Giving Full Faith and Credit to Punitive Damages Awards: Will Florida Rule the Nation

Michael Finch
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INTRODUCTION

In July 2000, a six-person jury in Florida returned the largest punitive damages verdict in history. The jury in *Engle v. R.J. Reynolds Tobacco Co.* awarded the plaintiff class $145 billion in punitive damages from the nation's largest producers of tobacco products, an award eclipsing the previous record of $4.8 billion. *Engle* signaled a stunning reversal in the tobacco companies' record of litigation success. Having never paid a single judgment throughout decades of litigation, the tobacco industry was confronted with a jury award so large that it was initially thought to be illegal under Florida law. The jury's award has since been upheld on appeal, and the tobacco companies have been forced to accept the consequences of their actions. This case marks a significant shift in the legal landscape of tobacco litigation and has far-reaching implications for the future of punitive damages awards in Florida and beyond.

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2. No. 94-08273 (Fla. Cir. Ct. Dade Co., filed May 5, 1994). The trial court's final order entering the jury's verdict for punitive damages is contained in Final Judgment and Amended Omnibus Order, Engle v. R.J. Reynolds Tobacco Co., No. 94-08273, 2000 WL 33534572 (Fla. Cir. Ct. Nov. 6, 2000). The final order states that the amount of the award is $144.08 billion, but a calculation of the punitive damages set forth in the order indicates that punitive damages are actually $144.87 billion. See id. at *14, *32. A basic description of the suit is found in the published opinion in *Engle v. R.J. Reynolds Tobacco Co.*, 122 F. Supp. 2d 1355, 1358 (S.D. Fla. 2000).


4. Subsequent to the decision in *Engle*, the tobacco company of Brown & Williamson became the first to actually pay a litigated judgment. See Gordon Fairclough, Philip Morris is Hit with $3 Billion Verdict, WALL ST. J., June 7, 2001, at A3. The judgment was for $1.1 million, and Brown & Williamson has sought review in the Supreme Court. Id.
companies now faced the prospect of bankruptcy because of a single judgment.\textsuperscript{5}

The decision in \textit{Engle} was distinctive for many reasons: (1) \textit{Engle} was the first tobacco class action ever to reach trial;\textsuperscript{6} (2) in \textit{Engle}, the Florida courts employed an unprecedented procedure—the jury assessed punitive damages before determining compensatory damages, even though compensatory damages have served as the historical benchmark for calculating an appropriate penalty;\textsuperscript{7} and (3) the \textit{Engle} jury awarded punitive damages to a class of largely unknown Florida smokers.\textsuperscript{8}

\textsuperscript{5} Most observers believe that the \textit{Engle} verdict could bankrupt the companies. See Adam Cohen, \textit{Smoked!}, TIME, July 24, 2000, at 44, 74. What is most perplexing about the final judgment in \textit{Engle} is that the jury awarded, and the trial judge affirmed, punitive damages that approximate the total net worth of the defendant companies given by the plaintiffs' lead expert. See \textit{Engle}, 2000 WL 3353457, at *17 (estimating defendants' net worth as $148.9 billion). Under Florida law, however, a punitive damages award should not be so large that it destroys or bankrupts the defendant. See \textit{Lipsig v. Ramlawi}, 760 So. 2d 170, 188 (Fla. Dist. Ct. App. 2000). Estimates of the tobacco companies' worth vary. Some Wall Street analysts value the companies at $100 billion. See Martin Merzer, \textit{Miami Class-Action Suit Can't Wipe Out Tobacco Firms, Experts Say}, MIAMI HERALD, March 21, 2000, at A1. The trial judge acknowledged that Florida law precluded an award of punitive damages that would bankrupt the defendants, and confessed his inability to accurately predict whether the jury's award would bankrupt the companies. Nonetheless, he affirmed the award without modification:

The law, as we know, dictates that the Court shall not allow a verdict that will financially destroy or bankrupt a defendant. In this case who is to say what will or will not bankrupt a defendant or put them out of business? The evidence certainly is not dispositive of that issue, therefore, that decision will have to be made on speculation and conjecture in this particular case since there is no definable threshold available. \textit{Engle}, 2000 WL 3353457, at *29.


\textsuperscript{8} Even the size of the class remains a matter of speculation. While plaintiffs' counsel estimated the class at 300,000 members, see \textit{As Ruling Nears, Big Tobacco Seeks Help}, DESERET NEWS, Mar. 20, 2000, at A1, others estimate the size of the class as approximately 500,000, see Van Voris, supra note 1, at A1. At the outset of trial, estimates of the class size appeared to vary between 300,000 and 700,000 smokers. See \textit{Engle Jury Socks Industry with Unprecedented $145 Billion Punitive Award}, supra note 3. The trial judge apparently estimated the class size based on statistical inference, although his final order does not state the size of the class. See \textit{Engle}, 2000 WL 3353457, at *12 ("Parenthetically, the Court is also aware of the due process problems associated with findings of liability for class actions of unspecified
Even before the verdict in Engle was returned, observers doubted that it would survive an appeal, but would there be an appeal? Under Florida law applicable at the commencement of the Engle trial, any judgment was immediately enforceable unless the defendants could post a supersedeas bond equal to 120% of the judgment's value. Since the plaintiffs demanded punitive damages in excess of the tobacco companies' apparent net worth, the anticipated judgment might drive the defendants into bankruptcy before they could pursue their appeal.

Pre-verdict apprehension set off unprecedented political action. The attorneys general for many states—who stood to lose some $246 billion in settlement monies that the defendants were already scheduled to pay over a twenty-five-year period—consulted bankruptcy law experts. The threatened size. The Court feels that a statistical finding of the class size preserves the Defendants' due process rights . . . .”


10. Fla. R. App. P. 9.310(b)(1) (requiring a bond equal to the value of the judgment, plus two years of statutory interest). At current statutory rates, the bond requirement for the ultimate award in Engle would be approximately $174 billion.

11. One Wall Street analyst estimated that the companies could post a bond of no more than $10 to $20 billion. See As Ruling Nears, Big Tobacco Seeks Help, supra note 8; see also North Carolina Hopes to Shield Tobacco Firms; Special Session Will Seek Limit on Appeal Bond, RICHMOND TIMES-DISPATCH, Apr. 1, 2000 at A2 (“If the tobacco industry had to post such a bond, there's no way it could be done . . . . The only way they could prevent that from happening is to declare bankruptcy. It would be absolutely devastating. It's the end of tobacco as we know it.”).

The tobacco companies' concerns were not hypothetical. In 1987, Texaco was forced into bankruptcy after it was found liable by a Texas jury for $11 billion in damages (principally compensatory). See Pennzoil Co. v. Texaco, Inc., 481 U.S. 1, 4-5 (1987). Texaco was unable to post a supersedeas bond covering the judgment, and when Texas courts refused to reduce the bond, Texaco filed for bankruptcy. Id. Texaco ultimately settled with the judgment creditor, Pennzoil. See Alexander Taborrok & Eric Helland, Court Politics: The Political Economy of Tort Awards, 42 J.L. & ECON. 157, 161 n.12 (1999).

loss of settlement monies\textsuperscript{14} even prompted Florida’s executive and legislative branches to openly repudiate the trial court’s conduct in \textit{Engle}. Florida’s Attorney General issued an opinion declaring that the \textit{Engle} court’s procedures were unlawful.\textsuperscript{15} The Florida legislature considered issuing a similar declaration,\textsuperscript{16} but instead took more direct action and rolled back the state’s supersedeas bond requirement to a mere $100 million.\textsuperscript{17}

Yet the most unusual political action was taken by legislatures in four states where the tobacco companies have the bulk of their operations.\textsuperscript{18} Those states—Georgia, Kentucky, North Carolina, and Virginia—enacted laws that permit the companies to stay the execution of any judgment in \textit{Engle} by posting more modest bonds ranging from $25 to $100 million.\textsuperscript{19} These
state responses to the Florida court's judgment in *Engle* have been characterized as the equivalent of a legal war between the states, and have been decried as unconstitutional by a host of constitutional scholars. These laws, however, may ultimately stand as the greatest bulwark against bankruptcy for some of the companies as *Engle* works its way through the always-unpredictable Florida court system.

*Engle*'s verdict and the various legislative responses to it foreshadow a growing tension between states. As pro-plaintiff courts like those in Florida adopt innovative procedures to redress mass torts, other states search for ways to protect their economic interests from "meta-verdicts" like that in *Engle*. These interests include not only those of the home states of large judgment debtors, but also those of other states that wish to preserve their, and their citizens', claims against the debtors. The lesson of *Engle* is that a single jury may exercise its power to punish wrongdoing in a way that devastates the interests of other claimants and other states.

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20. See infra text accompanying notes 31-35.

21. As indicated supra note 17, three of the defendants have paid the class some $710 million to avoid the risk that Florida courts might invalidate the Florida legislature's amendment of its bond requirement, while two defendants are taking their chances on appeal.

22. After the tobacco companies' post-verdict attempt to remove *Engle* to federal court failed, see *Engle* v. R.J. Reynolds Tobacco Co., 122 F. Supp. 2d 1355, 1358-63 (S.D. Fla. 2000), the trial court swiftly certified *Engle*'s punitive damages award for appeal. See Fla. Judge Quickly Certifies Huge Punitive Damages Award in *Engle*, 7 MASS TORT LITIG. REP. 12, 12 (2000). Class members' claims for compensatory damages have yet to be litigated.


24. There is continued anxiety about the impact of *Engle* on the tobacco companies' ability to satisfy payments due under their settlement with the states. Florida, for example, is exploring the possibility of insuring against the risk that the *Engle* defendants will not be able to satisfy their settlement obligation. See Shelly Sigo, Florida Gov. Jeb Bush Proposes a $700M Tobacco Securitization, THE BOND BUYER, Mar. 13, 2001.

25. Opponents of tobacco companies openly declare their hope that *Engle* will have a domino effect that will cripple the companies. See Oliphant, supra.
This Article considers the constitutional status of state punitive damage judgments and the particular obligation that sister-states have to enforce them. Part I considers the legality of measures recently enacted by the tobacco companies' home states to delay enforcement of the judgment in *Engle*. This discussion will show that, contrary to the public protestations of many legal scholars, those states properly exercised their authority under the Full Faith and Credit Clause of the Constitution when they acted to defer enforcement of the *Engle* judgment while it is appealed through the Florida courts.

Part II of this Article considers whether there is any obligation under the Full Faith and Credit Clause to enforce sister-state judgments for punitive damages. According to Supreme Court precedent dating back to the nineteenth century, "penal" judgments are not entitled to full faith and credit. While the penal judgment rule has not seen great service in recent decades, its reexamination is timely. First, there is widespread agreement that modern punitive damages awards no longer serve the compensatory purposes they served at the time the Full Faith and Credit Clause was ratified: Punitive damages now serve the quasi-criminal purposes of deterrence and punishment, and are therefore penal in nature. Second, an increasing number of states have reaffirmed the penal role of punitive damages by appropriating a share of the plaintiff's punitive award. Such shared recovery laws emphasize that punitive awards now vindicate "public wrongs," and so fulfill the historical purpose of penal laws.

This Article will contend, however, that the penal judgment rule should not be extended to permit the denial of full

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note 23. The hope appears to be well-founded. Recently, a California jury awarded $3 billion in punitive damages to a smoker—the largest verdict ever won by a single smoker against a tobacco company. See Gordon Fairclough, *Philip Morris is Hit with $3 Billion Verdict*, WALL ST. J., June 7, 2001. As one tobacco analyst acknowledged, "The tobacco industry can't afford to keep losing these cases." *Id.* See also Van Voris, *supra* note 1, at A1 ("The whole environment is like walking across a high wire without a safety net.... Even if a defendant wins most of the time... the stakes have become so high that a single punitive damages verdict can threaten bankruptcy. You only have to slip once."). The result in *Engle* could have been even more devastating for the tobacco companies. The trial court originally certified a class of national rather than Floridian smokers. See R.J. Reynolds Tobacco Co. v. *Engle*, 672 So. 2d 39, 40 (Fla. Dist. Ct. App. 1996). That ruling was reversed on appeal. *Id.* at 42.

26. See infra note 197 and accompanying text.

27. See infra note 197 and accompanying text.
faith and credit to judgments for punitive damages. Notwithstanding the linguistic similarity in the epithets penal judgments and punitive damages, the concepts address quite different concerns. Further, application of the penal judgment rule to punitive damages awards would serve no state or litigant interest not already addressed by other constitutional provisions—particularly the Due Process Clause. For these reasons, courts should not revivify the penal judgment rule to address contemporary problems posed by punitive damages awards.

This Article concludes that the Constitution offers defendants who suffer the imposition of catastrophic verdicts like that in *Engle* a measure of protection. States may, and after *Engle* should, eliminate appellate bond requirements for punitive awards when there is no reason to suspect that the judgment debtor will intentionally dissipate its assets. This approach will leave intact appellate bond requirements for compensatory damages, and thus secure the judgment creditor's right to be made whole for his losses. At the same time, judgment debtors need not face the prospect of bankruptcy, or exorbitant settlement, simply because they cannot post security for an aberrant, punitive verdict like that in *Engle*. The Supreme Court has emphasized the critical role of appellate courts in policing unconstitutionally excessive punitive verdicts, and that role can only be fulfilled if the appellate process is affordable.

Realistic appellate bond requirements, however, are only part of the solution. *Engle* sounds a grave warning. The current system of tort law increasingly "commits the fate of an entire industry or, indeed, the fate of a class of millions, to a single jury."[29] The constellation of interests affected by mass tort litigation—injured persons, consumers, states, national industries, and local economies—exceeds the competence of a single jury or single state court to resolve. A national solution is needed, and by default the task of devising that solution falls on Congress.[30]

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28. See infra note 116 and accompanying text.
I. DELAYING ENFORCEMENT OF SISTER-STATE JUDGMENTS UNDER THE FULL FAITH AND CREDIT CLAUSE

A. STATE LEGISLATIVE RESPONSES TO ENGLE

When the home states of the tobacco companies amended their bond requirements to permit courts to stay enforcement of the judgment in *Engle*, legal scholars swiftly assailed their action. Professor Clark Freshman of the University of Miami School of Law stated that the laws were clearly unconstitutional: "The Confederacy lost the Civil War. We are all one country. You can't have one state invalidate the legal decisions of another state." Professor Richard Daynard of Northeastern University agreed and premised his claim on the Full Faith and Credit Clause of the Constitution. Professor Graham Lilly of the University of Virginia concluded that there was "no way" a state legislature could alter the amount that Florida courts established as the bond requirement for staying enforcement of the *Engle* judgment. Professor David Million of Washington and Lee University thought the legislative action "[raised] some serious constitutional questions." He observed that only "Florida has authority to govern access to its courts," and other states "are supposed to respect each other's judgments." Professor John Coffee of Columbia University commented generally that the state legislation was "constitutionally dubious," a view shared in the press by still other unnamed legal experts.

Legal commentary on the legislative responses to *Engle* reveals several, distinct concerns. In part, scholars expressed dismay at other states' efforts to regulate the Florida courts' appellate procedures. In part, scholars criticized other states'
refusal to enforce the *Engle* judgment, while still other scholars viewed state efforts as an attempt to invalidate the judgment.

Were the states' legislative responses truly as multi-purposed and sweeping as legal critics suggest? As a starting point, it is important to examine precisely what the states of Georgia, Kentucky, North Carolina, and Virginia did in their offending legislation. Prior to *Engle*, all these states had adopted standard language found in section 4 of the Uniform Enforcement of Foreign Judgments Act (UEFJA). Subsection 4(a) of the UEFJA authorizes courts to stay enforcement of sister-state judgments on appeal “upon proof that the judgment debtor has furnished the security for the satisfaction of the judgment required by the state in which it was rendered.”

Under this provision, the states of Georgia, Kentucky, North Carolina, and Virginia could have stayed enforcement of the *Engle* judgment only if the tobacco companies had satisfied the bond requirement of Florida law—which, at the time these states responded to the anticipated verdict in *Engle*, seemed fiscally impossible.

Section 4 of the UEFJA has a second stay provision, however, in subsection 4(b), which states,

> If the judgment debtor shows the [enforcing court] any ground upon which enforcement of a judgment of [a local court] of this state would be stayed, the court shall stay enforcement of the foreign judgment for an appropriate period, upon requiring the same security for satisfaction of the judgment which is required in this state.

Under subsection 4(b), the “enforcing” court may assert its own, domestic grounds for staying enforcement of a sister-state judgment, and may employ its own security requirements as a condition of obtaining the stay. Even before *Engle*, the large majority of states had adopted some form of subsection 4(b), and so mutually reserved the right to determine their own

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36. See, e.g., GA. CODE ANN. ch. 9-12-116 (1993); KY. REV. STAT. ANN. § 426.965(2) (Michie 2001); N.C. GEN. STAT. § 1C-1806 (1999); VA. CODE ANN. § 8.01-465.2 (Michie 2000). The great majority of states are signatories to the UEFJA. See EUGENE F. SCOLES ET AL., CONFLICT OF LAWS 1164 n.6 (3d ed. 2000).


38. Id. § 4(b) (emphasis added).

39. The terms “rendering court” and “enforcing court” are used throughout this Article as shorthand references for, respectively, the state court that has rendered a final judgment in a civil suit, and the sister-state that is now being asked to enforce the judgment against local assets of the judgment debtor.
security requirements for the enforcement of sister-state judgments. The only limitation found in subsection 4(b) is that the enforcing court must act evenhandedly: It may apply its security requirements to stay enforcement of sister-state judgments only if they otherwise apply to the enforcement of domestic judgments.

When the home states of the tobacco companies legislated in response to Engle, they exercised their prerogative under subsection 4(b). That is, each of them altered the bond requirement for staying enforcement of domestic punitive damage judgments, by limiting such bonds to $25 million in the case of Georgia, North Carolina, and Virginia, or $100 million in the case of Kentucky. Any future stay of enforcement of the Engle judgment, then, will result from a legal rule applicable to domestic and sister-state judgments alike.

The subject states did not enact laws with the effects attributed to them by many legal commentators. First, none of the laws purports to affect the bond requirement that can be assessed by Florida courts. If Florida ultimately reinstates its 120% bond requirement, the Engle plaintiffs are free to execute their judgment in the state of Florida, or any state whose domestic bond requirements are not satisfied by the tobacco companies. The charge that the states of Georgia, Kentucky, North Carolina, or Virginia were seeking to regulate proceedings in the Florida state court system is simply unfounded.

