

## 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, while states have limited tort rights and remedies in the products liability and personal injury areas in recent years, they have at the same time increased tort rights and remedies to address new societal problems associated with privacy, publicity, consumer protection, and environmental harm. At the same time, however, Congress has eliminated state tort law entirely in targeted areas without replacing it with corresponding federal remedies. The Supreme Court has likewise cut back on the ability of states to provide their citizens with tort rights and remedies through the 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 the Supreme Court has shifted from a private law to a public law conception of tort that does not give sufficient attention to the important private law goals tort law still serves. This has allowed the Court to displace more easily 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.*

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## INTRODUCTION

This Article considers tort “experiments” in the states and the increasingly complicated and dynamic relationship between state legislatures, Congress, and state and 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.”<sup>1</sup>

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 compliance defenses for consumer claims against drug manufacturers, impose new statutes of limitation 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.<sup>2</sup> 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.<sup>3</sup>

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1. *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

2. *See infra* Part II.A.

3. *See infra* Part II.B.

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, the environment, and many other substantive areas that frequently are the subject of state tort law claims.<sup>4</sup> The continuing ability of states to engage in tort experiments has been called into question, however, by developments in Congress and the Supreme Court. While Congress has not enacted comprehensive federal tort reform, in recent years it has enacted targeted legislation to immunize certain industries, most recently the gun industry, from state lawsuits without any alternative federal remedy, as had been done with prior legislation to protect vaccine manufacturers, the nuclear power industry, and other industries.<sup>5</sup>

Likewise, the Supreme Court appears to have excluded state tort law from its “federalism revolution” that began in the 1990s.<sup>6</sup> Indeed, at the same time the Court was cutting back on Congress’s

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4. See *Bates v. Dow Agrosciences, LLC*, 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 would not find that congressional legislation in that area preempted state law unless Congress made such intention “clear and manifest”) (quoting *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996) (describing the “historic primacy of state regulation of matters of public health and safety” and applying the presumption against federal preemption of state law to plaintiff’s common law tort claims against medical device manufacturer); *N.Y. State Conf. of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645, 655 (1995)); *Hillsborough County v. Automated Med. Labs., Inc.*, 471 U.S. 707, 715 (1985) (refusing to find that federal regulations setting minimum standards for the collection of blood plasma preempted a county ordinance governing blood plasma centers in part because the county ordinance addressed a matter of health and safety, which fell under the “historic police powers of the State”) (quoting *Jones v. Roth Packing Co.*, 430 U.S. 519, 525 (1977)). See generally Alexandra B. Klass, *State Innovation and Preemption: Lessons from Environmental Law*, 41 *LOY. L.A. L. REV.* 1653 (2009) (describing rise of the federal regulatory state in areas of traditional state regulation and trends in federal preemption jurisprudence).

5. See *infra* Part III.

6. See Larry D. Kramer, *The Supreme Court, 2000 Term—Foreword: We the Court*, 115 *HARV. L. REV.* 4, 129-53 (2001) (explaining the Rehnquist Court’s “federalism revolution”); Kathleen M. Sullivan, *From States’ Rights Blues to Blue States’ Rights: Federalism After the Rehnquist Court*, 75 *FORDHAM L. REV.* 799, 808 (2006) (discussing limits on the scope of the Rehnquist Court’s “federalism revolution”); Linda Greenhouse, *Supreme Court Allows Disabled Georgia Inmate To Proceed with Suit Against State*, *N.Y. TIMES*, Jan. 11, 2006, at A27 (using the term “federalism revolution” to describe the series of decisions during the Rehnquist Court era which limited congressional power to make federal law binding on the states); see also *infra* Part IV.A.

authority under the Commerce Clause in the name of states' rights, it began to limit significantly 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.<sup>7</sup>

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 include 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 to provide their citizens both 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 current 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.<sup>8</sup> The second approach views tort law as private law rather than public regulatory law.<sup>9</sup> Under this private law approach,

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7. See *infra* Part IV.A-B.

8. See John C.P. Goldberg, *The Constitutional Status of Tort Law: Due Process and the Right to a Law for the Redress of Wrongs*, 115 YALE L.J. 524, 580-83 (2005) (stating that Justice Traynor, Fleming James, William Prosser, and Leon Green had "grand aspirations" for tort law than merely being a law for the redress of private wrongs, and instead, embraced a view of tort law as public regulatory law that would produce desired policy outcomes).

9. See, e.g., *id.* at 596-606; Benjamin C. Zipursky, *Civil Recourse, Not Corrective Justice*, 91 GEO. L.J. 695, 709-33 (2003).

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.<sup>10</sup>

Part II then analyzes a wide spectrum of recent state legislative and judicial actions to modify tort law not only to decrease the scope of tort law, such as 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 result 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. 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 directly affect 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 displace more easily tort law under doctrines of preemption and due process. It then discusses the inherent values of tort law and argues that the Court should more fully recognize both the public and private aspects of tort law in its preemption and punitive damages cases. This recognition should

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10. 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, 1076 (2006); Goldberg, *supra* note 8; Zipursky, *supra* note 9, at 695 (discussing corrective justice theory).

result in less preemption of state law in cases in which Congress has not expressed a clear intent to preempt state tort law. It should also 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 the 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.”<sup>11</sup> Tort law includes private lawsuits against public or private defendants under common law claims of battery, negligence, nuisance, strict liability, conversion, and other theories to recover for a wide range of economic, noneconomic, and punitive damages as well as injunctive relief to compel certain actions or to prevent certain actions.<sup>12</sup> 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.<sup>13</sup> Claims under state consumer protection laws and privacy

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11. See DAN B. DOBBS, *THE LAW OF TORTS* 1 (2000); see also W. PAGE KEETON ET AL., *PROSSER & KEETON ON THE LAW OF TORTS* 1-7 (W. Page Keeton ed., 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 idea” of tort law that “liability must be based upon conduct which is socially unreasonable”).

12. See KEETON ET AL., *supra* note 11, at 3.

13. See DOBBS, *supra* note 11.

laws are examples of this type of tort claim.<sup>14</sup> 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 resource.<sup>15</sup> Some examples of public nuisance tort suits include those 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 greenhouse gas emissions that lead to climate change.<sup>16</sup>

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. Although 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.<sup>17</sup> The first treats tort law as merely a branch of the public regulatory state.<sup>18</sup> 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.<sup>19</sup> Also in this camp are Progressive and Realist

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14. See KEETON ET AL., *supra* note 11, at 3-4.

15. See *infra* Part II.

16. See *infra* Part II.C.

17. See, e.g., Gary J. Schwartz, *Mixed Theories of Tort Law: Affirming Both Deterrence and Corrective Justice*, 75 TEX. L. REV. 1801, 1801 (1997) (introducing each camp).

18. See *id.*

19. See generally WILLIAM M. LANDES & RICHARD A. POSNER, *THE ECONOMIC STRUCTURE OF TORT LAW* (1987); David Rosenberg, *The Causal Connection in Mass Exposure Cases: A “Public Law” Vision of the Tort System*, 97 HARV. L. REV. 849, 859-60, 905-08 (1984); Zipursky, *supra* note 9, at 696-97 (discussing views of “instrumentalists,” including law and economics

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.<sup>20</sup> Both the economic-deterrence group and the Progressive-Realist group focus almost exclusively on the instrumental nature of tort law, viewing it as another branch of public law.<sup>21</sup>

The second “camp” of tort scholars views tort as private law.<sup>22</sup> 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.<sup>23</sup> The private law camp also includes John Goldberg and Benjamin Zipursky, who argue that tort law exists to redress 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.<sup>24</sup> By articulating duties of conduct that individuals and entities owe to each other, tort law empowers those injured by breaches of those duties to invoke the law to go after wrongdoers.<sup>25</sup> Thus, as a victim’s rights law, tort law helps sustain a distinctly liberal notion of civil society, assures

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scholars who view tort law and other traditional “private law” fields as a matter of public law).

20. See Goldberg, *supra* note 8, at 581-82; see also KENNETH S. ABRAHAM, *THE FORMS AND FUNCTIONS OF TORT LAW* 16-20 (3d 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).

21. See Goldberg, *supra* note 8, at 580-83; Zipursky, *supra* note 9, at 696-97 (stating that instrumentalists, including law and economics scholars, see tort law and other “private” areas of law as really a matter of public law).

22. See Schwartz, *supra* note 17, at 1201.

23. See *id.* at 1801-02 (discussing corrective justice and other theoretical frameworks); Zipursky, *supra* note 9, at 695-97 (discussing corrective justice theory); see also JULES L. COLEMAN, *RISKS AND WRONGS* (1992); ERNEST J. WEINRIB, *THE IDEA OF PRIVATE LAW* (1995); Richard A. Epstein, *A Theory of Strict Liability*, 2 J. LEGAL STUD. 151 (1973); George P. Fletcher, *Fairness and Utility in Tort Theory*, 85 HARV. L. REV. 537 (1972).

24. Goldberg, *supra* note 8, at 530; Zipursky, *supra* note 9, at 697-99.

25. Goldberg, *supra* note 8, at 530; Zipursky, *supra* note 9, at 733-53; see also Jason M. Solomon, *Equal Accountability Through Tort Law*, 103 NW. U. L. REV. (forthcoming 2009) (discussing “civil recourse” theory of tort law as articulated by Goldberg and Zipursky, comparing it to corrective justice theory, and attempting to provide a normative justification for a law of civil recourse).

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.<sup>26</sup> In their view, even though tort law may have the effect of deterring undesirable conduct or compensating injured parties, thus meeting public law goals, tort law's hallmark is the creation of a system of recovery for private wrongs to be utilized by injured parties.<sup>27</sup>

As the following Parts will show, the current dominance of tort law as "public law" has made it difficult for courts to recognize fully the importance of state tort experiments and the value of retaining state tort law in today's federal regulatory state. If tort law is simply another form of public law balancing the burdens and benefits of economic life, it ceases to be either a matter of traditional state concern or a unique institution to resolve private disputes.<sup>28</sup> When these features of tort law are disregarded, it becomes easier for the courts to displace tort law in favor of federal regulatory policy. If, however, tort law 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 that would 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.<sup>29</sup> It was judge-made law that was constantly evolving and adapting to address new concerns, new technologies, and

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26. See, e.g., Goldberg, *supra* note 10, at 1077-78 ("[C]ontrary 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.").

27. See, e.g., Goldberg, *supra* note 8, at 530.

28. See, e.g., *id.* at 575-80 (discussing how the current judicial view of tort law as public law rather than a unique form of state private redress allows courts more easily to displace it).

29. See DOBBS, *supra* note 11, at 1.

changing social norms.<sup>30</sup> During the twentieth century, state courts throughout the country expanded and modified long-standing tort doctrine in a manner that provided consumers and employees with greater protections while increasing 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.<sup>31</sup> 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 compensating thousands of plaintiffs by imposing liability on multiple defendants.<sup>32</sup> In these cases, courts also recognized and expanded historic but politically controversial remedies—such as punitive damages<sup>33</sup> and noneconomic damages<sup>34</sup>—in a manner that

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30. *See, e.g., id.* (stating that tort law “is predominantly common law” although a statutory or constitutional provision may make certain conduct legally wrong, permitting the recovery of damages for such conduct); KEETON ET AL., *supra* note 11, 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 of the time”); F. Patrick Hubbard, *The Nature and Impact of the Tort Reform Movement*, 35 HOFSTRA L. REV. 437, 464-66 (2006) (discussing evolving nature of the common law of torts).

31. *E.g., Greenman v. Yuba Power Prod., Inc.*, 377 P.2d 897 (Cal. 1963); *see DOBBS, supra* note 11, at 974-77 (describing shift to strict liability theory for defective products); JAMES A. HENDERSON ET AL., *THE TORTS PROCESS* 464-69 (7th ed. 2007) (discussing the transition from liability based on negligence and warranty to strict products liability with regard to the manufacture of defective products); Frances E. Zollers et al., *Looking Backward, Looking Forward: Reflections on Twenty Years of Product Liability Reform*, 50 SYRACUSE L. REV. 1019, 1022-23 (2000) (describing doctrinal shift to strict products liability).

32. *See, e.g., Sindell v. Abbott Labs.*, 607 P.2d 924, 933-38 (Cal. 1980) (adopting the notion of market-share liability, which distributes liability based on each defendant’s relative share of the market, when generic products from several manufacturers all possessed the same defect that produced the injuries, even though plaintiffs could not trace their harms to any specific manufacturer); *see also DOBBS, supra* note 11, at 430-32 (describing courts’ use of market-share liability); John T. 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).

33. 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. RESTATEMENT (SECOND) OF TORTS § 908(1) (1979); *see also* Alexandra B. Klass, *Punitive Damages and Valuing Harm*, 92 MINN. L. REV. 83, 90 (2007).

34. Noneconomic damages (or nonpecuniary damages) compensate a plaintiff for pain and

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<sup>35</sup> began to enact 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.<sup>36</sup> At the same time, however, state legislatures and state courts 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.

