OF REMEDY, JURIES, AND STATE REGULATION OF PUNITIVE DAMAGES: THE SIGNIFICANCE OF *PHILIP MORRIS V. WILLIAMS*

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INTRODUCTION

On February 20, 2007, the United States Supreme Court announced an important decision further limiting punitive damage

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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. 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.

This Article concerns the implications of *Philip Morris* on punitive damages and the continued practical viability of that remedy. In Part I, I discuss 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 fundamentally shaped and confined—as a matter of federal constitutional law—the very nature of punitive damages.

Part II focuses on *Philip Morris* itself. After briefly explaining the factual background of the case, this Part explains the holding. In sum, the Court held that a jury awarding punitive damages may not—consistent with the Constitution—punish a defendant for conduct directed at non-parties. That holding both further serves to constrain the award of punitive of damages and, quite confusingly, also appears to affect the role of the jury in the process in a significant fashion. After explaining the holding of *Philip Morris*, I situate the case in the broader constitutional landscape discussed in Part I.

Part III explores three significant aspects of *Philip Morris* that extend beyond its impact on constitutional doctrine. First, I con-

1. Philip Morris USA v. Williams, 127 S. Ct. 1057 (2007).

2. Certain newspaper editorial boards supported the decision. *See, e.g.*, Editorial, *Overly Punitive?*, WASH. POST, Feb. 26, 2007, at A14; Editorial, *Class Actions in Drag*, WALL ST. J., Feb. 21, 2007, at A16. Others were critical. *See, e.g.*, Editorial, *Logic vs. Nitpicking*, PITTSBURGH TRIB.-REV., Feb. 25, 2007; Editorial, *Shielding the Powerful*, N.Y. TIMES, Feb. 21, 2007, at A20. There was also widespread general newspaper coverage of the decision. *See, e.g.*, Robert Barnes, *Justices Overturn Tobacco Award*, WASH. POST, Feb. 21, 2007, at A1; Jess Bravin & Vanessa O'Connell, *High Court Denies Altria Damages, Sets No Formula*, WALL ST. J., Feb. 21, 2007, at A2; Linda Greenhouse, *Justices Overturn $79.5 Million Tobacco Ruling*, N.Y. TIMES, Feb. 21, 2007, at A1; Warren Richey, *Supreme Court Puts New Rules on Damage Awards*, CHRISTIAN SCI. MONITOR, Feb. 21, 2007, at 3.

sider 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. Specifically, the Court in *Philip Morris* more explicitly adopts a one-on-one tort model as the constitutionally favored view of the tort system, at least with respect to punitive damages. 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, a result that is clearly "pro-defendant." However, the decision also has the potential to affect state regulation in a way that is *harmful to defendants*. As I explain below, defendants in certain states will no longer be able to take advantage of statutory (and judicially crafted) rules designed to protect against multiple punishments. For example, if a state allows a defendant in a second case to claim an immunity from punitive damages based on conduct already punished in an earlier case, *Philip Morris* suggests that such an argument will be precluded by any finding in the earlier case that the award was constitutionally proper because it did not take into account the defendant's actions toward non-parties.

Finally, Part III considers the decision's impact on juries. I argue that the Court has planted seeds that could fundamentally alter the role of the jury in awarding punitive damages. Specifically, the Court held that lower-court judges must ensure that the jury uses any "non-party" evidence solely to determine the defendant's reprehensibility toward the plaintiff and not to punish the defendant for actions taken against non-parties.[3] The only way in which a lower court can faithfully comply with the Supreme Court's mandate is to intrude on the jury's deliberative function in a manner quite at odds with the American legal tradition.

Part IV concludes by suggesting that, despite its significance, *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 all the issues I do raise, Part IV at least begins the discussion of what may be on the constitutional horizon.

3. *Philip Morris*, 127 S. Ct. at 1063–64.

I.
PRE-*PHILIP MORRIS* CONSTITUTIONAL LIMITATIONS ON PUNITIVE DAMAGES

About twenty years ago, the Supreme Court essentially began to devote serious attention to the intersection of the United States Constitution and punitive damages. Since that time, the Court has refused to apply one constitutional provision, the Eighth Amendment's prohibition on the imposition of excessive fines,[4] as a limitation on punitive damages.[5] However, the more representative trend has been for a slim majority of the Justices to find several respects in which the Constitution constrains an award of punitive damages, including procedural due process,[6] substantive due process,[7] the dormant commerce clause,[8] and notions of state sover-

4. U.S. CONST. amend. VIII ("Excessive bail shall not be required, not excessive fines imposed, nor cruel and unusual punishments inflicted.").

5. *See* Browning-Ferris Indus. of Vt., Inc. v. Kelco Disposal, Inc., 492 U.S. 257, 260 (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) (2006) (50% of punitive damage award payable to the state); GA. CODE ANN. § 51-12-5.1(e)(2) (2000) (75% of punitive damages in product-liability actions, less a proportionate part of the costs of litigation, payable to the state); IND. CODE ANN. § 34-51-3–6(c)(2) (West Supp. 2007) (75% of punitive damage award payable to the state). This open issue is beyond the scope of this paper.

6. *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); Pac. Mut. Life Ins. 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 I.A.

7. *See, e.g.*, State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 416 (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 N. Am., 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 598–600 (Scalia, J., dissenting) (characterizing the Court's decision as based on substantive due process).

8. *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").

eignty.[9] I have elsewhere referred to this almost dizzying recitation of sources of authority as a "constitutional cacophony."[10]

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 its constitutional jurisprudence in the area.[11] 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 *Philip Morris* in the constitutional landscape.

A. Procedures

Perhaps the least controversial aspect of the Court's punitive damages decisions concerns the procedures associated with obtaining the remedy. Roughly speaking, the Court's work in this regard fits into two general areas: controlling the jury before its verdict (through instructions) and limiting the discretion of the jury after its 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 *Pacific Mutual Life Insurance Co. v. Haslip*, 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."[12] The Court went on to conclude that the jury instructions given in that case were constitutionally sufficient.[13] The important constitutional principle from *Pacific*

9. *See, e.g.*, *State Farm*, 538 U.S. at 421 ("Nor, as a general rule, 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.").

10. *See* Michael P. Allen, *The Supreme Court, Punitive Damages and State Sovereignty*, 13 GEO. MASON L. REV. 1, 10 (2004).

11. It is not possible to do justice here to the wide range of commentary concerning this issue. I have earlier catalogued a range of such scholarship. *See id.* at 3 n.7, 4 n.9.

12. Pac. Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 18 (1991).

13. *See, e.g.*, *id.* at 19–20.

