No. 05-1256

IN THE

Supreme Court of the United States

PHILIP MORRIS USA,

Petitioner,

v.

MAYOLA WILLIAMS,

Respondent.

ON WRIT OF CERTIORARI TO
THE SUPREME COURT OF OREGON

BRIEF OF AKHIL REED AMAR AND ARTHUR McEVOY AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

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Interest of *Amici Curiae*

This brief is submitted by two law professors who in their past work have analyzed various aspects of legal history pertinent to the remedy of punitive damages, also known as "exemplary damages."[1] *Amici* respectfully suggest that this brief may be of use to the Court as a counterpoint to the analysis of legal history contained in the Brief for the Petitioner ("Pet. Br.") and in the Brief of the American Tort Reform Association as *Amicus Curiae* in Support of Petitioner ("ATRA Br.") (ATRA's analysis is adopted by Philip Morris in Pet. Br. at 19 n.7).[2]

Akhil Reed Amar, the Southmayd Professor of Law and Political Science at Yale University, teaches constitutional law, federal jurisdiction, and legal history, among other subjects. He has published extensively on the history surrounding the drafting and ratification of the Constitution and of the Bill of Rights, devoting significant attention to historical matters relating to the role of the jury. He is a co-editor of a leading constitutional law casebook, *Processes of*

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[1] Given its historical focus, this brief uses the term "exemplary damages" to refer to what today are typically termed "punitive damages." "Exemplary damages" is a term English common-law courts began using in the 1760s to refer to extra-compensatory damages designed to punish intentional wrongs and thereby deter their future commission by "making an example" of the offender for others to heed. The term "punitive damages," which did not come into regular use until a century later, tends to obscure the deterrence-based origin and function of such damages by suggesting their principal function is "punishment," in the sense of retribution, that is, for its own sake. Thus we use the older term, which more accurately reflects a principal original function of such extra-compensatory damages, deterrence (both specific and general deterrence).

[2] All parties have consented to the filing of this brief (the parties' blanket consents having been lodged with the Clerk). No counsel for a party has written this brief in whole or in part. Indeed, this brief has been independently researched and written; no counsel for any party or any other *amicus* has seen drafts. No person or entity other than *amici curiae* and their counsel has made a monetary contribution to the preparation or submission of this brief.

Constitutional Decisionmaking, and the author of numerous law review articles. His several books include, most recently, *America's Constitution: A Biography* (Random House, 2005); and *The Bill of Rights: Creation and Reconstruction* (Yale University Press, 1998).

Arthur McEvoy, the J. Willard Hurst Professor at the University of Wisconsin Law School, teaches American legal history and torts and has published extensively in the fields of American history and American legal history. He was a professor of history at Northwestern University from 1980 to 1993, and a research fellow at the American Bar Foundation from 1989 to 1994. He has a particular interest in the history of judicial review of jury verdicts in the United States, and was counsel of record on an *amicus* brief filed by legal historians on that issue which this Court cited in *Honda Motor Co. v. Oberg*, 512 U.S. 415, 422 n.2 (1994).

Introduction and Summary of Argument

Philip Morris and ATRA make three basic arguments concerning the history of exemplary damages:

1. Through the second half of the 1800s, American courts were sharply divided over the very existence of an exemplary damages remedy — over the threshold question of "whether damages could *ever* properly be imposed for purposes of punishment," even where the only harm considered was harm done specifically to the plaintiff. Pet. Br. at 18 (emphasis added). *See also* ATRA Br. at 8 & n.5.

2. Once "[c]ourts gradually began to accept that damages could be used to punish as well as compensate," they focused on "the distinct harm to the party before the court." Pet. Br. at 18. This approach reflected the "general consensus that punitive damages may be imposed *only* to punish for the harm to the party before the court . . . ." Pet. Br. at 19 (emphasis added). *See also* ATRA Br. at 5-12. "For almost the entirety of their existence, punitive damages were awarded only as punishment for harm to the specific person bringing the claim." Pet. Br. at 17. *See also* ATRA

Br. at 12 ("punitive damages were never understood as a mechanism for vindicating affronts to society generally (or for that matter to anyone other than the plaintiff)").

3. Through "several centuries of Anglo-American legal history, . . . low-single-digit ratios of punitive to compensatory damages have always been the norm," Pet. Br. at 35 — a norm which "persisted throughout the 19th century and much of the 20th." Pet. Br. at 38. "Astronomical punitive damages awards yielding multi-digit ratios are a phenomenon that has emerged only recently. Such awards have no basis in common-law history." Pet. Br. at 38 (footnote omitted). *See also* ATRA Br. at 21-30.

Part I of this brief demonstrates that each of the three basic points urged by Philip Morris and ATRA is flawed.

There was no "sharp" division over the existence of an exemplary damages remedy through 1899. The existence and validity of this remedy was well established by the early 1800s under the common law of both England and America, as Chancellor Kent contemporaneously observed.

Exemplary damages have never been limited only to the consideration of harms done to the plaintiff. Nor were exemplary damages historically confined to a low, single-digit multiple of actual damages. From the beginning, courts justified exemplary damages in significant part as a mechanism to deter intentional wrongdoing and, at least in cases founded on deterrence (we do not consider cases founded on retribution), the ratio between exemplary and compensatory damages was of little significance.

Exemplary damages set at "astronomical" multiples of the particular plaintiff's actual damages are no modern phenomenon. At least with regard to deterrence-based exemplary damages, such awards have been a hallmark of this common-law remedy from its inception. The whole point of the 1763 litigation pursued by John Wilkes and his allies against government agents which led to the earliest decisions was to use the threat of enormous exemplary damages awards to deter sweeping invasions of privacy effected pursuant to general warrants. Lord Chief Justice Charles Pratt (later made Lord Camden) upheld enormous

exemplary damages in the cases involving Wilkes as an appropriate means of deterring harm to others, and to society generally. Lord Camden specifically rejected the government's argument that exemplary damages should not be used for purposes of deterrence.

The exemplary damages cases involving Wilkes were well known to the Founding generation. Wilkes and Lord Camden were lionized in part for their role in these cases. It is therefore no surprise that Lord Camden's approach to exemplary damages, including his focus on deterrence, was retained by the state courts after independence as part of their "reception" of the English common law. A handful of state courts, many decades later, altered their common law to bar exemplary damages. But in the states which *did* continue to permit exemplary damages (the vast majority), courts accepted Lord Camden's fundamental insight that exemplary damages should be based not simply on the harm that had been done to the plaintiff but should also take account of harm to others, and to society in general, and be set at levels adequate to deter such harm in the future.

Part II of this brief addresses a separate but related matter raised by Philip Morris and ATRA: the proper division of authority between judge and jury. ATRA argues that historical practice does not shield jury-awarded exemplary damages "from exacting constitutional scrutiny," ATRA Br. at 30, and Philip Morris goes so far as to argue that "long-established practice" requires that "when the compensatory damages are substantial, the constitutional maximum punishment is between zero and four times the amount of compensatory damages." Pet. Br. at 9. However, the historical practice of the English courts dating back to 1763, and of the American courts during the 19th century, was to defer heavily to jury determinations of exemplary damages. Both as a matter of tradition as it existed when the Fourteenth Amendment was enacted in 1868 and, even more fundamentally, in light of the Seventh Amendment enacted in 1791, the type of *de novo* or weight-of-the-evidence review of exemplary damages which Philip Morris and ATRA appear to champion is untenable.

Argument

I. History Supports the States' Use of Exemplary Damages to Deter Wrongdoing Generally, Not Just to Vindicate Harms to Particular Plaintiffs

Philip Morris's historical account is as follows. Through 1899 there was sharp division among American courts and commentators over the very existence of an exemplary damages remedy. Pet. Br. at 18. Once American courts gradually did begin to permit exemplary damages, there developed a general consensus that *only* the harm to the plaintiff in the particular case could be considered, and that exemplary damages should be strictly confined to punishing for harm to *that plaintiff*. Pet. Br. at 17-19. Exemplary damages awarded at multi-digit ratios above actual damages were unknown until recently. Pet. Br. at 35, 38.