This Part shows that virtually all of these different types of tort claims fall along a continuum, with some having more private law characteristics and others having more public law characteristics. Traditional tort claims fall closer to the private law side of the continuum;<sup>37</sup> the new statutory tort claims for fraud, privacy, and consumer protection fall somewhere in the middle;<sup>38</sup> whereas the state and local government common law nuisance suits fall on the public law side.<sup>39</sup> Where the various claims fall on the continuum does not impact their validity as “real” tort claims but instead highlights the mixed nature of the goals, both public and private, that tort law continues to attempt to achieve.

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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 (N.Y. 1989); HENDERSON ET AL., *supra* note 31, at 585-86 (discussing various forms of noneconomic damages).

35. For a discussion of congressional responses to the real or perceived tort “crisis” with regard to certain industries, see *infra* Part III.

36. See MARC A. FRANKLIN ET AL., *TORT LAW AND ALTERNATIVES* 809-11 (8th ed. 2006).

37. See *infra* Part II.A.

38. See *infra* Part II.B.

39. See *infra* Part II.C.

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 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.<sup>40</sup>

The first wave of state statutory “tort reform”<sup>41</sup> occurred in the 1970s and centered on claims for medical malpractice.<sup>42</sup> In response to physician complaints of high malpractice insurance premiums, many state legislatures responded by placing caps on pain and suffering damages, regulating fees of plaintiffs’ attorneys, shortening statutes of limitation, or altering or eliminating the collateral source rule.<sup>43</sup>

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 due to the increasing unavailability of liability insurance coverage for businesses as a result of increasing tort liability.<sup>44</sup> Between 1985 and 1988, virtually all state legislatures enacted some form of tort reform legislation, which included placing limits on recovery of noneconomic damages (such as pain and suffering damages), eliminating or placing caps on punitive damages, altering

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40. FRANKLIN ET AL., *supra* note 36, at 809-11.

41. Notably, although the term “tort reform” is generally used 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 twentieth 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).

42. See FRANKLIN ET AL., *supra* note 36, at 809; see also Catherine M. Sharkey, *Unintended Consequences of Medical Malpractice Damage Caps*, 80 N.Y.U. L. REV. 391, 413 (2005) (describing “waves” of medical malpractice and other tort reforms).

43. See FRANKLIN ET AL., *supra* note 36, at 809-10; see also ABRAHAM, *supra* note 20, at 223-24 (discussing the collateral source rule).

44. See FRANKLIN ET AL., *supra* note 36, at 810.

existing doctrines applicable to joint and several liability<sup>45</sup> and comparative fault,<sup>46</sup> and enacting statutes of repose to protect product manufacturers.<sup>47</sup> 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.<sup>48</sup>

A third wave began in the early 1990s and continues into the present. These reforms place additional caps on noneconomic and punitive damages, modify joint and several liability rules, place limits on the ability of courts to certify class actions, and immunize entire industries from certain types of claims.<sup>49</sup> For instance, in 2003, Texas enacted a comprehensive tort reform bill that placed a \$250,000 cap on noneconomic damages in medical malpractice cases and a separate \$250,000 cap for hospital facilities, barred punitive damages unless the jury verdict was unanimous, created a safe harbor for drugs and other products that meet government standards, modified joint and several liability rules, imposed a fifteen-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.<sup>50</sup> Likewise, in 2004, Ohio enacted legislation that placed a

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45. See HENDERSON ET AL., *supra* note 31, at 123 (discussing joint and several liability).

46. See FRANKLIN ET AL., *supra* note 36, 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 31, at 366-67.

47. 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 limitations 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 11, at 550-61 (discussing statutes of limitations and statutes of repose); see also *Montgomery v. Wyeth*, 540 F. Supp. 2d 933 (E.D. Tenn. 2008) (holding that a Tennessee statute of repose barring claims one year after a product expiration date prevented plaintiff's claim against a 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 in light of its harsh results).

48. FRANKLIN ET AL., *supra* note 36, at 810; see also *infra* notes 53-56 and accompanying text (discussing targeted immunity legislation).

49. FRANKLIN ET AL., *supra* note 36, at 812.

50. See TEX. CIV. PRAC. & REM. CODE ANN. §§ 26.001-26.003 (Vernon 2008) (addressing class action and fee-shifting rules); §§ 74.301-74.302 (setting limits on noneconomic and

\$250,000 cap on noneconomic 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.<sup>51</sup> An earlier tort reform measure imposed a \$350,000 limit on noneconomic 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.<sup>52</sup>

Notably, some of the recent state statutory tort reform provides partial or complete immunity for entire industries. For instance, between 2000 and 2005, at least thirteen states—including 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.<sup>53</sup> Beginning in 1999, 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.<sup>54</sup> Arizona, Colorado, Ohio, Oregon, Utah, North Dakota, and New Jersey have immunized pharmaceutical companies from punitive damages for injuries resulting from

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economic damages); §§ 82.007-82.008 (creating rebuttable presumption in favor of defendants in certain product liability actions); § 41.003(d) (providing for punitive damages only in the case of a unanimous jury); FRANKLIN ET AL., *supra* note 36, at 813-14; David A. Anderson, *Judicial Tort Reform in Texas*, 26 REV. LITIG. 1, 4 (2007) (discussing Texas statutory tort reform).

51. See OHIO REV. CODE ANN. § 2315.18(B)(2) (West 2004); see also *Arbino v. Johnson & Johnson*, 880 N.E.2d 420, 433 (Ohio 2007) (discussing Ohio statutory limits on noneconomic damages and punitive damages).

52. See OHIO REV. CODE ANN. § 2315.21 (D)(2)(b) (West 2004).

53. See generally NAT’L CONFERENCE OF STATE LEGISLATURES, FOOD VENDOR LAWSUIT IMMUNITY (2005), <http://www.ncsl.org/programs/health/fvmemo.htm> (last visited Mar. 2, 2009) (summarizing state legislation). Most of these state laws are modeled after federal legislation that was introduced in the House of Representatives in 2003, but was not enacted. *Id.*

54. See Elizabeth T. Crouse, Note, *Arming the Gun Industry: A Critique of Proposed Legislation Shielding the Gun Industry from Liability*, 88 MINN. L. REV. 1346, 1357-59 (2004). Congress enacted similar legislation preempting such suits nationwide in 2005. See *infra* notes 180-83 and accompanying text.

FDA-approved products unless the plaintiff can show the defendant fraudulently obtained FDA approval.<sup>55</sup> In 1995, Michigan enacted a statute that provides immunity to pharmaceutical companies from *all* liability for injuries resulting from FDA-approved products except in cases of fraud.<sup>56</sup>

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 cofounded the American Tort Reform Association (“ATRA”).<sup>57</sup> ATRA describes itself as “the only national organization exclusively dedicated to reforming the civil justice system,” and consists of a “nationwide network of state-based liability reform coalitions backed by 135,000 grassroots supporters.”<sup>58</sup> Its members include Fortune 500 companies in the manufacturing, pharmaceutical, medical, and medical device sectors, along with interest groups representing those business sectors.<sup>59</sup> 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 noneconomic damages, enact product liability and appeal bond reform, ensure “sound science in the courtroom,” and stop “regulation through

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55. See ARIZ. REV. STAT. ANN. § 12-701 (2008); COLO. REV. STAT. § 13-64-302.5(5)(a) (2008); N.J. STAT. ANN. § 2A:58C-5(c) (West 2000); N.D. CENT. CODE § 32-03.2-11(6)-(7) (2008); OHIO REV. CODE ANN. § 2307.80(c) (West 2008); OR. REV. STAT. ANN. § 30.927 (2008); UTAH CODE ANN. § 78B-8-203 (2008); *In re Aredia & Zometa Prod. Liab. Litig.*, No. 3:06-MD-1760, 2007 WL 649266, at \*\*7-9 (M.D. Tenn. Feb. 27, 2007) (discussing New Jersey statute); *Kobar v. Novartis*, 378 F. Supp. 2d 1166, 1168-69 (D. Ariz. 2005) (discussing Arizona statute). *But see* *McDarby v. Merck & Co.*, 949 A.2d 223, 272-76 (N.J. Super. Ct. App. Div. 2008) (invalidating a fraud exception to New Jersey’s statutory limitation on punitive damage claims against drug manufacturers under federal preemption principles).

56. See MICH. COMP. LAWS ANN. § 600.2946(5) (West 2008). Several additional states—Colorado, Indiana, Kansas, Kentucky, New Jersey, Tennessee, Texas, and Utah—provide more limited protection from failure-to-warn claims by creating a rebuttable presumption in favor of FDA-approved drugs. See Catherine M. Sharkey, *The Fraud Caveat to Agency Preemption*, 102 NW. U. L. REV. 841, 850 (2008) (discussing and citing state statutory regulatory compliance defenses). For a discussion of case law interpreting state regulatory compliance defenses, see *infra* notes 345-56 and accompanying text.

57. See Am. Tort Reform Ass’n, *At a Glance*, <http://www.atra.org/about/> (last visited Mar. 2, 2009).

58. *Id.*

59. See Am. Tort Reform Ass’n, *Sample List of ATRA Members*, <http://www.atra.org/about/members.php> (last visited Mar. 2, 2009).

litigation.”<sup>60</sup> According to its website, since ATRA’s founding more than forty-five states have enacted portions of ATRA’s legislative agenda.<sup>61</sup> Indeed, ATRA’s goals are not “just to pass laws” but “to change the way people think about personal responsibility and civil litigation.”<sup>62</sup>

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.<sup>63</sup> 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 private party tort actions.<sup>64</sup> Thus, the concept

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60. Am. Tort Reform Ass’n, *At a Glance*, *supra* note 57.

61. *Id.*

62. *Id.*

63. *See id.* (stating that one of ATRA’s goals is to “stop legislation through litigation”); *see also* Ctr. for Regulatory Effectiveness, <http://www.thecre.com/regbylit/about.html> (last visited Mar. 2, 2009) (describing “regulation by litigation”).

64. *See* JOHN FUND & MARTIN MORSE WOOSTER, *THE DANGERS OF REGULATION THROUGH LITIGATION: THE ALLIANCE OF PLAINTIFFS’ LAWYERS AND STATE GOVERNMENTS* (2000) (discussing suits by state attorneys general working together with plaintiffs’ lawyers against tobacco companies, lead paint companies, HMOs, and car rental companies, but also including private class actions against breast implant manufacturers); Kenneth S. Abraham, *The Insurance Effects of Regulation by Litigation*, in *REGULATION THROUGH LITIGATION* 212, 231-32 (W. Kip Viscusi ed., 2002) (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, 348 (recognizing that “all tort litigation can be seen as regulation by way of litigation” but that a narrower view would include mass tort suits against industries); W. Kip Viscusi, *Overview*, in *REGULATION THROUGH LITIGATION*, *supra*, at 1, 1 (describing regulation by litigation as a “new phenomenon” created by recent lawsuits by state and local governments involving cigarettes, guns, and other products); CTR. FOR REGULATORY EFFECTIVENESS, *REGULATION THROUGH PRIVATE LITIGATION—THE SMITHFIELD HAMS LAWSUIT AS AN ESCALATION OF AN EXISTING TREND*, available at [http://www.thecre.com/regbylit/private\\_20011220.html](http://www.thecre.com/regbylit/private_20011220.html) (recognizing that “regulation through litigation” had been thought to be limited to cases where government officials contracted with private firms to coerce private industry to comply with regulatory goals not attainable through the normal regulatory process but now includes actions by private parties based on state common law involving environmental contamination); Press Release, Am. Justice Partnership, Illinois Supreme Court Rejects Regulation Through Litigation in Auto Parts Case (Aug. 18, 2005), available at <http://www.legalreforminthenews.com/News%20Releases/ATRA-IL-Supreme-Court-8-18-05.html> (describing the initial certification of a class action against State Farm Insurance

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 considered as 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 now also 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.<sup>65</sup> State courts continue to involve themselves in traditional state tort reform both by rolling back earlier expansions of tort law in some areas and by ruling on the constitutionality of state statutory reform efforts.<sup>66</sup> 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.<sup>67</sup> Courts in numerous other states, however, most recently in Ohio, have upheld statutory tort reform efforts as valid under their state constitutions.<sup>68</sup>

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Company involving nonoriginal equipment manufacturer parts in car repairs as “regulation through litigation”).

65. See *supra* notes 29-34 and accompanying text.

66. 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 other”).

67. AM. TORT REFORM ASS’N, TORT REFORM RECORD 2-3, 15, 23, 25, 32, 35, 38, 47 (2007), available at [http://www.atra.org/files.cgi/8140\\_Record\\_12-07.pdf](http://www.atra.org/files.cgi/8140_Record_12-07.pdf) (describing judicial decisions invalidating and upholding statutory tort reform).

68. See *id.* at 4, 15, 22, 31, 33, 35; see also *Arbino v. Johnson & Johnson*, 880 N.E.2d 420

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.<sup>69</sup> 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."<sup>70</sup> Retired Justice Sandra Day O'Connor similarly wrote in the 1980s that "[a]wards 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.<sup>71</sup> 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.<sup>72</sup>

Regardless of whether the tort "crisis" is real or illusory, by characterizing the tort system as defective and as mere "regulation

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(Ohio 2007) (upholding as constitutional an Ohio statute limiting punitive damages and limiting noneconomic damages for all but the most serious injuries). Significantly, while state courts have often upheld plaintiffs' rights to tort remedies, 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. *E.g.*, *Montgomery v. Wyeth*, 540 F. Supp. 2d 933 (E.D. Tenn. 2008) (finding no federal due process protections for a plaintiff whose claim against a drug manufacturer was eliminated by a state statute of repose before she was even eligible to file it); *see also* Goldberg, *supra* note 8, at 527-28.

