



U.S. CHAMBER
Institute for Legal Reform

An illustration showing a large white banner with the words 'We the People' written in a black, calligraphic font. The banner is suspended by several red cables that converge at a single point above it. Below the banner, a small figure of a person in a white shirt and dark pants stands on top of the first of four classical columns. The columns are white with fluted shafts and papyrus capitals. The background is a blue sky with white clouds. A large red shape, resembling a stylized 'C' or a large bracket, is on the left side of the image, partially overlapping the banner and columns.

We the People

Legal Reform, The Framers and First Principles

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OCTOBER 2013



U.S. CHAMBER
Institute for Legal Reform

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Executive Summary

The validity of legal reform efforts is a hotly debated topic in legislatures and courts across the country. All too often, this discussion overlooks the views of the Framers, which can helpfully inform policy views on both sides of the debate. This paper attempts to return the discussion to first principles by evaluating how the Framers' views on separation of powers, constitutional values, and federalism can help inform the national dialogue on legal reform.

As explained in the discussion that follows, the Framers' views on the separation of powers would cause them to view state legislatures as the central actor in legal reform efforts and would make them highly skeptical of state judicial actions invalidating legislatively-enacted legal reforms. At the

same time, the Constitution generally, and the first ten amendments in particular, reflect a dedication to the rule of law that should inform the debate over legal reform. Finally, the Framers' innovative system of federalism counsels in favor of, not against, legal reform efforts at the state level.



Legal Reform and the Separation of Powers

Any discussion of the Constitution and the Framers' views should begin with the structural provisions of the Constitution. While much modern discussion and litigation focuses on the amendments to the Constitution, many of which expressly protect individual rights, the Framers were focused first and foremost on establishing a workable structure for the new federal government.

Indeed, the Federalist Papers, widely considered the definitive source for the views of the Framers, were aimed exclusively at securing the ratification of the unamended Constitution. And as the Supreme Court has emphasized in recent years, those structural protections exist not primarily to protect the prerogatives of any one part of the government, but to “protect[] individual liberty.”¹

The separation of powers was the animating principle for the structure of the new federal government under the Constitution. It is no accident that the Constitution was divided into articles, and the first three articles addressed the powers of the Congress, the President, and the Judiciary respectively. “The structure of our Government as conceived by the Framers of our Constitution disperses the federal power among the three

branches—the Legislative, the Executive, and the Judicial.”² The Framers “viewed the principle of separation of powers as the absolutely central guarantee of a just Government” and “essential to the preservation of liberty.”³ As James Madison observed in Federalist No. 47, “[n]o political truth is certainly of greater intrinsic value, or is stamped with the authority of more enlightened patrons of liberty.”⁴ “Without a secure structure of separated powers, our Bill of Rights would be worthless, as are the bills of rights of many nations of the world that have adopted, or even improved upon, the mere words of ours.”⁵

A central tenant of the Framers' belief in divided government is what has been loosely described as a system of “checks and balances.” Each branch is vested with core powers—legislative, executive, and judicial respectively—which are to

be exercised exclusively by that branch. Thus, for example, the Framers allocated to Congress—and Congress alone—the ability to make laws. Article I, § 1, cl. 1, states unequivocally that “[a]ll legislative Powers herein granted shall be vested” in Congress. But at the same time the Constitution grants all the legislative power to Congress and all the executive power to the executive, it also puts a check on the tendencies of any one branch toward self-aggrandizement by giving each branch a “‘partial agency’” in the affairs of the others.⁶ The Constitution does this not by dividing powers such that the judiciary exercises a little of the legislative power, but by granting each branch the authority to exercise its own power to check the authority of the other branches. Thus, for example, the President wields the executive power of the veto and the judiciary reviews the constitutionality of acts of Congress, both of which place a check on Congress’ ability to exercise “[a]ll legislative Powers herein granted.”

