Of Remedy, Juries, and State Regulation of Punitive Damages: The Significance of Philip Morris v. Williams

Michael P Allen, Stetson University College of Law

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REGULATION OF PUNITIVE DAMAGES:
THE SIGNIFICANCE OF PHILIP MORRIS v. WILLIAMS

Michael P. Allen*

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I. INTRODUCTION

On February 20, 2007, the United States Supreme Court announced an important
decision further limiting punitive damage awards. That decision, Philip Morris USA v.
Williams,¹ is the latest in the Court’s decade-plus long project to explain in what respects
the United States Constitution limits this particular remedy. Popular reaction to that
day’s 5-4 decision was swift and plentiful.² Such attention was certainly warranted.

² Certain newspaper editorial boards supported the decision. See, e.g., Editorial, Overly Punitive?, THE
   WASH. POST A14 (Feb. 26, 2007); Editorial, Class Actions in Drag, THE WALL STREET JOURNAL A16 (Feb.
While apparently modest, the ruling is a highly significant step in the Court’s development of constitutional doctrine in an area of great public interest.

There are many facets of Philip Morris that are worthy of academic discussion. By and large, I focus on the import of the decision on remedies and juries. However, one aspect of the decision beyond the scope of the Article is of such potential significance that is at least worthy of some initial comment. Specifically, Philip Morris is potentially important as an early predictor of the more general constitutional philosophies of Chief Justice Roberts and Justice Alito.

Of course, predictions of this sort are fraught with difficulties. That being said, the federal constitutional regulation of punitive damage awards, the overwhelming number of which are rendered under state law, has always been an intriguing battleground on which so-called “conservative” justices needed to choose between their purported instinct to protect business and commercial interests on the one hand and the protection of states from federal “interference” on the other.¹ One saw this perceived conservative division at play in earlier punitive damages cases in which Justices O’Connor and Kennedy consistently voted to limit state punitive damage awards through,

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among other things, substantive due process principles.\textsuperscript{4} In contrast, Justices Scalia and Thomas consistently dissented in these cases, arguing principally that the Constitution provides no warrant for federal intervention concerning punitive damage awards.\textsuperscript{5}

In \textit{Philip Morris} we got at least a preliminary indication of where the new Chief and Justice Alito came out on this “conservative split.” Perhaps somewhat surprisingly, both of them joined Justice Breyer’s majority opinion, which, as I discuss below,\textsuperscript{6} reaffirmed and extended the Supreme Court’s precedents imposing federal constitutional limitations on state punitive damage awards.\textsuperscript{7} And they did so despite the opportunity to join a dissent based at least in part on a commitment to state sovereignty principles.\textsuperscript{8}

What does all this mean? Only time will really tell. However, it is tempting to at least hypothesize that \textit{Philip Morris} may be one of the first signs that President Bush’s additions to the Court will not be committed to expanding some of the more aggressive federalism-related decisions of the Rehnquist Court,\textsuperscript{9} or at least not when there is some

\begin{itemize}
\item \textsuperscript{4} See, e.g., \textit{State Farm Mutual Automobile Ins. Co. v. Campbell}, 538 U.S. 408, 412 (2003) (noting that Justice Kennedy was the author of the Court’s opinion and that Justice O’Connor joined in that opinion); BMW of North America v. Gore, 517 U.S. 559, 562 (1996) (noting that both Justice O’Connor and Justice Kennedy joined in the opinion of the Court).
\item \textsuperscript{5} See, e.g., \textit{State Farm}, 538 U.S. at 429-30 (Scalia, J., dissenting); 429-30 (Thomas, J., dissenting); BMW, 517 U.S. at 598-607 (Scalia, J., joined by Thomas, J., dissenting). Strangely, Chief Justice Rehnquist switched from dissent in BMW to the majority in \textit{State Farm}. Compare \textit{State Farm}, 538 U.S. at 412 (noting that Chief Justice Rehnquist joined in Justice Kennedy’s opinion for the Court) with BMW, 517 U.S. at 607 (noting that Chief Justice Rehnquist joined the dissenting opinion of Justice Ginsburg). Because Chief Justice Rehnquist did not write an opinion in either case, we are left to guess at his rationale.
\item \textsuperscript{6} \textit{See infra} Part III.
\item \textsuperscript{7} \textit{Philip Morris}, 127 S. Ct. at 1060 (noting that Chief Justice Roberts and Justice Alito joined in the opinion of the Court).
\item \textsuperscript{8} \textit{Id.} at 1067-68 (Thomas, J., dissenting).
\item \textsuperscript{9} See, e.g., Bd. of Trustees of Univ. of Ala. v. Garrett, 531 U.S. 356 (2001) (holding that Congress had exceeded its authority under section 5 of the Fourteenth Amendment when it purported to make the states subject to suit in federal court under Title II of the Americans with Disabilities Act); United States v. Morrison, 529 U.S. 598 (2000) (holding that Congress lacked authority under either section 5 of the Fourteenth Amendment or the Interstate Commerce Clause to enact the Violence Against Women Act); Pintz v. United States, 521 U.S. 898 (1997) (holding that Congress could not “commandeer” state executive officials into federal service in connection with the Brady Handgun Violence Prevention Act); United States v. Lopez, 514 U.S. 549 (1995) (holding that Congress had exceeded its authority under the Interstate Commerce Clause in enacting certain portions of the Gun-Free School Zones Act of 1990); New York v.
other significant conservative value at play. There are many other possibilities as well. After all, both men have been on the Court for only a short time and many of the broader issues *Philip Morris* implicates were not necessarily squarely on the table. But at the very least, the votes of these two justices may have broader implications. It is certainly interesting fodder for Court watchers.¹⁰

But as tempting as such idol speculation is, as stated above, the focus of this Article is the implications of *Philip Morris* more focused on punitive damages. It has four parts in addition to this introduction. Part II discusses the various ways in which the Court had constitutionally limited punitive damage awards before *Philip Morris*. In brief, the Court’s decisions limited this remedy in three broad respects. First, the Constitution was said to require that certain procedural requirements attend the award of punitive damages. Second, the Court announced a proportionality requirement pursuant to which a given punitive damage award might simply be “too high” to comport with the Constitution. Finally, without expressly disclosing that it was doing so, the Court’s decisions had fundamentally shaped and confined – as a matter of federal constitutional law – the very nature of punitive damages.

Part III focuses on *Philip Morris* itself. After briefly explaining the factual background of the case, this Part explains the decision’s holding. That holding both further serves to constrain the award of punitive of damages and, quite confusingly, also

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¹⁰ *See, e.g.* Douglas W. Kmiec, *Up in Smoke: The Supreme Court Loses its Unanimity*, SLATE (Feb. 21, 2007), available at [www.slate.com/id/2160286](http://www.slate.com/id/2160286) (“Is it disappointing that in this instance Roberts and Alito boarded the Constitution-can-mean-anything train? Yes. Every disregard of principle here is likely to be played back elsewhere. Well, at least neither Roberts nor Alito actually wrote for the majority.”).
appears to affect the role of the jury in the process in a significant fashion. Thereafter, I situate Philip Morris in the broader constitutional landscape discussed in Part II.

Part IV explores three significant aspects of Philip Morris beyond its impact on constitutional doctrine. First, I consider how the decision will likely affect punitive damages as a remedial device. I suggest that Philip Morris is another step in the Court’s campaign to restrict the device to what it perceives to be its historical roots. The result of this effort could have significant repercussions especially when combined with other means by which monetary recovery in the civil justice system is being restricted. Second, I describe Philip Morris’s impact on the states’ ability to regulate punitive damages. Some of this impact is predictable: states are restricted in using punitive damages in innovative ways. However, the decision also has the potential to affect state regulation in a way that is harmful to defendants. I outline how this scenario could come to pass. Finally, Part IV considers the decision’s impact on juries. I argue that the Court has planted seeds by which the role of the jury in awarding punitive damages could be fundamentally altered.

Part V concludes by suggesting that, as significant as it is, Philip Morris leaves a host of questions unresolved. While I do not purport to address all such issues, or to provide in-depth treatment of the ones I do raise, Part V at least begins the discussion of what may be on the constitutional horizon.

II. PRE-PHILIP MORRIS CONSTITUTIONAL LIMITATIONS ON PUNITIVE DAMAGES

While it is somewhat of a simplification, the Supreme Court essentially began to devote serious attention to the intersection of the United States Constitution and punitive damages only about twenty years ago. In that time, the Court has rejected the application
of one constitutional provision, the Eighth Amendment’s prohibition on the imposition of excessive fines, as a limitation on punitive damages. However, the more representative trend has been for a slim majority of the Court to find several respects in which the Constitution constrains an award of punitive damages, including procedural due process, substantive due process, the dormant commerce clause, and notions of state sovereignty. I have elsewhere referred to this almost dizzying recitation of sources of authority as a “constitutional cacophony.”

There has been much written about the Court’s entry into the punitive damages arena, including significant commentary on the rationales the Court has used to support

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11 U.S. CONST., AMEND VIII (“Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.”).  
12 See Browning-Ferris Industries of Vermont, Inc. v. Kelco Disposal, Inc., 492 U.S. 257, 259 (1989). In reaching its conclusion, the Court left open whether the Excessive Fines Clause is applicable to the states through the Fourteenth Amendment and whether it is applicable to corporate entities at all. See id. at 276 n.22. Browning-Ferris may be ripe for reconsideration, however, given so-called split recovery statutes under which a state is entitled to receive a portion of a private litigant’s punitive damages judgment. See, e.g., ALASKA STAT. § 09.17.020(j) (50% of punitive damage award payable to the state); GA. CODE § 51-12-5.1(e)(2) (75% of punitive damages in product liability actions payable to the state); IND. CODE ANN. § 34-51-3-6 (75% of punitive damage award payable to the state). This open issue is beyond the scope of this paper.  
13 See, e.g., Honda Motor Co. v. Oberg, 512 U.S. 415, 432 (1994) (holding that due process principles require judicial review of punitive damage awards); Pacific Mutual Life Insurance Co. v. Haslip, 499 U.S. 1, 23 (1991) (summarizing the Court’s conclusion that procedures Alabama employed in the case were consistent with constitutional principles). I discuss the specific procedural strands of the Court’s decisions in more detail below. See infra Part II.A.  
14 See, e.g., State Farm Mutual Automobile Ins. Co. v. Campbell, 538 U.S. 408, 416-17 (2003) (holding that there are “substantive constitutional limitations” on punitive damage awards and that “[t]he Due Process Clause of the Fourteenth Amendment prohibits the imposition of grossly excessive or arbitrary punishments on a tortfeasor”); BMW of North America, Inc. v. Gore, 517 U.S. 559, 562 (1996) (holding that the Constitution prohibits “grossly excessive punishment on a tortfeasor”) (internal quotation marks omitted); see also BMW, 517 U.S. at 599 (Scalia, J., dissenting) (referring to the Court’s decision as being based on substantive due process).  
15 See, e.g., BMW, 517 U.S. at 571 (noting that a State’s power to award punitive damages may, in an appropriate case be “subordinate to the federal power over interstate commerce”).  
16 See, e.g., State Farm, 538 U.S. at 421 (“Nor, as a general matter, does a State have a legitimate concern in imposing punitive damages to punish a defendant for unlawful acts committed outside of the State’s jurisdiction.”); BMW, 517 U.S. at 572 (“We think it follows from these principles of state sovereignty and comity that a State may not impose economic sanctions on violators of its laws with the intent of changing the tortfeasors’ lawful conduct in other States.”).  
its constitutional jurisprudence in the area.\textsuperscript{18} I will not rehearse this literature here except to the extent necessary to make my specific points. My aim is to outline the three principal ways in which the Supreme Court’s efforts have affected punitive damages regardless of the specific constitutional doctrine employed: regulation of procedures used to award punitive damages; restrictions on the amount of any given award; and constriction of the nature of punitive damages as a remedial device. In the balance of this Part, I briefly describe these three issues so that, in the next Part, I can situate \textit{Philip Morris} in the constitutional landscape.