Philip Morris's arguments are contrary to the historical record. As Chancellor Kent contemporaneously observed, exemplary damages were a well-established part of both English and American common law by the early 1800s. From their beginnings in the mid-1700s, they have been awarded in large part not merely to punish for, or vindicate, harm to the plaintiff, but to deter harms against others, and against society generally — and at multi-digit ratios far above the actual damages if found necessary for deterrence.

A. Early English Cases

Exemplary damages were first formally recognized as a separate category of common-law damages in 1763, in the landmark English cases involving the government's targeting of John Wilkes for the alleged publication of *North Briton*, No. 45. Wilkes was a Member of Parliament and part of one of the Whig factions (led by William Pitt the Elder) which fell into opposition to the government following the accession of King George III in 1760, and which was fighting the efforts of other factions desiring to enhance the King's powers and to negotiate a peace treaty with France.

The most notorious of the *North Briton* issues (which, while published anonymously, were widely assumed to be written chiefly by Wilkes) was *North Briton*, No. 45. It depicted the King as the unwitting puppet of corrupt ministers who were being covertly led by a Scottish lord who owed his influence to an amorous connection with the King's mother.[3]

Beyond his extraordinary abilities as a propagandist and satirist, Wilkes was trained as a lawyer,[4] and was a capable administrator (later serving with distinction as sheriff, lord mayor, and chamberlain of London).[5] When the King and government ministers attacked *North Briton*, No. 45, as seditious and treasonous, and launched searches and seizures targeting dozens of individuals pursuant to general warrants in an effort to obtain evidence that Wilkes was its author, Wilkes drew on those skills to manage and finance a series of lawsuits against government ministers and agents seeking tort damages. Through their lawsuits, Wilkes and his allies "recovered a King's ransom from civil juries to teach arrogant officialdom a lesson and to deter future abuse," and Wilkes became a hero of liberty and democracy[6] — a reputation enhanced by Wilkes's later use

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[3] *See generally* ARTHUR R. CASH, JOHN WILKES: THE SCANDALOUS FATHER OF CIVIL LIBERTY 38-43, 49-50, 56-57, 60-62, 65-100 (2006); JOHN SAINSBURY, JOHN WILKES: THE LIVES OF A LIBERTINE xiv-xv, 45-70 (2006); LOUIS KRONENBERGER, THE EXTRAORDINARY MR. WILKES: HIS LIFE AND TIMES 16-35 (1974); GEORGE F. E. RUDÉ, WILKES AND LIBERTY: A SOCIAL STUDY 18-23 (1962); CHARLES CHENEVIX TRENCH, PORTRAIT OF A PATRIOT: A BIOGRAPHY OF JOHN WILKES 56-99 (1962); RAYMOND WILLIAM POSTGATE, THAT DEVIL WILKES 4-5, 10-17, 30-36, 46-51 (1929).

[4] CASH, *supra* note 3, at 12, 16, 21; SAINSBURY, *supra* note 3, at x, 8.

[5] CASH, *supra* note 3, at 292-94, 308-14, 351-52, 378; KRONENBERGER, *supra* note 3, at 138-44, 157-60, 187-88; TRENCH, *supra* note 3, at 290-94, 315-22; POSTGATE, *supra* note 3, at 180-82, 187-95, 212-16, 229-31; WILLIAM PURDIE TRELOAR, WILKES AND THE CITY 107, 124-49, 193-208 (1917).

[6] AKHIL REED AMAR, THE CONSTITUTION AND CRIMINAL PROCEDURE: FIRST PRINCIPLES 29, 194 n.146 (1997). *See also* AKHIL REED AMAR, THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION 70-71 & n.* (1998);

of similarly aggressive tactics to win landmark victories for the freedom of the press[7] and the freedom of the ballot.[8]

One of the cases sparked by *North Briton*, No. 45, *Huckle v. Money*, 95 Eng. Rep. 768 (C.P. 1763), involved a claim for exemplary damages made by a journeyman printer suspected of involvement with its printing. Huckle was detained for only six hours. Money and the other government agents treated him "rather well, feeding him 'beef steakes and beer, so that he suffered very little or no damages' . . . . [T]he jury awarded him £ 300, an enormous sum almost 300 times the plaintiff's weekly wage." *Honda Motor Co. v. Oberg*, 512 U.S. 415, 421 (1994) (quoting *Huckle*, 95 Eng. Rep. at 768). Lord Chief Justice Charles Pratt (later made Lord Camden) upheld the award in full on the basis that the case involved not simply "the mere personal injury" of the plaintiff, but also the liberty of "all the King's subjects" against the exercise of "arbitrary power," so that the jury had "done right in giving exemplary

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CASH, *supra* note 3, at 100-16, 131-33, 161-62, 371-72; SAINSBURY, *supra* note 3, at xv; KRONENBERGER, *supra* note 3, at 36-44, 250; RUDÉ, *supra* note 3, at 23-30, 34, 193-98; TRENCH, *supra* note 3, at 88-128, 163, 370-72; POSTGATE, *supra* note 3, at 51-61.

[7] Wilkes's exploitation of certain prerogatives of the London courts brought about, for the first time in English history, the ability of newspapers to provide coverage of the proceedings of Parliament. KRONENBERGER, *supra* note 3, at 130-35; RUDÉ, *supra* note 3, at 155-65, 194; TRENCH, *supra* note 3, at 279-85, 371; POSTGATE, *supra* note 3, at 173-77; TRELOAR, *supra* note 5, at 113-23.

[8] After years of effort, Wilkes established the right of voters to send as their representative to the legislature whomever they wished (even Wilkes, voted into Parliament once while under a sentence of outlawry, and thrice while imprisoned), a principle upon which this Court drew in *Powell v. McCormack*, 395 U.S. 486, 527-31 (1969). *See also* CASH, *supra* note 3, at 179, 208-13, 221-22, 224-27, 237-38, 242, 246-58, 305, 310, 316-18, 369-71; SAINSBURY, *supra* note 3, at xvi-xvii; KRONENBERGER, *supra* note 3, at 88-93, 99-101, 120-26, 128-29; RUDÉ, *supra* note 3, at 41-75, 105-07, 111, 194; TRENCH, *supra* note 3, at 214-24, 231-34, 237-51, 312-13, 370-71; POSTGATE, *supra* note 3, at 121-27, 132-47, 198-200, 224.

damages." 95 Eng. Rep. at 768-69.[9]

A case brought by Wilkes sought to hold the government accountable for searching his home under a general warrant, in its effort to uncover evidence that Wilkes had authored *North Briton*, No. 45. *Wilkes v. Wood*, 98 Eng. Rep. 489 (C.P. 1763). Wilkes specifically focused the case on deterrence, which was the whole point of the coordinated litigation effort. Arguing "that the case extended far beyond Mr. Wilkes personally" to "touch[] the liberty of every subject," Wilkes's counsel urged an award of "large and exemplary damages" because "trifling damages would put no stop to such proceedings . . . ." *Id.* at 490. Lord Camden charged the jurors that they had "it in their power to give damages for more than the injury received" so as "to deter from any such proceeding for the future . . . ." *Id.* at 498-99.

In so charging the jury, Lord Camden specifically rejected the Solicitor General's argument "[t]hat damages should always be reckoned according to the injury received," *id.* at 494, and his argument that the public interest could *only* be protected through criminal proceedings, not through jury-awarded damages. *Id.* at 493 ("This was the first time he ever knew a private action represented as the cause of all the good people of England. If the constitution has, in any instance, been violated, the Crown must be the prosecutor, as it is in all criminal cases."). So charged, the jury awarded Wilkes £ 1000, more than three times the enormous sum awarded the journeyman printer. *Id.* at 499.[10]

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[9] The "enormous" (to use this Court's description) exemplary damages award upheld on little or no damages in *Huckle v. Money* refutes the argument that "[a]stronomical punitive damages awards yielding multi-digit ratios are a phenomenon that has emerged only recently," and they "have no basis in common-law history." Pet. Br. at 38. *Compare* Clarence Morris, *Punitive Damages in Tort Cases*, 44 HARV. L. REV. 1173, 1180 & n.10 (1931) (noting 75 years ago that "punitive damages many times as great as the actual damages have been affirmed").

