Buffalo Law Review

Volume 56
Number 4 *Essay Collection: Classcrits*

Article 8

12-1-2008

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Martha T. McCluskey
University at Buffalo School of Law, mcclusk@buffalo.edu

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MARTHA T. MCCLUSKEY†

As a step toward the goal of constructing a story of class in constitutional law, this Essay explores a recent Supreme Court decision about due process: *State Farm Mutual Automobile Insurance Co. v. Campbell.*[1] In *State Farm*, the protection of wealthy business owners is not simply one substantive goal among many to be debated in a pluralist state and society. Instead, the Court implicitly equates protection of upper-class interests with fundamental fairness, *essential* to neutral legal process. Correspondingly, this case constructs protection of opposing class interests as violations of fundamental fairness, *impossible* for neutral legal process.

I. POST-*LOCHNER* PROCESS AS ECONOMIC EQUALITY

On the surface, modern U.S. constitutional law generally appears to abstain from taking sides in conflicts of economic class. In the conventional wisdom, since the *Lochner* era of the early twentieth century,[2] the Constitution treats questions of economic inequality as matters of policy largely immune from scrutiny by the judicial branch.[3] In the standard theory, the quintessential

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† William J. Magavern Faculty Scholar and Professor, State University of New York at Buffalo.

1. 538 U.S. 408 (2003).

2. The case for which the era is named, *Lochner v. New York*, 198 U.S. 45 (1905), struck down a state law regulating maximum hours for certain workers as a violation of Fourteenth Amendment due process rights.

3. A typical casebook summary explains:

> The Court has made it clear that economic regulations—laws regulating business and employment practices—will be upheld

function of the political process is to balance or reconcile competing economic interests.[4] The prevailing assumption is that economic interests are highly amenable to pluralistic bargaining and majority rule, since economic losers in one deal can readily regroup and re-negotiate to defend their interests another day or in another deal. In contrast, the conventional constitutional theory holds that the judicial branch has particular power to oversee legislative or executive branch decisions involving issues of race or gender inequality because a history of racial and gender-based prejudice, barriers, and insularity renders the political process suspect.[5] This theory assumes that race and gender interests can involve comprehensive and persistent class or caste identity, but that economic interests are distinctively narrow, transitory, fluid, and context-specific.[6] In this view, the Federal Constitution appropriately restricts economic equality rights to the limited protections of process, not substance.

Mainstream jurisprudence holds that this process-based approach to economic rights, whatever its occasional

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> when challenged under the Due Process Clause so long as they are rationally related to a legitimate government purpose . . . . The reality is that virtually any law can meet this very deferential requirement.

ERWIN CHEMERINSKY, CONSTITUTIONAL LAW 545 (2d ed. 2005).

4. *See, e.g.*, Ferguson v. Skrupa, 372 U.S. 726, 729-31 (1963) ("Under the system of government created by our Constitution, it is up to legislatures, not courts, to decide on the wisdom and utility of legislation. There was a time when the Due Process Clause was used by this Court to strike down laws which were thought unreasonable, that is, unwise or incompatible with some particular economic or social philosophy . . . . It is now settled that States 'have power to legislate against what are found to be injurious practices in their internal commercial and business affairs, so long as their laws do not run afoul of some specific federal constitutional prohibition, or some valid federal law'" (quoting Lincoln Fed. Labor Union v. Nw. Iron & Metal Co., 335 U.S. 525, 536 (1949))).

5. For the influential footnote articulating this exception to the rule of deference to legislative policy judgments, see United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938).

6. *See* Arthur Allen Leff, *Economic Analysis of Law: Some Realism About Nominalism*, 60 VA. L. REV. 451, 472 (1974) (criticizing Richard A. Posner's casebook, ECONOMIC ANALYSIS OF LAW (1973), for defining economic interests in narrow categories like "landowner, pedestrian, and corporate lawyer" rather than, for instance, "upper middle class").

unfortunate or unwise effects, remains a relatively neutral and sound resolution of the class bias that plagued the constitutional doctrine of the early twentieth century *Lochner* era. The conventional view explains the New Deal move from a substantive to a procedural approach to class as a *fair* deal that ensures the Constitution will favor the substantive interests of neither capital nor workers, rich nor poor, business nor consumers. As Justice O'Connor noted, echoing Justice Holmes' dissent in *Lochner*, "[t]he Constitution does not require the states to subscribe to a particular economic theory."[7]

One problem with this mainstream view is that the line between legal substance and process is slippery and strategic.[8] Many constitutional commentators concerned about economic inequality have lamented the lack of fundamental substantive rights to basic income or basic rights for workers.[9] Nonetheless, they typically acknowledge that even this limited vision of substantive constitutional protection for economic equality remains far "off the table" and even "off the wall" of mainstream constitutional law.[10]

But the real action on issues of class in constitutional law may be taking place under the rubric of process. That action has two prongs. First, class inequality can be constitutionalized by casting substantive protections for wealthy capital owners' interests in a procedural guise as narrow technicalities or as neutral formal principles. Second, class inequality can be constitutionalized by

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7. *See* Browning-Ferris Indus. of Vt., Inc. v. Kelco Disposal, Inc., 492 U.S. 257, 300 (1989) (O'Connor, J., concurring in part and dissenting in part) (quoting CTS Corp. v. Dynamics Corp. of Am., 481 U.S. 69, 92 (1987)).

8. *See* Martha T. McCluskey, *The Substantive Politics of Formal Corporate Power*, 53 BUFF. L. REV. 1453, 1464-67 (2006).

