.* at 136-39.

[146] World-Wide Volkswagen v. Woodson, 444 U.S. 286, 294 (1980)("Even if the defendant would suffer minimal or no inconvenience . . . ; even if the forum State has a strong interest in applying its law . . . ; even if the forum State is the most convenient location for litigation, the due process clause, acting as an instrument of interstate federalism, may sometimes act to divest the State of its power to render a valid judgment."); *Int'l Shoe Co.*, 326 U.S. at 319.

[147] Burger King Corp. v. Rudzewicz, 471 U.S. 462, 476 (1985) (citing World-Wide Volkswagen v. Woodson, 444 U.S. at 292) ("[W]here the defendant deliberately has engaged in significant activities within a State, … it is presumptively not unreasonable to require him to submit to the burdens of litigation in that forum.").

presence of other considerations would render jurisdiction unreasonable."[148] The Court emphasized different interests at different times, pointing at times to the sovereign's regulatory interest, to the defendant's need for notice of where it could be sued so that it could structure its conduct to avoid potential liability, and the need to balance both plaintiff's interests in accountability with fair process to the defendant.

The Roberts Court's jurisprudence did not jettison any of those interests, but instead set guidelines for the necessary connection between the defendant's conduct and the forum state in specific personal jurisdiction.[149] In one of the primary cases, *Bristol-Myers Squibb Co. v. Superior Court of California*, a group of plaintiffs, most of whom were not California residents, sued Bristol-Myers Squibb (BMS) in California state court for products liability claims related to the drug Plavix.[150] The California Supreme Court held that California courts could exercise specific jurisdiction over the defendant with respect to the nonresidents' claims.[151] It emphasized that BMS had extensive contacts with California, including maintaining research and laboratory facilities in California, employing hundreds of sales representatives in the state, and selling large quantities of Plavix in California (nearly $1 billion worth over six years).[152] BMS was the type of national company that, in the past, would have fit comfortably within "continuous and systematic" general jurisdiction. Indeed, the California courts first held that BMS would be subject to general jurisdiction, but when the Supreme Court decided *Daimler* while *BMS* was pending in state

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[148] *See id.*; *see also* Daimler v. Bauman, 571 U.S. 117, 139-40 n.20 (2014) (stating that, after determining whether "the connection between the forum and the episode-in-suit" justifies jurisdiction, the court is to consider, in a second step, whether exercising jurisdiction is reasonably by examining such factors as "'the burden on the defendant,' 'the interests of the forum state,' 'the plaintiff's interest in obtaining relief,' the interstate judicial system's interest in obtaining the most efficient resolution of controversies,' 'the shared interest of the several states in furthering fundamental substantive social policies,' and, in the international context, 'the procedural and substantive policies of other nations whose interests are affected by the assertion of jurisdiction.'").

[149] BNSF Railway Co. v. Tyrrell, 581 U.S. 402 (2017); Bristol-Myers Squibb Co. v. Super, Ct. of Cal., 582 U.S. 255 (2017).

[150] *Bristol-Myers Squibb Co.*, 582 U.S. at 258.

[151] *Id.* at 260-61.

[152] *Id.* at 258-59.

court, the California courts switched the analysis from general to specific jurisdiction.[153]

Despite the substantial and long-standing in-state contacts, the Supreme Court reversed, ruling that California courts lacked specific jurisdiction over the claims of non-California residents. The Court acknowledged that many of the interests would point to jurisdiction—California had an interest in regulating products sold in the state, it was a convenient forum in which to litigate, and the defendant had substantial in-state contacts.[154] But, just as Professor Allen had previously predicted, the Court relied on the same horizontal federalism approach it had adopted in the punitive damage cases; after reiterating the idea that state sovereignty requires restraint, the Court wrote that "at times, this federalism interest may be decisive."[155] The Supreme Court described the California court's opinion as offering a "loose and spurious" approach in which "the strength of the requisite connection between the forum and the specific claims at issue is relaxed if the defendant has extensive forum contacts that are unrelated to those claims."[156] In the Court's view, this sliding-scale approach was missing a key element: "What is needed—and what is missing here—is a connection between the forum and the specific claims at issue."[157]

Of course, one method to connect the forum and the claims at issue is to establish causation—that the defendant's in-forum contacts actually cause the plaintiff's harm. In 2021, the Roberts Court was asked to decide if a causal relationship was *necessary* for specific jurisdiction. In *Ford Motor Co. v. Montana Eighth Judicial District Court*, the plaintiffs bought used cars in their home states, were injured in an automobile accident in that state, and sought to bring a products-liability suit at home against the global auto company that manufactured the car. [158] In Ford's view, the required relationship between the forum and the specific claims as issue was

[153] *Id.* at 260.

[154] *Id.* at 263-65.

[155] *Id.* at 263.

[156] *Id.* at 264.

[157] *Id.* 265.

[158] *Ford Motor Co. v. Mont. Eighth Judicial Dist. Court*, 592 U.S. 351, 359 (2021).

not satisfied because the plaintiffs had not sued in a state where Ford had originally designed, manufactured, or sold the vehicles.[159] Instead, Ford argued that that case was controlled by *BMS,* where plaintiffs who bought the defective product from the defendant outside of California could not sue in California because their specific claims were unrelated to the defendant's conduct. Ford argued that its situation was no different—the plaintiffs may have bought the cars used on the secondhand market in the forum state, but they did not buy *from the defendant* in the forum state.[160] The defendant's suit-linked contacts were only with the states of original design, manufacture, and sale.

The Supreme Court rejected Ford's argument, concluding that specific jurisdiction did not always require "but-for" causation.[161] Instead, the location of the harm, the state's interest in protecting its citizens, and the defendant's marketing activities in the state combined to provide the necessary relationship between the forum and the claim, notwithstanding the absence of a causal link between the defendant's forum contacts and the plaintiff's claims. Ford's action in "systematically serv[ing]" the markets in the forum states (and, in particular, heavily marketing the same vehicle models at the heart of the products-liability claim) gave rise to a constitutionally sufficient "relationship among the defendant, the forum, and the litigation."[162]

Nonetheless, the Court's opinion made clear that due process requires a significant connection between the defendant and the forum. Although *Ford* stated that "some relationships will support personal jurisdiction without a causal showing," the Court cautioned that it "does not mean anything goes," as "the phrase 'relate to' incorporates real limits, as it must to adequately protect defendants foreign to a forum."[163] Although the Supreme Court left open questions about when, exactly, a less-than-causal relationship could suffice, the lines drawn by the Court in *BMS* and *Ford* help illustrate the contours of due process. Specifically, serving a market alone is insufficient to support jurisdiction if it is unrelated to the

[159] *Id.* at 356-57.

[160] *Id.* at 361.

[161] *Id.* at 361-62.

[162] *Id.* at 365-68.