\textbf{A. Procedures}

Perhaps the least controversial aspect of the Court’s punitive damages decisions concerns the procedures associated with obtaining such a remedy. Roughly speaking, the Court’s work in this regard fits into two general areas: control of the jury before its verdict through instructions and after the verdict through judicial review. One of the Court’s earliest decisions in its modern review of punitive damages focused on the constitutional importance of providing the jury with proper instructions. In \textit{Pacific Mutual} the Court stated that “the general concerns of reasonableness and adequate guidance from the court when the case is tried to a jury properly enter into the constitutional calculus.”\textsuperscript{19} The Court went on to conclude that the jury instructions given in that case were constitutionally sufficient.\textsuperscript{20} The important constitutional principle from

\textsuperscript{18}It is not possible to do justice to the wide range of commentary concerning this issue. I have earlier catalogued a range of such scholarship. See Allen, \textit{supra} note 17, at 3–4 nn. 7 & 9.

\textsuperscript{19} \textit{Pacific Mutual}, 499 U.S. at 18.

\textsuperscript{20} See, \textit{e.g.}, \textit{id.} at 18-19.
Pacific Mutual is that procedural due process requires that a jury be properly instructed concerning punitive damages.21

Of course, controlling the jury before it acts is only a part of the equation. The Court has also held that the Constitution requires a certain degree of judicial review after the fact. In two of its early decisions, the Court underscored the critical constitutional nature of such judicial review.22 More recently, the Court further articulated the nature of such review by requiring that appellate courts consider the constitutional propriety of punitive damage awards de novo.23

While the Court’s procedural holdings have generally not prompted sustained criticism, the same cannot be said of the other respects in which it has limited punitive damages. I turn to those more controversial issues in the next two sub-parts.

B. Amounts

Perhaps that most commonly considered aspect of the Supreme Court’s entry into the punitive damages arena is its work to ensure that any given award is not so great that it violates the principles of due process.24 The Court has left no doubt that the Constitution prohibits “grossly excessive” punishment.25 The tricky question has been

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21 I discuss juries further below. See infra Part IV.C.
22 See Honda Motor, 512 U.S. at 432 (“denial of judicial review of the size of punitive damage awards violates the Due Process Clause of the Fourteenth Amendment.”); Pacific Mutual, 499 U.S. at 20 (concluding that Alabama’s judicial review of punitive damage awards “ensures meaningful and adequate review by a trial court whenever a jury has fixed the punitive damages.”).
24 One may be able to judge the primacy of this aspect of the Court’s punitive damages doctrine by evaluating what is contained in remedies textbooks. By and large, although not exclusively of course, the focus in these books is on the Court’s use of the Due Process Clause to judge when an award is simply too high. See, e.g., Douglas Laycock, 2006 SUPPLEMENT TO MODERN AMERICAN REMEDIES CASES AND MATERIALS 85-109; David I. Levine, et. al, REMEDIES: PUBLIC AND PRIVATE 498-529 (4th ed. 2006); Doug Rendleman, REMEDIES CASES AND MATERIALS 132-160 (7th ed. 2006); Russell L. Weaver, et. al, REMEDIES: CASES, PRACTICAL PROBLEMS AND EXERCISES 717-33 (2004).
25 See, e.g., State Farm, 538 U.S. at 417; BMW, 517 U.S. at 562.
articulating how a court is to determine whether any given award is so large that it
offends the Constitution.

In *BMW* and *State Farm*, the Court articulated and then refined three “guideposts”
that courts are to use to assess the magnitude of a punitive damage award under the
Constitution. Specifically, lower courts are to assess the constitutional propriety of an
award of punitive damages by considering: “(1) the degree of reprehensibility of the
defendant’s misconduct; (2) the disparity between the actual or potential harm suffered
by the plaintiff and the punitive damages awards; and (3) the difference between the
punitive damages awarded by the jury and the civil penalties authorized or imposed in
comparable cases.”

The degree of reprehensibility factor was said to be “perhaps the most important
indicium of the reasonableness of a punitive damages award.” However, there was no
clear guidance that could be given about when “bad” conduct was “so bad” that it
justified a particularly high award of punitive damages. To be sure, the Court gave more
guidance by applying the principles first laid out in *BMW*, but the result was something

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26 See *State Farm*, 538 U.S. at 418-28 (discussing and applying *BMW* guideposts); *BMW*, 517 U.S. at 575-85 (articulating and applying the guideposts). Justice Scalia has described the guideposts as marking “a road to nowhere” and “providing no real guidance at all.” *BMW*, 517 U.S. at 605 (Scalia, J., dissenting). More colorfully but along the same lines, Dean Partlett wrote that “[t]he guideposts articulated in *Gore* and *Campbell* are fragile reeds set upon a blasted foggy moor with treacherous patches of quicksand.” David F. Partlett, *The Republican Model and Punitive Damages*, 41 SAN DIEGO L. REV. 1409, 1410 (2004) (footnotes omitted).

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

28 *BMW*, 517 U.S. at 575. As described later in *State Farm*, the Court provided five sub-factors for courts to consider in applying the degree of reprehensibility guidepost. See *State Farm*, 538 U.S. at 419 (“We have instructed courts to determine the reprehensibility of a defendant by considering whether: the harm caused was physical as opposed to economic; the tortious conduct evinced an indifference to or a reckless disregard of the health and safety of others; the target of the conduct had financial vulnerability; the conduct involved repeated actions or was an isolated incident; and the harm was the result of intentional malice, trickery, or deceit, or mere accident.”).
far less than certainty.\textsuperscript{29} It is understandable, therefore, that so much attention has been focused on the second of the Court’s rationales.\textsuperscript{30}

A focus on the ratio guidepost certainly makes sense. After all, if one is a lower court judge faithfully attempting to apply the Constitution’s prohibition on “excessive” punitive damage awards, a principle phrased in proportional terms seems incredibly attractive. The Court seems to have recognized the danger that what it apparently envisions largely as a highly contextual analysis could easily be converted into a quasi-mechanical process because it has been reticent to declare a bright line rule concerning a constitutionally appropriate ratio. In \textit{BMW}, for example, Justice Stevens stated that “we have consistently rejected the notion that the constitutional line is marked by a simple mathematical formula.”\textsuperscript{31} In \textit{State Farm}, the Court again refused to establish a single constitutional line.\textsuperscript{32}

The Court did use \textit{State Farm} to give more guidance about the issue, albeit at times potentially somewhat inconsistently. Specifically, Justice Kennedy stated that “[o]ur jurisprudence and the principles it has now established demonstrate . . . that, in practice, few awards exceeding a single-digit ratio between compensatory and punitive damages . . . will satisfy due process.”\textsuperscript{33} The potential inconsistency resulted, however,

\begin{enumerate}
\item \textsuperscript{29} See, e.g., \textit{State Farm}, 538 U.S. at 419-28.
\item \textsuperscript{30} The Court has tended to give the third guidepost short shrift in its opinions. See, e.g., \textit{State Farm}, 538 U.S. at 428 (spending less than a page in the \textsc{United States Reporter} discussing comparable sanctions and stating “we need not dwell long on this guidepost.”). There have, however, been several interesting academic discussions focused on this aspect of the Court’s jurisprudence. See, e.g., Steven L. Chasenson and John Y. Gotanda, \textit{The Foggy Road for Evaluating Punitive Damages: Lifting the Haze from the BMW/State Farm Guideposts}, 37 \textsc{U. Mich. J. L. Reform} 441 (2004); Colleen P. Murphy, \textit{Comparison to Criminal Sanctions in the Constitutional Review of Punitive Damages}, 41 \textsc{San Diego L. Rev.} 1443 (2004). Moreover, as I mention below, one of the areas of future constitutional development is this guidepost. See infra Part V.
\item \textsuperscript{31} \textit{BMW}, 517 U.S. at 582.
\item \textsuperscript{32} \textit{State Farm}, 538 U.S. at 425 (“We decline again to impose a bright-line ratio which a punitive damages award cannot exceed.”).
\item \textsuperscript{33} \textit{Id.} at 425.
\end{enumerate}
from statements elsewhere in the opinion to the effect that a ratio of 4 to 1 was “close to the line of constitutional impropriety”\textsuperscript{34} and even that a 1 to 1 ratio might be appropriate in case in which “compensatory damages are substantial.”\textsuperscript{35}

Whatever the precise standard may be, there is no question that \textit{State Farm} and \textit{BMW} developed a significant body of constitutional law a major purpose of which was to constrain the amount of punitive damages that a jury may appropriately award. There remain significant issues to be addressed in this body of law.\textsuperscript{36} However, many of these issues remain on the table because \textit{Philip Morris} is best considered as the Court’s next major move in another area: the definition of the nature of punitive damages as a remedy.\textsuperscript{37} I describe the Court’s work before \textit{Philip Morris} in this regard in the next subpart.

\textbf{C. \textit{The Nature of Punitive Damages}}

The Court’s work in the procedural arena and its efforts to provide guidance as to when an award of punitive damages is simply “too high” to comport with the Constitution are certainly important. These issues have rightly received a significant amount of scholarly attention.\textsuperscript{38} Equally important, however, is the Court’s jurisprudence shaping the contours of punitive damages as a remedial device. Effectively, the Court had defined constitutionally permissible punitive damages in three significant respects

\textsuperscript{34} \textit{Id.}
\textsuperscript{35} \textit{Id.}
\textsuperscript{36} \textit{See infra} Part V (highlighting issues that remain unresolved in the wake of \textit{Philip Morris}).
\textsuperscript{37} I discuss \textit{Philip Morris}’s place in this portion of the constitutional landscape below. \textit{See, e.g.,} Part IV.A (discussing impact of \textit{Philip Morris} on punitive damages as a remedial device); Part IV.C (discussing impact of \textit{Philip Morris} on the role of the jury in awarding punitive damages). The decision will almost certainly have an impact on the amount of punitive damages that will withstand constitutional scrutiny in a given case. However, it will have this effect more indirectly for the reasons discussed below. \textit{See infra} Part III.B (discussing \textit{Philip Morris}’s holding and rationale).
\textsuperscript{38} \textit{See supra} note 18 (referring to scholarly work on the Supreme Court’s punitive damages jurisprudence, much of which concerns the Court’s regulation of procedures used to award punitive damages and the “guideposts” restricting the amount of punitive damage awards).
before Philip Morris and had suggested in oblique terms a potential fourth constraint. This sub-part outlines the three pre-Philip Morris constraints and highlights the potential fourth one. It was to this fourth definitional aspect that the Court returned with a vengeance in Philip Morris itself.

The first way in which the pre-Philip Morris Court constitutionally defined punitive damages is easy to overlook because it is, in some respects, so obvious. The Court has made clear that the purposes of punitive damages are “in punishing unlawful conduct and deterring its repetition.” Moreover, the Court has tried to draw a line between punitive and compensatory damages. Representative of such line drawing is the following passage from State Farm:

in our judicial system compensatory and punitive damages, although usually awarded at the same time by the same decisionmaker, serve different purposes. Compensatory damages are intended to redress the concrete loss that the plaintiff has suffered by reasons of the defendant’s wrongful conduct. By contrast, punitive damages serve a broader function; they are aimed at deterrence and retribution.

And the Court went on later in its opinion to state that:

[i]t should be presumed that a plaintiff has been made whole for his injuries by compensatory damages, so punitive damages should only be awarded if the defendant’s culpability, after having paid compensatory damages, is so reprehensible as to warrant the imposition of further sanctions to achieve punishment or deterrence.

39 BMW, 517 U.S. at 568; see also Pacific Mutual, 499 U.S. at 19 (“Punitive damages are imposed for purposes of retribution and deterrence.”).
40 State Farm, 538 U.S. at 416 (internal quotation marks and citations omitted).
41 Id. at 419. It is true that elsewhere in the decision Justice Kennedy opines that “[t]he compensatory damages for the injury suffered here . . . likely were based on a component which was duplicated in the punitive award.” Id. at 426. This statement does not undermine my claim that the Court had restricted the purposes for which punitive damages are appropriate. Rather, the statement is one that recognizes that, as a growing body of literature suggests, juries may not make fine distinctions between the doctrinal categories of damages. See, e.g., Jonathan Klick and Catherine M. Sharkey, The Fungibility of Damage Awards: Punitive Damage Caps and Substitution, (Feb. 23, 2007) available at http://ssrn.com/abstract=912256; Catherine M. Sharkey, Crossing the Punitive-Compensatory Divide in CIVIL JURIES AND CIVIL JUSTICE: EMPIRICAL PERSPECTIVES (forthcoming 2007). The import of the Court’s recognition of the porous nature
If such passages were merely descriptive of what the states had done in defining for themselves the role of punitive damages, one would, by and large, be hard-pressed to argue with the Court. However, when one reads the Court’s decisions, it seems far more likely that the Court was going beyond the descriptive. It was itself establishing the constitutionally legitimate purposes of this historically state-defined remedial device.