Another example is Congress’ authority to pass legislation that shapes the way the executive and judicial branches discharge their core functions. Article I, § 8, cl. 18, makes plain that the legislative power includes the power “[t]o make all Laws which shall be necessary and proper for carrying into Execution the foregoing powers, and all other Powers vested by this Constitution in the Government of the United States” This “necessary and proper” clause is expressly not limited to augmenting Congress’ own authority, but also clearly extends to enacting laws necessary and proper to carry out the powers vested in the other branches of the “Government of the United States.”

Congress’ power to enact laws that impact the way the Article III courts discharge their judicial function is particularly clear in the Constitution. In addition to the necessary and proper clause, Article III, § 1, provides that “[t]he judicial Power of the United States, shall be vested in one Supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.” As Justice Samuel Chase noted just before the close of the 18th century, “the truth is, that the disposal of the judicial power (except in a few specified instances) belongs to congress. If congress has given the power to this court, we possess it, not otherwise”⁷ That is because, “[i]n republican government, the legislative authority necessarily predominates.”⁸

The Judiciary Act of 1789, adopted during Congress’ first session, provides a particularly good window into the Framers’ views on the nature and extent of legislative powers vis-à-vis the operation of the judiciary. That Act addressed everything from the fundamental—such as setting up the Supreme Court—to the smallest details—such as where, when, and how the courts would operate—and everything in between, including the scope of the courts’ jurisdiction and powers.⁹ The Act even addressed the process for selecting juries.¹⁰ And the example set by the first Congress is still followed today. Congress regularly passes laws, such as the Class Action Fairness Act and even the Federal Rules of Evidence, that govern the details of how courts resolve legal disputes.

To be sure, the Framers’ views regarding the critical importance of the separation of powers and the interaction between the legislature and the judiciary were directed at the newly-formed federal

government, and they do not directly govern the separation of powers applicable in state systems. For example, no one thinks Nebraska violates the federal Constitution by having a unicameral legislature. Nonetheless, much of the Framers' wisdom about the separation of powers generally and the division of authority between the legislative and judicial branches in particular applies with equal force to state governments. Thus, even though the federal Constitution does not directly regulate the separation of powers within states, the Framers' views should still inform the policy debate about the proper role for state legislatures in legal reform efforts at the state level. The Framers who granted Congress the power to establish inferior courts,

determine their jurisdiction, and enact rules necessary and proper for the exercise of that jurisdiction would clearly envision state legislatures as having the primary role in legal reform efforts. The members of the Framing generation who sat in the first Congress and enacted laws dictating the details of how federal juries would be selected would certainly be puzzled by state court interference with legal reform efforts, such as the Oklahoma Supreme Court's invalidation of legislation reforming the State's civil justice system.¹¹ That comprehensive reform package, which was enacted by an overwhelming majority of elected lawmakers, is exactly the sort of thing that the Framers would have thought should be left to the discretion of the legislature.

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Legal Reform and the Rule of Law

The Framers likely would have viewed legal reform efforts as well within the heartland of legislative powers. The Framers likewise would have assumed that the legislative branches—both state and federal—would have substantial discretion to adopt rules for ensuring the fair conduct of litigation in the courts.

In extreme cases, some litigation excesses and some legislative responses could implicate the constitutional limits on legislative power. But even where those constitutional limits are not actually violated, the principles they reflect can inform the policy debate over legal reform. First and foremost, legal reform efforts should take account of due process principles, and legislatures should ensure their reforms are consistent with the letter and spirit of those principles. Seventh Amendment values are also implicated by state legal reform efforts and should be respected, although that Amendment still grants state legislatures considerable latitude in deciding which questions should go to the jury. Moreover, other constitutional constraints against taking of property, bills of attainder, and denials of equal protection can influence the debate.