Mutual is that procedural due process requires that a jury be properly instructed concerning punitive damages.[14]

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 punitive damages decisions, the Court underscored the critical constitutional nature of such judicial review.[15] 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.[16]

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 the 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.[17] The Court has left no doubt that the Constitution prohibits "grossly excessive" punishment.[18] The tricky question has been articulating how a court is to determine whether any given award is so large that it offends the Constitution.

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14. I discuss juries further below. *See infra* Part III.C.

15. *See* Honda Motor Co. v. Oberg, 512 U.S. 415, 432 (1994) (holding that "Oregon's 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 20–21 (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").

16. *See* Cooper Indus., Inc. v. Leatherman Tool Group, Inc., 532 U.S. 424, 436 (2001).

17. One may be able to judge the primacy of this aspect of the Court's punitive damages doctrine by evaluating the contents of remedies textbooks. Generally, these books focus on the Court's use of the Due Process Clause to judge when an award is simply too high. *See, e.g.*, DAVID I. LEVINE ET AL., REMEDIES: PUBLIC AND PRIVATE 498–529 (4th ed. 2006); DOUG RENDLEMAN, REMEDIES: CASES AND MATERIALS 132–60 (7th ed. 2006); RUSSELL L. WEAVER ET AL., REMEDIES: CASES, PRACTICAL PROBLEMS AND EXERCISES 717–33 (2004).

18. *See, e.g.*, State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 417 (2003); BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 562 (1996). For a recent critique of the Court's proportionality principle in this context as well as in broader remedial issues, *see* Tracy A. Thomas, *Proportionality and the Supreme Court's Jurisprudence of Remedies*, 59 HASTINGS L.J. 73 (2007).

In *BMW of North America, Inc. v. Gore* and *State Farm Mutual Automobile Insurance Co. v. Campbell*, 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.[19] 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 award; and (3) the difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases."[20]

The Court said that the "degree of reprehensibility" factor was "perhaps the most important indicium of the reasonableness of a punitive damages award."[21] However, the Court failed to provide clear guidance 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 far less than certainty.[22] It is understandable, therefore, that the second of the Court's guideposts has received so much attention.[23]

19. *See State Farm*, 538 U.S. at 418–28 (discussing and applying *BMW* guideposts); *BMW*, 517 U.S. at 574–85 (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, David F. 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).

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

21. *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 or 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.").

22. *See, e.g.*, *State Farm*, 538 U.S. at 418–28.

23. The Court has tended to give the third guidepost short shrift in its opinions. *See, e.g.*, *id.* at 428 (spending less than a page in the *United States Reports* 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 & John Y. Gotanda, *The Foggy Road for Evaluating Punitive Damages: Lifting the Haze from the* BMW/State Farm *Guideposts*, 37 U. MICH. J.L. REFORM 441 (2004); Colleen

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's reluctance to identify any specific ratio as constitutionally appropriate indicates the Justices recognize the danger that such a bright-line rule could convert what they envision as a highly contextual analysis into a quasi-mechanical process. In *BMW*, for example, Justice Stevens, writing for the majority, stated that "we have consistently rejected the notion that the constitutional line is marked by a simple mathematical formula."[24] In *State Farm*, the Court again refused to establish a single constitutional line.[25]

The Court did use *State Farm* to give more guidance about the issue, albeit somewhat inconsistently. Specifically, Justice Kennedy, writing for the majority, stated that "[o]ur jurisprudence and the principles it has now established demonstrate . . . that, in practice, few awards exceeding a single-digit ratio between punitive and compensatory damages . . . will satisfy due process."[26] The potential inconsistency resulted, however, from subsequent statements in the opinion to the effect that a ratio of four-to-one was "close to the line of constitutional impropriety"[27] and even that a one-to-one ratio might be appropriate in cases in which "compensatory damages are substantial."[28]

Whatever the precise ratio may be, there is no question that the Court in *State Farm* and *BMW* developed a significant body of constitutional law, with a major purpose of limiting the amount of punitive damages that a jury may appropriately award. There remain significant issues to be addressed in this body of law.[29] Many of these issues remain unresolved because *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.[30]

P. Murphy, *Comparison to Criminal Sanctions in the Constitutional Review of Punitive Damages*, 41 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 IV.

24. *BMW*, 517 U.S. at 582.

25. *State Farm*, 538 U.S. at 425 ("We decline again to impose a bright-line ratio which a punitive damages award cannot exceed.").

26. *Id.*

27. *Id.*

28. *Id.*

29. *See infra* Part IV (highlighting issues that remain unresolved in the wake of *Philip Morris*).

30. I discuss *Philip Morris*'s place in this portion of the constitutional landscape below. *See, e.g.*, *infra* Part III.A (discussing the impact of *Philip Morris* on

C. 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.[31] 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 before *Philip Morris* and had suggested in oblique terms a potential fourth definitional constraint. This sub-part outlines the three pre-*Philip Morris* constraints and highlights the potential fourth one. It was to this fourth definitional aspect—the restriction of the punitive damage award to the conduct the defendant directed at the plaintiff—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 had made clear that the purposes of punitive damages are "punishing unlawful conduct and deterring its repetition."[32] Moreover, the Court tried to draw a line between punitive and compensatory damages. Representative of such line drawing is the following passage from *State Farm*:

> [I]n 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 reason of the defendant's wrongful conduct." By contrast, punitive damages serve a broader function; they are aimed at deterrence and retribution.[33]

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punitive damages as a remedial device); *infra* Part III.C (discussing the impact of *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. *See infra* Part II.B (discussing *Philip Morris*'s holding and rationale).

31. *See* Allen, *supra* note 10, at 3 n.7, 4 n.9 (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).

32. BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 568 (1996); *see also* Pac. Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 19 (1991) ("[P]unitive damages are imposed for purposes of retribution and deterrence.").

33. *State Farm*, 538 U.S. at 416 (citations omitted) (quoting Cooper Indus., Inc. v. Leatherman Tool Group, Inc., 532 U.S. 424, 432 (2001)).

The Court went on to state:

> It 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.[34]

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, in reading 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.[35] 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 Catherine Sharkey's innovative suggestion that punitive damages be re-conceptualized as a form of "societal compensatory" damages.[36] The impact of re-conceptualizing punitive damages might have been ameliorated in the grand scheme of things because states would have still been allowed wide latitude within the traditional confines of the remedy in which to

34. *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 & Catherine M. Sharkey, *The Fungibility of Damage Awards: Punitive Damage Caps and Substitution* (Fla. State Univ. Coll. of Law, Law & Econ. Paper No. 912256, 2007) *available at* http://srrn.com/abstract=912256; Catherine M. Sharkey, *Crossing the Punitive-Compensatory Divide*, *in* CIVIL JURIES AND CIVIL JUSTICE 79 (Brian H. Bornstein et al. eds., 2008). The import of the Court's recognition of the porous nature of damage classifications, as well as jurors' apparent attitude towards them, is an important issue worthy of further academic consideration. The issue is, however, beyond the scope of this Article.