The Court’s definitional enterprise standing alone is significant. By limiting the goals with which a state could align punitive damages, the Court necessarily limited the growth of the remedy. Thus, it arguably would not have been appropriate for a state to enact legislation to realize Professor Cathy Sharkey’s innovative suggestion that punitive damages be re-conceptualized as a form of “societal compensatory” damages. But the impact in the grand scheme of things might have been ameliorated because states would have still been allowed wide latitude within the traditional confines of the remedy in which to utilize punitive damages. But the Court did not stop. Instead, it added further constitutional restrictions to the nature of the remedy. Specifically, it began to define the type of conduct that a state could constitutionally deter or punish through punitive damages.

This general recognition leads to the second specific respect in which punitive damages were restricted pre-Philip Morris. The Court began to limit territorially the conduct a state could constitutionally punish or deter. Initially, the Court held that a state could not constitutionally impose punitive damages in order to deter or punish out-of-

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42 Some commentators seem to assume that the Court is on firm ground when it defines the goals of punitive damages. See, e.g., Keith N. Hylton, Reflections on Remedies and Philip Morris v. Williams, available at http://ssrn.com/abstract_id=977998 at 13.
state conduct that was lawful where it occurred and had no in-state impact. 44 Then, in State Farm, the Court expanded its holding in BMW by eliminating a state’s ability to deter and punish even unlawful conduct outside its territorial jurisdiction. 45 Thus, not only had the Court set the constitutionally permissible goals of the remedy, it had begun to limit the situations in which those goals could be applied. 46

Continuing in this vein, the Court in its third pre-Philip Morris definitional holding effectively imposed evidentiary limitations on the raw material juries could use to decide whether a defendant’s conduct was such that punishment and deterrence were warranted. Specifically, in State Farm, the Court held that “[a] defendant’s dissimilar acts, independent from the acts upon which liability was premised, may not serve as the basis for punitive damages.” 47 The Court went on to make its own assessment of whether State Farm’s conduct in connection with claims handling on first-party property insurance was constitutionally sufficiently related to the third-party claims handling practices the Campbells alleged. The Court ultimately concluded that it was not and that the evidence of such conduct was of the sort the Constitution prohibited being used as part of the jury’s decision whether State Farm’s conduct deserved to be punished or deterred. 48

In sum, after State Farm one could be certain that the Constitution did not allow a state to use punitive damages for a purpose other than punishment or deterrence; that a

44 See BMW, 517 U.S. at 572-73.
45 See State Farm, 538 U.S. at 421.
46 I have criticized the Court’s logic in establishing the territorial limits articulated in State Farm in a prior work. See generally Allen, supra note 17.
47 State Farm, 538 U.S. at 422; see also id. at 423 (“Although our holdings that a recidivist may be punished more severely than a first offender recognize that repeated misconduct is more reprehensible than an individual instance of malfeasance, in the context of civil actions courts must ensure the conduct in question replicates the prior transgressions.”) (internal quotation marks and citations omitted).
48 See id. at 423-24. Justice Ginsburg vigorously contested the Court’s conclusions on this point. See id. at 431-37 (Ginsburg, J., dissenting).
state could not punish or deter conduct occurring outside of its borders; and that no
evidence could constitutionally be admitted in connection with punitive damages that was
of a character dissimilar from the conduct for which the state legitimately sought to
punish and deter the defendant. 49 But it appeared that it was open to a state to punish
and deter a defendant for similar, in-state conduct even if all of that similar in-state
conduct had not been directed at the particular plaintiff. 50 There were hints in State Farm
that this might not be the case (thus making this the potential fourth point in this area),
but there was no clear holding that this aspect of defining punitive damages had yet taken
place. 51 That would change in Philip Morris as I discuss in Part III.

III. PHILIP MORRIS AND HOW IT FITS INTO THE CONSTITUTIONAL LANDSCAPE

In this Part, I lay out the facts underlying Philip Morris and explain the Court’s
holding (to the extent it is possible to do so). Thereafter, I situate the decision in the pre-
existing constitutional landscape. Part IV considers three of the more important reasons
why the decision is likely to be significant.

49 Other academic commentators similarly had noted the Court’s nationalization or constitutionalization of
the punitive damage remedy after State Farm. See, e.g., Thomas C. Galligan, Jr., U.S. Supreme Court Tort
Reform: Limiting State Power to Articulate and Develop Tort Law – Defamation, Preemption, and
Reform”) (“The Supreme Court’s punitive damages cases constitute a significant intrusion on a state’s
ability to define, articulate, and apply its own tort law. Indeed, the aggressive, judicial case-by-case review
mandated [by the Court’s cases] make every punitive damages case a potential constitutional case.”);
Michael L. Rustad, Happy No More: Federalism Derailed by the Court that Would be King of Punitive
Damages, 64 MD. L. REV. 461, 468 (2005) (“The Court has, in effect, federalized a tort remedy that had
been the exclusive province of state law.”) (hereafter “Rustad, Federalism Derailed”).

50 As discussed below, it was on this understanding of federal constitutional law that the Oregon courts
operated in adjudicating Mr. Williams’s claims against Philip Morris. See infra Part III.A.

51 See e.g., id. at 423 (“A defendant should be punished for the conduct that harmed the plaintiff, not for
being an unsavory individual or business. Due 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. . . ”) (emphasis added). Writers at the time noted the possibility that State
Farm had prohibited all punishment beyond that directly related to the plaintiff, but often recognized that
the Court’s opinion was not clear on this score. See, e.g., Colleen P. Murphy, The “Bedbug” Case and
see also Allen, supra note 17, at 25-26 n.112 (collecting cases and academic literature showing uncertainty
on the scope of State Farm on this issue).
A. The Factual and Procedural Background of the Decision

One wonders what Jesse Williams would think about the impact he might have on the development of at least a portion of American constitutional law. By all indications, Mr. Williams was the sort of person one could meet on the street in any American town on any given day. He served in the Army in Korea in the 1950s and at that time began smoking.\(^52\) After returning from Korea, he eventually became a janitor in the Portland public school system.\(^53\) He also married and started a family.\(^54\) Unfortunately, he also kept smoking.\(^55\)

In 1996, Mr. Williams was diagnosed with inoperable lung cancer.\(^56\) He died less than one year after being diagnosed.\(^57\) Believing her husband had been deceived about the dangerousness of the cigarettes he smoked, Mrs. Williams, as the personal representative of her husband’s estate, commenced a civil action in Oregon state court against Philip Morris, the manufacturer.\(^58\) After trial, a jury ruled in favor of Mr. Williams’s estate on both negligence and fraud claims.\(^59\) Specifically, the jury awarded the estate $21,485.80 in “economic” damages; $800,000 in “non-economic” damages; and $79.5 million in punitive damages with respect to the fraud claim.\(^60\)

The parties then skirmished in the trial courts concerning the jury’s verdict, in particular concerning the damages awarded the estate. First, the trial court reduced the

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\(^{54}\) See Williams I, 48 P.3d at 829 (discussing Mr. Williams’s “wife and their children”).
\(^{55}\) See, e.g., id. at 829 (discussing Mr. Williams’s addiction to nicotine).
\(^{56}\) Id.
\(^{57}\) Id.
\(^{58}\) Id. at 828-29.
\(^{59}\) Id. at 828.
\(^{60}\) Id.
non-economic damages awarded to $500,000 pursuant to relevant Oregon statutory law.\textsuperscript{61} The trial court also reduced the punitive damage award to $32 million based on its assessment that the jury’s original award was unconstitutionally excessive.\textsuperscript{62}

At this point, an appellate saga lasting several years began. There is no need to detail that history here.\textsuperscript{63} It is sufficient to know that when the dust had settled in the Oregon state courts, Philip Morris was facing punitive damages of $79.5 million (which had been reinstated on appeal) based on a $521,485.80 compensatory damages award. The Oregon Supreme Court ultimately concluded that the punitive damage award withstood constitutional scrutiny. First, that court articulated its understanding that the harm Philip Morris caused or could have caused other citizens of Oregon was a proper part of the jury’s determination of a punitive damage award in Mr. Williams’s lawsuit.\textsuperscript{64} Second, it determined that the guideposts indicated that the award was not grossly excessive.\textsuperscript{65} It was in this context that the United States Supreme Court substantively considered Philip Morris’s constitutional claims.

**B. The Court’s Holding and How it Fits Into the Constitutional Landscape**

In an opinion for four other members of the Court, Justice Breyer vacated the Oregon Supreme Court’s judgment and remanded the matter for reconsideration in light

\textsuperscript{61} Williams I, 48 P.3d at 828 (citing ORE. REV. STAT. 18.560(1)).

\textsuperscript{62} Williams I, 48 P.3d at 828.

\textsuperscript{63} In summary, the jury’s liability decision was affirmed and the $79.5 million punitive damages judgment was reinstated. Williams I, 48 P.3d at 828. The Oregon Court of Appeals adhered to its decision on reconsideration, 51 P.3d 670 (Ore. Ct. App. 2002), and the Supreme Court of Oregon denied review. 61 P.3d 928 (Ore. 2002). Philip Morris sought review in the United State Supreme Court. After its decision in State Farm, the Court granted the writ of certiorari, vacated the decision of the Oregon Court of Appeals and remanded for reconsideration in light of State Farm. See Philip Morris USA, Inc. v. Williams, 540 U.S. 801 (2003). On remand, the Oregon Court of Appeals extensively addressed the then-newly articulated federal constitutional standards governing punitive damages and, once again, reaffirmed the $79.5 million punitive damage award. Williams v. Philip Morris, Inc., 92 P.3d 126 (Ore. Ct. App. 2004) (“Williams II”). The Supreme Court of Oregon accepted review and affirmed the $79.5 million punitive damage award. Williams v. Philip Morris Inc., 127 P.3d 1165 (Ore. 2006) (“Williams III”).

\textsuperscript{64} Williams II, 127 P.3d at 1172-77.

\textsuperscript{65} Id. at 1177-82.
of the Court’s holding. Exactly how the Oregon courts, as well as other jurisdictions, were to comply with the Court’s holding is – to put it charitably – not entirely clear. But I will return to this point below. What follows in this Part is an explanation of the Court’s holding and how it relates to what the Court had done before.

The Court’s focus was on Philip Morris’s argument that the Oregon courts had “unconstitutionally permitted it to be punished for harming nonparty victims.” The Court technically did not reach the question of whether, in fact, the jury in Jesse Williams’s case punished Philip Morris for conduct directed at others. However, the Court did agree with Philip Morris’s argument that “the Constitution’s Due Process Clause forbids a State to use a punitive damage award to punish a defendant for injury it inflicts upon nonparties or those whom they directly represent, i.e., injury that it inflicts upon those who are, essentially, strangers to the litigation.” Thus, most prominently Philip Morris continues the Court’s articulation of the constitutionally permissible nature of punitive damages as a remedial device. I return below to a more focused consideration of the impact of the decision. What follows in the balance of this sub-part is a description of the decision itself.

66 Philip Morris, 127 S. Ct. at 1062.
67 Id.
68 See id. at 1065 (concluding that the “Oregon Supreme Court applied the wrong constitutional standard” in considering the jury’s verdict and “remand[ing] this case so that the Oregon Supreme Court can apply the standard we have set forth.”).
69 Id. at 1063. Later in his opinion, Justice Breyer forthrightly acknowledges that this holding is an extension of constitutional doctrine. See id. at 1065 (“We did not previously hold explicitly that a jury may not punish for the harm caused others. But we do so hold now.”); see also Hylton, supra note 42, at 3 (describing the Court’s holding as a “bold proposition”).
70 See supra Part II.C (discussing this aspect of the Court’s earlier decisions). The decision does not directly relate to the Court’s work concerning the size of any particular award. See supra Part II.B (discussing the Court’s constitutional jurisprudence limiting the size of individual punitive damage awards). Of course, one would expect that the limitation of the use to which a defendant’s conduct toward non-parties may constitutionally be put would have an impact on the amount of awards if only indirectly.
71 See infra Part IV.A.
Justice Breyer based his conclusion fundamentally on what he at one point terms “the risks of unfairness” associated with allowing a jury in at least some measure to use its award of punitive damages to punish the defendant for harm it may have inflicted on persons other than the plaintiff. Such “unfairness” seemed to flow from two principal attributes. First, allowing a jury to punish a defendant for harm to non-parties was said to deprive such defendant of its right “to present every available defense” to the claims at issue. Second, it was claimed that “to permit punishment for injuries to nonparty victims would add a near standardless dimension to the punitive damages equation.”