[10] As Lord Camden's analysis makes clear, both *Huckle v. Money* and *Wilkes v. Wood* refute the argument made to this Court that the focus of exemplary damages has always been on "the distinct harm to the party

Between 1764 and American independence, building on *Huckle v. Money* and *Wilkes v. Wood*, the English courts sustained other exemplary damages awards in a variety of contexts, typically involving powerful elites who abused their power against ordinary people, justifying exemplary damages as a means of deterring future such abuses. *E.g.*, *Beardmore v. Carrington*, 95 Eng. Rep. 790 (K.B. 1764); *Grey v. Grant*, 95 Eng. Rep. 794 (C.P. 1764); *Benson v. Frederick*, 97 Eng. Rep. 1130 (K.B. 1766); *Tullidge v. Wade*, 95 Eng. Rep. 909 (C.P. 1769); *Bruce v. Rawlins*, 95 Eng. Rep. 934 (C.P. 1770); *Sharpe v. Brice*, 96 Eng. Rep. 557 (C.P. 1774).

B. Early American Cases

Citing an 1899 treatise, Philip Morris argues that "[t]hroughout the second half of the 19th century, courts and commentators were sharply divided over whether damages

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before the court." Pet. Br. at 18; *see also* Pet. Br. at 17 ("For almost the entirety of their existence, punitive damages were awarded only as punishment for harm to the specific person bringing the claim."); ATRA Br. at 12 ("punitive damages were never understood as a mechanism for vindicating affronts to society generally (or for that matter anyone other than the plaintiff)"). As our discussion below demonstrates in detail, this argument by Philip Morris and ATRA ignores the well-settled deterrence function of exemplary damages, one specifically relied upon in the original 1763 decisions and in many later decisions.

Similarly flawed is the analysis set forth in a law review article heavily relied upon by Philip Morris and ATRA for their historical argument, Thomas B. Colby, *Beyond the Multiple Punishment Problem: Punitive Damages as Punishment for Individual, Private Wrongs*, 87 MINN. L. REV. 583 (2003) (cited in Pet. Br. at 12, 18, 38 n.25; ATRA Br. at 5, 9-12, 23). Despite the explicit deterrence rationale of *Huckle v. Money*, *Wilkes v. Wood*, and many later cases, Colby argues that courts have always conceived of exemplary damages "as punishment for the private legal wrong — the insult — done to the individual plaintiff." *Id.* at 619. Last year the California Supreme Court rejected Colby's "restrictive historical view of the *purposes* of punitive damages," explaining that accepting "such a narrow view" would "blind state juries and courts to the state's public interest in deterring a wrongful course of conduct." *Johnson v. Ford Motor Co.*, 113 P.3d 82, 91-92 (Cal. 2005).

could *ever* properly be imposed for purposes of punishment." Pet. Br. at 18 (emphasis added) (citing 2 SIMON GREENLEAF, A TREATISE ON THE LAW OF EVIDENCE § 253, at 240-50 (William Draper Lewis ed., 16th ed. 1899)). But as this Court has previously observed, "the common-law method for assessing punitive damages was well established before the Fourteenth Amendment was enacted," *Pacific Mutual Life Ins. Co. v. Haslip*, 499 U.S. 1, 17 (1991), a point which was "made clear" in 1851 by *Day v. Woodworth*, 54 U.S. 363 (1851). *Id.* That observation was a correct one.

Because the exemplary damages remedy was well established under the common law of England prior to American independence, it automatically became part of the common law of nearly all states (both the thirteen original states and those later admitted) due to their "reception" of the English common law.[11] Of course, the English common law was not imported wholesale in America. There was no slavish adherence to English common law as a technical

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[11] "Resisting the claim that the American plantations were 'conquered' territory and as such not entitled to the benefits of English law, the colonists largely succeeded after 1720 in establishing the proposition that they carried the English common law with them." MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW, 1780-1860, at 6 (1977) (citations omitted). "[T]he first Continental Congress in 1774 . . . maintain[ed] that Americans were 'entitled to the common law' . . . ." *Id.* at 4, 270 n.16 (quoting 1 *Journals of the Continental Congress* 69 (1904)). "Between 1776 and 1784, eleven of the thirteen original states adopted, directly or indirectly, some provision for the reception of the common law as well as of limited classes of British statutes," with the final two states following in 1798 and 1818. *Id.* at 4, 270 n.18 (citing E. BROWN, BRITISH STATUTES IN AMERICAN LAW, 1776-1836, at 24 (1964)). *See also* LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 66-70, 112 (3d ed. 2005).

Nor was reception of the English common law limited to the thirteen original states. The Northwest Ordinance of 1787 mandated "judicial proceedings according to the course of the common law" — that is, the common law of England. *E.g.*, *Penny v. Little*, 4 Ill. (3 Scam.) 301, 302-05 (1841). Virtually all the states admitted to the union after the Revolution adopted the common law of England, with the date of reception typically either left unspecified or set at 1776. *See* Joseph Fred Benson, *Reception of the Common Law in Missouri: Section 1.010 as Interpreted by the Supreme Court of Missouri*, 67 MO. L. REV. 595, 607-11 (2002) (catalog of provisions compiled by Missouri's judicial archivist).

system, and there was enough distrust of some English common-law principles that American judges felt latitude to reject them as seemed warranted. *See Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 132-37 (1996) (Souter, J., joined by Ginsburg and Breyer, JJ., dissenting) (citing numerous sources). But the particular principle animating the exemplary damages doctrine — the need to provide a remedy for common people to deter intentional wrongs by powerful elites, in a proceeding administered by jurors who would be difficult for elites to covertly influence — was hardly the subject of distrust in America.

After all, the exemplary damages remedy had first been formally recognized in the famous cases involving John Wilkes and Lord Camden, which added greatly to their status as "folk heroes in the colonies."[12] The various cases involving Wilkes can be thought of "as the *Brown v. Board of Education* of their day; and Lord Chief Justice Camden as the Earl Warren of his era." Akhil Reed Amar, *Foreword: Lord Camden Meets Federalism — Using State Constitutions to Counter Federal Abuses*, 27 RUTGERS L.J. 845, 846 (1996). Indeed, the exemplary damages remedy played a part in the dispute over ratification of the Constitution, particularly over whether ratification should be conditioned on a Bill of Rights guaranteeing the right to trial by jury in civil cases, on the view that "[t]he prospect of jury oversight and jury-

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[12] AKHIL REED AMAR, THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION 66-67 (1998). As this Court has noted: "Wilkes' struggle and his ultimate victory had a significant impact in the American colonies. His advocacy of libertarian causes and his pursuit of the right to be seated in Parliament became a *cause célèbre* for the colonies. '[T]he cry of "Wilkes and Liberty" echoed loudly across the Atlantic Ocean as wide publicity was given to every step of Wilkes's public career in the colonial press. . . . [Colonials] saw him as a popular hero and a martyr to the struggle for liberty. . . . They named towns, counties, and even children in his honour.'" *Powell v. McCormack*, 395 U.S. 486, 530-31 (1969) (quoting 11 L. GIPSON, THE BRITISH EMPIRE BEFORE THE AMERICAN REVOLUTION 222 (1956)). *See also* CASH, *supra* note 3, at 231-34, 259-60, 263-64 (noting the prominent revolutionaries who wrote Wilkes in admiration, including John Adams, Samuel Adams, John Hancock, and James Otis); POSTGATE, *supra* note 3, at 162-69, 206-07 (same).

awarded punitive damages would powerfully deter government officials contemplating unreasonable conduct."[13]

Given the historical pedigree of the English common law exemplary damages precedents and the reception of the English common law by the new American states, it is unsurprising that in the decades following independence, state after state confirmed the existence of an exemplary damages remedy under the common law, in accord with the English cases establishing this remedy. Some examples:

In 1784, a South Carolina court upheld the exemplary damages received by the victim of a practical joke. The defendant, a physician, first staged a fake duel with the intoxicated victim, and then slipped a diuretic into the wine