Second, the laws do not treat sister-state judgments less favorably than domestic judgments—they do not “discriminate” against sister-state judgments. Litigants seeking to stay enforcement of a judgment rendered by domestic courts, be they local or foreign, must satisfy the same bond requirement, and the bond requirement does not vary depending on whether the judgment creditor or judgment debtor is a “local” party. Thus, the legislative responses to Engle steer clear of the Supreme Court’s prohibition of state judgment enforcement procedures that discriminate against sister-states.

41. Id.
42. See sources cited supra note 19.
43. See supra note 10.
44. See, e.g., Watkins v. Conway, 385 U.S. 188, 190-91 (1966) (per curiam) (holding that the Full Faith and Credit Clause and Equal Protection Clause
Finally, it is clear that the laws do not invalidate sister-state judgments. The *Engle* plaintiffs remain free to enforce their judgment in any other state court without interference from the laws of Georgia, Kentucky, North Carolina, or Virginia. Most important, these state laws do not authorize local courts to deny sister-state judgments the res judicata effect that is the hallmark of the full faith and credit obligation. Local courts cannot reconsider the judgment debtors' liability or review the size of the punitive judgments against them. Issues resolved in the *Engle* litigation, consequently, will not be subject to reexamination when the *Engle* judgment is ultimately registered in other state courts. After the *Engle* judgment is appealed through the Florida court system, it will be enforced on its own terms. Thus, the judgment is not invalidated in any way.

If these states' laws are in any sense unconstitutional, it can only be because they attempt to stay enforcement of the *Engle* judgment while it is on appeal in Florida state court. And, since it is well-established that one state may decline enforcement of a judgment if the rendering state would, the constitutional problem must result from the fact that the home states of tobacco companies would stay immediate enforcement of the *Engle* judgment when Florida would not.

B. THE ARGUMENT THAT STATE LEGISLATIVE RESPONSES TO *ENGLE* ARE UNCONSTITUTIONAL

There is ample precedent apparently supporting the view that, when appellate enforcement of a judgment has not been stayed by the posting of a proper security bond in the rendering state, sister-states must enforce the judgment forthwith. In

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45. *See infra* note 269 and accompanying text.
46. *See infra* note 269. Courts have consistently held that judgment debtors may not relitigate the merits of a sister-state judgment when enforcement is sought under the UEFJA. Sara L. Johnson, Annotation, *Validity, Construction and Application of Uniform Enforcement of Judgments Act*, 31 A.L.R.4th 762 § 19 (1984).
47. *See* Watkins, 385 U.S. at 190-91 (stating that if the rendering state court would deny enforcement of its own judgment because of the statute of limitations, the enforcing state court could do the same).
Reeve v. Jones,49 for example, the New Mexico Court of Appeals was asked to stay enforcement of a Washington state judgment.50 The judgment debtor failed to post a supersedeas bond to stay enforcement in Washington, but asked that the New Mexico court nonetheless stay execution while he pursued his appeal in Washington.51 The New Mexico court refused the judgment debtor's request for a stay:

Defendants' failure to post a supersedeas bond means that plaintiffs could presently execute on their judgment in Washington even though defendants have appealed. Because the judgment is presently enforceable in Washington, it is final and should be considered final in New Mexico regardless of the appeal . . . . This holding supports the goals of finality and national unification which underlie the full faith and credit clause.52

Similarly, a Florida appellate court in SCG Travel, Inc. v. Westminster Financial Corp.53 refused to stay enforcement of a New Jersey judgment while the judgment was on appeal in the appellate courts of New Jersey.54 The court declined to stay enforcement because no bond had been posted in New Jersey:

Allowing a stay in Florida without supersedeas gives the judgment debtor, in effect, more rights here under the final judgment than the rendering state gives him there. Correspondingly, it gives the judgment creditor less. We are unable to square that result with the constitutional command of full faith and credit . . . .55

The decisions of the New Mexico and Florida courts are representative of a larger body of decisions, extending to the mid-nineteenth century, that suspend enforcement of a sister-state judgment only if enforcement has been stayed in the rendering court.56 Indeed, one legal authority offers the categorical statement that "The cases . . . reveal, almost without exception, that judgments from which an appeal has been taken

S.W.2d 145, 146 (Tex. Civ. App. 1979); Sweetser v. Fox, 134 P. 599, 601-02 (Utah 1911).

50. Id. at 747.
51. Id.
52. Id. at 747-78.
54. Id. at 726.
55. Id.
56. See cases cited supra note 48; see also HENRY CAMPBELL BLACK, A TREATISE ON THE LAW OF JUDGMENTS § 882 (1902) ("If, by the law of the state in which a judgment is obtained, an appeal does not operate as a supersedeas or stay proceedings on the judgment in that state, the conclusiveness of the judgment is not thereby impaired, and the pendency of such appeal is no bar to an action on the judgment in another state.").
without supersedeas have been regarded as *final judgments entitled to be accorded full faith and credit*, even though the appeals were pending in the courts of the original jurisdiction.  

This body of precedent implies that the various states' legislative responses to *Engle* are constitutionally infirm, for the legislation appears to deny full faith and credit, at least for a time, to sister-state judgments that are otherwise enforceable in the rendering state's courts. There is one immediate response to the view that existing precedent requires "almost without exception" that states enforce sister-state judgments immediately when they are enforceable in the sister-state: The law is not exceptionless. The UEFJA authorizes the enforcing court to employ its own requirements for staying enforcement of a sister-state judgment. Accordingly, courts applying the UEFJA have frequently exercised the power to employ their own laws for judgment enforcement. The UEFJA has been adopted by the large majority of states, and it is unlikely that so many states would adopt a patently unconstitutional procedure.

The *Restatement (Second) of the Conflict of Laws* also offers a view that seems to contradict the position that states may not stay the enforcement of judgments on appeal in a sister-state. The Restatement's reporter observes,

> Usually ... the courts of the state in which enforcement of the judgment is sought will either stay their judgment, or stay execution thereof, pending the determination of the appeal. ... As between States of the United States, full faith and credit does not prevent in

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58. See Fla. R. App. P. 9.310(b)(1) (permitting the enforcement of domestic judgments unless a sufficient supersedeas bond has been posted).


60. See supra text accompanying note 38.


62. See SCOLES ET AL., supra note 36, at 1164 n.6.
such circumstances either stay of the judgment, or stay of execution, pending determination of the appeal.\textsuperscript{53}

This divergent authority appears difficult to explain. On one hand, substantial legal precedent and several legal scholars deny states the power to stay enforcement of judgments presently enforceable in the rendering court. On the other hand, the UEFJA confers such power on signatory states, and the Restatement suggests that they use it.

A closer review of state court precedent requiring immediate enforcement of sister-state judgments reveals that these courts have typically addressed an issue quite different from that posed by legislative responses to Engle.\textsuperscript{64} The issue most often addressed in case precedent is whether a judgment on appeal is \textit{final} within the meaning of full faith and credit, not whether the judgment can be stayed after satisfying local bond requirements. Illustrative is the court's discussion in \textit{Reeve v. Jones}.\textsuperscript{65} In \textit{Reeve}, the judgment debtor did not seek to delay enforcement of a sister-state's judgment by invoking local stay procedures.\textsuperscript{66} Instead, the debtor argued that the judgment was unenforceable because it was not final while on appeal.\textsuperscript{67} The Court in \textit{Reeve} rejected this contention:

Before full faith and credit need be given to a sister-state's judgment, that judgment must be final. Finality is determined by the law of the first forum. Under Washington law, appellants must post bond in order to receive a stay of execution pending appeal.\ldots{} Defendants' failure to post a supersedeas bond means that plaintiffs could presently execute on their judgment in Washington even though defendants have appealed. Because the judgment is presently enforceable in Washington, it is final and should be considered final in New Mexico regardless of the appeal in Washington.\textsuperscript{68}

\textit{Reeve} reaches the correct result. The Supreme Court has made clear that only final judgments are entitled to full faith and credit, and that the state \textit{rendering} a judgment has ultimate authority to determine when it is final.\textsuperscript{69} Virtually all state courts—including those of Florida—adopt the position that a trial court judgment is final even though an appeal is

\begin{itemize}
\item \textsuperscript{53} \textbf{63.} \textit{RESTATEMENT (SECOND) OF THE CONFLICT OF LAWS} § 107 cmt. e (1969); accord id. 112 cmt. b.
\item \textsuperscript{64} See, e.g., cases cited supra note 48.
\item \textsuperscript{65} 681 P.2d 746 (N.M. Ct. App. 1984).
\item \textsuperscript{66} \textit{Id.} at 747.
\item \textsuperscript{67} \textit{Id.}
\item \textsuperscript{68} \textit{Id.} at 747-48 (citations omitted).
\item \textsuperscript{69} See \textit{Barber v. Barber}, 323 U.S. 77, 83-85 (1944).
\end{itemize}
Consequently, the court in Reeve properly refused to delay enforcement of a sister-state judgment on appeal based on the errant contention that the judgment was not final.

Finality, however, is not the issue posed by the legislative responses to Engle. Those states responding to the judgment in Engle have not attempted to abrogate its "finality" while the case is on appeal. Rather, they provide the judgment debtor a means of delaying execution of the judgment in local courts, by satisfying the alternative bond requirement of local law, while appeals are completed in the rendering court. This means of delaying enforcement, which again is expressly authorized by the UEFJA, does not purport to suspend finality.71

It could be argued, of course, that staying execution of a money judgment is tantamount to denying it finality, and hence full faith and credit.72 Under this view, full faith and credit requires that states enforce judgments in the same time and manner as would the rendering court. If this view is correct, then the UEFJA has mistakenly given signatory states a power they lack under the Constitution. Accordingly, the critical issue posed by Engle is what, exactly, is meant by the requirement that states give full faith and credit to sister-state judgments.

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70. See, e.g., Conopco, Inc. v. Roll Int'l, 231 F.3d 82, 90 (2d Cir. 2000) (noting that a vast majority of states accord finality to judgments on appeal).

71. By way of comparison, 28 U.S.C. § 1963 (1994), which authorizes inter-district enforcement of federal court judgments, denies "finality" to a judgment while it is on appeal (stating that a judgment may be registered and enforced "when the judgment has become final by appeal or expiration of the time for appeal").

72. Few courts have considered whether they are obliged to replace local rules governing the stay of judgment enforcement with those of the state that rendered the judgment. One state court has opined in dictum that full faith and credit requires that stay requirements of the rendering court be followed, based on the view that to do otherwise would compromise the judgment creditor's "rights." See SCG Travel, Inc. v. Westminster Fin. Corp., 583 So. 2d 723, 726 (Fla. Dist. Ct. App. 1991) (avoiding an actual decision on the issue of full faith and credit by construing Florida law consistently with that of the state rendering the judgment). Another court has rejected this view, and concluded that full faith and credit does not require displacement of local stay and bond procedures. See Pickwick Int'l, Inc. v. Tomato Music Co., 462 N.Y.S.2d 781, 782-84 (N.Y. App. Div. 1983) (acknowledging that full faith and credit precludes reexamination of the "merits" of the controversy). Neither court offers appreciable analysis of the issue.
C. FULL FAITH AND CREDIT AND JUDGMENT ENFORCEMENT: AN HISTORICAL PERSPECTIVE

Justice Jackson once observed that the Full Faith and Credit Clause is "peculiarly a lawyer's clause." Among constitutional provisions, it has been "less involved... with social and political considerations," and has thus been left primarily to the attentions of the legal profession. Even among legal scholars, the clause has been "neglected."

Article IV, section 1 of the Constitution provides,

Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof.

As stated, Article IV grants Congress the authority to prescribe the "effect" of state judgments. Congress could enact legislation that would specify procedures for interstate enforcement of judgments and, for example, impose a uniform rule governing stays of execution of judgments, but it has not. Instead, Congress has exercised its power solely to provide a means of authenticating state court judgments, and to iterate that they "shall have the same full faith and credit in every court... as they have [in their own courts]."

The Framers' intent in drafting Article IV is "hazy," and there is virtually no reference to the Article in state ratification debates. Although sparse, historical evidence provides some clues to the implications of full faith and credit for judgment execution.

Before adoption of the Articles of Confederation in 1778, the colonies had experienced problems with judgment debtors fleeing jurisdictions that had rendered judgments against them. As they fled, debtors often took with them any valu-

73. See Robert H. Jackson, Full Faith and Credit—The Lawyer's Clause of the Constitution, 45 COLUM. L. REV. 1, 2 (1945).
74. Id.
75. Id. at 3.
76. U.S. CONST. art. IV, §1.
78. See Jackson, supra note 73, at 6.
80. See George P. Costigan, Jr., The History of the Adoption of Section 1 of Article IV of the United States Constitution and a Consideration of the Effect on Judgments of that Section and of Federal Legislation, 4 COLUM. L. REV.
able property against which execution might be obtained.\textsuperscript{81} As a result, the colonies faced an internal problem like that faced by European nations.\textsuperscript{82} To what extent would "foreign" judgments (among which were sister-colony judgments) be enforced in local courts?

The colonies early conformed to the practice of their mother country, Great Britain.\textsuperscript{83} "Foreign" judgments constituted prima facie evidence of a judgment debt.\textsuperscript{84} Such foreign judgments, however, were not directly enforceable in local courts. Instead, a judgment creditor had to commence a new suit in a jurisdiction where the judgment debtor had property. In that suit, the judgment creditor could submit the judgment of a sister colony as prima facie evidence of the judgment debt. The judgment debtor, in turn, was free to present evidence to rebut the prima facie case, thus necessitating that the court re-adjudicate the underlying merits of the dispute.

The colonies partially addressed this problem when they confederated as states and adopted the Articles of Confederation. Among the Articles was a provision declaring that "Full faith and credit shall be given in each of these States to the... judicial proceedings of the courts and magistrates of every other State."\textsuperscript{85} The principal difference between this provision in the Articles of Confederation, and its successor provision in Article IV of the Constitution, was that the Articles failed to give the newly created central government any authority to interpret or enforce the mandate of full faith and credit.\textsuperscript{86}

There was an effort during discussion of the proposed Articles of Confederation to include a provision for directly enforcing sister-state judgments.\textsuperscript{87} In pertinent part, the proposal stated,

\textit{[A]n action of debt may lie in the Court of Law in any State for the recovery of a debt due on judgment of any Court in any other State;}

\textsuperscript{470, 471} (1904); Willis L.M. Reese & Vincent A. Johnson, \textit{The Scope of Full Faith and Credit to Judgments}, 49 COLUM. L. REV. 153, 153-54 (1949).

81. See Costigan, supra note 80, at 471.
82. See id.
83. See id. at 470.
84. Id.
85. ARTICLES OF CONFEDERATION art. IV, reprinted in THE UNITED STATES CONSTITUTION ANNOTATED x (The American Law Book Co. 1924) (1778).
86. See Costigan, supra note 80, at 474.
provided the judgment creditor gives sufficient bond with sureties before said Court before whom action is brought to respond to damages to the adverse party in case the original judgment should be afterwards reversed and set aside.88

This proposal was rejected for unknown reasons,89 but two aspects of the proposal are suggestive. First, the drafters anticipated that a second suit was required to enforce a judgment in sister-state courts, and so attempted to provide for a specific cause of action to facilitate the second action. Second, the drafters were specifically concerned with the enforcement of judgments still subject to reversal (e.g., on appeal), and thought it appropriate to require that the judgment creditor post a security bond. The risk of judgment reversal, then, was to be borne by the judgment creditor seeking to enforce a judgment on appeal, the opposite of modern procedures, which shift the risk of reversal to the judgment debtor.

As mentioned, Article IV of the Constitution incorporated the full faith and credit provision of the Articles of Confederation, and expanded it by granting Congress the power to prescribe procedures for interstate enforcement of judgments, but this power was never exercised. Consequently, until the states' adoption of the UEFJA in 1962, judgment creditors were forced to bring a separate action in sister-state courts in order to enforce a judgment.90 By necessity, this required that judgment creditors employ jurisdictional and procedural rules of the enforcing state court. As observed by Justice Jackson, "This was certain to make them vulnerable to procedural peculiarities."91

The principal change effected by the eighteenth-century mandate of full faith and credit was to give sister-state judgments a new status. While foreign nation judgments still constituted prima facie evidence of an enforceable judgment debt, sister-state judgments were res judicata on the underlying issues.92 Courts were no longer free to reconsider the merits of the underlying judgment, which were conclusively established (assuming the judgment was not otherwise assailable on fundamental grounds like lack of jurisdiction).93 In essence, the

88. 9 id.; see also Jackson, supra note 73, at 3-4 & n.11.
89. See Jackson, supra note 73, at 3-4.
90. See SCOTES ET AL., supra note 36, at 1163-65. Under the UEFJA, a judgment can be registered for enforcement in signatory states, and the judgment creditor need not actually commence a separate action.
91. Jackson, supra note 73, at 10.
93. See Jackson, supra note 73, at 8-10.
full faith and credit obligation changed the rule of evidence followed in international law. To achieve this res judicata effect, however, the judgment creditor still had to domesticate the judgment by commencing a new action in a sister-state court. Until domesticated, the judgment was not enforceable and did not constitute a lien in the same manner as a local judgment.

The modest history of Article IV has several implications for the issue posed by Engle. First, the primary effect of the full faith and credit obligation was as an evidentiary rule, a rule of res judicata. Second, neither Article IV nor implementing legislation expressly mandated that one state adopt any particular procedural mechanisms for judgment enforcement of another state’s judgments. To the contrary, judgment creditors were still required to commence a new suit in states where the debtor had property and negotiate their way through local procedural rules.94

Third, there is no compelling historical evidence to indicate that the Framers had a view on the specific issue of stays of execution. The Framers were obviously concerned about judgment debtors using interstate borders to evade collection of judgments. They were not sufficiently concerned about interstate enforcement, however, to adopt procedures that might expedite enforcement or provide creditors security while enforcement actions were pursued. To the contrary, the only specific evidence pertaining to security bonds reveals greater concern with the judgment debtor’s security when the creditor attempted to enforce a judgment still on appeal.95 The Supreme Court did not interpret the Full Faith and Credit Clause until

94. See Joseph Story, Conflict of Laws § 609, 974-75 (5th ed. 1857) (stating that Article IV “did not make the judgments of other States domestic judgments to all intents and purposes; but only gave a general validity, faith, and credit to them, as evidence. No execution can issue upon such judgments without a new suit in the tribunals of other States. And they enjoy not the right of priority, or privilege, or lien, which they have in the State where they are pronounced, but that only which the Lex fori gives to them by its own laws in their character of foreign judgments.”).