One could certainly debate the merits of the Court’s conclusion that principles of due process preclude a jury from punishing the defendant for actions taken towards non-parties. Indeed, Justice Stevens does so in his dissent. And one could certainly take issue with Justice Breyer’s claim that the consideration of harm to others was “punishment” for that harm instead of a means to set the punishment for the specific claim before the court or to deter certain conduct. But my main goal here is not to

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72 Id. at 1064.
73 Philip Morris, 127 S. Ct. at 1063 (quoting Lindsey v. Normet, 405 U.S. 56, 66 (1972)).
74 Id. To illustrate this concern, Justice Breyer posed a number of rhetorical questions: “How many such victims are there? How seriously were they injured? Under what circumstances did injury occur?” Id. at 1066 (Stevens, J., dissenting) (“Unlike the Court, I see no reason why an interest in punishing a wrongdoer ‘for harming persons who are not before the court,’ should not be taken into consideration when assessing the appropriate sanction for reprehensible conduct.” (quoting majority opinion at page 1060)).
76 Professor Hylton makes a similar point concerning deterrence. He described the Court’s holding as adopting “a theory of procedural due process under which it is unconstitutional to do precisely what deterrence theory indicates one should do in the case of a recidivist, infrequently punished wrongdoer.” Hylton, supra note 42, at 14.
debate the propriety of the Court’s assessment of these issues. Rather, I am more concerned with the implications of that conclusion as well as the problems flowing from the Court’s refusal to bar *entirely* the consideration of harm to others in the punitive damages calculus.

After concluding that it would be unconstitutional for a jury to punish a defendant for harm to others, the Court held that it was acceptable for a jury to use evidence of harm or potential harm to non-parties as part of its determination of the level of defendant’s reprehensibility. The Court’s articulation of how this was possible given the constitutional prohibition on directly punishing such conduct is worth quoting at length:

> [Williams] argues that she is free to show harm to other victims because it is relevant to a different part of the punitive damages constitutional equation, namely reprehensibility. That is to say, harm to others shows more reprehensible conduct. Philip Morris, in turn, does not deny that a plaintiff may show harm to others in order to demonstrate reprehensibility. Nor do we. 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 – although counsel may argue in a particular case that conduct resulting in no harm to others nonetheless posed a grave risk to the public, or the converse. Yet for the reasons given above, a jury may go no 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.

I have read this passage scores of times. I have also taught it to nearly a hundred students in a Remedies course so far. I confess, however, to being truly perplexed as to how the Court envisions the jury complying with this requirement. What precisely is the

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77 I note that I have elsewhere taken issue with the Court’s suggestion that a jury’s consideration of unlawful out-of-state conduct amounts to unconstitutional extraterritorial punishment. *See* Allen, *supra* note 17, at 30-46. In that earlier article I also suggested that I was skeptical of the position the Court eventually adopted in *Philip Morris* concerning non-party punishment more generally. *Id.* at 25 n. 112.

78 *Philip Morris*, 127 S. Ct. at 1063-65.

79 *Id.* at 1063-64.
jury to do in order to consider conduct towards other to determine reprehensibility but not use it directly to punish the defendant? As Justice Stevens so aptly put it in his dissent, “[t]his nuance eludes me.”

But is this a serious issue? After all, there are certainly numerous holdings of the Court that, if truth be told, many people do not understand. And we often ask jurors to perform in ways that seem to defy cognitive reality. The difficulty is, to put it bluntly, the Court seems quite serious that the judicial system needs to be sure that a jury actually has complied with the requirement it has laid out. In this regard, Justice Breyer stated that “it is constitutionally important for a court to provide assurance that the jury will ask the right question, not the wrong one.”

It is not clear what the Majority means by this statement. On the one hand, it is possible to read the decision merely as requiring specific jury instructions. In this vein, Justice Breyer writes of the importance of “avoid[ing] procedure that unnecessarily deprives juries of proper legal guidance.” But there are also signs that the Majority may contemplate something more intrusive with respect to the jury’s actions and deliberative processes. Specifically, the Court holds that in ensuring that the jury asks the “right

80 Id. at 1067 (Stevens, J., dissenting); see also id. at 1069 (Ginsburg, J., dissenting) (commenting with respect to Philip Morris’s requested jury instruction largely tracking the Court’s holding that exactly what the jury was to do “slips from my grasp.”). Writing after State Farm, Professor Janutis made similar comments concerning her reading of the Court’s jurisprudence to that point: “the limitations recognized in Gore and Campbell leave punitive damages decision makers (juries and reviewing courts) to walk a tightrope. They may not impose punitive damages to punish the entire scope of misconduct, but they may impose increased punitive damages to punish a segment of that misconduct because of the entire scope of the misconduct.” Rachel M. Janutis, Fair Apportionment and Multiple Punitive Damages, 75 Miss. L. J. 367, 389 (2006) (hereafter “Janutis, Multiple Punitive Damages”).
81 For example, judges give limiting instructions under which juries may use information for only one purpose. See Fed. R. Evid. 105.
82 Philip Morris, 127 S. Ct. at 1064.
83 Id. at 1064. Seen in this respect, the decision fits within the Court’s articulation of procedural minimums the Constitution requires in connection with punitive damages. See supra Part II.A (discussing the Court’s constitutional decisions concerning procedures before Philip Morris).
question, not the wrong one," an lower tribunals need to avoid “procedures that create an unreasonable and unnecessary risk of any such confusion occurring.” This statement seems to suggest that a state court would need to be more proactive than merely instructing the jury as to the constitutional limitation on the use to which it could put evidence concerning the defendant’s conduct towards non-parties.

Moreover, if the Majority had meant merely to require that traditional instructions be given to the jury, it would have been fairly easy to do so. Philip Morris had tied much of its constitutional appeal to the failure of the Oregon trial court to instruct the jury much along the lines of the Court’s ultimate holding. The Court discussed that instruction in its opinion but did not state, at least explicitly, that it was error not to give the instruction Philip Morris proposed. Rather, the Court engaged in the discussion described above concerning the need for lower courts to avoid “any risk” that a jury misused evidence. As I describe further below, this aspect of the Court’s decision casts serious doubt over the continued viability of the role of the jury in the punitive damages arena, at least as that institution has traditionally been understood.

This subpart has described the Court’s holdings in Philip Morris both as to the additional constitutional constraints on punitive damage awards as well as the hyper-

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84 Philip Morris, 127 S. Ct. at 1064.
85 Id. at 1065 (emphasis added).
86 See id. at 1065 (“Although States have some flexibility to determine what kind of procedures they will implement, federal constitutional law obligates them to provide some form of protection in appropriate cases.”) (emphasis in original).
87 See, e.g., Initial Brief of Appellant-Petitioner Philip Morris USA, 2006 U.S. S. Ct. Briefs LEXIS 512 (July 28, 2006) at **47-**50 (arguing that it had a due process right to a certain jury instruction concerning harm to non-parties).
88 Philip Morris, 127 S. Ct. at 1064-65; see also id. at 1069 (Ginsburg, J., dissenting) (“The Court ventures no opinion on the propriety of the charge proposed by Philip Morris, though Philip Morris preserved no other objection to the trial proceedings. Rather than addressing the one objection Philip Morris properly preserved, the Court reaches outside the bounds of the case as postured when the trial court entered its judgment.”).
89 Id. at 1065 (emphasis added).
90 See infra Part IV.C.
vigilance required of trial courts in enforcing those constraints. Part IV now turns to several respects in which *Philip Morris* may have particular lasting significance beyond the development of constitutional doctrine itself.

IV. THREE REASONS WHY *PHILIP MORRIS* IS SIGNIFICANT

There are many aspects of the Court’s decision in *Philip Morris* on which one could remark. As described in Part III, the decision is obviously important in the development of constitutional law concerning punitive damages. The Court speaks rarely on this topic and, therefore, its statements are important to litigants and the lower courts in applying the Constitution. In addition, and as mentioned above, there is potential significance in the positions of Chief Justice Roberts and Justice Alito in *Philip Morris*.91 Also of note is what *Philip Morris* may represent in the development of substantive due process principles more generally. Seen in one light at least, one might attempt to analogize *BMW*, *State Farm*, and *Philip Morris* to a modern variant of the substantive due process principles at play in *Lochner v. New York*.92 Finally, the line of cases dealing with constitutional limits on punitive damage awards provides a rich example of the refusal of a dissenting group of justices to accept or accord *stare decisis* to a certain precedent.93 One could usefully compare this situation with others in an attempt to

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91 See *supra* Part I.

92 *Lochner v. New York*, 198 U.S. 45 (1905). The Court has attempted to blunt such criticism early in its punitive damages journey. See *TXO Production Corp.* v. *Alliance Resources Corp.*, 509 U.S. 443, 455 (1993) (rejecting arguments that the Court’s suggestion that due process principles constrained the size of punitive damage awards were relics of a discredited constitutional era). Others have noted that there is a certain resemblance between some of the Court’s pre-*Philip Morris* punitive damages jurisprudence and *Lochner*. See Martin H. Redish and Andrew L. Matthews, *Why Punitive Damages are Unconstitutional*, 53 *EMORY L. J.* 1, 9-11 (2004); Rustad, *Federalism Derailed*, *supra* note 49, at 522-23.

93 See, e.g., *Philip Morris*, 127 S. Ct. at 1069 (Thomas, J., dissenting) (indicating that the Court’s constitutional punitive damages jurisprudence is not capable of “principled application”); *State Farm*, 538 U.S. at 429 (Scalia, J., dissenting) (“I am also of the view that the punitive damages jurisprudence which has sprung forth from *BMW v. Gore* is insusceptible of principled application; accordingly, I do not feel justified in giving the case *stare decisis* effect.”); *Cooper Industries*, 532 U.S. at 443 (Thomas, J., concurring) (“[G]iven the opportunity, I would vote to overrule *BMW.*”).
delineate when it is appropriate to do so and what may separate this area of constitutional law from others in which such a position might be seen as acceptable.\footnote{In this regard, one may recall Justice Stewart’s opinions in \textit{Griswold} on the one hand and \textit{Roe} on the other. \textit{Compare Griswold v. Connecticut}, 381 U.S. 479, 527 (1965) (Stewart, J., dissenting) ("I think this is an uncommonly silly law. . . We are asked to hold that it violates the United States Constitution. And that I cannot do."). \textit{with Roe v. Wade}, 410 U.S. 113, 168 (1973) (Stewart, J., concurring) ("\textit{Griswold} stands as one in a long line of pre-\textit{Skrupa} cases decided under the doctrine of substantive due process, and I now accept it as such.").}

This Part considers three other respects in which \textit{Philip Morris} is significant beyond the basic development of constitutional doctrine. First, the decision continues the Court’s restructuring of the nature of punitive damages as a remedial device. It has the potential – perhaps even the certainty – to limit further the usefulness of this remedy particularly as a means to address problems significantly different from those facing society when punitive damages came into being.\footnote{\textit{See infra} Part IV.A.} Second, the decision is important for the impact it will have on the ability of states to regulate in the field. Most obviously, perhaps, the states have been significantly limited in the use to which they may employ this remedial device. Less obvious than this defendant-friendly impact on state regulation, however, is the potential pro-plaintiff effect that \textit{Philip Morris} could have by undermining certain state statutes designed themselves to restrict punitive damage recoveries.\footnote{\textit{See infra} Part IV.B.} Third, the decision may portend a restructuring of the role of juries in this area of the civil justice system or, at the very least, signal continued judicial interference in the operation of that body.\footnote{\textit{See infra} Part IV.C.}

\textbf{A. Remedy}

\textit{Philip Morris} is significant as a continuation of the Court’s constitutionalization of the punitive damage remedy. There are two respects in which this is the case, one
obvious and one far more subtle. In the obvious category, as described above, the Court further restricted the conduct that could be used to decide whether a given defendant was worthy of punishment or deterrence and, correspondingly, the level of award necessary to serve these purposes. In short, the apparent ability of the states after *State Farm* to consider a defendant’s similar, unlawful, in-state conduct was closed off.98

The ultimate result is that it appears that the Court has tied punitive damages to a single conception of tort law – what Professor Michael Rustad presciently described after *State Farm* as involving a “myopic focus on one-on-one torts.”99 My point is not that the Court is necessarily wrong about the proper conception of tort law. Tort theory is dazzlingly complex. Rather, as with defining the purposes of punitive damages, the appropriate conception of tort law is something about which the Court should have nothing – or at least very little – to say.