[163] *Id.* at 362.

suit, even if the forum state would otherwise be a fair and convenient location in which to litigate. But when the defendant is serving "a market for a product in the forum State and the product malfunctions there,"[164] the case will be tipped over the due-process line—the combination of state interest over the injury, combined with the defendant's interest in serving the market, allow the state to exercise jurisdiction without encroaching on other states' sovereign interests.[165] In short, the Supreme Court made clear that the "forum relatedness" test for specific jurisdiction was neither a pure evaluation of fairness nor a mechanical test of but-for causation; instead, the jurisdictional analysis depended on the strength of the relationship between the defendant's in-state contacts, the plaintiff's harm, and the state's regulatory interest.

B. Consent Jurisdiction and the State's Interest

While *Ford* and *BMS* examined the relationship between the forum state's interests and the defendant's conduct in specific jurisdiction, the Supreme Court's most recent case raises a related issue: what is the required relationship between the state's interest and the lawsuit itself? In *Mallory v. Norfolk Southern Railway*,[166] the Court was no long grappling with causation questions. Instead, the case raised an old-fashioned jurisdiction ground that was attempting a modern comeback—the idea that a defendant's consent to jurisdiction can be conferred when a defendant corporation registers to do business in the forum state.[167] This jurisdictional basis has a long history, although it largely became unnecessary until the Supreme Court's sharp curtailment of general jurisdiction.[168] But with the end of general jurisdiction based on "continuous and systematic" contacts, the issue was once again ripe for decision, as consent-by-registration offered a

[164] Id. at 363.

[165] *Id.* at 365-68.

[166] 600 U.S. 122.

[167] *See* Sayer Paige, *Rethinking Jurisdictional Maximalism in the Wake of* Mallory, 92 FORDHAM L. REV. 2725, 2740 (2024) ("[T]he *Mallory* decision breathes life back into the *Pennoyer*-era creation of jurisdiction-by-registration.").

[168] *See* Rhodes & Robertson, *Longer Arm*, *supra* note 127, at 401-08; Rhodes & Robertson, *New Equilibrium*, *supra* note 125, at 258-63.

potential way for a state's courts to hear a case even when the forum-relatedness standard could not be satisfied.[169]

In a fractured opinion, the Supreme Court upheld the exercise of jurisdiction in *Mallory*. Justice Gorsuch authored the part-majority, part-plurality opinion. In a footnote, he quickly summarized the points on which five justices agreed:

> While various separate writings accompany this opinion, it should be apparent a majority of the Court today agrees that: Norfolk Southern consented to suit in Pennsylvania. *Pennsylvania Fire* therefore controls this case. *Pennsylvania Fire*'s rule for consent-based jurisdiction has not been overruled. *International Shoe* governs where a defendant has not consented to exercise of jurisdiction. Exercising jurisdiction here is hardly unfair. The federalism concerns in our due process cases have applied only when a defendant has not consented. Nor will this Court now overrule *Pennsylvania Fire*.[170]

Justice Gorsuch's conclusion that "[t]he federalism concerns in our due process cases" did not apply with consent-based jurisdiction was somewhat misleading. While the federalism interest was not explicitly part of the due-process analysis due to the defendant's consent, the Court nevertheless remanded the case to permit consideration of just such federalism interests under the scope of the dormant Commerce Clause.[171]

Justice Alito's concurrence explained why the Commerce Clause might prove a better home for evaluation of the federalism interests in this context, explaining that "we have never held that a State's assertion of jurisdiction unconstitutionally intruded on the

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[169] *See id.*; *see also* Matthew D. Kaminer, *The Cost of Doing Business? Corporate Registration As Valid Consent to General Personal Jurisdiction*, 78 WASH. & LEE L. REV. ONLINE 55, 105 (2021) (arguing that "states with silent registration statutes can--and should--displace their decisional law by passing modernized language that explicitly addresses whether or not the statute compels consent to personal jurisdiction--general or specific").

[170] *Mallory*, 600 U.S. at 146 n. 11 (citations to Justice Gorsuch's opinion and Justice Alito's opinion omitted).

[171] *Id.* at 127 n.3.

prerogatives of another State when the defendant had consented to jurisdiction in the forum State."[172] He noted that, because the Due Process Clause confers right on "person[s] . . . not States,"[173] a person's or entity's choice to waive such protections should be honored. In a footnote, Justice Alito also suggested that keeping the analysis as part of the dormant Commerce Clause would allow Congress, if it so chose, to override the decision pursuant to its Commerce Clause power. [174] Of course, Congress is not subject to the same horizontal federalism interests that restrict the states.

In any case, the federalism interest could not be avoided in *Mallory*. Because the state-interest point wasn't well developed in the record, and the Pennsylvania Supreme Court had not reached the dormant Commerce Clause issue, Justice Alito supported remanding the case for determination of that question.[175] He expressed serious doubt that the state could hear the case, writing that he was "hard-pressed to identify any legitimate local interest that is advanced by requiring an out-of-state company to defend a suit brought by an out-of-state plaintiff on claims wholly unconnected to the forum State," and that "a State generally does not have a legitimate local interest in vindicating the rights of non-residents harmed by out-of-state actors through conduct outside the State."[176] He concluded that "[w]ith no legitimate local interest served, 'there is nothing to be weighed . . . to sustain the law.'"[177]

In *Mallory*, the Supreme Court was influenced by the long historical tradition of registration-based consent to jurisdiction. A pending question is whether a due-process analysis would raise greater concerns without such a historical tradition. That issue arose in a recent Second Circuit case, *Fuld v. Palestine Liberation Organization*.[178] This case stemmed from the fatal stabbing of U.S.

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[172] *Id.* at 156 (Alito, J., concurring in part and concurring the judgment).

[173] *Id.*

[174] *Id.* at 157 n. 3 ("Analyzing these concerns under the Commerce Clause has the additional advantage of allowing Congress to modify the degree to which States should be able to entertain suits involving out-of-state parties and conduct.").

[175] *Id.*

[176] *Id.* at 162-63.

[177] *Id.* at 163 (quoting Edgar v. MITE Corp., 457 U.S. 624, 644 (1982)).

