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Tort Experiments in the Laboratories of Democracy

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TORT EXPERIMENTS IN THE LABORATORIES OF DEMOCRACY

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ABSTRACT

This Article considers the broad range of “tort experiments” states have undertaken in recent years as well as the changing attitudes of Congress and the Supreme Court toward state tort law. Notably, as states have engaged in well-publicized tort reform efforts in the products liability and personal injury areas, they have also increased tort rights and remedies to address new societal problems associated with privacy, publicity, consumer protection, and environmental harm. At the same time, however, just as the Supreme Court was beginning its so-called “federalism revolution” of the 1990s to limit Congressional authority in the name of states’ rights, it was simultaneously cutting back on the ability of states to provide their citizens with tort rights and remedies through preemption doctrine and due process limits on punitive damages. This Article explores these trends in the states, Congress, and the Supreme Court and concludes that part of the problem in federal-state relations in the area of tort law is that Congress and the Supreme Court have shifted from a private law view of tort that does not give sufficient attention to the important private law goals tort law still serves. This has allowed Congress and the Court to more easily displace state tort law without considering the need for any substitute federal remedy. Once the private law aspects of torts are recognized, it becomes easier to identify and value the role tort law plays in our federalist system.

INTRODUCTION

This Article considers tort “experiments” in the states and the increasingly complicated and dynamic relationship between the states, Congress, and the federal courts in the area of tort law. The idea of the states engaging in “experiments” is, of course, not new. As Justice Brandeis stated in 1932, one of the basic values of our federalist system of government is that it encourages innovation by allowing for the possibility that “a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.”

In recent years, states have engaged in significant “experiments” in the area of tort law. These experiments take many forms. First, state legislative “tort reform” efforts have continued unabated for over two decades as states enact increasing numbers of statutes to place limits on compensatory and punitive damages, create regulatory

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compliance defenses for consumer claims against drug manufacturers, impose new statutes of limitations and statutes of repose for products liability and other tort claims, place additional limits on claims for medical malpractice, and otherwise supplant historic common law tort developments in these areas. State tort experiments, however, are not limited to tort “reform” that restricts common law rights and remedies. Indeed, at the same time states are decreasing the rights of their citizens to bring certain types of claims for personal injury against drug manufacturers, product manufacturers, doctors and others, they are also increasing the rights of their citizens to bring other types of tort claims in targeted areas such as consumer fraud, privacy, publicity, and environmental protection. Likewise, in recent years, state attorneys general and local governments have been reviving the common law tort of public nuisance in efforts to obtain injunctive relief and damages for harm caused by lead paint, gun violence, greenhouse gas emissions, and mortgage foreclosures.

Such a variety of activity in the area of state tort law is not surprising. Along with public health and safety, tort law is seen as a classic area of “traditional state concern” even as Congress and federal agencies play an ever-increasing role in regulating drugs, consumer products, environmental protection, and many other substantive areas that frequently are the subject of state tort law claims. As a result, significant variability between states in the area of tort law is an expected and long-standing part of the legal landscape. The continuing ability of states to engage in tort experiments has been called into question, however, by recent developments in Congress and the Supreme Court. Although Congress has not enacted comprehensive federal tort reform (despite continuing efforts to do so), it has enacted targeted legislation to immunize certain industries from state lawsuits (most recently, the gun industry) without any corresponding federal, alternative remedy, as was done in prior years with vaccine manufacturers and the nuclear power industry.

Likewise, the Supreme Court appears to have excluded state tort law from its “federalism revolution” that began in the 1990s. Instead, at the same time the Court was

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2 See Bates v. Dow Agrosciences, 544 U.S. 431, 449 (2005) (describing state tort law as an area of “traditional state regulation,” confirming that there is a “presumption” against preemption of such state law, and holding that the Court will not find that Congressional legislation in that area preempts state law unless Congress makes such intention “clear and manifest”) (citing and quoting New York State Conf. of Blue Cross & Blue Shield Plans v. Travelers, 514 U.S. 645, 655 (1995)); Medtronic v. Lohr, 518 U.S. 470, 485 (1996) (describing the “historic primacy of state regulation of matters of public health and safety” and applying presumption against federal preemption of state law to plaintiff’s common law tort claims against medical device manufacturer); Hillsborough v. Automated Med. Labs., 471 U.S. 707, 715 (1985) (refusing to find that federal regulations setting minimum standards for the collection of blood plasma preempted county ordinance governing blood plasma centers in part because the county ordinance addressed a matter of health and safety, which falls under the “historic police powers of the State”). See also Alexandra B. Klass, State Innovation and Preemption: Lessons from Environmental Law, ___ LOY. L.A. L. REV. ___ (forthcoming 2008) (describing rise of the federal regulatory state in areas of traditional state regulation and trends in federal preemption jurisprudence).

3 See infra Part III.

cutting back on Congress’s authority under the Commerce Clause in the name of states’ rights, it began to significantly limit the ability of states to provide tort rights and remedies for its citizens by preempting common law and statutory claims for damages associated with drugs, medical devices, and consumer products under the Supremacy Clause, and limiting punitive damage awards under the Due Process Clause.

This Article attempts to shed new light on the federal-state relationship in the area of tort law through a broad analysis of state tort “experiments” that includes legislative and common law efforts to both limit and expand tort rights and remedies. In doing so, it concludes first that both Congress and the Supreme Court have exhibited a growing hostility to state tort law in recent years that stands in contrast to the rhetoric surrounding states’ rights that exists in these bodies’ statements and actions in other areas of law. Second, this Article concludes that despite the efforts of tort theorists to classify tort law as either public law or private law, state experiments with tort law demonstrate that states use tort law both to provide their citizens with the right to obtain redress for private wrongs and also to achieve public regulatory goals. The variation in tort experiments shows that some new torts may fall more on the public law side than the private law side, and vice-versa, but that tort law today is not a monolith that can be analyzed exclusively as public law or private law.

Part I begins with a brief background on the law of torts as well as a short summary of currents trends in tort theory today. At the present time, there are two main theoretical approaches to tort law. The first (and dominant) approach sees tort law as a branch of public regulatory law intended to serve state interests of deterring undesirable conduct, compensating victims of wrongdoing, and spreading societal losses. The second approach views tort law as private law rather than public regulatory law. Under this private law approach, tort law is a form of corrective justice or, as formulated by John Goldberg and Benjamin Zipursky, the means by which a state provides its citizens with the right to obtain redress for private wrongs.

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6 See, e.g., Goldberg, supra note 5; Benjamin Zipursky, Civil Recourse, Not Corrective Justice, 91 GEO. L.J. 695 (2003).
7 See, e.g., John C.P. Goldberg, What Are We Reforming: Tort Theory’s Place in Debates over Malpractice Reform, 59 VAND. L. REV. 1075 (2006); Goldberg, supra note 5; Zipursky, supra note 6, at 695 (discussing corrective justice theory).
Part II then analyzes a wide spectrum of recent state legislative and judicial actions to modify tort law to not only decrease the scope of tort law (traditional tort reform) but also to increase it, particularly in areas of consumer rights, privacy, publicity, and environmental protection. This Part also discusses the extent to which states use these tort “experiments” to achieve public law and private law goals. Part III considers Congressional responses to state tort experiments which, in the past, generally resulted in replacing state tort law with a federal regulatory framework or compensatory remedy, but now more often results in eliminating state tort law rights and remedies altogether without creating any substitute federal framework or remedy. Part IV considers the Supreme Court’s review of state tort law against the backdrop of its federalism “revolution.” This analysis includes recent decisions involving Congress’s authority to regulate under the Commerce Clause, federal preemption doctrine, and due process limits on punitive damages, all of which affect directly the ability of states to continue to experiment with statutory tort law as well as the common law. Through this analysis, Part IV shows that the Supreme Court has almost completely excluded state tort law from its rhetoric on states’ rights and federalism and explores the ways in which that has occurred.

Finally, Part V returns to tort theory in an effort to provide some additional insights on the federal-state relationship in tort law today. This Part first shows how the Supreme Court has failed to recognize the private law aspects of tort in its recent decisions, which has allowed it to more easily displace tort law under doctrines of preemption and due process. It then considers Congressional displacement of state tort law and concludes that while Congress in most cases has the authority to displace state tort law to promote national interests, it should be hesitant to do so under principles of federalism without providing a substitute right to redress. Likewise, the Court should more fully recognize the private elements of tort law in their preemption cases and punitive damages cases. This recognition should result in less preemption of state law in cases where Congress has not expressed a clear intent to preempt state tort law, and should result in more deference to state juries and courts in punitive damages cases when such verdicts are challenged under the Due Process Clause.

Ultimately, by focusing on the range of state tort experiments and the private as well as the public law interests they serve, this Article attempts to explore the values of tort law in a way that may assist in understanding and resolving tensions between the federal and state governments in this area of law. If there begins to be a greater understanding of how state legislatures and state courts expand and contract tort law to promote rights to obtain redress for private wrongs as well as public regulatory goals, scholars and the courts can use principles of federalism, preemption, and due process in a manner that fully considers the private as well as public benefits of state tort law in deciding whether and how to replace it.
I. TORT LAW AND TORT THEORY

A “tort” has been defined broadly as conduct that amounts to a legal wrong (other than breach of contract) “that causes harm for which courts will impose civil liability.” Tort law includes private lawsuits against public or private defendants under common law theories of battery, negligence, nuisance, strict liability, conversion, and other theories to recover for a wide range of economic, non-economic, and punitive damages as well as injunctive relief to compel certain actions or to prevent certain actions. Tort law also includes private rights of action under state and federal statutes to recover statutorily-specified damages or injunctive relief associated with private wrongs against the plaintiff that the statute was enacted to prevent. Claims under state consumer protection laws and privacy laws are examples of this type of tort claim. Going further afield from “traditional” tort claims are civil actions brought by states and local governments under theories of public nuisance to compel behavior that has a widespread impact on a state, city, neighborhood, or natural resources. Public nuisance suits filed against the gun industry to prevent gun violence, against paint manufacturers to remediate lead paint in buildings, and against auto companies and power plants to obtain injunctive relief or damages associated with the release of carbon dioxide emissions are examples of this type of tort.

Although all of these claims fall within the definition of a “tort” some of these torts appear to have significant private law characteristics, in that they are efforts to use the civil justice system to address wrongs done by private parties to private parties, even though they also may achieve public law deterrence and compensation benefits. Other types of claims, such as the public nuisance cases, appear to be primarily examples of public law in that the state or local government could achieve the relief sought through alternate means such as regulation or taxation of the activity sought to be compelled or prevented. While such variation in the forms and purposes of tort law may not be surprising, it is precisely this variation that makes it difficult to determine how to “classify” tort law, as many theorists and, ultimately, courts, have attempted to do.

The current literature shows there are two major “camps” of torts scholars today. The first treats tort law as merely a branch of the public regulatory state. Law and economics scholars such as Judge Richard Posner, who view tort law as a means of identifying and achieving the most cost-effective mix of precaution and injury, fall into this camp. Also

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8 See DAN B. DOBBS, THE LAW OF TORTS § 1, at 1 (2000); See also W. PAGE KEETON ET AL., PROSSER & KEETON ON THE LAW OF TORTS 1-7 (5th ed. 1984) (stating that a satisfactory definition of a “tort” has yet to be found but describing the purpose of the law of torts to adjust losses and give compensation for injury sustained by one person as a result of the conduct of another, and describing as a “central principle” of tort law that “liability must be based on conduct which is socially unreasonable.”).

in this camp are Progressive and Realist scholars such as Fleming James, Leon Green, and William Prosser, who, along with their followers, see tort law as a mechanism to distribute losses, provide compensation to victims of accidents, further social justice, and punish corporate misconduct. Both the economic-deterrence group and the Progressive-Realist group focus almost exclusively on the instrumental nature of tort law, seeing it as another branch of public law.

The second “camp” of tort scholars views tort as private law. This group includes “corrective justice” scholars such as George Fletcher, Richard Epstein, Jules Coleman, and Ernest Weinrib, who see tort law as a private law means of restoring equilibrium between a victim and tortfeasor so as to make the victim whole. The private law camp also includes John Goldberg and Benjamin Zipursky who argue that tort is for the redress of private wrongs. According to Goldberg and Zipursky, tort law empowers a victim to seek private redress from a wrongdoer who has acted wrongfully toward him or her; the victim is not simply the vicarious beneficiary of a duty owed to the public at large. In doing so, tort law articulates duties of conduct that individuals and entities owe to each other and empowers those injured by breaches of those duties to invoke the law to go after wrongdoers. Thus, as a victim’s rights law, tort law helps sustain a distinctly liberal notion of civil society, assures citizens that government is committed to attend to their complaints on a more or less individualized basis, and avoids excessive reliance on top-down regulation. In their view, even though tort law may have the effect of deterring undesirable conduct or compensating injured parties, thus meeting public law goals, it is the creation of a system of recovery for private wrongs to be utilized by injured parties that is the hallmark of tort law.

As shown in the following Parts, the current dominance of tort law as “public law” has made it difficult for courts to fully recognize and value the importance of state tort

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10 See Goldberg, supra note 5, at 581-82. See also KENNETH S. ABRAHAM, THE FORMS AND FUNCTIONS OF TORT LAW 17-18 (3rd ed. 2007) (describing tort theories of optimal deterrence, loss distribution, compensation, and redress of social grievances as views of tort law concerned with affecting the behavior of future actors or achieving other sorts of instrumental goals).

11 See Goldberg, supra note 5, at 580-83; Zipursky, supra note 6, at 697 (stating that instrumentalists, including law and economics scholars, see tort law and other “private” areas of law as really a matter of public law).


13 Goldberg, supra note 6; Zipursky, supra note 6.

14 Id.

15 See, e.g., Goldberg, supra note 7, at 1077-78 (“contrary to compensation-and-deterrence theory, the tort system is not best understood as arming victims with the power to sue in order to serve public goals such as deterrence and compensation. Instead, it arms victims because they are entitled to be so armed.”) (emphasis in original).

16 See, e.g., Goldberg, supra note 5, at 530.
experiments and the importance of retaining state tort law in today’s federal regulatory state. If tort law is simply another form of public law, it is easier for Congress and the courts to displace it in favor of a federal regulatory policy choice that differs from that pursued by the states. If, however, tort law also represents a private system of redress that is distinct from any substitute public regulatory system, there are additional arguments in favor of retaining state tort law in the absence of a strong federal need for uniformity or a federal system of redress to replace state tort law. Part II now considers a wide range of state tort experiments, with a focus on both the public law and private law aspects of these torts, to show the importance of states as “laboratories” in both areas.

II. TORT “EXPERIMENTS”

Initially, tort law was almost exclusively a matter of state common law. It was judge-made law that was constantly evolving and adapting to address new concerns, new technologies, and to reflect changing social norms. During the 20th century, state courts throughout the country expanded and modified long-standing tort doctrine in a manner that provided greater protections to consumers and employees and increased legal liability on employers, product manufacturers, doctors, and other professionals. For instance courts expanded product liability theory to allow plaintiffs to recover without regard to fault, holding product manufacturers and distributors strictly liable if the product was either produced or sold with a defect that caused injury.

Likewise, lawsuits against chemical companies, asbestos companies, the tobacco industry, and drug manufacturers resulted in courts using doctrines of joint and several liability and market share liability to fashion remedies to compensate thousands of plaintiffs by imposing liability on multiple defendants. In these cases, courts also recognized and expanded

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17 See, e.g., KEETON ET AL., supra note 8, at 20-21 (discussing how the common law precedent and legal history bear on current judicial decisions and that the development of tort law has always been influenced “by the social, economic, and political forces at that time.”); DOBBS, supra note 8, at 1 (stating that tort law “is predominantly common law” although a statute or constitutional provision may make certain conduct legally wrong, permitting the recovery of damages for such conduct); F. Patrick Hubbard, The Nature and Impact of the Tort Reform Movement, 35 Hofstra L. Rev. 437, 465-66 (2006) (discussing evolving nature of the common law of torts).

18 See Greenman v. Yuba Power Prod., Inc., 377 P.2d 897 (Cal. 1963); HENDERSON ET AL., THE TORTS PROCESS 464-69 (7th ed. 2007) (discussing transition from liability based on negligence and warranty to strict products liability with regard to the manufacture of defective products); DOBBS, supra note 8, at 974-77 (describing shift to strict liability theory for defective products); Frances E. Zollers et al., Looking Backward, Looking Forward: Reflections on Twenty Years of Product Liability Reform, 50 Syracuse L. Rev. 1019, 1022 (2000) (discussing doctrinal shift to strict products liability).

19 See, e.g., Sindell v. Abbot Labs., 607 P.2d 924, 933-35 (Cal. 1980) (adopting notion of market-share liability, distributing liability based on each defendant’s relative share of the market, when generic product from several manufacturers all possessed the same defect that produced the injuries, even though plaintiffs could not trace their harms to any specific manufacturer); DOBBS, supra note 8, at 40-32 (describing courts’ use of market-share liability); John Nockleby & Shannon Curreri, 100 Years of Conflict: the Past and Future of Tort Retrenchment, 38 Loy. L.A. L. Rev. 1021, 1036-49 (2005) (same).
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historic but politically-controversial remedies such as punitive damages\(^{20}\) and non-economic damages\(^{21}\) in a manner that created an increased liability burden on the business community. In these ways, courts have been “experimenting” with tort law through the development of common law for well over a century.

Starting in the 1970s, however, state legislatures and, in some cases, Congress\(^{22}\) began to enact tort legislation to limit common law tort doctrine in response to concerns of the business and medical communities that tort liability had reached a “crisis” point that was hindering their ability to obtain insurance, produce products, and participate in the market. These concerns led to a series of state “tort experiments” over the next several decades to limit traditional tort liability primarily in the areas of personal injury, medical malpractice, and products liability. At the same time, however, state legislatures and state courts have engaged in parallel tort experiments to expand tort liability in the areas of consumer rights, privacy, publicity, and environmental protection. This Part examines these contractions and expansions in tort law and explores the public law and private law goals states are attempting to meet through their experiments in this area.