The Due Process Clause

The Due Process Clause prohibits the deprivation “of life, liberty, or property, without due process of law.”¹² The values

embodied in the Due Process Clause were of paramount importance to the Framers and should play an important part in the debate surrounding legal reform. The Due Process Clause reflects the Framers’ dedication to the rule of law and aversion to arbitrary action. “The touchstone of due process is protection of the individual against arbitrary action of government.”¹³ One critical component of the due process guarantee is the concept of “fair notice”—that litigants have clear expectations about whether conduct is illegal and the consequences of any illegality.¹⁴ Indeed, “notice and opportunity to be heard” are the basic building blocks of modern due process jurisprudence and protect against arbitrary deprivations of life, liberty, and property.¹⁵ Thus, legal reform proposals that make state court litigation more predictable and less arbitrary promote the rule of law and due process values. Reasonable people can differ as to which rules are superior in guaranteeing uniform, predictable, and just results. But a policy debate that proceeds on the basis of those values is one the Framers would clearly understand.

The modern Supreme Court has developed and applied these due process principles in the punitive damages context. The Supreme Court has repeatedly “recognized that the Constitution imposes a substantive limit on the size of punitive damages awards.”¹⁶ As the Court stated in *BMW of N. America v. Gore*, 517 U.S. 559 (1996), “[t]he Due Process Clause of the Fourteenth Amendment prohibits a State from imposing a ‘grossly excessive’ punishment on a tortfeasor,” and mandates that punitive damages “bear a ‘reasonable relationship’ to compensatory damages.”¹⁷ Not surprisingly, the Court has grounded this jurisprudence in principles of notice. “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.”¹⁸ But notice is not an end in itself; it is a critical means to avoid the arbitrary deprivation of property. “To the extent an award is grossly excessive, it furthers no legitimate purpose and constitutes an arbitrary deprivation of property” in violation of the Due Process Clause.¹⁹ While the most extreme punitive damages awards actually violate the constitutional due process limits articulated by the Supreme Court, those same constitutional principles can inform the debate over legal reform proposals that can operate prophylactically to prevent due process violations from happening and to promote results that are predictable and fair, rather than arbitrary.²⁰

The Supreme Court’s punitive damages jurisprudence also underscores the importance of appellate review to prevent arbitrary and unpredictable results. Indeed,

the first of the Court’s modern punitive damages cases to find a constitutional violation, *Honda v. Oberg*, 512 U.S. 415 (1994), focused on the need for judicial review. In *Oberg*, the Court observed that “[j]udicial review of the size of punitive damages awards has been a safeguard against excessive verdicts for as long as punitive damages have been awarded.”²¹ The Court emphasized that such review provides much-needed “protection against arbitrary deprivations of property” and ensures that fundamental notions of justice and fair play are observed.²² Thus, the failure of the Oregon courts to provide meaningful judicial review of punitive damages awards violated the Due Process Clause. Notably, even Justices Scalia and Thomas, who have been skeptical of the Court’s later punitive damages cases, agreed that Oregon violated procedural due process by not providing judicial review.

While the Court has developed these due process principles with greater clarity in the punitive damages context, they are by no means limited to that context. The same basic principles extend to other departures from fair adjudication. For example, a party that “receive[s] neither notice of, nor sufficient representation in,” litigation is not bound by the outcome of that litigation as a matter of federal due process.²³ Finally, it should be underscored that while the Due Process Clause puts outer limits on truly arbitrary results (like the award struck down in *Gore*) or anomalous state rules (like the absence of judicial review in *Oberg*), the Constitution generally leaves substantial latitude for state legislative efforts, especially those that promote due process values. For that reason, the Due Process Clause is not an obstacle to legal

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reform proposals that promote predictability and fair notice. The Supreme Court has noted that “it is not at all clear that the Due Process Clause in fact requires that a legislatively enacted compensation scheme either duplicate the recovery at common law or provide a reasonable substitute remedy.”²⁴ It is well established that “[a] person has no property, no vested interest, in any rule at common law.”²⁵ 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,” “despite the fact that ‘otherwise settled expectations’ may be upset thereby.”²⁶ And, in all events, due process is not offended in this context so long as a law “provide[s] a reasonably just substitute for the common-law or state tort law remedies it replaces.”²⁷

Legislatures should ensure that their legal reform efforts not only avoid actual constitutional violations, but further the rule of law values that underscore the Framers' concern with due process. As examples, rules that promote predictability, limit arbitrariness, provide notice and ensure meaningful judicial review—such as expert

evidence reforms and laws that increase transparency in tort litigation—are consistent not just with the minimal requirements of due process, but with the broader values the constitutional protection promotes.