[178] 82 F.4th 74 (2d Cir. 2023).

citizen Ari Yoel Fuld in a 2018 terrorist attack outside a shopping mall in the West Bank. His widowed spouse and his children filed suit in the Southern District of New York against the PLO, which conducts Palestine's foreign affairs and serves as a Permanent Observer to the United Nations on behalf of Palestinians, and the PA, which is the non-sovereign and interim governing body of parts of the Gaza Strip and the West Bank.[179] The Fulds alleged that, because the PLO and PA incentivized and assisted the terrorist act that led to the fatal stabbing, monetary damages should be awarded against both defendants under the remedial provisions of the Anti-Terrorism Act (ATA), which authorize compensation to United States nationals injured "by reason of an act of international terrorism" from "any person who aids and abets, by knowingly providing substantial assistance" to the perpetrator of the attack.[180]

After a series of failed attempts to create a jurisdictional hook for litigation in the United States, Congress tried for a consent-based solution, this time with the "Promoting Security and Justice for Victims of Terrorism Act of 2019."[181] The PSJVTA, which applies just to the PLO, the PA, and successor or affiliated entities, deems that those entities consent to personal jurisdiction if, after a specified number of days from the statute's enactment, they either (1) make a direct or indirect payment to an imprisoned terrorist or a member of his family after his death, or (2) conduct activities while physically present in the United States or maintain any facilities or establishments within the United States other than those devoted exclusively to conducting official business of the United Nations or related to engagements with United States officials or legal representation.[182] Congress provided that this new act should "be liberally construed to carry out the purposes of Congress to provide relief for victims of terrorism" and should apply to "any case pending on or after August 30, 2016," which meant it applied to both the Waldman and Fuld litigation.[183]

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[179] Fuld v. Palestine Liberation Org., 82 F.4th 74 (2d Cir. 2023)

[180] Fuld v. Palestine Liberation Org., 82 F.4th 74 (2d Cir. 2023)

[181] Promoting Security and Justice for Victims of Terrorism Act of 2019, Pub. L. No. 116-94, § 903, 133 Stat. 2534, 3082 (2019) (codified at 18 U.S.C. § 2334(e)).

[182] *Id.*

[183] *Id.*; *see also* Aaron D. Simowitz, *The Private Law of Terror*, 126 PENN ST. L. REV. 159, 208 (2021) ("Congress broadened jurisdictional triggers of the statute

The PLO and the PA moved to dismiss the Fulds' suit for lack of personal jurisdiction.[184] Although Congress enacted the PSJVTA specifically to authorize jurisdiction over the PLO, the PA, and any successor or affiliated entities in suits under the ATA in federal court, the defendants urged that the PSJVTA's jurisdictional provisions deeming their statutorily defined post-enactment conduct as a "consent" to personal jurisdiction conflicted with the dictates of the Fifth Amendment's Due Process Clause.[185]

The Second Circuit agreed. It held that *Mallory* did not control, concluding that consent jurisdiction in that case had relied on the defendant choosing to accept "a government benefit from the forum, in return for which the defendant is required to submit itself to suit in the forum."[186] In *Fuld*, by contrast, Congress unilaterally decided what type of conduct would be "deemed" to consent to jurisdiction, and that conduct neither offered the defendant any countervailing benefit from the forum nor gave the defendant permission to do something it could not otherwise have done.[187]

With consent off the table, the jurisdiction analysis reverted to due process. Here, the court acknowledged that some of the due process interests were satisfied, acknowledging the plaintiffs argument that the statute "gives the defendants 'fair warning' of the relevant jurisdiction-triggering conduct and 'reasonably advances legitimate government interests in the context of our federal system.'"[188] In the court's view, however, these interests "establish only minimum due process requirements."[189] What was missing was the same relatedness requirement at issue in *BMS*, only with an international dimension—the acts giving rise to liability took place outside of the United States, and U.S. citizens were affected

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significantly, making them more aggressive, less tied to any nexus to the United States, and more vague.").

[184] Fuld v. Palestine Liberation Org., 82 F.4th 74, 90 (2d Cir. 2023)

[185] *Id.*

[186] Fuld v. Palestine Liberation Org., 82 F.4th 74, 90 (2d Cir. 2023)

[187] Fuld v. Palestine Liberation Org., 82 F.4th 74, 92–93 (2d Cir. 2023) (explaining that the statute "cannot reasonably be construed as requiring a defendant's consent to jurisdiction in exchange for permission to engage in the predicate activities, because the defendants have not been granted permission to engage in those activities at all.").

[188] *Id.* at 93.

[189] *Id.*

only as victims of "indiscriminate violence," not as specific targets.[190]

The decision in *Fuld* was controversial, sparking a rare dissent from a denial of the motion for rehearing *en banc.* It may yet be overturned by the Supreme Court—the Second Circuit panel was constrained by prior precedent from considering whether the federal government should be as constrained under the Fifth Amendment's due process clause as state governments would be under the Fourteenth. There is a good argument that the due process analysis should be different, especially because concerns of horizontal federalism that are paramount in considering state authority carry far less weight in the face of federal supremacy.[191] Nevertheless, these cases demonstrate that even when jurisdiction is based on consent, the fundamental due process concerns of fairness, notice, and the balance of state and federal interests in our federal system still have a role to play—either directly, as part of the jurisdictional analysis, or indirectly through the consideration of other constitutional doctrine, such as the dormant Commerce Clause.

C. The Nexus of Interests in Personal Jurisdiction

The Supreme Court's personal jurisdiction jurisprudence, like its punitive-damages doctrine, reveals a complex interplay of interests that must be balanced within the framework of due

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[190] *Id.* at 82.

[191] *See, e.g.*, Ray Worthy Campbell, *Personal Jurisdiction and National Sovereignty*, 77 WASH. & LEE L. REV. 97, 125 (2020) ("The Court has paid surprisingly little heed to the issue of whether defendants from outside the United States should be treated differently from domestic defendants when assessing personal jurisdiction."); Austen Parrish, *Personal Jurisdiction: The Transnational Difference*, 59 VA. J. INTL. L. 97, 145 (2019) (explaining that "[c]ivil disputes involving foreign, nonresident defendants raise different considerations--both practical and conceptual--than domestic disputes," and that "[t]he tendency for courts and commentators to conflate and treat international disputes as variations of domestic disputes continues to be problematic, particularly because sovereignty considerations play a different and more significant role in international cases."); Donald Earl Childress III, *Rethinking Legal Globalization: The Case of Transnational Personal Jurisdiction*, 54 WM. & MARY L. REV. 1489, 1541 (2013) (explaining that "domestic personal jurisdiction dismissals do not necessarily end the case; they merely delay the case or encourage the filing of the case in another United States court"); Wendy Perdue, *Aliens, the Internet, and "Purposeful Availment": A Reassessment of Fifth Amendment Limits on Personal Jurisdiction*, 98 NW. L. REV. 455, 470 (2004) ("[W]e should pause before concluding that our government is constitutionally disabled from asserting jurisdiction over foreigners under circumstances in which other countries consider it entirely appropriate.").

process. Although the two doctrines are distinct, the due process analysis in both rests on a very similar nexus of interests.