A. Tort Contractions: Traditional State “Tort Reform”

1. Statutory Tort Reform

The most well-known state tort experiments are state legislative efforts over the past thirty years to limit plaintiff tort rights and remedies under the common law to recover for damages for personal injury (and sometimes property damage) in products liability, medical malpractice, and other claims where individuals are seeking relief against manufacturers, pharmaceutical companies, medical device companies, hospitals, and doctors.

The first wave of state statutory “tort reform”\(^{23}\) occurred in the 1970s and centered on claims for medical malpractice. In response to physician complaints of high malpractice insurance premiums, most state legislatures responded in various ways by placing caps

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\(^{20}\) Punitive damages are damages, other than compensatory damages, awarded to a plaintiff to punish the defendant for outrageous or intentionally wrongful conduct and to deter the defendant and others from engaging in such conduct in the future. See RESTATEMENT (SECOND) OF TORTS § 908(1) (1979); Alexandra B. Klass, Punitive Damages and Valuing Harm, 92 MINN. L. REV. 83, 90 (2007).

\(^{21}\) Non-economic damages (or non-pecuniary damages) compensate a plaintiff for pain and suffering, loss of enjoyment of life, and other physical and emotional consequences of injury separate and apart from economic or pecuniary loss. See McDougald v. Garber, 536 N.E.2d 372, 374-75 (1989); HENDERSON ET AL., supra note 18, at 585-86 (discussion varying forms of non-economic damages).

\(^{22}\) For a discussion of Congressional responses to the real or perceived tort “crisis” with regard to certain industries, see infra Part III.

\(^{23}\) Notably, although the term “tort reform” is generally used to today to refer to Congressional and state legislative efforts to limit common law tort rights and remedies, it was used during the early part of the 20th century to refer to legislative efforts to expand common law rights and remedies arising out of a concern that tort law was not providing adequate protection to the victims of workplace injuries. See Robert L. Rabin, Poking Holes in the Fabric of Tort: A Comment, 56 DEPAUL L. REV. 293, 293 (2007).
on pain and suffering damages, regulating fees of plaintiffs’ attorneys, shortening statutes of limitation, or altering or eliminating the collateral source rule.\(^{24}\)

The second wave of tort reform took place in the mid-1980s in response to what was perceived (rightly or not) as a “crisis” in tort law and the increasing unavailability of liability insurance coverage for businesses as a result of increasing tort liability.\(^{25}\) Between 1985 and 1988, virtually all state legislatures enacted some form of tort reform legislation, including placing limits on recovery of non-economic damages (such as pain and suffering damages), eliminating or placing caps on punitive damages, altering existing doctrines applicable to joint and several liability\(^{26}\) and comparative fault,\(^{27}\) and enacting statutes of repose to protect product manufacturers.\(^{28}\) These reforms often applied across the board in all types of tort claims, in contrast to the prior reforms that had targeted primarily claims for medical malpractice.\(^{29}\)

A third wave of tort reform in the states began in the early 1990s and continues into the present. These reforms place additional caps on non-economic and punitive damages, modify joint and several liability rules, and place limits on the ability of courts to certify class actions.\(^{30}\) For instance, in 2003, Texas enacted a comprehensive tort reform bill that placed a $250,000 cap on non-economic damages in medical malpractice cases and a separate $250,000 cap for hospital facilities, barred punitive damages unless the jury was unanimous, created a safe harbor for drugs and other products that meet government standards, modified joint and several liability rules, imposed a 15-year statute of repose for product liability cases, adopted fee-shifting rules, reduced bond-posting requirements for appeals, and provided for interlocutory appeals of class action certification orders.\(^{31}\)

\(^{24}\) See Marc A. Franklin et al., Tort law and Alternatives 809-10 (8th ed. 2006). See also Abraham, supra note 10, at 223-24 (discussing the collateral source rule).

\(^{25}\) See Franklin et al., supra note 24, at 810.

\(^{26}\) See Henderson et al., supra note 18, at 123 (discussing joint and several liability).

\(^{27}\) See Franklin et al., supra note 24, at 810-11. Under comparative fault principles, a plaintiff’s recovery in a negligence action may be reduced, but not eliminated, by the plaintiff’s own fault. By contrast, under a contributory fault regime, the plaintiff’s own negligence can act as a complete bar to recovery. See Henderson et al., supra note 18, at 366-67.

\(^{28}\) Statutes of repose bar all claims against a defendant a certain number of years after the product had been placed in the stream of commerce, regardless of when the plaintiff was injured or had knowledge of the injury. By contrast, a statute of limitation begins to run or “accrues” when the plaintiff knew or should have known of the injury and the identity of the defendant. Thus, under a statute of repose, a plaintiff’s claim might be time-barred even before the plaintiff sustains any injury, making a lawsuit impossible. See Dobbs, supra note 8, at 550-61 (discussing statutes of limitation and statutes of repose). See also Montgomery v. Wyeth, 540 F. Supp. 2d 933 (E.D. Tenn. 2008) (holding Tennessee statute of repose that barred claims one year after product expiration date prevented plaintiff’s claim against diet drug manufacturer even though her disease did not develop until five years after the product expiration date, thus barring the claim before it even accrued, and urging the Tennessee legislature to examine the law which had such a harsh result in the case).

\(^{29}\) Franklin et al., supra note 24, at 810.

\(^{30}\) Id.

\(^{31}\) See Tex. Civ. Prac. & Rem. Code Ann. §§ 26.001-26.003 (addressing class action and fee-shifting rules), §§ 74.301-74.302 (setting limits on non-economic and economic damages), §§ 82.007-82.008 (creating rebuttable presumption in favor of defendants in certain product liability actions), § 41.003(d)
Likewise, in 2004, Ohio enacted legislation that placed a $250,000 cap on non-economic damages involving “non-catastrophic” injuries (or three times economic damages up to $350,000 per plaintiff), with a maximum limit of $500,000 per occurrence. An earlier tort reform measure imposed a $350,000 limit on non-economic damages in medical malpractice cases. The 2004 Ohio legislation also limits punitive damages to not more than two times the compensatory damages or 10 percent of a defendant’s net worth not to exceed $350,000.

Some of the recent state statutory tort reform provides partial or complete immunity for entire industries. For instance, between 2000 and 2005, thirteen states (Arizona, Colorado, Georgia, Florida, Idaho, Illinois, Louisiana, Michigan, Missouri, South Dakota, Tennessee, Utah, and Washington) enacted statutes that exempt completely from civil liability manufacturers, marketers, distributors, advertisers, sellers and suppliers of food and beverages for claims based on obesity, weight gain, or health conditions relating to consumption of these products. Beginning in 2000, numerous states enacted legislation shielding gun manufacturers and distributors from lawsuits by states, local governments, and private parties that had sought (or might seek in the future) injunctive relief or damages from harm resulting from third-party use of firearms. Arizona, Colorado, Ohio, Oregon, Utah, North Dakota, and New Jersey have provided immunity to pharmaceutical companies from liability for punitive damages for injuries resulting from FDA-approved products unless the plaintiff can show the defendant engaged in fraud to obtain the approval. In 1995, Michigan enacted a statute that provides immunity to (providing for punitive damages only in the case of a unanimous jury); FRANKLIN ET AL., supra note 24, at 813-14; David A. Anderson, Judicial Tort Reform in Texas, 26 REV. OF LIT. 1, 4 (2007) (discussing Texas statutory tort reform).

See OHIO REV. CODE. ANN. § 2315.18(B)(2). See also Arbino v. Johnson & Johnson, 880 N.E.2d 420 (Ohio 2007) (discussing Ohio statutory limits on non-economic damages and punitive damages).

See OHIO REV. CODE. ANN. § 2315.21.

See, e.g., Nat’l Conf. of State Leg., Food Vendor Lawsuit Immunity (2005), at http://www.ncsl.org/programs/health/fvmemo.htm (summarizing state legislation). Most of these state laws are modeled after federal legislation that was introduced in the House of Representative in 2003 but was not enacted. Id.


pharmaceutical companies from *all* liability for injuries resulting from FDA-approved products except in cases of fraud.\(^{37}\)

Interest groups representing the business community were a significant factor in fueling this legislative activity. In 1986, the American Medical Association and the American Council of Engineering Companies co-founded the American Tort Reform Association (“ATRA”). ATRA describes itself as “the only national organization exclusively dedicated to reforming the civil justice system,” consisting of a “nationwide network of state-based liability reform coalitions backed by 135,000 grassroots supporters.”\(^{38}\) Its members include Fortune 500 companies in the manufacturing, pharmaceutical, medical, and medical device sectors, along with interest groups representing those business sectors.\(^{39}\) ATRA lobbies Congress and state legislatures to enact health care liability and class action reform, abolish joint and several liability and the collateral source rule, place limits on punitive and non-economic damages, enact product liability and appeal bond reform, ensure “sound science in the courtroom,” and stop “regulation through litigation.”\(^{40}\) According to its website, since ATRA’s founding more than 45 states have enacted portions of ATRA’s legislative agenda.\(^{41}\) Indeed, ATRA’s goals are not “just to pass laws” but “to change the way people think about personal responsibility and civil litigation.”\(^{42}\)

Part of that effort was to characterize much of tort law today as “regulation through litigation,” with the message being that reforms are necessary to quell abuses of the process.\(^{43}\) Although the term “regulation by litigation” was initially coined to describe specific actions where state attorneys general collaborated with private lawyers to sue tobacco companies, the gun industry, and other major industries, the term is now also used by tort reform advocates as well as some legal scholars to include private class actions and other more traditional tort actions by private parties.\(^{44}\) Thus, the concept of


\(^{38}\) See American Tort Reform Association, At a Glance, at www.atra.org/about/.

\(^{39}\) See American Tort Reform Association, Sample List of ATRA Members, at www.atra.org/about/members.php.

\(^{40}\) ATRA, At a Glance, supra note 38.

\(^{41}\) Id.

\(^{42}\) Id.

\(^{43}\) See id. (stating that of ATRA’s goals is to “stop legislation through litigation.”). See also Center for Regulatory Effectiveness, at http://www.thecre.com/regbylit/about.html (describing “regulation by litigation”).

\(^{44}\) See W. Kip Viscusi, *Overview, in Regulation Through Litigation*, 1, 1 (W. Kip Viscusi ed. 2002) (describing regulation by litigation as a “new phenomenon” created by recent lawsuits by state and local governments involving cigarettes, guns, and other products); Kenneth S. Abraham, *The Insurance Effects of Regulation by Litigation, in Regulation Through Litigation, supra* at 212, 231-32 (discussing the impact of mass tort litigation on the insurance industry, noting that both backward-looking and forward-looking litigation can have a regulatory impact, and stating that from an insurance perspective “every lawsuit is potentially regulation by litigation.”); Gary T. Schwartz, *Comment, in Regulation Through Litigation, supra* at 348 (recognizing that “all tort litigation can be seen as regulation by way of
“regulation by litigation” has become part of the mainstream and creates a view of private tort litigation that is squarely in the “public law” realm. Once tort law is only a form of public regulation (and improper public regulation at that), it becomes easier to convince legislators and courts that it must be stopped. As shown below, this public law rhetoric surrounding traditional personal injury torts is no longer limited to interest group politics or scholarly debates but instead is evident in judicial decisions reviewing state tort law claims.

2. Tort reform in the courts

State courts, for their part, were of course the original tort “experimenters” when they began to expand the rights of plaintiffs to recover for the newly-discovered and increasing harms caused by the industrialization and, later, commercialization of American society.\(^{45}\) State courts continue to be involved in traditional state tort reform both by rolling back earlier expansions of tort law in some areas and also ruling on the constitutionality of state statutory reform efforts.\(^{46}\) Indeed, state supreme courts in Alabama, Illinois, Kansas, Kentucky, New Hampshire, North Dakota, Oregon, and Washington, among others, have struck down all or portions of those states’ statutory tort reform measures on grounds that they violate state constitutional provisions ensuring a right to a jury trial, equal protection, or separation of powers.\(^{47}\) Courts in numerous other states, however, most recently, in Ohio, have upheld statutory tort reform efforts as valid

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\(^{45}\) See supra notes 17-21 and accompanying text.

\(^{46}\) See John Fabian Witt, The Long History of State Constitutions and American Tort Law, 36 Rutgers L.J. 1159, 1162 (2005) (explaining that the “current generation of state constitutional decisions reviewing tort reform legislation is merely the latest incarnation of what has been almost one and a half centuries of interaction between American constitutions at the state and sometimes federal levels, on one hand, and the law of torts, on the others.”).


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under their state constitutions. Significantly, federal courts have shown no interest to date in finding that plaintiffs have any substantive due process rights to state tort law claims and remedies, even though they have found defendants have substantive due process rights to be free from certain state tort claims and remedies.

The debates over tort reform, however, have gone beyond state legislatures and state courts. For over two decades now, both the scholarly community and the federal courts have debated the extent to which the civil justice system is the cause of many of the nation’s economic ills or whether these concerns are overstated to meet the needs of the business community’s tort reform agenda. Indeed, scholars such as Kip Viscusi lament the rise of punitive damages and declare that “punitive damages represent the most visible symptom of the ills of the U.S. tort system.” Retired Justice Sandra Day O’Connor similarly wrote in the 1980s that “awards of punitive damages are skyrocketing” and warned that the threat of such awards would detrimentally affect the research and development of new products, pharmaceutical drugs, vaccines, and motor vehicles. Others, however, point to empirical data showing that punitive damages are rarely awarded and have not increased, on average, over time, with the exception of awards in the business litigation context. Indeed, tort filings in state courts declined from 1992 to 2001. Regardless of whether the tort “crisis” is real or illusory, the idea that the tort system is in crisis and is merely disguised “regulation through litigation” provides support for efforts to treat tort law as invalid “public law” that has gone astray rather than a private law system worthy of protection by the courts and Congress.


49 For a discussion of federal due process limits on state tort remedies, see infra Part IV.C. For a discussion of the refusal of federal courts to find any due process rights to state tort remedies, see Goldberg, supra note 5, at 527-28; Montgomery v. Wyeth, 540 F. Supp. 2d 933 (E.D. Tenn. 2008) (finding no federal due process protections for plaintiff whose claim against drug manufacturer was eliminated by state statute of repose before she was even eligible to file it).


52 See Nockley & Curreri, supra note 19, at 1080-85 (summarizing and explaining data showing significant increase in the amounts of state and federal jury verdicts in suits brought by businesses against other businesses); Alexandra B. Klass, Punitive Damages and Valuing Harm, 92 MINN. L. REV. 83, 93, 98-99 (2007) (citing various studies and articles on both sides of the debate over whether there is a civil justice “crisis” involving punitive damages and non-economic damages). See also Exxon Shipping Co. v. Baker, 126 S. Ct. 2605 (2008) (stating that recent studies undercut most of the criticism mounted against punitive damages, that the median ratio of compensatory to punitive damages has remained less than 1:1, and that there has not been a marked increase in the percentage of cases in which punitive damages have been awarded over the past several decades, although there are “outlier” cases that subject some defendants “to punitive damages that dwarf the corresponding compensatories”).

B. Tort Expansions: The Creations of New Rights and Remedies in Consumer Protection, Privacy, Publicity, and Environmental Protection Cases

This Section focuses on state legislative and judicial expansions of state tort rights and remedies in the areas of consumer protection, privacy, and environmental protection. While these developments are in no way hidden, they are rarely, if ever, recognized simply as “tort law” and more often are organized under headings of consumer protection law, intellectual property law, and environmental law. These developments, however, are tort experiments in the same vein as traditional tort reform. Thus, despite being parts of separate fields, the creation of new consumer protection, privacy, publicity, and environmental actions that establish liability, damages, and other relief, are tort law, and their developments count as tort experiments. Throughout the discussion, this Section highlights both the private law and public law aspects of these torts.