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[13] AMAR, *supra* note 12, at 70; *see also* AKHIL REED AMAR, AMERICA'S CONSTITUTION: A BIOGRAPHY 233-34, 329-30 (2005); AKHIL REED AMAR, THE CONSTITUTION AND CRIMINAL PROCEDURE: FIRST PRINCIPLES 14-15, 29 (1997). For example, explaining the need for civil jury trials, one Pennsylvania Anti-Federalist noted that if a federal officer searching "for stolen goods, pulled down the clothes of a bed in which there was a woman and searched under her shift . . . a trial by jury would be our safest resource, heavy damage would at once punish the offender and deter others from committing the same: but what satisfaction can we expect from a lordly [judge] always ready to protect the officers of government against the weak and helpless citizens." *Essay of a Democratic Federalist*, *reprinted in* 3 THE COMPLETE ANTI-FEDERALIST 58, 61 (Herbert J. Storing ed., 1981). Similarly, the prominent Anti-Federalist essayist "Maryland Farmer" noted: "[N]o remedy has yet been found equal to the task of deterring and curbing the insolence of office, but a jury — [i]t has become an invariable maxim of English juries, to give ruinous damages whenever an officer had deviated from the rigid letter of the law, or been guilty of any unnecessary act of insolence or oppression." *Essays by a Farmer (I)*, *reprinted in* 5 THE COMPLETE ANTI-FEDERALIST 5, 14 (Herbert J. Storing ed., 1981). On the importance and meaning of the Seventh Amendment, *see generally* Alexander Hamilton, *Federalist No. 83*, at 499 (Clinton Rossiter ed., 1961) ("The friends and adversaries of the plan of the convention, if they agree in nothing else, concur at least in the value they set upon the trial by jury"); *Parklane Hoisiery Co. v. Shore*, 439 U.S. 322, 339-46 (1979) (Rehnquist, J., dissenting); Alan Howard Scheiner, *Judicial Assessment of Punitive Damages, The Seventh Amendment, and the Politics of Jury Power*, 91 COLUM. L. REV. 142, 148-60 (1991); Charles W. Wolfram, *The Constitutional History of the Seventh Amendment*, 57 MINN. L. REV. 639, 653-710 (1973).

he offered the victim for a "reconciliation" toast. The defendant insisted it was all "a drunken frolic, and no injury was seriously intended," but the court upheld the plaintiff's "very exemplary damages," especially because the physician "could not plead ignorance of the operation, and powerful effects of this medicine." *Genay v. Norris*, 1 S.C.L. (1 Bay) 6, 6 (S.C. Com. Pl. Gen. Sess. 1784).

In 1790, a Maryland court upheld a sizable damages award in an ejectment action in a case in which the plaintiff's counsel admitted the actual damages "were insignificant," but argued "the entry and ouster was so violent as to deserve exemplary damages," which the jury "gave such as should deter others from such proceedings . . . ." *Joan v. Joshua Shield's Lessee*, 3 H. & McH. 7, 8 (Md. Gen. Oct. Term 1790).

In 1791, in a New Jersey lawsuit alleging seduction and breach of promise of marriage, a jury was charged "not to estimate the damages by any particular proof of suffering or actual loss; but to give damages for *example*'s sake, to prevent such offences in [the] future . . . ." *Coryell v. Colbaugh*, 1 N.J.L. (1 Coxe) 77 (N.J. 1791).

In 1808, the Pennsylvania Supreme Court upheld a "severe" damages award against a sheriff for his deputy's invalid levy of property from the administrator of an estate. Even though "the actual injury was nothing," the court held the jury could properly "have thought it a necessary check to rude and improper behaviour of the sheriff and his officers. . . . [T]he happiness of society requires that these officers should be influenced by powerful motives to avoid all acts of rudeness and wanton injury." *Hazard v. Israel*, 1 Binn. 240, 246 (Pa. 1808). *Compare* note 13, *supra*.

The 1808 New York decision in *Tillotson v. Cheetham*, 3 Johns. 56 (N.Y. 1808), upheld an exemplary damages award for libel. Written by Chief Justice (later Chancellor) James Kent, it termed the exemplary damages doctrine "well settled" in America. Kent saw no need for lengthy exposition. He summarized several exemplary damages decisions (including *Huckle v. Money*) and then concluded:

> But it cannot be requisite to multiply instances in which the doctrine, contained in this part of the charge, has received the sanction of the *English* and of the *American* courts of justice. It is too well settled in practice, and is too valuable in principle, to be called into question.

Id. at 64-65.

A 1818 maritime decision by this Court reflected the sharp distinction which had developed between compensatory and exemplary damages, in specifying the damages owed by the owners of a privateer who were constructively liable for an illegal seizure. The owners were liable "for all the injuries and losses actually sustained" on account of the illegal seizure, "but they are not bound to the extent of vindictive damages" — although in a suit against the crew of the privateer, "it might be proper to go yet further, and visit upon them in the shape of exemplary damages, the proper punishment which belongs to such lawless conduct." *The Amiable Nancy*, 16 U.S. 546, 558-59 (1818) (Story, J.).

In 1818, emphasizing the deterrent function of exemplary damages, a South Carolina court rejected an attack on a jury verdict for slander: "Exemplary damages are the only means of bridling licentious tongues." *Hogg v. Wilson*, 1 Nott & McC. 216, 216 (S.C. Const. 1818).

In 1836, reiterating its stance on exemplary damages and citing English decisions, the Pennsylvania Supreme Court stated: "Whatever be the speculative notions of fanciful writers, the authorities teach that damages may be given, in peculiar cases, not only to compensate, but to punish. * * * That corrective damages may be given for the sake of example, is as old as the law itself." *McBride v. McLaughlin*, 5 Watts 375, 376-77 (Pa. 1836).[14]

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[14] The "fanciful" writer the court had in mind apparently was Theron Metcalf, a Boston lawyer who six years earlier had published an article arguing a radical new theory concerning the exemplary damages doctrine. Metcalf's article is relied on by ATRA's *amicus* brief filed in support of Philip Morris (ATRA Br. at 17-18), and in the chief law review article relied on by Philip Morris and ATRA (Colby, *supra* note 10, at 617 n.119),

In 1839, the highest court of New Hampshire, in a case involving harm caused by an unsafe bridge, upheld a jury charge that "if the defendants had been guilty of *gross negligence*, . . . [the jurors] might, in their discretion, give the plaintiff exemplary damages." *Whipple v. Walpole*, 10 N.H. 130, 133 (1839). It cited both English authority and Chancellor Kent's 1808 analysis of the well-settled nature of the doctrine, concluding a jury may award "damages beyond the actual injury sustained, for the sake of the example . . . ." *Id*. at 132.

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with no acknowledgment of its radical, indeed, fanciful, nature.

Despite the preceding half century of both English and American decisions authorizing the use of exemplary damages to punish and deter intentional wrongdoing, Metcalf argued that "neither on principle, nor by the preponderance of authority, can damages be estimated by any other standard than the actual injury received . . . ." Theron Metcalf, *A Reading on Damages in Actions Ex Delicto*, 3 AM. JURIST & LAW MAG. 287, 288 (1830). As to principle, he argued: "There would seem to be no reason why a plaintiff should receive greater damages from a defendant who has intentionally injured him, than from one who has injured him accidentally, his loss being the same in both cases." *Id*. at 292. As to precedent, he asserted that only "a few decisions and dicta," advancing a "preposterous and unjust" doctrine, cut against his thesis. *Id*. at 304, 306. These admittedly included Chancellor Kent's decision in *Tillotson* stating that the exemplary damages doctrine was "well settled" by 1808, which Metcalf conceded was "highly respectable" authority. Yet, he insisted, Chancellor Kent had misread the relevant English cases. *Id*. at 306-08.

Not surprisingly given its radical thesis and tendentious reading of precedent, Metcalf's analysis had little if any impact in the 19th century. It was cited in only three court decisions (according to a Westlaw search), each of which rejected the position argued by Metcalf. *McWilliams v. Bragg*, 3 Wis. 377, 379 (1854); *Taylor v. Grand Trunk Ry. Co.*, 48 N.H. 304, 319 (1869); *Goddard v. Grant Trunk Ry. of Canada*, 57 Me. 202, 220 (1869). Metcalf is, however, enjoying a remarkable renaissance in the 21st century. ATRA, for example, now refers to Metcalf's article (written for a legal journal that went out of business 163 years ago) as a "treatise." ATRA Br. at 17. To ATRA, anyone who cites Metcalf for his (accurate) description of "the precise doctrine advanced" by mainstream thinkers, 3 AM. JURIST & LAW MAG. at 287 (language replaced with ellipses in ATRA Br. at 17) — rather than citing his fanciful view that exemplary damages "did not exist," ATRA Br. at 18 — is making a "flatly misleading reference to an 1830 treatise." ATRA Br. at 17.