First, similar to punitive damages cases, the defendant's interest in fair notice and protection against arbitrary assertions of jurisdiction is paramount in personal jurisdiction analysis.[192] This is evident in cases like *Ford*, where the Court emphasized that while but-for causation is not required, there must be a reasonable relationship between the defendant's conduct and the forum state. This ensures that defendants can reasonably anticipate where they might be haled into court.[193]

Second, the state's interest in adjudicating disputes and regulating conduct within its borders is another crucial factor. In *Ford*, the Court recognized Montana and Minnesota's legitimate interests in providing a forum for their residents injured by products marketed in those states.[194] In *Bristol-Myers Squibb*, by contrast, the Court held that California's interest was insufficient to justify jurisdiction over claims by non-residents for injuries occurring outside the state.[195] With the rise of online employment and increasing electronic cross-border activity, states may find themselves reconsidering how state interests intersect with jurisdictional policy.[196]

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[192] *See, e.g.*, Jeffrey L. Rensberger, *Consent to Jurisdiction Based on Registering to Do Business: A Limited Role for General Jurisdiction*, 58 S.D. L. REV. 309, 376 (2021) ("Allowing a state to assert jurisdiction simply because it desires to aid a plaintiff with whom it has no connection conflicts with the requirement that a court assess the interest of the forum state in evaluating minimum contacts jurisdiction.").

[193] Ford Motor Co. v. Montana Eighth Judicial District Ct., 592 U.S. 351 (2021).

[194] *Id.*

[195] Bristol-Myers Squibb Co. v. Superior Court of Cal., 582 U.S. 255 (2017).

[196] *See, e.g.*, Kathryn M. Couture, *Traditional Notions of Fair Play and Substantial Justice?: The Interplay Between Remote Work, State Regulations, and Personal Jurisdiction*, 29 ROGER WILLIAMS U.L. REV. 146, 176 (2024) ("even courts that have declined to exercise specific personal jurisdiction over an out-of-state employer with an in-state remote employee have acknowledged that such a decision just might be revisited in the wake of the COVID-19 pandemic and the corresponding prevalence of remote work."); Eric T. Laity, *International Prescriptive Jurisdiction and American Conflict of Laws*, 52 GA. J. INT'L. & COMP. L. 239, 250 (2024) ("The international and domestic limitations on the adjudicative jurisdiction of a nation's courts also constrain the effect of its lawmaking."); Aaron D. Simowitz, *Jurisdiction As Dialogue*, 52 N.Y.U. J. INTL. L. & POL. 485, 529 (2020) ("[T]he

Third, and closely related, the Supreme Court's concern with horizontal federalism in personal jurisdiction cases mirrors its approach in punitive damages cases. Just as a state cannot punish conduct lawful in other states through punitive damages, it cannot assert jurisdiction over a defendant without a sufficient connection to the forum. This limitation respects the sovereignty of other states and protects defendants from being subject to conflicting state regulations.[197] The Court explicitly highlighted this concern in *Bristol-Myers Squibb*, quoting *World-Wide Volkswagen* for the proposition that "the States retain many essential attributes of sovereignty, including, in particular, the sovereign power to try causes in their courts. The sovereignty of each State ... implies a limitation on the sovereignty of all its sister States."[198]

Finally, as seen in *Mallory*, historical practice and tradition can play a significant role in the due process analysis. The Court's reliance on the long-standing practice of registration-based consent to jurisdiction influenced its decision, suggesting that due process concerns may be heightened in novel jurisdictional contexts lacking such historical precedent.[199] If the Supreme Court accepts review in the *Fuld* case, it may clarify just how strong of a role historical practice played in *Mallory*.

V. DUE PROCESS AND CAUSATION

The Court's development of a coherent due process framework in the modern contexts of punitive damages and personal jurisdiction represents a significant evolution in constitutional jurisprudence. This nexus, which balances individual rights, state interests, and federalism concerns, offers valuable insights for evaluating the constitutionality of doctrines such as market-share liability and innovator liability that relax, or even eliminate, traditional standards of causation.

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doctrinal tests associated with specific jurisdiction are simply proxies for the question of whether the state's regulatory interests are genuinely impacted.").

[197] *See* Michael H. Hoffheimer, *End of the Line for General Territorial Jurisdiction*, 87 TENN. L. REV. 419, 464 (2020) ("The Court has repeatedly identified due process as a limit on juridical jurisdiction necessary to prevent states from interfering with the authority of other states.").

[198] *Id.* at 263 (quoting World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 293 (1980)).

[199] Mallory v. Norfolk S. Ry. Co., 600 U.S. 122 (2023).

In some cases, personal jurisdiction itself may pose a barrier to market-share liability directly, without evaluation of the underlying nexus of interests. The states that embraced market-share liability's relaxed causation standard largely did so in the era before the Supreme Court restricted personal jurisdiction and refined the due-process analysis underlying that doctrine. Some courts dismissed apparently well-taken personal jurisdiction objections under the governing jurisdictional standards at the time in pursuit of substantive objectives, reasoning that state jurisdictional authority "must be modified for mass torts."[200] But other courts disagreed. The Florida Supreme Court dismissed some defendants from a market-share liability case on personal-jurisdiction grounds under the state's long-arm statute, which required the claim to arise from or relate to in-state business,[201] and held in a separate case that due process precluded imposing joint-and-several liability against a defendant under a market-share theory.[202] Scholars at the time likewise split, with some arguing for further relaxed jurisdictional requirements,[203] while other scholars objected.[204] Modern cases have been more likely to dismiss based on a lack of specific jurisdiction.[205]

Even where personal jurisdiction does not itself pose a barrier, however, the underlying nexus of interests that the Supreme Court articulated in the punitive damages and personal jurisdiction cases may prohibit courts from eliminating the causal

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[200] *In re DES Cases*, 789 F. Supp. 552, 557 (E.D.N.Y. 1992); *In re N.Y. Cnty, DES Litigation*, 202 A.D.2d 6, 615 N.Y.S.2d 882, 884 (1994).

[201] *Conley v. Boyle Drug Co.*, 570 So.2d 275 (Fla. 1990).

[202] *Agency for Health Care Admin. v. Assoc. Indus. of Fla., Inc.*, 678 So.2d 1239 (Fla. 1996).

[203] Patrick J. Borchers, *Jurisdictional Pragmatism:* International Shoe*'s Half-Buried Legacy*, 28 U.C. Davis L. Rev. 561, 585-89 (1995); Harold L. Korn, *Rethinking Personal Jurisdiction and Choice of Law in Multistate Mass Torts*, 97 Colum. L. Rev. 2183, 2200-09 (1997).

[204] Scott Fruehwald, *Judge Weinstein on Personal Jurisdiction in Mass Tort Cases: A Critique*, 70 Tenn. L. Rev. 1047 (2003); *cf.* Howard M. Erichson, *Judge Jack Weinstein and the Allure of Antiproceduralism*, 64 DePaul L. Rev. 393, 395-402 (2015).

[205] *See* In re: Zantac (Ranitidine) Products Liab. Litig., 546 F. Supp. 3d 1192, 1214 (S.D. Fla. 2021) ("Although Plaintiffs met their burden for the purposeful availment prong, because Plaintiffs have not met their burden for the relatedness prong, the Court need not address whether a court's exercise of jurisdiction over Defendants in those forums would violate traditional notions of fair play and substantial justice.").

requirement from tort liability. In 1989, when Rexall made its due process argument, the Supreme Court had not yet developed its due process doctrine in the punitive damages context. And likewise, although due process had been part of the personal jurisdiction analysis for over a century, the Court had not yet fleshed out the nexus of interests protected under the due process umbrella as it later would in the Roberts Court era.