1. Tort Expansions in Consumer Protection and Disclosure Laws

Modern consumer protection law grew out of the perceived need to reform the common law for consumer transactions. Prior to reform, the law took the approach that buyers and sellers were equally able to judge the quality of goods and thus if the buyer did not receive what he or she expected from the transaction, the doctrine of caveat emptor (buyer beware) would apply.\textsuperscript{54} As consumer goods and society in general became more complex, and buyers and sellers more remote, Congress and state legislators began to recognize that buyers were not able to protect themselves under traditional contract law and required statutory protection.\textsuperscript{55} In 1975, Congress strengthened the Federal Trade Commission Act, giving the FTC industry-wide rulemaking power and, around the same time, state legislatures increasingly began to enact “little FTC Acts” prohibiting unfair and deceptive trade practices and providing private rights of action for injured consumers.\textsuperscript{56} By 1980, however, Congress reduced the FTC’s power in response to the perception the agency had gone too far.\textsuperscript{57} As a result of this federal inactivity, state legislatures became even more active in consumer protection matters, passing legislation on new and used car warranties, mobile homes, and consumer services.\textsuperscript{58} More recently, with the mortgage foreclosure crisis in full swing, state legislatures are again taking the lead and enacting new legislation to protect consumers from predatory lending, foreclosure scams, and other harmful activities by banks and lenders.\textsuperscript{59}

A significant part of state legislation in this area expands tort rights and remedies to protect consumers. For instance, a private right of action to sue for alleged violations of

\textsuperscript{55} Id. at 3.
\textsuperscript{56} Id. at 3.
\textsuperscript{57} Id. at 4.
\textsuperscript{58} Id.
the state consumer protection act exists in every state except Iowa and North Dakota.\textsuperscript{60} In bringing such actions, if a plaintiff establishes causation, he or she generally can recover compensatory damages (the difference between the value of the item as represented and what the item purchased was actually worth) and/or rescission damages.\textsuperscript{61} In some states a plaintiff can also recover emotional distress damages, physical pain and suffering, consequential damages, and injunctive relief to enjoin future violations.\textsuperscript{62} In addition, at least eighteen states allow successful consumer plaintiffs to recover minimum damages (ranging from $25 to $2,000) to encourage plaintiffs to litigate consumer protection violations, a similar number authorize double or treble damages to successful plaintiffs, and several states allow punitive damages in particularly egregious cases.\textsuperscript{63} Most states allow plaintiffs to recover attorneys’ fees incurred in bringing a successful action under their consumer protection statutes.\textsuperscript{64}

Notably, many of the same states that have enacted the most restrictive limits on punitive damages and non-economic damages in traditional common law tort suits have expansive consumer protection statutes allowing those same types of damages for consumer protection violations. For instance, Texas has set stringent limits on non-economic and punitive damages in traditional personal injury tort suits against doctors and product manufacturers but authorizes emotional distress damages and treble damages under its consumer protection laws.\textsuperscript{65} Likewise, Ohio, which recently enacted significant tort reform measures for common law claims, allows for treble damages under its consumer protection statute.\textsuperscript{66}

Moreover, states have not been content to simply leave their 1970s-era consumer protection legislation in place but instead have been active in expanding it in recent years by utilizing tort rights and remedies to address new consumer protection concerns such as predatory lending. “Predatory lending” occurs where brokers or lenders offer mortgages to high-risk borrowers without fully disclosing material terms or by changing the loan type or interest rate as closing approaches.\textsuperscript{67} Such practices increased dramatically during the past ten years, as restrictions on interstate banking were removed, allowing banks and lenders to provide a broader range of credit and financial services to consumers who were

\begin{itemize}
\item \textsuperscript{60} See PRIDGEN, supra note 54, § 6:2, at 441.
\item \textsuperscript{61} Id. at §§ 6:4, 6:8.
\item \textsuperscript{62} Id. at §§ 6:5-6:7.
\item \textsuperscript{63} Id. at § 6:10.
\item \textsuperscript{64} Id. at § 6:18.
\item \textsuperscript{65} See PRIDGEN, supra note 54, § 6.5, at 452-54 (discussing awards of emotional distress damages under Texas Consumer Protection Act); § 6.12, at 467 (showing Texas mandates multiple damages in cases of intentional or willful conduct by the defendant). See also supra note 31 and accompanying text (discussing Texas tort reform legislation).
\item \textsuperscript{66} See OHIO REV. CODE § 1345.09 (allowing private right of action, compensatory damages, treble damages and attorneys’ fees for successful plaintiffs).
\end{itemize}
not able to qualify financially for more traditional loans. Not surprisingly, many of these subprime borrowers were unable to maintain their mortgage payments, leading to an increase in home foreclosures across the country.

In response to this crisis in the mortgage industry, states have begun to fill what they see as a federal regulatory void and use new and existing consumer protection practices to not only set regulatory limits on predatory lending but utilize tort rights and remedies in their efforts. Since 1999, numerous states have enacted predatory lending legislation or have brought enforcement actions against predatory lenders using new and old consumer protection laws. Some of these new predatory lending statutes provide for private rights of action by consumers and allow recovery of comprehensive damages, punitive damages, costs, and attorneys’ fees. For instance, in 2007, Minnesota enacted a predatory lending statute that provides that a borrower injured by the standards set forth in the law shall have a private right of action for recovery and the court shall award actual, incidental, and consequential damages; statutory damages equal to the amount of all lender fees included in the amount of the principal of the residential mortgage loan; punitive damages if appropriate consistent with general state standards on punitive damages; court costs; and reasonable attorneys’ fees. The statute also provides that the remedies set forth in the law are cumulative and do not restrict any other right or remedy available to the borrower. Other states, including Arkansas, Indiana, New Mexico, New York, and Ohio have enacted similar laws protecting borrowers and providing private rights of action to recover tort-like damages.

In addition to the legislative creation of new tort rights and remedies, cities are turning to the courts in hopes of using the common law tort doctrine of public nuisance to recoup municipal costs associated with the foreclosure crisis. Just this year, the Cities of

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68 See Laurie A. Burlingame, A Pro-Consumer Approach to Predatory Lending: Enhanced Protection Through Federal Legislation and New Approaches to Education, 60 CONSUMER FIN. L.Q. REP. 460, 460 (2006) (explaining changes in banking regulation that led to changes in the financial services industry, the increase of availability of credit, and the emergence of subprime lending). See also Fogel, supra note 67, at 438 (noting that in recent years, the subprime lending market has witnessed “dramatic growth” with $332 billion in mortgage loans originating from subprime lenders in 2003, compared to $125 billion in 1997).

69 See Jeffcott, supra note 59, at 450-54 (discussing the phenomenon of subprime lending among low and moderate income borrowers and the effects of such lending which has “led to a disastrous increase in the rates of foreclosure.”). See also Viaks Bajaj & Michael M. Grynpbaum, The Pace of Foreclosures and Overdue Payments is Surging, N.Y. TIMES, at C1, June 6, 2008.

70 See Jeffcott, supra note 59, at 467 (citing the “ineffectiveness of federal legislation” as the reason behind the significant state legislative activity in the area of predatory lending).

71 See Burlingame, supra note 68, at 468-69. See also Fogel, supra note 67, at 454-59 (describing how state consumer protection statutes are often more effective vehicles to prevent predatory lending practices because they contain private rights of action, prohibit unfair or deceptive practices without requiring proof of fraudulent intent or knowledge, provide for expansive remedies, and do not run afoul of federal preemption principles).

72 MINN. STAT. § 58.18.

73 Id.

74 See, e.g., ARK. CODE ANN. § 23-53-106; IND. CODE ANN. § 24-9-5-4; N.M. STAT. ANN. § 58-21A-9; N.Y. LAWS ANN. § 6-l(6), (7); OHIO REV. CODE ANN. § 1322.081.
Cleveland and Buffalo sued financial institutions under public nuisance doctrine, arguing that the sub-prime lenders and the financial institutions that backed them knowingly contributed to the current foreclosure crisis in the cities. These lawsuits seek to recoup the city’s lost property taxes as well as the cost of fire departments, police, code enforcement, demolition and other services required to deal with the foreclosed properties.

These developments show a significant amount of activity in the states geared toward using tort law as a means to provide a right of redress for consumers harmed by fraudulent sales practices or predatory lending practices. Although these torts have significant “private law” aspects in that they are suits brought by individuals seeking relief for wrongs done to them by private parties, they also have significant “public law” aspects. Notably, states enacted these laws in order to help fill a federal regulatory gap in consumer protection and to assist state enforcement of the laws. The fact that most of the state laws allow for recovery of attorneys’ fees, treble damages, and minimum damages in addition to actual damages shows the state using tort law to assist with public regulation. These increases in state tort rights and remedies in the consumer protection area stand in contrast to the limits placed on state tort rights and remedies in the product liability and medical malpractice areas. Thus, state approaches to tort law are not one-dimensional but instead demonstrate both expansions and contractions of rights and remedies along the private law-public law continuum.

2. Tort Expansions in Privacy and Publicity Rights

Another significant area of state tort expansion involves the right of privacy and the right of publicity. The right to privacy began to develop in legal scholarship, the courts, and state legislatures at the end of the 19th century. The modern right to privacy began in 1960, when William Prosser created his “four tort” approach to privacy law. In doing so, Prosser undertook a comprehensive survey of right to privacy cases and concluded that not one tort, but a set of four torts, each protecting a different interest, made up the right to privacy. These four torts were (1) the physical intrusion into private places, (2) public disclosure of private facts, (3) publicity falsely attributing to the plaintiff some opinion or utterance, and (4) appropriating the plaintiff’s likeness without consent for business purposes. The First Restatement of Torts, state legislatures, and courts across the country adopted this “four tort” approach to the right of privacy although the right

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75 See, e.g., Mayor and City of Baltimore v. Wells Fargo Bank, Civ. No. 08-CV-062; City of Cleveland v. Deutsche Bank Trust Co., No. CV08646970 (Cuyahoga County, Ohio, Jan. 10, 2008); Julie Kay, Empty Homes Spur Cities’ Suits, THE NATIONAL LAW JOURNAL (May 9, 2008).

76 Id.

77 See supra notes 58-59, 70 and accompanying text.

78 Id.


80 William L. Prosser, Privacy, 48 CAL. L. REV. 383 (1960); HENDERSON ET AL., supra note 18, at 771.

81 Id.
varies from state to state under both common law and state statutes.\textsuperscript{82} The right to publicity, which grew out of the right to privacy, has been defined as “the inherent right of every human being to control the commercial use of his or her identity.”\textsuperscript{83} Beginning in 1953 with the Court of Appeals for the Second Circuit, courts began to recognize a common law right of publicity as a matter of state law either as its own right or as part of the right of privacy. As of 2003, courts in eighteen states had recognized the right of publicity under state common law and only two states had expressly rejected it.\textsuperscript{84}

In addition to the right under common law, in the 1980s and 1990s, numerous states enacted statutes expressly recognizing and protecting the right of publicity separate and apart from the right to privacy which existed in earlier statutes.\textsuperscript{85} California, Illinois, Indiana, Kentucky, Nevada, Ohio, Oklahoma, Tennessee, Texas, and Washington all enacted statutes during this time period that expressly recognize property rights in certain aspects of personal identity (such as name, likeness, photograph, or voice), both during life and post mortem. They permit the recovery of compensatory damages, punitive damages, and/or injunctive relief for a defendant’s use of the commercial value of the plaintiff’s identity.\textsuperscript{86} Other states such as Florida, Massachusetts, Nebraska, New York, Rhode Island, Utah, and Wisconsin permit recovery of damages associated with the commercial value of a person’s identity, a “major hallmark” of the right of publicity, but consider these rights to be part of the right of privacy rather than a property right in personal identity.\textsuperscript{87} These state developments have taken place against a backdrop of developing federal privacy and publicity law at the federal level involving the First and Fourth Amendments to the U.S. Constitution as well as growing federal statutory privacy protection beginning in the 1980s.\textsuperscript{88}

The increase in state attention to privacy and publicity laws can be seen as a direct response to the new challenges in information privacy and use. The first set of modern privacy and publicity challenges began in the 1970s and 1980s as a result of the rise of digital technology, computer databases, and other sophisticated digital collection of information.\textsuperscript{89} The second set of challenges took place in the 1990s and 2000s following the internet explosion with the vastly increased access to personal information and the ability to use that personal data and information for commercial gain.\textsuperscript{90} Thus, state

\textsuperscript{82} Id. at 772.
\textsuperscript{83} MCCARTHY, supra note 79, § 1:3.
\textsuperscript{84} Id., § 6:3.
\textsuperscript{85} Id., §§ 6:6-6:8.
\textsuperscript{86} Id., §§ 6:4, 6:8.
\textsuperscript{87} See id., §§ 6:7-6:8.
\textsuperscript{88} See CHRISTOPHER WOLF, PROSKAUER ON PRIVACY: A GUIDE TO PRIVACY AND DATA SECURITY LAW IN THE INFORMATION AGE §§ 1:4.3-1:4.5, 14:1.1 (2007).
\textsuperscript{89} See id., §§ 1:4.3-1:4.4.
\textsuperscript{90} Id.
legislatures have turned to tort law as one tool in responding to the public’s concern about the use and misuse of technology in the Internet Age.\textsuperscript{91}

Another example of states using tort law to respond to the public’s concern over interference with privacy and publicity rights is the recent focus on “anti-paparazzi” legislation. In 1998, the California legislature enacted the California Privacy Protection Act of 1988\textsuperscript{92} to provide protection against technological intrusion and trespass.\textsuperscript{93} The legislation redefined the state law of trespass to create new privacy torts in response to the death of Princess Diana in 1997, which resulted when her car tried to escape aggressive paparazzi photographers.\textsuperscript{94} The first new tort, “physical invasion of privacy” allows a party to sue for damages or injunctive relief when someone has “knowingly entered the land of another without permission; the entry was made with the intent to capture any type of visual image, sound recording, or other physical impression of another person engaged in a “personal or familial activity;” and the invasion was made “in a manner offensive to a reasonable person.”\textsuperscript{95} Under this tort, a plaintiff can recover general damages, special damages, treble damages, punitive damages, disgorgement of profits, and equitable relief (including an injunction and restraining order).\textsuperscript{96}

The second new tort, labeled “constructive invasion of privacy,” goes beyond physical invasion by providing for liability even without entry onto the land of another. “Constructive invasion of privacy” occurs where a person attempts to capture any type of visual image, sound recording or other physical impression of another person engaging in “personal or familial activity;” the attempt is made in a manner that is offensive to a reasonable person; there is a reasonable expectation of privacy; and a “visual or auditory enhancing device is used.”\textsuperscript{97} Liability exists “regardless of whether there is a physical trespass.”\textsuperscript{98} The full range of relief for physical invasion of privacy is also available for constructive invasion of privacy.\textsuperscript{99} Holding a defendant liable for “constructive invasion of privacy” departs dramatically from common law trespass doctrine, which has always required a physical entry to establish liability.\textsuperscript{100} In 2005, the California Legislature

\textsuperscript{91} Id., § 1:4.4. See also id., § 5:1.2 (“The wide availability of personal computers, Internet access, and electronic mail beginning in the 1990s led to a resurgence of concern regarding the protection of personal information in an on-line environment.”).

\textsuperscript{92} CAL. CIV. CODE § 1708.8.


\textsuperscript{95} See CAL. CIV. CODE § 1708.8(a).

\textsuperscript{96} See CAL. CIV. CODE § 1708.8(d).

\textsuperscript{97} See id., § 1708.8(b).

\textsuperscript{98} Id.

\textsuperscript{99} Id. at § 1708.8(d).

\textsuperscript{100} See HENDERSON ET AL., supra note 18, at 386 (stating that to constitute a trespass, “the defendant must accomplish an entry on the plaintiff’s land by means of some physical, tangible agency”); \textit{RESTATEMENT (SECOND) OF TORTS} § 158 (stating that a defendant is liable for trespass if he or she (1)
amended its privacy law to add assault to the list of activities that constitute invasion of privacy and to impose civil liability for “assault committed with the intent to capture any type of visual image, sound recording, or other physical impression.”

Thus, we see state legislatures reacting to citizen concerns over new vulnerabilities in the areas of privacy and publicity in an age where computers, the internet, high-resolution cameras, and other forms of technology make it difficult to keep private or retain proprietary rights in our most personal information and attributes. State legislatures as well as Congress have enacted standards and regulations in response to these concerns but states have additionally undertaken recent innovations in the area of tort law in order to provide minimum protections for their citizens. Once again, these new torts serve private law goals by granting state citizens additional “property” rights in their identity and privacy that they can enforce in court against private actors, but also serve public law goals by creating additional “zones” of privacy that make citizens as members of the public feel protected from potential abuses of technology.

3. Tort Expansions in Environmental Protection

Although courses in environmental law still focus primarily on the numerous federal statutes that, since the 1970s, govern most aspects of environmental protection, states have in recent years enacted new statutes and pursued new common law tort theories for environmental protection purposes. States first took these actions to augment the federal regulatory structure but, more recently, to respond to what they see as a failure of Congress and the Executive Branch to address critical environmental issues such as greenhouse gas emissions (“GHG emissions”) that lead to climate change. This subsection focuses on recent state efforts to use tort law (both statutory and common law) to meet environmental protection objectives and puts those efforts into their historical context, which begins with Congress’s enactment of the Comprehensive Environmental Response, Compensation, and Liability Act (“CERCLA”) in 1980.