69. *See* DOBBS, *supra* note 11, at 1093-97 (discussing criticisms of the tort system).

70. *See* W. Kip Viscusi, *The Blockbuster Punitive Damages Awards*, 53 EMORY L.J. 1405, 1405 (2004).

71. *Browning-Ferris Indus. of Vt., Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 282 (1989) (O'Connor, J., concurring in part and dissenting in part).

72. *See* Klass, *supra* note 33, at 98-99 (citing various studies and articles on both sides of the debate over whether there is a civil justice "crisis" involving punitive damages and noneconomic damages); Nockleby & Curreri, *supra* note 32, 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); *see also* *Exxon Shipping Co. v. Baker*, 128 S. Ct. 2605, 2624-25 (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").

through litigation,” commentators and courts treat tort law as invalid “public law” that has gone astray, rather than a private law system worthy of protection by the courts and legislatures. Putting aside the public law rhetoric that surrounds traditional state tort law, the fact remains that these claims still have significantly more private law characteristics than public law characteristics. First, these claims are generally brought by private parties against other private parties. Second, these claims generally involve primarily private wrongs rather than public wrongs. Third, the plaintiffs, in these claims, are not acting as vicarious agents for the state, but are pursuing their own rights, if they choose to do so, to obtain private redress for wrongs. Thus, traditional state tort claims fall on the private law side of the continuum despite often meeting public law goals of deterrence and compensation as well.

*B. Tort Expansions: The Creation 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. Although 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 in that they provide private parties with new rights to recover for new types of harm, and create liability for those who would interfere with those newly-created rights. 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 forms of 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 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.<sup>73</sup> As consumer goods and society in general became more complex, and buyers and sellers more remote, Congress and state legislatures began to recognize that buyers were not able to protect themselves under traditional contract law and thus required statutory protection.<sup>74</sup> 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, significantly, providing private rights of action for injured consumers.<sup>75</sup> By 1980, however, Congress reduced the FTC’s power in response to the perception the agency had gone too far.<sup>76</sup> 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.<sup>77</sup> 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.<sup>78</sup> A significant part of state legislation in this area expands tort rights and remedies to protect consumers. For instance, “[a] private right

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73. See DEE PRIDGEN, *CONSUMER PROTECTION AND THE LAW* § 1:1 (2006).

74. *Id.*

75. *Id.*

76. *Id.* For instance, in the FTC Improvements Act of 1980, Congress imposed a congressional review of all FTC trade regulation rules and placed a three-year moratorium on FTC rules regulating unfair advertising. *Id.* § 8:2 (citing 15 U.S.C. § 57(a)(I)). The congressional veto portion of the legislation was subsequently held to be unconstitutional. *Id.*

77. *Id.*

78. See Emily Jeffcott, *The Mortgage Reform and Anti Predatory Act of 2007: Paving a Secure Path for Minorities in the Midst of the Subprime Debacle*, 10 SCHOLAR 449, 468-70 (2008); Seth Yaffo, Comment, *Beware the Dotted Line: Foreclosure Rescue Fraud and the Growing Effort To Combat It*, 37 U. BALT. L. REV. 113 (2007).

of action to sue for alleged violations of the state consumer protection act currently exists in every state except Iowa and North Dakota.”<sup>79</sup> In bringing such actions, if a plaintiff establishes causation, he or she generally can recover compensatory damages and/or rescission damages.<sup>80</sup> In some states a plaintiff can also recover emotional distress damages, physical pain and suffering damages, consequential damages, and injunctive relief to enjoin future violations.<sup>81</sup> In addition, at least eighteen states allow successful consumer plaintiffs to recover minimum damages (ranging from twenty-five to two thousand dollars) 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.<sup>82</sup> Most states allow plaintiffs to recover attorneys’ fees incurred in bringing a successful action under their consumer protection statutes.<sup>83</sup>

Notably, many of the same states that have enacted the most restrictive limits on punitive damages and noneconomic 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 noneconomic 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.<sup>84</sup> Likewise, Ohio, which recently enacted significant tort reform measures for many common law claims, allows for treble damages under its consumer protection statute.<sup>85</sup>

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79. See PRIDGEN, *supra* note 73, § 6:2.

80. *Id.* §§ 6:4, 6:8.

81. *Id.* §§ 6:5-6:7, 6:9.

82. *Id.* § 6:10.

83. *Id.* § 6:17.

84. See PRIDGEN, *supra* note 73, § 6.5 (discussing awards of emotional distress damages under Texas Consumer Protection Act); *id.* § 6.12 (showing Texas mandates multiple damages in cases of intentional or willful conduct by the defendant); see also *supra* note 50 and accompanying text (discussing the Texas tort reform legislation).

85. See OHIO REV. CODE ANN. § 1345.09 (West 2008) (allowing private right of action, compensatory damages, treble damages, and attorneys’ fees for successful plaintiffs); see also *supra* notes 51-52 and accompanying text (discussing Ohio tort reform legislation).

Moreover, states have not been content simply to 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.<sup>86</sup> 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 not able to qualify financially for more traditional loans.<sup>87</sup> Not surprisingly, many of these subprime borrowers were unable to maintain their mortgage payments, leading to an increase in home foreclosures across the country and contributing to a worldwide financial crisis.<sup>88</sup>

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 not only to set regulatory limits on predatory lending but also to utilize tort rights and remedies in their efforts.<sup>89</sup> Since 1999, numerous states have enacted predatory lending legislation or have brought enforcement actions against predatory lenders using new and old consumer protection laws.<sup>90</sup> Some of these new predatory lending statutes

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86. See Jessica Fogel, *State Consumer Protection Statutes: An Alternative Approach to Solving the Problem of Predatory Mortgage Lending*, 28 SEATTLE U. L. REV. 435, 435 (2005).

87. 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 86, 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).

88. See Jeffcott, *supra* note 78, at 450-54 & n.26 (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 Vikas Bajaj & Michael M. Grynbaum, *About 1 in 11 Mortgageholders Face Loan Problems*, N.Y. TIMES, June 6, 2008, at C1.

89. See Jeffcott, *supra* note 78, at 468 (citing the “ineffectiveness of federal legislation” as the reason behind the significant state legislative activity in the area of predatory lending).

90. See Burlingame, *supra* note 87, at 468-69; see also Fogel, *supra* note 86, 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

provide for private rights of action by consumers and allow recovery of a wide range of compensatory 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.<sup>91</sup> 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.<sup>92</sup> 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.<sup>93</sup>

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. In 2008, the cities of Cleveland and Buffalo sued financial institutions under public nuisance doctrine, arguing that the subprime lenders and the

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deceptive practices without requiring proof of fraudulent intent or knowledge, provide for expansive remedies, and do not run afoul of federal preemption principles).

91. MINN. STAT. ANN. § 58.18 (West 2008).

92. *Id.*

93. *See, e.g.*, ARK. CODE ANN. § 23-53-106 (2008); IND. CODE ANN. § 24-9-5-4 (West 2008); N.M. STAT. ANN. § 58-21A-9 (West 2008); N.Y. BANKING LAW § 6-1(6) to (7) (McKinney 2008); OHIO REV. CODE ANN. § 1322.081 (West 2008). Many states are concerned, however, that the Supreme Court's 2007 decision in *Watters v. Wachovia Bank*, 550 U.S. 1 (2007)—which holds 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 preempt state laws regulating predatory lending. *See id.* at 13-16; *see also* Julia Patterson Forrester, *Still Mortgaging the American Dream: Predatory Lending, Preemption, and Federally Supported Lenders*, 74 U. CIN. L. REV. 1303, 1360-62 (2006) (stating that judicial preemption of state antipredatory lending statutes will reduce experimentation among the states and prolong a potential solution to the problem, and arguing that state antipredatory lending statutes are preferable to congressional action because state regulation allows for experimentation and quick adaptation). For a discussion of federal preemption doctrine, *see infra* Part IV.B.

financial institutions that backed them knowingly contributed to the current foreclosure crisis in the cities.<sup>94</sup> These lawsuits sought to recoup the cities' 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.<sup>95</sup>

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 to help fill a federal regulatory gap in consumer protection and assist state enforcement of the laws.<sup>96</sup> 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 states are using tort law to assist with public regulation.<sup>97</sup> 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 to privacy and the right to publicity. The right to privacy began to develop in legal scholarship, the courts, and state legislatures at the end of the nineteenth century.<sup>98</sup> The modern right to privacy began

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94. *See, e.g.*, *Mayor of Baltimore v. Wells Fargo Bank*, Civ. No. 08-CV-062 (D. Md. filed Jan. 8, 2008); *Cleveland v. Deutsche Bank Trust Co.*, No. CV08646970 (Ct. Com. Pl. Ohio filed Jan. 10, 2008); *see also* Julie Kay, *Empty Homes Spur Cities' Suits*, NAT'L L.J., May 5, 2008, at 1.

95. *See* Kay, *supra* note 94.

96. *See supra* notes 77-78, 89 and accompanying text.

97. *See supra* notes 77-78, 89 and accompanying text.

98. J. THOMAS MCCARTHY, 1 THE RIGHTS OF PUBLICITY AND PRIVACY § 1:4 (2d ed. 2003); *see also* Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890).

in 1960, when William Prosser created his “four tort” approach to privacy law. In so doing, 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.<sup>99</sup> 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.<sup>100</sup> The First Restatement of Torts, state legislatures, and courts across the country adopted this “four tort” approach to the right to privacy although the right varies from state to state under both common law and state statutes.<sup>101</sup>

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.”<sup>102</sup> Beginning in 1953 with the Second Circuit, courts began to recognize a common law right to publicity as a matter of state law either as its own right or as part of the right to privacy.<sup>103</sup> As of 2003, courts in eighteen states recognized the right to publicity under state common law and only two states expressly rejected it.<sup>104</sup>

In addition to the right under common law, in the 1980s and 1990s, numerous states enacted statutes expressly recognizing and protecting the right to publicity separate and apart from the right to privacy that existed in earlier statutes.<sup>105</sup> 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.<sup>106</sup> They permit recovery of compensatory damages, punitive damages, and/or injunctive relief for a

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99. William L. Prosser, *Privacy*, 48 CAL. L. REV. 383 (1960); see also HENDERSON ET AL., *supra* note 31, at 771.

100. HENDERSON ET AL., *supra* note 31, at 771.

101. *Id.* at 772.

102. MCCARTHY, *supra* note 98, § 1:3.

103. *Id.* § 6:3.

104. *See id.*

105. *See id.* §§ 6:6-6:8.

106. *See id.* § 6:8.

defendant's use of the commercial value of the plaintiff's identity.<sup>107</sup> 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 to publicity, but consider these rights to be part of the right to privacy rather than a property right in personal identity.<sup>108</sup>

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.<sup>109</sup> The second set of challenges arose in the 1990s and 2000s following the Internet explosion. During that time, there was a significant increase in public access to personal data and information, as well as an increased ability to use that personal data and information for commercial gain.<sup>110</sup> Thus, state legislatures 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.<sup>111</sup>

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 1998<sup>112</sup> to provide protection against technological intrusion and trespass.<sup>113</sup> The legislation redefined the state law of trespass to create new privacy torts in response to the death of Princess Diana in 1997,

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107. *See id.* §§ 6:4, 6:8.

108. *See id.* §§ 6:7-6:8. These state law developments have taken place against a backdrop of federal statutory and constitutional privacy and publicity law beginning in the 1980s. *See* CHRISTOPHER WOLF, *PROSKAUER ON PRIVACY: A GUIDE TO PRIVACY AND DATA SECURITY LAW IN THE INFORMATION AGE* §§ 1:4.3-1:5.2, 14:1.1 (Christopher Wolf ed., 2008).

109. *See* Wolf, *supra* note 108, at §§ 1:4.3-1:4.4.

110. *Id.* §§ 1:4.4-1:5.2.

111. *Id.* § 1:4.4; *see also id.* § 16:1.1 (“[T]he most compelling need for a ‘right to be let alone’ is, for many Americans, manifested in a desire to avoid unsolicited and unwanted commercial communications.”).

112. CAL. CIV. CODE § 1708.8 (West 2008).

113. *See* Erwin Chemerinsky, *Balancing the Rights of Privacy and the Press: A Reply to Professor Smolla*, 67 GEO. WASH. L. REV. 1152, 1153-58 (1999) (discussing the California legislation).

which resulted when her car, in an attempt to escape aggressive paparazzi photographers, collided with a concrete post inside a tunnel.<sup>114</sup> The first new tort, “physical invasion of privacy” allows a party to sue for damages or injunctive relief when someone has (1) “knowingly enter[ed] on to the land of another person without permission;” (2) 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 (3) the invasion was made “in a manner that is offensive to a reasonable person.”<sup>115</sup> 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).<sup>116</sup>

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 when (1) 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”; (2) the attempt is made in a manner that is offensive to a reasonable person; (3) there is a reasonable expectation of privacy; and (4) a “visual or auditory enhancing device” is used.<sup>117</sup> Liability exists “regardless of whether there is a physical trespass.”<sup>118</sup> The full range of relief for physical invasion of privacy is also available for constructive invasion of privacy.<sup>119</sup> 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.<sup>120</sup>

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114. See Lisa Vance, Note, *Amending its Anti-Paparazzi Statute: California's Latest Baby Steps in its Attempt To Curb the Aggressive Paparazzi*, 29 HASTINGS COMM. & ENT. L.J. 99, 99-100, 107-08 (2006) (discussing history behind the California law and the contours of the law).