95. The fear that judgment creditors might execute on a judgment while appeal is pending and dissipate the recovered assets continues to trouble defense counsel. See Robert M. Tyler, Jr., Practices and Strategies for a Successful Appeal, 16 Am. J. Trial Advoc. 617, 641-42 (1993) (“For judgment debtors, [the time immediately proceeding entry of a judgment] is an absolutely critical stage of the litigation because of the specter of the adversary’s executing on the judgment, dissipating the proceeds, and leaving the defendant an academic victory in the end. This is a situation that a diligent attorney avoids by all means.”).
In Mills v. Duryee,96 Francis Scott Key argued that the clause only required that state judgments be given the same effect as foreign nation judgments.97 This position, which would have reinstated the international law rule that foreign judgments are but prima facie evidence of the underlying debt, was firmly rejected.98 As Justice Story observed, Key's argument would have rendered the Full Faith and Credit Clause "utterly unimportant and illusory."99 Thus, the Court affirmed that the Clause required that courts give "conclusive" effect to state court judgments, that is, that they have res judicata effect.100

In 1839, the Court issued its most significant decision concerning the impact of full faith and credit on judgment enforcement.101 McElmoyle v. Cohen involved a judgment creditor's effort to enforce a South Carolina judgment in a Georgia court.102 Under the law of South Carolina, the judgment was still enforceable notwithstanding the lapse of seven years since its rendition.103 Further, the judgment had special lien priority because of its status as a judgment.104 Under the law of Georgia, by contrast, sister-state judgments were unenforceable unless enforcement was sought within five years of the judgment's rendition.105 Further, the law of Georgia gave sister-state judgments the lien status of simple debts, rather than the superior lien priority of judicial judgments accorded to domestic judgments.106 The judgment creditor challenged both aspects of Georgia law under the Full Faith and Credit Clause.107

The judgment creditor's argument was based on a view of the Full Faith and Credit Clause that would have dramatically altered existing judgment enforcement practice. According to the creditor, the American states surrendered their power to enact laws affecting judgments of sister-states when they rati-
fied the Full Faith and Credit Clause. Further, Congress's statutory implementation of the clause required that enforcing states follow the law of the rendering state—here, South Carolina—in an enforcement action. Since the judgment at issue was directly enforceable under the laws of South Carolina—without being first domesticated in another state's court—and constituted a lien on property of the debtor, it should be given the same effect by the court in Georgia.

A unanimous Court rejected the judgment creditor's arguments. The Court affirmed its understanding of the core purpose of the Full Faith and Credit Clause, that state judgments must be given conclusive (i.e., res judicata) effect in sister-state courts. The impact of Congress's implementing legislation was that

the judgment is made a debt of record, not examinable upon its merits; but it does not carry with it, into another state, the efficacy of a judgment upon property or persons, to be enforced by execution. To give it the force of a judgment in another state, it must be made a judgment there; and can only be executed in the latter as its laws may permit.

The Court also reaffirmed the by then established rule of lex fori, under which courts are free to apply their own procedural or remedial laws even when enforcing foreign judgments. According to the Court, "[T]here is no direct constitutional inhibition upon the states... that the states may not legislate upon the remedy in suits upon the judgments of other states, exclusive of all interference with their merits." Further, the Court rejected the notion that a judgment creditor

108. Id. at 314 (Plaintiff's argument).
109. Id. at 315 (Plaintiff's argument).
110. Id. at 317-18 (Plaintiff's argument).
111. Id. at 327-30.
112. Id. at 325. The Court had stated this position earlier in Mills v. Duryee. 11 U.S. (7 Cranch) 481, 485 (1813) ("The right of a Court to issue execution depends upon its own powers and organization.").
113. McElmoyle, 38 U.S. at 325 (emphasis added).
114. See id. at 328.
115. See Sun Oil Co. v. Wortman, 486 U.S. 717, 723 (1988) (stating that lex fori, as applied to statutes of limitations, was established as a matter of international law at the time of the Constitution's ratification, and thus was perpetuated in the Full Faith and Credit Clause); see also, Le Roy v. Crowninshield, 15 F. Cas. 362, 364-65 (C.C.D. Mass. 1820) (No. 8,269) ("[A court of law] is not obliged to depart from its own notions of judicial order, from mere comity to any foreign nation.").
could rely on laws of the rendering state to "be put on a better footing" than judgment creditors of the enforcing state.117  

The import of McElmoyle for the enforcement issue raised by Engle is apparent. Remedial issues, like the statute of limitations applicable to judgment enforcement, or the lien priority of judgments, are governed by lex fori.118 This is so even when the remedial law of the forum precludes enforcement of a sister-state judgment altogether, as was the case in McElmoyle.119 Further, a judgment creditor cannot insist that the enforcing court place sister-state judgments "on a better footing" than domestic judgments by insisting that enforcement procedures of the rendering state displace local procedures.120  

The intervening decades have not blunted McElmoyle's impact. In subsequent decisions, the Court has reaffirmed that (1) state judgments must be domesticated before they are entitled to enforcement in another state's court;121 and (2) state judgments need not be accorded judgment lien status in another state prior to being domesticated.122 Further, McElmoyle's overarching rationale, that remedial issues are governed by the law of the forum, was affirmed by the Court in its 1988 decision, Sun Oil Co. v. Wortman.123 In Wortman, the Court specifically rejected the contention that McElmoyle was wrongly decided.124 According to the Court, full faith and credit permits a court to apply the law of the forum to issues traditionally classified as "remedial" or "procedural," even if traditional classifications have lost currency in modern practice.125  

Perhaps the most forceful statement by the modern Court is found in its 1998 decision, Baker v. General Motors Corp.126 In Baker, the Court reaffirmed that state judgments may be enforced under the procedures adopted by the enforcing state:

Full faith and credit ... does not mean that States must adopt the practices of other States regarding the time, manner, and mechanisms for enforcing judgments. Enforcement measures do not travel

117. Id. at 327.
118. See id. at 328-30.
119. See id. at 313 (Certificate of Division from Circuit Court of Georgia).
120. Id. at 327.
122. See M.E. White, 296 U.S. at 276.
124. Id. at 723 n.1.
125. Id. at 724-25.
with the sister-state judgment as preclusive effects do; such measures remain subject to the evenhanded control of forum law.\textsuperscript{127}

It is difficult, then, to escape the conclusion that states may adopt judgment enforcement procedures—like those providing more affordable bond requirements to stay enforcement of judgments—and apply them to sister-state judgments.\textsuperscript{128} While the Constitution requires that domestic and sister-state judgments be treated evenhandedly, it does not require that states displace local enforcement procedures and put sister-state judgments "on a better footing" than those of a local origin.\textsuperscript{129}

As for the abundant statements by state courts that "final" judgments of sister-state courts must be immediately enforced unless a proper bond has been secured in the sister-state, those statements must be placed in context. Admittedly, "finality" is determined by the court that renders a judgment, as is the res judicata effect of a judgment. The rendering court has plenary power to decide both issues,\textsuperscript{130} but the questions of whether a

\textsuperscript{127. Id. at 235.}

\textsuperscript{128. A more commonplace example of the principle that courts may apply local law when enforcing judgments is the use of local law to determine what assets may be attached to satisfy the judgment. Enforcing states almost always employ local law to determine what property of the judgment debtor is subject to execution. In Florida, for example, a judgment debtor's homestead is exempt from forced sale to satisfy a judgment lien rendered by another court, arguably even if the debtor has acquired the homestead to evade payment of the judgment. See Bank Leumi Trust Co. of N.Y. v. Lang, 898 F. Supp. 883, 885 n.4, 887 (S.D. Fla. 1995) (applying the Florida homestead exemption although the exemption is not recognized under New Jersey law). See generally Richard W. Nenno, Delaware Law Offers Asset Protection and Estate Planning Benefits, 26 EST. PLAN. 3, 11 (1999) (discussing the use of asset-protection trusts to prevent, \textit{inter alia}, the enforcement of a foreign judgment). A judgment may even be given greater effect in the enforcing state than it would in the rendering state, by permitting the judgment creditor to execute against property that would be exempt from execution in the rendering state. See, e.g., Huntington Nat'l Bank v. Sproul, 861 P.2d 935, 945-47 (N.M. 1993) (applying New Mexico law to determine whether judgment creditor can foreclose on debtor spouse's interest in community property to enforce an Ohio judgment); People's Nat'l Bank v. Hitchcock, 428 N.Y.S.2d 850, 851 (N.Y. Sup. Ct. 1980) (applying New York law to determine whether judgment creditor can garnish wages to enforce a Pennsylvania judgment). See generally UNIF. ENFORCEMENT OF FOREIGN JUDGMENTS ACT § 2, 13 U.L.A. 154 (amended 1964) (1986) ("judgment [filed under the act] has the same effect and is subject to the same procedures, defenses and proceedings . . . as a judgment . . . of this state and may be enforced or satisfied in like manner.").

\textsuperscript{129. McElmoyle v. Cohen, 38 U.S. (13 Pet.) 312, 327 (1839).}

\textsuperscript{130. See, e.g., SCOLES ET AL., supra note 36, at 1154.}
judgment is final, and what preclusive effect it may demand, are not the same question as whether an enforcing court must comply with the security bond requirements of the rendering court. The latter question is one of remedies, and is governed by the enforcing court’s own procedural law. Provided the en-

131. Several decisions that are cited for the proposition that judgments on appeal are final and must be given full faith and credit are readily understandable in light of this principle. For example, in Brinker v. Superior Court, the judgment debtor had sought not only to stay execution of a judgment on appeal, but to actually vacate that judgment. 235 Cal. App. 3d 1296, 1299 (Cal. Ct. App. 1991). Vacating the judgment would have permitted the debtor to reargue the underlying merits, and so was denied. See id. at 1299-1300. Similarly, in Bank of N. Am. v. Wheeler, the judgment debtor attempted to bring suit based on the same cause of action underlying the earlier judgment. The court correctly held that the second suit was barred even though the earlier judgment was on appeal. 1859 WL 1295 (Conn. 1859). And in Lonergan v. Lonergan, the court properly found that the judgment debtor was precluded from reasserting a counterclaim that had been resolved during litigation leading to the earlier judgment. 76 N.W. 16, 17-18 (Neb. 1898). In all these cases, the earlier judgment on appeal was given full faith and credit in its truest historical sense because the judgment debtor was prevented from relitigating issues that had been resolved in earlier proceedings before a sister-state court.

The distinction between giving a judgment full faith and credit through rules of res judicata and giving it full faith and credit through enforcement is reflected elsewhere in the law. Thus, some states will suspend the res judicata effect of a judgment on appeal even though they might not defer execution of a judgment. See generally E.H. Schopler, Annotation, Judgment as Res Judicata Pending Appeal or Motion for a New Trial or During the Time Allowed Therefor, 9 A.L.R.2d 984 § 2 (1950) (“The authorities are in conflict as to whether the pendency of an appeal affects the operation of a judgment as res judicata.”).

132. A closer review of the “finality” precedent indicates that, with few exceptions, it is entirely reconcilable with the rule of McElmoyle and the legislative actions of the tobacco states in response to Engle. Courts have almost always been asked to delay enforcement of a sister-state’s judgment when the enforcing court’s bond requirements do not differ from those of the court that rendered the judgment. See, e.g., Bank of N. Am. v. Wheeler, 28 Conn. 433 (1859); Birney v. Birney, 161 A. 50 (N.J. Ch. 1932); Reeve v. Jones, 681 P.2d 746 (N.M. Ct. App. 1984); Moody v. State, 520 S.W.2d 452 (Tex. Civ. App. 1975). In none of these cases did the judgment debtor object to enforcement based on local stay requirements. To the contrary, it appears that until the legislative responses to Engle, the great majority of courts required that supersedeas bonds cover the entire amount of judgments, whether compensatory or punitive. See, e.g., 11 CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 2905 (2d ed. 1995). As a consequence, the issue presented by Engle has little, if any, historical precedent.

When a judgment debtor asks a court to stay enforcement of a sister-state judgment without basing the request on a local procedural rule applicable to all judgments, the debtor is essentially asking the court to discriminate against sister-state judgments. Such discrimination would run afoul of the Full Faith and Credit Clause. See supra text accompanying note 44.
forcing court treats domestic and foreign judgments the same, it does not run afoul of the Full Faith and Credit Clause.

One suspects that much of the criticism of the legislative responses to Engle reflects the impression that the tobacco companies were attempting to manipulate the result in Engle through friendly legislatures. Unquestionably, the home states of the tobacco companies amended their judgment enforcement procedures at the behest of the companies, and unquestionably, these states legislated in anticipation of the verdict in Engle.\footnote{133}{See sources cited supra notes 31-35.}

Yet, the fact that state legislatures amended their judgment enforcement procedures at the request of local lobbying interests does not render them unconstitutional. Legislatures typically enact laws at the urging of local interests.\footnote{134}{Indeed, the Supreme Court has endorsed the principle that a state's interest in protecting its own citizens provides it a basis for applying its own law in a dispute. See, e.g., Allstate Ins. Co. v. Hague, 449 U.S. 302, 313-20 (1981); Watson v. Employers Liab. Assurance Corp., 348 U.S. 66, 72-73 (1954). Similarly, the Court has held that a state may assess punitive damages against an out-of-state defendant to the extent necessary to protect its own consumers and economy. See BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 572-73 (1996); see also Larry Kramer, Rethinking Choice of Law, 90 COLUM. L. REV. 277, 293-94 (1990) (stating that legislatures usually enact laws with local interest in mind).}

The critical requirement is that legislatures ultimately enact enforcement procedures that apply uniformly to all judgments, regardless of their origins or who is benefited.

Nor is there merit to the assertion that states deny a judgment creditor his “rights”\footnote{135}{The illegality of Florida’s procedures in Engle, if any, will not turn on the fact that they were applied for the benefit of state citizens. As a matter of constitutional law, the Supreme Court has endorsed the power of states to apply their laws for the specific benefit of state citizens. See cases cited supra note 134.} when enforcement is stayed in reliance on local law. Essentially the same contention was made and rejected in McElmoyle, when the state of Georgia was permitted to apply its statute of limitations to deny enforcement of a South Carolina judgment.\footnote{136}{See supra note 72 (discussing one court’s view that denial of immediate enforcement of a judgment abrogates the judgment creditor’s “rights”).}

\footnote{137}{McElmoyle v. Cohen, 38 U.S. (13 Pet.) 311, 327 (1839); see supra notes 97-117 and accompanying text.}
Nonetheless, the Court affirmed the enforcing court's power to employ local procedures.

Similarly, the fact that state legislative action occurred during the Engle trial does not run afoul of the "modest" constitutional restriction on retroactive lawmaking. At the time the states acted, no action was pending to enforce the Engle judgment, since the judgment had not yet been rendered. The legislatures' actions were prospective. As the Supreme Court has observed, "When the intervening statute authorizes or affects the propriety of prospective relief, application of the new provision is not retroactive." This view has particular force when changes in procedural law are applied to pending litigation.

In short, the states of Georgia, Kentucky, North Carolina, and Virginia acted within their constitutional powers when they amended their bond requirements to provide the Engle defendants a means of staying enforcement while the judgment against them is appealed through the Florida courts. Although the legislation was prompted by the specter of bankruptcy for the Engle defendants, it extends evenhandedly to all judgment debtors and does not in any sense abrogate existing rights of the parties. Equally important, the legislation does not interfere with the ultimate power of Florida appellate courts to determine the legality of the award in Engle.

The controversial legislative responses to Engle should be placed in perspective. Security bond requirements attempt to balance conflicting interests. First, there is the judgment

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138. The legislative responses to Engle do not affect the plaintiffs' right to recover the full amount of their judgment, assuming it is affirmed on appeal. Such recovery would include all post-judgment interest that accrues from the time the trial court entered its final judgment until the time of collection. See Fla. Stat. Ann. § 55.03 (West Supp. 2001). Nothing in the UEFJA, or in the tobacco states' amended versions of it, suspends accrual of post-judgment interest. As a consequence, the value of the debtor's judgment is not lessened by a stay of enforcement.


140. See Landgraf v. USI Film Prods., 511 U.S. 244, 272 (1994).

141. Id. at 273.

142. Id. at 275 ("Because rules of procedure regulate secondary rather than primary conduct, the fact that a new procedural rule was instituted after the conduct giving rise to the suit does not make application of the rule at trial retrospective."). The Court's willingness to apply procedural changes to pending suits is graphically illustrated in Bradley v. Sch. Bd., 416 U.S. 696, 724 (1974), where the Court authorized recovery of attorneys' fees under a statute that was enacted while the suit was pending.
creditor's interest in being compensated fully for his losses. Second, there is the judgment debtor's interest in avoiding premature payment of a legally flawed judgment. The laws of Georgia, Kentucky, North Carolina, and Virginia accommodate both interests, albeit in a manner different from most states. Judgment creditors may insist on a certain level of security, ranging from $25 to $100 million, and if the creditor can show that the debtor is attempting to divert or dissipate assets, the court may waive limits on the bond. Further, the bond laws of these states do not apply to compensatory damages. Thus, the risk posed to the creditor by bond limitations is that the punishment inflicted on the debtor will be compromised, not that the creditor will go uncompensated for actual losses.

Large judgment debtors, on the other hand, need not suffer bankruptcy because of an errant trial verdict. Substantial doubts exist regarding the propriety of the proceeding that rendered a record-shattering verdict in *Engle*. The Florida Attorney General has issued an opinion stating as much. Moreover, the jury in *Engle* may have anticipated that its verdict would be moderated during the near-certain appellate process.

143. *See*, e.g., VA. CODE ANN. § 8.01-676.1(K) (Michie 2000) (rescinding bond limitations if the court finds that the debtor is “purposefully dissipating its assets or diverting assets outside the jurisdiction of the United States courts for the purpose of evading the judgment”). Similar provisions can be found in Georgia, Kentucky, and North Carolina statutes. *See* statutes cited *supra* note 19.