Instead, the Court has effectively made it impossible for states to experiment concerning the use a well-established remedy in connection with anything other than one

98 Professor Klass has recently argued that *Philip Morris* should not be a bar to using “unvalued harm to natural resources when those natural resources are not ‘represented’ by a government entity” as a means of setting the level of punitive damages in a given case. *See* Alexandra B. Klass, *Punitive Damages and Valuing Harm*, 92 MINN. L. REV. ___ (forthcoming 2007), available at http://ssrn.com/abstract=979817 at 45-46. Professor Klass’s argument is well-developed. For example, she is certainly correct that situations concerning harm to natural resources, for which no individual may have a right to sue, are different from situations involving mass produced products in which each victim unquestionably has such a right. *Id*. Indeed, I have much sympathy with the argument. Nevertheless, given the Court’s vehemence in *Philip Morris* concerning the need to tie the award in a given case only to harm done to the plaintiff, it seems that Professor’s Klass’s argument would likely fall on deaf ears. Moreover, as I argue below, *see infra* Part IV.C, I do not believe that Professor Klass’s suggestion that jury instructions would alleviate the problems identified in *Philip Morris* accurately reflects the depth of the Court’s concerns. *See* Klass, *supra* this note, at 45.

99 Rustad, *Federalism Derailed*, *supra* note 49, at 464; *see also* Thomas B. Colby, *Beyond the Multiple Punishment Problem*: *Punitive Damages as Punishment for Individual Private Wrongs*, 87 MINN. L. REV. 583, 588-89, 650-66 (2003) (arguing before *State Farm* that it is unconstitutional to award punitive damages in anything other than the one-on-one lawsuit paradigm). The Court’s one-on-one conception of the tort to which punitive damages may constitutionally apply calls to mind one of the more common and influential forms of corrective justice theory. *See*, e.g., Ernest J. Weinrib, THE IDEA OF PRIVATE LAW 56-83 (1995) (describing the bi-polar or one-on-one private law tort suit).
type of now constitutionally favored tort action. This is so no matter how much the modern realities facing society – and thus tort law – have changed. This result is particularly noteworthy, and perhaps at least somewhat surprising, given the Court’s own acknowledgement that punitive damages are, in some measure at least, evolutionary in nature. Moreover, by framing the issue as one of federal constitutional law, the Court has made it practically impossible for any entity – state or federal – other than itself to change this stunted conception of punitive damages. It has stopped evolution in its tracks.

100 Other commentators noted this potential effect of the Court’s work in this area after State Farm. See Laura J. Hines, Due Process Limitations on Punitive Damages: Why State Farm Won’t be the Last Word, 37 AKRON L. REV. 779, 811 (2004); Janutis, Multiple Punitive Damages, supra note 80, at 387-88; Rustad, Federalism Derailed, supra note 49, at 646-66. Philip Morris has removed any doubt about these assessments; but see Klass, supra note 98, at 45-46 (taking less absolute position on the meaning of Philip Morris).

101 As one commentator has noted: “The modern reality that allegedly tortious conduct can impact numerous parties demands a reexamination of current models of tort decision-making and goals.” Thomas C. Galligan, Jr., The Risks of and Reactions to Underdeterrence in Torts, 70 Mo. L. Rev. 691, 697 (2005) (hereafter “Galligan, Underdeterrence in Tort”); see also Sharkey, Societal Damages, supra note 43, at 357 (“Modern tort cases, however, have exerted increasing pressure upon this individual-specific harm model”); Benjamin C. Zipursky, A Theory of Punitive Damages, 84 TEX. L. REV. 105, 132 (2005) (“Understanding tort law, in a century of tort thinking dominated by Oliver Wendell Holmes, William Prosser, and Leon Green, is understanding the idea that tort law is always simultaneously serving multiple functions, and playing many different roles.”). At least in some measure, the Supreme Court has made such reexamination constitutionally impossible.

102 See, e.g., Copper Industries, 532 U.S. at 437 n.11 (discussing ways in which punitive damages have “evolved somewhat” over time). In many respects, the very history of punitive damages is the subject of heated scholarly debate. For example, some scholars argue that the history of punitive damages is one in which the remedial device has been used for shifting purposes depending on the broader needs of society. See, e.g., Rustad, Federalism Derailed, supra note 49, at 468-93; Anthony J. Sebok, What Did Punitive Damages Do? Why Misunderstanding the History of Punitive Damages Matters Today, 78 CHI-KENT L. REV. 163, 180-204 (2003). Other scholars have concluded that punitive damages have only a single acceptable historical purpose. See, e.g., Colby, supra note 99, at 614-43 (developing a historical account in which punitive damages were awarded for punishment and deterrence in the context of a bi-polar lawsuit).

103 Thomas Galligan has extensively discussed the constitutionalization of punitive damages and made a similar point about the Court’s earlier forays into the punitive damages arena. See Galligan, Supreme Court Tort Reform, supra note 49, at 1243-58. Of course, the Court’s position is not without its (distinguished) defenders. Several years before Philip Morris, Professor Kelly argued that using punitive damages to address harm beyond that caused to a particular defendant by a particular plaintiff was inappropriate as both a matter of policy and constitutional law. See Michael B. Kelly, Do Punitive Damages Compensate Society? 41 SAN DIEGO L. REV. 1429, 1432-42 (2004). And in early writing after the decision, Professor Sebok has also supported the Court’s result concerning non-party conduct even if he does not fully embrace the Court’s reasoning. See Anthony J. Sebok, Punitive Damages from Myth to
More subtly, perhaps, the Court in *Philip Morris* also appeared to take further steps in limiting the remedial goals punitive damages could serve. As described above, the Court had made clear that those goals were limited to deterrence and punishment. The Court does not formally retreat from that position in *Philip Morris*. Yet, there is an unmistakable quality to Justice Breyer’s opinion that suggests that the Court has nearly discounted the deterrent function of punitive damages. For example, in Parts III and IV of the Majority opinion, the portions of the decision dealing substantively with the issue presented, the words “deterrence” or “deter” never appear. In contrast, the terms “punish” or “punishment” appear no fewer than twelve times. The potential implication is the beginning of further narrowing of the constitutionally legitimate goals for which a state may put the ever increasingly limited punitive damage remedy.

One can glimpse the potentially serious consequences of the Court’s continued constitutionalization of punitive damages in *Philip Morris* by considering one line of reasoning that has been prominent in both judicial decisions and scholarship. In both these areas, well-respected commentators and jurists have argued from a “law and

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104 See supra Part II.C.
105 See, e.g., *Philip Morris*, 27 S. Ct. at 1062 (“This Court has long made clear that ‘punitive damages may properly be imposed to further a State’s legitimate interests in punishing unlawful conduct and deterring its repetition’”) (quoting *BMW*, 517 U.S. at 568).
106 See *Philip Morris*, 127 S. Ct. at 1063-65.
107 See id. I am not here arguing that deterrence should be a principal rationale for supporting damages or that the remedy actually achieves this result. See Sebok, *Myth to Theory*, supra note 103, at 976-89 (discussing what he terms the “myth” that punitive damages can produce effective deterrence). My point is that *Philip Morris* is at least a partial retreat from the Court’s earlier embrace of deterrence as a legitimate goal in this area.
108 Professor Rustad has argued that the Court had earlier expressed a view of punitive damages that largely ignored the deterrent rationale. See Rustad, *Federalism Derailed*, supra note 49, at 520-21. For an excellent overview arguing that deterrence and punishment are truly separate goals in the context of punitive damages, each of which is important for distinct reasons, see generally Thomas C. Galligan, Jr., *Disaggregating More-Than-Whole Damages in Personal Injury Law: Deterrence and Punishment*, 71 *Tenn. L. Rev.* 117 (2003).
an important factor to be considered when setting the level of a given punitive damage award (or even the decision to award any punitive damages in the first instance) is the risk of non-detection of the defendant’s wrongful conduct. For example, in their influential 1998 HARVARD LAW REVIEW article, Professors Polinsky and Shavell argued that “punitive damages ordinarily should be awarded if, and only if, an injurer has a chance of escaping liability for the harm he causes.” 109 Basing their analysis on economic theory, they concluded that the deterrence rationale of punitive damages only made sense by considering the likelihood that a defendant would be called to account for its unlawful conduct. 110 If such a calculation was not undertaken and some other basis for a punitive damage award was used, Polinksy and Shavell feared either over- or under-deterrence would result. 111

Two well-regarded judges, each associated with law and economics approaches in at least some respects, have used logic akin to the Polinsky/Shavell approach. First, in Mathias v. Accor Economy Lodging, Inc., 112 Judge Richard Posner faced a case in which

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109 A. Mitchell Polinsky and Steven Shavell, Punitive Damages: An Economic Analysis, 111 HARV. L. REV. 869, 874 (1998) (emphasis omitted). Professors Polinsky and Shavell make clear that they consider their methodology is based on economics. See id. at 873 (“Our methodology is economic in the sense that we organize our inquiry around an examination of how rational parties will respond to the threat of punitive damages, and whether their response will promote, or fail to promote social welfare.”) (footnote omitted). While never rejecting their normative arguments, the Court has expressed skepticism that juries presently operate using the deterrent rationale Polinsky and Shavell articulate. See Cooper Industries, 532 U.S. at 439. Some recent empirical scholarship supports the Court’s skepticism in this regard. See, e.g., W. Kip Viscusi, Deterrence Instructions: What Juries Won’t Do in Cass R. Sunstein et al., PUNITIVE DAMAGES: HOW JURIES DECIDE 142-170 (U. Chi. Press 2002) (reporting based on mock jury experiments that jurors do not follow detailed deterrence-based instructions).

110 See, e.g, Polinsky and Shavell, supra note 109, at 887-86. Polinksy and Shavell later explain that their argument concerning non-detection is distinct from arguments based on the consideration of potential harm, arguments which they generally reject. See id. at 914-17.

111 Id. at 887-904. Other scholars less favorably inclined to law and economics principles as a general matter have also argued that the risks associated with non-detection (including potential under-deterrence) counsel in favor of the use of punitive damages. See generally Galligan, Underdeterrence in Torts, supra note 101.

112 Mathias v. Accor Economy Lodging, Inc., 347 F.3d 672 (7th Cir. 2003). For an excellent discussion of Judge Posner’s opinion in Mathias, see generally Murphy, Bedbug supra note 51.
the plaintiffs had been bitten by bedbugs at a Chicago hotel. They sued the hotel claiming, among other things, that the hotel knew about the bedbugs but rented them the room nonetheless. A jury awarded the plaintiffs $5,000 in compensatory damages and $186,000 in punitive damages. The defendant appealed claiming in part that the punitive damage award was unconstitutionally excessive.

The Seventh Circuit rejected the defendant’s argument. One reason Judge Posner advanced for doing so tracked Polinsky and Shavell. Judge Posner wrote: “If a tortfeasor is ‘caught’ only half the time he commits torts, then when he is caught he should be punished twice as heavily in order to make up for the times he gets away.” In other words, the risk that the defendant’s actions towards non-parties will go undetected is a reason for a jury to award a higher amount to the party before the court.

Judge Guido Calabresi expressed similar logic in *Ciraolo v. City of New York*. The case concerned a claim that the New York Police Department’s policy of strip-searching everyone arrested for misdemeanors violated the Constitution. The jury awarded both compensatory and punitive damages. The issue on appeal was whether punitive damages were available against the municipality. The Second Circuit held that they were not.