35. *See* Keith N. Hylton, *Reflections on Remedies and* Philip Morris v. Williams 13 (Boston Univ. Sch. of Law Working Paper Series, Law & Econ., Working Paper No. 07-06, 2007), *available at* http://ssrn.com/abstract_id=977998 (noting the Supreme Court "has not attempted to set out the theoretical basis for punitive awards").

36. *See* Catherine M. Sharkey, *Punitive Damages as Societal Damages*, 113 YALE L.J. 347, 389–402 (2003).

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 of the limitation of the constitutionally legitimate goals of punitive damages leads to the second specific respect in which punitive damages were restricted pre-*Philip Morris*. The Court territorially limited 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-state conduct that was lawful where it occurred and had no in-state impact.[37] 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.[38] Thus, the Court had not only set the constitutionally permissible goals of the remedy, but had also begun to limit the situations in which those goals could be applied.[39]

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 warranted punishment and deterrence. 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."[40] The Court went on to determine that State Farm's conduct in connection with claims-handling on first-party property insurance was not sufficiently related, from a constitutional perspective, to the third-party-claims-handling practices the plaintiffs alleged.[41] Therefore, the jury was constitutionally prohibited from considering evidence of State Farm's claims-handling practices in relation to third parties when

37. *See BMW*, 517 U.S. at 572–73.

38. *See State Farm*, 538 U.S. at 421.

39. 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 10, at 18–30.

40. *State Farm*, 538 U.S. at 422–23; *see also id.* at 423 ("Although '[o]ur 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." (quoting BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 577 (1996))).

41. *See id.* at 423.

deciding whether State Farm's conduct deserved to be punished or deterred.[42]

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 state could not punish or deter conduct occurring outside its boundaries; 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.[43] But it appeared that a state could punish and deter a defendant for similar, in-state conduct even if all of that conduct had not been directed at the particular plaintiff.[44] 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.[45] That would change in *Philip Morris*.

42. *See id.* at 423–24. Justice Ginsburg vigorously contested the Court's conclusions on this point. *See id.* at 431–37 (Ginsburg, J., dissenting).

43. Other academic commentators similarly 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 Punitive Damages*, 74 U. CIN. L. REV. 1189, 1256 (2006) ("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.").

44. 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 II.A.

45. *See, e.g.*, *State Farm*, 538 U.S. 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* State Farm v. Campbell, 9 ROGER WILLIAMS U. L. REV. 579, 582–86 (2004); *see also* Allen, *supra* note 10, at 25–26 n.112 (collecting cases and academic literature showing uncertainty on the scope of *State Farm* on this issue).

II.
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. Thereafter, I situate the decision in the pre-existing constitutional landscape. Part III considers three of the more important reasons why the decision is likely to be significant.

A. The Factual and Procedural Background of the Decision

One wonders what Jesse Williams, the plaintiff in *Philip Morris*, would have thought about the impact he might have on the development of 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.[46] After returning from Korea, he eventually became a janitor in the Portland public school system.[47] He also married and started a family.[48] Unfortunately, he also kept smoking.[49]

In 1996, Mr. Williams was diagnosed with inoperable lung cancer.[50] He died less than one year after being diagnosed.[51] 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 cigarette manufacturer.[52] After trial, a jury ruled in favor of Mr. Williams's estate on both negligence and fraud claims.[53] Specifically, the jury awarded the estate $21,485.80 in "economic" damages and $800,000 in "non-economic" damages on each claim; however, it awarded $79.5 million in punitive damages with respect to the fraud claim.[54]

46. Williams v. Philip Morris Inc. (*Williams I*), 48 P.3d 824, 829 (Or. Ct. App. 2002).

47. Patrick O'Neill, *Trial Begins in Dispute Over Responsibility in Smoker's Death*, OREGONIAN, Feb. 25, 1999, at A1.

48. *See Williams I*, 48 P.3d at 829 (discussing Mr. Williams's "wife and their children").

49. *See id.* (discussing Mr. Williams's addiction to nicotine).

50. *Id.*

51. *See id.*

52. *Id.* at 828–29.

53. *Id.* at 828.

54. *Id.*

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 non-economic damages awarded to $500,000, pursuant to relevant Oregon statutory law.[55] 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.[56]

At this point, an appellate saga lasting several years began. There is no need to detail that history here.[57] 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.[58] 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.[59] Second, it determined that the guideposts indicated that the award was not grossly excessive.[60] It was in this context that the United States Supreme Court substantively considered Philip Morris's constitutional claims.

55. *Id.* (citing OR. REV. STAT. § 18.560(1) (2002) (current version at OR. REV. STAT. § 31.710 (2005))).

56. *Id.*

57. In summary, the court affirmed the jury's liability decision and reinstated the $79.5 million punitive damages judgment. *Id.* The Oregon Court of Appeals adhered to its decision on reconsideration, 51 P.3d 670, 671 (Or. Ct. App. 2002), and the Supreme Court of Oregon denied review, 61 P.3d 923, 938 (Or. 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, 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. (*Williams II*), 92 P.3d 126, 145–46 (Or. Ct. App. 2004). The Supreme Court of Oregon accepted review and affirmed the $79.5 million punitive damage award. Williams v. Philip Morris Inc. (*Williams III*), 127 P.3d 1165, 1165 (Or. 2006).

58. *Williams III*, 127 P.3d at 1182 ("[W]e conclude that the jury's $79.5 million punitive damage award against Philip Morris comported with due process, as we understand that standard to relate to punitive damage awards.").

59. *Id.* at 1175–76.

60. *Id.* at 1177–82.

B. The Court's Holding and How it Fits into the Constitutional Landscape

In an opinion for five members of the Court, Justice Breyer vacated the Oregon Supreme Court's judgment and remanded the matter for reconsideration in light of the Court's holding.[61] 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 focused on Philip Morris's argument that the Oregon courts had "unconstitutionally permitted it to be punished for harming nonparty victims."[62] 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.[63] 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 that 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."[64] Thus, most prominently, *Philip Morris* continues the Court's articulation of the constitutionally permissible nature of punitive damages as a remedial device.[65] I return below to a more focused consideration of the impact of the decision.[66] What follows in the balance of this sub-part is a description of the decision itself.

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61. Philip Morris USA v. Williams, 127 S. Ct. 1057, 1062 (2007).

62. *Id.*

63. *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").

64. *Id.* at 1063. Later in his opinion, Justice Breyer forthrightly acknowledged 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 35, at 3 (describing the Court's holding as a "bold proposition").

65. *See supra* Part I.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 I.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.

66. *See infra* Part III.A.