115. See CAL. CIV. CODE § 1708.8(a) (West 2008).

116. See *id.* § 1708.8(d), (h).

117. See *id.* § 1708.8(b).

118. *Id.*

119. *Id.* § 1708.8(d).

120. See RESTATEMENT (SECOND) OF TORTS § 158 (1965) (stating that a defendant is liable for trespass if he or she (1) enters the plaintiff's land or causes a thing or third person to do so, (2) remains on the land, or (3) fails to remove from the land a thing that he is under a duty to remove); HENDERSON ET AL., *supra* note 31, at 386 (stating that to constitute a trespass, “the defendant must accomplish an entry on the plaintiff's land by means of some physical,

In 2005, the California Legislature amended its privacy law to add assault to the list of activities that constitute invasion of privacy. It also imposed civil liability for “assault committed with the intent to capture any type of visual image, sound recording, or other physical impression.”<sup>121</sup>

Thus, we see state legislatures expanding tort law in response to citizen concerns over new vulnerabilities in the areas of privacy and publicity in an age when 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. These new torts serve private law goals by granting state citizens additional “property” rights in their identities and granting new privacy rights that they can enforce in court against private actors. These torts also serve public law goals, however, 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. More recently, however, states have enacted environmental protection laws to respond to what they have seen 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.<sup>122</sup> 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

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tangible agency”).

121. CAL. CIV. CODE § 1708.8(c) (West 2008); see also Vance, *supra* note 114, at 108-10 (discussing the 2005 amendment).

122. See, e.g., Alexandra B. Klass, *Common Law and Federalism in the Age of the Regulatory State*, 92 IOWA L. REV. 545, 579-80 (2007).

historical context, which began with Congress's enactment of the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA") in 1980.<sup>123</sup>

In the 1970s, Congress, for the first time, began to enact far-reaching legislation to reduce or eliminate air and water pollution;<sup>124</sup> govern the generation, storage, and disposal of solid and hazardous waste;<sup>125</sup> and create a regulatory system to review, classify, and regulate a host of pollutants and hazardous chemicals.<sup>126</sup> The most "tort-like" of these federal statutes is CERCLA, also known as "Superfund."<sup>127</sup> Congress enacted CERCLA in December 1980 in response to a growing concern that past and current disposal of hazardous substances was significantly impacting human health and the environment.<sup>128</sup> 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.<sup>129</sup> During the congressional debates, members of Congress frequently referred to "Love Canal" and "Valley of the Drums," which were the most publicized of the thousands of abandoned hazardous waste sites around the country presenting a threat to human health and the environment.<sup>130</sup>

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123. 42 U.S.C. §§ 9601-9675 (2000).

124. Clean Air Act Amendments of 1977, Pub. L. No. 95-95, 91 Stat. 685 (codified as amended at 42 U.S.C. §§ 7401-7671 (2000)); Clean Water Act of 1977, Pub. L. No. 95-217, 91 Stat. 1566 (codified at 33 U.S.C. §§ 1251-1387 (2000)).

125. Resource Conservation and Recovery Act of 1976, Pub. L. No. 94-580, 90 Stat. 2795 (codified at 42 U.S.C. §§ 6901-92 (2000)).

126. Toxic Substances Control Act, Pub. L. No. 94-469, 90 Stat. 2003 (codified at 15 U.S.C. §§ 2601-26 (2006)).

127. "Superfund" refers to the \$1.6 billion Hazardous Substances Response Trust Fund created to finance cleanups. See 26 U.S.C. § 9507 (2000) (establishing Superfund); 42 U.S.C. § 9601(11) (defining "Fund" or "Trust Fund" under CERCLA); see also SUSAN M. COOKE & CHRISTOPHER P. DAVIS, *THE LAW OF HAZARDOUS WASTE MANAGEMENT, CLEANUP, LIABILITY AND LITIGATION* §§ 12.03[3], 12.03[4][f] (explaining funding for and uses of Superfund).

128. See H.R. REP. NO. 96-1016 pt. I, at 17, reprinted in 1980 U.S.C.A.N. 6119, 6119-20; see also Alexandra B. Klass, *From Reservoirs to Remediation: The Impact of CERCLA on Common Law Strict Liability Environmental Claims*, 39 WAKE FOREST L. REV. 903, 924-26 (2004) (noting the toxic waste crisis facing the public).

129. Klass, *supra* note 128, at 926-27.

130. *Id.* at 927-28.

Under CERCLA, anyone who is found to be “responsible”<sup>131</sup> for a release or threatened release<sup>132</sup> of a hazardous substance<sup>133</sup> from a facility<sup>134</sup> that results in the incurrence of response costs,<sup>135</sup> is strictly, jointly, and severally liable for reimbursing those costs.<sup>136</sup> CERCLA, however, limits recovery by private parties to money spent on the investigation and remediation of a release of hazardous substances. It 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.<sup>137</sup> 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.<sup>138</sup>

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131. 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).

132. *Id.*; see also *id.* § 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)”).

133. See *id.* § 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).

134. See *id.* § 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”).

135. See *id.* § 9601(25) (defining “respond” or “response”). “Costs of response” incurred by a private party must be both “necessary” and “consistent with the national contingency plan.” *Id.* § 9607(a)(4)(B).

136. *Id.* § 9607(a).

137. See Klass, *supra* note 128, at 923.

138. See ALASKA STAT. §§ 46.03.822, 46.03.824 (2007) (providing for strict liability, cost recovery, and broadly defined damages including injury to, or loss of, persons or property, and costs of containment and cleanup in connection with the release of hazardous substances); MINN. STAT. §§ 115B.05, 115B.14 (2007) (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); WASH. REV. CODE § 70.105D.080 (2008) (allowing recovery of expenses and reasonable attorneys’ fees in connection with cost recovery actions); *FDIC v. Laidlaw Transit, Inc.*, 21 P.3d 344, 345 (Alaska 2001) (holding that

State legislatures enacted these expansive statutes during the same period they were engaging in traditional tort reform measures to limit recovery rights in personal injury, medical malpractice, and product liability cases.<sup>139</sup> Notably, some states that enacted caps on economic damages, noneconomic 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.<sup>140</sup> 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 that cap to actions involving defective products or the emission, spilling, or disposal of toxic, radioactive, or hazardous materials or waste.<sup>141</sup> For its part, New Jersey has abolished punitive damages in product liability actions against drug manufacturers except in claims where the cause of harm arises from the exposure to toxic or hazardous substances.<sup>142</sup>

There are several possible explanations for why legislatures expanded environmental torts while at the same time placed 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

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a state statute imposing strict liability on polluters of hazardous substances provided a private cause of action for the owner of private property damaged by the pollution); *see also* MO. REV. STAT. § 260.210.1(5) (2007) (providing that any person sustaining injury as a result of another knowingly accepting or hauling solid waste or demolition waste to a site operating without a permit may bring a civil action to recover actual and exemplary damages).

139. *See supra* Part II.A.

140. *See* HAW. REV. STAT. §§ 663-8.7; 663-10.9(2) (2007).

141. *See* NEV. REV. STAT. § 42.005 (2007).

142. *See* N.J. STAT. ANN. § 2A:58C-6 (West 2000).

the 1980s, in 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.<sup>143</sup> There is much less sympathy for traditional “polluters.” Indeed, the publicity of Love Canal and other toxic sites in the late 1970s and early 1980s began the era of federal environmental regulation in the first place and also had a significant influence on state legislatures.<sup>144</sup> Thus, environmental protection has been 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 emissions that contribute to climate change. In July 2004, Connecticut, California, six other states, and the City of New York sued the electric power industry<sup>145</sup> under the tort of public nuisance to curtail the defendants’ emissions of carbon dioxide.<sup>146</sup> As relief, the plaintiffs asked the court to cap carbon dioxide emissions from the power plants and mandate annual reductions of such emissions.<sup>147</sup> Then, in September 2006, California brought its own public nuisance lawsuit against numerous automakers; it sought damages associated with the defendants’ production of vehicles that create GHG emissions.<sup>148</sup> In each case, the states brought the lawsuits to respond to the federal

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143. See generally Rick Blizzard, *Americans Support Malpractice Award Limits*, GALLUP POLL MONTHLY, Feb. 1, 2003, at 15, available at <http://www.gallup.com/poll/7705/Americans-Support-Malpractice-Awards-Limits.aspx> (presenting findings that 74 percent of Americans believe medical malpractice insurance is a major problem with 72 percent supporting limiting damages for emotional pain and suffering and 64 percent supporting limits on punitive damage awards).

144. See *supra* notes 128-30 and accompanying text (discussing events leading up to enactment of CERCLA).

145. The electric power industry is responsible for significantly more carbon dioxide emissions in the U.S. than any other industry, contributing 40 percent of total emissions as compared with 20 percent for cars and light-duty trucks. See U.S. DEPT OF ENERGY, EMISSIONS OF GREENHOUSE GASES IN THE UNITED STATES 2004, at 22 (2005), available at [http://www.eia.doe.gov/oiaf/1605/ggrpt/cdemissions\\_tbls.html](http://www.eia.doe.gov/oiaf/1605/ggrpt/cdemissions_tbls.html).

146. *Connecticut v. Am. Elec. Power Co.*, 406 F. Supp. 2d 265, 267 (S.D.N.Y. 2005).

147. *Id.* at 270.

148. *California v. Gen. Motors Corp.*, No. 606-05755 MJJ, 2007 WL 2726871, at \*2 (N.D. Cal. Sept. 17, 2007).

government's failure to address the growing threat of climate change and to use their own state tort rights and remedies to obtain either injunctive relief or damages.<sup>149</sup> According to one of the attorneys prosecuting the California suit under public nuisance theory, "[t]he 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."<sup>150</sup>

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 better addressed by the legislative and executive branches.<sup>151</sup> The court stated that "The scope and magnitude of the relief Plaintiffs seek reveals the transcendently legislative nature of this litigation."<sup>152</sup> 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.<sup>153</sup> 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 branches, and not this Court."<sup>154</sup> The court declined to rule on the state public nuisance claim, dismissing it without prejudice

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149. 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.").

150. *Id.* at 170.

151. *Am. Elec. Power Co.*, 406 F. Supp. 2d at 273-74.

152. *Id.* at 272.

153. *Gen. Motors Corp.*, 2007 WL 2726871 at \*\*8-9.

154. *Id.* at \*8.

for refiling in state court.<sup>155</sup> 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 in order to obtain injunctive relief and punitive damages associated with harms caused by lead paint in residential homes.<sup>156</sup> Not surprisingly, these lawsuits have been subject to criticism as examples of attorneys general abusing their authority in pursuit of political and other agendas,<sup>157</sup> 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.<sup>158</sup> It is true that these statutes were enacted to allow private parties to assist with the massive problem of remediating hazardous waste sites.<sup>159</sup> It is

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155. *Id.* at \*16. Although public nuisance suits by states to address GHG emissions have not been successful to date, a public nuisance suit brought by North Carolina against the Tennessee Valley Authority involving traditional air pollutants from coal-fired power plants (such as nitrogen oxide, sulfur dioxide, and particulates) did lead a federal district court to order the TVA to install additional pollutant control technology on certain TVA plants in Tennessee. *Cooper v. Tenn. Valley Auth.*, No. 1:06CV20, 2009 WL 77998, at \*17-19 (W.D.N.C. Jan. 13, 2009). In reaching its decision, the court noted that “the judiciary has always played a significant role in the abatement of public nuisances, particularly when such lawsuits are brought by the United States or by sovereign states.” *Id.* at \*2.

156. *See, e.g.*, *State v. Lead Indus.*, 951 A.2d 428, 435 (R.I. 2008) (dismissing the state’s public nuisance claim against paint manufacturers); Julie Steinberg, *Columbus, Ohio, Dismisses Nuisance Suit Against Former Makers of Lead Pigment*, 23 TOXICS L. REP. (BNA) 612 (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); 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 149, at 339 (discussing public nuisance suits brought by states and municipalities to address harms of lead paint in residential buildings).

157. *See, e.g.*, John S. Gray & Richard O. Falk, *‘Negligence in the Air?’ Should ‘Alternative Liability’ Theories Apply in Lead Paint Litigation?*, 35 PROD. SAFETY & LIAB. REP. (BNA) 341 (Apr. 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”).

158. *See supra* text accompanying notes 131-42.

159. *See* Klass, *supra* note 128, at 923.