9. *See, e.g.*, CASS R. SUNSTEIN, THE SECOND BILL OF RIGHTS: FDR'S UNFINISHED REVOLUTION AND WHY WE NEED IT MORE THAN EVER 10-13 (2004) (explaining and developing President Franklin D. Roosevelt's 1944 State of the Union speech proposing a constitutional commitment to a living wage, decent housing, medical care, education, and income during unemployment, disability and retirement).

10. William E. Forbath, *Constitutional Welfare Rights: A History, Critique and Reconstruction*, 69 FORDHAM L. REV. 1821, 1824 (2001) (quoting J.M. Balkin, *Agreements With Hell and Other Objects of Our Faith*, 65 FORDHAM L. REV. 1703, 1733 (1997)).

recasting basic procedural protections for the non-wealthy into illegitimate claims to substantive rights.

II. REVIVING *LOCHNER'S* SUBSTANTIVE PROTECTION FOR ECONOMIC *IN*EQUALITY

In its 2003 due process ruling in *State Farm*, the U.S. Supreme Court makes both of these slippery moves between substance and process to produce what corporate lawyers billed as "a big win for corporate America."[11] First, *State Farm* reinforces and legitimizes a zone of substantive protection from political and legal challenge for multistate and multinational corporations. In contrast to the *Lochner* era, which grounded protection for business interests in substantive due process rights, *State Farm* attempts to defend privileged constitutional status for organized capital largely in terms of procedural neutrality. Second, *State Farm* turns the mere *process* of engaging the political and legal system in opposition to capital interests into arbitrary substantive privilege.

I have discussed *State Farm* in another article as an example of the problem of how corporations distort the civil justice system.[12] That article was a response to Marc Galanter's analysis of the numerous ways the U.S. civil justice systematically privileges large corporations over real human beings.[13] I argued that the skewing of the civil justice system toward corporate "artificial persons" and against unorganized natural persons is not simply an unfortunate but necessary and natural byproduct of a modern legal system characterized by complex, formal rules and institutions rather than informal personal interactions.[14] Instead, corporate power in the courts should

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11. Edward Walsh & Brooke A. Masters, *Justices Overturn Big Jury Award*, WASH. POST, Apr. 8, 2003, at E1 (reporting the views of legal experts and corporate defense attorneys); *see also* JEFFREY W. STEMPEL, LITIGATION ROAD: THE STORY OF CAMPBELL V. STATE FARM 503 (2008) (noting that the Skadden, Arps law firm quoted this comment on its web site as part of the biographical highlights for a partner who represented State Farm).

12. McCluskey, *supra* note 8, at 1489.

13. Marc Galanter, *Planet of the APs: Reflections on the Scale of Law and its Users*, 53 BUFF. L. REV. 1369 (2006).

14. McCluskey, *supra* note 8, at 1456.

be understood as the product of a series of specific, contingent, and contested substantive legal rules that helped privilege large corporations and their wealthy capital owners at the expense of competing economic interests, organized or not.[15] That article ended by explaining how *State Farm* continues this trend: it confers particular, and particularly problematic, substantive rights on large corporate entities that further disadvantage "natural persons" in the civil justice system and beyond.[16]

This Essay revisits *State Farm* to analyze its implications for understanding the treatment of *class* in constitutional doctrine. In *State Farm*, the Supreme Court overturned a punitive damage award against a corporate defendant,[17] further developing a new constitutional doctrine limiting punitive damage awards that greatly exceed compensatory damages.[18] On the surface, the case seems to present a fairly narrow doctrinal issue generally treated as peripheral to the "canon" of basic constitutional law courses, and also as marginal to general discussions of constitutional economic equality rights.[19] But beneath the narrow doctrinal issue lie assumptions about economic class that have broader implications for the understanding of the Fourteenth Amendment and for constitutional law more generally.

In the case leading to *State Farm*, Utah's highest court had affirmed the state trial court's findings that the State Farm Mutual Automobile Insurance Company had systematically, deliberately, and even maliciously violated consumers' contractual rights in order to increase its profits

15. *See id.* at 1475-89.

16. *Id.* at 1489-98.

17. 538 U.S. 408, 429 (2003).

18. *See* BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 575 (1996) (ruling that due process limits punitive damage awards that are "grossly excessive," to be measured by the reprehensibility of the conduct, the disparity between the punitive damage amounts and amount of harm to the individual victim, and the difference between the punitive damages and civil penalties for comparable misconduct).

19. For an insightful discussion of this emerging Supreme Court doctrine concerning punitive damages, see Anthony J. Sebok, *Punitive Damages: From Myth to Theory*, 92 IOWA L. REV. 957 (2007). For an extensive discussion of the facts and litigation in the *State Farm* case, see STEMPEL, *supra* note 11.

at the expense of auto insurance policyholders and their accident victims.[20] One of the practices at issue involved breach of State Farm's duty to settle in a third-party auto accident case brought against a policyholder, Mr. Campbell. Mr. Campbell's car insurance policy had a liability limit of $25,000 per person injured, capped at $50,000 per accident, and the accident at issue left one victim dead and a second disabled.[21] The attorneys representing the victims made repeated attempts to settle the case for the policy limits, but State Farm refused, despite strong evidence of liability.[22]

When budget-conscious drivers (such as Mr. Campbell and his wife) buy low-coverage auto liability insurance, the insurance company agrees to provide limited protection against the risk that the driver will be liable for damages in an auto accident.[23] As part of this liability insurance protection, auto insurance companies assume responsibility for defending the insured driver in the event of litigation over liability (fault) for an auto accident. Additionally, as part of that contractual duty to defend an insured driver, the insurance company has a legal obligation to settle the accident liability claim brought against the policyholding driver if that settlement would be in the insured driver's interest.[24] Lawyers representing auto accident victims frequently seek to settle accident liability cases before trial for the amount of the driver's insurance policy limit in order to avoid the costs and uncertainty of litigation and because of concern that any judgment awarded after trial against the driver exceeding the limits of the liability insurance policy will be difficult or impossible to collect.[25]

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20. Campbell v. State Farm Mut. Auto. Ins. Co., 65 P.3d 1134, 1148, 1172 (Utah 2001), *rev'd*, 538 U.S. 408 (2003).