Justice Breyer, writing for the majority, based his conclusion fundamentally on what he at one point termed "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.[67] 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.[68] Second, it was claimed that "to permit punishment for injuring a nonparty victim would add a near standardless dimension to the punitive damages equation."[69]

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 toward non-parties. Indeed, Justice Stevens does so in his dissent.[70] 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.[71] But my main goal here is not to debate the propriety of the Court's assessment of these issues.[72] Rather, I am more con-

67. *Philip Morris*, 127 S. Ct. at 1064.

68. *Id.* at 1063 (quoting Lindsey v. Normet, 405 U.S. 56, 66 (1972)).

69. *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.*

70. *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 1060)). Justice Stevens's dissent in *Philip Morris* is particularly noteworthy. He had been in the majority in both *BMW* (indeed he was the author of the Court's opinion in that case) and *State Farm*. *See* State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 411 (2003); BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 562 (1996). Justice Stevens makes clear that he is not retreating from his position in those earlier cases. *Philip Morris*, 127 S. Ct. at 1066 (Stevens, J., dissenting) ("I remain firmly convinced that the cases announcing those constraints [on punitive damages, including *BMW* and *State Farm*,] were correctly decided."). However, he indicates that the Court's extension of constitutional limitations in *Philip Morris* is untoward. *Id.* As the Court faces additional challenges to punitive damage awards, Justice Stevens's position could become critical on such a closely divided Court.

71. 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 35, at 14.

72. 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

cerned 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.[73] 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.[74]

I have read this passage scores of times. I have also taught it to hundreds of students in Remedies courses so far. I confess, however, to being truly perplexed as to how the Court envisions the jury complying with this requirement. How can the jury consider conduct toward others to determine reprehensibility but not to punish the defendant? As Justice Stevens so aptly put it in his dissent, "This nuance eludes me."[75]

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extraterritorial punishment. *See* Allen, *supra* note 10, 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.

73. *Philip Morris*, 127 S. Ct. at 1063–65.

74. *Id.* at 1063–64.

75. *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:

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.[76] The difficulty is, to put it bluntly, that 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."[77]

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."[78] 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 question, not the wrong one,"[79] lower tribunals need to avoid "procedures that create an unreasonable and unnecessary risk of *any* such confusion occurring."[80] This statement seems to suggest that a 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 toward non-parties.[81]

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 constitu-

> [T]he limitations recognized in *Gore* and *Campbell* leave punitive damage decision makers (juries and reviewing courts) to walk a tightrope. They may not impose punitive damages to punish the entire scope of misconduct, but 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).

76. For example, judges give limiting instructions under which juries may use information for only one purpose. *See, e.g.*, FED. R. EVID. 105.

77. *Philip Morris*, 127 S. Ct. at 1064.

78. *Id.* 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 I.A (discussing the Court's constitutional decisions concerning procedures before *Philip Morris*).

79. *Philip Morris*, 127 S. Ct. at 1064.

80. *Id.* at 1065 (emphasis added).

81. *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 of protection in appropriate cases.").

tional appeal to the failure of the Oregon trial court to instruct the jury much along the lines of the Court's ultimate holding.[82] 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.[83] Rather, the Court engaged in the discussion described above concerning the need for lower courts to avoid *any risk* that a jury misused evidence.[84] 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.[85]

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-vigilance required of trial courts in enforcing those constraints. Part III now turns to several respects in which *Philip Morris* may have particular lasting significance beyond the development of constitutional doctrine itself.

III.
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. 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*.[86] Finally, the line of cases dealing with consti-

82. *See, e.g.*, Brief for the Petitioner at 23–25, Philip Morris USA v. Williams, 127 S. Ct. 1057 (2007) (No. 05-1256) (arguing that the defendant had a due process right to a certain jury instruction concerning harm to non-parties).

83. *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.").

84. *Id.* at 1065 (majority opinion).

85. *See infra* Part III.C.

86. *See* Lochner v. New York, 198 U.S. 45 (1905). The Court attempted to blunt such criticism early in its punitive damages journey. *See* TXO Prod. Corp. v.

tutional 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.[87] One could usefully compare this situation with others in an attempt to 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.[88]

This Part considers three other respects in which *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 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.[89] 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 ways in 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 *Philip Morris* could have by undermining certain state statutes designed to restrict punitive damage recoveries.[90] Third, the decision

Alliance Res. Corp., 509 U.S. 443, 455 (1993) (rejecting arguments that the Court's use of due process principles to constrain the size of punitive damage awards was a relic 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 & Andrew L. Mathews, *Why Punitive Damages are Unconstitutional*, 53 EMORY L.J. 1, 9–11 (2004); Rustad, *supra* note 43, at 522–23.

87. *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 Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 429 (2003) (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 Indus., Inc. v. Leatherman Tool Group, Inc., 532 U.S. 424, 443 (2001) (Thomas, J., concurring) ("[G]iven the opportunity, I would vote to overrule *BMW*.").

88. In this regard, one may recall Justice Stewart's opinions in *Griswold* on the one hand and *Roe* on the other. *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.") *with* Roe v. Wade, 410 U.S. 113, 168 (1973) (Stewart, J., concurring) ("*Griswold* stands as one in a long line of pre-*Skrupa* cases decided under the doctrine of substantive due process, and I now accept it as such.").

89. *See infra* Part III.A.

90. *See infra* Part III.B.

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.[91]

A. Remedy

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.[92]

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."[93] 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 pur-

91. *See infra* Part III.C.

92. Professor Klass has recently argued that *Philip Morris* should not be a bar to using "unvalued harm to natural resources where those natural resources are not 'represented' in the case by a governmental entity" as a means of setting the level of punitive damages in a given case. Alexandra B. Klass, *Punitive Damages and Valuing Harm*, 92 MINN. L. REV. 83, 150 (2007). 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.* at 151. 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, Professor's Klass's argument would likely fall on deaf ears. Moreover, as I argue below, *see infra* Part III.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* at 150.

93. Rustad, *supra* note 43, 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) (discussing the bi-polar or one-on-one private law tort suit).

poses 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 with a well-established remedy in connection with anything other than one type of now constitutionally favored tort action.[94] And this is so no matter how much the modern realities facing society—and thus tort law—have changed.[95] This result is particularly noteworthy, and perhaps at least somewhat surprising, given the Court's own acknowledgment that punitive damages are, in some measure at least, evolutionary in nature.[96] Moreover, by framing the issue as one of federal *constitutional* law, the Court has made it practically impossible for any entity other than itself—state

94. 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, *supra* note 75, at 387–88; Rustad, *supra* note 43, at 466. *Philip Morris* has removed any doubt about these assessments. *But see* Klass, *supra* note 92, at 150–51 (taking less absolute position on the meaning of *Philip Morris*). In addition, Professor Geistfeld has noted this effect of *Philip Morris*. *See* Mark A. Geistfeld, *Punitive Damages, Retribution, and Due Process*, 81 S. CAL. L. REV. 263, 265–68 (2008).