The Seventh Amendment

The Seventh Amendment provides that “[i]n Suits at common law, where the value in controversy shall exceed twenty dollars, the right to trial by jury shall be preserved”²⁸ The Seventh Amendment, unlike virtually every other provision of the Bill of Rights, has not been treated as incorporated into the Fourteenth Amendment and thus does not apply to the states.²⁹ Indeed, the Framers' decision not to address the availability of jury trials in state courts was a deliberate accommodation of the variety of approaches employed by different states. As soon-to-be-Justice James Iredell explained in 1788: “[t]he States in these particulars differ very much in their practice from each other.”³⁰ Thus, a uniform federal rule applicable to state courts was not practical; “if they had pleased some States they must have displeased others.”³¹ Alexander Hamilton made a similar point in Federalist No. 83, and elaborated on “[t]he great difference between the limits of the jury trial in different states,” and thus “no general rule could have been fixed upon.”³² But, as with other constitutional provisions not directly applicable to the states, the values that underlie the Seventh Amendment should inform the policy debate about legal reform at the state level.

The Seventh Amendment reflects the Framers' “concern[] with preserving the right of trial by jury in civil cases where it

existed at common law.”³³ While some commenters have contended that legal reform and Seventh Amendment values are incompatible, that is simply not the case. To be sure, a wholesale legislative effort (as opposed to private agreement) to take away damages issues from a jury and give them to a judge when a statutory or common law cause of action is at issue may raise questions with Seventh Amendment principles that would need to be addressed. As the Supreme Court recognized in *Feltner v. Columbia Pictures Television, Inc.*, 523 U.S. 340 (1998), “[i]t has long been recognized that ‘by the law the jury are the judges of damages.’”³⁴ “[T]he common law rule as it existed at the time of the adoption of the Constitution’ was that ‘in cases where the amount of damages was uncertain[,] their assessment was a matter so peculiarly within the province of the jury that the Court should not alter it.’”³⁵

That said, any argument that Seventh Amendment values reflected in cases like *Feltner* conflict with legal reform efforts cannot survive a careful reading of *Feltner* itself. *Feltner* found only that a plaintiff bringing an infringement suit under the Copyright Act was entitled to have a jury determine the amount of his or her statutory damages, not that a plaintiff had a right to have a jury exceed the limits set by Congress on such damages. The Copyright Act authorizes damages either “in a sum of not less than \$500 or more than \$20,000,” or “a sum of not more than \$100,000,” depending on the circumstances.³⁶ There was no hint in *Feltner* that the statutory damages cap imposed by the Copyright Act was in any way constitutionally problematic.

To the contrary, the Court emphasized the long historical compatibility of statutory damage limits, including a specified liquidated damage amount per page copied, and the jury’s role in adjudicating the facts necessary to apply the legislatively-chosen damages provision.