In two 1842 decisions, the highest court of Connecticut emphasized the well-settled nature of the doctrine. *Linsley v. Bushnell*, 15 Conn. 225, 236 (1842) ("There is no principle better established, and no practice more universal, than that vindictive damages, or smart money, may be, and is, awarded, by the verdicts of juries, in cases of wanton or malicious injuries"); *Huntley v. Bacon*, 15 Conn. 267, 273 (1842) (upholding exemplary damages charge; its propriety "has been too frequently and too recently sanctioned, by this court, to be again drawn into discussion or doubt").

In 1842, Abraham Lincoln successfully defended on appeal an exemplary damages award for seduction: "In vindictive actions, and this is now regarded as one, the jury are always permitted to give damages for the double purpose of setting an example, and of punishing the wrong-doer." *Grable v. Margrave*, 4 Ill. (3 Scam.) 372, 373 (1842).

In 1847, the status of exemplary damages under American law was reviewed in the first treatise on damages published in the United States, by Theodore Sedgwick, a leading member of the New York bar.[15] The treatise, which Sedgwick wrote at Justice Story's urging,[16] was "the most brilliant and boldly innovative American antebellum legal

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[15] Although his career was cut short by his untimely death in his late 40s, Sedgwick cosponsored David Dudley Field's codification efforts; worked with Field and Samuel J. Tilden in Democratic party politics; served as co-counsel with John Quincy Adams in *The Amistad* Case, 40 U.S. 518 (1841); served as U.S. Attorney for New York; and produced three editions of the seminal American treatise on damages. *See generally* ARTHUR M. SCHLESINGER, JR., THE AGE OF JACKSON 187-88, 233-34, 315, 463, 468, 482 (1945); HOWARD JONES, MUTINY ON THE AMISTAD: THE SAGA OF A SLAVE REVOLT AND ITS IMPACT ON AMERICAN ABOLITION, LAW, AND DIPLOMACY 40, 68, 80, 219 (1987).

[16] Justice Story wrote Sedgwick that "a thorough analysis of the whole subject, with all the lights of the modern authorities" would have "great utility to the profession," as there existed "no book that treats of the subject at once fully, accurately, and with suitable distinctions and expositions of principle." Letter from Justice Joseph Story to Theodore Sedgwick, November 7, 1844 (reprinted in THEODORE SEDGWICK, A TREATISE ON THE MEASURE OF DAMAGES 1-2 (1st ed. 1847)).

treatise." HORWITZ, *supra* note 11, at 83. This Court adopted its analysis of the exemplary damages doctrine, calling it an "excellent treatise." *Missouri Pacific Ry. Co. v. Humes*, 115 U.S. 512, 521 (1885).

Sedgwick's analysis of the exemplary damages doctrine is straightforward and familiar. Generally, damages provide compensation "for the actual loss sustained." THEODORE SEDGWICK, A TREATISE ON THE MEASURE OF DAMAGES 28 (1st ed. 1847). However, for torts "accompanied by oppression, fraud, malice, or negligence so gross as to raise a presumption of malice, . . . the jury have a discretion to award exemplary or vindictive damages . . . ." *Id.* at 27-28; *see also id.* at 34 (referencing the "large class of cases where the common law in giving relief loses sight of the principle of compensation, and gives damages by way of punishment for acts of malice, vexation, fraud or oppression").

Sedgwick emphasized that a case involving exemplary damages is conceptually distinct from a case involving merely compensatory damages, as it involves the imposition of punishment to protect society. Where there is a "question of fraud, malice, gross negligence, or oppression" involved,

> the law, instead of adhering to the system or even the language of compensation, adopts a wholly different rule. It permits the jury to give what it terms punitory, vindictive, or exemplary damages; in other words, blends together the interest of society and of the aggrieved individual, and gives damages not only to recompense the sufferer, but to punish the offender.

Id. at 38-39. Sedgwick provided an analysis of thirteen representative decisions, dating back to 1763, including those of Chancellor Kent and Justice Story. *Id.* at 39-44.

Four years after Sedgwick published his treatise, this Court reached the same conclusion as Sedgwick concerning the status of the exemplary damages doctrine, stating that it was "a well-established principle of the common law" that in tort cases "a jury may inflict what are called exemplary, punitive, or vindictive damages upon a defendant, having in

mind the enormity of his offence rather than the measure of compensation to the plaintiff." *Day v. Woodworth*, 54 U.S. 363, 371 (1851). On the basis that "repeated judicial decisions for more than a century are to be received as the best exposition of what the law is," this Court concluded that "the question will not admit of argument." *Id*. ATRA asserts that in *Day*, "this Court all but apologized for the availability of exemplary damages in civil cases . . . ." ATRA Br. at 3 (citing *id*.). We see no basis for that assertion.

Seven years later, this Court reiterated that "punitive or exemplary damages" may be recovered in tort cases "[w]henever the injury complained of has been inflicted maliciously or wantonly, and with circumstances of contumely or indignity," and that in such cases "the jury are not limited to the ascertainment of a simple compensation for the wrong committed against the aggrieved person." *Philadelphia, Wilmington, and Baltimore R.R. Co. v. Quigley*, 62 U.S. 202, 213-14 (1858).

Seventeen years later, this Court reiterated that the exemplary damages doctrine "is too well settled now to be shaken"; that the doctrine is based "on the ground, not that the sufferer is to be recompensed, but that the offender is to be punished"; that juries are thereby "authorized, for the sake of public example, to give such additional damages as the circumstances require"; and that the doctrine "has been accepted as the general rule in England and in most of the States of this country." *Milwaukee and St. Paul Ry. Co. v. Arms*, 91 U.S. 489, 492-93 (1875).

Ten years later this Court, in an opinion by Justice Field, reaffirmed the above decisions; explicitly approved Sedgwick's analysis of how the exemplary damages remedy protects the interests of society; and stated that "the wisdom of allowing such additional damages to be given is attested by the long continuance of the practice." *Missouri Pacific Ry. Co. v. Humes*, 115 U.S. 512, 521 (1885).

The next year, in *Barry v. Edmunds*, 116 U.S. 550 (1886), this Court stated that under "settled law," a tort plaintiff may seek "exemplary damages calculated to vindicate his right and protect it against future similar

invasions." *Id*. at 562. After discussing its earlier decisions and selected lower court decisions, *id*. at 562-65, this Court noted that it was unnecessary "further to multiply authorities on this point," for the precedents validating the remedy of exemplary damages "are indefinite in number, and the application of the rule as uniform as the circumstances of the cases are various." *Id*. at 565.

Three years later, in another opinion by Justice Field, this Court noted that the "propriety and legality" of exemplary damages had been recognized "by repeated judicial decisions for more than a century," so that their imposition "cannot be opposed as in conflict with the prohibition against the deprivation of property without due process of law." *Minneapolis and St. Louis Railway Co. v. Beckwith*, 129 U.S. 26, 36 (1889).

Four years later, this Court again noted the "well settled" nature of the exemplary damages remedy. *Lake Shore & Mich. S. Ry. Co. v. Prentice*, 147 U.S. 101, 107 (1893). In a historical analysis, Justice Gray cited Lord Camden's 1763 decisions in the lawsuits involving Wilkes and *North Briton*, No. 45, stating: "The recovery of damages, beyond compensation for the injury received, by way of punishing the guilty, and as an example to deter others from offending in like manner, is here clearly recognized." *Id*.

Mentioning in its brief *none* of these seven decisions of this Court decided between 1851 and 1893 — all confirming the consensus status of the exemplary damages doctrine — Philip Morris asserts: "Throughout the second half of the 19th century, courts and commentators were sharply divided over whether damages could ever properly be imposed for purposes of punishment." Pet. Br. at 18. This assertion rests on a citation to the 16th and final edition of Professor Simon Greenleaf's evidence treatise, published in 1899.[17]

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[17] 2 SIMON GREENLEAF, A TREATISE ON THE LAW OF EVIDENCE § 253, at 240-50 (William Draper Lewis ed., 16th ed. 899). Philip Morris's other two citations provide no support for its assertion. One is a citation to Sedgwick's treatise, supplied only to illustrate the contrary view. The second is a citation to a concurring opinion by Justice Scalia. That

The 1899 edition of Professor Greenleaf's treatise actually contradicts Philip Morris's assertion that a "sharp" division over the exemplary damages doctrine existed in 1899. Philip Morris relies on an 11-page footnote containing Greenleaf's radical assertion that awards of extra-compensatory damages simply had no precedential support. The footnote is appended to Greenleaf's statement that damages are solely "given as a compensation . . . for an injury actually received by [plaintiff] from the defendant," and thus damages "should be precisely commensurate with the injury, neither more nor less; and this whether it be to his person or estate." Greenleaf, *supra* note 17, at 240.