95. 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); *see also* Sharkey, *supra* note 36, 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.

96. *See, e.g.*, Cooper Indus., Inc. v. Leatherman Tool Group, Inc., 532 U.S. 424, 437 n.11 (2001) (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, *supra* note 43, 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 93, 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).

or federal—to change this stunted conception of punitive damages.[97] It has stopped evolution in its tracks.

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 previously made clear that those goals were limited to deterrence and punishment.[98] The Court did not formally retreat from that position in *Philip Morris*.[99] 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" and "deter" *never appear*.[100] In contrast, the terms "punish" and "punishment" appear no fewer than twelve times.[101] The potential implication is that this is the beginning of further narrowing of the constitutionally legitimate goals for which a state may use the increasingly limited punitive damage remedy.[102]

97. 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, *supra* note 43, 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. Michael B. Kelly, *Do Punitive Damages Compensate Society?*, 41 SAN DIEGO L. REV. 1429 (2004). And in early writing after the decision, Professor Sebok also supported the Court's result concerning non-party conduct even though he did not fully embrace the Court's reasoning. *See* Anthony J. Sebok, *Punitive Damages from Myth to Theory*, 92 IOWA L. REV. 957, 1031–32 (2007).

98. *See supra* Part I.C.

99. *See, e.g.*, Philip Morris USA v. Williams, 127 S. Ct. 1057, 1062 (2007) ("This Court has long made clear that '[p]unitive damages may properly be imposed to further a State's legitimate interests in punishing unlawful conduct and deterring its repetition.'" (quoting BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 568 (1996)).

100. *See Philip Morris*, 127 S. Ct. at 1063–65.

101. *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, *supra* note 97, 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.

102. Professor Rustad has argued that the Court had earlier expressed a view of punitive damages that largely ignored the deterrence rationale. *See* Rustad, *supra* note 43, at 520–21. See Thomas C. Galligan, Jr., *Disaggregating More-Than-Whole Damages in Personal Injury Law: Deterrence* and *Punishment*, 71 TENN. L. REV. 117 (2003), for an excellent overview arguing that deterrence and punishment are

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 economics" perspective that 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 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."[103] Basing their analysis on economic theory, they concluded that the deterrence rationale of punitive damages made sense only by considering the likelihood that a defendant would be called to account for its unlawful conduct.[104] If such a calculation were not undertaken and some other basis for a punitive damage award were used, Polinksy and Shavell feared either over- or under-deterrence would result.[105]

Two well-respected judges, each associated with law and economics approaches in at least some respects, have used logic akin to the approach of Polinsky and Shavell. In *Mathias v. Accor Economy*

truly separate goals in the context of punitive damages, each of which is important for distinct reasons.

103. A. Mitchell Polinsky & Steven Shavell, *Punitive Damages: An Economic Analysis*, 111 HARV. L. REV. 869, 874 (1998) (emphasis omitted). Professors Polinsky and Shavell make clear that 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."). 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 Indus., Inc. v. Leatherman Tool Group, Inc., 532 U.S. 424, 439 (2001). Some recent empirical scholarship supports the Court's skepticism in this regard. *See, e.g.*, W. Kip Viscusi, *Deterrence Instructions: What Jurors Won't Do*, *in* PUNITIVE DAMAGES: HOW JURIES DECIDE 142, 142–43, 162–64 (2002) (reporting, based on mock-jury experiments, that jurors do not follow detailed deterrence-based instructions).

104. *See, e.g.*, Polinsky & Shavell, *supra* note 103, at 887–88. Polinksy and Shavell later explain that their argument concerning non-detection is distinct from arguments based on the consideration of potential harm, arguments they generally reject. *See id.* at 914–17.

105. *See 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, *supra* note 95.

Lodging, Inc.,[106] Judge Richard Posner faced a case in which the plaintiffs had been bitten by bedbugs at a Chicago hotel.[107] They sued the hotel claiming, among other things, that the hotel knew about the bedbugs but rented them the room nonetheless.[108] A jury awarded the plaintiffs $5,000 in compensatory damages and $186,000 in punitive damages.[109] The defendant appealed claiming in part that the punitive damage award was unconstitutionally excessive.[110]

The Seventh Circuit rejected the defendant's argument.[111] 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."[112] In other words, the risk that the defendant's actions toward 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* several years before Judge Posner dealt with the bedbugs.[113] The case concerned a claim that the New York Police Department's policy of strip-searching everyone arrested for misdemeanors violated the Constitution.[114] The jury awarded both compensatory and punitive damages.[115] The issue on appeal was whether punitive damages were available against the municipality.[116] The Second Circuit held that they were not.[117]

Judge Calabresi concurred, in addition to writing a separate majority opinion, to argue that, while punitive damages were precluded under relevant Supreme Court precedent, a different out-

106. 347 F.3d 672 (7th Cir. 2003). See Murphy, *supra* note 45, for an excellent discussion of Judge Posner's opinion in *Mathias*.

107. *Mathias*, 347 F.3d at 673.

108. *Id.* at 674.

109. *Id.*

110. *Id.*

111. *Id.* at 674–78.

112. *Id.* at 677.

113. Ciraolo v. City of New York, 216 F.3d 236, 244 (2d Cir. 2000) (Calabresi, J., concurring). For an informative discussion of *Ciraolo*, see Anthony J. Sebok, *Deterrence or Disgorgement? Reading* Ciraolo *After* Campbell, 64 MD. L. REV. 541 (2005) (arguing that punitive damage awards should not be calculated by unproven losses to hypothetical plaintiffs).

114. *Ciraolo*, 216 F.3d at 237–38.

115. *Id.* at 238.

116. *Id.*

117. *Id.*

come would have been better.[118] 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.[119]

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 toward persons not before the Court could play such a prominent role. Similarly, the scholarly arguments of those such as Professors Polinksy and Shavell seem to have been rejected.[120] 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 toward others may be used in this manner.[121] 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.[122] Taking a different tack, one might argue that the non-detection rationale could still be appropriately used by appellate courts reviewing 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.[123] If anything, it would seem that the use of the non-detection ratio-

118. *Id.* at 242 (Calabresi, J., concurring).

119. *Id.* at 243–44. Judge Calabresi cited Polinsky & Shavell, *supra* note 103, 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 argument 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 of society-wide compensation in connection with punitive damages. *See supra* text accompanying note 36.