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113 *Mathias*, 347 F.3d at 673.
114 *Id.* at 673-74.
115 *Id.* at 674.
116 *Id.*
117 *Id.* at 675-78.
118 *Id.* at 677.
120 *Id.* at 237-38.
121 *Id.*
122 *Id.*
123 *Id.* at 238-42.
Judge Calabresi concurred in his own majority opinion to argue that, while punitive damages were precluded under relevant Supreme Court precedent, a different outcome would have been better. Specifically, he argued that punitive damages would be an appropriate way to ensure that a wrongdoer internalized all the costs of its wrongdoing because they would serve as a proxy for compensatory damages that were not awarded in cases not brought by injured persons.124

It seems unlikely that the logic underpinning the non-detection rationale survived *Philip Morris*. It is difficult to see how either Judge Calabresi or Judge Poser could today faithfully write an opinion in which the conduct of the defendant towards persons not before the Court could play such a prominent role. Similarly, the scholarly arguments of those such as Professors Polinsky and Shavell seem to have been rejected.125 Of course, one might say first that the risk of non-detection could be a relevant criterion in determining the “degree of reprehensibility” in the same way that the Court tells us that the defendant’s actions towards others may be used in this manner.126 But it would seem that the same metaphysical restrictions on such evidence – that is, using it for determining reprehensibility but not using it to punish the defendant for conduct concerning non-parties – would apply.127 Taking a different tack, one might argue that the non-detection rationale could still be appropriately used by appellate courts reviewing

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124 *Ciraolo*, 216 F.3d at 242-50 (Calabresi, J., concurring). Judge Calabresi cited the Polinsky and Shavell *HARVARD LAW REVIEW* article in support of his position. *See id.* at 243. Later in his concurrence, Judge Calabresi described his approach as one of “socially compensable damages.” *Id.* at 245. As I mentioned above concerning Professor Sharkey’s *YALE LAW JOURNAL* article arguing for a reconceptualization of punitive damages as societal compensatory damages, the Supreme Court’s limitation of this remedial device to punishment or deterrence is a difficult hurdle to overcome for anyone advancing the goal for society-wide compensation in connection with punitive damages. *See supra* text accompanying note 43.


126 *See Philip Morris*, 127 S. Ct. at 1063-65.

127 *Id.*
a jury’s work even if the jury could not itself use the logic in setting the award in the first instance. While such an argument is not totally without merit, it seems unlikely to carry the day given the firmness of the Court’s decision in *Philip Morris* that courts need to avoid the “risk of *any such confusion*” concerning the use of non-party evidence. 128 If anything, it would seem that the use of the non-detection rationale by reviewing courts would actually add to the “confusion” in the process.

In the end, the full impact of *Philip Morris*’s continued constitutionalization of punitive damages as a remedial device will not be known for some time. 129 What does seem certain, however, is the decision is an important part of the Court’s effort to constrain the remedy.

**B. State Regulation**

*Philip Morris* will also have an important effect on a state’s ability to regulate punitive damage. If one accepts what I have described above concerning the constitutionalization of the punitive damage remedy, this point is self-evident in some respects. Thus, a state will not be able to use punitive damages to advance its interests outside of the increasingly narrow range the United States Supreme Court has defined. 130 This restriction on state authority – at least viewed in isolation – is most certainly

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128 Id. at 1065 (emphasis added).
129 For example, in addition to the doubt the decision casts on the non-detection rationale, *Philip Morris* may also pose significant obstacles to claims that unjust enrichment principles should be used to judge the propriety of a given award of punitive damages. This issue has been contentious thus far. See, e.g., *Mathias*, 347 F.3d at 677 (discussing as one reason to affirm the award that “the defendant may well have profited from its misconduct”); Johnson v. Ford Motor Co., 113 P.3d 82, 93-96 (Cal. 2005) (generally rejecting the use of “total profits” to support an award of punitive damages). Of course, one need not support a gains-based approach even if one is in favor of consideration of the harm to others in at least some measure. See, e.g., Polinsky and Shavell, *supra* note 109, at 918-20 (generally rejecting use of defendant’s gain as a relevant factor in punitive damage calculus). In any event, after *Philip Morris*, one might argue that basing an award of punitive damages on the defendant’s profits, which after all in most cases will be based in large measure on the defendant’s actions concerning non-parties, is violative at least of the spirit of the decision. I do not provide a full discussion of this issue here. Rather, I raise it as another possible consequence of the Court’s constitutional definition of punitive damages.
130 See *supra* Part IV.A.
defendant-friendly. In this sub-part, I focus on a different, less obvious respect in which *Philip Morris* is likely to limit state regulation. As I will explain, the consequences of this type of restriction were almost certainly not intended and are far more favorable to plaintiffs.

To understand how *Philip Morris* and its kin could possibly have such a pro-plaintiff effect, as well as to appreciate a certain irony in that result, one needs to step back to consider a significant concern underlying a good deal of the movement against punitive damages, including the Court’s move to check that remedy. That concern goes something like this: given the modern economy involving mass produced goods, a major problem with punitive damage awards, apart from the size of any given award, is that many defendants could be subject to award after award for the same conduct. This multiple punishment scenario could lead to “too much” overall punishment (or over-deterrence) and thus steps need to be taken to reign in punitive damages across the board. This type of logic is apparent in the Court’s decisions as well as the academic literature.

The concern with potential multiple punishments – whether warranted or not – has not been ignored by the states. In fact, as would befit a collection of laboratories,  

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131 See, e.g., *State Farm*, 538 U.S. at 423 (“Due 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, but we have no doubt the Utah Supreme Court did that here. Punishment on these bases creates the possibility of multiple punitive damage awards for the same conduct; for in the usual case nonparties are not bound by the judgment some other plaintiff obtains.”) (citations omitted); *BMW*, 517 U.S. at 593 (Breyer, J., concurring) (“Larger damages might also ‘double count’ by including in the punitive damages award some of the compensatory, or punitive, damages that subsequent plaintiffs would also recover.”); see also *Roginsky v. Richardson-Merrell, Inc.*, 378 F.2d 832, 839-40 (2d Cir. 1969) (Friendly, J.) (articulating in an early decision the “multiple punishment” concern).

132 See, e.g., *Allen*, supra note 17, at 43-44 n.177 (collecting academic literature concerning the perceived “multiple punishment” problem); *Janutis, Multiple Punitive Damages, supra* note 80, at 372-77 (discussing the issue and collecting sources).

133 See *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) (discussing the “laboratories of the States” that exists in the American federal system).
there are many approaches to deal with the perceived problem. Some states have enacted statutory schemes to address the “piling on” effect at the heart of the multiple punishment argument. Other jurisdictions consider the multiple punishment issue as part of their common law (or state constitutional) reasonableness inquiry. In sum, the states overwhelmingly appear to have in place at least some mechanism to control for the perceived evils of multiple punitive damage awards for similar conduct.

At first blush, it would appear that the Court’s myopic focus on the one-on-one tort rationale on which its punitive damages jurisprudence is constructed is a perfect (and defendant-friendly I might add) solution to the perceived multiple punishment issue.

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134 The states have also been active in limiting punitive damages in other respects such as with damage caps. The American Tort Reform Association has a useful website summarizing such actions. See www.atra.org/issues/index.php?issue=7343 (last visited April 29, 2007).

135 See, e.g., ALA. CODE § 6-11-23 (trial court is to assess punitive damage award by considering, among other things, “whether or not the defendant has been guilty of the same or similar acts in the past”); ALASKA STAT. § 09.17.020(c)(7) (in setting amount of punitive damages the factfinder is to consider, among other things, “the total deterrence of other damages and punishment imposed on the defendant as a result of the conduct, including compensatory and punitive damages awards to persons in situations similar to those of the plaintiff . . . ”); FLA. STAT. § 768.73(2)(a) and (b) (If a “defendant establishes, before trial, that punitive damages have previously been awarded against that defendant in any state or federal court in any action alleging harm from the same act or single course of conduct for which the claimant seeks compensatory damages . . . [unless] in subsequent civil actions involving the same act or single course of conduct for which punitive damages have already been awarded, if the court determines by clear and convincing evidence that the amount of prior punitive damages awarded was insufficient to punish the defendant’s behavior, the court may permit a jury to consider an award of subsequent punitive damages . . . . Any subsequent punitive damage awards must be reduced by the amount of any earlier punitive damage awards rendered in state or federal court.”); GA. CODE § 51-12-5.1(1) (“Only one award of punitive damages may be recovered in a court in this state from a defendant for any act or omission if the cause of action arises from product liability, regardless of the number of causes of action which may arise from such act or omission.”); MO. REV. STAT. § 510.623(4) (defendant allowed credit for “amounts previously paid by the defendant for punitive damages arising out of the same conduct on which the imposition of punitive damages is based.”); MONT. CODE ANN. § 27-1-221(7) (making “previous awards of punitive or exemplary damages against the defendant based in the same wrongful act” relevant to a later award of punitive damages); ORE. REV. STAT. § 30.925(2)(g) (one of the criteria for awarding punitive damages is “[t]he total deterrent effect of other punishment imposed upon the defendant as a result of the misconduct, including, but not limited to persons in situations similar to the claimant’s and the severity of criminal penalties to which the defendant has been or may be subjected).

136 See, e.g., Alabama: Green Oil Co. Hornsby, 539 So.2d 218, 224 ( Ala. 1989) (appellate courts are to consider other punitive damage awards as part of common law excessiveness inquiry); Colorado: Frick v. Abell, 602 P.2d 852 (Colo. 1979) (deterrent effect of other punitive damages awards is a factor to consider in assessing the reasonableness of a given punitive damage award); Maryland: Bowden v. Caldor, Inc., 710 A.2d 267 (Md. App. 1998) (noting that a court may consider other punitive damage awards as part of its excessiveness inquiry).
Yes, it might be duplicative given certain of the state efforts, but what could be the harm?
It would seem to be nothing more than the equivalent of putting a belt on when you are
wearing suspenders. Yet the surely unintended consequence of the specific manner in
which the Court has constitutionalized punitive damages potentially leads to a surprising
result.

To see the difficulty, assume the following scenario. Acme, Inc. is a
manufacturer of DVD players. It turns out that Acme cut a fair number of corners when
designing its newest model. As a result of this presumed grossly negligent conduct, a
number of different people were injured in Florida when the DVD exploded. Tom
brings a suit against Acme and prevails. He is awarded $1 million in compensatory
damages and $3 million in punitive damages. The award is affirmed on appeal in all
respects despite Acme’s claims under both state law and the United States Constitution.