In the 1970s, Congress for the first time began to enact far-reaching legislation to reduce or eliminate air and water pollution; govern the generation, storage, and disposal of solid and hazardous waste; and create a regulatory system to review, classify, and regulate a host of pollutants and hazardous chemicals. The most “tort-like” of these federal statutes is CERCLA, also known as “Superfund.” Congress enacted CERCLA

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101 Id. at § 1708.8(c). See also Vance, supra note 94, at 108-10 (discussing 2005 amendment).
in December 1980 in response to a growing concern that past and current disposal of hazardous substances was having a significant impact on human health and the environment.\textsuperscript{105} CERCLA’s legislative history is full of facts, statistics, and horror stories justifying the need for federal legislation to address a major crisis of abandoned hazardous waste facilities.\textsuperscript{106} During the Congressional debates, members of Congress made frequent reference to “Love Canal” and “Valley of the Drums” which were only the most publicized of the thousands of abandoned hazardous waste sites around the country that posed a threat to human health and the environment.\textsuperscript{107}

Under CERCLA, anyone who is found to be “responsible”\textsuperscript{108} for a release or threatened release\textsuperscript{109} of a hazardous substance\textsuperscript{110} from a facility\textsuperscript{111} that results in the incurrence of response costs,\textsuperscript{112} is strictly, jointly, and severally liable for reimbursing those costs.\textsuperscript{113} CERCLA, however, limits recovery by private parties to money spent on the investigation and remediation of a release of hazardous substances, and does not allow private parties to recover damages associated with lost profits, diminution in value to property, personal injury, lost rents, punitive damages, or other damages associated with contamination of property or the environment.\textsuperscript{114} By contrast, some state superfund statutes enacted subsequent to CERCLA, such as those in Alaska, Minnesota, and Washington, allow recovery for personal injury, lost profits, diminution in value to property, attorneys’ fees, expenses, or other losses stemming from the contamination of property or harm to human health and the environment.\textsuperscript{115}

\textsuperscript{106} Id. at 926-27.
\textsuperscript{107} Id. at 927-28.
\textsuperscript{108} See 42 U.S.C. § 9607(a) (setting forth categories of persons liable under CERCLA for the release or threatened release of a hazardous substance from a facility that causes response costs to be incurred).
\textsuperscript{109} Id.; see also 42 U.S.C. § 9601(22) (defining “release” to include any “spilling, leaking, pumping, pouring, emitting, emptying, discharging, injecting, escaping, leaching, dumping, or disposing into the environment (including the abandonment or discarding of barrels, containers, and other closed receptacles containing any hazardous substance or pollutant or contaminant’’)).
\textsuperscript{110} See 42 U.S.C. § 9601(14) (defining “hazardous substance” to include any substance designated as hazardous by EPA under CERCLA and/or various other environmental statutes such as the Clean Water Act, Clean Air Act or Solid Waste Disposal Act and to exclude petroleum or natural gas). For a further discussion of CERCLA’s “petroleum exclusion,” see infra note 124, and accompanying text.
\textsuperscript{111} See 42. U.S.C. § 9601(9) (defining “facility” broadly to include “... any site or area where a hazardous substance has been deposited, stored, disposed of, or placed, or otherwise come to be located; ...”).
\textsuperscript{113} 42 U.S.C. § 9607(a).
\textsuperscript{114} See Klass, supra note 105, at 923.
\textsuperscript{115} See MINN. STAT. §§ 115B.05, 115B.14 (allowing recovery for personal injury, lost profits, diminution in value to property, and other damages associated with the release of hazardous substances as well as reasonable costs and attorneys’ fees). See also ALASKA STAT. §§ 46.03.822, 46.03.824 (providing for strict liability, cost recovery, and broadly defined damages including injury to or loss of persons or
State legislatures enacted these expansive statutes during the same period they were engaging in traditional tort reform measures to limit rights to recovery in personal injury, medical malpractice, and product liability cases. Notably, some states that enacted caps on economic damages, non-economic damages, or punitive damages in traditional tort cases expressly exempted environmental harm from those caps. For instance, Hawaii law limits damages for pain and suffering to a maximum award of $375,000, but specifically excludes from that cap damages in actions involving torts relating to environmental pollution, toxics, asbestos, and products liability. Nevada law limits punitive damages to $300,000 (if the compensatory damages are less than $100,000) or three times the amount of compensatory damages (if the compensatory damages are $100,000 or more) but does not apply those caps to actions involving defective products or the emission, spilling or disposal of toxic, radioactive, or hazardous materials or waste. For its part, New Jersey has abolished punitive damages in product liability actions against drug manufacturers except in claims where the cause of harm is exposure to toxic or hazardous substances.

There are several possible explanations for this legislative expansion of environmental torts at the same time that legislatures were placing significant limits on “traditional” torts. One, of course, is that the American Medical Association, the American Tort Reform Association, and manufacturing interests are more powerful lobbyists than those representing landfills, industrial operations, chemical companies, and other sources of pollution, at least on the state level. Another explanation though is that just as the tort reform interests groups have been successful in convincing legislatures, the courts, and the public that we are in the midst of a torts “crisis,” environmental groups have been just as successful, since the 1980s, of convincing these same actors that we are in an environmental “crisis.” There is significant sympathy toward doctors and small businesses with regard to increasing liability and the lack of affordable insurance to cover those liabilities. There is much less sympathy for traditional “polluters.” Indeed, it was the publicity of Love Canal and other toxic sites in the late 1970s and early 1980s than began the era of federal environmental regulation in the first place and also had a significant influence on state legislatures. Thus, environmental protection has been

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116 See supra Part II.A.
117 See HAWAII REV. STAT. §§ 663-8.7; 663-10.9(2).
118 See NEV. REV. STAT. § 42.005.
120 See supra notes 105-07 and accompanying text (discussing events leading up to enactment of CERCLA).
separated from traditional tort law and accordingly has been able to expand at both the state and federal level.

Even more recently, state attorneys general have attempted to use public nuisance doctrine to obtain wide-ranging damages and injunctive relief for harm associated with GHG emission which contribute to climate change. In July 2004, Connecticut, California, six other states, and the City of New York sued the electric power industry\(^\text{121}\) under the tort of public nuisance to curtail the defendants’ emissions of carbon dioxide.\(^\text{122}\) As relief, the plaintiffs asked the court to cap carbon dioxide emissions from the power plants and mandate annual reductions of such emissions.\(^\text{123}\) Then, in September 2006, California brought its own public nuisance lawsuit against numerous automakers seeking damages associated with the defendants’ production of vehicles which emit GHG emissions.\(^\text{124}\) In each case the states brought the lawsuits to respond to the federal government’s failure to address the growing threat of climate change and use their own state tort rights and remedies to obtain either injunctive relief or damages.\(^\text{125}\) According to one of the attorneys prosecuting the California suit under public nuisance theory, “the automakers could continue producing cars with GHG emissions that contribute to global warming and the specific harms identified in California, but they would be liable for the costs imposed by those harms.”\(^\text{126}\)

To date, these public nuisance suits have not met with much success. In the Connecticut case, the federal district court dismissed the suit in 2005 on justiciability grounds, holding that the action raised political questions over how to address global warming that were better addressed by the legislative and executive branches.\(^\text{127}\) The court stated that “[t]he scope and magnitude of the relief Plaintiffs seek reveals the transcendently legislative nature of this litigation.”\(^\text{128}\) The case is currently under review at the Second Circuit. In the California case, the district court dismissed the federal public nuisance claim on similar grounds even though the case sought damages instead of injunctive relief.\(^\text{129}\) The court reasoned that granting relief would require the court to balance the interests of reducing global warming with economic and industrial developments, and that such policy determinations should “be made by the political

\(^\text{121}\) The electric power industry is responsible for significantly more CO\(_2\) emissions in the U.S. than any other industry, contributing 40% of total emissions as compared with 20% for cars and light-duty trucks. See U.S. Dept. of Energy, Emissions of Greenhouse Gas Emissions in the United States 2004, at 19, 22 (2005), available at http://www.eia.doe.gov/oiaf/1605/ggrpt/cdemissions_tbls.html.


\(^\text{125}\) See Kenneth P. Alex, California’s Global Warming Lawsuit: The Case for Damages, in CREATIVE COMMON LAW STRATEGIES FOR PROTECTING THE ENVIRONMENT 165, 166 (Clifford Rechtschaffen & Denise Antolini eds. 2007) (“Both lawsuits were carefully crafted by the states’ attorneys to respond to failures of the federal government to address the growing threat of global warming.”).

\(^\text{126}\) See Alex, supra note 125, at 170.


\(^\text{128}\) Id. at 272.

branches, and not this Court.” The court declined to rule on the state public nuisance claim, dismissing it without prejudice for re-filing in state court. The case is on appeal at the Ninth Circuit.

It may be that these cases will meet with greater success at the appellate level, and that other similar cases will join them. Indeed, there has been a resurgence of public nuisance lawsuits in other areas of environmental protection, including high-profile (but so far unsuccessful) suits brought by states and local governments against paint manufacturers to obtain injunctive relief and punitive damages associated with harms caused by lead paint in residential homes. Not surprisingly, these lawsuits have been subject to criticism as examples of attorneys general abusing their authority in pursuit of political and other agendas and as classic “regulation by litigation.”

On the private law-public law line, the developments in CERCLA and state law to recover cleanup costs associated with environmental contamination fall toward the private law side. It is true that these statutes were enacted to allow private parties to assist with the massive problem of remediating hazardous waste sites. It is also true, however, that these laws were enacted to address the problems private citizens faced in relying on traditional tort claims of negligence and nuisance where the contamination occurred decades in the past making it difficult, if not impossible, to prove breach of a duty of care or causation. Thus, the new torts were important in giving private citizens new rights to recover for private wrongs associate with the cleanup of hazardous waste.

The public nuisance suits brought by state and local governments, however, are certainly examples of public entities using litigation to advance public law goals. As noted above, these suits have met with much criticism as a misuse of the tort system. On the other hand, attorneys general play an important role not only in enforcing existing state statutes but using their broad powers to engage in their own legitimate tort

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130 General Motors Corp., 2007 WL at *8.
131 Id. at *16. In another similar lawsuit brought by North Carolina against the Tennessee Valley Authority, the federal district court rejected TVA’s argument that it was a federal agency entitled it to immunity under the “discretionary function doctrine” but has not yet ruled on the merits of the suit. See North Carolina ex rel. Cooper v. Tennessee Valley Auth., 439 F. Supp. 2d 486 (W.D.N.C. 2006).
132 See, e.g., State v. Lead Industries, 951 A.2d 428 (R.I. 2008) (dismissing state’s public nuisance claim against paint manufacturers); Katie J. Zoglin, Getting the Lead Out: The Potential of Public Nuisance in Lead-Based Paint Litigation, in CREATIVE COMMON LAW STRATEGIES FOR PROTECTING THE ENVIRONMENT, supra note 125, at 339 (discussing public nuisance suits brought by states and municipalities to address harms of lead paint in residential buildings); Julie Steinberg, Columbus, Ohio, Dismisses Nuisance Suit Against Former Makers of Lead Pigment, TOXICS LAW DAILY (BNA July 17, 2008) (discussing voluntary dismissals of public nuisance suits by several Ohio cities against paint manufacturers as well as the fact that all of the similar suits filed around the country have been dismissed).
133 See, e.g., John S. Gray & Richard O. Falk, “Negligence in the Air?” Should “Alternative Liability Theories Apply in Lead Paint Litigation?”, 35 PRODUCT SAFETY & LIABILITY REPORTER, ANALYSIS & PERSPECTIVE, 341 (BNA April 2, 2007) (arguing that public officials pursuing public nuisance actions against lead paint manufacturers are ignoring existing state law and attempting “to create public policy based on their personal views through judicial decree.”).
134 See Klass, supra note 105, at 923-24.
135 See id. at 928-32.
TORT EXPERIMENTS

experiments under common law.\textsuperscript{136} Thus, one can argue that innovative lawsuits brought by attorneys general under their state tort law play a legitimate role in state efforts to experiment with tort law in our federalist system.\textsuperscript{137} Whether one has a positive view or negative view of these suits, the fact remains that they are an example of tort law that is primarily promoting public law goals to achieve broad change in society at large rather than enforcing private law rights to redress.

C. Conclusion

These state experiments with tort law likely will not abate any time soon. States will continue to struggle with where to increase and where to decrease tort rights to respond to the needs of its citizens, the business community, and technological and social advances. Just as environmental torts expanded in the 1980s to be responsive to the growing awareness of environmental harm, we now see states expanding privacy and publicity torts to provide tailored protections for the Internet Age. As state legislatures conduct their experiments, state courts conduct their own as well as review the legislative experiments under state constitutions. The next question, of course, is the role Congress, federal agencies, and federal courts have played and will continue to play in tort experiments.

III. CONGRESIONAL RESPONSES TO STATE TORT EXPERIMENTS

This Part turns to the current tensions between the federal government and the states in the context of tort law. Despite the description of tort law as an area of “traditional state concern,” Congress has long played a role in displacing state tort law to both increase plaintiff rights and decrease plaintiff rights in the name of promoting national interests. As early as 1908, Congress enacted the Employers’ Liability Act which required common carriers engaged in interstate commerce to compensate employees for damages caused by equipment defects or negligence of fellow employees, replaced the defense of contributory negligence with comparative negligence, and eliminated defenses to liability set forth in employment contracts.\textsuperscript{138} In upholding the ability of Congress to displace state tort law in this manner, the Court found that changes in common law

\textsuperscript{136} Indeed, state attorneys general are democratically elected in forty-three states and thus accountable to the electorate. See NATIONAL ASS’N OF ATTORNEYS GENERAL, STATE ATTORNEYS GENERAL: POWERS AND RESPONSIBILITIES 15 (Lynn M. Ross ed. 1990).


\textsuperscript{138} 45 U.S.C. §§ 51-60. The Supreme Court upheld the 1908 law after striking down a similar 1906 law as beyond Congress’s authority under the Commerce Clause. See The Employers’ Liability Cases, 207 U.S. 463 (1907); The Second Employers’ Liability Cases, 223 U.S. 1 (1912).
liability rules would promote workplace safety and that Congress had the authority to determine whether national law “would better serve the needs of commerce.” ¹³⁹

Starting in the middle of the 20th century, Congress began to enact numerous laws that granted liability protections for defendants in certain industries from state tort claims but along with that protection provided substitute remedies for injured parties. These laws include the Federal Drivers Act in 1961 (making the Federal Tort Claims Act the exclusive remedy for injuries resulting from operation of a motor vehicle by federal government employees); ¹⁴⁰ the Price-Anderson Act enacted in 1957 and amended in 1966, 1975 and 1998 (providing for an exclusive federal cause of action against nuclear power plants and setting a maximum aggregate liability in the event of a nuclear accident in exchange for plant operators waiving defenses to liability if sued and providing federal compensation from a pool funded by plant operators); ¹⁴¹ the Black Lung Benefits Act of 1972 (requiring employers to provide benefits to coal miners suffering from “black lung disease” and their families and preempting state workers’ compensation laws in this area); ¹⁴² the Swine Flu Act enacted in 1976 (substituting liability of the United States under the Federal Tort Claims Act for manufacturers, distributors, and volunteer medical personnel in connection with administration of swine flu vaccine); ¹⁴³ the Atomic Testing Liability Act enacted in 1984 (making action against the United States under Federal Tort Claims Act the exclusive remedy for injury or death due to exposure of radiation from atomic weapons testing by government contractors); ¹⁴⁴ and the National Childhood Vaccine Act of 1986 (creating a no-fault compensation program for childhood vaccine-injury victims to be funded by a tax on each dose of vaccine). ¹⁴⁵ In each of these laws, Congress preempted state tort claims against the industries or activities to be protected but coupled that preemption with a federal system of compensation to ensure that some aspects of tort remedies were preserved in a federal forum. In this way, Congress chose to promote national interests (such as encouraging nuclear testing, nuclear energy development, or vaccine manufacturing) by eliminating aspects of tort liability but still recognizing the need for compensation in cases of harm.

Congress began a new wave of targeted tort reform in the 1990s, providing an 18-year statute of repose for manufacturers of general aviation aircraft and their components parts (General Aviation Revitalization Act of 1994); ¹⁴⁶ exempting persons who donate food and grocery products to nonprofits for distribution to the needy (the Bill Emerson

¹⁴¹ See, e.g., 42 U.S.C. §§ 2210(n)(1), 2210(c).
¹⁴⁵ See 42 U.S.C. §§ 300aa-1 to 300aa-34.
Good Samaritan Food Donation Act enacted in 1996);\footnote{147} providing liability protections to individuals who volunteer for nonprofit or government agencies (the Volunteer Protection Act of 1997);\footnote{148} limiting compensatory and punitive damages in suits against rail passenger transportation companies (the Amtrak Reform and Accountability Act of 1997);\footnote{149} granting suppliers of raw materials and medical implant component parts the right to be dismissed from product liability suits if they meet certain contractual and other product specifications (the Biomaterials Access Assurance Act of 1998);\footnote{150} and providing liability relief and limits on punitive damages for defendants in legal actions arising from year 2000 computer failures (Y2K Act enacted in 1999).\footnote{151}

These laws are notable for at least three reasons. First, like earlier legislation preempting state tort suits, the federal legislation of the 1990s is narrowly tailored to protect specific industries or activities.\footnote{152} Second, also in keeping with earlier legislation, these federal laws are clearly intended to promote activities and industries that many would agree are beneficial to society at large (i.e., volunteering, providing passenger rail service, encouraging development of computer technology, etc.) in the name of the national interest. Third, however, unlike earlier federal legislation preempting state tort suits, Congress did not see fit to provide any alternative compensation scheme for potential plaintiffs injured by the industries or activities to be protected. Thus, in the 1990s, we see a shift away from the idea that Congress should provide a federal substitute when it decides to eliminate state tort lawsuits.

In recent years, federal legislation displacing tort law has continued to abandon the idea of creating any federal compensation substitute in place of state tort law and, moreover, has begun to provide liability protection to more “controversial” industries and activities. In 2005, Congress enacted the Protection of Lawful Commerce in Arms Act which prohibits virtually all civil liability actions against manufacturers and sellers of firearms and their trade associations based on the criminal or unlawful misuse of guns.\footnote{153} This legislation was in response to a series of public nuisance suits brought by

\footnote{147} 42 U.S.C. § 1791.
\footnote{148} 42 U.S.C. §§ 14501-14505.
\footnote{149} 49 U.S.C. § 28103.
\footnote{150} 21 U.S.C. §§ 1601-1606.
\footnote{152} Although Congress has attempted on several occasions to enact national tort reform legislation limiting state causes of action and damages in products liability actions more generally, those efforts have so far failed. See HENDERSON ET AL., supra note 18, at 543 (discussing President Clinton’s veto of Common Sense Product Liability Legal Reform Act of 1996, and later efforts to enact the Product Liability and Reform Act of 1998, which would have capped punitive damages for small businesses at the greater of $250,000 or two times compensatory damages, created new statutes of repose and statutes of limitations, and limited liability generally for various defendants in such actions); Apelbaum & Ryder, supra note 139, at 627-28 (same).
\footnote{153} See 15 U.S.C. §§ 7901-03, 18 U.S.C. §§ 922, 944. See also City of New York v. Beretta U.S.A. Corp., 524 F.3d 384 (2d Cir. 2008) (dismissing New York City public nuisance action against gun manufacturers on grounds that Protection of Lawful Commerce in Arms Act did not violate the Commerce Clause, the Tenth Amendment, the First Amendment, or separation of powers doctrine and that the Act required dismissal of the lawsuit).
municipalities in the early 1990s, attempting to hold gun sellers, manufacturers, and trade shows liable under public nuisance theories for gun violence.\textsuperscript{154} In these cases local governments and one state (New York) began filing suits against the gun industry in the late 1990s arguing, among other things, that the gun industry knowingly contributed to the illegal flow of weapons which endangered the health and safety of those living in the plaintiffs’ communities.\textsuperscript{155} Congress enacted its legislation despite the fact that none of the plaintiffs had prevailed in court on their claims and despite the fact that over thirty states had already enacted legislation banning such lawsuits.\textsuperscript{156} Moreover, in response to the filing of these suits, some gun dealers and distributors entered into settlement agreements with various states and cities in which the gun industry agreed to reform various manufacturing and distribution practices.\textsuperscript{157}

The food industry (particularly the fast food industry) is seeking similar protection from all lawsuits relating to health conditions associated with weight gain and obesity. Although Congress has not preempted those claims to date, several bills have passed in the House and Senate and many states have already preempted such claims.\textsuperscript{158} Also in 2005, Congress enacted legislation (known as the “Graves Amendment”) that relieved rental car companies from vicarious liability for accidents caused by rental car drivers by preempting all state laws that impose such liability.\textsuperscript{159}

This most recent federal legislation differs from that which preceded it. With the earlier legislation, there appeared to be an attempt to balance the need for compensation with the need to promote industries or practices that were important to the national economy and national community. While one can argue over whether it was necessary to displace state tort liability to promote nuclear energy, that debate was softened somewhat by the creation of a federal compensation scheme. One can also argue over whether


\textsuperscript{155} See, e.g., City of Chicago v. Beretta, 821 N.E.2d 1099, 1108 (Ill. 2004).