21. *Id.* at 1141 n.2.

22. *Id.* at 1141.

23. *See* Tom Baker, *Liability Insurance Conflicts and Defense Lawyers: From Triangles to Tetrahedrons*, 4 CONN. INS. L.J. 101, 106 (1997-98) (quoting and explaining language in the standard insurance contract).

24. *See, e.g.*, Robert E. Keeton, *Liability Insurance and Responsibility for Settlement*, 67 HARV. L. REV. 1136 (1954).

25. *See* Tom Baker, *Blood Money, New Money, and the Moral Economy of Tort Law in Action*, 35 LAW & SOC'Y REV. 275, 289-90 (2001) (discussing findings from a study based on interviews with tort lawyers).

But auto insurers may face incentives to shirk their contractual obligation to accept reasonable settlement offers when they represent drivers whose insurance policies have low insurance coverage limits (such as the Campbells' $50,000 limit per accident). If the auto insurance company calculates the costs and benefits over a large pool of low-coverage policyholders, the insurance company may rationally decide it can profit from refusing settlement offers in litigation over auto accident liability, even when these settlement offers are likely to protect the insured driver from the risk of high damage awards at trial. In some portion of auto accident liability cases, when the question of accident fault goes to trial the liability case against the insured driver will end up being stronger than originally expected. But the driver's low insurance coverage limits will protect the insurance company against this downside risk that the court will award greater damages against a driver than would have been paid under the proposed settlement offer. For the insurance company, the worst that can happen if it refuses to settle the accident liability case is that it will have to pay the small maximum coverage amount that it would have likely paid anyway under the initially proposed settlement. On the other hand, an insurance company can expect that some portion of auto accident claims brought to trial will result in little or no damages awarded against the insured driver, and in those cases the insurance company can save money by refusing settlements that seem reasonable prior to the trial.

For insurance policyholders, however, this refusal to settle substantially erodes their contractual right to insurance protection: it significantly increases the insured's (and possibly the insured's accident victim's) exposure to the risk of large, unpredictable losses. In Mr. Campbell's case, for instance, the verdict from the liability trial was five times the policy limit, and the lawyer for State Farm—representing the insurer and the insured—suggested selling the Campbell's home to cover the cost of the award.[26] Reviewing the trial court decision, the Utah Supreme Court concluded that "the Campbells lived for nearly eighteen months under constant threat of losing everything they had

26. *Campbell*, 65 P.3d at 1142.

worked for their whole lives. This threat led to sleeplessness, heartache, and stress in the Campbells' marriage and family relationships."[27] Further, the trial court found that State Farm's deceitful conduct toward the Campbells was part of a company-wide practice that particularly targeted vulnerable groups of policyholders (like low-income racial and ethnic minorities, women, and the elderly) who would be unlikely to take legal action challenging insurers' breach of contract.[28]

Utah, like some other states, has adopted particular substantive legal rules to address the problem of these economic incentives for insurance companies to violate insureds' contractual rights: it gives liability insurance policyholders the right to sue insurance companies in tort for fraud and bad faith breach of contract.[29] The policyholders here were able to bring a successful state tort action, and the Utah Supreme Court upheld a jury verdict awarding $145 million in punitive damages on top of $1 million in compensatory damages, with ninety percent of the damages going to victims of Mr. Campbell's auto accident.[30] The state court justified the high punitive damage award as reasonable deterrence, given the nature and impact of the wrongdoing and the risk that the wrongdoing would continue.[31]

Why did the U.S. Supreme Court not simply defer to this result on the ground that state governments have the right to adopt and enforce substantive rules protecting their own views of the interests of consumers over the possibly competing interests of corporate defendants? After all, post-*Lochner* jurisprudence claims to protect such economic and political judgments from judicial interference. Nonetheless, the Court turned this substantive policy choice into a problem of fundamental constitutional rights to due process. The Court's reasoning raises four interrelated

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27. *Id.* at 1149.

28. *Id.* at 1148.

29. *See* Campbell v. State Farm Mut. Auto. Ins. Co., 840 P.2d 130 (Utah Ct. App. 1992); *see also* STEMPEL, *supra* note 11, at 218-22 (discussing Utah's bad faith case law and the trial court's interpretation of the doctrine).

30. *Campbell*, 65 P.3d at 1172.

31. *Id.* at 1147-50, 1154-58.

procedural problems that, on closer examination, rest on substantive policy judgments about economic class.