The only portion of this footnote actually arguing in support of the statement in text is not any material describing the law as it stood in the late 1800s, but material which was written by Greenleaf *more than 45 years before* the 16th edition was published in 1899. The first 581 of the 645 lines relied on by Philip Morris (90%) are identical to the fifth edition published in 1854 shortly after Greenleaf's death.[18] The remaining 10% of the material in the 1899 edition, added by editors after 1854 in several installments, contains no argument in support of Greenleaf's position circa

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opinion actually undermines Philip Morris's assertion. Justice Scalia did not suggest there was a relevant division among commentators over the existence of exemplary or punitive damages throughout the 19th century, that is, through 1899. Instead, he merely noted that "[a]s recently as the mid-19th century, treatise writers sparred over whether they even existed." *Pacific Mutual Life Ins. Co. v. Haslip*, 499 U.S. 1, 25 (1991) (Scalia, J., concurring in the judgment). Further, rebutting the notion that the position argued in Greenleaf's treatise had solid support, and thus was part of a "sharp" division, Justice Scalia stated that Greenleaf's view "was not widely shared." *Id.* Finally, Justice Scalia's ultimate conclusion based on the historical record (which Philip Morris ignores) is one we share: by 1868, "punitive damages were undoubtedly an established part of the American common law of torts." *Id.* at 26.

[18] *Compare* 2 SIMON GREENLEAF, A TREATISE ON THE LAW OF EVIDENCE § 253, at 250-66 n.2 (5th ed. 1854), *with* 2 GREENLEAF, *supra* note 17, at 240-49 n.2. (Copies of these and other Greenleaf treatise sections, and of various other materials referenced in this brief, are being posted online in PDF format at http://blogs.law.harvard.edu/onfile/williams.)

1899; instead, these additions undermine that position. Of the 27 post-1854 cases which are cited, virtually all are contrary to Greenleaf's position. Further, two comments added by the editors first undercut (in 1883) and then abandon (in 1899) Greenleaf's entire argument. They describe the "large class of cases" which had been decided contrary to "the elaborate argument of Mr. Greenleaf," and the "settled" nature of the exemplary damages doctrine.[19] Even during his lifetime Greenleaf did not defend his argument after Sedgwick attacked it in his second edition.[20]

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[19] A passage added in 1883 by the editor of the 14th edition (pages 263-64) highlights the deterrence function of the exemplary damages doctrine as it was being applied to railroads. It cites nine cases in support of this statement: "There is a large class of cases, *i.e.* actions against railroad companies for injuries inflicted by them, in which the language of courts at least seems to uphold the view of Mr. Sedgwick. The underlying principle is, perhaps, that the only way to secure safety for passengers is to mulct the companies so heavily when accidents occur, that it will be for their interest to use all possible precautions to avoid such accidents, and in this roundabout way to produce a public benefit." 2 GREENLEAF, *supra* note 17, at 249 n.2.

The 15th edition, published in 1892, included no additions or edits to this footnote. Both the 14th and 15th editions were edited by Greenleaf's grandson. Not until the 16th edition published in 1899 (the edition relied on by Philip Morris) — a project carried out by Professor (later Dean) Wigmore and another law professor — was a statement finally added recognizing that "the elaborate argument of Mr. Greenleaf" made in his 1854 edition had been soundly rejected by the courts in the subsequent 45 years. 2 GREENLEAF, *supra* note 17, at 250 n.2.

[20] The first edition of Sedgwick's damages treatise was published in 1847. It "demonstrated overwhelmingly the long-standing authority behind punitive damages." MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW, 1870-1960: THE CRISIS OF LEGAL ORTHODOXY, at 113 (1992). It was at this juncture that Greenleaf attacked Sedgwick's position; the lengthy footnote first appeared in the second edition of Greenleaf's evidence treatise (pages 242-57) which was published in 1848.

In 1852, Sedgwick responded in his second edition, including a detailed refutation of Greenleaf's argument in which he described Greenleaf's views as "untenable" and contrary to "the uniform language of the courts." THEODORE SEDGWICK, A TREATISE ON THE MEASURE OF DAMAGES 466-67 n.¶ (2d ed. 1852). Greenleaf's fourth edition was published in 1852 *before* Sedgwick's second edition, so Greenleaf's chance

Thus, contrary to Philip Morris's brief, this Court was plainly correct, when it surveyed the historical record 15 years ago, in concluding that the exemplary damages doctrine was "well established before the Fourteenth Amendment was enacted" in 1868. *Pacific Mutual Life Ins. Co. v. Haslip*, 499 U.S. 1, 17 (1991); *see also id*. at 25-26 (Scalia, J., concurring in the judgment). Indeed, our review of the historical record has not uncovered *any* state which prior to 1868 repudiated the common-law doctrine and imposed a total bar on the recovery of exemplary damages; instead, there was a common-law consensus in 1868. Only after 1868, influenced by the beginnings of late-19th-century legal formalism, did some courts begin to believe that the imposition of exemplary damages was "a usurpation of the public law functions of the criminal law," leading several courts to impose a total bar on exemplary damages.[21]

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to respond to Sedgwick was in his fifth edition, the last one he edited, which was published in 1854, and in which Greenleaf updated his lengthy footnote, adding 35 new lines summarizing two recent decisions (at pages 262 and 265). But Greenleaf neither defended himself against Sedgwick's attack on his analysis, nor edited the analysis in his footnote to remedy the flaws identified by Sedgwick. He simply ignored Sedgwick's attack.

[21] Morton J. Horwitz, *The History of the Public/Private Distinction*, 130 U. PA. L. REV. 1423, 1425 (1982). It was "[d]uring the late 1870s and 1880s" that opposition to exemplary damages became powerful enough that "the theoretical issue of the true nature of public versus private law overshadowed the question of precedent," and several courts "overthrew the doctrine of punitive damages . . . through a process of deduction from the supposedly different inherent functions of public and private law." HORWITZ, *supra* note 20, at 113-14. As examples, Horwitz cites *Fay v. Parker*, 53 N.H. 342, 382 (1873), and *Murphy v. Hobbs*, 7 Colo. 541, 551 (1884). *Id*. at 114, 296. Other examples of an absolute bar on exemplary damages influenced by the public/private construct would appear to include *Boyer v. Barr*, 8 Neb. 68, 72 (1878) (adopting *Fay*); *Spokane Truck & Dray Co. v. Hoefer*, 2 Wash. 45 (1891) (adopting *Fay* and *Murphy*); *Burt v. Advertiser Newspaper Co.*, 154 Mass. 238, 245 (1891) (Holmes, J.).

ATRA Br. at 8-9 n.5, asserts an 1868 Michigan decision banned all exemplary damages, but in fact the decision merely shielded publishers sued for libel if they had acted in good faith. *Detroit Daily Post Co. v. McArthur*, 16 Mich. 447, 453-54 (1868). Philip Morris notes that Michigan was allowing exemplary damages in 1874. Pet. Br. at 19.

History does not support the efforts of Philip Morris and ATRA to obscure the deterrence-based origins of the exemplary damages doctrine by asserting that historically "punitive damages were awarded only as punishment for harm to the specific person bringing the claim," Pet. Br. at 17, and that "punitive damages were never understood as a mechanism for vindicating affronts to society generally," ATRA Br. at 12. To the contrary, from their very beginnings in the 1763 cases involving John Wilkes and presided over by Lord Camden, both in England and in America exemplary damages have been awarded in large part as a means of advancing society's interest in deterring intentional wrongs.