\textsuperscript{156} THOMAS O. MCGARITY ET AL., THE TRUTH ABOUT TORTS: LAWYERS, GUNS, AND MONEY, CENTER FOR PROGRESSIVE REFORM WHITE PAPER #603 (JULY 2006).

\textsuperscript{157} See Crouse, supra note 35.


\textsuperscript{159} See Graves Amendment to the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users, 49 U.S.C. § 30106. See also Vanguard Car Rental Co. v. Huchon, 532 F. Supp. 2d 1371 (S.D. Fla. 2007) (finding Graves Amendment was beyond Congress’s authority under the Commerce Clause and distinguishing Supreme Court precedent on grounds that earlier legislation preempting state liability (such as the Price-Anderson Act and the Federal Employers’ Liability Act) were ‘part of a larger-scale federal involvement with the regulated industry.’). But see Flagler v. Budget Rent A Car System, Inc., 538 F. Supp. 2d 557, 559 (E.D.N.Y. 2008) (upholding Graves Amendment under the Commerce Clause, finding no Supreme Court or circuit court authority on the issue, and finding that a significant majority of federal district courts and state courts have found the law constitutional).
eliminating state tort liability for nonprofit volunteers will create more volunteers, but
most will agree that additional volunteers are a good thing. The same cannot be said as
easily for legislation that immunizes the gun industry, the rental car industry, or the food
industry from state tort liability. In particular, it is not at all clear there is a national
consensus that either guns or fast food deserve special protection in our current culture.
Many would argue the problem in the United States is in fact too many guns and too
much fast food at a time when gun violence and obesity are already far too prevalent.
Thus, there appears to be an increasing readiness of Congress to displace state tort law
without the existence of a clear national interest and without creating any real substitutes
for compensation or regulation.

IV. THE SUPREME COURT, FEDERALISM AND TORT LAW

This Part analyzes U.S. Supreme Court decisions considering limits on state tort law
under doctrines of federal preemption and substantive due process. Inevitably, in each of
these substantive areas of constitutional law, the Court is forced to consider basic
principles of federalism in the context of tort law. Notably, after over 100 years of
minimal involvement in reviewing state tort law the Court has in the past two decades
been increasingly willing to allow Congress and federal agencies to override state tort
law as a matter of constitutional law, statutory interpretation, and agency deference.
Also, this closer scrutiny of state tort law began at approximately the same time the Court
was cutting back on the authority of Congress under the Commerce Clause as part of its
“federalist revolution” of the 1990s. Thus, while the Court was limiting Congressional
authority under the Commerce Clause in the name of federalism and states’ rights, it also
began imposing more federal restrictions on state tort law through preemption doctrine
and due process limits on punitive damages despite federalism principles.

Section A provides a general introduction to federalism principles and discusses the
Court’s use of federalism principles in the 1990s to invalidate Congressional authority
under the Commerce Clause to regulate in areas of public health, safety, and other areas
of traditional state concern. Section B then considers the Court’s retreat from these same
federalism principles in cases involving federal preemption of state tort law. Section C
discusses the Court’s foray into the realm of state punitive damages and its increasing use
of federal substantive due process to place significant limits in this area of tort law. This
Part concludes with some observations about the Court’s perceptions of tort law and its
role in policing state tort law.

A. The Supreme Court’s Federalism “Revolution”

The U.S. Constitution sets out a system of “dual sovereignty” between the federal
government and the states. Thus, the federal government has enumerated powers that are
limited in scope but are supreme within its realm of authority while the states have
residual broad and plenary powers.160 Moreover, apart from the few areas in which the

Constitution grants the federal government exclusive authority, there are many areas that are subject to concurrent and overlapping federal and state regulation. This federalist system assures “a decentralized government that will be more sensitive to the diverse needs of a heterogeneous society; it increases opportunity for citizen involvement in democratic processes; it allows for more innovation and experimentation in government; and it makes government more responsive by putting the States in competition for a mobile citizenry.”

One of the broadest of Congress’s enumerated powers is the power to regulate interstate commerce under Article I, Section 8 of the U.S. Constitution. From the time of the New Deal until the 1990s, the Supreme Court approved far-reaching legislation governing all aspects of civil society, including housing, environmental protection, and discrimination in employment based on the theory that these activities had a “substantial effect” or “cumulative effect” on interstate commerce. Beginning in the 1990s, however, the Court under Chief Justice William Rehnquist began to alter the balance of power between the federal government and the states by reigning in Congressional authority under the Commerce Clause. In 1995 in United States v. Lopez (involving a federal statute imposing criminal sanctions for possessing a gun near a school), and in 2000 in United States v. Morrison (involving a federal statute providing a federal civil damage remedy for victims of gender-motivated violence), the Court for the first time in 60 years struck down federal legislation as beyond Congressional authority. In Lopez, the Court held that the law did not regulate an economic activity and was not in any way connected to interstate commerce, and thus did not have a “substantial effect” on interstate commerce sufficient to allow regulation under the Commerce Clause. In Morrison, the Court found that the regulation and punishment of intrastate violence was not economic activity, “has always been the province of the states,” and that Congress could not regulate it under its Commerce Clause authority.

\footnotesize{161 See Caleb Nelson, Preemption, 86 VA. L. REV. 225, 225 (2000) (“The powers of the federal government and the powers of the state overlap enormously. Although the Constitution makes a few of the federal government’s powers exclusive, the states retain concurrent authority over most of the areas in which the federal government can act.”); Morrison, supra note 137.}  
\footnotesize{162 Gregory, 501 U.S. at 458.}  
\footnotesize{163 See U.S. CONST. art. I, § 8, cl. 3 (providing that Congress shall have the power to regulate commerce “among the several states.”).}  
\footnotesize{164 See 1 LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 811-15 (3d ed. 2000) (discussing Supreme Court decisions expanding Congressional authority under the Commerce Clause during this period).}  
\footnotesize{165 United States v. Lopez, 514 U.S. 549 (1995).}  
\footnotesize{166 United States v. Morrison, 529 U.S. 598 (2000).}  
\footnotesize{167 See Morrison, 529 U.S. at 613; Lopez, 514 U.S. at 561. See also ERWIN CHEMERINSKY, CONSTITUTIONAL LAW 264 (3rd ed. 2006) (noting that “between 1936 and April 26, 1995, the Supreme Court did not find one federal law unconstitutional as exceeding the scope of Congress’s commerce powers”).}  
\footnotesize{168 Morrison, 529 U.S. at 617.}
While these cases brought much talk of a new federalism “revolution” or “revival,” subsequent cases refused to place additional limits on Congress’s Commerce Clause authority. Most notably, in *Gonzales v. Raich*, the Court held that Congress had the authority under the Commerce Clause to prohibit the cultivation and possession of small amounts of marijuana for medical purposes. In holding that the federal law could override California’s exemption to its state drug laws allowing marijuana for medical use, the Court found that even small amounts of marijuana, looked at cumulatively, had a substantial effect on interstate commerce.

For purposes of this Article, what is most relevant about the recent Commerce Clause cases is the Court’s discussion (generally in concurrences and dissents) regarding the increasingly intertwined relationship between the federal and state governments in what were once areas of traditional state concern. For instance, in *Lopez*, Justice Kennedy joined the majority but wrote separately to discuss “the significance of federalism in the whole structure of the Constitution.” He highlighted the idea that the Constitution divides authority between two governments (state and federal) to provide more liberty by providing two distinct and discernable lines of accountability—one between the citizens and the federal government and the other between the citizens and the states. If the federal government “were allowed to take over the regulation of entire areas of traditional state concern,” the “boundaries” between the “spheres” of federal and state authority would “blur” and would reduce political accountability. He went on to recognize that most states, and most individuals, would argue it is good public policy to prohibit guns in or near schools. Nevertheless, the issue was one for the states, not for Congress, because federalism supports the idea that “the States may perform their role as laboratories for experimentation to devise various solutions where the best solution is far from clear.”

Thus, Justice Kennedy’s vision of federalism, at least in *Lopez*, was based on the idea of separate “spheres” of regulation between the federal and state governments, with any increase in federal authority necessarily diminishing that of state authority.

By contrast, Justices Souter and Breyer describe a different vision of federalism in their respective dissents in *Morrison*. In that case, Justice Souter argued that today’s integrated, national economy renders the idea of separate spheres of federal and state influence “incoherent” and that state sovereign interests are better protected by procedural safeguards inherent in the structure of the federal system than by “judicially

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169 See, e.g., Richard H. Fallon, *The “Conservative” Paths of the Rehnquist Court’s Federalism Decisions*, 69 U. Chi. L. Rev. 429, 430 (2002) (stating in 2002 that commentators have referred to a federalism “revival” while law reviews have discussed “whether the Court has yet achieved, or is likely to effect, a federalism ‘revolution.’”). *See also supra* note 4.
170 See Sullivan, *supra* note 4 (explaining how the Rehnquist Court “conspicuously failed to extend the federalism revival to its logical limit”).
172 *Raich*, 545 U.S. at 32.
173 *Lopez*, 514 U.S. at 575 (Kennedy, J., concurring).
174 *Id.*
175 *Id.* at 581.
created limitations on federal power.”176 He then placed great weight on the fact that the states themselves overwhelmingly supported the federal law in question as “a federal civil rights remedy aimed exactly at violence against women, as an alternative to the generic state tort causes of action found to be poor tools of action by the state task forces.”177 Thus, it was “not the least irony of these cases that the States will be forced to enjoy the new federalism whether they want it or not.”178 Justice Souter concluded by stating that the federalism of “some earlier time” cannot account for today’s integrated national commerce and the modern political relationship between the federal government and the states.179 In the other words, the days of “separate spheres” are over and the Court must begin to recognize that in its federalism jurisprudence. Justice Breyer struck a similar note in his dissent, in which he focused on how Congress followed procedures to protect “the federalism values at stake” and tailored the law to prevent its use in areas of traditional state concern such as divorce, alimony, and child custody.180 Justice Breyer saw the law as “an instance, not of state/federal conflict, but of state/federal efforts to cooperate in order to help solve a mutually acknowledged national problem.”181

These opinions show it is unlikely the states have always relished the increased “authority” the majority in Lopez and Morrison gave to them by limiting the powers of Congress to assist them in battling social ills of guns in schools and gender-motivated violence.182 Indeed, in similar areas, such as environmental protection, cases that limit the ability of Congress to regulate and protect intrastate wetlands and other state environmental amenities simply result in the states having less funding and other resources to do the job in an age where so many of these issues cannot be placed easily into separate state and federal spheres of influence.183 Thus, it appears the Court has used principles of federalism under the Commerce Clause to limit the ability of Congress to help the states (i.e., Lopez and Morrison) but has reaffirmed Congressional authority to keep the states “in line” when they go too far with their experimentation (i.e., Raich).

176 Morrison, 529 U.S. at 646-47, 650 (Souter, J., dissenting) (quoting Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 552 (1985)).

177 Id. at 653-54.

178 Id. at 654.

179 Id. at 655.

180 Id. at 662 (Breyer, J., dissenting).

181 Id.

182 See, e.g., REDEFINING FEDERALISM: LISTENING TO THE STATES IN SHAPING “OUR FEDERALISM” 1 (DOUGLAS T. KENDALL ED. 2004) (stating that in the last decade, “[t]he Supreme Court has reworked significant areas of constitutional law with the professed purpose of protecting the dignity and authority of the States, while frequently disregarding the States’ views as to what federalism is all about.”).

183 See, e.g., Rapanos v. United States, 126 S. Ct. 2208 (2006) (discussing the outer limits of Congress’s authority under the Commerce Clause to regulate intrastate wetlands pursuant to the Clean Water Act); Solid Waste Agency v. Army Corps of Eng’rs, 531 U.S. 159 (2001) (same); REDEFINING FEDERALISM, supra note 182, at 27 (contending the states “do not view formalistic limits on federal power as essential to state liberty’ and have “overwhelmingly supported federal laws necessary to combat national problems such as violence against women and pollution of our air and water.”).
B. The Supremacy Clause and Preemption

At the same time the Court was calling on principles of federalism and states’ rights to limit Congressional authority to assist the states with public health and safety matters, it was simultaneously limiting the ability of states to allow their citizens to seek redress for harm using state tort law through federal preemption. The doctrine of preemption is based on the Supremacy Clause in the U.S. Constitution which declares the Constitution and U.S. laws “shall be the supreme law of the Land” notwithstanding any state law to the contrary.\textsuperscript{184} Courts find preemption where (1) Congress preempts state law by saying so in express terms (express preemption); (2) Congress and federal agencies create a sufficiently comprehensive federal regulatory structure in an area where the federal interest is so dominant that it allows the inference that Congress left no room for supplementary state regulation (implied field preemption); or (3) Congress has not completely displaced state regulation in a specific area but the state law at issue actually conflicts with federal law or the state law “stands as an obstacle” to achieving the full purposes and objectives of Congress (implied conflict preemption).\textsuperscript{185} For all three types of preemption, under principles of federalism, the Court applies a “presumption against preemption” when Congress is regulating in areas of “traditional state concern,” which include state affirmative regulation and common law claims for relief in areas of public health, safety, and environmental protection.\textsuperscript{186}

In 1992, the Court held in \textit{Cipollone v. Liggett Group, Inc.}\textsuperscript{187} that a smoker’s claim for damages against a cigarette manufacturer under a failure to warn theory was preempted by section 5(b) of the Public Health Smoking Act of 1969, which prohibited state regulation of advertising or promoting cigarettes labeled in conformity with federal law.\textsuperscript{188} In finding preemption, the Court found the phrase “[n]o requirement or prohibition” in the statute’s express preemption clause did not distinguish between positive regulatory enactments and common law claims for damages.\textsuperscript{189} The Court

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\item \textsuperscript{184} U.S. CONST. art. VI, cl. 2 (“This Constitution and the Laws of the United States which shall be made in Pursuance thereof; . . . shall be the supreme Law of the Land; the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding”); Fidelity Sav. & Loan Ass’n v. Cuesta, 458 U.S. 141, 152 (1982) (stating that preemption doctrine “has its roots in the Supremacy Clause”).
\item \textsuperscript{186} See Bates v. Dow Agrosciences LLC, 544 U.S. 431, 449 (2005) (“because the States are independent sovereigns in our federal system, we have long presumed that Congress does not cavalierly pre-empt state-law causes of action”) (quoting Medtronic v. Lohr, 518 U.S. 470, 485 (1996)); Hillsborough County, 471 U.S. at 715 (discussing “presumption that state or local regulation of matters related to health and safety is not invalidated under the Supremacy Clause”).
\item \textsuperscript{187} 505 U.S. 504 (1992).
\item \textsuperscript{188} \textit{Cipollone}, 505 U.S. at 524-25.
\item \textsuperscript{189} \textit{Id.} at 521.
\end{enumerate}
reasoned that “the obligation to pay compensation can be, indeed is designed to be, a potential method of governing conduct and controlling policy.”

The Court appeared to leave some room for state tort law a few years later in *Medtronic v. Lohr.* In that case, a plurality of the Court rejected the argument FDA regulations that streamlined the approval process for certain medical devices (the 510(k) process) under the Medical Device Act (“MDA”) preempted state common law claims for damages against a medical device manufacturer. The Court focused on the importance of state tort law in finding Congress could not have meant to preempt state common law claims for damages in its provision prohibiting states from establishing any “requirement” for a medical device different from or in addition to any requirement established under the MDA. The Court found it would be difficult to believe “Congress would have barred most, if not all, relief for persons injured by defective medical devices” without saying so explicitly, particularly where there is no explicit or implicit private right of action under the MDA. To adopt the defendant's interpretation of the preemption provision “would require far greater interference with state legal remedies, producing a serious intrusion into state sovereignty while simultaneously wiping out the possibility of remedy for the Lohrs' alleged injuries.” Thus, in finding no preemption, the Court focused on both state sovereignty and the private right to redress in leaving room for state tort law within a federal regulatory scheme.