In short, the legislature retains substantial discretion to enact laws that determine what facts are legally relevant. The fact that a legislative initiative may make a particular factual inquiry—for example, the amount of non-economic damages above a cap—legally irrelevant does not intrude on the jury’s role, as long as the jury determines the facts that remain legally relevant. This is underscored by a review of jury practice during the Framers’ time. As Justice James Iredell observed in 1788: “[i]n respect to the trial by jury in civil cases, it must be observed that it is a mistake to suppose that such a trial takes place in all civil cases now. Even in the common law courts, such a trial is only had where facts are disputed between the parties, and there are even some facts triable by other methods.”³⁷ At the Founding, the jury’s role was defined

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by three procedures: the “case stated,” the “demurrer to the evidence,” and the “special verdict.”³⁸ Most relevant for present purposes, “[t]he ‘case stated’ procedure was a trial device employed to bypass the jury when only undisputed facts remained in a case. When this occurred, the jury’s role was reduced to a mere formality.”³⁹ The jury remained on hand to resolve fact issues in case they arose, but was otherwise uninvolved in the proceedings.⁴⁰ “The ‘case stated’ procedure, therefore, demonstrates that, at the time the Constitution was adopted, the jury’s sole function was to resolve disputed facts.”⁴¹

Accordingly, to the extent that legal reform is structured so as to retain the jury’s role in assessing the facts that remain relevant, state legislators can determine which facts remain relevant while fully respecting Seventh Amendment values. For example, allowing a jury to determine the amount of damages suffered by a plaintiff, but then allowing a court to ascertain the legal consequences of that assessment, including the application of any statutory cap, would not implicate the values underlying the Seventh Amendment. A judge who “merely implement[s] a policy decision of the legislature in applying the law enacted by the legislature when it

predetermined the extent and amount of damages that it, the legislature, would allow in a malpractice action” does not “reexamin[e] a ‘fact tried by a jury’” within the meaning of the Seventh Amendment.⁴²

Other Constitutional Provisions

Beyond the Due Process Clause and the Seventh Amendment, other provisions in the Constitution also reflect concerns of the Framers that remain relevant to contemporary debates about legal reform. For example, the Taking Clause reflects the Framers’ concerns about using the machinery of government to take property in an arbitrary manner. Likewise, the prohibitions on bills of attainder in the unamended Constitution reflect a concern against singling out unpopular entities for especially disfavored treatment. And, the Commerce Clause and the constitutional grant of diversity jurisdiction both demonstrate the Framers’ concern that states not discriminate against out-of-state entities. All of these concerns can appropriately inform a debate about legal reform and the optimal rules for adjudicating disputes with fairness and predictability. Some commentators have argued that legal reforms aimed at capping damages violate the Equal Protection Clause by

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impermissibly creating two classes of plaintiffs—a class of “less seriously injured” plaintiffs “who are entitled to keep everything which the jury awards,” and a class of “more seriously injured” plaintiffs whose damages are capped.⁴³ These arguments are essentially a non-starter under modern equal protection analysis. Such “classifications” would—at most—be subjected to rational basis. Under the rational basis test, courts will not invalidate a law ““unless the varying treatment of different groups or persons is so unrelated to the achievement of any combination of legitimate purposes that [the court] can only conclude that [the governmental]

actions were irrational.”⁴⁴ Several courts have rejected efforts to characterize legal reforms as irrational, and thus problematic under the Equal Protection Clause.⁴⁵ These courts have concluded that the Equal Protection Clause does not pose an obstacle to the legislature’s responsibility to “strike[] a balance between a tort victim’s right to recover noneconomic damages and society’s interest in preserving the availability of affordable liability insurance.”⁴⁶



Legal Reform and Federalism

The Framers thought that the vertical division of authority between the federal and state governments, much like the horizontal separation of powers in the new federal government, was a critical aspect of the Constitution. In fact, “federalism was the unique contribution of the Framers to political science and political theory.”⁴⁷ And, as with the separation of powers, the Framers viewed this structural aspect of the Constitution as critical to protecting individual rights and individual liberties.⁴⁸

Numerous provisions of the Constitution reflect the Framers’ view that the new federal government in no way eliminated the sovereignty or critical role of the states. As the Supreme Court has underscored, under the Constitution the states “retain a residuary and inviolable sovereignty” — “[t]hey are not relegated to the role of mere provinces or political corporations, but retain the dignity, though not the full authority, of” sovereigns.⁴⁹ One way in which the Constitution reflects the continuing sovereignty and vitality of states is by granting the federal Congress only limited and enumerated powers, while recognizing that only states exercise plenary authority, or what is sometimes referred to as the “general police power.”⁵⁰