120. Ironically, Professors Polinsky and Shavell submitted an amicus brief in *Philip Morris* arguing in support of the company. *See* Brief for A. Mitchell Polinsky, Steven Shavell & the Cato Institute in Support of Petitioner, Philip Morris USA v. Williams, 127 S.Ct. 1057 (2007) (No. 05-1256). The brief dealt only with the use of corporate wealth in the punitive damages calculus. *See id.*

121. *See* Philip Morris USA v. Williams, 127 S. Ct. 1057, 1063–65 (2007).

122. *Id.*

123. *Id.* at 1065 (emphasis added).

nale 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.[124] What does seem certain, however, is that 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 damages. If one accepts what I have described above concerning the constitutionalization of the punitive damage remedy, this point is self-evident in some respects. Specifically, a state will not be able to use punitive damages to advance its interests outside of the increasingly narrow range of instances the United States Supreme Court has defined.[125] This restriction on state authority—at least viewed in isolation—is most certainly 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

124. 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) (discussing problems with 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 & Shavell, *supra* note 103, 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.

125. *See supra* Part III.A.

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 rein in punitive damages across the board. This type of logic is apparent in the Court's decisions[126] as well as the academic literature.[127]

The concern with the potential of multiple punishments—whether warranted or not—has not been ignored by the states. In fact, as would befit a collection of laboratories,[128] there are many approaches to deal with the perceived problem.[129] Some states have enacted schemes to address the "piling on" effect at the heart of the multiple punishment argument.[130] Other jurisdictions con-

126. *See, e.g.*, State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 423 (2003) ("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.") (citation omitted); BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 593 (1996) (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) (articulating in an early decision the "multiple punishment" concern).

127. *See, e.g.*, Allen, *supra* note 10, at 43 n.177 (collecting academic literature concerning the perceived "multiple punishment" problem); Janutis, *supra* note 75, at 372–77 (discussing the issue and collecting sources).

128. *See* New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) (accepting and praising the role states play as laboratories for "novel social and economic experiments" in the American federal system).

129. 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 Punitive Damages Reform*, http://www.atra.org/issues/index.php?issue=7343 (last visited Nov. 12, 2007).

130. *See, e.g.*, ALA. CODE § 6-11-23(b) (LexisNexis 2005) (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) (2006) (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. ANN. § 768.73(2)(a)–(b) (West 2005) (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

sider the multiple punishment issue as part of their common law (or state constitutional) reasonableness inquiry.[131] 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. 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 also wearing suspenders. Yet the specific manner in which the Court constitutionalized punitive damages potentially leads to a surprising result, namely that the defendant will be faced with punitive damages in situations in which it would have been protected prior to *Philip Morris*.

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same act or single course of conduct for which the claimant seeks compensatory damages . . . [unless i]n 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 ANN. § 51-12-5.1(e)(1) (2000) ("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. § 510.263(4) (Supp. 2006) (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)(b)(vii) (2007) (making "previous awards of punitive or exemplary damages against the defendant based upon the same wrongful act" relevant to a later award of punitive damages); OR. REV. STAT. § 30.925(2)(g) (2005) (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, punitive damages awards 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.").

131. *See, e.g.*, Green Oil Co. v. Hornsby, 539 So. 2d 218, 224 (Ala. 1989) (appellate courts are to consider other punitive damage awards as part of common law excessiveness inquiry); Frick v. Abell, 602 P.2d 852, 854 (Colo. 1979) (deterrent effect of other punitive damages awards is a factor to consider in assessing the reasonableness of a given punitive damage award); Bowden v. Caldor, Inc., 710 A.2d 267, 280 (Md. 1998) (noting that a court may consider other punitive damage awards as part of its excessiveness inquiry).

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 their DVD players exploded.[132] Tom, a Florida citizen, brings a suit against Acme and prevails. He is awarded $1 million in compensatory damages and $3 million in punitive damages.[133] The award is affirmed on appeal in all respects, despite Acme's claims under both Florida law and the United States Constitution, including a claim that the award runs afoul of the constitutional limitation set forth in *Philip Morris* concerning non-party punishment.

Now assume that Acme is then sued by Tina, another Florida citizen. Tina claims that she, too, was severely injured when her Acme DVD player 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.[134] The Florida statute goes on to allow a plaintiff to nevertheless seek punitive damages so long as she convinces the court by clear and convincing evidence that the prior punitive damage award "was insufficient to punish that defendant's behavior."[135]

Acme would certainly have been correct in its argument before *Philip Morris*. However, 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

132. 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. ANN. § 768.72(2).

133. Under the facts presented, Florida law would limit Tom's punitive damages to three times the compensatory damages. *See id.* § 768.73(1)(a)(1).

134. *Id.* § 768.73(2)(a).

135. *Id.* § 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. *Id.*

nonparties . . . who are, essentially, strangers to the litigation."[136] 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.

Philip Morris has a far greater negative consequence for the hypothetical Acme: 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 is final and cannot be collaterally challenged in Tina's case against Acme.[137] The judgment is presumed to be correct, including the holding 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 able to do so in a world before *Philip Morris*.[138]

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.[139] In-

136. Philip Morris USA v. Williams, 127 S. Ct. 1057, 1063 (2007).

137. *See, e.g.*, 1 PUBLISHER'S EDITORIAL STAFF, JUDGMENTS IN FEDERAL COURT § 8.08 (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.").

138. 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, *see* ALASKA STAT. § 09.17.020(c)(7) (2006), as does the Colorado Supreme Court's consideration of the deterrent and punishment tied to previous awards, *see* Frick v. Abell, 602 P.2d 852, 854 (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 ANN. § 51-12-5.1(e)(1) (2000) ("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.").

139. *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, *supra* note 75, 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* Polinksy & Shavell, *supra* note 103, at 923–26.

deed, 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."[140] 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.[141]

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.'"[142] 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."[143] Or as one

140. *See* Allen, *supra* note 10, at 45 (footnote omitted).

141. Professor Hylton reached a similar conclusion based on different reasoning. *See* Hylton, *supra* note 35, at 16 ("[T]he risk of redundant penalties in punitive damages litigation is probably enhanced by the *Philip Morris* decision."); *see also* Howard J. Bashman, *'Philip Morris' Punitives Ruling May Contain Silver Lining for Plaintiffs*, LAW.COM, Feb. 26, 2007, http://www.law.com/servlet/ContentServer?pagename=OpenMarket/Xcelerate/View&c=LawArticle&cid=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 defendant."); 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, 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.").

142. Pac. Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 18 (1991).

143. *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 Indus. of Vt., Inc. v. Kelco Disposal, Inc., 492 U.S. 271, 281 (1989) (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

commentator put it: "Juries are portrayed as insurgent radicals encumbering corporate America with increasingly erratic and unpredictable punitive damage awards."[144]

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 the jury as decision-maker. As mentioned above, the Court has required that juries be sufficiently instructed about their duties and that appellate courts exercise meaningful review of those decisions (as well as those of the trial courts).[145] 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*."[146] Thus, as matters stood

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 Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 417 (2003) (commenting critically that "[j]ury instructions typically leave the jury with wide discretion in choosing amounts").