Now assume that Acme is then sued by Tina. Tina claims that she too was
severely injured when her Acme DVD exploded. Tina seeks both compensatory and
punitive damages. Acme believes that Tina should not be allowed to seek punitive
damages in the case because Florida law provides that if Acme is able to establish “that
punitive damages have previously been awarded against the defendant . . . in any action
alleging harm from the same act or single course of conduct for which [Tina] seeks
compensatory damages” no additional punitive damages are warranted. The Florida
statute goes on to allow a plaintiff to nevertheless seek punitive damages so long as she

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137 We may assume that all the injured persons are in Florida so that there is no “extra-territorial
punishment” issue. We may also assume that Acme’s conduct meets the Florida statutory requirement that
punitive damages are applicable only for “gross negligence” or “intentional misconduct.” See FLA. STAT. §
768.72(2).
138 Under the facts presented, Florida law would limit Tom’s punitive damages to three times the
compensatory damages. See FLA. STAT. § 768.73(1)(a).
139 See FLA. STAT. § 768.73(2)(a).
convinces the court by clear and convincing evidence that the prior punitive damage award “was insufficient to punish that defendant’s behavior.”\textsuperscript{140}

Acme would certainly have been correct in its argument before \textit{Philip Morris}. It cannot be nearly as confident after that decision. The reason is that the Supreme Court has made the Florida statute meaningless in certain important respects. The Court has told us that, by constitutional definition, a punitive damage award cannot “punish a defendant for injury that it inflicts upon non-parties . . . who are essentially strangers to the litigation.”\textsuperscript{141} If this is the case, it seems that the Florida statutory scheme enacted to address multiple punishments is redundant because a defendant could not have constitutionally been punished for that conduct before. But for Acme in my hypothetical, \textit{Philip Morris} has a far more negative consequence. The decision effectively exposes the company to a punitive damage award that it likely would not have had to face before that case was decided. Why? Recall that Acme lost its appeal concerning Tom’s punitive damage award. Thus, that judgment now is final and cannot be collaterally challenged in Tina’s case against Acme.\textsuperscript{142} The judgment is presumed to be correct, including one would think, that the earlier award was not constitutionally improper as a punishment beyond the harm it caused to Tom. The end result is that Tina will be able to pursue the award against Acme even though she almost certainly would not have been in a world before \textit{Philip Morris}.\textsuperscript{143}

\textsuperscript{140} \textit{Id.} at 768.73(2)(b). If successful in recovering punitive damages in this later action, the plaintiff is required to subtract from her award the amount of punitive damages awarded in the earlier action. \textit{Id.}
\textsuperscript{141} \textit{Philip Morris}, 127 S. Ct. at 1063.
\textsuperscript{142} \textit{See, e.g., 1 JUDGMENTS IN FEDERAL COURT} § 8.08 at p. 378 (Lawyers’ Coop. Pub. 1997) (“A judgment cannot be collaterally attacked on the grounds that it was merely wrong or erroneous and could be reversed on appeal or set aside on direct attack.”).
\textsuperscript{143} One could craft similar arguments under other states’ statutes. For example, Alaska’s provision that one is to consider the “punishment” of earlier awards seems vulnerable, \textit{see ALASKA STAT.} § 09.17.020(c)(7), as does the Colorado Supreme Court’s consideration of the deterrent and punishment tied to previous
To be sure, one can argue against my interpretation of the Florida statute. One could also hypothesize that the Court will impose some aggregate constitutional cap on punitive damages. Indeed, I have suggested myself that “[t]he due process excessiveness rationale . . . should be extended to address not only one-time awards but also a series of punitive damage awards based on the same course of conduct.” But it is difficult to see how the Court could do so after Philip Morris given the now firm linkage between constitutionally acceptable punitive damages and the classic one-on-one tort model. At the very least, however, the example I have outlined above suggests that the consequences of Philip Morris on the state regulation of punitive damages could be far reaching, are difficult to predict, and are by no means necessarily defendant-friendly.

\[144\] See Frick v. Abell, 602 P.2d 882 (Colo. 1979). This is not to say that all state action concerning multiple punishments would be undermined. For example, it does not appear that Philip Morris would affect the Georgia statutory scheme for punitive damages in product liability actions. See GA. CODE § 51-12-5.1(e)(1) (“Only one award of punitive damages may be recovered in a court in this state from a defendant for any act or omission if the cause of action arises from product liability, regardless of the number of causes of action which may arise from such act or omission.”).

\[145\] See, e.g., John Calvin Jeffries, Jr., A Comment on the Constitutionality of Punitive Damages, 72 VA. L. REV. 139, 152-58 (1986) (advancing the argument for some cumulative limit on punitive damages for the same course of conduct); see also Janutis, Multiple Punitive Damages, supra note 80, at 387 (“While purporting to impose limitations on individual awards, Gore and Campbell also indirectly impose limitations on multiple punitive damage awards.”). Arguing from an economic perspective, Polinsky and Shavell similarly propose that other punitive damage judgments for the same course of conduct should be taken into account when determining the level of an award to achieve optimal deterrence. See Polinsky and Shavell, supra note 109, at 923-26.

\[146\] See Allen, supra note 17, at 45 (footnote omitted).

Professor Hylton reached a similar conclusion based on different reasoning. See Hylton, supra note 42, at 16 (“the risk of redundant penalties in punitive damages litigation is probably enhanced by the Philip Morris decision.”); see also Howard J. Bashman, Philip Morris’ Punitive Ruling May Contain Silver Lining for Plaintiffs, LAW.COM (Feb. 26, 2007), available at www.law.com/id=1172224994787/ (“Because under Philip Morris, earlier punitive damages awards could not permissibly have punished the defendant for having harmed the plaintiff currently before the court, now each plaintiff would appear to have an individual right to seek a punitive damages windfall based on the harm caused by the defendants”); Anthony J. Sebok, The Supreme Court’s Decision to Overturn a $79.5 Punitive Damages Verdict Against Philip Morris: A Big Win, But One with Implications that May Trouble Corporate America, FINDLAW.COM (Feb. 27, 2007), available at http://writ.news.findlaw.com/sebok/20070227.html (“In sum, then, Philip Morris was certainly less of a victory than many had hoped it would be. And worse yet, the big prize that corporate America sought – extension of the ‘hard cap’ to punitive damages in personal injury cases – was put off for another day.”).
C. Juries

The image of a jury guided by no rules wielding the awesome power of the state has been a prominent part of the Court’s “concern about punitive damages that ‘run wild.’” As Justice O’Connor put it early in her ultimately successful quest to convince a majority of her colleagues that the Court needed to take action: “Juries are permitted to target unpopular defendants, penalize unorthodox or controversial views, and redistribute wealth. Multimillion dollar losses are inflicted on a whim.” Or as one commentator put it: “Juries are portrayed as insurgent radicals encumbering corporate America with increasingly erratic and unpredictable punitive damage awards.”

Given the prominent place of the jury in discussions of punitive damages, it is not surprising that the Court has included in its constitutional jurisprudence elements designed to address that decision maker. As mentioned above, the Court has required that juries be sufficiently instructed about their duties and that appellate courts exercise

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147 Pacific Mutual, 499 U.S. at 18.
148 Id. at 43 (O’Connor, J., dissenting). Justice O’Connor’s fundamental point could also be found in earlier decisions. See, e.g., Browning-Ferris, 492 U.S. at 281 (Brennan, J., concurring) (noting that punitive damages “are imposed by juries guided by little more than an admonition to do what they think is best.”); Gertz v. Robert Welch, Inc., 418 U.S. 323, 350 (1974) (“In most jurisdictions jury discretion over the amounts awarded is limited only by the gentle rule that they not be excessive. Consequently, juries assess punitive damages in wholly unpredictable amounts bearing no necessary relation to the actual harm caused.”). It is also present in cases after Pacific Mutual. See, e.g., State Farm, 538 U.S. at 417 (commenting critically that “[j]ury instructions typically leave the jury with wide discretion in choosing amounts).
149 Rustad, Federalism Derailed, supra note 49, at 461. Professor Rustad is generally favorably inclined towards punitive damages. However, one can find the same general description from a general critic as well. See Redish, supra note 92, at 2 (“If left unchecked, juries may employ the power to award punitive damages in order to impose what amounts to an economic death penalty on a defendant or to reward a plaintiff with an undeserved windfall.”). Additionally, some prominent academics have argued that fundamental aspects of human cognition argue in favor of a dramatically reduced, if not the elimination of, the role of the jury in assigning punitive damages. See generally Sunstein et al., supra note 109. Sunstein et al.’s work has been the subject of significant criticism. See, e.g., Catherine M. Sharkey, Book Review: Punitive Damages: Should Juries Decide, 82 TEX. L. REV. 381 (2003) (reviewing PUNITIVE DAMAGES: HOW JURIES DECIDE by Cass R. Sunstein, et al.); Neil Vidmar, Experimental Simulations and Tort Reform: Avoidance, Error and Overreaching in Sunstein et al.’s Punitive Damages (2002), 53 EMORY L. J. 1359 (2004).
meaningful review of those decisions (as well as those of the trial courts). In addition, the Court has held that “[u]nlike the measure of actual damages suffered, which presents a question of historical or predictive fact, the level of punitive damages is not really a fact tried by the jury.” Thus, as matters stood before Philip Morris, there was a fair degree of skepticism of the jury’s role in assigning punitive damages but the Court appeared to be addressing that concern through standard means: jury instructions and appellate review, that changed with Philip Morris.

A fair reading of Philip Morris suggests that to comply faithfully with the Court’s directions, judges will need to invade juries’ decision making processes in ways unheard of in the American legal system. As I alluded to above, Justice Breyer’s opinion for the Court contains four important aspects with respect to the instant question. First, “it is constitutionally important for a court to provide assurance that the jury will ask the right

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150 See supra Part II.A.
151 Cooper Industries, 532 U.S. at 437 (emphasis added; internal quotation marks and citations omitted) (quoting Gasperini v. Center for Humanities, Inc., 518 U.S. 415, 419 (1996) (Scalia, J., dissenting)).
152 Earlier in the opinion, the Court had described the jury’s decision as “an expression of its moral condemnation.” Id. at 432. This conclusion was almost certainly driven by the Court’s goal of providing meaningful appellate review of punitive damage awards. Id. at 437 (“Because the jury’s award of punitive damages does not constitute a finding of ‘fact,’ appellate review of the District Court’s determination that an award is consistent with due process does not implicate the Seventh Amendment concerns raised [in the matter].”) In relevant part, the Seventh Amendment provides that “In suits at common law, where the value in controversy shall exceed twenty dollars, . . . no fact tried by jury, shall be otherwise reexamined in any Court of the United States, than according to the rule of the common law.” U.S. CONST., AMEND. VII.
153 Of course, as commentators noted before Philip Morris the fact that the Court appeared to be relying largely on traditional methods of jury control did not mask potential dangers to the role of the jury in awarding punitive damages. See generally e.g., Nathan Seth Chapman, Note: Punishment by the People: Rethinking the Jury’s Political Role in Assigning Punitive Damages, 56 DUKE L. J. 1119 (2007); Partlett, supra note 26.
154 In an early assessment of Philip Morris, Professor Hylton made a separate, but related point. He argued that the decision “will encourage obfuscation and dishonesty from lower courts more than straightforward analysis of the grounds for a punitive award.” See Hylton, supra note 42, at 16. I agree that this is possible. My point is distinct from the one Professor Hylton advances. He considers what a court (trial or appellate) will do in response to an award. My focus concerns what a trial court must do at the time (or perhaps immediately before or immediately after) a jury renders its verdict.
155 See supra Part III.B (discussing constitutionally significant aspects of the Court’s holding in Philip Morris).
question, not the wrong one.” 155 By this he meant that the jury will not use “non-party evidence” to punish the defendant for actions towards non-parties but rather merely as a means of assessing the defendant’s reprehensibility toward the plaintiff. 156 Second, Justice Breyer held that state courts could not follow procedures “that create an unreasonable and unnecessary risk of any such confusion occurring.” 157 Third, the Court recognized, albeit apparently grudgingly, that the states retained some measure of flexibility. However, it also stressed that they were under a constitutional imperative to provide the protection described in the opinion. 158 And, finally, the Court conspicuously did not hold that the jury instruction Philip Morris had proposed was required or, in fact, would have solved the constitutional problem even if it had been given. 159

So, what does the Court envision needs to be done in order to ensure that a jury does not run afoul of the prohibitions concerning the use of “non-party” evidence? 160 One reading of the opinion would suggest that the Court’s holding concerns traditional procedures by which juries are controlled before they act. 161 In this case, for example,

155 Philip Morris, 127 S. Ct. at 1064.
156 See id. at 1063-64.
157 Id. at 1065 (emphasis added).
158 See id. (“Although the States have some flexibility to determine what kind of procedures they will implement, federal constitutional law obligates them to provide some form or protection in appropriate cases.”) (emphasis in original)).
159 See generally id.; see also id. at 1069 (Ginsburg, J., dissenting) (“The Court ventures no opinion on the propriety of the charge proposed by Philip Morris . . .”).
160 Expressing a similar questioning attitude about the decision, Professor Douglas Kmiec recently wrote that the Court’s opinion “is not an example of clarity. It is, instead, what happens when you’re lucky enough to be in a position to delegate to others the implementation of unworkable rules.” Kmiec, supra note 10.
161 See, e.g. id. at 1063-64 (discussing the use of “procedures”). Professor Sebok apparently reads the decision in this way. See Sebok, Myth to Theory, supra note 103, at 1032 (discussing Philip Morris and commenting that “Punishment based on injury to others not party to the plaintiff’s suit, on the other hand, implicates serious due-process concerns that can be cured by properly framed jury instructions.”). In addition, some lower courts responding to Philip Morris have read the opinion in this narrow way. See, e.g., Merrick v. Paul Revere Life Insurance Co., ___ F.3d ___, (9th Cir. Aug. 31, 2007) (remanding a punitive damages verdict “due to the district court’s failure to give an adequate limiting jury instruction under Williams.”); White v. Ford Motor Co., ___ F.3d ___, (9th Cir. Aug. 30, 2007) (noting that “[a]bsent a proper limiting instruction” the court could not be sure that the Philip Morris mandate had been
trial courts could use limiting instructions as to the non-party evidence, jury instructions describing the use to which the jury could put the evidence, and the use of special verdict forms. If this is so, states may relatively easily comply with the Court’s holding. There may be some short-term disruption as new forms and instructions are drafted, but the substantive impact on the jury as an institution would likely be small.