144. Distinguished jurists have observed that conventional justifications for supersedeas bonds are absent when the judgment concerns punitive damages. Indeed, bond requirements for punitive judgments, which give the judgment creditor an absolute security interest in payment, may well place the judgment creditor in a superior position to other creditors of the judgment debtor who stand to suffer actual losses. *See*, e.g., Olympia Equip. Leasing Co. v. W. Union Tel. Co., 786 F.2d 794, 797 (7th Cir. 1986) (Posner, J.) (“The punitive damages in the award are a windfall to Olympia, their purpose (their principal purpose, anyway) being to punish and deter antitrust violators rather than to compensate the victims. The element of windfall mitigates our concern that if Western Union Telegraph declared bankruptcy, Olympia might never collect a penny of the punitive damages, even if there were some money for other creditors.”); *see also id.* at 800 (Easterbrook, J., concurring) (“[A] bond or irrevocable letter of credit prefers the judgment creditor over other creditors. The bond *assures* the judgment creditor of payment in full. It puts the assets of a solvent bank or bonding company behind the obligation, while other creditors must look to the assets of the debtor; the guarantor of the judgment will take security in the debtor’s assets, which causes the position of other creditors to deteriorate. The bond does not preserve the judgment creditor’s position; it improves the position, perhaps dramatically.”).

145. *See* *supra* note 15 and accompanying text.
and so felt free to "send a message" to tobacco companies based on this expectation. If, in fact, jurors in high-profile liability cases rely on appellate courts to check their excesses, the judicial system should provide defendants an opportunity to use this judicial check prior to bankrupting themselves.

The wisdom of affordable appellate bonds was recently confirmed by the Supreme Court's recent decision in Cooper Industries v. Leatherman Tool Group, Inc. In Cooper, the Court determined that appellate courts should apply a de novo standard of review in assessing whether a jury's award of punitive

146. Van Voris, supra note 1, at A9. ("Some defense lawyers observing the Miami verdict were troubled by the possibility that the jurors thought the near-certain appeal meant they could send a message to the tobacco industry without having to take full responsibility for the results.").

147. It should be emphasized that the argument for moderating supersedeas bond requirements to permit defendants to pursue an appeal is not founded in constitutional necessity. The contention that a judgment debtor has a constitutional right to appeal without posting a prohibitive bond has not fared well in the Supreme Court. For example, in Louisville & Nashville Railroad v. Stewart, 241 U.S. 261, 263 (1916), Justice Holmes wrote for a unanimous Court that a state is not required to "provide for a suspension of the judgment" as a condition of granting the right to appeal. In Lindsey v. Normet, 405 U.S. 56, 78 (1972), the Court observed that "a State has broad authority to provide for the recovery of double or treble damages in cases of illegal conduct that it regards as particularly reprehensible, even though posting an appeal bond by an appellant will be doubly or triply more difficult than it otherwise would be."

More recently, in Pennzoil Co. v. Texaco, Inc., 481 U.S. 1, 17-18 (1987), the Court declined on jurisdictional grounds to consider whether a bond requirement that is unaffordable by the judgment debtor denies the debtor due process. In Pennzoil, the defendant, Texaco, was adjudged liable for over $11 billion in compensatory and punitive damages. Id. at 4, 6 n.5. Texaco could not post such a bond, and thus Pennzoil was authorized under Texas law to commence immediate enforcement of the judgment notwithstanding a pending appeal. Id. at 5. Texaco subsequently obtained an injunction against further proceedings in Texas court by filing suit in a federal court in New York. Id. at 6. The Court's majority ultimately invalidated the injunction on jurisdictional grounds and did not address Texaco's challenge to the bond requirement. Three justices, however, addressed Texaco's challenge in their concurrences and rejected it. Id. at 22 (Brennan, J., concurring), 29 (Blackmun, J., concurring), 33-34 (Stevens, J., concurring). Justice Brennan believed that Texaco's right to appeal could be preserved, in essence, by filing for bankruptcy. Id. at 22 (Brennan, J., concurring). Justice Stevens, by comparison, concluded that there was no constitutional right to obtain a stay pending appeal even if state bond requirements are fiscally destructive of the judgment debtor. Id. at 33-34 (Stevens, J., concurring). See generally Elaine A. Carlson, Mandatory Supersedeas Bond Requirements—A Denial of Due Process Rights?, 39 BAYLOR L. REV. 29 (1987) (arguing that the supersedeas bond requirement in Texas does not comport with the Texas Constitution's provisions for due process).

damages is so excessive that it violates due process.\footnote{149} If this heightened appellate scrutiny of punitive awards is to be meaningful, defendants must be able to afford to pursue the appeal.

The greatest objection to the states' legislative responses to Engle is not that they go too far, but that they do not go far enough. Many judgment debtors stand to be bankrupted long before they reach a bond cap of $25 or $100 million. If fairness to the judgment debtor is the issue, then legislation should be tailored to protect all defendants who are subjected to mortal punitive damages awards. If concern for the economic welfare of the judgment debtor's community is the issue, "community" should encompass smaller localities than the state. In this sense, the states' legislative responses to Engle are imperfect and will inevitably invite the charge that they are the product of big business and government.\footnote{150}

A better response to the threat of aberrant verdicts would be to reconsider altogether the requirement of supersedeas bonds to stay enforcement of punitive damages judgments. The Model Punitive Damages Act offers a promising solution.\footnote{151} Under the Model Act, a judgment creditor may register a punitive judgment and preserve its lien priority, but may take no action to actually collect the judgment until the appellate process has ended.\footnote{152} The Model Act contains a "good cause" exception, which authorizes a court to require a bond under appro-

\footnote{149. \textit{Id.} at 1685-86.}

\footnote{150. This is not to say that caps on state bond requirements are unconstitutional. As the Court has stated, "In the area of economics . . . a State does not violate the Equal Protection Clause merely because the classifications made by its laws are imperfect. If the classification has some 'reasonable basis,' it does not offend the Constitution simply because the classification 'is not made with mathematical nicety or because in practice it results in some inequality.'" \textit{Dandridge v. Williams}, 397 U.S. 471, 485 (1970) (quoting \textit{Lindsley v. Natural Carbonic Gas Co.}, 220 U.S. 61, 78 (1911)).}

\footnote{151. \textsection 13 of the Act provides in pertinent part:
\begin{quote}
Pending timely appellate review . . . a judgment creditor may perfect a lien or establish its priority or seek other relief, but may not invoke process to collect the portion of the judgment for punitive damages unless the court orders otherwise for good cause shown. In the latter event, the defendant may file a supersedeas bond . . . .
\end{quote}
\textit{UNIF. LAW COMM'RS' MODEL PUNITIVE DAMAGES ACT} \textsection 13, 14 U.L.A. 72 (2000).

As explained in the Comment, "The section suspends enforcement of an award of punitive damages during the time an appeal is pending unless the court orders otherwise. The purpose is to obviate the need for a supersedeas bond and the costs involved." \textit{Id.} \textsection 13 cmt.}

\footnote{152. \textit{Id.} \textsection 13.}
priate circumstances, as when the judgment debtor threatens to divert or dissipate assets. Absent "good cause," however, a judgment debtor can pursue its appeal without the threat of bankruptcy or an extortionate settlement.

Federal law suggests an alternative to the Model Act's approach. Federal Rule of Civil Procedure 62(d) requires the posting of a supersedeas bond in order to stay enforcement of a judgment pending appeal, but many courts exercise their discretion to modify bond requirements when "extraordinary circumstances" are present. Among such circumstances is the judgment debtor's financial ability to satisfy a full bond requirement. The federal approach appears to offer a flexible and fair approach to the Engle problem, and it certainly is preferable to an invariable bond requirement that requires full security for a punitive judgment.

The federal approach, however, may not be the best solution for interstate enforcement of judgments. The discretion provided by Rule 62(d) is exercised by the court rendering the judgment. The problem posed by Engle, on the other hand, assumes that the rendering court has declined to relieve the judgment debtor of the bond requirement, either because state law provides no relief or local courts refuse to give it. If a sister-state court asked to enforce a judgment exercises its discretion to relieve the judgment debtor of a bond requirement when the rendering court has not, there is obvious suspicion that the enforcing court is discriminating against foreign judgments.

153. Id. § 13 cmt. The comment explains,

Good cause may consist of a showing that the judgment debtor is attempting to secret or dissipate assets in fraud of the judgment creditor's rights or that another judgment creditor with an award of punitive damages is attempting to collect it and that such action would substantially lessen the likelihood that the judgment debtor would remain solvent.

154. FED. R. CIV. P. 62(d).


157. FED. R. CIV. P. 62(d). As noted previously, federal judgments on appeal are not considered "final," so the problem of extra-jurisdiction enforcement pending appeal is not presented. See Scoles et al., supra note 36.

158. Such was the case, for example, when Texaco was forced into bankruptcy when a Texas court refused to decrease the supersedeas bond requirement for an $11 billion judgment. See Van Voris, supra note 1.
Interstate comity is best promoted by adopting an approach that eliminates unnecessary judicial discretion.

For that reason, among others, the Model Act approach is preferable. The Model Act presumptively relieves all judgment debtors of bond requirements pertaining to punitive judgments, and places the burden on the judgment creditor to prove some threat to its ultimate ability to collect a judgment. Assuming that judgment debtors do not routinely seek to evade judgments by improper disposition of their assets, enforcing courts would seldom have to make discretionary calls and invite the charge of discrimination. At the same time, a judgment creditor's interest in enforcing a judgment for compensatory damages is fully secured, while the judgment debtor is able to pursue what are usually successful challenges to a punitive award.

II. DENYING FULL FAITH AND CREDIT TO PUNITIVE DAMAGES AWARDS

A state's power to stay enforcement of sister-state judgments pending appeal provides an important, if short-term solution to the problem of errant trial verdicts, but a more comprehensive solution is suggested by historical interpretation of the Full Faith and Credit Clause. Could states refuse to enforce punitive awards rendered by sister-states because they are based on "penal" laws?

159. Other reasons include (1) the lesser need for judgment creditor protection when a judgment is for punitive damages, and (2) the potential harm to other creditors when a large bond is required. See supra note 11.

160. Bond caps like those adopted in response to Engle likewise have the virtue of providing fixed references for courts.

161. It seems unlikely that large judgment debtors, particularly those subject to SEC reporting requirements, will try to hide or dissipate substantial assets. There is certainly no indication that the tobacco companies have attempted to protect their assets, assuming such a tack would even make sense for a publicly-traded company that has an extensive national and international business.

162. To the extent that the punitive judgment creditor is concerned with its priority among other creditors, the Model Act preserves the creditor's lien priority while appeals are completed. See UNIF. LAW COMM'S MODEL PUNITIVE DAMAGES ACT § 13 cmt., 14 U.L.A. 72 (2000) ("The provision does not affect the right of a judgment creditor to perfect a lien or establish its priority while an appeal is pending.").

163. See infra note 303.
A. THE ISSUE

The Full Faith and Credit Clause contains no express exceptions. Nonetheless, the Supreme Court has recognized that "there may be limits to the extent to which the policy of one state ... may be subordinated to the policy of another," and so has recognized implied exceptions to the command of full faith and credit.¹⁶⁴ These exceptions have been traditionally based on principles of international law prevailing when the Constitution was adopted.¹⁶⁵

As early as 1825, the Court affirmed the international law principle that "[t]he courts of no country execute the penal laws of another."¹⁶⁶ Although first recognized as a limitation on American courts' obligation to enforce other nations' laws, the penal-law exception was later extended to sister-state judgments.¹⁶⁷

American courts vigorously applied the penal-law exception well into the twentieth century.¹⁶⁸ Based on the exception, several forms of non-compensatory damages were deemed "penal" and unenforceable in sister-states.¹⁶⁹ In recent decades, however, state courts have been far more reluctant to apply the penal-law exception, particularly to deny enforcement of sister-state judgments.¹⁷⁰ Some commentators have even suggested that the penal-law exception is moribund.¹⁷¹

¹⁶⁵. See, e.g., Sun Oil Co. v. Wortman, 486 U.S. 717, 724 (1988); Huntington v. Attrill, 146 U.S. 657, 685 (1892); STORY, supra note 94, at ch. XV. Modern limitations on the enforcement of state court judgments may also be based on the 14th Amendment. See, e.g., Pennoyer v. Neff, 95 U.S. 714, 733 (1878).
¹⁶⁷. See, e.g., Wisconsin v. Pelican Ins. Co., 127 U.S. 265, 290 (1888) ("The rule that the courts of no country execute the penal laws of another applies ... to all judgments for such penalties.").
¹⁶⁹. See id. at 611-17 (discussing laws providing for fixed damages, multiple damages and exemplary damages).
¹⁷¹. See SCOLES ET AL., supra note 36, at 1176. Most authorities recognize that the applicability of the penal-law exception to judgments remains an open question. See, e.g., RESTATEMENT (SECOND) CONFLICT OF LAWS § 120 cmt. d (1971); 36 AM. JUR. 2D Forfeitures and Penalties § 76 (Cum. Supp. 1999).
Requiems for the penal-law exception are premature. The penal-law exception has not been reexamined in the context of modern punitive damages.172 Earlier precedent typically addressed a private plaintiff's effort to enforce a relatively modest punitive damages award.173 In such cases, enforcement is inconsequential to the states involved. The emergence of metaverdicts, like that in *Engle*, dramatically alters the interests implicated by interstate enforcement of punitive damages judgments.174 A state that authorizes the recovery of large judgments can effectively extend its regulatory authority far beyond its borders.175 At the same time, compulsory enforcement of large judgments in a sister-state has the potential to devastate local economies, as *Engle* demonstrates. The contemporary implications of full faith and credit likely exceed anything imagined by its authors. The problem extends beyond purely private litigation like that in *Engle*. In recent decades, federal and state governments have dramatically increased their own use of civil penalties to exact compliance with criminal and quasi-criminal laws.176 This is manifest not only in the proliferation of fines and penalties imposed directly by the states, but also by the states' increased efforts to share in punitive damages judgments recovered by private citizens. Numer-

172. The last Supreme Court decision addressing the penal-law exception as a limit on the enforcement of judgments was in 1935, in *Milwaukee County v. M.E. White Co.*, 296 U.S. 268 (1935). See infra notes 233-43 and accompanying text.

173. See, e.g., cases cited supra note 134.

174. The historic shift in the nature and size of punitive damages awards was noted even before the decision in *Engle*. See, e.g., Dorsey D. Ellis, Jr., *Fairness and Efficiency in the Law of Punitive Damages*, 56 S. CAL. L. REV. 1, 2 (1982) ("Perhaps in the past the issue [of punitive damages] merited scant attention. Punitive damages were rarely assessed and likely to be small in amount. But today punitive damage liability can no longer be dismissed as a curious artifact of the common origins of tort and criminal law. Punitive damages are being sought and awarded in a growing number of cases, often for substantial amounts.").


176. See Kenneth Mann, *Punitive Civil Sanctions: The Middleground Between Criminal and Civil Law*, 101 YALE L.J. 1795, 1798 (1992) ("[P]unitive civil sanctions are rapidly expanding, affecting an increasingly large sector of society in cases brought by private parties as well as by the government. These sanctions are sometimes more severely punitive than the parallel criminal sanctions for the same conduct. Punitive civil sanctions are replacing a significant part of the criminal law in critical areas").
ous states have enacted laws allowing them to appropriate a portion of punitive judgments obtained in private litigation.\textsuperscript{177} By doing so, these states invite the objection that they are now using private civil litigation to accomplish traditional goals of "penal" law, and that the resulting judgments need not be given full faith and credit.\textsuperscript{178}

The following section addresses the question whether punitive damages judgments may constitute "penal-law" judgments and thus be excepted from the command of full faith and credit. This section will first examine the state of punitive damages law at two critical points in American legal history—at the time the Full Faith and Credit Clause was adopted, and the present. It will then review Supreme Court precedent addressing the penal-law exception, and the implications of this precedent for contemporary enforcement of punitive damages awards.

B. PUNITIVE DAMAGES—THEN AND NOW\textsuperscript{179}

At the time of the Constitution's adoption, punitive damages were recognized to some degree in Anglo-American common law. In 1763, "exemplary" damages were awarded in the seminal English cases of \textit{Wilkes v. Wood}\textsuperscript{180} and \textit{Huckle v. Money},\textsuperscript{181} both arising from unlawful searches and seizures by

\begin{itemize}
  \item \textsuperscript{177} See infra notes 184-86 and accompanying text.
  \item \textsuperscript{178} Since 1989, the Supreme Court has expanded constitutional coverage to encompass ostensibly "civil" sanctions imposed by governmental entities for penal purposes. See, e.g., \textit{Austin v. United States}, 509 U.S. 602, 604 (1993) (finding the Excessive Fines Clause of the 8th Amendment applies to civil forfeiture proceedings); \textit{United States v. Halper}, 490 U.S. 435, 448-49 (1989) (holding the Double Jeopardy Clause of the 5th Amendment limits the government's power to impose civil, penal sanctions following criminal prosecutions); see \textit{also} \textit{Browning-Ferris Indus. v. Kelco Disposal, Inc.}, 492 U.S. 257, 298-99 (1989) (O'Connor, J., concurring) (stating the Excessive Fines Clause of the 8th Amendment limits punitive damages where the state shares in recovery).
  \item \textsuperscript{179} Both the history and the contemporary state of punitive damages have been examined extensively. See, e.g., 2 \textit{THEODORE SEDGWICK, A TREATISE ON THE MEASURE OF DAMAGES} 348-52 (9th ed. 1912); \textit{LINDA L. SCHLUETER & KENNETH R. REDDEN, PUNITIVE DAMAGES} (4th ed. 2000). This section focuses on those aspects of the phenomenon of punitive damages that have the most bearing on whether they fall within the penal-law exception.
  \item \textsuperscript{180} 98 Eng. Rep. 489 (K.B. 1763).
  \item \textsuperscript{181} 95 Eng. Rep. 766 (K.B. 1763).
\end{itemize}
King George III. As the presiding justice charged the jury in Wilkes,

[J]ury have it in their power to give damages for more than the injury received. Damages are designed not only as a satisfaction to the injured person, but likewise as a punishment to the guilty, to deter from any such proceeding for the future, and as a proof of the detestation of the jury to the action itself.