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.<sup>160</sup> Thus, the new torts were important in giving private citizens new rights to recover for private wrongs associated 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 also in using their broad powers to engage in their own tort experiments under common law.<sup>161</sup> One can argue that innovative lawsuits brought by attorneys general under their state tort law complement state legislative efforts to experiment with tort law in our federalist system.<sup>162</sup> 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 decrease tort rights to respond to the needs of their citizens, the business community, and technological and social advances. Just as environmental torts expanded in the 1980s to respond to the growing awareness of environmental harm, we now see states expanding privacy and publicity torts to provide tailored protections

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160. *See id.* at 928-32 (discussing evidence presented during congressional debates on CERCLA to justify strict liability).

161. Indeed, state attorneys general are democratically elected in forty-three states and thus accountable to the electorate. *See* NAT'L ASS'N OF ATT'YS GEN., STATE ATTORNEYS GENERAL: POWERS AND RESPONSIBILITIES 15 (Lynn M. Ross ed., 1990).

162. *See, e.g.*, Trevor W. Morrison, *The State Attorney General and Preemption*, in PREEMPTION CHOICE: THE THEORY, LAW & REALITY OF FEDERALISM'S CORE QUESTION 81, 92-95 (William W. Buzbee ed., 2009).

for the Internet age.<sup>163</sup> In expanding and contracting tort law in various areas, states are using tort law to meet both private law goals and public law goals, not exclusively one or the other. Moreover, as state legislatures conduct their experiments, state courts both conduct their own experiments 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. CONGRESSIONAL RESPONSES TO STATE TORT EXPERIMENTS

This Part turns to the current tensions between Congress 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 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.<sup>164</sup> In upholding the ability of Congress to displace state tort law in this manner, the Court found that changes in common law liability rules would promote workplace safety and that Congress had the authority to determine whether national law “would better subserve the needs of ... commerce.”<sup>165</sup>

Starting in the middle of the twentieth century, Congress began to enact numerous laws that granted liability protections for defendants in certain industries from state tort claims, but along

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163. See *supra* notes 109-11 and accompanying text.

164. 45 U.S.C. §§ 51-60 (2000). 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, 504 (1908); *The Second Employers’ Liability Cases*, 223 U.S. 1, 48-49 (1912).

165. *Second Employers’ Liability Cases*, 223 U.S. at 51; see also Perry H. Apelbaum & Samara T. Ryder, *The Third Wave of Federal Tort Reform: Protecting the Public or Pushing the Constitutional Envelope?*, 8 CORNELL J.L. & PUB. POL’Y 591, 598 (1999) (discussing the Supreme Court’s review of the Employers’ Liability Act).

with that protection, Congress provided substitute remedies for injured parties. These laws include the Federal Drivers Act of 1961, which made the Federal Tort Claims Act the exclusive remedy for injuries resulting from operation of a motor vehicle by federal government employees;<sup>166</sup> the Price-Anderson Act, enacted in 1957 and amended in 1966, 1975, and 1998, which provided for an exclusive federal cause of action against nuclear power plants, set a maximum aggregate liability in the event of a nuclear accident in exchange for plant operators waiving defenses to liability if sued, and provided federal compensation from a pool funded by plant operators;<sup>167</sup> the Black Lung Benefits Act of 1972, which required employers to provide benefits to coal miners suffering from “black lung disease” and their families and preempted state workers’ compensation laws in this area;<sup>168</sup> the Swine Flu Act, enacted in 1976, which substituted liability of the United States under the Federal Tort Claims Act for manufacturers, distributors, and volunteer medical personnel in connection with the administration of swine flu vaccine;<sup>169</sup> the Atomic Testing Liability Act, enacted in 1984, which made action against the United States under the Federal Tort Claims Act the exclusive remedy for injury or death due to exposure to radiation from atomic weapons testing by government contractors;<sup>170</sup> and the National Childhood Vaccine Act of 1986, which created a no-fault compensation program for childhood vaccine injury victims to be funded by a tax on each dose of vaccine.<sup>171</sup> 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 while still recognizing the need for compensation in cases of harm.

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166. 28 U.S.C. § 2679 (2000).

167. *See, e.g.*, 42 U.S.C. § 2210(c), (n)(1) (2000).

168. 30 U.S.C. §§ 901-945 (2000).

169. 42 U.S.C. § 247b (1976) (completely revised 1978).

170. 42 U.S.C. § 2212 (2000).

171. *See* 42 U.S.C. §§ 300aa-1 to -34 (2000).

Congress began a new wave of targeted tort reform in the 1990s which included providing an eighteen-year statute of repose for manufacturers of general aviation aircraft and their component parts under the General Aviation Revitalization Act of 1994;<sup>172</sup> exempting persons who donate food and grocery products to non-profits for distribution to the needy under the 1996 Bill Emerson Good Samaritan Food Donation Act;<sup>173</sup> providing liability protections to individuals who volunteer for nonprofit or government agencies under the Volunteer Protection Act of 1997;<sup>174</sup> limiting compensatory and punitive damages in suits against rail passenger transportation companies under the Amtrak Reform and Accountability Act of 1997;<sup>175</sup> 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 under the Biomaterials Access Assurance Act of 1998;<sup>176</sup> and providing liability relief and limits on punitive damages for defendants in legal actions arising from year 2000 computer failures under the Y2K Act.<sup>177</sup>

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.<sup>178</sup> Second, also in keeping with earlier legislation, these federal laws are clearly intended to promote activities and indus-

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172. See 49 U.S.C. § 40101 (2000).

173. 42 U.S.C. § 1791 (2000).

174. 42 U.S.C. §§ 14501-05 (2000).

175. 49 U.S.C. § 28103 (2000).

176. 21 U.S.C. §§ 1601-06 (2000).

177. 15 U.S.C. §§ 6601-17 (2006).

178. 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 31, 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 165, at 627-28 (describing the Product Liability and Reform Act's proposal to "narrow the grounds for the award of punitive damages to those cases where there is a 'conscious, flagrant, indifference to the rights or safety of others' which can be established by 'clear and convincing evidence'").

tries 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.<sup>179</sup> Third, 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.<sup>180</sup> This legislation was a response to a series of public nuisance suits brought by municipalities in the early 1990s, attempting to hold gun sellers, manufacturers, and trade shows liable under public nuisance theories for gun violence.<sup>181</sup> In these cases, local governments and one state (New York) argued, among other things, that the gun industry knowingly contributed to the illegal flow of weapons which endangered the health and safety of

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179. *See, e.g.*, 15 U.S.C. § 6601(a)(2) (2006) (“It is in the national interest that producers and users of technology products concentrate their attention and resources ... on assessing, fixing, testing, and developing contingency plans ... so as to minimize possible disruptions associated with computer failures.”); 42 U.S.C. § 14501(a)(7)(C) (2000) (“[I]t is in the interest of the Federal Government to encourage the continued operation of volunteer service organizations and contributions of volunteers ....”); RAILS TO RESOURCES ACT OF 2000, Pub. L. No. 106-570, § 302, 114 Stat. 3043 (codified at 49 U.S.C. § 28101-03 (2000)) (“Congress finds that ... rail transportation is an essential component of the North American intermodal transportation system ....”).

180. *See* 15 U.S.C. §§ 7901-03 (2006); *see also* *New York v. Beretta U.S.A. Corp.*, 524 F.3d 384, 394-98 (2d Cir. 2008) (dismissing New York City’s public nuisance action against gun manufacturers on grounds that the 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).

181. *See* 151 CONG. REC. S9107 (daily ed. July 27, 2005) (statement of Sen. Baucus) (citing to the time, expenses, and effort associated with the need for gun manufacturers and sellers to defend public nuisance suits).

those living in the plaintiffs' communities.<sup>182</sup> Congress enacted the 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.<sup>183</sup>

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.<sup>184</sup> Eliminating this type of vicarious liability, traditionally available under state law, without replacing it with any federal system of compensation or regulation, will undoubtedly leave some injured drivers without a historic right to redress under state law.

Indeed, one lower federal court, which invalidated the Graves Amendment on Commerce Clause grounds, cited just that failure to replace state tort law with some sort of federal compensatory or regulatory system, in order to distinguish the Graves Amendment from prior legislation held constitutional, such as the Price-Anderson Act.<sup>185</sup> Other federal courts, however, have upheld the law as within Congress's Commerce Clause authority despite its failure to replace state tort law with any substitute system of compensation.<sup>186</sup> In one decision, the Eleventh Circuit recognized that the Graves Amendment was "novel" in that its purpose and effect was not to regulate the rental car market generally, but solely to preempt state tort law claims.<sup>187</sup> Indeed, the court found that the only other federal statute with this same purpose and effect was the Protection of Lawful

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182. See, e.g., *Chicago v. Beretta*, 821 N.E.2d 1099, 1108 (Ill. 2004).

183. Thomas O. McGarity et al., *The Truth About Torts: Lawyers, Guns, and Money* (Ctr. for Progressive Reform, White Paper No. 603, July 2006); see Crouse, *supra* note 54, at 1357. 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. See Crouse, *supra* note 54, at 1356.

184. See Graves Amendment to the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users, 49 U.S.C. § 30,106 (Supp. 2005). For a discussion of the Price-Anderson Act, see *supra* note 167 and accompanying text; *infra* notes 329-30 and accompanying text.

185. See *Vanguard Car Rental Co. v. Huchon*, 532 F. Supp. 2d 1371, 1380-81 (S.D. Fla. 2007).

186. See *Garcia v. Vanguard*, 540 F.3d 1242 (11th Cir. 2008); *Flagler v. Budget Rent A Car System, Inc.*, 538 F. Supp. 2d 557, 559 (E.D.N.Y. 2008).

187. See *Garcia*, 540 F.3d at 1252.

Commerce in Arms Act.<sup>188</sup> Despite the novelty of these types of statutes, however, the court held there was “no reason in principle why state laws or lawsuits cannot themselves constitute a burden on interstate commerce.”<sup>189</sup>

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. Although 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 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 or the rental car industry from state tort liability. Thus, there has been an increasing readiness on the part 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.

In these cases though, the question is not whether Congress intended to eliminate state tort law (that is made clear in the legislation), but whether Congress has the authority to do so. In other cases, however, the issue is whether Congress intended to eliminate state tort law at all. In these cases, Congress has decided to regulate in an area historically within the purview of state law, and the question becomes how much state law Congress intended to leave intact. This raises separate issues of federalism, including federal preemption doctrine and substantive due process rights, which are discussed in the next Part.

#### IV. THE SUPREME COURT, FEDERALISM, AND TORT LAW

This Part analyzes U.S. Supreme Court decisions that consider limits on state tort law under doctrines of federal preemption and

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188. *Id.*; see also *supra* notes 180-83 and accompanying text (discussing the Protection of Lawful Commerce in Arms Act).

189. *Id.*

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 more than one hundred 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 otherwise cutting back on the authority of Congress over the states under the Commerce Clause and principles of state sovereign immunity as part of its “federalist revolution” of the 1990s. Thus, while limiting congressional authority in the name of federalism and states’ rights, the Court also began imposing more federal restrictions on state tort law through the preemption doctrine and due process limits on punitive damages.

Section A provides a general introduction to federalism principles and discusses specifically the Court’s use of these principles in the 1990s to invalidate congressional authority over the states 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 on this area of state 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 Jurisprudence*

The U.S. Constitution sets out a system of “dual sovereignty” between the federal government and the states.<sup>190</sup> Thus, the federal government has enumerated powers that are limited in scope but are supreme within its realm of authority, whereas the states have

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190. See U.S. CONST. art. I, § 8 (enumerating Congress’s powers); U.S. CONST. amend. X (reserving unenumerated powers to the states).

residual broad and plenary powers.<sup>191</sup> 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.<sup>192</sup> 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.<sup>193</sup>

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.<sup>194</sup> 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.<sup>195</sup> 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*,<sup>196</sup> and in 2000, in *United States v. Morrison*,<sup>197</sup> the Court for the first time in sixty years struck down

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191. *Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991).

192. See Caleb Nelson, *Preemption*, 86 VA. L. REV. 225, 225 (2000) ("The powers of the federal government and the powers of the states 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."); see also *Morrison*, *supra* note 162.

193. *Gregory*, 501 U.S. at 458.

194. See U.S. CONST. art. I, § 8, cl. 3 (providing that Congress shall have the power to regulate commerce "among the several states").

195. 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).

196. 514 U.S. 549, 557 (1995) (involving a federal statute imposing criminal sanctions for possessing a gun near a school).

197. 529 U.S. 598, 601-02 (2000) (involving a federal statute providing a federal civil damage remedy for victims of gender-motivated violence).

federal legislation as exceeding congressional authority.<sup>198</sup> In *Lopez*, the Court held that a federal law imposing criminal sanctions for possessing a gun near a school 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.<sup>199</sup> In *Morrison*, the Court found that the regulation and punishment of intrastate violence against women was not economic activity, “has always been the province of the States,” and that Congress could not regulate it under its Commerce Clause authority.<sup>200</sup>

Although these cases brought much talk of a new federalism “revolution” or “revival,”<sup>201</sup> subsequent cases, namely *Gonzales v. Raich*,<sup>202</sup> refused to place additional limits on Congress’s Commerce Clause authority.<sup>203</sup> Nevertheless, the focus on states’ rights and limited federal authority in *Lopez* and *Morrison* has made a significant mark on the federalism landscape.