A more holistic reading of the opinion, however, suggests that the Court likely expects more than traditional approaches from the states. First, none of the traditional devices mentioned above would actually give a court any real “assurance” that the jury has asked the right question. If that is truly a constitutional requirement, pretending that an instruction or other traditional device will be sufficient is simply wishful thinking.

Moreover, in other contexts when the Court has wanted to direct state courts to better instruct juries, it has done so clearly. An interesting comparison can be drawn between the Court’s approach in *Philip Morris* and that used in connection with the

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162 See, e.g., *Fed. R. Evid. 105* ("Where evidence is admissible . . . for one purpose but not admissible . . . for another purpose is admitted, the court, upon request, shall restrict the evidence to its proper scope and instruct the jury accordingly.").
163 See, e.g., *Fed. R. Civ. P. 51* (providing authority for federal courts to provide instructions as to matters of law to the jury).
164 See, e.g., *Colby, supra note 99, at 675-76; Janutis, Multiple Punitive Damages, supra note 80, at 414-15.*
165 See *Philip Morris*, 127 S. Ct. at 1064. Some lower courts also appear to recognize that there is at least a possibility that the Court expects them to do more to police juries awarding punitive damages than simply giving instructions. See, e.g., *Southstar Funding, LLC v. Sprouse*, 2007 U.S. Dist. LEXIS 22585 at *7-*8 n.2 (Mar. 13, 2007) (Noting that “the Court did not provide any specific instruction on how to handle a case that involves the introduction of other bad acts evidence as to the substantive claims.”) The district court avoided having to answer the question by ruling that no proper objection to the evidence at issue had been preserved). In addition, if it is true that juries are not cognitively able to follow instructions in this area, as some have argued, this means of jury control would not be meaningful. See, e.g., *Viscusi, supra* note 109, at 142-170.
Eighth Amendment requirement that a jury have meaningful opportunity to give effect to mitigating evidence when considering whether to sentence a defendant to death. For example, in *Penry v. Lynaugh*, the Court reversed a death sentence because “we cannot be sure that the jury was able to give effect to the mitigating evidence” the defendant presented. Standing alone, this seems remarkably like the Court’s statement in *Philip Morris* that courts needed to avoid “any . . . confusion” occurring in the process. What is significantly different in *Penry*, however, is that the Court was clear in that case how the risk – there of not giving the jury a meaningful chance to use mitigating evidence -- was to be avoided. The *Penry* Court began its statement about not being “sure” of the jury’s ability to use the mitigating evidence with these words: “In the absence of jury instructions. . ..” The contrast between the approaches taken in these two contexts is potentially quite telling concerning the Court’s expectations of lower courts and juries when dealing with punitive damages.

Since instructions (and their traditional cousins) will not suffice, states will need to be creative in carrying out the Court’s mandate. Of course, states could avoid this task

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168 *Id.* at 323.
169 *Philip Morris*, 127 S. Ct. at 1065.
170 *Penry*, 492 U.S. at 323 (emphasis added). Indeed, much of the opinion is focused on the language of the instructions given to and the special questions to be answers by the jury in the case. See, e.g., *id.* at 322-28. Of course, it is not surprising that the Court would focus on instructions. That was the specific error the defendant preserved and argued. See *id.* at 311-12. This too stands in contrast to *Philip Morris* where the defendant claimed a jury instruction error on appeal. See supra text accompanying notes 87-90 (discussing Court’s failure to take a position on the propriety of Philip Morris’s proposed jury instruction). In any event, *Penry* was not an aberration. The Court has underscored the importance of instructions in this area consistently, most recently near the end of the October 2006 Term. See Abdul-Kabir v. Quarterman, 2007 U.S. LEXIS 4536 at *26-*56 (Apr. 25, 2007).
171 The appropriateness of adopting a standard that is, all things being equal, more likely to lead to a constitutional error when considering the death penalty than when dealing with a punitive damage award is another issue entirely.
by eliminating juries for punitive damages.\textsuperscript{172} If a judge were the decision maker, she would need to “show her work” by articulating specific findings of fact.\textsuperscript{173} Trial judges could also make their collective lives simpler by just excluding non-party evidence as being too prejudicial when offered for admission even if it is relevant to determine the defendant’s reprehensibility.\textsuperscript{174} But if they do not avoid the question, trial judges are going to need to devise ways in which to monitor the actual reasoning of – not just the results rendered by – the jury. I can think of no such actual monitoring that takes place in American jury practice. Indeed, there are rules that tend to prohibit it.\textsuperscript{175}

It may be that diligent and innovative trial judges in the state and federal systems will be able to devise methods to comply with the Court’s interpretation of the Constitution as articulated in \emph{Philip Morris} while simultaneously preserving the jury process. However, I am not optimistic that this will occur, at least not in a way that preserves the traditional role of the jury in the process.\textsuperscript{176}

\section*{V. WHAT MAY THE FUTURE HOLD?}

When in the midst of a journey, it is often difficult to appreciate one’s travels. You are too close to the action to get perspective. The same can often be said of the

\textsuperscript{172} One could argue that \textit{Cooper Industries}'s holding that punitive damages are not “facts,” see 532 U.S. at 437, could be used to support restricting the jury right at least in federal court. The same would be true in state courts if one assumes that the Court’s \textit{Cooper Industries} decision was not limited to the Seventh Amendment. Otherwise, one might need to deal with relevant state constitutional law. These issues are beyond the scope of this Article.

\textsuperscript{173} See, e.g., Fed. R. Civ. P. 52.

\textsuperscript{174} See, e.g. Fed. R. Evid. 403 (“although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice [or] confusion of the issues. . . ”).

\textsuperscript{175} See, e.g., Fed. R. Evid. 606(b) (limiting inquiry of a juror concerning “the validity of a verdict” to three narrow circumstances not including a misuse of evidence that was admitted at trial).

\textsuperscript{176} I have not sought in this Article to defend normatively the role of the jury in connection with awarding punitive damages. There is a seriously debate on that point in the academic literature. See, e.g., supra note 109 (collecting sources concerning the role of the jury in assigning punitive damages). While as one might guess from the text I tend to favor the role of the jury, for present purposes my point has been that whether for good or ill the jury has played a certain role in the process historically and the Court’s decision in \textit{Philip Morris} will likely have an important impact on that traditional role.
growth of legal doctrine. It can be challenging to appreciate a given development’s effect on the big picture. As I have suggested in this Article, I do not think that *Philip Morris* is that type of development. The Court – albeit through a bare majority – has continued a decade long push to fundamentally transform a traditional state remedy into a frozen, federalized device that is not nearly as useful to address new societal problems as it could be. No doubt, the Court – as well a scores of state and federal judges around the country – will need to wrestle with *Philip Morris*’s Delphic command concerning the jury’s use of “non-party” evidence. I have no confidence that the courts will be able to craft a solution to the puzzle the Supreme Court has created. I am relieved, however, that I will not be a trial judge trying to implement that decision.

A logical next question beyond the “non-party” conundrum is whether the Court’s project is finished? The answer to that question is almost certainly no – at least in some respects. For example, there are scores of questions concerning the guideposts that the Court will, no doubt, be called to answer at some point. 177 Does failing one guidepost mean that an award must fail? 178 How does the third guidepost concerning comparable sanctions actually operate? 179 What, precisely, is the proper role of the defendant’s financial status in the punitive damages calculus? 180 And one could go on.

177 There are also narrow (although not unimportant) non-guidepost related issues that the Court may be called on consider. For example, do state split recovery statutes trigger the Excessive Fines Clause? *See supra* test accompanying notes 11-12 (discussing the Excessive Fines Clause in connection with punitive damages). Similarly, does the Court’s close tie of punitive damages to a one-on-one tort model make such state split recovery statutes susceptible to constitutional attack on the ground that they amount to a taking of property?

178 The Oregon Supreme Court held in *Williams* that it did not. *See Williams III*, 127 P.3d at 1181-82. The United States Supreme Court did not address this issue in its opinion.

179 Once again, the Oregon Supreme Court discussed this issue. It laid out a comprehensive three-step process to implement the third guidepost. *See Williams III*, 127 P.3d at 1178-80. The United States Supreme Court also did not consider the propriety of the Oregon approach.

180 This issue, too, was considered in Oregon. *See Williams III*, 127 P.3d at 1181; *see also* Johnson v. Ford Motor Co., 113 P.3d 82, 89 (Cal. 2005) (noting the lack of specific guidance in the Supreme Court’s cases on this issue). This issue was also not considered by the United States Supreme Court in its opinion in
Such issues are of intense practical importance to litigants and lower court judges alike. However, the more interesting question to me is whether the Court is done with its larger project of redefining the very nature of punitive damages as a remedial device. In this regard, will the Court eventually take it on itself to police as a constitutional matter whether punitive damages are called for in a given case?\(^{181}\) Will the Court extend its punitive damage jurisprudence to other types of damages, thus constitutionalizing more of state tort law?\(^{182}\) Or will the Court simply hold that punitive damages themselves are unconstitutional?\(^{183}\) And what does this decision mean for the class action as a procedural device?\(^{184}\) Some of these questions are more realistic than others. But my instincts tell me that the Court is not finished with its more ambitious project, even if I am not able to say with any confidence the precise form its future work will take.

*Philip Morris.* The Court previously held that a defendant’s wealth “cannot justify an otherwise unconstitutional punitive damages award.” *State Farm*, 538 U.S. at 472. The full import of the Court’s statement is unclear.

\(^{181}\) A close reading of *State Farm* could lead one to conclude that the Court is, already, engaging in some sort of constitutional review concerning whether any amount of punitive damages is appropriate. In this regard, Justice Kennedy commented: “While we do not suggest there was error in awarding punitive damages based on State Farms’ conduct towards the Campbells, a more modest punishment for this reprehensible conduct could have satisfied the State’s legitimate objectives, and the Utah courts should have gone no further.” *State Farm*, 538 U.S. at 419-20 (emphasis added). The Court tells us why the amount of the award is a matter of federal concern – its due process excessiveness line of analysis. Yet, one is left to wonder what in the Constitution makes it any of the Court’s business to say anything about whether “there was error in awarding punitive damages” in the first place.

\(^{182}\) Several recent articles have suggested that the Court will or should do so. See, e.g., Paul DeCamp, *Beyond State Farm: Due Process Constrains on Noneconomic Compensatory Damages*, 27 HARV. J. L. & PUB. POLICY 231 (2003); Mark A. Geistfeld, *Due Process and the Determination of Pain and Suffering Tort Damages*, 55 DEPAUL L. REV. 331 (2006); Hylton, *supra* note 42, at 17-19.

\(^{183}\) See generally Redish, *supra* note 92 (arguing that awarding punitive damages is inherently unconstitutional as a matter of procedural due process because private parties are exercising a punitive power that only the state may wield).

\(^{184}\) An early assessment of *Philip Morris* suggests that the decision could seriously undermine the class action as a constitutional matter. See Hylton, *supra* note 42, at 7, 15-16. Even before *Philip Morris* the intersection of class actions and punitive damages had been controversial in the courts, see, e.g., In Re Simon II Litigation, 407 F.3d 125 (2d Cir. 2005) (reversing certification of a limited fund punitive damage class action); Engle v. Liggett Group, Inc., 945 So. 2d 1246 (Fla. 2006) (largely vacating trial court decision to certify a class under state law in tobacco litigation), and academic commentary. See, e.g., *Symposium: Engle v. R.J. Reynolds Tobacco Co.: Lessons in State Class Actions, Punitive Damages, and Jury Decision-Making*, 36 WAKE FOREST L. REV. 871-1179 (2001); see also Allen, *supra* note 17, at 64-67 (discussing the potential impact of the Court’s state sovereignty rationale on class actions).