It is difficult to say how prevalent was the practice of awarding punitive damages in the late eighteenth century. Wilkes is the first English decision to expressly approve the awarding of punitive damages, and yet the court's charge to the jury suggests that Wilkes did not inaugurate a new remedy. Statutory forms of punitive damages had been occasionally authorized since the thirteenth century. Not until the mid-eighteenth century, however, did punitive damages fully emerge in the common law of Great Britain.

Punitive damages appeared in American common law at about the same time. The Supreme Court has observed that “the practice of awarding damages far in excess of actual compensation for quantifiable injuries was well recognized at the time the Framers produced the Eighth Amendment.” The Court’s view may be somewhat exaggerated, since existing case precedent from the Framers’ era is sparse. In 1784, a South Carolina jury awarded the plaintiff 400 pounds sterling in “very exemplary damages” when the defendant laced his drink with Spanish Fly. In 1791, in a suit for breach of a promise to marry, a New Jersey court instructed a jury “not to estimate the damages by any particular proof of suffering or actual loss;

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182. Both cases arose out of the Crown’s attempt to suppress publications critical of it. Wilkes’ home was searched, prompting him to file suit for trespass, see Wilkes, 98 Eng. Rep. at 489, and Huckle, a pressman, was temporarily imprisoned, prompting him to sue for trespass and false imprisonment, see Huckle, 95 Eng. Rep. at 768.


185. See Massey, supra note 184, at 1265-66.

186. See id. at 1268 (“The expansion of private rights, coupled with the functional necessity of punishing civil miscreants, created the logical opportunity for punitive damages to slip comfortably into the common-law system.”).


188. Genay v. Norris, 1 S.C.L. (1 Bay) 6, 7 (1784).
but to give damages for example's sake." Suffice it to say that punitive damages were sufficiently common in the late-eighteenth century for the Supreme Court to impute constructive knowledge of them to the Framers of the Constitution.

In the Framers’ era, punitive damages were understood to serve more than a punitive purpose. At the time, punitive damages appear to have compensated plaintiffs, in part, for “intangible” injuries like mental suffering and injury to one’s dignity. Since these injuries were not compensated in their own right under prevailing legal standards, punitive damages may have represented the common law’s early effort to fill a remedial void.

The notion that punitive damages were part compensatory and part punitive appears to have persisted well into the nineteenth century in American jurisdictions.

There is no evidence that government attempted to share in punitive damages recovered by private plaintiffs. To the

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190. By 1851, the Supreme Court would observe that it is a “well-established principle of the common law, that in . . . all actions on the case for torts, a jury may inflict what are called exemplary, punitive, or vindictive damages upon a defendant, having in view the enormity of his offence rather than the measure of compensation to the plaintiff.” Day v. Woodworth, 54 U.S. 363, 371 (1851).

191. See Note, Exemplary Damages in the Law of Torts, 70 HARV. L. REV. 517, 519 (1957); Ellis, supra note 174, at 15-17; Peter Hay, The Recognition and Enforcement of American Money-Judgments in Germany—The 1992 Decision of the German Supreme Court, 40 AM. J. COMP. L. 729, 743 (1992) (stating that punitive damages awards in English and American courts in the eighteenth and nineteenth centuries were also intended “for pain and suffering, mental anguish, offence to . . . dignity.”)

192. See SCHLUETER & REDDEN, supra note 179, § 1.3(c); Ellis, supra note 174, at 19.

193. See Cooper Indus., Inc. v. Leatherman Tool Group, Inc., 121 S. Ct. 1678, 1686 n.11 (2000) (“Until well into the 19th century, punitive damages frequently operated to compensate for intangible injuries, compensation which was not otherwise available under the narrow conception of compensatory damages prevalent at the time.”); see also Fay v. Parker, 53 N.H. 342, 382-84 (1873) (stating that punitive damages are intended to compensate plaintiff for emotional injury); Stuart v. W. Union Tel. Co., 18 S.W. 351, 353 (Tex. 1885) (“[T]he whole doctrine of punitory or exemplary damages has its foundation in a failure to recognize as elements upon which compensation may be given many things which ought to be classed as injuries entitling the person to compensation.”). See Note, supra note 191, at 517-33.

194. For example, in a 1987 report of the ABA on the tort liability system, the authors observed that proposals to divert punitive damages to the public were novel. See Report of the 1987 American Bar Association Action Commission to Improve the Tort Liability System, reprinted in SCHLUETER & REDDEN, supra note 179, app. A at 658-59. See also JOHN KIRCHER & CHRISTINE
contrary, common law recovery of punitive damages emerged at a time when governmental actions to recover monetary penalties against wrongdoers—termed "amercements" in England—had fallen into disuse.\textsuperscript{195} According to one legal historian, punitive damages constituted "the privatization of the amercement."\textsuperscript{196}

Punitive damages, like other remedies available in American courts, have evolved significantly since the eighteenth century. Three changes are particularly important to the present discussion. First, punitive damages today are widely viewed as exclusively serving the goals of punishment and deterrence. Second, punitive verdicts have increased in both size and frequency. Third, several states have recently taken the unprecedented action of mandating that plaintiffs share punitive awards with the state.

Today, few authorities rationalize punitive damages as serving a compensatory function.\textsuperscript{197} The "vast majority" of jurisdictions authorize punitive damages solely for the purposes of punishment and deterrence.\textsuperscript{198} As the Supreme Court has

\textsuperscript{195} Massey, \textit{supra} note 184, at 1267. Massey's article provides an excellent overview of the development of the amercement, which served a function similar to the modern fine, as well as the contemporaneous evolution of common-law punitive damages. \textit{See id.} at 1259-69.

\textsuperscript{196} Id. at 1269.

\textsuperscript{197} \textit{See Restatement (Second) of Torts} § 908(1) (1979) (defining punitive damages as "damages, other than compensatory or nominal damages"); \textit{Unif. Law Comm'r's Model Punitive Damages Act} § 1(1),(2), 14 U.L.A. 61 (Supp. 2001). The Model Act defines compensatory damages as an award "made to compensate a claimant for a legally recognized injury. The term does not include punitive damages." \textit{Id.} By contrast, punitive damages consist of "an award of money made to a claimant solely to punish or deter." \textit{Id.}

The compensatory rationale appears to have waned and largely disappeared in the nineteenth century. \textit{See Schlueter & Redden, supra} note 179, § 1.4(A), at 15-16. Schlueter and Redden contend that it has been well settled doctrine in this country for over a century that punitive damages are noncompensatory in character. \textit{Id.} § 1.4(B), at 16. While this may be somewhat of an exaggeration, it demonstrates the vintage of the prevailing view that punitive damages are not intended to compensate.

\textsuperscript{198} Kircher & Wiseeman, \textit{supra} note 194, § 4.02, 4.1 at 4-4, 4-17; \textit{see also Schlueter & Redden, supra} note 179, § 2.2, at 25 ("In almost all jurisdic-
observed, punitive damages "are not compensation for injury. Instead, they are private fines levied by civil juries to punish reprehensible conduct and to deter its future occurrence." 199

The few states that recognize some compensatory role for punitive damages identify two purposes—compensation for certain intangible losses and compensation for litigation expenses like attorney fees. 200 Because modern remedial law otherwise permits recovery for intangible injuries, 201 however, the remaining compensatory role of punitive damages is essentially limited to defraying litigation expenses. An appreciable number of states now include attorney fees within the scope of punitive damages. 202 By recognizing the right to recover attorney fees as an aspect of punitive damages, courts tacitly modify the "American Rule," under which attorney fees are not compensable damages in the absence of statutory authorization. 203

It merits reemphasis that the great majority of jurisdictions authorize punitive damages in order to punish and deter.


200. In Connecticut, for example, common-law punitive damages are recoverable in an amount equal to the plaintiff's "expenses of litigation." See Collins v. New Cannan Water Co., 234 A.2d 825, 831-32 (Conn. 1967). In Michigan, "exemplary" damages are recoverable in certain tort suits to compensate for humiliation or loss of dignity. Veselenak v. Smith, 327 N.W.2d 261, 264 (Mich. 1982). In Texas, punitive damages appear to be recoverable in part to compensate for litigation expenses and in part for losses that may be too "remote" to be captured under stricter tests of compensation. Hofer v. Lavender, 679 S.W.2d 470, 474-75 (Tex. 1984). More recently, the Texas Supreme Court has stated that punishment and deterrence are the sole justifications for punitive damages and has seemingly abandoned the compensation rationale. See Transp. Ins. Co. v. Moriel, 879 S.W.2d 10, 16-17 (Tex. 1994).

201. See James B. Sales & Kenneth B. Cole, Jr., Punitive Damages: A Relic That Has Outlived Its Origins, 37 VAND. L. REV. 1117, 1122 (1984) ("The ambit of compensatory damages has expanded rapidly over recent years to include an entire spectrum of actual and ethereal injuries, including mental anguish, physical pain, loss of society, loss of consortium, emotional trauma, and other metaphysical injuries.").

202. See SCHLUETER & REDDEN, supra note 179, § 2.2 (B) (1), at 30-31 n.73 (citing extensive case illustrations).

203. See Alyeska Pipeline Serv. Co. v. Wilderness Soc'y, 421 U.S. 240, 247 (1975) (explaining the "American Rule" under which the prevailing litigant is not ordinarily entitled to collect attorneys' fees from the loser).
With few exceptions, the remedial role of punitive damages recognized in earlier common law is served by other remedial measures.

The second distinctive feature of contemporary punitive damages is the degree to which punitive awards have increased, or at least appear to have increased.204 In 1989, Justice O'Connor observed, "Awards of punitive damages are skyrocketing."205 Partially in response to the Justices' perception, the Court soon began enunciating a new due process jurisprudence to curb excessive punitive damages.206

There is considerable debate about the actual frequency and size of punitive damages awards. Some recent empirical studies conclude that punitive damages awards are relatively "rare"207 insofar as they are given in only 3-5% of civil trials.208 On the other hand, experience in particular locales—certain metropolitan counties and the "tort hell" of Alabama209—suggests that the frequency of awards may vary considerably from jurisdiction to jurisdiction.210

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207. See, e.g., Michael L. Rustad, Unraveling Punitive Damages: Current Data and Further Inquiry, 1998 Wis. L. Rev. 15, 30 (1998). It is debatable, of course, whether a 3-5% rate of incidence should be considered "rare."
209. This characterization of Alabama is found in Thomas Koenig, The Shadow Effect of Punitive Damages on Settlements, 1998 Wis. L. Rev. 169, 180.
210. See, e.g., Eisenberg, supra note 208, at 640; Priest, supra note 204, at 825. Professor Priest has noted that as recently as the mid-twentieth century, "punitive damages verdicts were exceptionally rare in all jurisdictions and were available against only the most extreme and egregious of defendant ac-
There is also debate over how much the size of punitive damage awards has increased in recent decades. Again, there appears to be considerable geographic variation. Empirical evidence indicates that there has been a dramatic increase in the size of "high-end" jury awards in recent years. Certainly it is accurate to say that verdicts of the magnitude in Engle and other high-profile cases were unknown in the late eighteenth century.

The contemporary threat posed by the high-end award is compounded by two factors. First, a few states like Florida have grown more receptive to class action suits in mass tort litigation. When plaintiffs are permitted to aggregate their 

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211. See, e.g., STEPHEN DANIELS & JOANNE MARTIN, CIVIL JURIES AND THE POLITICS OF REFORM 227-38 (1995); MOLLER, supra note 208, at 36-38. A recent study of punitive damages awards in California concludes that awards have dramatically increased during the 1990s. Mark Ballard, Mississippi Becomes a Mecca for Tort Suits, NAT'L L.J., April 30, 2001, at A1. See Kevin Livingston, The Punies in California Aren't So Puny, NAT'L L.J., May 7, 2001, at A4 (reporting that punitive damages account for 88.4% of all damages awarded to plaintiffs during the 1990s, and that the average award has increased from $5.6 million to $19.3 million during this time period).

212. See, e.g., DANIELS & MARTIN, supra note 211, at 231; MOLLER, supra note 208, at 37; Richard W. Murphy, Superbifurcation: Making Room for State Prosecution in the Punitive Damages Process, 75 N.C. L. REV. 463, 465 n.4, 494-96 (1998); see also In re Exxon Valdez, 229 F.3d 790 (9th Cir. 2000) (awarding $5 billion in punitive damages). Recent examples of billion dollar awards are found in Gordon Fairclough, Philip Morris is Hit with $3 Billion Verdict, WALL ST. J., June 7, 2001, at A3; Phillip Rawls, Jury: Exxon Mobil to Pay $3.5 Billion to Alabama, LEGAL INTELLIGENCER, Dec. 20, 2000, at 4; and John Flynn Rooney, $1 Billion Judgment Upheld Against Auto Insurer, CHI. DAILY L. BULL., April 6, 2001, at 1.

213. One commentator observes that nineteenth century juries were willing to award punitive damages far in excess of the quantifiable harm done by a defendant. See Jonathan S. Massey, Why Tradition Supports Punitive Damages and How the Defense Bar Misreads History, TRIAL, Sept. 1995, at 19. While this may be true, the size of the jury awards identified by the author pales next to contemporary awards, even when adjustment is made for inflation. Massey's illustrative American awards, for example, range from $38,000 to $250,000 in current value. Id. at 21.

214. See Susan E. Kearns, Note, Decertification of Statewide Tobacco Class Actions, 74 N.Y.U. L. REV. 1336, 1354-55 (1999) (noting that Florida, Louisiana, and Maryland are exceptional in certifying class actions against tobacco companies); Jim Oliphant, Weight of Miami Trial Grows, Would Plaintiff Win Decimate Industry?, LEGAL INTELLIGENCER, April 8, 1999, at 3 ("Class action suits—with their ability to trigger staggering verdicts—are still viewed by anti-smoking forces as the hammer that will bring the tobacco industry to its knees in the United States.").
claims for punitive damages in a class, the possibility of verdicts like that in Engle increases. \[215\] Second, there are, as yet, no effective checks on the power of different courts to punish the same wrongful behavior in multiple suits. \[216\] As multiple punitive awards become more common, the cumulative threat of these awards to the defendant increases. \[217\]

As mentioned, one response to the perception that punitive damages have become excessive is the Supreme Court’s recent recognition of due process limits. \[218\] Other legislative responses include prohibiting punitive damages altogether, capping them, imposing a higher burden of proof on plaintiffs, and bifurcating the liability and damages phases of trial. \[219\] One of the most touted reform proposals in the past decade is “split-recovery” legislation. This reform permits individual states to appropriate a share of punitive damages awarded to private plain-

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215. Engle is illustrative. The award of $145 billion is to be divided among an unknown group of plaintiffs, whose size may vary between 300,000 and 500,000 members. See supra notes 1-8 and accompanying text. Thus, the per-plaintiff award of punitive damages varies between roughly $290,000 and $483,000. By contemporary standards, such per plaintiff awards are large but not unprecedented. Only when aggregated through the device of the class action do the individual awards reach phenomenal levels. The result in Engle recalls comments of the Fifth Circuit when, in refusing to certify a class in tobacco litigation, it observed, “The collective wisdom of individual juries is necessary before this court commits the fate of an entire industry or, indeed, the fate of a class of millions, to a single jury.” Castano v. Am. Tobacco Co., 84 F.3d 734, 752 (5th Cir. 1996).

216. See Murphy, supra note 212, at 543 (“A number of defendants have argued that such multiple awards violate due process, but none successfully.”). Ironically, one of the proposed solutions to the problem of multiple awards is to recognize class actions to recover punitive damages. See, e.g., Richard A. Seltzer, Punitive Damages in Mass Tort Litigation: Addressing the Problems of Fairness, Efficiency and Control, 52 FORDHAM L. REV. 37, 41-45 (1983). When one reflects on the results of class action treatment in Engle, one is reminded why the defendants’ bar is not eager to embrace this solution.

Federal Judge Jack Weinstein is presently attempting to engineer a nationwide class action that would resolve all claims for punitive damages against the tobacco industry. Some commentators express doubts that his efforts will survive legal scrutiny. See Bob Van Voris, Blue Cross Tobacco Case Set for Trial in Brooklyn, NAT'L L.J., Apr. 2, 2001, at A5.

217. The Engle class, for example, was limited to Florida residents. See Engle v. R.J. Reynolds Tobacco Co., 122 F. Supp. 2d 1355, 1358 (S.D. Fla. 2000). So limited, the class recovered a verdict that could force the tobacco companies into bankruptcy. See supra note 5 and accompanying text. It takes little imagination to foresee the implications of the verdict in Engle if it is replicated in but a few other states.

218. See supra note 149.

219. See Murphy, supra note 212, at 482-85; Klaben, supra note 194, at 108-09.
Since 1985, thirteen states have approved some form of split-recovery.

The split-recovery reform appears to be premised on two principles. First, advocates observe that punitive damages in most states are intended to punish and deter, and so should rightfully be shared with the public. Second, advocates maintain that plaintiffs who do not share their recoveries with the state enjoy a "windfall." The "windfall" contention is of-

220. See, e.g., Klaben, supra note 194, at 109 (advocating split-recovery between the plaintiff and the state); Murphy, supra note 212, at 484; James A. Breslo, Comment, Taking the Punitive Damage Windfall Away from the Plaintiff: An Analysis, 86 NW. U. L. REV. 1130, 1133 n.16 (1992); Scott Dodson, Note, Assessing the Practicality and Constitutionality of Alaska's Split-Recovery Punitive Damages Statute, 49 DUKE L.J. 1335, 1335 (2000); Note, An Economic Analysis of the Plaintiff's Windfall from Punitive Damages Litigation, 105 HARV. L. REV. 1900, 1911-16 (1992) (advocating state recovery of all punitive damages, while permitting plaintiff's attorney to recover fees). Chief Justice Rehnquist has seemingly endorsed the notion that punitive damages should be allocated to the state. As he observed in Smith v. Wade, "Punitive damages are generally seen as a windfall to plaintiffs, who are entitled to receive full compensation for their injuries—but no more. Even assuming that a punitive 'fine' should be imposed after a civil trial, the penalty should go to the State, not to the plaintiff—who by hypothesis is fully compensated." 461 U.S. 30, 59 (1983) (Rehnquist, J., dissenting).