A. *Class and Arbitrary Law Enforcement*

First, according to the Court's majority opinion, punitive damages that greatly outstrip compensatory damages risk depriving business owners of property through arbitrary coercion, rather than law.[32] The Court stressed the danger of allowing broad state discretion in using punitive damages to further the goals of deterrence and retribution apart from compensation.[33] The Court reasoned that great discretion and variability in punishment for similar wrongs create opportunities for punishment based on arbitrary, unpredictable whim or bias.[34]

What is the *class* problem with this? In theory, the flexibility and individualized nature of discretionary decision-making can promote or destroy justice, depending on how we view the power relationship involved in one party's exercise of discretionary judgment over another's. If the decisionmaker's power over a subject is viewed as normal, legitimate, and largely benevolent, then discretion will seem likely to ensure fairness because it gives the decisionmaker more power to take into account specific needs and circumstances that might elude more rigid rules. On the other hand, if the decisionmaker's power over another is viewed as aberrant, not fully authoritative, or normally tainted with bias or malice, then sharp restraints on that discretion will seem to promote justice by transferring more power to a decisionmaking entity perceived as more legitimate and trustworthy.

In *State Farm*, the Court discusses the dangers of discretion in punishment by comparing wealthy corporate defendants in civil suits to criminal defendants.[35] But in cases deciding the rights of criminal defendants, who are overwhelmingly non-wealthy (and disproportionately non-

32. State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 417 (2003).

33. *Id.* at 417-18.

34. *Id.*

35. *Id.* at 417.

white), the Court has taken the opposite position about due process and discretion, as Adam Gershowitz has explained.[36] In *McCleskey v. Kemp*,[37] for example, the Court rejected the argument that Georgia's death penalty is racially discriminatory because its discretionary nature leads to disproportionate death sentences for black defendants in cases with white murder victims.[38] In *McCleskey*, the Court worried that a substantive right to judicial protection from racially disparate criminal penalties would undermine the discretion by jurors and prosecutors that it deemed more essential to fundamental fairness.[39] Indeed, *McCleskey* reasoned that preserving state discretion in punishment was so crucial to due process that it should be protected even at the risk of promoting prejudice and arbitrary discrimination.[40] More recently, in *Town of Castle Rock v. Gonzales*,[41] the Supreme Court denied a claim that a local government violated a domestic violence victim's procedural due process rights. In that case, the police had failed to respond to a woman's repeated calls requesting enforcement of a court restraining order against her estranged husband, who kidnapped and then murdered her children.[42] The Court decided that mandatory, individualized court orders directing arrest nonetheless could be appropriately viewed as discretionary by local police.[43] It concluded that constitutional due process principles recognize the public's interest in *maintaining* discretionary law enforcement, and it rejected any individual right to predictable enforcement of court orders protecting against private deprivation of life or liberty.[44]

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36. Adam M. Gershowitz, Note, *The Supreme Court's Backwards Proportionality Jurisprudence: Comparing Judicial Review of Excessive Criminal Punishments and Excessive Punitive Damages Awards*, 86 VA. L. REV. 1249, 1288-1301 (2000).

37. 481 U.S. 279 (1987).

38. *Id.* at 286-97.

39. *Id.* at 296-97, 308-13.

40. *Id.* at 308-11.

41. 545 U.S. 748, 751-54, 768 (2005).

42. *Id.* at 751-54, 768.

43. *See id.* at 760-62.

44. *See id.* at 761-66.

In contrast to those cases, the Court's special scrutiny for the discretion exercised by juries awarding punitive damages against corporate defendants seems to reflect a heightened concern about the basic legitimacy of subjecting large corporations to the control of the state legal process. Although both *Castle Rock* and *McCleskey* involve questions of power over life or death, states' power to impose punitive damages on corporations appears more fundamentally suspect. Perhaps this striking contrast stems from implicit assumptions about entitlement to unchecked power by defendant corporations (as well as from an implicit assumption of disentitlement linked to race and gender disadvantage in the other cases involving criminal defendants and domestic violence victims).

The Court seems to assume that wealthy owners of corporate capital, whose interests are protected by the *State Farm* ruling, must be afforded wide protection from accountability and constraint when it comes to concerns about deterrence of unlawful profit-seeking. The Court treats criminal defendants or victims of domestic violence as normally and naturally (and beneficially) subject to the regulatory authority of criminal juries or police, even though it recognizes that these authorities can be irrational or unwise. But, in the Court's view, the authority of state courts to regulate the organized interests of capital owners appears less normal and natural (and less obviously beneficial).

The contrast between the Court's criticism of discretion in *State Farm* compared to its deference to discretion in the other cases is even more striking considering the potential for checking abuses of discretion in the different cases. In *Castle Rock* and *McCleskey*, the Court reasoned that the problem of improper discretion in law enforcement is best left to state political majorities.[45] In this implicit logic, protection of criminal defendants and domestic violence victims against arbitrary application of law is first and

45. *Id.* at 768-69; *McCleskey*, 481 U.S. at 319. Of course, in *Castle Rock*, the legislature had already acted to constrain the discretion of local law enforcement, but the majority interpreted a statutory "mandate" to instead authorize discretion, reasoning that the language "'shall use every reasonable means to enforce a restraining order' (or even 'shall arrest . . . or . . . seek a warrant')" leaves police broad power to decide how to respond. *Castle Rock*, 545 U.S. at 761-62 (quoting COLO. REV. STAT. §§ 18-6-803.5(3)(a), (b) (2004)).

foremost a matter of contingent political power, not fundamental legal process. In contrast, *State Farm* assumed that large corporations cannot be left to the vagaries of the political process to obtain protection from abuse of discretion in state civil law enforcement.[46] For organized capital (as opposed to individual criminal defendants or domestic violence victims) federal judicial protection must supplement political power. It would be absurd to defend this distinction on the grounds that large, wealthy corporations (and their owners) are more systematically disadvantaged than criminal defendants or domestic violence victims in either the state justice systems or in state politics.[47] As Mark Galanter has extensively shown, corporations have disproportionate power to ensure their interests get attention and weight in both state judicial and political systems.[48]

B. *Class and Fair Notice of Penalties*

Second, *State Farm* identified lack of *notice* as a reason that the discretionary award of corporate punitive damages poses a potential procedural problem.[49] The Court explained that the Constitution requires fair notice not just about what counts as wrongdoing, but also about the severity of penalties for that wrongdoing.[50] Here, the Court is focusing on the harmful *impact* of these damages on business entities, instead of on the questionable intent or rationality of those with discretion to award punitive damages. As the Court explained, "the point of due process . . . is to allow citizens to order their behavior."[51]

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46. State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 417 (2003).