Moreover, during the same time period the Court decided *Lopez* and *Morrison*, it also placed new and significant limits on the ability of Congress to abrogate state sovereign immunity and make states amenable to private lawsuits in state and federal courts. First, in 1996, in *Seminole Tribe v. Florida*,<sup>204</sup> the Court held that Congress lacked the power under Article I to abrogate the states’ sovereign immunity from suits brought in federal court. Then, in 1999, in *Alden v. Maine*,<sup>205</sup> it held that Congress could not subject states to suits in state court without state consent. Taken together, these

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198. See *Morrison*, 529 U.S. at 613; *Lopez*, 514 U.S. at 561; see also ERWIN CHERMERINSKY, CONSTITUTIONAL LAW 264 (3d ed. 2006) (noting that “[b]etween 1936 and April 26, 1995, the Supreme Court did not find one federal law unconstitutional as exceeding the scope of Congress’s commerce power”).

199. *Lopez*, 514 U.S. at 561.

200. *Morrison*, 529 U.S. at 617-18.

201. See 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 6.

202. 545 U.S. 1, 32 (2005) (holding that Congress had the authority under the Commerce Clause to prohibit the cultivation and possession of small amounts of marijuana for medical purposes).

203. See Sullivan, *supra* note 6, at 800, 808 (explaining how the Rehnquist Court “conspicuously failed to extend the federalism revival to its logical limits”).

204. 517 U.S. 44 (1996).

205. 527 U.S. 706 (1999).

Commerce Clause and sovereign immunity cases seemed to herald an expansion of “judicially enforced limitations on national authority.”<sup>206</sup>

For purposes of this Article, what is most relevant about these federalism cases is the Court’s discussion in its Commerce Clause cases (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.”<sup>207</sup> 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.<sup>208</sup> 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.<sup>209</sup> 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.<sup>210</sup> 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.”<sup>211</sup> 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 described a different vision of federalism in their respective dissents in *Morrison*. In that case, Justice Souter argued that today’s integrated, national

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206. See Ernest A. Young, *The Rehnquist Court’s Two Federalisms*, 83 TEX. L. REV. 1, 2 (2004).

207. *United States v. Lopez*, 514 U.S. 549, 575 (1995) (Kennedy, J., concurring).

208. *Id.* at 576.

209. *Id.* at 577.

210. *Id.* at 581.

211. *Id.*

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 created limitations on federal power.”<sup>212</sup> 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.”<sup>213</sup> 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.”<sup>214</sup> 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.<sup>215</sup> In 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.<sup>216</sup> 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.”<sup>217</sup>

These opinions show that states do not always relish their increased “authority” arising from the limits *Lopez* and *Morrison* placed on Congress’s power to assist states in battling social ills such as guns in schools and gender-motivated violence.<sup>218</sup> Indeed, in similar areas, such as environmental protection, cases that limit the ability of Congress to regulate and protect intrastate wetlands

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212. *United States v. Morrison*, 529 U.S. 598, 646-47, 650 (2000) (Souter, J., dissenting) (quoting *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 552 (1985)).

213. *Id.* at 653-54.

214. *Id.* at 654.

215. *Id.* at 655.

216. *Id.* at 661-62 (Breyer, J., dissenting).

217. *Id.* at 662.

218. See, e.g., REDEFINING FEDERALISM: LISTENING TO THE STATES IN SHAPING “OUR FEDERALISM” 1 (Douglas T. Kendall ed., 2004) [hereinafter REDEFINING FEDERALISM] (“In the last decade, the 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.”).

and other state environmental amenities simply result in the states having less funding and other resources to do the job—especially in an age in which so many of these issues cannot be placed easily into separate state and federal spheres of influence.<sup>219</sup> Thus, even when states welcome federal assistance for their efforts to protect public health and the environment, the Commerce Clause cases show the Court foreclosing such help, ironically in the name of states' rights.

### *B. The Supremacy Clause and Preemption*

While the Court invoked principles of federalism and states' rights to limit congressional authority to help the states protect their citizens in public health and safety areas, the Court simultaneously limited the ability of states to allow their citizens to seek private 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.<sup>220</sup> 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 in which 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

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219. See, e.g., *Rapanos v. United States*, 547 U.S. 715, 738-39 (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, 172-74 (2001) (rejecting a request for "administrative deference" in reading the Clean Water Act to avoid usurping "the States' traditional and primary power over land and water use"); REDEFINING FEDERALISM, *supra* note 218, 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").

220. 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; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding"); see also *Fid. Fed. Sav. & Loan Ass'n v. Cuesta*, 458 U.S. 141, 152 (1982) (stating that the preemption doctrine "has its roots in the Supremacy Clause").

“stands as an obstacle” to achieving the full purposes and objectives of Congress (implied conflict preemption).<sup>221</sup> 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.<sup>222</sup>

In 1992, the Court held in *Cipollone v. Liggett Group, Inc.*<sup>223</sup> 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.<sup>224</sup> 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.<sup>225</sup> The Court reasoned that “[t]he obligation to pay compensation can be, indeed is designed to be, a potent method of governing conduct and controlling policy.”<sup>226</sup>

The Court appeared to leave some room for state tort law a few years later in *Medtronic v. Lohr*.<sup>227</sup> In that case, a plurality of the Court rejected the argument that 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.<sup>228</sup> The Court focused on the importance of state tort law in finding

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221. See *Hillsborough County v. Automated Med. Labs., Inc.*, 471 U.S. 707, 713 (1985) (citing *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)); Nelson, *supra* note 192, at 226-28 (discussing the three types of preemption).

222. See *Bates v. Dow Agrosiences, LLC*, 544 U.S. 431, 449 (2005) (“[B]ecause 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”).

223. 505 U.S. 504 (1992).

224. *Id.* at 524.

225. *Id.* at 521.

226. *Id.* (quoting *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236, 247 (1959)).

227. 518 U.S. 470 (1996).

228. *Id.* at 501-02.

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.<sup>229</sup> The Court found it would be difficult to believe that “Congress would have barred most, if not all, relief for persons injured by defective medical devices” without saying so explicitly, particularly where there was no explicit or implicit private right of action under the MDA.<sup>230</sup> 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.”<sup>231</sup> 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.*<sup>232</sup> 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.<sup>233</sup> The Court reasoned that allowing common law tort suits would impede the accomplishment of federal objectives to develop a mix of alternative passive restraint devices rather than mandating airbags in all cars.<sup>234</sup> 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.<sup>235</sup> 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: “[T]he 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.”<sup>236</sup> The dissent focused on the role

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229. *Id.* at 487-88.

230. *Id.* at 487.

231. *Id.* at 488-89.

232. 529 U.S. 861 (2000).

233. *Id.* at 864-65, 874-75.

234. *Id.* at 866.

235. *Id.* at 868.

236. *Id.* at 894 (Stevens, J., dissenting).

of the states as “separate sovereigns in our federal system” noting the Court has

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 a federal statute unless it is the clear and manifest purpose of Congress to do so.<sup>237</sup>

The Court continued to narrow the role for state law in areas governed by federal regulation in its 2001 decision in *Buckman Co. v. Plaintiffs’ Legal Committee*.<sup>238</sup> 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.<sup>239</sup> 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.<sup>240</sup> In reversing the Third Circuit’s rejection of a preemption defense, the Court carved out an “exclusive” federal interest in considering the consultant’s implied preemption defense.<sup>241</sup> Rather than describing the case as one involving the state’s traditional interest in protecting the health and safety of its citizens, the Court defined the case as one involving “[p]olicing fraud against federal agencies,” which is “hardly ‘a field which the States have traditionally occupied.’”<sup>242</sup>

In 2005, however, in *Bates v. Dow Agrosciences*,<sup>243</sup> the Court 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

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237. *Id.*

238. 531 U.S. 341 (2001).

239. *Id.* at 343.

240. *Id.* at 346-47; see also *In re Orthopedic Bone Screw Prods. Liab. Litig.*, 159 F.3d 817, 821-22 (3d Cir. 1998) (discussing the elements of the plaintiff’s fraud-on-the-FDA claim), *rev’d sub nom*, *Buckman v. Plaintiffs’ Legal Comm.*, 531 U.S. 341 (2001).

241. *Buckman*, 531 U.S. 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)).

242. *Id.* at 347 (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)).

243. 544 U.S. 431 (2005).

state's deceptive trade practices act in connection with crop damage caused by the defendant's herbicide.<sup>244</sup> 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 requirements for labeling or packaging in addition to or different from those required under this subchapter."<sup>245</sup> 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.<sup>246</sup> 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.<sup>247</sup> 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."<sup>248</sup> The Court also recognized that 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.<sup>249</sup>

Since *Bates*, the Court has continued to struggle with its preemption jurisprudence and the extent to which citizens may rely on state statutory and common law to obtain relief from federally regulated defendants. During its 2007 October Term, the Court granted certiorari in four separate cases involving federal preemption of state tort claims for relief.<sup>250</sup> The Court issued opinions in

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244. *Id.* at 434-36.

245. *Id.* at 436; *see* 7 U.S.C. § 136v(b) (2000).

246. *Bates*, 544 U.S. at 443-44 (internal quotation marks and emphasis omitted).

247. *Id.* at 445.

248. *Id.* at 449 (citing *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 251 (1984)).

249. *Id.* at 451.

250. *See* *Wyeth v. Levine*, No. 06-1249, 2009 WL 529172 (U.S. Mar. 4, 2009) (holding that state law tort claims against a drug manufacturer are not preempted merely because the manufacturer complied with FDA labeling requirements); *Warner-Lambert Co. v. Kent*, 128 S. Ct. 1168 (2008) (per curiam) (affirming, by an equally divided court, a lower court decision finding no preemption of fraud exception to state regulatory compliance defense for drug manufacturers); *Riegel v. Medtronic, Inc.*, 128 S. Ct. 999 (2008) (holding that the FDA's pre-market approval (PMA) process for medical devices established federal requirements that

three of the cases (*Riegel v. Medtronic*, *Altria Group v. Good*, and *Wyeth v. Levine*), and split 4-4 without decision in the other.<sup>251</sup> Most recently, the Court held in *Wyeth v. Levine* that state tort law claims against a drug manufacturer are not preempted merely because the manufacturer complied with FDA labeling requirements.<sup>252</sup>

In *Riegel*, the Court held in an opinion by Justice Scalia that the MDA premarket 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.<sup>253</sup> 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.<sup>254</sup> Moreover, the Court took a very different view of the role of state tort law than was expressed in *Lohr* or *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.<sup>255</sup>

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.<sup>256</sup> Thus, in *Riegel*, the Court expressed a view that completely equated tort law

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served to preempt state law product liability claims against the medical device manufacturer); *Altria Group, Inc. v. Good*, 129 S. Ct. 538 (2008) (holding that the Federal Cigarette Labeling and Advertising Act does not preempt a smoker’s fraud claims against makers of light cigarettes brought under the Maine Unfair Trade Practices Act).

251. See *Warner-Lambert*, 128 S. Ct. at 1168 (affirming, by an equally divided court, a lower court decision finding no preemption of fraud exception to state regulatory compliance defense for drug manufacturers).

252. *Levine*, 2009 WL 529172, at \*1.

253. *Riegel*, 128 S. Ct. at 1008-10.

254. *Id.* at 1007-08 (citing plurality opinions and concurring opinions in earlier preemption decisions); see also 21 U.S.C. § 360(k) (2006) (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).

255. See *supra* notes 227-31, 243-49 and accompanying text.

256. *Riegel*, 128 S. Ct. at 1008.

with public regulation (and bad regulation at that), at least for purposes of interpreting the term “requirements” under the federal statute at issue.

In *Altria Group*, the Court considered whether the Federal Cigarette Labeling and Advertising Act (the same statute at issue in the Court’s 1992 *Cipollone* decision) preempted the plaintiff smokers’ fraud claim against the makers of light cigarettes under the Maine Unfair Trade Practices Act.<sup>257</sup> In a 5-4 decision, the Court interpreted the express preemption clause of the statute narrowly, and found that the plaintiffs’ statutory fraud claims could go forward.<sup>258</sup> In reaching that conclusion, Justice Stevens relied heavily on the presumption against preemption of state law, particularly “when Congress has legislated in a field traditionally occupied by the States.”<sup>259</sup> Although the bulk of the opinion was devoted to interpreting the precise language of the statute at issue, Justice Stevens also noted that the states had long played a role in regulating deceptive advertising practices and that the Federal Trade Commission “has long depended on cooperative state regulation to achieve its mission because, although one of the smallest administrative agencies, it is charged with policing an enormous amount of activity.”<sup>260</sup>

While Justice Steven’s majority opinion relied heavily on the presumption against preemption of state law, the dissent, authored by Justice Thomas, expressly rejected any role for state law in this area. He contended that since the time the Court decided *Cipollone* in 1992, the Court “has altered its doctrinal approach to express preemption” resulting in a complete rejection of the presumption against preemption of state law in cases of express preemption.<sup>261</sup> He proceeded to analyze much of the Court’s express preemption jurisprudence since *Cipollone*, placing the greatest focus on the Court’s recent decision in *Riegel v. Medtronic*.<sup>262</sup> He pointed out that the Court in *Riegel* “interpreted the statute without reference to the presumption or any perceived need to impose a narrow construction

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257. 129 S. Ct. 538 (2008).