221. The states' enactment of split-recovery statutes appears to have been prompted, in considerable part, by an ABA proposal in 1987, which would have allocated a portion of punitive damages to "compensate the plaintiff and counsel" while directing the remainder to "public purposes." See Klaben, supra note 194, at 115-16 (citing A.B.A, Report of the Action Commission to Improve the Tort Liability System 19 (1987)).

222. See Dodson, supra note 220, at 1336 n.12 (listing twelve state enactments). Of the twelve statutes listed by Dodson, four have been repealed. Dodson's count does not include the short-lived attempt of the Alabama Supreme Court to require that plaintiffs share punitive damages with the state. See Life Ins. Co. of Ga. v. Johnson, 701 So. 2d 524, 531-32 (Ala. 1997), modifying 684 So. 2d 685, 689 (1996). When debating health care reform in 1994, Congress considered allocating 75% of punitive damages recovered in health care malpractice actions to the state. See Klaben, supra note 194, at 106 n.14 (citing Senate Mainstream Coalition's "Proposed Agreement" on Health Care Reform, Dated Aug. 22, 1994, 1994 Daily Rep. For Exec. (BNA) No. 162, at d57 (Aug. 24, 1994)).

In a move it may come to regret, the Florida legislature repealed its split-recovery statute prior to the decision in Engle. See FLA. STAT. ANN. § 768.73 (2000).

223. See, e.g., Dodson, supra note 220, at 1345 (stating that a punitive judgment "reflects society's outrage at some egregious conduct potentially harming a whole segment of the public, not just the individual plaintiff. A more sensible distribution would thus allocate the award to some public purpose benefiting a part of society greater than just the already-compensated plaintiff" (citation omitted)).

224. See sources cited supra note 220.
ten linked to the perception that punitive damages have become excessive,\textsuperscript{225} even though it is unclear why an "excessive" award becomes acceptable simply because it is shared with the state.

Split-recovery statutes have been challenged on constitutional grounds.\textsuperscript{226} More recent challenges have failed.\textsuperscript{227} It appears likely, however, that if the Court ultimately considers split-recovery statutes, it will find sufficient governmental involvement to subject punitive verdicts to scrutiny under the Excessive Fines Clause of the Eighth Amendment.\textsuperscript{228} At the same time, it appears unlikely that the Excessive Fines Clause will add much to existing due-process limitations.\textsuperscript{229} If the state shares in a punitive verdict that is not excessive as a matter of due process, it seems unlikely that it will constitute an excessive fine.\textsuperscript{230}

It also appears likely that the Court will ultimately view split-recovery as a form of punishment invoking the Double Jeopardy Clause of the Fifth Amendment.\textsuperscript{231} In \textit{Austin v. United States}, the Court held that civil forfeiture proceedings were a form of punishment implicating the Double Jeopardy Clause.\textsuperscript{232} According to the Court, "a civil sanction that cannot fairly be said solely to serve a remedial purpose, but rather can only be explained as also serving either retributive or deterrent

\textsuperscript{225} See, e.g., \textit{Johnson}, 701 So. 2d at 531-32 (rejecting earlier ruling requiring split-recovery based on new due process limits on verdicts that will prevent excessive awards). \textit{See generally} \textit{Dodson, supra} note 220, at 1335-37 (stating that split-recovery statutes were enacted in response to a belief that punitive damages awards are excessive).

\textsuperscript{226} \textit{See generally} \textit{Dodson, supra} note 220, at 1353-68 (discussing plaintiffs' and defendants' constitutional challenges to split-recovery statutes); \textit{Benjamin Evans, Split-Recovery Survives: The Missouri Supreme Court Upholds the State's Power to Collect One-Half of Punitive Damage Awards}, 63 Mo. L. Rev. 511, 520-27 (1998) (discussing various constitutional theories on which to ground challenges to split-recovery statutes).

\textsuperscript{227} \textit{See} sources cited \textit{supra} note 226. Sixty percent of the punitive damages award at issue in \textit{Cooper Industries, Inc. v. Leatherman Tool Group, Inc.}, 121 S. Ct. 1678 (2001), was payable to the State of Oregon. \textit{Id.} at 1682. This aspect of the award was not at issue. \textit{Id.}

\textsuperscript{228} \textit{See} \textit{Dodson, supra} note 220, at 1355-58.

\textsuperscript{229} \textit{See} \textit{id.} at 1359.

\textsuperscript{230} Indeed, in \textit{BMW of North America, Inc. v. Gore}, 517 U.S. 559 (1996), the Court stated that one of three guideposts for assessing whether a punitive damages award is excessive as a matter of due process is how it compares to comparable fines and penalties. \textit{Id.} at 583.

\textsuperscript{231} \textit{See} \textit{Dodson, supra} note 220, at 1389-61.

\textsuperscript{232} 509 U.S. 602 (1993).
purposes, is punishment, as we have come to understand the term."233 As with the Excessive Fines Clause, however, application of the Double Jeopardy Clause to split-recovery statutes does not pose an appreciable threat to them.234 Nonetheless, recent Court decisions strongly suggest that the "penal" character of punitive damages is amplified as states share in their recovery.235

In summary, the modern phenomenon of punitive damages bears little resemblance to its colonial antecedent. Punitive damages are no longer a relatively modest remedy that purports to compensate as well as to punish. Modern punitive damages are justified essentially as a form of punishment, and there is a growing notion that such damages belong, at least in part, to the public. Further, punitive awards have grown dramatically in the past two centuries, to the point where they now receive the sustained attention of legislatures and the courts.236 To many, punitive damages are viewed as an economic blight as much as a judicial remedy.

C. LEGAL EVOLUTION OF THE PENAL-LAW EXCEPTION

The penal-law exception can be traced to the Supreme Court's decision in The Antelope.237 In that opinion, the Court refused to enforce the "penal" laws of Spain and Portugal, which arguably prohibited trading in slaves.238 The Court rejected the United States' contention that it was entitled to confiscate slaves seized off North American shores because the slave traders were violating the laws of their home nations of Spain and Portugal.239 Justice Marshall appears to have viewed the penal-law exception as axiomatic, for he cited no British or American precedent in its support.240

233. Id. at 610 (quoting United States v. Halper, 490 U.S. 435, 448 (1989)).
234. Application of the Excessive Fines Clause would simply prevent the state from seeking to recover punitive damages in the (unlikely) event the civil defendant had been criminally prosecuted for the same activity underlying the civil action. See Klaben, supra note 194, at 149-50 (observing that most actions giving rise to claims for punitive damages are not subject to criminal sanctions).
235. See cases cited supra note 178.
236. See supra notes 168-70, 182-86 and accompanying text.
237. 23 U.S. 66 (1825).
238. See id. at 123-25.
239. See id.
240. See id. at 123. There was very little Anglo-American published precedent at the time The Antelope was decided, and virtually no precedent at the
The Antelope involved international litigation in which recognition of foreign criminal law was sought. The Full Faith and Credit Clause was literally inapplicable. Yet, when finally confronted with the issue, the Court did not hesitate to extend the penal-law principle to suits to enforce American state-court judgments. In Wisconsin v. Pelican Insurance Co., the Court was asked to exercise original jurisdiction in a suit brought by the state of Wisconsin to enforce a judgment obtained in its courts against another state’s citizen. The underlying judgment was based on an insurance company’s failure to make annual reports to the state concerning its conduct of insurance business in Wisconsin. According to state law, the company’s failure to comply with state law resulted in a fixed penalty of $500 a month throughout the period of non-compliance.

The Court declined to exercise jurisdiction over the judgment enforcement action because the judgment was based on a “penal” law. According to the Court,

The rule that the courts of no country execute the penal laws of another applies not only to prosecutions and sentences for crimes and misdemeanors, but to all suits in favor of the State for the recovery of pecuniary penalties for any violation of statutes for the protection of its revenue, or other municipal laws, and to all judgments for such penalties. If this were not so, all that would be necessary to give

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241. See Thomas B. Stoel, Jr., The Enforcement of Foreign Non-Criminal Penal and Revenue Judgments in England and the United States, 16 INT’L & COMP. L.Q. 663, 663-64 (1967). The limited precedent prior to The Antelope has been rationalized in different ways. According to the late Professor Robert A. Leflar, existing precedent stood for the proposition that one nation would not enforce the laws of another nation if those laws conflicted with local public policy and worked to the disadvantage of forum residents. See Robert A. Leflar, Extrastate Enforcement of Penal and Governmental Claims, 46 HARV. L. REV. 193, 195 (1932). Professor Mark W. Janis, in contrast, contends that The Antelope is founded on quite different precedent and a quite different rationale. See Mark W. Janis, The Recognition and Enforcement of Foreign Law: The Antelope’s Penal Law Exception, 20 INT’L LAW. 303 (1986). According to Janis, the penal-law exception was based on British precedent that deferred to the penal laws of another nation by declining to confiscate property that, under applicable penal law, rightly belonged to that nation. See id. at 307-08.


243. Id. at 286-87.

244. Id.

245. Id. at 267 (Court facts).
ubiquitous effect to a penal law would be to put the claim for a penalty into the shape of a judgment.\textsuperscript{246}

The Court rejected the state's contention that the penal-law exception was applicable solely to "criminal" laws. The Court cited copiously from British and American treatises on conflicts of law, private international law, and equity, purportedly extending the penal-law exception beyond purely criminal laws.\textsuperscript{247} The Court also addressed the impact of the Full Faith and Credit Clause on the continued vitality of the penal-law exception, and rejected the contention that the clause preempts the exception.\textsuperscript{248} Although technically dictum,\textsuperscript{249} the Court's examination of the clause was not casual.

The Court also offered a clue as to the meaning of "penal" as used in the penal-law exception. The Court observed, "The cause of action was not any private injury, but solely the offense committed against the State by violating her law. The prosecution was in the name of the State, and the whole penalty, when recovered, would accrue to the state."\textsuperscript{250}

The decision in \textit{Pelican Insurance} indicated, then, that the penal-law exception of international law is impliedly incorporated as an exception to the Full Faith and Credit Clause,\textsuperscript{251} and the exception extends to a state's enforcement of its civil

\textsuperscript{246} Id. at 290.
\textsuperscript{247} Id. at 290-91.
\textsuperscript{248} Id. at 291-92.
\textsuperscript{249} The Court noted in the later decision of \textit{Fauntleroy v. Lum}, 210 U.S. 230, 236 (1908), that the discussion of full faith and credit in \textit{Pelican Insurance} was dictum.
\textsuperscript{250} 127 U.S. at 299.
\textsuperscript{251} The author has discovered nothing in the history of the adoption of the Full Faith and Credit Clause that would shed light on the "Framers' intent" concerning the penal-law exception. \textit{See generally} sources cited supra notes 64, 69-70. Although Justice Story addresses the Clause, his treatise is devoid of any reference to punitive damages. \textit{See generally} \textit{STORY, supra} note 94. Nor has the Supreme Court, in its opinions examining the penal-law exception to full faith and credit, cited to historical evidence of such intent. Rather, the Court appears to have assumed that international law principles, especially those prevailing in Anglo-American jurisdictions, were not superseded by the Full Faith and Credit Clause. \textit{See, e.g., Pelican Ins. Co.}, 127 U.S. at 289-92. This is in contrast to the Court's early interpretation of the clause in other contexts, where the Framers' intent was considered. \textit{See, e.g.}, \textit{McElmoyle v. Cohen}, 38 U.S. 312, 325 (1839) (finding that in examining the import of giving "full faith and credit" to a judgment, "we need not doubt . . . what the framers of the Constitution intended").
judgments to recover "penalties." So limited, the penal-law exception encompasses enforcement of both criminal and civil penalties sought by a state, but does not apply to private-party suits even when some form of "penal" relief is sought.

Four years later, the Court directly addressed whether the penal-law exception limits a state's obligation under the Full Faith and Credit Clause to enforce sister-state judgments. In *Huntington v. Attrill*, the Court was asked to deny enforcement of a private party's judgment based on the ground that it was "penal." In essence, the judgment debtor urged the Court to extend the exception to judgments obtained by private litigants insofar as the creditor sought to recover monies in excess of compensatory damages. The Court was thus asked to give the penal-law exception greater scope than had been recognized in *Pelican Insurance*.

The judgment creditor in *Huntington* had lent money to a corporation that later became insolvent. Prior to the loan, the corporation had filed a report with the state of New York, signed by director and shareholder Attrill, avowing that the issued stock of the corporation had been fully paid. When the report proved false, the creditor sued Attrill under a New York state law making him liable for the corporation's debt, and obtained a judgment from a New York court.

When the creditor sought to enforce his New York judgment in the state courts of Maryland, his suit was dismissed. The Maryland court concluded that, because Attrill's liability was strict, and not premised on proof that he had actually

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252. The Court appears to affirm that claims in which the state suffers "private and particular injury" to its own proprietary interests fall outside the penal-law exception. 127 U.S. at 295-96.
253. 146 U.S. 657 (1892).
254. *Id.* at 663. The Court stated that the most "prominent" argument of the debtor was that state law imposed liability without inquiring whether a creditor had been deceived and induced by deception to lend his money or to give credit, or whether he had incurred loss to any extent by the inability of the corporation to pay, and without limiting the recovery to the amount of loss sustained, and was intended as a punishment.
255. *Id.* at 661.
256. *Id.*
257. *Id.*
258. *Id.* at 663.
caused Huntington's loss, the underlying judgment was "penal" and not entitled to full faith and credit.259

In Huntington, the Court held that the judgment was entitled to full faith and credit. In doing so the Court necessarily agreed that the penal-law exception limited a state's obligation to give full faith and credit to sister-state judgments.260 Otherwise, the Court's extensive discussion of what constitutes a "penal" judgment would have been superfluous. It is difficult to say, however, what meaning the Court gave to the term "penal." At least three interpretations can be found in Huntington, and each has different implications for the issue of whether a punitive damages award might come within the penal-law exception.

Huntington can be construed to stand for the proposition that "penal" is synonymous with "criminal." Under this view, suits to enforce judgments obtained in civil litigation are never "penal." Instead, the penal-law exception is limited to situations where the state proceeds criminally against a party and obtains a conventional penalty, such as a sentence or a fine.

Several statements in Huntington support this restrictive view of "penal." For example, as the Court observed early in its opinion, "Penal laws, strictly and properly, are those imposing punishment for an offence committed against the State, and which, by the English and American constitutions, the executive of the State has the power to pardon."261 Similarly, the Court cited approvingly to an earlier decision, in which it observed that "criminal laws,' that is to say, laws punishing crimes" constitute "the whole class of penal laws which cannot be enforced extra-territorially."262

259. See id.
260. The Court's framing of the issue before it seems to make this clear:
   If a suit to enforce a judgment rendered in one State... is brought in the courts of another State, this court, in order to determine... whether the highest court of the latter state has given full faith and credit to the judgment, must determine for itself whether the original cause of action is penal in the international sense.
   Id. at 683-84. But see Scoles et al., supra note 36, at 1177 (arguing that Huntington requires that full faith and credit be given to non-penal-law judgments, but does not go so far as to deny full faith and credit to penal-law judgments).
261. Huntington, 146 U.S. at 667.
262. Id. at 674-75.
Yet, the view that "penal" means nothing more than "criminal" conflicts with the Court's decision in *Pelican Insurance*. In *Pelican Insurance*, the state had argued that the penal-law exception was inapplicable because it was seeking to enforce a "civil" judgment. The Court rejected this narrow interpretation of "penal" and expressly stated that the term extended "not only to prosecutions and sentences for crimes and misdemeanors, but to all suits in favor of the state for the recovery of pecuniary penalties . . . and to all judgments for such penalties."263 The litigants in *Huntington* cited extensively to *Pelican Insurance*, and the Court itself quoted generously from its prior decision.264 It seems unlikely that the Court intended to recede from the broader rationale of *Pelican Insurance*, that "penal" laws may include civil penalties sought by the state.

There is a second interpretation of *Huntington*. The case might affirm the broader definition of "penal" set forth in *Pelican Insurance*, which would include civil judgments to enforce penalties, provided they are obtained in favor of the state. This second interpretation has much to commend it. Of particular importance, it affirms the international law definition of "penal" that prevailed in British courts at the time of the decision in *Huntington*.

The judgment creditor in *Huntington* also sought enforcement of his judgment in Canada, where the debtor resided.265 When the Canadian court's judgment was appealed to the Privy Council in Great Britain, the judgment debtor argued that the underlying judgment was "penal" because it bore "no relation to the actual loss or damage sustained by the party to whom the

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The real nature of the case is not affected by the forms provided by the law of the State for the punishment of the offence. It is immaterial whether . . . the prosecution must be by indictment or by action; or whether . . . a judgment there obtained for the penalty might be enforced by execution, by scire facias, or by a new suit. In whatever form the State pursues her right to punish the offence against her sovereignty, every step of the proceeding tends to one end, the compelling the offender to pay a pecuniary fine by way of punishment for the offence.


264. See *Huntington*, 146 U.S. at 670-71.

action is given." The Privy Council rejected this contention, stating,

Their Lordships do not hesitate to accept that exposition of the law, which, in their opinion, discloses the proper test for ascertaining whether an action is penal within the meaning of the rule. A proceeding, in order to come within the scope of the rule, must be in the nature of a suit in favour of the State whose law has been infringed. . . . Penalties may be attached to [foreign laws], but that circumstance will not bring them within the rule, except in cases where these penalties are recoverable at the instance of the State, or of an official duly authorized to prosecute on its behalf, or of a member of the public in the character of a common informer.

The Privy Council's explanation of the penal-law exception, according to the Supreme Court in Huntington, expressed the "true limits of the international rule."

There is, then, much to commend the view that the penal-law exception is limited to judgments for penalties, whether styled criminal or civil, recovered on behalf of the state. Regrettably, however, the Court in Huntington seemed to offer yet a third definition of "penal," one that has come to be identified by many courts as the holding of the case.

According to the Court in Huntington,

The question whether a statute of one State, which in some aspects may be called penal, is a penal law in the international sense, so that it cannot be enforced in the courts of another State, depends upon the question whether its purpose is to punish an offence against the public justice of the State, or to afford a private remedy to a person injured by the wrongful act.