To date, the Court has not yet ruled on the constitutionality of the market-share approach to liability. But if Rexall's argument were to return to the Supreme Court today, it would have a substantial body of doctrine to draw on that would buttress its due process argument. In this Part, we consider how the Supreme Court would approach such a challenge today.

A. Market-Share Liability's Relaxation of Causation

Market-share liability has two primary policy rationales: first, to compensate plaintiffs for harm that would likely go without remedy under traditional tort principles;[206] and second, to deter potential defendants from taking undue risks.[207] Proving causation remains a problem in cases with multiple actors and long periods of time before harm becomes apparent—products causing environmental contamination and pharmaceuticals causing medical injury, in particular, may cause substantial harm decades after their initial use. In addition, even if causation wasn't difficult to prove, assigning liability only for actual harm necessarily undervalues the deterrence interest. As scholar Mark Geistfeld explains, "when the liability rule instead requires that the unreasonable risk must actually cause physical harm, the actor can avoid liability in conflict with the deterrence objective."[208] Focusing on risk, rather than causation, might therefore better internalize costs.

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[206] Logan L. Page, *Write This Down: A Model Market-Share Liability Statute*, 68 Duke L.J. 1469, 1483 (2019) ("The DES Daughters did not know, and often could not determine, which manufacturer had harmed them; they were plaintiffs searching for a theory of causation.")

[207] *See* Mark A. Geistfeld, *The Doctrinal Unity of Alternative Liability and Market-Share Liability*, 155 U. Pa. L. Rev. 447, 449 (2006).

[208] *See id.*

Professor Geistfeld urges that, at its heart, market-share liability should be viewed as a type of alternative liability.[209] Alternative liability, first articulated in the 1948 case of *Summers v. Tice*,[210] has a long history of acceptance. In *Summers*, the plaintiff was part of a hunting party, and was shot after two of the other hunters discharged their firearms toward the plaintiff, both at the same time.[211] It was evident that one of the two had shot the plaintiff, but the plaintiff had no evidence of which hunter's shot hit him.[212] The court allowed the defendants to be held jointly and severally liable, writing that "[t]he wrongdoers should be left to work out between themselves any apportionment."[213]

Professor Geistfeld argues that the core of market-share liability is simply aggregating all potential tortfeasors into an "evidential grouping."[214] This maintains the causation requirement in theory; as in *Summers*, it creates a situation where "each of the defendant's tortious conduct may have caused the plaintiff's harm, and one of them did."[215] It is admittedly a relaxation of the causation requirement—it puts the burden of a lack of causation evidence on the defendants, not the plaintiff.[216] But under this theory, a defendant who can establish a lack of causation should still be able to exculpate themselves to the extent that they can muster evidence that their conduct was not the cause of the plaintiff's harm.

Geistfeld acknowledges that the theory of "evidential grouping" does not work as well when courts do not allow for such exculpation—as, for example, Rexall complained about with the New York decision.[217] Similarly, although Wisconsin allowed exculpation to the extent that a defendant could establish that its

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[209] *Id.*

[210] Summers v. Tice, 199 P.2d 1 (Cal. 1948)

[211] *Id.*

[212] *Id.*

[213] *Id.* at 88

[214] Geistfeld, *supra* note 207, at 473.

[215] Geistfeld, *supra* note 207, at 473.

[216] Geistfeld, *supra* note 207, at 475-76 ("[A]lternative liability requires a distinctive policy judgment--it makes liable one or more of the defendants who did not actually cause the plaintiff's harm.").

[217] *See supra* Part I.

product could not have cause the plaintiff's harm,[218] Wisconsin nevertheless based market-share liability in DES cases on the company's national market share rather than the state-level contribution.[219] In the New York case, a defendant like Rexall could be held liable for harm that it could prove it didn't cause. Even in Wisconsin, "[b]y adopting an expansive definition of risk exposure," a defendant could be liable for "an amount in excess of its market share" in relation in the plaintiff's injury; in other words, the state court would be holding the defendant liable for its contribution to the national market, not for the chance that its product actually caused the particular harm at issue.[220] New York maintained this approach in an environmental case dealing with MBTE.[221] As a result, "even plaintiffs who were able to trace MTBE from a specific leaking underground storage tank to a specific tainted well" were not limited to pursuing the owner of the leaking well; instead, they were able to "hold the entire industry responsible for the contamination."[222]

There is therefore a difference in how states recognizing market-share liability treat the causation requirement. Some states apply a relaxed causation requirement that merely flips the burden of proof, presuming liability unless the defendant establishes the contrary. Typically such presumptions, unless irrational and arbitrary, do not violate the Due Process Clause.[223] Other states, however, have more fully jettisoned the causation requirement and have based liability instead on the combination of risk and harm alone, without the additional connection of any causal relationship between the defendant's conduct and the plaintiff's harm.

B. Innovator Liability's Elimination of Causation

Another contemporary tort doctrine, innovator liability, goes a step further in jettisoning causation. Under innovator liability, a brand-name pharmaceutical company develops patient packaging

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[218] Thomas ex rel. Gromling v. Mallett, 701 N.W.2d 523, 550 (Wis. 2005).

[219] Collins v. Eli Lilly Co., 342 N.W.2d 37, 48-49 (Wis. 1984)

[220] Geistfeld, *supra* note 207, at 484.

[221] In re MTBE Prod. Liab. Litig., 379 F. Supp. 2d 348 (S.D.N.Y. 2005).

[222] Graham C. Zorn, Casey T. Clausen, Eric L. Klein, *Going Backward? Environmental Regulation Through Tort Litigation*, 33 Nat. Res. & Env. 22, 23 (Spring 2019)

[223] *See* Usery v. Turner Elkhorn Mining Co., 428 U.S. 1, 28-31 (1976).

with various disclaimers that is ultimately approved by the FDA.[224] When generic manufacturers produce the same medication, they are legally obligated to include the same FDA-approved disclaimer.[225] Unlike market share liability which spreads liability among a number of companies, innovator liability makes a single brand-name pharmaceutical company liable for harm arising from a larger number of generic-medication manufacturers. However, it may nonetheless be seen as an offshoot of market-share liability because it shares an underlying approach—predicating liability on a defendant's conduct combined with harm to a plaintiff, even when there is no underlying connection directly between the plaintiff and the defendant.[226] Based on this relationship, scholar Lars Noah has suggested that "market shift liability" might be a more accurate label that "aims to isolate the extension of financial responsibility to the customers of [the defendants'] competitors."[227]

The Alabama Supreme Court was the first state supreme court to apply the doctrine in *Wyeth, Inc. v. Weeks*.[228] The court denied that it was creating a new tort, but wrote instead that "[t]he unique relationship between brand-name and generic drugs as a result of federal law and FDA regulations, combined with the learned-intermediary doctrine and the fact that representations regarding prescription drugs are made not to the plaintiff but to a

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[224] *See* Allen Rostron, *Prescription for Fairness: A New Approach to Tort Liability of Brand–Name and Generic Drug Manufacturers*, 60 Duke L.J. 1123, 1176 (2011).