This division of authority does not mean that the federal government has no role in

legal reform. As discussed in “Federalism, The Framers, And Legal Reform” (Sept. 27, 2012), the federal government can address such issues when exercising powers granted to it by the Constitution, whether via the Commerce Clause, the Bankruptcy Clause or other grants of power. Indeed, even the Constitution itself reflects a degree of federal “legal reform” by establishing the diversity jurisdiction of federal courts and granting Congress the power to establish the metes and bounds of that jurisdiction. “Congress has wide latitude to address and remove obstacles to interstate commerce whether they arise from state positive law, state common law or even state procedural rules,” and federal legal reform would be a valid exercise of Congress’ power under the Commerce Clause.⁵¹ Moreover, “Congress is not limited to its commerce power in

addressing distortions created by state law; exercises of narrower federal powers under such provisions as the spending power, Necessary and Proper Clause, and Bankruptcy Clause also provide Congress with the authority to override state law.”⁵²

At the same time, the ability of the federal government to take action to effect legal reform when it implicates one of the enumerated powers granted to the federal government in no way detracts from the ability of states to use their plenary power to address legal reform issues. Of course, if Congress exercises one of its enumerated powers in a manner that preempts state law, the state laws must give way under the Supremacy Clause.⁵³ But absent the relatively rare instance in which Congress not only addresses a legal reform issue, but does so with preemptive effect, the states retain the full authority to address such issues for themselves. In fact, the Framers would undoubtedly have viewed the states as having principle responsibility for advancing legal reform. Although the Framers would have recognized a role for the federal government to address state laws that create an affirmative obstacle to the free flow of interstate commerce, they would have hoped that states would craft sensible laws that prevent such obstacles from arising in the first place. That would clearly have been the case for state courts and state tort systems, which the Framers would have recognized as the principal responsibility of the states, with the federal government playing a complementary role only when uniquely federal interests are implicated, as illustrated by the grant of diversity jurisdiction.

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Conclusion

In sum, numerous aspects of the Constitution reinforce the critical role state legislatures play in considering legal reform, and a number of constitutional values are relevant to the policy debates over legal reform. The Framers viewed separation of powers as critical and envisioned a significant role for the legislature in determining the rules applicable in adjudicating cases.

The first Congress, populated by many of the signers of the Constitution, enacted the Judiciary Act of 1789, which reflects a robust role for the legislature on procedural matters both big and small. While the Framers' views on such matters do not directly constrain the states, they certainly can inform a discussion of the proper role of state legislatures. The Constitution also includes a number of provisions that reflect the Framers' dedication to the rule of law and abhorrence for arbitrary results. In extreme cases, constitutional provisions, such as the Due Process Clause, may render a particular application of state law unconstitutional, and the role of such constitutional provisions is not so limited. Judges applying federal constitutional rules can serve as the ultimate backstop to prevent the most

arbitrary results, but states retain the primary role in designing a system that is both informed by constitutional values and avoids unconstitutional results. In a similar fashion, the federal Congress retains a role when state rules, including those created by judges or labeled procedural, implicate some uniquely federal interest. But the role of federal actors remains a backstop for relatively extreme and unusual circumstances. It is the states and state legislatures in particular who are on the front lines of the policy debates over the best rules to foster predictability and avoid arbitrary results. The views of the Framers on everything from separation of powers to due process to the role of judicial review and juries retain considerable relevance to these contemporary debates.