258. *Id.* at 549.

259. *Id.* at 543.

260. *Id.* at 544 n.6.

261. *Id.* at 555-58 (Thomas, J., dissenting).

262. *Id.* at 557-58.

on the provision in order to protect the police powers of the States.”<sup>263</sup> Once the presumption was put aside, Justice Thomas proceeded to analyze the express preemption clause in the statute at issue and ultimately concluded that it is the federal government that must reach a “comprehensive judgment” with respect to whether the defendants’ claims regarding light cigarettes were fraudulent rather than “juries on a state-by-state basis.”<sup>264</sup> Thus, Justice Thomas, joined by Chief Justice Roberts and Justices Scalia and Alito, saw no role for the states to provide either assistance with public regulatory enforcement or a means of private redress for wrongs.

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 when 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 MDA at issue in *Lohr*, *Riegel*, and *Buckman*, 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 without providing any alternative federal compensation mechanism.<sup>265</sup> In the preemption cases described in this Part, the issue is 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.<sup>266</sup> 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

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263. *Id.* at 557.

264. *Id.* at 561.

265. *See supra* Part III.

266. *Medtronic v. Lohr*, 518 U.S. 470, 488-89 (1996).

describe the tort system merely as a force that “disrupts the federal [regulatory] scheme” through imposing “requirements” that fail to use cost-benefit analysis.<sup>267</sup> Indeed, even in *Bates*, in which 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 to petition EPA to allow more detailed labeling of their products.”<sup>268</sup> 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.”<sup>269</sup> 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 that a majority of Justices placed on states’ rights and federalism in the Commerce Clause and sovereign immunity cases with their virtual abandonment of those principles when it came to state tort law in *Geier*, *Buckman*, and *Riegel*.<sup>270</sup> Indeed, it is generally those Justices arguing in favor of states’ rights and federalism in the Commerce Clause and sovereign immunity cases that were in the majority in *Geier*, *Riegel*, and the other pro-preemption cases.<sup>271</sup>

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267. *Riegel v. Medtronic, Inc.*, 128 S. Ct. 999, 1008 (2008).

268. *Bates v. Dow Agrosciences, LLC*, 544 U.S. 431, 451 (2005).

269. DAVID G. OWEN, *PRODUCTS LIABILITY LAW* § 14.4, at 896 (2005) (stating that preemption doctrine continues to “wallow in a state of utter chaos”); see, e.g., 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 192, at 232 (stating that “[m]odern preemption jurisprudence is a muddle” both as applied to discrete areas of law and in general).

270. 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* stand in stark contrast to the voting patterns in the preemption cases in which it is the “liberals” who favor state law in close cases and the “conservatives” who insist on national power).

271. Chief Justice Rehnquist authored the opinions in *Lopez*, *Morrison*, and *Seminole Tribe* (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’Connor, Scalia, and Kennedy). See Fallon, *supra* note 201, at 471-72 (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-federalism Justices found preemption in every case while the four most liberal Justices

Scholars have come up with varying explanations for these apparent inconsistencies. Some argue the Court is simply pursuing a pro-business, antiregulatory agenda, using principles of federalism to strike down progressive federal laws as a violation of state sovereign immunity or beyond Congress's Commerce Clause authority and using preemption doctrine to do the same with regard to state law actions for private redress of harm.<sup>272</sup> Others see some consistency in the Court's preemption cases based on the position the relevant federal agency has taken with regard to preemption in each of these cases.<sup>273</sup> 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 or simply did not take a position in prior decades.<sup>274</sup>

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reached the opposite conclusion).

272. 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 rather hidden "value choices to limit civil rights laws and to protect business from regulation"); see also Fallon, *supra* note 201, 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); Young, *supra* note 270, 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").

273. See, e.g., Catherine M. Sharkey, *Products Liability Preemption: An Institutional Approach*, 76 GEO. WASH. L. REV. 449, 455, 465-66 (2008) (arguing the Court's product liability preemption cases reveal a "distinct pattern" in which, 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).

274. Klass, *supra* note 4, at 1653-57, 1674-76 (discussing dramatic change in federal agency positions on preemption of state law during the Bush Administration in environmental, health, safety, and consumer protection areas); Nina Mendelson, *A Presumption Against Agency Preemption*, 102 NW. U. L. REV. 695, 695 (2008) (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

Since 2000, federal courts have struggled with the level of deference to give such agency interpretations, but 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.<sup>275</sup> Indeed, in every one of the preemption cases discussed in this section, except for *Bates*, the Court adopted the position on preemption the relevant federal agency had taken before the Court.<sup>276</sup> Should a federal regulatory agency be given such deference on issues of statutory interpretation and constitutional federalism? Scholars and courts will continue to disagree on this point, but the fact remains that deference to the federal administrative agency in these cases appears to greatly overshadow any deference or "presumption" in favor of the states in the area of state tort law.

In sum, there appears to be a growing trend toward using principles of federal constitutional law to limit the ability of states to grant their citizens the right to obtain private redress for harm under tort law. 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—as described in *Bates*—and as to its shortcomings—as described in *Riegel*. Such a view has contributed to the Court's willingness to let federal agencies replace state tort law with a public regulatory regime, even when that regime fails to substitute for the private redress components of tort law.

### *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

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statements in federal regulations).

275. See Sharkey, *supra* note 273, at 455, 465-66 (discussing deference to the FDA's preemption position). See generally Sharkey, *supra* note 274 (discussing the Court's pattern in preemption cases of adopting the position of the relevant federal agency on preemption).

276. See Sharkey, *supra* note 274, at 471.

the defendant or others similarly situated from engaging in such conduct in the future.<sup>277</sup>

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 percent of all cases where plaintiffs prevail on the merits (and in 1 to 4 percent 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.”<sup>278</sup>

Until recently, limits on state punitive damage awards were a matter almost entirely of state law. In 1996, however, in *BMW of North American, Inc. v. Gore*,<sup>279</sup> 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.<sup>280</sup> This began a series of Supreme Court decisions between 1996 and 2007 that were notable 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,<sup>281</sup> directed appellate courts to apply a de novo standard in reviewing the constitutionality of punitive damage awards,<sup>282</sup> set a “presumptive” single-digit ratio between compensatory damages and

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277. RESTATEMENT (SECOND) OF TORTS § 908(1) (1979).

278. Klass, *supra* note 33, at 93 (citing studies and debates over punitive damages).

279. 517 U.S. 559 (1996).

280. *Id.* at 585-86.

281. *See id.* at 574-85 (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).

282. *See Cooper Indus. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 443 (2001).

punitive damages,<sup>283</sup> and prohibited juries from considering harm to nonparties in assessing punitive damages.<sup>284</sup>

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,<sup>285</sup> those Justices (Scalia and Thomas) who do not believe the Due Process Clause provides any protection against "excessive" or "unreasonable" punitive damage awards,<sup>286</sup> 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.<sup>287</sup>

This line of cases culminated in the Court's most recent punitive damages decision, *Exxon Shipping Co. v. Baker*.<sup>288</sup> In that case, the Court reviewed the twenty-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 eleven million gallons of oil into the Sound and one of the largest environmental

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283. *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 "[w]hen compensatory damages are substantial ... a lesser ratio, perhaps only equal to compensatory damages, can reach the outermost limit of the due process guarantee").

284. *Phillip Morris U.S.A. v. Williams*, 549 U.S. 346 (2007).

285. *Pac. 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" (internal quotation marks and citations omitted)).

286. *See, e.g., Campbell*, 538 U.S. at 429 (2003) (Scalia, J., dissenting); *id.* at 429-30 (Thomas, J., dissenting).

287. *See, e.g., id.* at 438 (Ginsburg, J., dissenting) (stating that large punitive damage awards may well support state legislation capping punitive damages but that such caps are "out of order" in a "judicial degree imposed on the States by this Court under the banner of substantive due process"); *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 607 (1996) (Ginsburg, J., dissenting) (rejecting due process limits on punitive damages on grounds that 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").

288. 128 S. Ct. 2605 (2008).

disasters in U.S. history.<sup>289</sup> 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.<sup>290</sup> 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 commercial fisherman, native groups, and local governments.<sup>291</sup> 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 fishermen.<sup>292</sup> 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 five-to-one violated Exxon's due process rights under the Supreme Court's precedent in this area.<sup>293</sup>

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.<sup>294</sup> Citing instances of "outlier" multimillion and multibillion dollar awards in some cases, the Court concluded that punitive damages are unpredictable and thus unfair to defendants.<sup>295</sup> 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.<sup>296</sup> It also rejected maximum penalty amounts because of the high variability in the types of tort and contract injuries that support punitive damages.<sup>297</sup>

It then looked to its prior punitive damages jurisprudence in the due process area, as well as efforts by states to use a quantified

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289. See *In re the Exxon Valdez*, 296 F. Supp. 2d 1071, 1077-82 (D. Alaska 2004), *vacated*, 742 F.3d 600 (9th Cir. 2006) (per curiam), *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 33, at 122 (discussing facts of the *Exxon* case).

290. *Baker*, 128 S. Ct. at 2613-14.

291. *Id.*

292. *Id.*

293. *Id.* at 2614.

294. *Id.*

295. *Id.* at 2625-26.

296. *Id.* at 2627-28.

297. *Id.* at 2629.

approach in criminal sentencing cases, and settled on setting a maximum ratio between punitive damages and compensatory damages.<sup>298</sup> The Court ultimately chose a one-to-one ratio of punitive damages to compensatory damages because of the large compensatory damages (\$507 million) and the lack of intentional misconduct by Exxon.<sup>299</sup> 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 might also be the outer constitutional limit in this case,<sup>300</sup> 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 efforts 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.<sup>301</sup> 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 the placement of due process limits on punitive damages.<sup>302</sup> 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 militate in the opposite direction—that is, the states are successfully policing themselves without the need for federal intervention by the Court. Nevertheless, the Court's recent decisions in the punitive damages cases show the Court applying very different principles of federalism when it comes to state tort law in general and punitive damages in particular.

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.<sup>303</sup> In the preemption cases, the rejection of

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298. *Id.* at 2629-34.

299. *Id.* at 2633-34.

300. *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").

301. *See supra* Part IV.B.

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

303. *See supra* notes 267-68 and accompanying text.

the private law aspects of tort was mostly implicit,<sup>304</sup> whereas 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 concluded 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 deterring harmful conduct.”<sup>305</sup> 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 a State’s legitimate interests in punishing unlawful conduct and deterring its repetition.”<sup>306</sup> 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.<sup>307</sup>

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.<sup>308</sup> Anthony Sebok similarly argues that punitive damages should be seen as a form of private revenge,<sup>309</sup> while Benjamin Zipursky characterizes the role of punitive damages as vindicating a plaintiff’s private right to “be punitive.”<sup>310</sup> Likewise, Thomas Colby argues that punitive damages are punishment for “private

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304. *Id.*

305. *Exxon Shipping Co. v. Baker*, 128 S. Ct. 2605, 2621 (2008).

306. 547 U.S. 346, 352 (2007); *see also* *Cooper Indus. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 432 (2001) (describing punitive damages as “private fines’ intended to punish the defendant and deter future wrongdoing”).

307. *See Baker*, 128 S. Ct. at 2628.

308. John C.P. Goldberg, *Tort Law for Federalists (And the Rest of Us): Private Law in Disguise*, 28 HARV. J.L. & PUB. POL’Y 3, 7 (2004).

309. Anthony J. Sebok, *Punitive Damages: From Myth to Theory*, 92 IOWA L. REV. 957, 1002-29 (2007).

310. Benjamin C. Zipursky, *A Theory of Punitive Damages*, 84 TEX. L. REV. 105, 151-53 (2005).

wrongs” to individuals rather than public wrongs to society.<sup>311</sup> Thus, there is an alternative view of punitive damages grounded in their historic role of punishing defendants for 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 that the Constitution supports a due process right to a body of law “for the redress of private wrongs” that “would set judicially enforceable constraints on how legislatures may go about tort reform.”<sup>312</sup> Whether 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 also 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 explains 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

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311. Thomas B. Colby, *Clearing the Smoke from Phillip Morris v. Williams: The Past, Present, and Future of Punitive Damages*, 118 YALE L.J. (forthcoming 2009) (manuscript at 25-42), available at <http://ssrn.com/abstract=1152029>.

312. Goldberg, *supra* note 8, at 527, 626.

law in its recent preemption and punitive damages cases. Section B then considers the importance of state tort law within our federalist system of government.

A. *“Public” Tort Law and the Supreme Court*

This Section discusses how the Supreme Court has failed to protect adequately state tort law under the U.S. Constitution because the Court has shifted almost completely to a view of state tort law as public law. There is a long history of support for the idea that the Constitution provides due process protections for the right to redress from wrongs.<sup>313</sup> Based on this history, John 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.<sup>314</sup> 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.<sup>315</sup> 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 exclude state tort law completely 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 IV, the Supreme Court has been quick to abandon the federalism principles espoused so strongly 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

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313. *See id.* at 531-83.