[225] In re: Zantac (Ranitidine) Products Liab. Litig., 546 F. Supp. 3d 1192, 1210–11 (S.D. Fla. 2021) ("The link is established because of the federal regulations that require a generic product's label to match the label of the brand-name product, which arises from the brand manufacturer's labeling decisions.").

[226] Holding the innovating company liable for harm caused by ingestion of the generic pharmaceutical can be seen either as jettisoning the causation element or the duty element of negligence claims. *See* Jenny Ange, *Am I My Competitor's Keeper? Innovator Liability in the Fifty States*, 21 COLUM. SCI. & TECH. L. REV. 1, 30 (2019) (explaining that "[u]nder traditional tort principles, foreseeability is the touchstone of proximate cause," but that "some courts have ruled that foreseeability is a matter of duty and so judges instead of fact-finders should make the categorical determination of whether injury to a generic consumer is foreseeable"). Regardless of how they choose to label it, however, courts upholding innovator liability are relaxing the required connection between the defendant's harm and the plaintiff's injury, stretching liability beyond the foreseeable consequences of the defendant's action.

[227] Noah, *supra* note 19, at *2.

[228] Wyeth, Inc. v. Weeks, 159 So. 3d 649, 677 (Ala. 2014).

third party, create the sui generis context" for pharmaceuticals.[229] The court emphasized that the harm was caused by the defendant's statements about the product, not an inherent defect in the product itself:

> [T]he fraud or misrepresentation claim that may be brought under Alabama law against a drug manufacturer based on statements it made in connection with the manufacture of a brand-name prescription drug by a plaintiff claiming physical injury caused by a generic drug manufactured by a different company is premised upon liability not as a result of a defect in the product itself but as a result of statements made by the brand-name manufacturer that Congress, through the FDA, has mandated be the same on the generic version of the brand-name drug.[230]

Even with these caveats, the Alabama legislature concluded that jettisoning causation was a step too far. The case was legislatively superseded the very next year, with the legislature requiring that in products liability cases "the plaintiff must prove, among other elements, that the defendant designed, manufactured, sold, or leased the particular product the use of which is alleged to have caused the injury on which the claim is based, and not a similar or equivalent product," and that "[d]esigners, manufacturers, sellers, or lessors of products not identified as having been used, ingested, or encountered by an allegedly injured party may not be held liable for any alleged injury."[231]

Innovator liability found more fertile ground in California. In 2017, the California Supreme Court adopted the doctrine in a case alleging that the asthma medicine Brethine, which was sometimes prescribed "off label" to protect against preterm labor, "posed a serious risk to fetal brain development."[232] The plaintiffs' mother was prescribed a generic form of the drug, which was "required to follow the brand-name manufacturer's label to the letter"—a label

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[229] *Id.*

[230] *Id.*

[231] ALA. CODE §6-5-530.

[232] T.H. v. Novartis Pharm. Corp., 407 P.3d 18, 22 (Cal. 2017)

that did not warn about the risk to fetal brain development.[233] This raised two possible ruptures in the chain of causation—not only did the patient take the generic form of the drug not manufactured by the defendant, but the defendant had actually sold its intellectual property rights to the brand-name drug more than six years earlier. Nonetheless, the California Supreme Court held that the brand-name manufacturer could be held liable, concluding that "brand-name drug manufacturers have a duty to use ordinary care in warning about the safety risks of their drugs, regardless of whether the injured party (in reliance on the brand-name manufacturer's warning) was dispensed the brand-name or generic version of the drug," and also that "a brand-name manufacturer's sale of the rights to a drug does not, as a matter of law, terminate its liability for injuries foreseeably and proximately caused by deficiencies present in the warning label prior to the sale."[234]

Massachusetts adopted liability "in a narrower fashion."[235] In *Rafferty v. Merck & Co.*, the Massachusetts Supreme Court expressed concern that "imposing on brand-name manufacturers a duty to warn generic drug consumers would add to the manufacturer's costs," and thus stifle research and development.[236] The court explained that such liability would come at a difficult time for the brand-name manufacturer, as "costs would not be incurred until after the brand-name manufacturer's patent monopoly expires and generic competitors enter the market, at which point the brand-name manufacturer will have suffered a precipitous decline in sales of its product."[237] Once generic pharmaceutical products become available, they "command approximately ninety per cent of the market."[238] Given these incentives, the court therefore drew a line between innovator liability for ordinary negligence, which it disclaimed, and innovator liability for gross negligence or recklessness, which it allowed. The court stated that "we conclude as a matter of public policy that allowing a generic drug consumer to bring a general negligence

[233] *Id.*

[234] *Id.* at 47-48.

[235] In re: Zantac (Ranitidine) Products Liab. Litig., 546 F. Supp. 3d 1192, 1209 (S.D. Fla. 2021)

[236] Rafferty v. Merck & Co., Inc., 92 N.E.3d 1205, 1215 (Mass. 2018)

[237] *Id.* at 1216.

[238] *Id.*

claim for failure to warn against a brand-name manufacturer poses too great a risk of chilling drug innovation," but that "we also conclude that public policy is not served if generic drug consumers have no remedy for the failure of a brand-name manufacturer to warn in cases where such failure exceeds ordinary negligence, and rises to the level of recklessness."[239] The court explained that under this narrowed version of innovator liability, "a brand-name manufacturer that intentionally fails to update the label on its drug to warn of an unreasonable risk of death or grave bodily injury, where the manufacturer knows of this risk or knows of facts that would disclose this risk to any reasonable person, will be held responsible for the resulting harm."[240]

C. Causation's Constitutional Protection

Does causation fall within the ambit of the Due Process Clause's constitutional protection?[241] Based on the Supreme Court's articulation of due process its punitive damages and personal jurisdiction cases, the answer is likely to be a qualified "yes." In these areas, the Court has identified a nexus of interests that include fair warning of potential liability, a strong connection between the defendant's conduct, the plaintiff's harm, and the state's interest, and a vision of horizontal federalism that places real limits on states' ability to judicially regulate extraterritorial conduct. Each of these elements comes into play when causation standards are relaxed.