Endnotes

- 1 *Bond v. United States*, 131 S. Ct. 2355, 2365 (2011) (it is the “structure of our Government that protects individual liberty”); *Loving v. United States*, 517 U.S. 748, 756 (1996) (the “separation of powers” is a “defense against tyranny”).
- 2 *Metro. Washington Airports Auth. v. Citizens for Abatement of Aircraft Noise, Inc.*, 501 U.S. 252, 272 (1991).
- 3 *Morrison v. Olson*, 487 U.S. 654, 697 (1988) (Scalia, J., dissenting); *Mistretta v. United States*, 488 U.S. 361, 380 (1989).
- 4 The Federalist No. 47, at 301 (C. Rossiter ed. 1961).
- 5 *Morrison*, 487 U.S. at 697.
- 6 *Clinton v. Jones*, 520 U.S. 681, 703 (1997) (quoting Federalist No. 47, at 325).
- 7 *Turner v. Bank of North America*, 4 Dall. 8, 10 n.1 (1799); see *United States v. Hudson*, 11 U.S. 32, 33 (1812) (“Courts created by the general Government possess no jurisdiction but what is given them by the power that creates them, and can be vested with none but what the power ceded to the general Government will authorize them to confer.”). The Federalist No. 51, at 322 (James Madison) (C. Rossiter ed. 1961)
- 8 The Federalist No. 51, at 322 (James Madison) (C. Rossiter ed. 1961).
- 9 See, e.g., 1 Stat. 73, § 9 (“the district courts shall have . . . cognizance of all crimes and offences . . . committed within their respective districts”); *id.* § 11 (“the circuit courts shall have original cognizance . . . of all suits of a civil nature at common law or in equity”); *id.* § 14 (“the before-mentioned courts . . . shall have the power to issue writs of scire facias, habeas corpus, and all other writs”).
- 10 See *id.* § 29 (“jurors in all cases to serve in the courts of the United States shall be designated by lot”).
- 11 See *Douglas v. Cox Retirement Properties, Inc.*, 302 P.3d 789 (Okla. 2013).
- 12 U.S. Const. amend. V; U.S. Const. amend. XIV.
- 13 *Meachum v. Fano*, 427 U.S. 215, 226 (1976) (internal quotation marks omitted); see *Wolff v. McDonnell*, 418 U.S. 539, 558 (1974); *County of Sacramento v. Lewis*, 523 U.S. 833, 845-46 (1998).
- 14 See, e.g., *F.C.C. v. Fox Television Stations, Inc.*, 132 S. Ct. 2307, 2317 (2012) (“A fundamental principle in our legal system is that laws which regulate persons or entities must give fair notice of conduct that is forbidden or required.”).
- 15 See, e.g., *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 178 (1951) (“Notice and opportunity to be heard are fundamental to due process of law.”).
- 16 *Honda Motor Co., Ltd. v. Oberg*, 512 U.S. 415, 418 (1994) (citing *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1 (1991)).
- 17 *BMW of N. America v. Gore*, 517 U.S. 559, 562, 580 (1996) (quoting *TXO Production Corp. v. Alliance Resources Corp.*, 509 U.S. 443, 454 (1993)).
- 18 *Id.* at 574; accord *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 416-17 (2003).
- 19 *Id.*; see *Haslip*, 438 U.S. at 42 (O’Connor, J., dissenting) (“Punitive damages are a powerful weapon. Imposed wisely and with restraint, they have the potential to advance legitimate state interests. Imposed indiscriminately, however, they have a devastating potential for harm. Regrettably, common-law procedures for awarding punitive damages fall into the latter category.”).
- 20 Justice Scalia and Justice Thomas have both expressed the view that “the Constitution does not constrain the size of punitive damages awards.” *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 429 (2003) (Thomas, J., dissenting); see *id.* at 429 (“the Due Process Clause provides no substantive protections against ‘excessive’ or ‘unreasonable’ awards of punitive damages”) (Scalia, J., dissenting).
- 21 *Oberg*, 512 U.S. at 421.
- 22 *Id.* at 430.