314. *Id.* at 601-05.

315. *Id.* at 575-80.

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.<sup>316</sup>

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*.<sup>317</sup> The majority opinion equated common law tort claims with state statutes and regulations for purposes of finding that both impose state "requirements" barred by the MDA's express preemption clause.<sup>318</sup> Even more strikingly, Justice Stevens, in his concurring opinion, stated 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.<sup>319</sup> He found, however, based on *Cipollone* and the conclusion of five of the Justices in *Medtronic v. Lohr*, that there was now consensus on the Court that "common-law rules administered by judges, like statutes and regulations, create and define legal obligations," and that some of them qualify as "requirements."<sup>320</sup> Thus, Justice Stevens's opinion made clear that the Court gave a meaning to Congress's use of the word "requirements" that was inconsistent 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 also 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 the Court to displace it more cavalierly 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

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316. See *supra* Part IV.B.

317. 128 S. Ct. 999 (2008).

318. *Id.* at 1008.

319. *Id.* at 1011-12 (Stevens, J., concurring).

320. *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)).

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.<sup>321</sup> 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.”<sup>322</sup>

It is this hybrid status, and the failure of the Supreme Court to recognize explicitly this status, that has resulted in the Court’s current punitive damages jurisprudence. Goldberg too has written that the Court has wrongly focused on the states’ interest in imposing punitive damages for deterrence and retribution purposes rather than the plaintiff’s interest in vindicating his or her rights.<sup>323</sup> Indeed, the Court no longer acknowledges these private aspects of punitive damages at all.<sup>324</sup> 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 of redress. The next Section highlights the problems with this approach and proposes some modest solutions.

### *B. Where To Go From Here: Why Tort Law?*

State tort law today is more dynamic and multifaceted than many scholars and courts recognize. While states cut back on decades of common law expansions of tort rights and remedies in product liability and other personal injury suits, they also create new rights and remedies for the Internet age. In response to a perception that Congress and federal agencies are failing to regulate adequately guns, GHG emissions, and mortgage fraud, some states attempt to fill the gaps through public nuisance suits as perhaps a crude but potentially powerful stand-in for regulation. Tort law thus is alive

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321. See Zipursky, *supra* note 310, at 155-59.

322. See *id.* at 129.

323. Goldberg, *supra* note 308, at 6-7.

324. See *supra* Part IV.C.

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.<sup>325</sup> The placement of all tort law into the public law box has the potential to hinder significantly the states from serving their historically critical role as laboratories for democracy,<sup>326</sup> particularly at a time when the federal government has been less inclined to provide federal support in these areas.<sup>327</sup>

One potential solution 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 is perhaps inappropriate to conduct a single analysis of tort law that covers 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 other consumer products. Although success by plaintiffs in all these lawsuits may deter harmful practices and compensate victims for injuries, 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. One must recognize that there is a significant difference between suits to compensate the public and suits to compensate a private wrong. 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.

With regard to the public law goals of tort, as explained in Part I, these goals focus in large part on deterrence and compensation.<sup>328</sup> In the past, Congress often replaced state tort law with an alternate

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325. *See* *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

326. *See supra* Part II.

327. *See supra* Part III.

328. *See supra* notes 19-21 and accompanying text.

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 limit on total liability for any nuclear accident.<sup>329</sup> 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.<sup>330</sup>

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. Although many of these laws were controversial when enacted and remain so today (often seen as unwarranted subsidies for the industries at issue),<sup>331</sup> Congress attempted in a somewhat sophisticated fashion 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.<sup>332</sup>

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.<sup>333</sup> The same is true for the Graves Amendment relieving rental car companies from vicarious liability.<sup>334</sup> Of course, two acts of Congress do not necessarily create a “trend” that should cause concern. Yet, these recent enactments still serve as a caution to courts to consider the public law benefits of tort, as well as the benefits of state experimentation, before upholding such legislation as within Congress’s authority.

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329. See *supra* Part III; see also Robert L. Rabin, *Some Thoughts on the Efficacy of a Mass Toxics Administrative Compensation Scheme*, 52 MD. L. REV. 951, 955-56 (1993).

330. See Rabin, *supra* note 329, at 956.

331. See, e.g., Jaclyn Shoshana Levine, *The National Vaccine Injury Compensation Program: Can It Still Protect an Essential Technology?*, 4 B.U. J. SCI. & TECH. L. 283, 288 (1998).

332. See *supra* notes 166-71 and accompanying text.

333. See *supra* note 180 and accompanying text.

334. See *supra* notes 184-89 and accompanying text.

Even more important is the need to recognize the public law benefits of tort law in cases involving preemption. Even if there is no constitutional prohibition on Congress simply eliminating certain tort actions to promote national interests, as it has done with the Protection of Lawful Commerce in Arms Act and the Graves Amendment,<sup>335</sup> at least in those cases, Congress was quite explicit in its intent to preempt all common law suits for relief.<sup>336</sup> 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 regulation.<sup>337</sup> In these preemption cases, the question often becomes whether the Court should defer to the federal agencies' position that their regulations should displace state tort law that allegedly interferes with federal regulatory goals.<sup>338</sup>

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 likely is no. With regard to deterrence, the lack of adequate time, money, and staffing in the agencies 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.<sup>339</sup> Moreover, even in cases in which products violate agency standards, preemption of state tort law forces victims to rely on less-than-perfect agency enforcement because of the lack of private rights of action in the federal food and drug law, the Medical Device Act, the Consumer Product Safety Act, and many other federal statutes regulating public health and safety.<sup>340</sup> As for compensation, with the exception of specific federal funding created for vaccine injuries,

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335. See *supra* notes 180-89 and accompanying text.

336. See *supra* notes 180, 184 and accompanying text.

337. See Rabin, *supra* note 41, 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.").

338. See *supra* Part IV.B; see also Sharkey, *supra* note 274.

339. See Klass, *supra* note 4, at 1674-75 (discussing problems with agency funding and enforcement).

340. See Rabin, *supra* note 41, at 301.

nuclear energy accidents, and the like,<sup>341</sup> there is no general federal funding to compensate injured parties for harm caused by regulated products and industries, and no private rights of action available under the federal enabling statutes that regulate such products and industries.

Federal court preemption decisions involving state regulatory compliance defenses highlight this problem. 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, if the FDA has approved the drug in question.<sup>342</sup> Each of these statutes contains an exception providing that the defendant is not entitled to immunity if the plaintiff can show that 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.<sup>343</sup> Thus, each of these states balanced the extent to which it wished to limit the liability of drug manufacturers against some level of deterrence and compensation for fraudulent activity.

After the Court's 2001 decision in *Buckman* prohibiting state suits for fraud-on-the-FDA, 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 interest in policing fraud in the drug approval process.<sup>344</sup> 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.<sup>345</sup> The Court of Appeals for the Second Circuit disagreed and held that *Buckman*

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341. See *supra* notes 166-71 and accompanying text.

342. See *supra* notes 55-56 and accompanying text (discussing regulatory compliance statutes for drug manufacturers in New Jersey, Arizona, and Michigan).

343. See, e.g., MICH. COMP. LAWS ANN. § 600.2946(5)(a) (West 2008); *supra* note 56 and accompanying text.

344. 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).

345. See *Garcia v. Wyeth-Ayerst Labs.*, 385 F.3d 961, 966-67 (6th Cir. 2004).

did not preempt the Michigan fraud exception.<sup>346</sup> It reasoned that the state law was not an attempt to police fraud against the FDA but instead was an effort to define the duties product manufacturers owed to Michigan consumers.<sup>347</sup> As such, the Michigan legislation involved an area of “traditional state concern” entitled to the presumption against preemption of state law.<sup>348</sup> Moreover, the Second Circuit found no evidence in *Buckman* that the Supreme 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.<sup>349</sup> 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.<sup>350</sup>

These developments show the problems with the Court’s broad preemption decisions, particularly in cases involving implied preemption. 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.”<sup>351</sup> In making this policy choice, however, Michigan lawmakers also intended to preserve some measure of compensation and deterrence through tort law in cases in which the drug company acted in a fraudulent manner to obtain its drug approval.<sup>352</sup> *Buckman*, and the Sixth Circuit’s interpretation of *Buckman*, limits the ability of state legislatures to experiment with the extent to which they wish to utilize state tort law to protect their citizens and deter misconduct within their jurisdictions. 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

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346. *Desiano v. Warner-Lambert & Co.*, 467 F.3d 85, 93 (2d Cir. 2007), *aff’d by an equally divided Court sub nom.* *Warner-Lambert v. Kent*, 128 S. Ct. 1168 (2008) (per curiam).

347. *Id.* at 94-95.

348. *Id.*

349. *Id.* at 97.

350. *Warner-Lambert*, 128 S. Ct. 1168.

351. *Garcia v. Wyeth-Ayerst Labs.*, 385 F.3d 961, 967 (6th Cir. 2004) (citing State Fiscal Agency, Revised Bill Analysis, S.B. 344 & H.B. 4508 (Mich. 1996)).

352. *See supra* notes 342-43 and accompanying text.

any evidence involving fraud in the regulatory approval process in common law fraud claims.<sup>353</sup>

By taking this issue 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 still limiting tort law burdens 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.<sup>354</sup> 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.<sup>355</sup> 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 fully. The Court’s recent preemption jurisprudence, as highlighted by the *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.<sup>356</sup> Closer attention to the limited ability of the federal agencies to act as a real substitute for the public law goals of torts should weigh against preemption of state tort law, even in the face of agency pro-preemption arguments.

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

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353. See *Warner-Lambert*, 128 S. Ct. 1168; see also *In re Medtronic, Inc. Implantable Defibrillators Litig.*, 465 F. Supp. 2d 886, 895 (D. Minn. 2006) (rejecting arguments by defendants that plaintiffs could not use any evidence of the defendant’s alleged efforts to defraud or otherwise manipulate the federal regulatory process to establish claims of negligence and strict products liability against medical device manufacturer); *McDarby v. Merck & Co.*, 949 A.2d 223, 272-76 (N.J. Ct. App. 2008) (invalidating fraud exception to New Jersey statutory limitation on punitive damage claims against drug manufacturers under federal preemption principles).

354. See generally Robert L. Rabin, *Federalism and the Tort System*, 50 RUTGERS L. REV. 1 (1997).

355. *Id.* at 18-19.

356. 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”).

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.”<sup>357</sup> As such, tort law “empowers victims in particular ways” by giving to them the right to complain and the right to choose whether or not to pursue “redress” rather than leaving that choice to the state (as is done with criminal prosecutions).<sup>358</sup> “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.”<sup>359</sup> Likewise, Thomas Colby articulates a private law vision of punitive damages, arguing that “punitive damages are a form of legalized private revenge—both theoretically and constitutionally distinct from the public retribution and deterrence achieved through criminal law.”<sup>360</sup> He states that allowing “controlled revenge” is in the interest of justice because it helps prevent “extra legal” private revenge and also “vindicates the dignity of the victim.”<sup>361</sup>

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 other important goals such as providing compensation to victims without the cost and difficulty of litigation. 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 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. But the problem addressed here, however, is ensuring the courts explicitly acknowledge the full extent of what is to be lost through their decisions before acting.

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357. See Goldberg, *supra* note 8, at 599.

358. *Id.* at 601.

359. See *id.* at 602-05.

360. See Colby, *supra* note 311 (manuscript at 3).

361. *Id.* (manuscript at 44).

If courts do so, they may weigh agency statements in favor of preemption of state law with more skepticism, particularly in cases in which Congress has not been clear that it intends broadly to preempt state tort law through its legislation and has not provided any substitute mechanism for private parties to seek relief for harm.<sup>362</sup> Likewise, the current view on punitive damages may expand to include not only their public law goals, but their important private law goals as well. Once the private and public law benefits of tort law are expressly acknowledged and valued, courts can recognize that eliminating key aspects of state tort law eliminates not just another form of public regulation covered in other areas of federal and state law, but instead leaves an irreplaceable gap where important rights to private redress used to be.

Creating new language around state tort law and rights to redress may not have any immediate impact. But language matters, at least in the long run. If the judicial language of tort law becomes richer and more multi-faceted, it may create a fuller picture of what states are attempting to do with their tort experiments and the weight those experiments should be given under principles of federalism.

### 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

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362. Notably, no private right of action exists under many of the federal laws at issue in the preemption cases discussed in Part IV.B, including the federal laws governing medical devices, pesticides, and prescription drugs. *See* *Bates v. Dow Agrosciences, LLC*, 544 U.S. 431, 448 (2005) (noting that the federal pesticide law does not provide a federal remedy to farmers or others injured by the violation of the law’s labeling requirements); *Medtronic v. Lohr*, 418 U.S. 470, 478 (1996) (noting the absence of an explicit or implicit private right of action under the MDA); *Merrill Dow Pharms., Inc. v. Thompson*, 478 U.S. 804, 810 (1986) (noting that all parties to the case agreed with the lower court’s conclusion that there is no federal right of action under the federal food and drug law).

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 assist in creating a richer judicial and scholarly language surrounding the federal review of state tort law that will better allow states to serve their role as “laboratories of democracy.”