II. History Supports the States' Deference to Juries in Determining the Amount of Deterrence-Based Exemplary Damages

Philip Morris and ATRA make a related argument concerning the history of exemplary damages which appears equally without merit. The issue is what degree of deference courts, particularly appellate courts, historically have accorded juries in their determination of what amount of exemplary damages is needed in a given case.

Both Philip Morris and ATRA appear to suggest that there is no tradition of judges giving any particular deference to the exemplary damages awarded by a jury in a given case, so that *de novo* review, or at least some sort of weight-of-the-evidence review, is permissible for this Court to undertake. We do not know what else to make of their statements, for example, that historical practice supposedly does not shield jury-awarded exemplary damages "from exacting constitutional scrutiny," ATRA Br. at 30, and that "long-established practice" supposedly requires that "when compensatory damages are substantial, the constitutional maximum punishment is between zero and four times the amount of compensatory damages." Pet. Br. at 9. Certainly there is no mention in either brief of any sort of deference owed juries in exemplary damages cases.

"As this Court has stated from its first due process cases, traditional practice provides a touchstone for constitutional analysis." *Honda Motor Co. v. Oberg*, 512 U.S. 415, 430 (1994). *See also Pacific Mutual Life Ins. Co. v. Haslip*, 499 U.S. 1, 40 (1991) (Kennedy, J., concurring in the judgment) ("Historical acceptance of legal institutions serves to validate them not because history provides the most convenient rule of decision but because we have confidence that a long-accepted legal institution would not have survived if it rested upon procedures found to be either irrational or unfair."). The traditional practice regarding judicial review of exemplary damages verdicts, particularly verdicts based on the deterrence rationale found in the earliest cases, is one of deference to the jury's weighing of the facts of the case and the jury's judgment regarding what size award is appropriate. The view that judges (particularly appellate judges) can or should engage in *de novo* or weight-of-the-evidence review of damages awards, including exemplary damages awards, is inconsistent with the historical record.

For example, in rejecting a challenge to the exemplary damages awarded in one of the cases involving John Wilkes and *North Briton*, No. 45 (see pp. 5-8, *supra*), Lord Camden stated that "it is very dangerous for the Judges to intermeddle in damages for tort; it must be a glaring case indeed of outrageous damages in a tort, and which all mankind at first blush must think so, to induce a Court to grant a new trial for excessive damages." *Huckle v. Money*, 95 Eng. Rep. 768, 769 (C.P. 1763). Later English cases generally deferred to "the jury's determination of damages" (though they reserved the power "to order new trials solely on the basis that the damages were too high," and sometimes did order them).[22] Such deference to jury verdicts

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[22] *Oberg*, 512 U.S. at 422-23. *See also* Brief for Legal Historians Daniel R. Coquillette, Mark M. Hager, Bruce H. Mann, and Arthur F. McEvoy as *Amici Curiae* in Support of Respondent in *Honda Motor Co. v. Oberg*, No. 93-644 (filed Mar. 31, 1994), at 4-8 ("*Oberg* Historians' *Amicus* Br.") (cited in this Court's *Oberg* decision, *id.* at 422 n.2).

on damages was, Theodore Sedgwick noted, a corollary of the welcome movement in the law away from the earlier blunderbuss approach of having damages arbitrarily fixed under preset schedules, or according to arbitrary ratios.[23]

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[23] Sedgwick observed that it was "the laws of remote and barbarous periods" which took "the most minute care" in fixing damages recoveries (for example, sixth-century England used a damages schedule under which six shillings were due for a front tooth knocked out; 10 shillings for a great toe cut off; 12 shillings for an ear cut off, etc.). THEODORE SEDGWICK, A TREATISE ON THE MEASURE OF DAMAGES 13 (3rd ed. 1858). Schedules of specific damages "arbitrarily assessed in each class of cases, without reference to the actual injury sustained in the particular case" are found in "still more ancient" codes, for example double damages for certain offenses under Jewish law. *Id.* at 21. With the advance of civilization, the law outgrew such arbitrary damages rules, as tribunals were formed which could "be trusted with the assessment of the amount" of damages, *id.* at 16 — in England, the jury. *Id.* at 19. Sedgwick believed that such arbitrary rules were "always a misfortune and a defect in jurisprudence; they should never be tolerated, unless on account of some peculiar and extraordinary difficulty in arriving at the truth of the individual case." *Id.* at 16.

Modern scholarship confirms Sedgwick's insights and further illustrates that arbitrary "ratio" rules such as Philip Morris's proposed "multiple-of-0-to-4 rule," Pet. Br. at 9, draw on the historical record of remote periods. Primitive and early societies typically had "no officials to take action against murder, theft, and other coercive acts," so deterrence of intentional wrongs was accomplished though "the possibility of retaliation by victim against aggressor," usually with help from the victim's family or broader group. Richard A. Posner, *Retribution and Related Concepts of Punishment*, 9 J. LEGAL STUD. 71, 76-77 (1980). In such societies, the principle of "the *lex talionis* of early Roman law," and "the 'eye for an eye' precept in the Old Testament . . . and in many other early codes" developed "as a substitute for or limitation on vengeance." Without such a limitation, "people might react to a wrong by retaliating against the wrongdoer *disproportionally* and, especially when this was so, the original wrongdoer or his family might in turn retaliate against the original retaliator or his family," in "an endless cycle of injury, retaliation, and counter-retaliation . . . ." *Id.* at 71, 82. The principle of *lex talionis* preserved social order by supplanting "the ancient practices of indiscriminate personal revenge" in which "partisan bias" risked triggering "spirals of escalating violence." Francesco Parisi, *The Genesis of Liability in Ancient Law* , 3 AM. L. & ECON. REV. 82, 86-87 (2001). *See also* Louis Kaplow & Steven Shavell, *Fairness Versus Welfare*, 114 HARV. L. REV. 961, 1282-84 (2001). Of course, with the rise of the modern administrative state, which couples a monopoly on legitimate violence

Historically, American courts followed the English practice of providing some judicial review of jurors' damages verdicts while generally according heavy deference to the discretion of the jury. Typically judges only disturbed verdicts so extravagant and inexplicable on the record of the case as to make clear that the jurors' verdict must have been the product of "passion and prejudice," and not the product of a fair trial involving reasoned decisionmaking based on the evidence. *Oberg*, 512 U.S. at 424-26; *see also Oberg* Historians' *Amicus* Br., *supra* note 22, at 12-19.

Consistent with this history, various justices of this Court have stated that in an exemplary damages case where there are no indications that the trial was unfair or that the jury engaged in improper reasoning, there attaches to a jury verdict a presumption (possibly irrebuttable, or virtually so) that the product of that fair process comports with due process. *E.g.*, *TXO Prod. Corp. v. Alliance Resources Corp.*, 509 U.S. 443, 457 (1993) (plurality opinion) (citing earlier opinions by Justices Scalia and Kennedy); *BMW of North America, Inc. v. Gore*, 517 U.S. 559, 586-88 (1996) (Breyer, J., joined by O'Connor and Souter, JJ., concurring). So far, this Court has not disturbed any jury verdict to which that presumption attached. In both cases in which this Court has found problematic the size of an exemplary damages award, the presumption did not attach because of serious

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with elaborate procedural protections, *id*. at 1284, the predicate for insisting on a principle of proportional retaliation long ago vanished. Still, given the period during which the observance of proportional limits on retaliation was important to social order, "it would not be surprising that everyone, . . . would be inclined to find the retributive conception of fair punishment intuitively appealing." *Id*. at 1287. But today "it would make no sense" to apply this conception developed in primitive times to limit the penalties otherwise found appropriate to increase the well-being of all members of modern society. *Id*. at 1288. An understanding of economic principles coupled with an understanding of "the origins and functions of retribution as a social norm makes clear that there is no good reason for treating our intuitions about retribution as if they constituted an independent basis for" limiting the punishment found to be appropriate to improve the welfare of members of society. *Id*. at 1290.

defects this Court saw in the underlying trials.[24]

Confirmation that appellate judges historically have not engaged in *de novo* or weight-of-the-evidence review of exemplary damages awards is found in the arguments made by prominent members of this Court's bar in *Oberg*, in addressing what level of judicial review is required by due process. They did not suggest the existence of any tradition of *de novo* or weight-of-the-evidence review which should inform the content of due process.