47. *See* STEMPEL, *supra* note 11, at 521 (criticizing the Court's constitutional protection from punitive damages for businesses with "plenty of clout in state legislatures and courts").

48. *See* Galanter, *supra* note 13, at 1376-92 (discussing evidence of corporate power in the civil justice system); *id.* at 1398-99 (discussing evidence of corporate political power).

49. *State Farm*, 538 U.S. at 416-17.

50. *Id.* at 417.

51. *Id.* at 418.

This concern about predictability and order is particularly dubious in the context of punitive damages against large corporate defendants, which are not "citizens" but formal legal entities that can be dismantled, reorganized, and reconstituted. Returning to the comparison with others who may face severe harm from arbitrary exercises of discretion in the justice system, consider the extent to which unpredictable enforcement of "mandatory" court protective orders might cause terror and destruction in the daily lives of victims of domestic violence, or how a discretionary death penalty highly subject to prejudice might affect innocent criminal defendants (or those otherwise deserving of mercy or exoneration), as well as their families and communities.[52] Many of the real human beings facing those threats of potentially arbitrary death will be particularly likely to lack economic, legal, and social resources. In contrast, large and wealthy corporate entities should be particularly able to take rational steps to prevent, mitigate, and hedge against the very small chance of very severe harm from punitive damages. Indeed, insurance company defendants would seem especially capable of orderly planning in the face of such large and variable risks, as that form of risk management is the substantive core of their business. If such large, wealthy companies do not always appear fully competent at managing their own highly variable risks of punitive damages, it might be that their huge reserves of capital sometimes make preventing even large punitive damage awards not worth the trouble to senior management, at least *ex ante*.

Furthermore, in companies with huge financial assets, even quite high unanticipated punitive damage awards may be readily folded into normal operating losses without noticeable disruption. For example, the trial court in *State Farm* found that the company had been prepared to absorb the cost of a previous $100 million punitive damage award for similar conduct without the knowledge (much less major

52. *See, e.g.*, Rachel King & Katherine Norgard, *What About Families? Using the Impact on Death Row Defendants' Family Members as a Mitigating Factor in Death Penalty Sentencing Hearings*, 26 FLA. ST. U. L. REV. 1119, 1126-27, 1138-60, 1172 (1999) (discussing the profound harmful impact of the current unfair death penalty on the families of death row inmates).

disruption) of corporate headquarters.[53] The U.S. Supreme Court dismissed this evidence of a previous damage award, noting that the case ultimately settled for a fraction of the verdict.[54] However, this ultimate result suggests a reason why the highly uncertain risks of high punitive damages may not cause disorder in very wealthy corporate defendants: corporate management may make a rational, orderly business calculation to ignore such risks at the highest levels because (at least *ex ante*) the likely short-term benefits of taking the risks outweigh the very unlikely chance of long-term bad outcomes. Indeed, managers of business defendants may rationally decide that the cheapest way to manage the risk of such very rare, very high punitive damage awards (while maximizing gains from potential and actual wrongdoing) is to litigate after the fact of an award in the expectation of changing the punitive damage rules in their favor.[55] Following that logic, the Court's concern about protecting corporate defendants from unpredictable damage awards is a self-fulfilling prophesy: the due process protection from punitive damages seems necessary to orderly business only because defendant companies appear to have decided to plan their business around constitutional intervention to obtain a different, more profitable legal order.

The real issue underlying the Court's reasoning, therefore, is not the *procedural* problem that highly variable punitive damage awards preclude rational calculation and control, but rather the *substantive* problem of the distributive results from planning for that risk. A system without constitutional protection from highly uncertain costs of occasional punitive damage awards would likely lead corporate managers and investors not to irrational

53. Campbell v. State Farm Mut. Auto. Ins. Co., 65 P.3d 1134, 1147 (Utah 2001), *rev'd*, 538 U.S. 408 (2003).

54. *See State Farm*, 538 U.S. at 427 (finding also that this previous damage award was irrelevant out of state evidence).

55. As one example, in the state litigation of the bad faith tort claim in *State Farm*, the company apparently chose to bear the risk of punitive damages rather than the cost of serious settlement negotiations. *See* STEMPEL, supra note 11, at 220, 516 (stating that State Farm "never offered to settle the Campbell bad faith claim for anything more than payment of the $50,000 policy limits and the excess judgment in the [accident liability] trial").

economic chaos, but to *different* rational economic responses—perhaps managers would raise prices (with the risk of loss in competitive consumer markets), lower investors' profits (with the risk of loss in the competitive capital markets), or strengthen corporate policies constraining illegal behavior (forgoing illegally obtained profits). Even a risk of occasional arbitrarily high punitive damage awards leading to the failure of a particular business entity would not necessarily mean economic disorder for capital owners, given that the existing financial system is arguably ordered around highly speculative investment practices dependent on chance as much as on rational calculation[56]—and in which capital owners may have sufficient market and political power to secure government bailouts to cover the worst speculative losses.[57] Reading between the lines of the Court's reasoning, the risk of highly variable damages for similar corporate injuries is not really a problem of procedural predictability or notice, but of substantive class power.