Applying this definition to the claim at issue in Huntington, the Court observed that the judgment creditor had recovered his judgment in a private, civil action, and that his dam-

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266. Id. at 152-53.
267. The Court in Huntington described the "common informer" action as one brought by a private person to enforce a penalty authorized by criminal law, which can also be enforced by the state itself, and which can be pardoned. See Huntington, 146 U.S. at 673.
268. Huntington, [1893] A.C. at 157. It is also significant that the British Privy Council cited extensively to American sources of law, including the Court's decision in Pelican Insurance and Justice Story's treatise on conflicts of law. Id. at 155-57.
269. Huntington, 146 U.S. at 680.
270. See, e.g., Loucks v. Standard Oil Co., 120 N.E. 198, 198 (N.Y. 1918) (Cardozo, J.); RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 120 cmt. d. See generally Kutner, supra note 168, at 609 (discussing the differences in the descriptions of the penal law doctrine between the Privy Council and the Court in the Huntington cases).
ages were "measured by the amount of his debt."\(^{272}\) Since this measure of damages was plainly a remedy for the judgment creditor's loss, it was not a "penal" judgment.

This part of the decision in *Huntington* preserved the contention that judgments obtained by private litigants might be "penal" if they are obtained to vindicate a public wrong rather than to provide a private remedy. After all, if the Court truly intended to limit the penal-law exception to suits brought by the state, it had no need to scrutinize Mr. Huntington's judgment to determine if it was punitive or remedial. Following *Huntington*, courts increasingly scrutinized state laws permitting private parties to recover various forms of ostensibly punitive damages to determine whether they served, at least in part, a compensatory function.\(^{273}\)

Indeed, the Court appears to have affirmed this approach in later cases, when deciding the scope of federal diversity jurisdiction\(^{274}\). In *Atchison, Topeka & Santa Fe Railway Co. v. Nichols*, for example, the Court affirmed that a state wrongful death statute authorizing fixed damages was not "penal" under *Huntington*, in part because the statute provided a predictable formula for compensatory damages that could not otherwise be accurately calculated.\(^{275}\) And in *James-Dickinson Farm Mort-

\(^{272}\) *Id.* at 676.

\(^{273}\) See Kutner, *supra* note 168, at 622 ("Thus, while the penal law label may continue to be applied to foreign statutes which set damages in an amount wholly unrelated to the extent of harm sustained, there appears to be a consensus that liability which is either proportionate to the extent of injury or conceived as a rough measure of compensation for injury is not penal in the international sense."). See, e.g., Holbein v. Rigot, 245 So. 2d 57, 59 (Fla. 1971) (stating the judgment "was not to punish defendant... but to give plaintiff's redress or reparation by way of punitive or exemplary damages for the private wrong they suffered"); City of Philadelphia v. Smith, 413 A.2d 952, 954 (N.J. 1980) (finding the penalty was intended to compensate the city for trouble and expense in litigating tax liability); *Loucks*, 120 N.E. at 199 (concluding that a wrongful death statute is not penal where the "purpose of the punishment is reparation to those aggrieved"); Medina & Medina, Inc. v. Gurrentz Int'l Corp., 450 A.2d 108, 110 n.3 (Pa. Super. Ct. 1982).

\(^{274}\) In reviewing the exercise of diversity jurisdiction in the cases cited in the text, the Court recognized that federal trial courts cannot enforce causes of action that would not be enforced by local state courts. The defendants in these cases urged that the local state courts would refuse to enforce causes of action arising under other state laws that were "penal."

\(^{275}\) 264 U.S. 348, 352 (1924) (stating that damages were "compensation for pecuniary loss[,]" the legislature recognized "the incapability of precise accuracy being attained either by court or jury of the damages that may result from the death of a person"). The Court reached a similar result in *Brady v. Daly*, 175 U.S. 148 (1899), decided seven years after *Huntington*. In *Brady*,
gage Co. v. Harry,"276 the Court concluded that a state law providing for exemplary damages “not to exceed double the amount of the actual damages” was not a “penal” law. According to the Court, the statute “as applied in this case does not add any extraordinary feature to the common law liability for fraudulent misrepresentations.”277 In neither case did the Court offer the more simple response suggested by Pelican Insurance and Huntington: The penal-law exception is not implicated by private-party litigation.

In 1935, the Court issued its next, and last, opinion concerning the penal-law exception to full faith and credit.278 In Milwaukee County v. M.E. White Co.,279 the Court refused to extend the penal-law exception to governmental judgments for unpaid taxes. Judgments for unpaid taxes, the Court held, are not “penal.”280 Further, “no state can be said to have a legitimate policy against payment of its neighbor’s taxes, the obligation of which has been judicially established.”281

M.E. White, more than any other Court decision, lends support to the view that the Court disfavors the penal-law exception. On one hand, the Court acknowledged possible exceptions to the command of full faith and credit, and cited its decisions in Pelican Insurance and Huntington.282 Yet, the Court interjected a discordant note when it gratuitously commented that “[w]e intimate no opinion” about whether a judgment based on a penal law must be given full faith and credit.283

the Court considered whether a federal copyright claim authorizing recovery of damages based on a fixed statutory formula was “penal,” thus not within the federal circuit court’s jurisdiction. Id. at 152-53. The Court concluded that the claim was not penal, based largely on the fact that the federal statute was intended to “provide for the recovery by the proprietor of full compensation from the wrongdoer for the damages” in light of “the difficulty of determining the amount of such damage in all cases.” Id. at 154. The Court also observed that “[t]he whole recovery is given to the proprietor, and the statute does not provide for a recovery by any other person in case the proprietor himself neglects to sue.” Id. at 154.

277. Id. at 126 (citations omitted).
278. The Court has seemingly acknowledged the penal-law exception in more recent cases, see, e.g., Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 413-14 (1964) (citing Pelican Insurance and Huntington), but has not had occasion to apply it.
279. 296 U.S. 268 (1935).
280. Id. at 270-73.
281. Id. at 277.
282. Id. at 273.
283. Id. at 279.
This comment is at odds with the working premise of *Huntington*—that full faith and credit need not be extended to truly penal judgments—but *M.E. White* provides an obvious foothold for the contention that the penal-law exception does not extend to the enforcement of civil judgments.

The Court appeared to repudiate earlier precedent in one respect. According to *Pelican Insurance*, the fact that one state court has reduced an objectionable cause of action, like a penal-law claim, to final judgment, does not preclude another state in which judgment enforcement is sought from scrutinizing the underlying cause on which the judgment is based. As the Court in *Pelican Insurance* stated, “The essential nature and real foundation of a cause of action are not changed by recovering judgment upon it....”

Even before *M.E. White*, the Court had undermined this categorical position. In *Fauntleroy v. Lum*, the Court held that, while a state might refuse to entertain a suit based on a cause of action offensive to its “public policy,” once the cause had been reduced to a final judgment it was entitled to full faith and credit. Relying on *Fauntleroy*, the Court in *M.E. White* intimated that, while a state might refuse to enforce a cause of action based on “penal” law, it did not follow that judgments based on such a cause were likewise beyond the command of full faith and credit.

In drawing a distinction between the enforcement of claims and the enforcement of judgments, the Court also expressed a willingness to scrutinize the distinct policies implicated by each form of enforcement. *M.E. White* is founded in part on the Court’s conclusion that many of the objections to enforcing another state’s revenue law against its citizens simply do not apply once a legal claim has been reduced to a monetary judgment.

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284. As the Court stated in *Huntington*, “If a suit to enforce a judgment rendered in one State . . . is brought in the courts of another State, this court, in order to determine . . . whether the highest court of the latter State has given full faith and credit to the judgment, must determine for itself whether the original cause of action is penal in the international sense.” 146 U.S. 657, 683-84 (1892).


287. See id. at 237-38.

288. See *M.E. White*, 296 U.S. at 278.

289. Id. at 276 (stating that “[t]rial of these issues, even though the judgment be for taxes incurred under the laws of another state, requires no scru-
Therefore, M.E. White raises the possibility that a future Court might deny application of the penal-law exception to the enforcement of civil judgments. Such contraction of the penal-law exception would make it largely inconsequential as a limitation on the Full Faith and Credit Clause. M.E. White also suggests that the Court is no longer willing to follow the lead in cases like Pelican Insurance and Huntington, where the Court affirmed the penal-law exception based solely on its pedigree in international law. Given the importance of the Full Faith and Credit Clause to interstate relations, expansion of the exception will require a compelling justification.

D. RECONSIDERING APPLICATION OF THE PENAL-LAW EXCEPTION

1. Private Litigant Recovery

The burden of proof is formidable for those who would extend the penal-law exception to private judgments for punitive damages. The exception itself has no express foundation in the Full Faith and Credit Clause. As a result, any extension of the penal-law exception must be based on legal history or contemporary policy.

The earliest historical suggestion that the penal-exception might be extended to private judgments appears in Huntington v. Attrill, more than a century after the Constitution's adoption. Huntington arguably suggests that full faith and credit is required only when a judgment provides a "private remedy to a person injured." If construed liberally, this definition might
exclude most contemporary judgments for punitive damages, which no longer purport to serve any remedial purpose.293 Huntington, however, is rife with inconsistency.294 One finds more in Huntington to repudiate extension of the exception to private judgments than to support it.295 Moreover, the Court has never actually denied recognition of a private, punitive judgment based on the rationale stated in Huntington. All things considered, the decision is a frail historical basis for arguing that private judgments are encompassed within the penal-law exception.296

Historical principles of international law prevailing in Great Britain affirm the inapplicability of the penal-law exception to private judgments. The courts of Great Britain appear never to have encompassed private judgments within the exception. The English precedent on which Justice Marshall apparently relied in The Antelope involved action by government.297 Similarly, in the Privy Council’s decision in Huntington v. Attrill, the penal-law exception was understood as applicable to suits in favor of a foreign state.298 This view still prevails in the British commonwealth.299

Therefore, to the extent that the penal-law exception in American law is founded on historical pedigree, the argument for its extension to private judgments fails.300 If the exception is to be extended, some compelling policy rationale must be

293. See supra notes 162-63 and accompanying text.
294. See supra notes 215-27 and accompanying text.
295. See supra notes 215-27 and accompanying text.
296. Lower court precedent prior to Huntington adopted a broader view of what constituted a “penal” law, but that precedent appears to have arisen in the context of claim rather than judgment enforcement. See Kutner, supra note 168, at 610-11.
297. See supra note 240.
298. See supra note 265 and accompanying text.
300. See also RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 483 cmt. b (1987) (defining a penal judgment as “a judgment in favor of a foreign state or one of its subdivisions, and primarily punitive rather than compensatory in character”).
Most policies that have been urged in support of the penal-law exception generally apply to the enforcement of penal claims, rather than penal judgments. These policies largely concern the appropriateness of conducting the trial outside the state whose penal laws are being enforced, and so have no relevance to judgment enforcement.

The rationale that might be implicated by penal judgment enforcement is the public policy defense. The public policy defense, which provides the basis for refusing to enforce private penal judgments in the courts in the United Kingdom, posits that a jurisdiction may refuse to enforce a judgment founded on the laws of another jurisdiction that offend local policy. The public policy defense is frequently employed by state courts when they are called upon to enforce legal rules that conflict with "fundamental" policies of the forum. As applied to punitive judgments, the defense might be used to deny enforcement to a judgment that is based on liability principles not recognized by the enforcing state, that is the product of objectionable procedures, or that is excessive.

However, the Supreme Court has long rejected the contention that American states may refuse to enforce sister-states' policies.

301. See Milwaukee County v. M. E. White Co., 296 U.S. 268, 276-77 (1935) ("The very purpose of the full faith and credit clause was to alter the status of the several states as independent foreign sovereignties... That purpose ought not lightly to be set aside out of deference to a local policy which, if it exists, would seem to be too trivial to merit serious consideration when weighed against the policy of the constitutional provision and the interest of the state whose judgment is challenged.").

302. See, e.g., Stoel, supra note 240, at 669; Leflar, supra note 240, at 201-02.

303. See, e.g., Stoel, supra note 240, at 669; Leflar, supra note 240, at 201-02.

304. See Lee & Edwards, supra note 299, at 1-2 (finding that courts in the United Kingdom might refuse to enforce private punitive judgments based on the "public policy" defense).

305. See id. Professor Leflar argues that the penal-law exception is historically premised on the notion that courts should not enforce laws that are offensive to local public policy. See Leflar, supra note 240, at 195.

306. See SCOLESETAL., supra note 36, at 139-41.

307. The German Supreme Court has declined, as a matter of public policy, to enforce American punitive damages judgments beyond those amounts that can be attributed to the reimbursement of attorney fees. See Hay, supra note 191, at 745-46. Similarly, the Restatement (Third) of Foreign Relations Law takes the position that American courts are not required to enforce foreignnation judgments for the collection of penalties, based in part on the public policy defense. See RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW (1987) § 483 Reporter's note 2.
judgments because local public policy differs from that of the law underlying the judgments. As recently as 1998, the Court observed that there is “no roving ‘public policy exception’ to the full faith and credit due judgments.” As a consequence, the Court has rejected the public policy defense as a basis for denying enforcement of monetary judgments generally, or as the basis for denying enforcement of equitable decrees relating to monetary claims.

The question then arises: Is there anything distinctive about modern punitive damages that justifies a departure from the historical practice of requiring that states give full faith and credit to private judgments that offend local policy? Consideration of the punitive verdict in Engle suggests a distinction.

Full faith and credit was envisioned principally as a tool of debt collection in a system of federated states. Within this vision, full faith and credit insured that commercial obligations were honored and civil wrongs compensated. Today, however, few states authorize punitive damages for remedial purposes. Instead, the avowed goal of punitive damages is to punish, and cases like Engle demonstrate that juries can occasionally punish to a degree unimaginable to the authors of the Full Faith and Credit Clause. Further, the only courts that can check such excesses are those of the state that has facilitated recovery of the judgment and, perhaps, the Supreme Court. Once a state court’s judgment is final, the res judicata component of full faith and credit requires other states to enforce it without consideration of its fairness or legality.

308. See Estin v. Estin, 334 U.S. 541, 546 (1948) (finding the Full Faith and Credit Clause “ordered submission by one State even to hostile policies reflected in the judgment of another State, because the practical operation of the federal system, which the Constitution designed, demanded it”); Fauntleroy v. Lum, 210 U.S. 230, 236-37 (1908).


311. See Baker, 522 U.S. at 234.

312. See supra notes 70-73 and accompanying text.

313. See supra note 177 and accompanying text.

314. As discussed previously, enforcing courts must give res judicata effect to sister-state judgments as a matter of full faith and credit. See supra notes 86-87 and accompanying text. One fundamental requirement of res judicata is that the defendant must assert all available defenses to a judgment in the underlying action. See JACK H. FRIEDENTHAL ET AL., CIVIL PROCEDURE 655 (3d
Contemporary extension of full faith and credit to punitive judgments also transforms the constitutional command into a means by which states can extend their regulatory authority beyond state borders. As Engle illustrates, massive punitive awards can give states exceptional influence over national policy regarding controversial products like tobacco, firearms, or pharmaceuticals. In the civil context, the power to punish may sometimes be the power to destroy entire industries and decimate local economies. The Court has recognized that "there may be limits to the extent to which the policy of one state . . . may be subordinated to the policy of another." Verdicts like the one in Engle arguably approach those limits.

These are plausible arguments. Yet, they are not sufficient reason to authorize a categorical rule excepting private punitive damages judgments from the command of full faith and credit. First, the advent of large punitive verdicts does not signal the need for novel limits on the command of full faith and credit. In the recent past, awards of compensatory damages have forced major companies into bankruptcy far more often than punitive awards. More importantly, the Supreme Court has already begun addressing the problem of excessiveness in punitive judgments through a singular expansion of the Due Process Clause. Due process provides a more tailored approach for limiting punitive damages than categorically excepting punitive judgments from the command of full faith and credit. An anomalous verdict like that in Engle should not
obscure the fact that most punitive judgments are within the bounds of reasonableness, and those that are not are frequently reversed.\textsuperscript{320} To generically except private punitive judgments from the command of full faith and credit is over-response, to say the least.

Nor does the potential impact of punitive judgments on other states' regulatory authority justify a generic exception to full faith and credit. One again finds that the Due Process Clause provides a more direct means of setting those limits. In \textit{BMW of North America, Inc. v. Gore}, the Court specifically circumscribed state power to punish out-of-state conduct through punitive damages.\textsuperscript{321} The Court observed, "[T]he economic penalties that a State ... inflicts on those who transgress its laws, whether the penalties take the form of legislatively authorized fines or judicially imposed punitive damages, must be supported by the State's interest in protecting its own consumers and its own economy."\textsuperscript{322} In \textit{BMW}, the Court refused to permit an Alabama jury to punish the defendant's behavior that was lawful in other states,\textsuperscript{323} and called into question a state's power to regulate unlawful conduct that occurs beyond its borders.\textsuperscript{324} Thus, \textit{BMW} offers the rudiments of a due process theory that may prevent state courts from using punitive remedies to regulate conduct outside their borders.\textsuperscript{325}

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\textsuperscript{320} Defense attorneys and their corporate clients predict that the decision . . . [in Cooper] will have a substantial effect on the punitives awarded by juries.
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While it is true that suits filed in state court will receive federal review only in the Supreme Court, if at all, there is no reason to think that this will appreciably diminish the scrutiny of state-court awards. Since 1991, the Court has aggressively granted review of state-court punitive awards. \textit{See supra} note 178 and accompanying text. The fact that \textit{Cooper} was an 8-1 decision indicates that the Court is in substantial agreement over the need to police punitive awards.

\textsuperscript{321} 517 U.S. 559 (1996).
\textsuperscript{322} Id. at 572.
\textsuperscript{323} \textit{See id.} at 572-73.
\textsuperscript{324} \textit{See id.} at 573 n.20, 577 & n.27.
\textsuperscript{325} It remains unclear what impact \textit{BMW} will have on punitive damages judgments, like that in \textit{Engle}, which address nationwide misconduct. Arguably, \textit{BMW} forecloses the imposition of punitive damages for any conduct beyond a state's borders, whether lawful or unlawful. \textit{See} Margaret Meriwether Cordray, \textit{The Limits of State Sovereignty and the Issue of Multiple Punitive
Neither the Supreme Court,\textsuperscript{326} nor state courts,\textsuperscript{327} have shown a desire to draw the quite extensive world of private punitive judgments into the reach of the penal-law exception.\textsuperscript{328} Given the history and precedent underlying the penal-law exception, and the fact that the Court has already recognized other constitutional limits on the perceived problems of punitive awards, it is difficult to imagine that the Court would boldly revise the meaning of full faith and credit at this late date in constitutional history. Even though the distinction between private and governmental penalties has blurred during the twentieth century, it is a distinction the Court continues to recognize.\textsuperscript{329}

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\textit{Damages Awards, 78 OR. L. REV. 275, 303-09 (1999).} The BMW Court, however, expressly approved a jury's consideration of wrongdoing in other states insofar as it is assessing the "reprehensibility" of the defendant's behavior. 517 U.S. at 576-77. It is uncertain whether a jury can, on one hand, limit its verdict to the punishment and deterrence of local misconduct, while simultaneously considering out-of-state conduct in assessing the defendant's "reprehensibility." \textit{See} Cordray, \textit{supra}, at 313-14 (arguing that, while this distinction is "a fine one," BMW should nonetheless provide some check on excessive regulation of out-of-state conduct).