In 2000, however, the Court held in a 5-4 decision in *Geier v. American Honda Motor Co.*, that a defective design claim based on lack of driver’s side airbags was subject to implied conflict preemption under the National Traffic and Motor Safety Act. The Court reasoned that allowing common law tort suits would serve as an obstacle to the accomplishment of federal objectives to develop a mix of alternative passive restraint devices rather than mandating airbags in all cars. It reached this holding despite a statutory savings clause stating that compliance with a federal safety standard did not exempt a defendant from liability under state common law. In that case, not surprisingly, the majority did not focus on any distinction between state regulation and tort claims to recover compensation for harm as part of the preemption analysis. Instead, it was the dissent that looked to principles of federalism and warned “the Supremacy Clause does not give unelected federal judges carte blanche to use federal law as a means of imposing their own ideas of tort reform on the States.” The dissent focused on the role of the states as “separate sovereigns in our federal system” noting the Court has...

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190 Id. (quoting San Diego Bldg. Trades Council v. Garmon, 359 U.S. 236, 247 (1959)) (internal quotation marks omitted).
193 Id. at 487-88.
194 Id. at 487.
195 Id. at 488-89.
197 Id. at 866.
198 Id. at 868.
199 Id. at 894 (Stevens, J., dissenting).
“long presumed that state laws—particularly those, such as the provision of tort remedies to compensate for personal injuries, that are within the scope of the States’ historic policy powers—are not to be pre-empted by federal statute unless it is the clear and manifest purpose of Congress to do so.”

In 2005, the Court reversed course again in *Bates v. Dow Agrosciences*, and made some of its strongest statements about the need to preserve state private rights of redress under principles of federalism in cases involving preemption. In that case, peanut farmers sued for breach of express warranty, strict liability, negligence, and violation of the state’s deceptive trade practices act in connection with crop damage caused by the defendant’s herbicide. The defendant argued the federal pesticide law preempted the claims based on the law’s express preemption clause, which provides that states shall not impose or continue in effect “any requirement for labeling or packaging in addition to or different from those required under this subchapter.” In finding the preemption clause did not prevent the state claims for damages, the Court held the prohibitions in the federal law apply “only to requirements” and only to requirements related to “labeling or packaging” that are “in addition to or different” from those required under federal law. Thus, “an event, such as a jury verdict, that merely motivates an optional decision is not a requirement” and is not within the scope of the preemption clause. The Court found that the “long history of tort litigation against manufacturers of poisonous substances adds force to the basic presumption against preemption” and that Congress would have expressed its intent more clearly if it “had intended to deprive injured parties of a long available form of compensation.” The Court also recognized the state tort suits for injuries “may aid in the exposure of new dangers associated with pesticides” and may lead manufacturers or the EPA to add more detailed labeling to their products.

*Bates* perhaps set the high-water mark for the Court’s deference to state tort claims and remedies under its preemption jurisprudence. For its 2007-2008 Term, the Court granted certiorari in four separate cases involving federal preemption of state tort claims for relief. In 2008, the Court decided *Riegel v. Medtronic*, in which it held in an

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200 *Id.*
201 *544 U.S. 431 (2005).*
202 *Bates, 544 U.S. at 434-36.*
203 *See 7 U.S.C. § 136v(b); Bates, 544 U.S. at 436.*
204 *Id.* at 443-44.
205 *Id.* at 445.
206 *Id.* at 449-50 (citing *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 251 (1984)).
207 *Id.* at 451.
opinion by Justice Scalia that the Medical Device Act’s (“MDA”) pre-market approval (“PMA”) process (unlike the 510(k) process at issue in Medtronic v. Lohr) established federal “requirements” that preempted the plaintiff’s state common law claims for relief. Notably, for the first time, the Court stated unequivocally that absent other indication by Congress, state common law actions for damages under theories of negligence and strict liability impose “requirements” for purposes of preemption clauses like that in the MDA. Moreover, the Court took a very different view of the role of state tort law than was expressed in Lohr or in Bates. In those prior cases, in opinions by Justice Stevens, the Court hailed the important benefits of state tort law such as providing redress for injury, generating more information regarding products, exposing new harms, and encouraging the development of safer products.

In Riegel, by contrast, the Court described state tort law as a force that “disrupts the federal regulatory scheme no less than state regulatory law” and is in fact “less deserving of preservation” than state regulation, which is often based on cost-benefit analysis similar to that used by the experts at the federal agency. Thus, in Riegel, the Court expresses a view that completely equates tort law with public regulation (and bad regulation at that), at least for purposes of interpreting the term “requirements” under the federal statute at issue. The Supreme Court split equally without opinion on one other case under review that term, with two more preemption cases yet to be decided.

Taken together, these cases show significant disagreement among members of the Court over the role state tort law can continue to play at a time where federal statutes and regulations govern many product safety areas but do not provide private rights of action or any other means of private redress for harm caused by the regulated products. Indeed, there is no private right of action for damages for violation of the standards set forth in the federal pesticide law at issue in Bates, the Medical Device Act at issue in Lohr and Riegel, or the National Traffic and Motor Safety Act at issue in Geier. Part III explained the current trend of Congress to expressly eliminate state tort law claims for relief, even without evidence of a clear national interest and without providing any alternative federal compensation mechanism. In the preemption cases described in this Part, the issue is

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210 Riegel, 128 S. Ct. at 1008-10.
211 Riegel, 128 S. Ct. at 1007-08 (citing plurality opinions and concurring opinions in earlier preemption decisions). See also 21 U.S.C. § 360(k) (providing that no state or political subdivision may establish or continue in effect with respect to a medical device for human use any requirement which is different from or in addition to any requirement applicable under this chapter to the device).
212 See supra notes 206-07 and accompanying text.
213 Riegel, 128 S. Ct. at 1008.
216 See supra Part III.
the extent to which the Court will interpret the Supremacy Clause so broadly as to eliminate state tort law claims for relief without Congress expressly saying so by finding the claims are state “requirements” that conflict with federal law.

As the case law also shows, there is a marked trend in the Court that increasingly equates tort law with public law regulation rather than a private law system of redress. In *Lohr*, the Court noted that finding preemption “would interfere with state legal remedies” and, in particular, a remedy for the Lohrs’ injuries.\footnote{217 Medtronic v. Lohr, 518 U.S. 470, 488-89 (1996).} Thus, the Court described the tort system as a state system of legal remedies for the redress of private injury. A decade later in *Riegel*, the Court would describe the tort system as merely as a force that “disrupts the federal regulatory scheme” through imposing “requirements” that fail to use cost-benefit analysis.\footnote{218 Riegel v. Medtronic, 128 S. Ct. 999, 1008 (2008).} Indeed, even in *Bates*, where the Court preserved state law tort claims for relief, it highlighted the benefits of tort claims to “aid in the exposure of new dangers associated with pesticides” and “lead manufacturers or EPA to add more detailed labeling to their products.”\footnote{219 See, e.g., DAVID G. OWEN, PRODUCTS LIABILITY LAW § 14.4, at 896 (2005) (stating that preemption doctrine continues to “wallow in a state of utter chaos”); Viet D. Dinh, *Reassessing the Law of Preemption*, 88 GEO. L.J. 2085, 2085 (2000) (“Notwithstanding its repeated claims to the contrary, the Supreme Court’s numerous preemption cases follow no predictable jurisprudential or analytical pattern.”); Nelson, supra note 161, at 232 (stating that “[m]odern preemption jurisprudence is a muddle” both as applied to discrete areas of law and in general).} These benefits of course, are public law benefits more than private law benefits.

Many have complained that the Court’s preemption jurisprudence is unpredictable, inconsistent, and in a “state of utter chaos.”\footnote{220 See, e.g., ERNEST A. YOUNG, FEDERAL PREEMPTION AND STATE AUTONOMY, in FEDERAL PREEMPTION: STATES’ POWERS, NATIONAL INTERESTS 249, 263 (Richard Epstein & Michael S. Greve, eds. 2007) (noting the voting patterns of the “states’ rights” Justices (i.e., Rehnquist, O’Connor, Scalia, Kennedy, and Thomas) in the “classic” federalism cases like *Lopez* and *Morrison* in stark contrast to the voting patterns in the preemption cases where it is the “liberals” who favor state law in close cases and the “conservatives” who insist on national power).} Based on the Court’s preemption decisions in the area of tort law since *Cipollone*, such criticisms seem justified. This is particularly true when comparing the importance a majority of Justices placed on states’ rights and federalism in the Commerce Clause cases with their virtual abandonment of those principles when it came to state tort law in *Geier* and *Riegel*.\footnote{221 See *Ernest A. Young, Federal Preemption and State Autonomy, in Federal Preemption: States’ Powers, National Interests* 249, 263 (Richard Epstein & Michael S. Greve, eds. 2007) (noting the voting patterns of the “states’ rights” Justices (i.e., Rehnquist, O’Connor, Scalia, Kennedy, and Thomas) in the “classic” federalism cases like *Lopez* and *Morrison* in stark contrast to the voting patterns in the preemption cases where it is the “liberals” who favor state law in close cases and the “conservatives” who insist on national power).} It is generally those Justices arguing in favor of states’ rights and federalism in *Lopez*, *Morrison*, and the other Commerce Clause cases that were in the majority in *Geier*, *Riegel*, and the other pro-preemption cases.\footnote{222 Chief Justice Rehnquist authored the opinions in *Lopez* and *Morrison* (joined by Justices O’Connor, Scalia, Kennedy, and Thomas). Justice Stevens authored the opinion in *Lohr* (in which Justices O’Connor, Scalia, Thomas, and Chief Justice Rehnquist dissented). Justice Breyer authored the opinion in *Geier* (joined by Chief Justice Rehnquist and Justices O’Conner, Scalia, and Kennedy). *See also Fallon, supra* note 169, at 470-71 (noting the Court held state law was preempted in every one of its seven preemption cases during 1999 and 2000 and that four of the Court’s five most conservative and generally pro-
Scholars have come up with varying explanations for these apparent inconsistencies. Some argue the Court is simply pursuing a pro-business, anti-regulatory agenda, using principles of federalism to strike down progressive federal laws under the Commerce Clause and using preemption doctrine to do the same with regard to state law actions for redress of harm. Other see some consistency in the Court’s preemption cases based on the position federal agencies have taken with regard to preemption in each of these cases. Indeed, beginning in 2000, federal agencies like the Food and Drug Administration, the Consumer Product Safety Commission, the Environmental Protection Agency, and the Department of Transportation all began enacting regulations and regulatory preambles and submitting amicus briefs in the Court’s preemption cases arguing in favor of federal preemption of state tort law where, for the most part, they had argued against preemption of state law prior in prior decades. Since 2000, federal courts have struggled with the level of deference to give such agency interpretations and a review of the Supreme Court’s case law in this area shows that the Court has far more often than not adopted the agency’s position.

Regardless of the explanation, the contrast between the Court’s use of federalism principles in the Commerce Clause cases and in the federal preemption cases is striking. Particularly with regard to state tort law, there appears to be a growing trend toward using principles of federal constitutional law to limit state tort rights and remedies, whether it federalism Justices found preemption in every case while the four most liberal Justices reached the opposite conclusion.

See, e.g., Erwin Chemerinsky, *Empowering States When it Matters: A Different Approach to Preemption*, 69 Brook. L. Rev. 1313, 1315 (2004) (stating that “what animates the Rehnquist Court is not a concern for states’ rights and federalism” but is instead a hidden “value choice” to limit civil rights laws and protect business from regulation). See also Young, supra note 221, at 262 (stating that there is no evidence that the Court’s “federalist revival” on issues like the Commerce Clause will spill over into preemption doctrine and “the pervasive scope of federal preemption suggests that the primary threat to state autonomy lies here”); Fallon, supra note 169, at 429 (concluding that the Court’s pro-federalism majority is “at least as substantively conservative as it is pro-federalism” and when federalism and substantive conservatism come into conflict, substantive conservatism frequently dominates.

See, e.g., Catherine M. Sharkey, *Products Liability Preemption: An Institutional Approach*, 76 Geo. Wash. L. Rev. 449 (2008) (arguing the Court’s product liability preemption cases reveal an “unmistakable pattern” where in every case (with the exception of Bates) the Court has adopted the position of the relevant federal agency as to whether the plaintiff’s state law claims should be preempted).

See, e.g., Nina Mendelson, *A Presumption Against Agency Preemption*, http://ssrn.com/abstract=1030626 (noting that in areas such as homeland security, pharmaceutical regulation, and automotive safety, federal agencies are increasingly targeting state tort law and regulatory law for preemption even where the state law is not expressly targeted by the statutes the agencies administer); Catherine M. Sharkey, *Preemption by Preamble: Federal Agencies and the Federalization of Tort Law*, 56 DePaul L. Rev. 227, 229-42 (2007) (discussing recent efforts by federal public health and safety agencies to achieve preemption of state regulations and common law claims for relief through express statements in federal regulations); Alexandra B. Klass, *State Innovation and Preemption: Lessons from Environmental Law*, __ Loy. L.A. L. Rev. __ (forthcoming 2008) (discussing dramatic change in federal agency positions on preemption of state law during the Bush Administration in environmental, health, safety, and consumer protection areas).

See Sharkey, supra note 224 (discussing the Court’s pattern in preemption cases of adopting the position of the relevant federal agency on preemption).
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means striking down the federal civil remedy provisions of the Violence Against Women Act in *Morrison* or eliminating the ability of injured consumers to seek redress from cigarette companies, auto manufacturers, or drug and medical device manufacturers in *Cipollone, Geier*, and *Riegel*. Moreover, the Court’s preemption cases also show a marked trend of viewing tort law as almost interchangeable with public regulatory law both as to its benefits (described in *Bates*) and as to its shortcomings (described in *Riegel*).

C. Limiting State Punitive Damage Awards under the Due Process Clause

The 1990s saw not only the beginning of the Court’s efforts to cut back on state tort remedies through preemption doctrine, but also the Court’s first foray into placing substantive due process limits on state punitive damage awards. Punitive damages are damages, other than compensatory and nominal damages, awarded against a defendant to punish him or her for outrageous conduct and to deter the defendant or others similarly situated from engaging in such conduct in the future.227

As discussed in Part II, states have been active in recent years in placing statutory restrictions on the amount of punitive damages a jury can award plaintiffs in various types of tort actions. Although empirical studies tend to show that punitive damages are awarded in less than 10% of all cases where plaintiffs prevail on the merits (and in 1%-4% of all civil actions filed), recent punitive damage awards in the millions and billions of dollars against tobacco companies and other product manufacturers have made headlines, creating a perception that punitive damages are “out of control” and must be “reigned in.”228

Until recently, limits on state punitive damage awards were a matter almost entirely of state law. In 1996, however, in *BMW v. Gore*,229 the Supreme Court for the first time struck down a state jury award of punitive damages on grounds that it violated the defendant’s due process rights under the Fourteenth Amendment.230 This began a series of Supreme Court decisions between 1996 and 2007 that were striking for their frequency and willingness to second-guess what had historically been a matter of state concern. These cases set new “guideposts” for courts to follow to ensure that punitive damage awards were within constitutional limits,231 directed appellate courts to apply a *de novo* standard in reviewing the constitutionality of punitive damage awards,232 set a

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227 Restatement (Second) of Torts § 908(1) (1979).
228 Klass, *supra* note 20, at 93 (citing studies and debates over punitive damages).
230 *BMW*, 517 U.S. at 585.
231 See id. at 575 (directing lower courts to provide constitutional review of punitive damage awards using the following three guideposts: (1) the reprehensibility of the misconduct; (2) the ratio of punitive damages to compensatory damages; and (3) the difference between the punitive damages imposed and the civil penalties authorized or imposed in comparable cases).
“presumptive” single-digit ratio between compensatory damages and punitive damages, and prohibited juries from considering harm to non-parties in assessing punitive damages.

Notably, many of these decisions revealed a strong divide between those Justices (O’Connor in particular) who expressed the view that tort lawsuits in general and punitive damages in particular are a significant societal problem that must be dealt with on a federal constitutional level, those Justices (Scalia and Thomas) who do not believe the Due Process Clause provides any protection against “excessive” or “unreasonable” punitive damage awards, and those Justices (Ginsburg in particular) who believe punitive damages should be a matter for the states and that the states are addressing concerns adequately through traditional legislative and judicial tort reform measures.

This line of cases culminated in the Court’s most recent punitive damages decision in 2008, Exxon Shipping Co. v. Baker. In that case, the Court reviewed the 19-year litigation over the 1989 grounding of the Exxon Valdez oil tanker on Bligh Reef in Prince William Sound, Alaska, which resulted in the discharge of 11 million gallons of oil into the Sound and one of the largest environmental disasters in U.S. history. Punitive damages in the case were based on the fact that Exxon officials knew the ship’s captain, Joseph Hazelwood, was a relapsed alcoholic who was drinking at sea but let him pilot the Valdez through Prince William Sound nevertheless. Exxon paid hundreds of millions of dollars to federal, state, and local governments for environmental damages and $507 million in compensatory damages (based on a jury award and voluntary settlements) to

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233 State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 425 (2003) (stating that “few awards exceeding a single-digit ratio between punitive and compensatory damages will satisfy due process” and that when compensatory damages are substantial, “a lesser ratio, perhaps only equal to compensatory damages, can reach the outermost limit of the due process guarantee.”).


235 Pacific Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 43, 62 (1991) (O’Connor, J., dissenting) (calling for more stringent constitutional limitations on punitive damage awards because juries use them to “target unpopular defendants, penalize unorthodox or controversial views, and redistribute wealth” and because there is “an explosion in the frequency and size of punitive damage awards” that appear to be “limited only by the ability of lawyers to string zeros together in drafting a complaint.”).


237 See, e.g., State Farm Mut. Ins. Co., 538 U.S. at 438 (Ginsburg, J., dissenting) (stating that large punitive damage awards may well support state legislation capping punitive damages but is “out of order” in a “judicial degree imposed on the States by this Court under the banner of substantive due process”); BMW v. Gore, 517 U.S. 559, 607 (1996) (Ginsburg, J., dissenting) (rejecting due process limits on punitive damages on grounds the Court “unnecessarily and unwisely ventures into territory traditionally within the States’ domain, and does so in the face of reform measures currently adopted or currently under consideration in legislative arenas.”).