Most notably, the lead counsel for the petitioner in *Oberg*, who is also lead counsel for Philip Morris in this case, was pressed by Justice O'Connor at the *Oberg* oral argument about the nature of the judicial review being sought as a matter of due process. Justice O'Connor asked "why should the constitutionally mandated review be any more than is required in a criminal case" under the standard of *Jackson v. Virginia*, 443 U.S. 307, 317-20, 324 (1979)? He conceded that judicial review under *Jackson*'s "rational factfinder" test would be constitutionally adequate judicial review, stating: "I have no problem with that standard. That's what we would like to see the Court supply." Transcript of Oral Argument in *Honda Motor Co. v. Oberg*, No. 93-644 (Apr. 20, 1994), 1994 WL 665077, at *15-*17.

A similar position was advanced by the late Dean Griswold in an *amicus* brief filed on behalf of the petitioner

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[24] In *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408 (2003), there was no hint of any presumption in operation; indeed, this Court affirmatively indicated that its concerns were "heightened" because the jury had awarded $145 million in exemplary damages after being presented "with evidence that has little bearing as to the amount of punitive damages that should be awarded," evidence that was "tangential or only inflammatory." *Id.* at 418; *see also id.* at 420-24 (summarizing concerns about fairness of trial). In *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996), no presumption could attach because it was conceded that "the jury improperly computed the amount of punitive damages by multiplying Dr. Gore's compensatory damages" of $4,000 (the loss of value due to the repainting of his vehicle) "by the number of similar sales in other jurisdictions" (approximately 1,000), *id.* at 564, 567, even though "neither the jury nor the trial court was presented with evidence that any of BMW's out-of-state conduct was unlawful." *Id.* at 573.

in *Oberg*. He suggested that "courts should be required to consider whether a particular award is rationally related to the goals of deterrence and punishment . . . ." Brief *Amici Curiae* for the American Council of Life Insurance, et al., in No. 93-644 (filed Feb. 28, 1994), at 13-14. Further, Dean Griswold urged that "to ensure that courts consult something other than their own preconceptions in evaluating the rationality of such awards, courts should be required to consider certain objectively measurable indicia of what amounts are reasonably necessary to serve the goals of deterrence and punishment," in the form of "a non-exclusive list of factors" for courts to consider in analyzing the rationality of an award. *Id.* at 14. This Court took that course two years later in *BMW v. Gore*.

In its *Oberg* decision, this Court held only "that Oregon's denial of judicial review" of exemplary damages awards violated due process, and did not decide "what standard of review is constitutionally required." *Oberg*, 512 U.S. at 432 & n.10. However, this Court suggested that the traditional approach of review for "passion and prejudice" might be a rough equivalent of the *Jackson* standard, which asks whether a "rational trier of fact could have" reached the jury's verdict. *Id.* at 432 n.10. "This familiar standard gives full play to the responsibility of the trier of fact fairly to resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts," thus "imping[ing] upon 'jury' discretion only to the extent necessary to guarantee the fundamental protection of due process of law." *Jackson*, 443 U.S. at 319.[25]

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[25] By definition, review under the *Jackson* "rational factfinder" test is conceptually distinct from both *de novo* review and weight-of-the-evidence review. *See* Kevin M. Clermont, *Procedure's Magical Number Three: Psychological Bases for Standards of Decision*, 72 CORNELL L. REV. 1115, 1126-27 (1987). The function of the *Jackson* test in a criminal case is to set, as a matter of due process, "a lower limit on an appellate court's definition of evidentiary sufficiency," which means no weight-of-the-evidence analysis is permitted; rather, "the reviewing court must view 'the evidence in the light most favorable to the prosecution.'" *Tibbs v. Florida*, 457 U.S. 31, 45 & n.21 (1982) (quoting *Jackson*, 443 U.S. at 319).

Jackson involved the review of evidentiary sufficiency to sustain a criminal conviction, but a close variant of the *Jackson* standard has traditionally applied to judicial review of jury determinations in civil litigation as well.[26] Judicial review of a jury's verdict under *Jackson's* "rational factfinder" standard is obviously the most that any civil litigant could claim a right to as a matter of due process. Thus, if a defendant attacking an exemplary damages award following a procedurally fair trial fails to show that no rational jury could reach that result, due process should provide no basis for displacing the jury's verdict.

Even if *de novo* or weight-of-the-evidence were somehow permitted or even required by due process, there would remain the Seventh Amendment problem with this Court or any other federal appellate court conducting such review. As *amici* have discussed at length in an earlier *amicus* brief, a key function of the Re-Examination Clause of the Seventh

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See also Herrera v. Collins, 506 U.S. 390, 402 (1993) (*Jackson* "does not focus on whether the trier of fact made the *correct*" decision, "but rather whether it made a *rational* decision"); *Burks v. United States*, 437 U.S. 1, 16 (1978) ("Even the trial court, which has heard the testimony of witnesses firsthand, is not to weigh the evidence or assess the credibility of witnesses when it judges the merits of a motion for acquittal").

[26] As to liability determinations, this Court has required use of the *Jackson* "rational factfinder" standard both in the summary judgment context, *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 585-88 (1986), and on motions for judgment as a matter of law. *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 149-51 (2000). The standard has long been used by the lower federal appellate courts in reviewing attacks on the size of a jury's compensatory damage award. *E.g.*, *Glazer v. Glazer*, 374 F.2d 390, 413 (5th Cir.) (Wisdom, J.), *cert. denied*, 389 U.S. 831 (1967) (striking down $1.9 million compensatory award for breach of contract because "[t]he verdict was excessive as a matter of law in that it exceeds any rational appraisal or estimate of the damages that could be based upon the evidence before the jury"). *See also Naeem v. McKesson Drug Co.*, 444 F.3d 593, 611 (7th Cir. 2006); *Sailor Inc. F/V v. City of Rockland*, 428 F.3d 348, 353-55 (1st Cir. 2005) (Boudin, J.); *Asa-Brandt, Inc. v. ADM Investor Services, Inc.*, 344 F.3d 738, 745 (8th Cir. 2003); *Kasper v. St. Mary of Nazareth Hosp.*, 135 F.3d 1170, 1176-77 (7th Cir. 1998) (Posner, C.J.); *Outboard Marine Corp. v. Babcock Indus., Inc.*, 106 F.3d 182, 186-87 (7th Cir. 1997) (Posner, C.J.).

Amendment is to bar federal appellate courts, including this Court, from engaging in any sort of *de novo* or weight-of-the-evidence review of jury verdicts, including damages awards. Brief of Federal Jurisdiction and Legal History Scholars Akhil Reed Amar, et al., as *Amici Curiae* in Support of Petitioner in *Gasperini v. The Center for Humanities*, No. 95-710 (filed Mar. 1, 1996), at 4-21.

In exemplary damages cases based on deterrence, a jury must "look to the future conduct of the defendant and others; the question is: how large a judgment is needed to discourage this sort of conduct in the future?" Morris, *supra* note 9, 44 HARV. L. REV. at 1179. As far back as 1763, in *Huckle v. Money*, 95 Eng. Rep. 768, 768 (C.P. 1763), Lord Camden emphasized that juries awarding exemplary damages in tort cases must consider "a vast variety of causes, facts, and circumstances . . . ." *Huckle* was one of the cases this Court cited in upholding a Seventh Amendment right to a jury trial on statutory damages in a copyright case. *Feltner v. Columbia Pictures Television, Inc.*, 523 U.S. 340, 353 (1998). It would be extraordinary if *Huckle* were good precedent for the right to a jury trial in a copyright case but *not* good precedent for the right to a jury trial in a case like *Huckle* seeking deterrence-based exemplary damages.

It was in large part to ensure that cases involving exemplary damages and other important matters would be decided by juries, not by judges who might be beholden to elites, that the Seventh Amendment was made part of our Constitution. See note 13, *supra*. Even if it is possible to characterize *some* exemplary damages awards as involving the expression of abstract moral condemnation and not the decision of questions of historical or predictive fact, *see Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 437-39 (2001), such a theory could not support wholesale nullification of the Seventh Amendment in the field of exemplary damages, particularly as to awards specifically focused on a deterrence rationale. Because the Seventh Amendment is one of the few structural constraints imposed by the Constitution on this Court's own power, it deserves close attention wherever potentially relevant.

Respectfully submitted.

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