326. \textit{See supra} notes 229-31 and accompanying text.


328. In decisions following \textit{Huntington v. Attrill}, 146 U.S. 657 (1892), the Court often took a pragmatic view of various forms of exemplary damages so as to exclude them from the "penal" classification. In particular, the Court recognized that compensation itself is often an elusive concept, and so exemplary damages may provide an indirect means of making the injured plaintiff whole. \textit{See supra} notes 229-31 and accompanying text. The same pragmatism might also inform contemporary views of punitive damages, notwithstanding the prevailing wisdom that they no longer compensate. Professor Thomas Koenig has emphasized that the principal impact of punitive damages may be their "shadow effect" on settlement—the means by which most suits are resolved. \textit{See The Shadow Effect of Punitive Damages on Settlements, 1998 WIS. L. REV. 169, 170-71.} According to Professor Koenig, the threat of punitive damages may be the catalyst that induces defendants to pay full compensatory damages in mass tort cases. \textit{Id.} at 177. If Professor Koenig is correct, punitive damages may well serve a "compensatory" role not recognized by contemporary critics. \textit{See also} G. Robert Blakey, \textit{Of Characterization and Other Matters: Thoughts about Multiple Damages}, 60 LAW & CONTEMP. PROBS., Summer 1997, at 97, 118-19.

329. The Court's decision in \textit{Browning-Ferris Industries v. Kelco Disposal, Inc.}, 492 U.S. 257 (1989), illustrates the Court's faithfulness to distinctions founded in constitutional history—even in the face of a fairly compelling argument that the distinctions have lost contemporary significance. In \textit{Browning-Ferris}, the Court refused to extend the Excessive Fines Clause to the regulation of punitive damages awards obtained by private parties. \textit{Id.} at 275.

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2. State Recovery of Punitive Damages

The argument that the penal-law exception should be extended to punitive damages recoverable by the state is easier to make. As an historical matter, penalties directly recoverable by the state appear to come within the exception recognized by international law.\textsuperscript{330} Further, the Supreme Court has edged quite close to the view that civil penalties shared with the state contain the essential characteristics of a fine or quasi-criminal penalty.\textsuperscript{331} Therefore, contemporary state efforts to share in punitive damages appear to place them within historical definitions of the penal-law exception.\textsuperscript{332}

The Court recognized that "punitive damages advance the interests of punishment and deterrence" that are also advanced by governmental recovery of penalties, \textit{id.} at 275, and further recognized that "a principle to be vital must be capable of wider application than the mischief which gave it birth." \textit{Id.} at 273 (quoting Weems v. United States, 217 U.S. 349, 373 (1910)). Nonetheless, the Court ultimately relied on the fact that "fines" were historically understood as penalties recovered by government alone in refusing to extend the Excessive Fines Clause to private punitive awards. 492 U.S. at 264 (declaring that "[t]o hold otherwise ... would be to ignore the purposes and concerns of the [Eighth] Amendment, as illuminated by its history"). The decision in \textit{Browning-Ferris} is but one of many decisions by the Court demonstrating a fidelity to the meaning of a constitutional provision as it was likely understood by its drafters. \textit{See, e.g.,} Austin v. United States, 509 U.S. 602, 608-10, 613-14 (1993); Burnham v. Superior Court, 495 U.S. 604, 610-22 (1990).


\textsuperscript{332} \textit{See McBride v. Gen. Motors Corp.,} 737 F. Supp. 1563, 1578 (M.D. Ga. 1990) (finding that the state's sharing in recovery of punitive damages "converts the civil nature action of the prior Georgia punitive damages statute into a statute where fines are being made for the benefit of the State"). A differing view is expressed in \textit{James A. Breslo, Comment, Taking the Punitive Damage Windfall Away from the Plaintiff: An Analysis,} 86 NW. U. L. REV. 1130, 1139-40 (1992). Breslo argues that diversion of state recovery to a "special compensation fund for victorious plaintiffs" would restore the "compensatory" purpose of punitive damages. \textit{Id.} While Breslo's contention is plausible, no state appears to actually divert its share to a fund from which victims of the particular defendant can
Yet, the fact that state-recovered penalties appear to come within the historical definition of penal judgments should not, alone, justify a significant contraction of the Full Faith and Credit Clause. Absent a compelling reason, the Court should not revive the penal-law exception simply because the state has emerged in modern efforts to reform punitive damages. The Court's decision in Milwaukee v. M.E. White illustrates a better approach to the issue. In M.E. White, the Court rejected the view of tax judgments historically prevailing both in international practice and American courts. Refusing to defer to historical practice, the Court scrutinized the justifications for continuing to deny full faith and credit to tax judgments, at that time considered a species of "penal" judgments, and found them wanting. As the Court observed, "[N]o state can be said to have a legitimate policy against payment of its neighbor's taxes, the obligation of which has been judicially established...".

It is somewhat anomalous that the Court has, in the past, often deferred to principles of international law when interpreting the Full Faith and Credit Clause, particularly without considering the suitability of those principles for interstate relations. As the Court observed in M.E. White:

The very purpose of the full faith and credit clause was to alter the status of the several states as independent foreign sovereignties, each free to ignore obligations created under the laws or by the judicial proceedings of the others, and to make them integral parts of a single nation throughout which a remedy upon a just obligation might be demanded as of right, irrespective of the state of its origin. That purpose ought not lightly to be set aside out of deference to a local policy which, if it exists, would seem to be too trivial to merit serious consideration when weighed against the policy of the constitutional provision and the interest of the state whose judgment is challenged.

On closer examination, no legitimate policy supports extension of the penal-law exception to state-recovered punitive damages. Arguments of procedural convenience do not with-
stand scrutiny. Nor is there a compelling argument that the penal-law exception is needed to limit excessive verdicts or to check the states' regulatory zeal. As stated, the Supreme Court has already begun addressing these problems through due process jurisprudence. Further, the Court's apparent willingness to increase constitutional regulation of civil penalties extracted by state government does not support excepting them from the command of full faith and credit. If the state's involvement alters the character of penalty-seeking litigation, this is an argument for providing defendants' expanded constitutional protections in that litigation. Denying interstate enforcement of judgments in which the states share is a circumspect, and ultimately ineffectual means of addressing the core problem.

The remaining objection to enforcement of civil penalties in the state's favor is a conceptual one: One state should not be compelled to compromise its sovereignty by assisting in the extraterritorial enforcement of another state's penal laws. This notion of sovereignty has considerable vintage. It hales from a period in American history when state territorial borders were taken far more seriously than today. The penal-law exception is of a piece with Pennoyer v. Neff, when the Court strictly limited the reach of a state's power over persons outside its territory. That, however, is the point. Pennoyer has been overturned and with it nineteenth-century principles of territorialism. Wrongdoers may not avoid civil litigation by the expedient of removing themselves or their property from the state of their

337. See supra notes 140-42 and accompanying text.
338. See supra note 149.
339. See supra note 178.
342. The penal-law exception is also reminiscent of the "territorialist" approach to choice of law, which limited each state's power to apply its tort law solely to wrongs occurring within the state. See generally SCROLES ET AL., supra note 36, at 688-97.
wrongdoing. Even in the context of criminal law-involving quintessential “penal” regulation, the Constitution provides for interstate cooperation: States are obligated to extradite persons charged with crimes under the laws of sister-states.\textsuperscript{344} There is, of course, no express constitutional mechanism for “extraditing” the property or person of a judgment debtor so that the judgment can be enforced. Nonetheless, interstate cooperation is facilitated today by the concepts of due process and full faith and credit. States may render long-arm judgments against violators that are valid as a matter of due process, and full faith and credit mandates that those judgments be enforced wherever the violator or his property can be found.

Principles of federalism thus commend interstate enforcement of civil judgments whether styled penal or remedial. Perpetuation of the penal-law exception would leave a noticeable gap in the interstate enforcement of regulatory law, at a time when civil sanctions occupy an increasingly important place.\textsuperscript{345} To the extent that state involvement increases concerns about the penalty-seeking process, those concerns should be addressed directly by regulating the process itself.

Additional reasons support interstate enforcement of punitive judgments. First, to deny enforcement of judgments recoverable by government undermines contemporary efforts to reform punitive damages. Whatever the merits of shared-recovery statutes, they do attempt to channel punitive damages to the wronged public.\textsuperscript{346} If the penal-law exception were extended to such reforms, states would lose the incentive to experiment with them.

Second, extension of the penal-law exception to civil penalties sets the worst example for international relations.\textsuperscript{347} Many nations continue to follow the balkanizing rule that denies recognition to “penal” judgments defined in the most liberal man-

\textsuperscript{344} See U.S. CONST. art. IV, § 2; Puerto Rico v. Branstead, 483 U.S. 219, 227 (1987) (stating that the commands of the Extradition Clause are mandatory).

\textsuperscript{345} See supra notes 14-41 and accompanying text.

\textsuperscript{346} See supra notes 184-89 and accompanying text.

\textsuperscript{347} See, e.g., Lee & Edwards, supra note 299 at 1 ("The continuing growth of international trade and investment increases the instances in which the recognition and enforcement of foreign judgments become a crucial part of litigation. However, it is a common phenomenon that the pace of international business transactions far outstrips the ability of legal systems to make effective provision for the enforcement of judgments.").
ner.\textsuperscript{348} Repudiation of the penal-law exception among American states is a right first step toward encouraging reconsideration by other nations.\textsuperscript{349} So long as the vestiges of the penal-law exception linger in American constitutional law, the United States' effort to limit the exception in international relations is compromised.

Finally, extension of the penal-law exception to civil penalties would likely accomplish little to remedy the problems highlighted by excessive awards like that in \textit{Engle}. The fact that a few states might act to protect local interests by denying enforcement of sister-state awards does not obviate the problem. Businesses operating in the national market remain exposed to judgment satisfaction in other states that choose to extend full faith and credit. Few states would exercise the prerogative to deny enforcement of penal judgments if granted the opportunity. Consequently, unless national businesses are willing to sequester their activities and assets in a few, protective states, punitive damages judgments will likely be satisfied in some forum. For this reason, the problem of excessiveness must be addressed by directly regulating the size of punitive awards, and by limiting the ability of different states to issue multiple awards that are cumulatively excessive. The problem inheres in the judgment itself, not in its means of enforcement.

\textbf{CONCLUSION}

It is possible that \textit{Engle} signals the beginning of the end for big tobacco, as many of the industry's critics hope. If the

\textsuperscript{348} See, e.g., Peter Hay, The Recognition and Enforcement of American Money-Judgments in Germany—The 1992 Decision of the German Supreme Court, 40 \textit{Am. J. Comp. L.} 729 (1992); S\textsc{o}cles \textsc{et al.}, supra note 36, at 1208 (discussing preservation of the penal-law exception in U.S.-U.K. Recognition of Judgments Convention).

\textsuperscript{349} A prominent example is one variation of the penal-law exception under which one nation will not enforce the tax judgments of another nation. \textit{See Restatement (Third) of the Foreign Relations Law of the United States} \textsection 483 note 2 (observing that "[I]n an age when virtually all states impose and collect taxes and when instantaneous transfer of assets can be easily arranged, the rationale for not recognizing or enforcing tax judgments is largely obsolete"). The prohibition of enforcement of foreign-nation tax judgments has been modified, in some instances, by treaty. \textit{See Atty. Gen. of Canada v. R.J. Reynolds Tobacco Holdings, Inc.}, 103 F. Supp. 2d 134, 141 (N.D.N.Y. 2000) (discussing the United States-Canadian Income Tax Convention Treaty of 1980). As discussed, the Supreme Court has set aside traditional hostility to the enforcement of tax judgments within the American states. \textit{See supra} notes 289, 330-32 and accompanying text.
worst befalls the tobacco companies as a result of *Engle*, they will find little sympathy among spectators of the tobacco wars. From the outset, tobacco companies have promised plaintiffs and their attorneys financial disaster as a cost of suing the companies.350 Should the husband-wife team351 representing the plaintiffs in *Engle* ultimately bankrupt the companies in one stroke, some poetic justice will be served.

Yet, *Engle* has seriously diminished the repute of punitive damages as a common-law remedy. *Engle* seems to exemplify much that is objectionable in the remedy. The case appears to illustrate how a single state judge,352 a runaway jury,353 and an indulgent appellate bench can force a major industry to the brink of bankruptcy,354 in disregard of other states and other claimants. It also signals how a seemingly fair and innocuous procedural requirement for posting appellate bonds can transform an aberrant verdict into a $710 million payout.355

*Engle* demands a response. As a first step, states should amend uniform judgment-enforcement laws to account for the problem of devastating punitive awards. Enforcement laws, particularly those concerning appellate bonds, should distinguish between compensatory and punitive awards. The judg-

350. See Haines v. Liggett Group, Inc., 814 F. Supp. 414, 421 (D.N.J. 1993) (quoting an internal memorandum of R.J. Reynolds, in which counsel stated that “[t]o paraphrase General Patton, the way we won these cases was not by spending all of [RJRI’s money, but by making that other son of a bitch spend all of his.”) (alteration in original).


352. Judge Robert Kaye previously certified a national class of flight attendants injured through second-hand smoke. That case settled for some $300 million and provided plaintiffs’ counsel the means of funding the *Engle* litigation. See Broin v. Philip Morris Cos., Inc., 641 So. 2d 888 (Fla. Dist. Ct. App. 1994). When Judge Kaye was later assigned the *Engle* case, the defendants moved to recuse him on the ground that he is a former smoker suffering from heart disease and therefore a member of the plaintiff class. He refused to step down from the case. Petitions to review his decision were denied. See Supreme Court Refuses to Remove Engle Judge, 15 ANDREWS TOBACCO INDUS. LITIG. REP. 3 (May 26, 2000).

353. See Van Voris, *supra* note 1, at A1 (noting competition among high-profile juries to “‘deliver the biggest whack’”). The *Engle* jury deliberated for little more than four hours, after hearing testimony from 157 witnesses over the course of two years. Id.

354. See id. (“The whole environment is like walking across a high wire without a safety net... Even if a defendant wins most of the time... the stakes are so high that a single punitive damages verdict can threaten bankruptcy. ‘You only have to slip once.’”).

355. See *supra* note 17.
ment creditor's need for security, if it exists at all, is far less compelling when he seeks to secure nothing more than his right to penalize the debtor. Especially when one reflects on the high attrition rate of punitive awards on appeal, the balance of equities tips in favor of the judgment debtor. It is nonsensical that a judgment debtor should be unable to post a bond sufficient to preserve a meaningful right of appeal, when the underlying judgment is supposed to be commensurate with the debtor's ability to pay.356

Further reform requires a national solution. In part, the Supreme Court has already inaugurated reform through its extension of due process limits on the awarding of punitive damages. The Court's recent decision in Cooper Industries, Inc. v. Leatherman Tool Group, Inc.357 is a clear statement that the Court envisions an appreciable role for appellate courts in scrutinizing punitive awards, assuming, of course, that judgment debtors can afford bonds that preserve a meaningful appeal. At the same time, courts should avoid the temptation to revive the penal-law exception to full faith and credit, which would likely increase interstate tensions while doing little to address the underlying problems with punitive damages.

The greatest work remains to be done by Congress. Even if the Court is successful in reining in aberrant awards, its jurisprudence fails to address the problem of multiple awards.358 Engle is but one of many substantial punitive judgments that tobacco companies will face in the future.359 The same likely is true of other manufacturers of products—pharmaceuticals, implants, tires, weapons—who quickly become fair game once a single state court returns a verdict. It is in the interest of all states, and most plaintiffs, that a national solution be forged to the problem of punishing nationwide misconduct.360 Though

357. 121 S.Ct. 1678 (2001).
358. In Amchem Products, Inc. v. Windsor, 521 U.S. 591, 628-29 (1997), the Court observed that the federal class action mechanism was not adequate to resolve the many, conflicting claims arising out of asbestos litigation, and noted the Congress has the ability to develop a national solution.
360. See, e.g., Dennis Jones et al., Multiple Punitive Damages Awards for a Single Course of Wrongful Conduct: The Need for a National Policy to Protect Due Process, 43 ALA. L. REV. 1 (1991); Jonathan Hadley Koenig, Punitive
such a solution has eluded Congress in the past, decisions like \textit{Engle} bring an element of urgency to the predicament that might yet produce results.³⁶¹

³⁶¹ Previous attempts by Congress to achieve a global settlement of tobacco litigation have failed. In 1997, Senator John McCain proposed legislation that would have resolved pending litigation against tobacco companies at a cost to the tobacco companies of $368.5 billion. The proposal's failure left hundreds of pending suits unresolved. \textit{See} Bob Van Voris, \textit{Judge Pushes to End Tobacco Wars}, NAT'L L.J., MAY 1, 2000, at A4. The proposed legislation, and means of avoiding various problems presented by it, are discussed in Bianchini, \textit{supra} note 30.

The recent punitive damages judgment obtained by a single California smoker against the tobacco companies for $3 billion is illustrative of the need for action. \textit{See} Gordon Fairclough, \textit{supra} note 4, at A3. If that award were replicated by only a few score California smokers, the tobacco companies would be forced into bankruptcy—with potentially devastating results—by other claimants seeking compensation for smoking-related injuries. Because California has approved the doctrine of non-mutual collateral estoppel, it may be easier for other state smokers to take advantage of the findings against Philip Morris in subsequent litigation. \textit{See} Vandenberg v. Superior Court, 982 P.2d 229, 236-42 (Cal. 1999).