The Court hinted its implicit substantive class agenda when it rejected the theory that extreme wealth reduces the potential for harmful disorder from very high punitive damages. In that theory, punitive damages more effectively deter corporate wrongdoing when tied to the wealth of a corporation (rather than to the amount of compensatory damages). That is because the presence or absence of extensive capital assets routinely and rationally affects economic calculations about the costs and benefits of using wrongful behavior to pursue potentially high long-term rewards, as well as calculations about the costs of defending

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56. *See, e.g.*, SUSAN STRANGE, CASINO CAPITALISM (1997) (characterizing the global economic "order" as a casino, produced by government policies aimed at promoting volatility and disorder).

57. *See, e.g.*, Edmund L. Andrews et al., *Fed in an $85 Billion Rescue of an Insurer Near Failure*, N.Y. TIMES, Sept. 17, 2008, at A1; Andrew Ross Sorkin & Mary Williams Walsh, Giant *Insurer May Get More in U.S. Bailout*, N.Y. TIMES, Nov. 10, 2008, at A1 (explaining the original bailout plan for AIG has been increased to a total expected $150 billion from taxpayers); *Bailing Away* (Editorial), N.Y. TIMES, Nov. 30, 2008, at B7 (criticizing lack of conditions on the federal government's commitment of $1 trillion to bail out Citigroup, following "nearly $8 trillion pledged in loans, guarantees, and investments to financial firms" in the 2008 economic crisis).

against legal challenges to such wrongdoing.[58] From this perspective, broad state discretion to award punitive damages targeted to the wealth of the wrongdoer could logically *increase* lawful order in the market.

In short, a risk of large awards linked to corporate wealth logically might induce large companies and their wealthy capital owners to more consistently and effectively treat legal rules as reasonable limitations on their actions. The very disordering potential of high punitive damages logically is their proper purpose. Punitive damages should be calculated in such a way as to *change* corporate calculations in which illegal and reprehensible conduct is part of a routine plan to maximize profit.[59] By encouraging wealthy capital owners to increase compliance with the law, high punitive damage awards arguably *enhance* the goals of predictability and transparency that are at the heart of the idea of ensuring a rule of law sufficient to provide fair notice to competing interests.

In a 2008 non-constitutional decision using federal Maritime law to limit a punitive damage award, the Supreme Court further emphasized the problem of predictability from highly variable punitive damages.[60] In that case, Exxon, which in 2007 reported the largest annual profit in U.S. history at $40.6 billion,[61] convinced the highest court to protect it from an award of $2.5 billion arising from its culpability for the Valdez oil spill.[62] The

58. *See* STEMPEL, supra note 11, at 520 (explaining that prohibiting consideration of a corporate defendant's wealth, although intended to protect the rich against "Robin Hood" takings of their property, instead "tends to thwart rational application of punitive damages policy").

59. *See id.* at 517 (criticizing the Supreme Court's ruling by concluding that "[t]he net effect of this comparative slap on the wrist for State Farm has to be to encourage businesses to look at punitive liability as just another risk of doing business that can be reserved against so that the business need not be deterred from pursuing any gainful business strategy, even one that might systematically injure clients, customers, or policyholders to whom a high duty is owed").

60. *See* Exxon Shipping Co. v. Baker, No. 07-219, slip op. at 25-26 (U.S. June 25, 2008).

61. *See* Associated Press, *Exxon Mobil Posts $40.6 Billion Annual Profit*, MSNBC, Feb. 1, 2008, http://www.msnbc.msn.com/id/22949325/.

62. *See Exxon Shipping Co.*, No. 07-219, at 4 (capping the damages at the amount of compensatory harm: $507.5 million).

Court argued that the unpredictability of the severity of damage awards undermined rather than furthered deterrence goals, because a "bad man" looks at the punishment for "his counterparts" wreaking similar harm to decide what the stakes are in choosing one course of action over another.[63] But even if a sure risk of severe punishment is a better deterrent than an uncertain risk of severe punishment, it does not logically follow that a more certain risk of much lower damages will be a better deterrent than a variable risk of very high damages when it comes to wrongdoing by wealthy business entities. Again, by dramatically *reducing* punitive damages to improve predictability, the Court is effectively changing the *substance* of what is predicted, not the effectiveness of the process. Faced with this new judicial assurance of relatively insignificant damages, corporate managers considering wrongdoing now will rationally make a new calculation: they can be more certain that unlawful activity will bring high profits at low cost.

C. *Class and Evidence of Harm to Others*

Third, the Court explained that the punitive damages in *State Farm* violated both procedural and substantive due process because the high award was based on evidence the Court judged to be irrelevant to the injury in the Campbells' case.[64] Utah's highest court justified the large punitive damages award as punishment for the insurance company's policy of using claims fraud as "a consistent way of doing business for the last twenty years"[65] that had caused the harm to this particular policyholder as well as "vast numbers of other Utah customers."[66] In overturning the state court decision, however, the U.S. Supreme Court reasoned that due process prevents states from using punitive damage awards to punish "other parties'

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63. *See id.* at 29.