- 23 See, e.g., *Richards v. Jefferson County*, 517 U.S. 793, 805 (1996); see *Hansberry v. Lee*, 311 U.S. 32, 37 (1940) (it would violate due process to bind litigants to a judgment rendered in an earlier litigation to which they were not parties and in which they were not adequately represented).
- 24 *Duke Power Co. v. Carolina Environmental Study Group, Inc.*, 438 U.S. 59, 88 (1978).
- 25 *Second Employers' Liability Cases*, 223 U.S. 1, 50 (1912).
- 26 *Silver v. Silver*, 280 U.S. 117, 122 (1929); *Duke Power*, 438 U.S. at 88 n.32 (quoting *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 16 (1976)).
- 27 *Duke Power*, 438 U.S. at 88 (citing *New York Central R. Co. v. White*, 243 U.S. 188 (1917); *Crowell v. Benson*, 285 U.S. 22 (1932)).
- 28 U.S. Const. amend. VII.
- 29 See *Dohany v. Rogers*, 281 U.S. 362, 369 (1930); *Walker v. Sauvinet*, 92 U.S. 90, 92 (1875).
- 30 James Iredell, Answers to Mr. Mason's Objections to the New Constitution (1788), reprinted in 5 *The Founders' Constitution* 357.
- 31 *Id.*
- 32 Federalist No. 83, at 336 (C. Rossiter ed. 1961).
- 33 *Colgrove v. Battin*, 413 U.S. 149, 155 (1973).
- 34 523 U.S. 340, 353 (quoting *Lord Townshend v. Hughes*, 2 Mod. 150, 151, 86 Eng. Rep. 994, 994-95 (C.P. 1677)).
- 35 *Id.* (quoting *Dimick v. Schiedt*, 293 U.S. 474, 480 (1935)).
- 36 17 U.S.C. § 504(c)(1)-(2).
- 37 Iredell, *supra*, at 357.
- 38 Edith G. Henderson, *The Background of the Seventh Amendment*, 80 Harv. L. Rev. 289, 319 (1966).
- 39 *Etheridge v. Medical Center Hospitals*, 237 Va. 87 (1989) (rejecting challenge to statute capping recovery in medical malpractice actions).
- 40 See Henderson, *supra*, at 305-06.
- 41 *Etheridge*, 237 Va. at 95.
- 42 *Davis v. Omitowoju*, 883 F.2d 1155, 1162 (3d Cir. 1989); see *Boyd v. Bulala*, 877 F.2d 1191, 1196 (4th Cir. 1989) ("[I]t is not the role of the jury to determine the legal consequences of its factual findings. . . . That is a matter for the legislature.").
- 43 *Murphy v. Edmonds*, 323 Md. 342, 355 (1992) (rejecting challenge to cap on noneconomic damages in personal injury actions).
- 44 *Gregory v. Ashcroft*, 501 U.S. 452, 471 (1991) (quoting *Vance v. Bradley*, 440 U.S. 93, 97 (1979)).
- 45 See, e.g., *Omitowoju*, 883 F.2d at 1159; *Bulala*, 877 F.2d at 1196-97.
- 46 *Patton v. TIC United Corp.*, 77 F.3d 1235, 1247 (10th Cir. 1996).
- 47 *United States v. Lopez*, 514 U.S. 549, 575 (1995) (Kennedy, J., concurring).
- 48 *Bond*, 131 S. Ct. at 2365 (it is the "structure of our Government that protects individual liberty").
- 49 *Alden v. Maine*, 527 U.S. 706, 715 (1999) (quoting The Federalist No. 39, at 245 (James Madison) (C. Rossiter ed. 1961)).
- 50 See, e.g., *United States v. Morrison*, 529 U.S. 598, 618 n.6 (2000) (discussing states' "general police powers").
- 51 Federalism, The Framers, And Legal Reform 1 (Sept. 27, 2012).
- 52 *Id.*
- 53 See, e.g., *Gade v. Nat'l Solid Wastes Mgmt. Ass'n*, 505 U.S. 88, 108 (1992).



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