144. Rustad, *supra* note 43, at 461. Professor Rustad is generally favorably inclined towards punitive damages. *See id.* However, one can find the same general description from general critics as well. *See* Redish & Mathews, *supra* note 86, 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 dramatically reducing, if not eliminating, the role of the jury in assigning punitive damages. *See generally* CASS R. SUNSTEIN ET AL., PUNITIVE DAMAGES: HOW JURORS DECIDE 142 (2002). Sunstein et al.'s work has been the subject of significant criticism. *See, e.g.*, Catherine M. Sharkey, *Punitive Damages: Should Juries Decide?*, 82 TEX. L. REV. 381 (2003) (reviewing SUNSTEIN ET AL., *supra*); Neil Vidmar, *Experimental Simulations and Tort Reform: Avoidance, Error, and Overreaching in Sunstein et al.'s* Punitive Damages, 53 EMORY L.J. 1359 (2004).

145. *See supra* Part I.A.

146. Cooper Indus., Inc. v. Leatherman Tool Group, Inc., 532 U.S. 424, 437 (2001) (emphasis added) (internal quotation marks and citation omitted) (quoting Gasperini v. Ctr. for Humanities, Inc., 518 U.S. 415, 459 (1996) (Scalia, J., dissenting)). 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 a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law." U.S. CONST. amend. VII.

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.[147] 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.[148] As I alluded to above,[149] 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 question, not the wrong one."[150] By this he meant that the jury will not use "nonparty evidence" to punish the defendant for actions toward nonparties but rather merely as a means of assessing the defendant's reprehensibility toward the plaintiff.[151] Second, Justice Breyer held that state courts could not follow procedures "that create an unreasonable and unnecessary risk of *any such confusion occurring*."[152] Third, the Court recognized, albeit apparently grudgingly, that the states retained some measure of flexibility.[153] However, it also stressed that they were under a constitutional imperative to provide the protection described in the opinion.[154] And, finally, the Court conspicuously did *not* hold that the jury instruction Philip Morris

147. 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, 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 19.

148. 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 35, 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.

149. *See supra* Part II.B (discussing constitutionally significant aspects of the Court's holding in *Philip Morris*).

150. Philip Morris USA v. Williams, 127 S. Ct. 1057, 1064 (2007).

151. *See id.* at 1063–64.

152. *Id.* at 1065 (emphasis added).

153. *See id.* at 1062–63.

154. *See id.* at 1065 ("Although the 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.").

had proposed was required or, in fact, would have solved the constitutional problem even if it had been given.[155]

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?[156] One reading of the opinion would suggest that the Court's holding concerns traditional procedures by which juries are controlled before they act.[157] In this case, for example, trial courts could use limiting instructions as to the non-party evidence,[158] jury instructions describing the use to which the jury could put the evidence,[159] and the use of special verdict forms.[160] If this is so, states may relatively easily comply with the

155. *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 . . . .").

156. 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." Douglas W. Kmiec, *Up in Smoke: The Supreme Court Loses its Unanimity*, SLATE, Feb. 21, 2007, http://www.slate.com/id/2160286.

157. *See, e.g.*, *Philip Morris*, 127 S. Ct. at 1063–64 (discussing the use of "procedures"). Professors Geistfeld and Sebok apparently read the decision in this way. *See* Geistfeld, *supra* note 94, at 298–301 (discussing *Philip Morris* and its impact on the control of juries); Sebok, *supra* note 97, 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 Ins. Co., 500 F.3d 1007, 1009–10 (9th Cir. 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., 500 F.3d 963, 972 (9th Cir. 2007) (noting that "[a]bsent a proper limiting instruction" the court could not be sure that the *Philip Morris* mandate had been followed); Moody v. Ford Motor Co., 506 F. Supp. 2d 823, 850 (N.D. Okla. 2007) ("The Supreme Court noted [in *Philip Morris*] that there is a constitutionally permissible use of evidence of harm to others, but that *the jury must be given proper instructions* to ensure that a defendant's due process rights are not violated.") (emphasis added). Tellingly, none of these decisions explained exactly—or even perfunctorily—how the juries in the cases are supposed to perform the task the Supreme Court set for them.

158. *See, e.g.*, FED. R. EVID. 105 ("When evidence which 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.").

159. *See, e.g.*, FED. R. CIV. P. 51 (providing authority for federal courts to provide instructions as to matters of law to the jury).

160. FED. R. CIV. P. 49 (providing for use of special verdicts and interrogatories).

Court's holding.[161] There might 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 lower courts. First, none of the traditional devices mentioned above would actually give a court any real "assurance" that the jury has asked the right question.[162] 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 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 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*,[163] 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.[164] Standing alone, this seems remarkably like the Court's statement in *Philip Morris* that courts needed to avoid "any . . . confusion" occurring in the process.[165] What is significantly different in *Penry*, however, is that the Court was clear in that case how the risk—in that case 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 abil-

161. Indeed, there already exists some academic commentary proposing instructions and other traditional devices to control the jury concerning issues quite similar to those the Court discussed in *Philip Morris*. *See, e.g.*, Colby, *supra* note 93, at 675–76; Janutis, *supra* note 75, at 414–15.

162. *See Philip Morris*, 127 S. Ct. at 1064. Some lower courts also appear to recognize that 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, No. 3:05-CV-253-W, 2007 U.S. Dist. LEXIS 22585, at *7–*8 n.2 (W.D.N.C. Mar. 13, 2007) ("[T]he 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 103, at 142–43, 162–64.

163. 492 U.S. 302 (1989).

164. *Id.* at 323.

165. *Philip Morris*, 127 S. Ct. at 1065.

ity to use the mitigating evidence with these words: "*In the absence of jury instructions* . . . ."[166] 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.[167]

Since instructions will not suffice, lower courts will need to be creative in carrying out the Court's mandate. Of course, state courts and the lower federal courts could avoid this task by eliminating juries for punitive damages.[168] If a judge were the decisionmaker, she would need to articulate specific findings of fact.[169] 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.[170] 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.[171]

166. *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 id.* at 328. 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 82–85 (discussing the 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, 127 S. Ct. 1654, 1664–75 (2007).

167. 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.

168. Because *Cooper Industries* held that a punitive damages award was not a finding of "fact," 532 U.S. 424, 437 (2001), one could argue that *Cooper Industries* 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 *Cooper Industries* decision was not limited to the Seventh Amendment. Otherwise, one might need to deal with relevant state constitutional law. These issues, however, are beyond the scope of this Article.