64. State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 422-23 (2003).

65. Campbell v. State Farm Mut. Auto. Ins. Co., 65 P.3d 1134, 1154 (Utah 2001), *rev'd*, 538 U.S. 408 (2003).

66. *Id.* at 1153.

hypothetical claims"[67] and instead requires that states mete out punishment only for defendant's conduct, "not for being an unsavory individual or business."[68]

How is this dispute over the relevance of out-of-state evidence about class? The Supreme Court's limitation on evidence helps to restrict states from recognizing and responding to the class-based identity and class-based interests involved in tort litigation against corporate defendants. The Utah Supreme Court explained that the evidence of broader corporate wrongdoing was important to understanding the cause and nature of the wrongdoing that harmed the Campbells and why that conduct was so reprehensible, malicious, and difficult to detect and deter.[69] In the state court's view, the broader evidence showed the wrongdoing was not a mistake or an isolated incidence of incompetence or animosity toward the Campbells, but instead, was a "method[] of doing business"[70] and a "profit scheme" that involved systematic claims fraud as well as systematic efforts to cover-up this wrongdoing, including routine destruction of documents as well as harassment and intimidation of claimants, attorneys, and witnesses.[71] By tracing the injury to the conscious, calculated pursuit of overall corporate profits by high-level corporate officers and owners, the state court construed the evidence of different types of fraud in different types of claims as closely related parts of a unified wrongful plan of action.[72] The bad faith refusal to settle that harmed the Campbells in their auto liability case could be particularly likely to rationally maximize profits if the victims of wrongdoing were treated as part of a generalized, aggregated pool where a high volume of relatively small fraudulent gains would offset the risk of being caught and penalized.

In contrast, the U.S. Supreme Court majority reasoned that the detailed evidence of systematic claims fraud

67. *State Farm*, 538 U.S. at 423.

68. *Id.*

69. *See Campbell*, 65 P.3d at 1153, 1159.

70. *Id.* at 1159

71. *Id.* at 1148.

72. *See id.* at 1158.

planned and promoted by high-level managers against thousands of policyholders was irrelevant to determining the reprehensibility of the corporate wrongdoing against the Campbells because that systematic corporate claims fraud included different kinds of illegal actions in different types of insurance.[73] This reasoning individualizes and trivializes the problem of corporate wrongdoing, steering away from a picture that would recognize the dispute between the Campbells and the corporation as a serious conflict of collective economic interests between consumers of modest income and wealthy corporations. In addition, the Court's treatment of the evidence helps to obscure a structural analysis of class that would see harm not just as tragic but as unjust: a matter of intentional, systematic *gain* for the wrongdoer rather than simply a loss to the victim. By steering the inquiry away from large-scale corporate policy, the Court evades inquiry into the calculated, organized, and substantial *gain* to the corporate managers and owners.[74]

But what about the *State Farm* majority's reasoning that evidence of the corporation's broader claims fraud scheme shifts the punishment from *conduct* to *status*? The Court's concern that states might use punitive damages to penalize a tort defendant for being an "unsavory individual or business" hints at the problem of *class* status in particular. The Court's effective "strict scrutiny" of evidence of corporate wrongdoing implies it is attempting to enforce a "class-blind" approach to punitive damage awards that ensures state tort law punishes capital owners only for individual corporate *acts* of fraud, but not for *being* part of an economically powerful collective organized to maximize profit at the expense of less powerful economic actors.

This logic in effect constructs a one-sided bar to consciousness of class. As the Utah courts seemed to see it, the corporation's wrongful conduct specifically targeted *class* status in this case. State Farm designed its claims

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73. State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 422-24 (2003).

74. Compare the Utah Supreme Court's ruling finding that evidence supported the jurys conclusion that "State Farm specifically calculated and planned to avoid full payment of claims, regardless of their validity." *Campbell*, 65 P.3d at 1149.

practices to defraud Mr. Campbell not because he was a consumer of a particular insurance line—such as auto rather than home—but because he was an economically vulnerable policyholder who could be treated as part of a statistical group sharing a common situation of low coverage levels and lack of substantial socioeconomic power—a class status that provided opportunities for enhancing the wealth of those who effectively controlled the corporation.[75] Since it viewed the illegal corporate conduct as a problem of using class power to subvert the law, the Utah Court remained conscious of class in tailoring the remedy so that it would punish and deter this class power in particular. From that perspective, using evidence of class in tailoring the remedy (punitive damages) is not irrational prejudice irrelevant to the wrongdoing, but is precisely the tool needed to correct illegal class-based harm.

Furthermore, the U.S. Supreme Court's effort to distinguish punishment for wrongful *acts* from punishment for *identity* draws too simplistically on the metaphor of the individual defendant. In cases involving punitive damages, the defendants are "artificial persons," organized as business entities according to formal rules governing their purpose and structure.[76] Broad judgments about the common interests and motivations underlying the conduct of those entities are more rational and fair than in the case of individual human beings. After all, corporate identity is defined by law, and that legal identity (in the U.S.) constructs corporations as the organized, narrow, and economic interests of capital owners.

Subsequent cases developing the constitutional doctrine limiting evidence in punitive damage cases have further narrowed the vision of class consciousness, reinforcing a picture in which class is a problem of individual illegitimate

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75. State Farm Auto Insurance Company is technically organized as a mutual insurance company in which policyholders, rather than outside investors, theoretically "own" the company and reap its gains in the form of dividends. *See* StateFarmInsurance.com, State Farm Companies, http://www.statefarm.com/about/companie.asp (last visited Sept. 29, 2008). However, policyholders are not likely to exercise actual significant control, and executives and other wealthy capital owners are likely to be able to hoard and divert profits for their own benefit.