239 See In re the Exxon Valdez, 296 F. Supp. 2d 1071, 1077-82 (D. Alaska 2004), vacated per curium, 742 F.3d 600 (9th Cir. 2006), amended by 490 F.3d 1066 (9th Cir. 2007), vacated and remanded, sub nom. Exxon Shipping Co. v. Baker, 128 S. Ct. 2605 (2008); Klass, supra note 20, at 122 (discussing facts of Exxon case).

240 Exxon Shipping Co., 128 S. Ct. at 2613-14.
commercial fisherman, native groups, and local governments. The Supreme Court’s review of the case, however, concerned a federal jury award of $5 billion in punitive damages to a plaintiff class of fisherman. In 2006, the Ninth Circuit reduced the punitive damage award to $2.5 billion, finding that any ratio of punitive damages to compensatory damages exceeding 5-to-1 violated Exxon’s due process rights under the Supreme Court’s precedent in this area.

In its decision, the Supreme Court remained committed to its path of placing firm federal limits on punitive damages, in this case under federal maritime law rather than the Due Process Clause. Citing instances of “outlier” multi-million and multi-billion dollar awards in some cases, the Court concluded that punitive damages are unpredictable and thus unfair to defendants. The Court then proceeded to entertain various options. It rejected the idea of additional verbal formulations of standards to guide juries and lower courts as insufficiently specific to reach an appropriate penalty. It also rejected maximum penalty amounts because of the high variability in the types of tort and contract injuries that support punitive damages.

It then looked to its prior punitive damages jurisprudence in the due process area, as well as efforts by states to use a quantified approach in criminal sentencing cases, and settled on setting a maximum ratio between punitive damages and compensatory damages. The Court ultimately chose a one-to-one ratio of punitive damages to compensatory damages because of the large compensatory damages ($507 million) the lack of intentional misconduct, by Exxon. Moreover, even though this case arose in the context of federal maritime law, the Court’s reliance on its due process precedent, as well as its statement in a footnote that a one-to-one ratio in this case might also be the outer constitutional limit in this case, makes it very likely the case will be applied to state law punitive damage verdicts.

As in the preemption cases discussed in the previous Section, what is striking about the Court’s journey to place federal, constitutional limits on state punitive damage awards is how markedly it diverges from the federalism and states’ rights rhetoric contained in the Commerce Clause cases decided during precisely the same period. One explanation for this divergence is that the interest group efforts to paint the state tort system as “broken” has worked not only in the states, but has influenced the Supreme Court, resulting in an expansion of federal preemption of state tort law as well as due process.

\[^{241}\text{Id.}^{242}\text{Id.}\]
\[^{243}\text{Id. at 2614.}\]
\[^{244}\text{Id. at 2625-26.}\]
\[^{245}\text{Id. at 2627-28.}\]
\[^{246}\text{Id. at 2629.}\]
\[^{247}\text{Id. at 2629-34.}\]
\[^{248}\text{Id. at 2633-34.}\]
\[^{249}\text{See id. at 2634 & n.28 (stating that the plaintiff class recovery of $500 million is “substantial” and thus in this case “the constitutional outer limit may well be 1:1.”).}\]
limits on punitive damages. This is particularly notable because under principles of federalism, the fact that states themselves have engaged in significant tort reform in recent years would seem to argue in the opposite direction, i.e., that the states are successfully policing themselves without the need for federal intervention by Congress, federal agencies, or the Supreme Court. Nevertheless, the Court’s recent decisions in the preemption and punitive damages cases show the Court applying very different principles of federalism when it comes to state tort law.

Also, similar to the preemption cases, in the punitive damages cases, the Court exhibits a view of tort law that focuses exclusively on its public law aspects. In the preemption cases, the rejection of the private law aspects of tort was mostly implicit while here, in the context of punitive damages, the Court is very explicit in its rejection of any private law role for punitive damages. For instance, in *Exxon*, the Court recognized that historically, punitive damages may have served a role to compensate for intangible injuries that were not otherwise compensable under the narrow conception of compensatory damages that existed in the past. The Court concluded, however, that regardless of the various rationales for punitive damages over the years, the “consensus” today is that punitive damages are aimed not at compensation but principally at retribution and deterrence. As the Court has made clear in earlier decisions, retribution and deterrence are public law goals rather than private law goals. For instance, in its 2007 decision in *Phillip Morris USA v. Williams*, the Court justified punitive damages as properly imposed “to further the State’s legitimate interests in punishing unlawful conduct and deterring its repetition.” In *Exxon*, the Court went even further and noted the “obvious” similarities between the interests of punitive damages and the interests advanced by the criminal law, thus moving punitive damages even further into the public law realm.

Some tort theorists today, however, have taken issue with the Court’s conception of punitive damages as only serving state, public law interests and argue for a conception of punitive damages that focuses on private retribution and punishment. John Goldberg has argued that what is at stake in punitive damages is not the state’s interest in obtaining retribution on behalf of its citizens but the plaintiff’s interest in vindicating his or her rights not to be mistreated. Anthony Sebok similarly argues that punitive damages should be seen as a form of private revenge, while Benjamin Zipurksy characterizes the

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See supra Part II (discussing the rise of tort reform interest groups).


252 Exxon Shipping Co., 128 S. Ct. at 2621.


254 Exxon Shipping Co., 128 S. Ct. at 2628.


role of punitive damages as vindicating a plaintiff’s private right to “be punitive.”

Likewise, Thomas Colby argues that punitive damages are punishment for “private wrongs” to individuals rather than public wrongs to society. Thus, there is an alternative view of punitive damages based on their historic role of punishing defendants based on the private wrong done to the plaintiff and granting a right to the plaintiff to inflict private punishment on the defendant.

Once the conception of punitive damages as a private remedy rather than a public remedy is lost, as it has been in the Court’s recent punitive damages jurisprudence, it becomes much easier to scrutinize state punitive damages awards as a matter of constitutional law. If it is the state, rather than private parties, that are imposing punitive damages, it is no longer inconsistent to have due process limits on punitive damages without having any corresponding due process rights to punitive damages or any other tort relief. Indeed, John Goldberg has argued the Constitution supports due process protections for a right to a body of law “for the redress of private wrongs” that generate meaningful and judicially enforceable limits on tort reform legislation. Whether or not one agrees with that argument (and the federal courts so far have shown no interest in recognizing such a right), it highlights the vulnerability of many aspects of tort law, including punitive damages, once tort law is seen as an arm of the regulatory state used to achieve state goals rather than a unique system of redress to be used by private citizens to address private wrongs.

V. Who Needs Tort Law?: Federalism and State Tort Experiments

This Part returns to tort theory and suggests that classifying tort law as either public law or private law does not do justice to the diversity of tort experiments states are currently pursuing. Instead, most of the recent tort experiments to expand or contract tort rights fall at various points along a private law-public law continuum. Section A shows how the Court’s failure to acknowledge the private law aspects of tort has led to the inconsistencies between the Supreme Court’s federalism revival and its approach to state tort law in its recent preemption and punitive damages cases. Section B focuses on Congress, and shows how the failure of that branch to recognize the role of tort law as a state system of redress for private wrongs (as opposed to merely “regulation through litigation”) has allowed it to more easily displace state tort law. Finally, Section C considers the importance of state tort law as a system of private redress within our federalist system of government.

259 Goldberg, supra note 5.
A. “Public” Tort Law and the Supreme Court

This Section discusses how the Supreme Court has failed to adequately protect state tort law under the U.S. Constitution because it has shifted almost completely to a view of state tort law as public law. According to John Goldberg, there is a long history of support for the idea that the Constitution provides due process protections for the right to redress from wrongs. Based on this history, Goldberg has argued that courts have strayed from these protections in recent years because of the now-dominant theory of tort law as an arm of the public regulatory state rather than a private right to redress. Once tort law is merely another form of public law “balancing the benefits and burdens of economic life,” then a rational basis test applies and virtually any state or federal interference with state tort rights and remedies survives constitutional scrutiny. Regardless of whether one supports the idea that the Due Process Clause places limits on federal or state interference with individual tort rights and remedies, the fact remains that judicial rhetoric has moved away from recognizing the private law aspects of tort law.

Moreover, this public law conception of state tort law has led the Court to completely exclude state tort law from any aspect of its federalism revolution. Once tort law stops being a private “right” of citizens and just another means by which the state pursues an economic or social agenda potentially harmful to business interests, a new dynamic kicks in that allows federal economic or social interests (whether put forward by Congress or federal agencies) to dominate. As shown in Part III, the Supreme Court has been quick to abandon the federalism principles espoused in the Commerce Clause cases when it comes to displacing state tort law under principles of federal preemption and federal due process limits on punitive damages. With regard to federal preemption, the Court’s willingness since Cipollone to treat private tort suits for damages as equivalent to state-enacted “requirements” or “regulations” subject to preemption shows the Court implicitly classifying all of state tort law as public law without saying so.

The Court’s transition to classifying tort law as solely a matter of public law is most evident in its 2008 opinion in Riegel v. Medtronic. The majority opinion equates common law tort claims with state statutes and regulations for purposes of finding that both impose state “requirements” barred by the Medical Device Act’s express preemption clause. Even more strikingly, Justice Stevens in his concurring opinion states that Congress did not fully appreciate the scope of the preemption provisions of the MDA when it was enacted in 1976, and that Congress did not believe state tort remedies interfered with the development of medical devices. He finds, however, based on Cipollone and the conclusion of five of the Justices in Medtronic v. Lohr, that there is now consensus on the Court that “common-law rules, administered by judges, like

260 See id.
261 Id.
262 Id
264 Riegel, 128 S. Ct. at 1008.
265 Id. at 1011-12 (Stevens, J., concurring).
...statutes and regulations, create and define legal obligations,” and some of them qualify as “requirements.”

Thus, Justice Stevens’s opinion makes clear that the Court is giving a meaning to Congress’s use of the word “requirements” that is not consistent with what Congress intended back in 1976 (i.e., it did not include common law claims for relief). The Court’s current meaning, however, is nevertheless consistent with its now complete acceptance of the idea that all of tort law is exclusively another form of public law that imposes requirements on regulated parties rather than a unique institution that provides the right to obtain redress for private wrongs. In other words, it is the Court’s current conception of tort law as public law that allows it to more cavalierly displace it under principles of preemption.

This conception of tort law also helps explain the Court’s willingness to scrutinize punitive damage verdicts under substantive due process principles. Benjamin Zipursky has argued punitive damages today have a “hybrid status” in that they are simultaneously about the plaintiff’s private right to “be punitive” and the plaintiff’s role as a private attorney general helping the state to impose criminal or regulatory punishment as part of a private compensatory award. Zipursky highlights the “ambiguity” of punitive damages which are in some sense “damages to the plaintiff-victim in a civil tort action and, in another sense, a fine imposed by the state as punishment for wrongful conduct and collected by the one who brought the action.” It is this hybrid status, and the failure of the Supreme Court to explicitly recognize this status, that has resulted in the Court’s problematic punitive damages jurisprudence. Goldberg too has written that the Court has wrongly focused on the state’s interest in imposing punitive damages for deterrence and retribution purposes rather than the plaintiff’s interest in vindicating their rights. The Court, however, no longer acknowledges these private aspects of punitive damages. Thus, once again, the Court’s adoption of a public law view of tort allows it to impose a heightened scrutiny on state tort law under constitutional principles that trump any deference to states acting in their areas of traditional state concern to provide citizens with private rights to redress.

B. Congress and the Displacement or Replacement of Tort Law

As detailed in Part II, state courts have struggled with whether there are state constitutional limits on state legislative tort reform efforts. These concerns become even more heightened when it is Congress rather than state legislatures that are eliminating a state cause of action. As shown in Part III, there has been a shift away from replacing state tort law with a federal system of compensation or regulation (as was done...

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266 Id. at 1012 (citing Cipollone v. Liggett Group, Inc. 505 U.S. 504, 522 (1992); Medtronic v. Lohr, 518 U.S. 470 (1996) (plurality opinion)).


268 See id. at 129.


270 See supra Part IV.C.

271 See supra notes 46-48 and accompanying text.
with the Price-Anderson Act and the National Childhood Vaccine Act) toward one where Congress simply eliminates state tort actions in controversial areas with no federal replacement. Take the “Graves Amendment” for example. As discussed in Part III, Congress enacted this legislation in 2005 granting immunity to car rental companies for vicarious liability associated with accidents caused by rental drivers.272

The elimination of this type of vicarious liability which was traditionally available under state law will undoubtedly leave at least some injured drivers without a historic right to redress under state law without replacing it with any federal system of compensation or regulation. Indeed, the one state lower court that has invalidated the Graves Amendment on commerce clause grounds cited just that failure to replace tort law with some sort of federal compensatory or regulatory system in distinguishing the Graves Amendment from prior legislation held constitutional, such as the Price-Anderson Act.273 Whether or not the court was correct in its commerce clause analysis (and all other courts to consider the Graves Amendment have upheld the law), its concerns raise at least important prudential concerns.

The same concerns arise with respect to new state laws granting additional rights in the areas of consumer protection, privacy, and publicity. As shown in Part II, these laws are designed to create new rights of action to allow state citizens to protect themselves from new types of interferences with their person and property. Once again, Congress has the authority to preempt such laws if it wishes,274 but it should recognize the unique private rights to redress created by these laws before preempting them and, likewise, the Court should decline to find preemption unless Congress is explicit about it.

A different analysis, perhaps should apply to state experiments with public nuisance actions to obtain widespread relief for harms caused by guns, lead paint, or GHG emissions. Public nuisance has been described as not just another form of tort but a quasi-criminal exercise of the police power used to prevent intrusions on the public welfare.275 These tort experiments are very much on the “public law” side of the public law-private law continuum. For instance, in the public nuisance suits brought by municipalities against the gun industry, government plaintiffs sought damages and injunctive remedies to deter gun violence such as preventing multiple sales to single

272 See supra Part III.
273 See Vanguard Car Rental Co. v. Huchon, 532 F. Supp. 2d 1371 (S.D. Fla. 2007). See also supra note 159 and accompanying text (discussion Graves Amendment).
274 Indeed, many states are concerned that the Supreme Court’s 2007 decision in Watters v. Wachovia Bank, holding that Office of the Comptroller of Currency regulations preempt any state law that obstructs, impairs, or conditions a national bank’s ability to exercise power granted to it under federal law, may prevent state laws regulating predatory lending. See Watters v. Wachovia Bank, 127 S. Ct. 1559 (2007); Julia Patterson Forrester, Still Mortgaging the American Dream: Predatory Lending, Preemption, and Federally Supported Lenders, 74 U. CIN. L. REV. 1303, 1361-1362 (2006) (stating that judicial preemption of state anti-predatory lending statutes will reduce experimentation among the states and prolong a potential solution to the problem).
275 See Cox v. City of Dallas, 256 F.3d 281, 290 (5th Cir. 2001). By contrast, a private nuisance is “a nontrespassory invasion of another’s interest in the private use and enjoyment of land.” RESTATEMENT (SECOND) OF TORTS § 821D (1979).
buyers, training distributors to recognize illegal reselling, tracing crime-guns, preventing unauthorized sales, reducing crime-friendly gun models, barring manufacturers from supplying certain retailers, and imposing supervisory measures upon the industry.\textsuperscript{276} These goals are certainly “public law” goals.

The same is true for the public nuisance suits brought by states against industries emitting greenhouse gases. In these actions, state attorneys general are attempting to use the common law of tort to fill gaps in federal enforcement and lawmaker in the area of climate change.\textsuperscript{277} These lawsuits serve many goals, most notably, attempting to protect state interests in preserving the environment and the ecological systems of the states.\textsuperscript{278} While some will argue that today’s state and federal comprehensive regulatory regimes have supplanted public nuisance as a means to govern social behavior, the common law, including nuisance law, can continue to serve an important role in setting standards of conduct, ordering society, and providing redress for harm. Nevertheless, public nuisance suits aimed at addressing broad public health goals as opposed to seeking redress for individual harms constitute a form of public tort law that cannot appropriately be analyzed as a right to obtain redress for wrongs.\textsuperscript{279} As a result, in these suits, there is arguably more room for the federal government to make a different policy choice without interfering with private rights of redress.

Nevertheless, the fact that the federal government has the ability to make a choice that supersedes that of the states (as Congress did with regard to the gun cases and as


\textsuperscript{277} See, e.g., Alex, \textit{supra} note 125, at 166 (stating that both the public nuisance lawsuit against the power plants and California’s public nuisance lawsuit against the auto companies “were carefully crafted by the states’ attorneys to respond to failures of the federal government to address the growing threat of global warming.”).

\textsuperscript{278} See, e.g., Matthew F. Pawa, \textit{Global Warming: The Ultimate Public Nuisance}, in \textit{COMMON LAW STRATEGIES FOR PROTECTING THE ENVIRONMENT}, \textit{supra} note 125, at 107, 126 (quoting from the complaint in \textit{Connecticut v. American Electric Power Co.}, in which the state plaintiffs allege they “have an interest independent of and behind the titles of their citizens and in all the earth and air within their domains” and that “[b]y altering the plaintiff States’ natural climate, global warming injures interests that are fundamental to the rights of those sovereigns, namely, their interest in the integrity of an ecological system that supports their natural heritage and upon which all of their natural resources and much of their economies depend.”).