First, the emphasis on notice in punitive damages cases could inform whether defendants in a market-share liability case had fair warning of potential liability for products they may not have manufactured. In *BMW v. Gore*, the Court emphasized that

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[239] Rafferty v. Merck & Co., Inc., 92 N.E.3d 1205, 1219 (Mass. 2018)

[240] *Id.*

[241] At least one cert petition in the modern due process era has argued in favor of due process protection for causation. *See* Petition for a Writ of Certiorari, at 27-31, in *Am. Cyanamid Co. v. Gibson*, 135 S. Ct. 2311 (No. 14-849), 2015 WL 241883 (asserting that "[l]iability wholly untethered from fault is . . . not merely a possibility in the lead pigment context, but a certainty" and arguing that such liability would violate both the Due Process Clause and the Takings Clause). The Supreme Court ultimately denied certiorari in that case. However, the case did not raise the lack of exculpation found in *Rexall*—instead, the cert petition acknowledged that "[m]anufacturers could exculpate themselves if they present evidence establishing that they could not reasonably have made the actual white lead carbonate the plaintiff ingested." *Id.* at *7.

"[e]lementary notions of fairness enshrined in our constitutional jurisprudence dictate that a person receive fair notice not only of the conduct that will subject him to punishment, but also of the severity of the penalty that a State may impose."[242] This principle is likely to be particularly relevant in cases where market share is calculated on a national rather than local basis (as in Wisconsin), or where defendants are not allowed to exculpate themselves (as in New York).[243] For innovator liability, brand-name manufacturers could reasonably argue they lack fair notice that they could be held liable for injuries caused by generic versions of their drugs, especially after their patent has expired and they no longer profit from the drug.

Second, the "relatedness" requirement in personal jurisdiction cases could logically be imported in analyzing the relationship between a defendant's participation in the market and the harm suffered by the plaintiff. In *Bristol-Myers Squibb*, the Court emphasized the need for "a connection between the forum and the specific claims at issue."[244] If such a connection is needed merely for jurisdiction, it is difficult to see how such a standard would not be required for liability itself. This could pose challenges for both market-share liability (where the connection is based on aggregate market activity rather than specific causation) and innovator liability (where the connection is based on the development of the original drug rather than the specific product that caused harm). The standard might be satisfied in the "evidential grouping" type of market share liability identified by Professor Geistfeld, where each defendant could have contributed to the plaintiff's harm.[245] But where causation is missing entirely, the relationship between the defendant and the plaintiff may be so remote as to violate due process.[246]

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[242] BMW of N.A., Inc. v. Gore, 517 U.S. 559, 574 (1996).

[243] *See supra* Part III.B.

[244] Bristol-Myers Squibb Co. v. Super. Ct. of California, San Francisco Cnty., 582 U.S. 255, 265 (2017).

[245] Geistfeld, *supra* note 207, at 473.

[246] When liability is based on market participation without proof of harm caused by that participation, it begins to look more like a tax. *See, e.g.*, George L. Priest, *Market Share Liability in Personal Injury and Public Nuisance Litigation: An Economic Analysis*, 18 S. CT. ECON. REV. 109, 131 (2010) ("At heart, the idea of passing along injury costs transforms market share liability into a form of tax.").

Third, the consideration of horizontal federalism could help address concerns about one state's market-share liability doctrine impacting manufacturers' behavior in other states. The Supreme Court in *BMW v. Gore* cautioned against allowing one state to attempt to impose its own policy choice on other states by basing liability on the defendant's nationwide activities.[247] The same federalism interest is at play when market-share liability schemes effectively regulate national markets.[248] It would also be a particularly acute concern for states like Wisconsin that base market-share liability on the national market.[249]

These concerns for horizontal federalism would also apply to innovator liability, which might be viewed as allowing states to regulate the national pharmaceutical market in ways that conflict with the regulatory choices of other states.[250] Further, concerns of vertical federalism would also arise to the extent that federal regulation controls pharmaceutical product labeling.[251] In both cases, the state policy could overstep and impinge on the regulatory interests of either co-equal sovereigns (in the case of other states) or supreme one (in the case of the federal government.

The Supreme Court's emphasis on historical practice in cases like *Mallory v. Norfolk Southern Railway Co.* might also be relevant.[252] Unlike consent-based jurisdiction, which has a long historical pedigree, market-share and innovator liability are relatively recent innovations in tort law. The lack of historical precedent for these doctrines might make the Court more skeptical of their constitutionality under a due process analysis.

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[247] BMW of N.A., Inc. v. Gore, 517 U.S. 559, 564-65 (1996)

[248] Scholars have noted that the roles of sovereign and party interests are common to both personal jurisdiction and choice of law. *See, e.g.*, Joseph William Singer, *Hobbes & Hanging: Personal Jurisdiction v. Choice of Law*, 64 ARIZ. L. REV. 809, 851–52 (2022) (explaining that "[r]ights that concern relations between persons are necessarily relational," and that "[d]efendants may have rights to be protected from being forced to litigate in a distant forum with which they have no connection, but plaintiffs have a Hobbesian right to the protection of their home state laws.").

[249] *See supra* Part III.B.

[250] *See supra* Part V.B.

[251] *Id.*

[252] *See supra* Part IV.B.

Finally, the substantive due process protection against arbitrary deprivations of property, which underlies much of the Court's punitive damages jurisprudence, may also require a causal connection. Defendants could reasonably argue that holding them liable without proof of causation, and based solely on their market share, constitutes an arbitrary deprivation of property. This argument is particularly strong in cases where defendants are not permitted to exculpate themselves by proving they did not cause the plaintiff's injury.

Market-share liability and innovator liability serve important policy goals of compensating victims and deterring harmful conduct. Nonetheless, the Court's due process jurisprudence over the last thirty-five years makes clear that these goals are not enough to satisfy the Constitution's guarantee of due process, and it suggests that these doctrines would face significant constitutional hurdles.

D. Market Share as a Limiting Factor

Is there a role for market-share analysis under the Supreme Court's due process analysis? We have argued above that market-share liability and innovator liability would likely be vulnerable to a due process challenge when evaluated under the Court's modern framework that protects a tight-knit nexus of interests.[253] Nonetheless, there is likely still a role for market-share analysis to play—but as a limiting factor for liability, rather than as a way of expanding liability. In some cases, the Court's due process framework may even require a market-share analysis or similar limiting factor in the face of joint and several liability in certain cases.

Market share as a limiting factor is likely to be most salient in large-scale sovereign litigation. Individual plaintiffs have long struggled to hold defendants liable for mass harms—this, of course, was part of the impetus for developing market-share liability in the first place. But as discussed above, many courts never relaxed tort liability to the extent that hurdles of jurisdiction, causation, and similar doctrines could be overcome. In recent decades, efforts to hold defendants accountable has therefore sparked interest in

[253] *See supra* Part V.A and B.

litigation by cities, counties, or states seeking compensation for their own harm, often under a "public nuisance" theory.[254]

Thus, for example, a case out of California was brought on behalf of the residents of "two cities, seven counties, and one city and county," against three manufacturers of white lead pigments for paint, alleging that both contributed to "the public nuisance created by interior residential lead paint."[255] In spite of the passage of time, the court concluded that the defendants pre-1950 promotions of lead paint "were not too remote to be considered a legal cause of the current hazard," even though the court recognized that "the actions of others in response to those promotions and the passive neglect of owners also played a causal role" in creating the current conditions, finding that "[t]he connection between the long-ago promotions and the current presence of lead paint was not particularly attenuated."[256]