76. *See* Galanter, *supra* note 13.

prejudice rather than a rational understanding of real, relevant, and shared economic interests and incentives.[77] In a 2007 ruling, the Supreme Court remanded a case involving a punitive damage award against a tobacco company for deceit in cigarette marketing, insisting that evidence of even similar harm to others must be used only to prove the *reprehensibility* of the conduct that produced the harm in the case at hand, not to punish the corporation for its conduct more generally.[78] Though this elusive distinction is likely to be more confusing than helpful in fostering predictable, non-arbitrary rules for limiting punitive damage awards, it may be more coherent and workable if understood as a means of masking and de-legitimizing class consciousness among those at risk of harm from illegal corporate profit-seeking.

D. *Class and Conflicting Substantive Interests*

Finally, and most explicitly, the *State Farm* decision constitutionalizes class inequality by interpreting conscious class *opposition* to wealthy capital owners as fundamentally arbitrary and irrational. The Court's central concern may be that high punitive damage awards are likely to reflect intentional class resentment by the non-wealthy. The majority opinion quoted an earlier precedent warning that "juries will use their verdicts to express biases against big businesses"[79] and also noted that the Utah court had taken into account *State Farm*'s massive wealth in measuring meaningful deterrence and punishment.[80] Turning the famous *Carolene Products* Footnote Four on its head, the Court rules that wealthiest, most organized capital interests deserve special constitutional protection against substantive policymaking and law enforcement.[81]

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77. For an in-depth critique of the conventional analysis of *class*, see Martha Mahoney, *Class and Status in American Law: Race, Interest, and the Anti-Transformation Cases*, 76 S. CAL. L. REV. 799 (2003).

78. *See* Phillip Morris USA v. Williams, 549 U.S. 346, 354 (2007).

79. State Farm Mut. Ins. Co. v. Campbell, 538 U.S. 408, 417 (2003) (quoting Honda Motor Co. v. Oberg, 512 U.S. 415, 532 (1994)).

80. *See id.* at 427.

81. *See* McCluskey, *supra* note 8, at 1497-98.

How does the Court turn a seemingly rational interest in consumer protection—or in restraining illegal gain by the wealthy from the disadvantaged—into irrational hatred? Just as the Court's view implies that corporate capital owners' interests are inherently legitimate, however unlawful,[82] the Court implicitly views opposing economic interests as inherently illegitimate, however lawful. But why consider jurors' feelings against *a specific* corporate entity as generalizable beyond this case if harm to others is irrelevant to consideration of the merits of a punitive damage award? When it considered the possibility of corporations as *victims* rather than corporations as *wrongdoers*, the Court seemed willing to construct the corporate defendant as part of a generalizable *collective* with common economic interests and identity. That is, it accepts—indeed constitutionalizes—a class consciousness that adopts the perspective of wealthy capital owners. In this view, capital owners' organized and collective gain at the expense of the non-wealthy is a fundamentally normal, natural, and *just* exercise of power, while organized efforts to protect competing economic interests of the non-wealthy are fundamentally unfair, not just debatable policy.

III. CLASS AND THE RULE OF LAW

In sum, *State Farm* offers a grim window into the ideology of class that is gaining power in law and in culture. In this warped vision, substantive legal rules are construed as emotional, prejudicial, and special-interested class warfare if they promote class *equality*. Substantive legal rules are construed as rational, public-interested fairness if they are about consolidating class inequality and concentrated economic power.

Finally, this case suggests some clues for uncovering and retelling the story of economic class in constitutional doctrine. The legal infrastructure of class inequality goes beyond rules allocating discrete economic resources between groups. Constitutional questions of class should also go beyond the question of whether minimal economic

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82. *See supra* Part II.A (analyzing the court's implicit and special protection of an entitlement to profit by business defendants even when those profits arguably violate state law).

security is important to democratic citizenship.[83] Analyzing recent doctrine, Julie Nice argues that U.S. constitutional law uses an unacknowledged double standard for due process and equal protection that systematically denies poor people basic constitutional rights available to others.[84] To find class, we must look under the surface questions of overt "redistribution" and affirmative economic rights to examine the way in which unequal class privileges and penalties become folded into the background as natural and necessary to the public order—becoming matters of basic neutrality, rather than substantive policy judgment. The class-based message and material impact of *State Farm* may not be so much that it limits money (punitive damages) that might otherwise have gone from wealthy investors' profits (or executive bonuses) to policyholders with modest income and their victims, or even that its contribution to the developing doctrine limiting punitive damages will help shift money from plaintiff consumers in general to corporate defendants. After all, punitive damage awards are exceedingly rare[85] and corporations are overwhelmingly successful in defeating plaintiffs' claims.[86] Instead, *State Farm*'s greater class significance may be its contribution to shoring up a world view where class inequality seems central to the rule of law.

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83. For a discussion of this question of "social citizenship" and an analysis of the relationship between questions of basic economic protection and broader civil and political rights, see Martha T. McCluskey, *Efficiency and Social Citizenship: Challenging the Neoliberal Attack on the Welfare State*, 78 IND. L.J. 783 (2003).

84. *See* Julie A. Nice, *No Scrutiny Whatsoever: Deconstitutionalization of Poverty Law, Dual Rules of Law, & Dialogic Default*, 35 FORDHAM URB. L.J. 629 (2008).

85. *See, e.g.*, Michael L. Rustad, *The Closing of Punitive Damages' Iron Cage*, 38 LOY. L.A. L. REV. 1297, 1298-99 & nn.8-9 (2005).

86. *See* Galanter, *supra* note 13, at 1387-98.