\textsuperscript{279} This is not to say that all common law claims to obtain relief for environmental harm or other societal ills are predominantly public law torts rather than private law torts. On the contrary, common law private nuisance, negligence, trespass, and strict liability suits are critical tools for citizens to obtain private redress associated with personal injury or property damage caused by toxic chemicals, consumer products, and other environmental or industrial harm that impacts persons or property. See, e.g., Michael D. Axline, \textit{The Limits of Statutory Law and the Wisdom of Common Law}, in \textit{CREATIVE COMMON LAW STRATEGIES FOR PROTECTING THE ENVIRONMENT}, \textit{supra} note 125, at 53, 54, 68 (stating that while statutory remedies are directed toward solving environmental problems at the societal level, common law remedies are directed “toward individual and site-specific problems” that can involve “the immediate risk of personal harm and the potential to recover economic damages.”); Klass, \textit{supra} note 102, at 582-83 (discussing the benefit of common law claims in obtaining relief from environmental harms, including the ability of judges and courts to judge the effects of pollution in individualized cases, and the ability to obtain compensatory damages, punitive damages, and injunctive relief to address private harms).
federal courts have done under principles of justiciability with regard to the GHG emission cases) does not mean it should make that choice easily. Congress and the courts should look to principles of federalism, the historic “presumption against preemption” of state law in areas of traditional state concern, and the need for Congress to be very clear about its desire to displace state tort law to promote a significant national interest. As such, courts should give states ample leeway to pursue these claims in the absence of clear Congressional statements, while Congress should be wary about expressly preempting such claims in the first place (although it likely has constitutional authority to do so).

Such “wariness” by Congress has been lacking in recent years. Congress’s enactment of the Protection of Lawful Commerce in Arms Act in 2005 is one such example. The Act prevents civil liability actions against the gun industry associated with harm caused by third-party use of firearms and compels the immediate dismissal of any pending actions in court. Prior to its enactment, however, no state court had imposed civil liability on the gun industry under public nuisance or any other tort theory, and over thirty states had enacted statutes barring state and local governments from bringing such suits. Thus, it is hard to argue that a national crisis threatened the ability of law-abiding citizens to obtain guns and justified Congressional action.

One can argue, of course, that Congress’s elimination of state tort suits against the gun industry was a reaction to state attorneys general going “too far” and stretching the law of public nuisance beyond its reasonable limits. One can also cite the fact that firearms have been subject to federal regulation for some time as argument they are not within an area of traditional state concern. On the other hand, Congress acted in the absence of any adverse judgment against the defendants, and perhaps without considering whether state experimentation in this area might benefit public policy. In fact, some of the lawsuits were resulting in defendants voluntarily agreeing to implement safer manufacturing and distribution practices in exchange for dismissal of the lawsuits, thus addressing the “gaps” in federal regulation of firearms that the public nuisance suits were meant to address. As a result, Congress displaced tort law that was having a public policy impact at the state and local levels (an impact some would view as positive and some would view as negative) without in any way addressing the public health and safety concerns of states and municipalities through federal regulation or funding. Congress likely has authority to enact such legislation preempting state tort law, but its haste in doing so is not consistent with federalism principles. More important, such legislation stifles the ability of state and local governments to use tort law to experiment with approaches to gun violence in their communities without providing something in return.

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280 See supra notes 153-56 and accompanying text.
281 MCGARITY ET AL., supra note 156, at 6.
283 See supra Part III (discussing Congressional enactments prior to the 1990s that replaced state tort law with federal regulation, funding, or compensation).
C. Where to Go From Here: Why Tort Law?

State tort law today is more dynamic and multi-faceted than is recognized by many scholars and courts. While states are cutting back on decades of common law expansions of tort rights and remedies in product liability and other personal injury suits, they are also creating new rights and remedies for the Internet Age. In response to a perception that Congress and federal agencies are failing to adequately regulate guns, GHG emissions, and mortgage fraud, states are attempting to fill the gaps through public nuisance suits as a perhaps crude but potentially powerful stand-in for regulation. Tort law thus is alive and well as private law while also serving public law goals. The Supreme Court, however, has taken a wrong turn in implicitly classifying all tort law as public law, with unfortunate consequences for states and their citizens who deserve more protection from the elimination of tort law under principles of federalism and due process. Thus, the placement of all tort law into the public law box has the potential of significantly hindering the states from serving their historically critical role as laboratories for democracy, particularly at a time when the federal government is less inclined to provide federal support in these areas.

One potential correction is for courts to give a much more explicit recognition of the important role tort law continues to play in providing private rights for the redress of private wrongs. It perhaps is not appropriate to conduct a single analysis of tort law that covers the state public nuisance suits, new private causes of action for invasion of privacy, right to publicity, or for harm arising from predatory lending practices, and traditional tort claims to recover for harm from medical malpractice, battery, fraud, and personal injury from drugs or products. While success by plaintiffs in all these lawsuits may result in deterring harmful practices and compensating for harm, the public nuisance suits constitute public law actions to achieve widespread public goals while the remaining causes of action for privacy, right to publicity, harm from predatory lending practices, or personal injury also constitute the creation of a state structure for citizens to obtain redress for private wrongs. There is a significant difference between them that has to be recognized. Once this distinction is recognized, the question is what to do with it. What is so special about state tort law that it should either be preserved or replaced with some other system? Some answers arise from a review of both the public law benefits and private law benefits of tort law.

As explained in Part I, the public law goals of tort law focus in large part on deterrence and compensation. In the past, Congress often replaced state tort law with an alternative system of compensation and, in some cases, a regulatory scheme to address deterrence. The Price Anderson Act discussed in Part III is an example of a Congressional approach to perceived deficiencies in tort law that combines a no-fault compensation program for nuclear accidents (funded by a combination of private insurance and mandatory contributions to a common fund by nuclear operators) with a

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284 See supra notes 9-11.
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limit on total liability for any nuclear accident. Claims for recovery are brought in federal court, claimants must establish causation and proof of loss, but liability is strict and there is no defense of contributory negligence.

The National Childhood Vaccine Act and the Black Lung Benefits Act discussed in Part III are other examples of efforts by Congress to retain some of the public law benefits of tort (deterrence and compensation) through federal programs when eliminating traditional common law claims for relief. While many of these laws were controversial when enacted and remain so today (often seen as unwarranted subsidies for the industries at issue), there was at least a somewhat sophisticated attempt to address the public law goals of compensation and deterrence as part of a decision that tort law was not the best solution to a problem. This stands in contrast to the Protection of Lawful Commerce in Arms Act, where tort suits against the gun industry were eliminated entirely, without any regulatory or compensatory system to address state and local concerns over the ease with which criminal actors can obtain firearms. Of course, one action by Congress does not necessarily create a “trend” that should cause concern. Moreover, the legislation was narrowly tailored to address litigation by states and local governments that many (even those outside the gun industry) saw as pushing the outer limits of legitimate tort law in the first place. Nevertheless, it still serves as a caution to Congress and other legislatures to consider the public law benefits of tort, as well as the benefits of state experimentation, before completely eliminating claims against an industry.

As recognized earlier, there may be no constitutional prohibition on Congress simply eliminating certain tort actions to promote national interests, as it has done with the Lawful Commerce in Arms Act. Even in that case, though, Congress was fairly explicit in its intent to preempt common law suits for relief against gun manufacturer for harm caused by third parties. In many of the recent preemption cases the Court has considered, however, the problem is that Congress has not been clear about whether it intends to preempt state tort law or whether it intends to delegate to federal agencies the power to preempt state tort law through their implementing regulations. In these cases involving implied preemption, the question becomes whether the Court should defer to agency positions that their regulations should displace state tort law because such tort law interferes with federal regulatory goals.

Do the agency regulations address the public law goals of deterrence and compensation sufficiently to act as a substitute for the tort law being displaced? The answer may well be no. The lack of adequate time, money, and staffing in the agencies


286 See Rabin, supra note 285, at 956.

287 See supra note 153 and accompanying text.

288 See Rabin, supra note 23, at 296 (“Congress has been notoriously vague in indicating its intention to preempt, let alone its intention to delegate this power to an agency pursuant to the creation of regulatory authority.”).

289 See supra Part IV.B. See also Sharkey, supra note 225.
regulating drugs, medical devices, and consumer products means that injured parties cannot always rely on agencies to ensure that products are safe, even if those products meet agency standards, because the agency cannot always adequately review the products at issue and set appropriate safety standards.\textsuperscript{290} Moreover, even in cases where products violate agency standards, preemption of state tort law means victims are forced to rely on less-than-perfect agency enforcement because of the lack of private rights of action in the Food and Drug Act, the Medical Device Act, the Consumer Product Safety Act, and many other federal statutes regulating public health and safety.\textsuperscript{291}

This problem is highlighted in federal court preemption decisions involving state regulatory compliance defenses. As noted in Part II, in the 1990s states began experimenting with granting immunity to drug companies from punitive damages and, in the case of Michigan, from liability entirely, where the FDA has approved the drug in question.\textsuperscript{292} Each of these statutes contains an exception providing that the defendant is not entitled to immunity if the plaintiff can show the defendant intentionally withheld or misrepresented to the FDA information concerning the drug and that the drug would not have been approved if the information had been accurately provided.\textsuperscript{293} Thus, each of these states set a balance on the extent to which it wished to limit tort claims against drug manufacturers but still provide some level of deterrence and compensation associated with fraudulent activity.

In 2001, however, the Supreme Court decided \textit{Buckman Co. v. Plaintiffs’ Legal Committee}.\textsuperscript{294} In that case, the plaintiff sued a regulatory consultant to a manufacturer of orthopedic bone screws, alleging that the FDA would never have approved use of the bone screws in the absence of fraudulent representations by the consultant.\textsuperscript{295} The plaintiff included a state common law misrepresentation claim entitled “fraud-on-the-FDA,” which alleged the defendant made specific fraudulent representations to the agency during the device approval process.\textsuperscript{296} In reversing the court of appeals’ rejection of a preemption defense, the Court carved out an “exclusive” federal interest in considering the consultant’s implied preemption defense.\textsuperscript{297} Rather than describing the case as one involving the state’s traditional interest in protecting the health and safety of

\textsuperscript{290} See Klass, supra note 2 (discussing problems with agency funding and enforcement).
\textsuperscript{291} See Rabin, supra note 23, at 301.
\textsuperscript{292} See supra notes 36-37 and accompanying text (discussing regulatory compliance statutes for drug manufacturers in New Jersey, Arizona, and Michigan).
\textsuperscript{293} See, e.g., \textit{Mich. Comp. Laws § 2946(5)(a); supra note 37, and accompanying text.}
\textsuperscript{294} 531 U.S. 341 (2001).
\textsuperscript{295} \textit{Buckman}, 531 U.S. at 343.
\textsuperscript{296} \textit{Id.} at 346-47. See also \textit{In re Orthopedic Bone Screw Products Liability Litigation}, 159 F.3d 817, 821-22 (3rd Cir. 1998) (discussing the elements of the plaintiff’s fraud-on-the-FDA claim), \textit{rev’d sub nom Buckman v. Plaintiffs’ Legal Committee}, 531 U.S. 341 (2001).
\textsuperscript{297} \textit{Id.} at 352 (pointing to clear evidence that “Congress intended that the MDA be enforced exclusively by the Federal Government.”) (citing 21 U.S.C. § 337(a)).
its citizens, the Court defined the case as one involving “[p]olicing fraud against federal agencies” which is “hardly ‘a field which States have traditionally occupied.’”

After *Buckman*, the question was whether the fraud exceptions to state regulatory compliance defenses (as well as any common law fraud claims against drug manufacturers in states without such defenses), remained valid or whether they were preempted as interfering with the FDA’s exclusive interests in policing fraud in the drug approval process. Federal lower courts have split on this issue. The Court of Appeals for the Sixth Circuit held that the fraud exception to the Michigan regulatory compliance defense was preempted under *Buckman* and severed it from the remainder of the statute, leaving drug manufacturers with virtually complete immunity from product liability suits. The Court of Appeals for the Second Circuit disagreed and held that *Buckman* did not preempt the Michigan fraud exception. It reasoned that the state law was not an attempt to police fraud against the FDA but instead was an effort to set the duties between product manufacturers and Michigan consumers. As such, the Michigan legislation involved an area of “traditional state concern” entitled to the presumption against preemption of state law. Moreover, the Court found no evidence in *Buckman* that the Court intended to use principles of implied preemption (there is no express preemption clause in the federal food and drug law), to eliminate all evidence of fraud involving the FDA in “run of the mill” tort cases. The Supreme Court granted certiorari in 2007 to resolve the issue, but split 4-4 (Justice Roberts did not participate), leaving the issue for another day.

These developments show the problems with the Court’s broad preemption decisions in cases involving implied preemption (i.e., where Congress did not expressly preempt state determinations on the scope of tort law). The legislative history indicates that Michigan legislators enacted the statute based on a concern that “unlimited liability for drug manufacturers would threaten the financial viability of many enterprises and could add substantially to the cost and unavailability of many drugs.” In making this policy choice, however, Michigan lawmakers also intended to preserve some measure of compensation and deterrence through tort law in cases where the drug company acted in a fraudulent manner to obtain its drug approval. *Buckman* and the Sixth Circuit’s interpretation of *Buckman*, limit the ability of state legislatures to experiment with the

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298 *Buckman*, 531 U.S. at 347 (quoting Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947)).
299 For a recent discussion of *Buckman* preemption in the context of state regulatory compliance defenses, see Catherine M. Sharkey, *The Fraud Caveat to Agency Preemption*, 102 Nw. U. L. Rev. 841 (2008).
302 Desiano, 467 F.3d at 94-95.
303 Id. at 97.
304 Id. at 97.
extent to which they wish to utilize state tort law to protect their citizens and deter misconduct within their jurisdictions. Indeed, at least four members of the current Supreme Court were prepared to eliminate the ability of states to make those choices with regard to statutory regulatory compliance defenses and perhaps the use of any evidence involving fraud in the regulatory approval process in common law fraud claims.\textsuperscript{307}

By taking this issue away from the states and placing it solely in the hands of federal agencies (not even Congress), state legislative bodies have a decreased ability to experiment with attempts to achieve the public law goals of compensation and deterrence while not placing too heavy a burden on industry. Robert Rabin has argued that the benefits associated with placing states in charge of products liability law likely outweigh any uniformity benefits served by creating a national liability standard or national damage cap. Rabin focuses in particular on the ability of states to monitor their tort reform actions (and adjust them if the results are too harsh) in a way that a “remote” Congress is unlikely to do.\textsuperscript{308} When it is a federal agency, rather than Congress, that would be displacing state law, the federalism concerns are even greater, and should lead to even more caution in preemption cases in the absence of express Congressional intent to displace state tort law. Thus, the Court’s recent preemption jurisprudence, as highlighted by the \textit{Buckman} implied preemption cases, calls into question whether public law goals of tort law can be met when tort law is displaced without a substitute.\textsuperscript{309}

What about the private law aspects of tort law? As Goldberg has argued, the hallmarks of the tort system are its creation of a civil system that empowers the victim to seek redress from a wrongdoer that has acted wrongfully toward him or her rather than as the vicarious beneficiary of a duty owed to the public at large.\textsuperscript{310} As such, tort law “empowers victims in particular ways” by placing the right to complain with the victim rather than the state (in contrast to criminal prosecutions) and the right to pursue “redress.”\textsuperscript{311} For its part “redress” is not simply monetary compensation to make the victim “whole,” but the right to have the “wrong” acknowledged and, if the victim chooses, to seek an appropriate amount of damages to act as “satisfaction.”\textsuperscript{312} Likewise, Thomas Colby articulates a private law vision of punitive damages, arguing that punitive


\textsuperscript{309}See id. at 29 (stating that even if Congress is free to replace state tort law with a federal regulatory scheme, it is important to keep in mind the “comparative institutional competence of state common law adjudication and federal regulatory action, and the “functional reality that federal regulation is devoid of a compensation mechanism”).

\textsuperscript{310}See Goldberg, supra note 5, at 599.

\textsuperscript{311}Id. at 601.

\textsuperscript{312}See id. at 602.
damages are “a form of legalized private revenge—both theoretically and constitutionally distinct from the public retribution and deterrence achieved through criminal law.”\footnote{313} He states that allowing “controlled revenge” is in the interests of justice because it helps prevent “extra-legal” private revenge and also “vindicates the dignity of the victim.”\footnote{314}

To the extent these private law aspects of tort law are seen as valuable in our society, a federal scheme of regulation and compensation cannot replace tort law in meeting these goals, although it may meet many other important goals such as providing compensation to victims without the cost and difficulty of a lawsuit. Simply eliminating tort law or punitive damages through preemption doctrine or due process limits on punitive damages eliminates the private law benefits of torts without even attempting to replace it with anything that would at least achieve some compensation goals in return.

In sum, there is something to be lost with regard to both the public benefits and private benefits of tort law if Congress and the Courts displace such law. Congress can certainly make that choice, at least in most circumstances, under its Commerce Clause authority. The problem addressed here, however, is ensuring that Congress and the Courts explicitly and fully acknowledge the full extent of what is to be lost through their decisions before acting.

**CONCLUSION**

This Article explores “tort experiments” in the states for the purpose of making three main points. First, state tort experiments today include not only common law and legislative efforts to cut back on earlier expansions of tort rights and remedies in product liability and personal injury cases but also include common law and legislative efforts to expand and create new tort rights and remedies in the areas of consumer protection, privacy, publicity, and environmental protection. Second, state tort experiments contain aspects of both private law and public law. Third, the Supreme Court in recent years appears to have embraced a public law view of tort that fails to recognize the important private law aspects of tort, particularly the existence of a state structure that grants citizens the right to obtain redress for private wrongs. The failure to recognize these private law aspects of state tort law is perhaps one of the reasons why the Court so easily excluded state tort law from its “federalist revolution,” as shown by its recent decisions involving preemption and punitive damages. Ultimately, by placing a spotlight on these issues, this Article hopes to build a richer dialogue surrounding the federal review of state tort law that will better allow states to serve their role as “laboratories of democracy” in this area.

\footnote{313} See Colby, supra note 258.
\footnote{314} Id.