After concluding that causation was satisfied, however, the court declined to apportion responsibility. Instead, it held that "[t]he trial court could have reasonably concluded that defendants did not prove that the harm was capable of apportionment," and cited to the *Restatement of Torts* for the proposition that "where the harm is not capable of apportionment, each contributor is liable for the entire harm."[257] This left three corporations, none of whom had

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[254] *See* Leslie Kendrick, *The Perils and Promise of Public Nuisance*, 132 YALE L.J. 702, 706–07 (2023) ("The plaintiff state, local, and tribal governments claim that the opioid products made or distributed by the defendants are a public nuisance under relevant state law . . . by jeopardizing public health and welfare."); Albert C. Lin, *Dodging Public Nuisance*, 11 UC IRVINE L. REV. 489, 491 (2020) (". Public nuisance claims against fossil fuel companies, drug companies, lead paint manufacturers, and other industries have raised the specter of onerous abatement orders and damage awards."); Steven Czak, *Public Nuisance Claims After* ConAgra, 88 FORDHAM L. REV. 1061, 1097 (2019) ("Time-barred from products liability or negligence claims, numerous states have employed the public nuisance doctrine in attempts to hold lead paint companies liable for the persisting problem.").

[255] People v. ConAgra Grocery Products Co., 227 Cal. Rptr. 3d 499, 514 & n.1 (Cal. App. 6th Dist. 2017) (noting that the case was brought on behalf of residents of Santa Clara County, San Francisco City and County, Alameda County, Los Angeles County, Monterey County, City of Oakland, City of San Diego, San Mateo County, Solano County, and Ventura County).

[256] People v. ConAgra Grocery Products Co., 17 Cal.App.5th 51, 104 (Cal. App. 6 Dist. 2017).

[257] People v. ConAgra Grocery Prod. Co., 227 Cal. Rptr. 3d 499, 549 (Cal. App. 6th Dist. 2017).

produced the pigments for over forty years, responsible for the full abatement costs.

The defendants made a due process argument, asserting that "due process requires that their liability for remediation be proportionate to their individual contributions."[258] The court disagreed, specifically calling out the defendants' reliance on punitive damages jurisprudence as irrelevant, since "defendants are not being penalized or required to pay damages of any kind. They are being required simply to clean up the hazardous conditions that they assisted in creating."[259] Of course, the cost to remediate residential lead paint throughout the state (estimated at $4 billion dollars)[260] would be prohibitively expensive for even the wealthiest of corporations—if it weren't so expensive, it would be easier for homeowners, landlords, and even the state to take care of. Further, the court had acknowledged that the defendant corporations had contributed to only a fraction of the lead problems still existing in the twenty-first century.[261]

Professor Richard Ausness has examined large-scale sovereign litigation around the opioid crisis, and has argued that market-share liability can offer a mechanism to limit joint and several liability when multiple parties contributed to the harm. He explained that "market share liability in *Sindell* was intended to protect the interests of plaintiffs who would otherwise not be compensated because of their failure to prove specific causation." By contrast, he argued, "[i]n opioid litigation, market share liability is intended to protect the interests of the defendant drug companies and by extension, the interests of consumers of prescription painkillers and other drugs."[262]

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[258] *Id.* at 543.

[259] *Id.* at 559.

[260] California taxpayers could have to take on cost of removing lead paint, CBS News, June 26, 2018, at https://www.cbsnews.com/news/california-taxpayers-could-have-to-take-on-cost-of-removing-lead-paint/ ("It would cost taxpayers an estimated $4 billion and excuse the paint companies from liability imposed in the suit.").

[261] People v. ConAgra Grocery Products Co., 17 Cal.App.5th 51, 104 (Cal. App. 6 Dist. 2017).

[262] Ausness, *supra* note 2, at 567.

Professor Ausness grounds this argument in the theories of corrective justice, retributive justice, and deterrence.[263] All of these have merit. However, we would go a step further and argue that the California court was too quick to reject the defendants' due process argument.

The relevant factor under the Court's jurisprudence isn't whether the judgment is intended to be punitive or even whether it is a monetary judgment at all. Instead, the issue is whether judgment fairly protects the interests at the heart of the due process nexus.[264] And on that metric, the decision is vulnerable. From the punitive damages cases, we know that due process requires that the defendant have fair notice and protection against arbitrary deprivation of property; liability for $4 billion dollars in damages, seven decades after the relevant conduct at issue, with sole responsibility to remediate a condition caused by numerous other entities almost certainly pushes the judgment into the territory of arbitrariness.

VI. CONCLUSION

When Rexall Drug Company petitioned the Supreme Court in 1989, arguing that market-share liability violated due process, the Court lacked a modern cohesive framework for evaluating such claims. In the intervening years, however, the Court has developed a robust due process jurisprudence that offers valuable insights into how it might approach similar challenges today. Through our examination of the Court's decisions in punitive damages and personal jurisdiction cases, we have identified a consistent nexus of interests that the Court has sought to protect. This nexus balances individual rights, state interests, and federalism concerns, emphasizing the need for fair notice, a close relationship between conduct and consequences, and respect for the sovereignty of co-equal states.

Applying this framework to market-share liability and innovator liability reveals significant constitutional vulnerabilities in

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[263] *Id.* at 569-72.

[264] *See, e.g.*, Megan M. La Belle, *Personal Jurisdiction and the Fairness Factor(s)*, 72 EMORY L.J. 781, 853–54 (2023) (explaining that "[w]hen a doctrine . . . is governed by a standard such as 'due process,' rather than a bright-line rule, it is important that courts articulate a methodology that will produce a body of law that is more determinate and predictable," while simultaneously leaving room for examination of individual facts and context).

these doctrines. The Court's insistence on a close relationship between the defendant's conduct and the plaintiff's harm, as well as its concern for fair notice and protection against arbitrary deprivations of property, suggest that these doctrines may struggle to withstand constitutional scrutiny. However, our analysis also suggests that market-share concepts may still have a role to play within the bounds of due process—not as a means of expanding liability, but as a limiting factor. This approach could be particularly relevant in large-scale sovereign litigation, where traditional joint and several liability might lead to results that strain the bounds of due process.

As courts continue to grapple with complex cases involving multiple actors and attenuated chains of causation, the framework we have identified provides a helpful tool for navigating the constitutional dimensions of tort law. It suggests that while courts and legislatures have some flexibility in crafting remedies for mass harms, there are constitutional limits on how far they can stray from traditional causation requirements.

Ultimately, our analysis suggests that Rexall's due process argument, if presented to the Court today, would likely find a more receptive audience. The Court's jurisprudence over the past three decades has created a coherent framework that places real constitutional weight on the causal nexus between a defendant's conduct and a plaintiff's harm. As courts continue to innovate in response to complex, large-scale harms, they should ensure that doctrinal changes protect the due process nexus of interests.