169. *See, e.g.*, FED. R. CIV. P. 52.

170. *See* FED. R. EVID. 403 ("[A]lthough relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice [or] confusion of the issues.").

171. *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).

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 *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.[172]

IV.
CONCLUSION AND SOME THOUGHTS ABOUT WHAT THE FUTURE MAY 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 a perspective. The same can often be said of the 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 as 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 a multitude of questions concerning the guideposts that the Court will, no doubt, be called to answer at some point.[173] Does

172. I have not sought in this Article to defend normatively the role of the jury in connection with awarding punitive damages. There is a serious debate on that point in the academic literature. *See, e.g.*, *supra* note 103 (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 *Philip Morris* will likely have an important impact on that traditional role.

173. There are also narrow (although not unimportant) non-guidepost-related issues that the Court may be called on to consider. For example, do state-split recovery statutes trigger the Excessive Fines Clause? *See supra* notes 4–5 and accompanying text (discussing the Excessive Fines Clause in connection with punitive damages). Similarly, does the Court's close tie of punitive damages to a one-

failing one guidepost mean that an award *must* fail?[174] How does the third guidepost (concerning comparable sanctions) actually operate?[175] What, precisely, is the proper role of the defendant's financial status in the punitive damages calculus?[176] And one could go on.

Such issues are of intense practical importance to litigants and lower court judges alike. However, perhaps the more interesting question is whether the Court is done with its larger project of redefining the very nature of punitive damages as a remedial device. Will the Court itself eventually police whether punitive damages are called for in a given case as a constitutional matter?[177] Will the Court extend its punitive damage jurisprudence to other types of damages, thus further constitutionalizing state tort law?[178] Alternatively, will the Court simply hold that punitive damages themselves

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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?

174. The Oregon Supreme Court held that it did not. *See Williams III*, 127 P.3d 1165, 1181–82 (Or. 2006). The United States Supreme Court did not address this issue in its opinion.

175. Once again, the Oregon Supreme Court discussed this issue. It laid out a comprehensive three-step process to implement the third guidepost. *See id.* at 1178–79. The United States Supreme Court also did not consider the propriety of the Oregon approach.

176. This issue, too, was considered in Oregon. *See id.* 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 *Philip Morris*. The Court previously held that a defendant's wealth "cannot justify an otherwise unconstitutional punitive damages award." State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 427 (2003). The full import of the Court's statement is unclear.

177. 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 upon State Farm's 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.

178. Several recent articles have suggested that the Court will or should do so. *See, e.g.*, Paul DeCamp, *Beyond* State Farm: *Due Process Constraints on Noneconomic Compensatory Damages*, 27 HARV. J.L. & PUB. POL'Y 231, 234 (2003); Mark A. Geistfeld, *Due Process and the Determination of Pain and Suffering Tort Damages*, 55 DEPAUL L. REV. 331 (2006); Hylton, *supra* note 35, at 17–19.

are unconstitutional?[179] Moreover, what does this decision mean for the class action as a procedural device?[180] 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 unable to say the precise form its future work will take.

There is one final aspect of the decision beyond its implications for punitive damages and broader constitutional doctrine that is of such *potential* significance that it is at least worthy of some comment. Specifically, *Philip Morris* is potentially important as an early predictor of the more general constitutional philosophies of Chief Justice Roberts and Justice Alito, two Justices who will likely be members of the Court for quite some time.

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.[181] 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, among other things, substantive due pro-

179. *See generally* Redish & Mathews, *supra* note 86 (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). Related to this question, one wonders whether the Court's jurisprudence in this area applies to statutory multiple-damages provisions.

180. An early assessment of *Philip Morris* suggests that the decision could seriously undermine the class action as a constitutional matter. *See* Hylton, *supra* note 35, 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 Litig., 407 F.3d 125, 140 (2d Cir. 2005) (reversing certification of a limited-fund punitive damage class action); Engle v. Liggett Group, Inc., 945 So. 2d 1246, 1288 (Fla. 2006) (largely vacating trial-court decision to certify a class under state law in tobacco litigation), and in 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 (2001); *see also* Allen, *supra* note 10, at 64–67 (discussing the potential impact of the Court's state-sovereignty rationale on class actions).

181. *See* Robert A. Levy, *The Conservative Split on Punitive Damages:* State Farm Mutual Automobile Insurance Co. v. Campbell, 2002–2003 CATO SUP. CT. REV. 159 (discussing the split between Justices O'Connor and Kennedy on the one hand and Justices Scalia and Thomas on the other concerning punitive damages).

cess principles.[182] In contrast, Justices Scalia and Thomas consistently dissented in those cases, arguing principally that the Constitution provides no warrant for federal intervention concerning punitive damage awards.[183]

In *Philip Morris* we got at least a preliminary indication of where the new Chief Justice and Justice Alito come down on this "conservative split." Perhaps somewhat surprisingly, both of them joined Justice Breyer's majority opinion reaffirming and extending the Supreme Court's precedents imposing federal constitutional limitations on state punitive damage awards.[184] And they did so despite the opportunity to join a dissent based at least in part on a commitment to state-sovereignty principles.[185]

What does all this mean? Only time will really tell. However, it is tempting to at least hypothesize that *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,[186] or at least not

182. *See, e.g.*, *State Farm*, 538 U.S. at 411 (noting that Justice Kennedy was the author of the Court's opinion and that Justice O'Connor joined in that opinion); BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 562 (1996) (noting that both Justice O'Connor and Justice Kennedy joined in the opinion of the Court).

183. *See, e.g.*, *State Farm*, 538 U.S. at 429 (Scalia, J., dissenting); *id.* at 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 *State Farm*. *Compare State Farm*, 538 U.S. at 411 (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.

184. Philip Morris USA v. Williams, 127 S. Ct. 1057, 1060 (2007) (noting that Chief Justice Roberts and Justice Alito joined in the opinion of the Court).

185. *Id.* at 1067–68 (Thomas, J., dissenting).

186. *See, e.g.*, Bd. of Trs. of the 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 I of the Americans with Disabilities Act); United States v. Morrison, 529 U.S. 598, 598 (2000) (holding that Congress lacked authority to enact the Violence Against Women Act under either the Interstate Commerce Clause or Section 5 of the Fourteenth Amendment); Printz v. United States, 521 U.S. 898, 933 (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, 551 (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. United States, 505 U.S. 144, 188 (1992) (holding that Congress could not commandeer state legislative bodies in connection with the Low-Level Radioactive Waste Policy Amendments Act of 1985).

when there is some 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.[187]

The short of it is that we most certainly live in interesting constitutional times.

187. *See, e.g.*, Kmiec, *supra* note 156 ("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.").