

National Geographics: Toward a “Federalism Function” of American Tort Law

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I. INTRODUCTION

On Christmas morning, a little boy finds wrapped presents meticulously placed beneath a modest tree that his parents bought and decorated weeks earlier in the family living room. He tears through the wrapping of several boxes and finds in one the small plastic oven for which he begged his parents after seeing an advertisement during morning cartoons the month prior. His parents help him assemble the toy after reading its instructions closely and admonishing him to avoid the heating element with great care. The boy plays with the new toy for several hours, baking muffins from a simple recipe provided by the manufacturer. Suddenly and inexplicably, the heating element comes loose, drops several inches to its plastic housing, melts through to the table underneath, and catches fire. Before the flames can be extinguished, the boy is severely burned on both hands, requiring heavy medical attention at a local burn center.

With little doubt that the boy in this situation will bring a claim for his injuries, the question becomes whether that claim ought to be governed by state or federal legal principles. Should the norms preventing this type of harm and the conduct that generates it be community-specific or nationally uniform in nature? Realistically, the answer may favor one party: a community standard can better reflect the experience and meaning of a child whose small hands were burned on Christmas, but a national standard may better reflect the expectations of a mass-market commercial manufacturer operating in numerous American states at once.

The choices reflect two competing visions of how American tort liability should work. The first says that liability should remain a strict matter of state common law because torts derive basic legitimacy from community values.¹ The second holds that torts should be unified across the fifty states to account for faster and wider movement of risk-creating

1. *E.g.*, Linda S. Mullenix, *Mass Tort Litigation and the Dilemma of Federalization*, 44 DEPAUL L. REV. 755, 768 (1995).

activity and that this is more predictable for companies in the age of mass markets, modern finance, and information economics.² The latter promotes a form of value-globalization; the former seems to resist it. Both are propositions as much about the role of cultural difference as about legal rules and processes.

Critics of the status quo tend to undervalue or exaggerate this role. Among them, *communitarians* argue tort law has seen too much federalization³ and strayed from the community-based normativity of the common law.⁴ Others, *unitarians*, argue for greater federalization and its benefits to mass-market corporate actors.⁵ Against proponents of both arguments, this Article defends current contours in the federalization of tort law wherein norms have been federalized in discrete substantive areas although remaining shielded from federal incursion in others. As suggested here, it becomes the task of judges to develop and refine these contours in the same fashion that they serve public law needs elsewhere through adjudication. In support of this claim, this Article develops what I term the “federalism function”—the capacity for torts disputes to implicate the balance of federal and state authority and thereby reinforce or recalibrate that balance in large or small measure. Indeed, as problems of scale cut increasingly across political persuasion and economic worldview,⁶ the

2. See, e.g., Pamela M. Madas, Note, *To Settlement Classes and Beyond: A Primer on Proposed Methods for Federalizing Mass Tort Litigation*, 28 SETON HALL L. REV. 540, 566 (1997).

3. I use this term to mean the process by which national norms are brought to interact with state rules. This differs from common uses to mean the process of separating and maintaining state and national sovereignty or the process of entirely displacing state rules with national ones. Federalization here means the installation of new requirements to perennially balance state and national interests in a growing variety of tort actions.

4. See, e.g., Mark C. Weber, *Complex Litigation and the State Courts: Constitutional and Practical Advantages of the State Forum over the Federal Forum in Mass Tort Cases*, 21 HASTINGS CONST. L.Q. 215, 228, 274 (1994).

5. E.g., Madas, *supra* note 2, at 566.

6. As many have pointed out, globalization is not exclusively liberal or antiliberal. Although economic and financial globalization has proliferated through liberal policies, it has been met with strong resistance by increasingly transnationally networked social movements such as the World Social Forum and Occupy. See generally CHARLES LINDHOLM & JOSÉ PEDRO ZÚQUETE, *THE STRUGGLE FOR THE WORLD: LIBERATION MOVEMENTS FOR THE 21ST CENTURY* (2010) (discussing the World Social Forum); W.J.T. MITCHELL, BERNARD E. HARCOURT & MICHAEL TAUSSIG, *OCCUPY: THREE INQUIRIES IN DISOBEDIENCE* (2013) (discussing Occupy).

balance of central and local power through federalism becomes a key implication of many torts disputes today.

This discussion is overdue in light of wider debates about federal preemption and state sovereignty. Immigration reform and marijuana regulation are but two hot-button issues that illustrate the contemporary struggle over federalism.⁷ More than tort law, these areas implicate what many have come to describe as “global governance”—the effort to assert uniform norms across ever-wider geographic and political distances.⁸ Because immigration and marijuana policies necessarily affect the flow of people and things across the international border, they more understandably implicate and undermine the idea of states’ rights. Tort law, meanwhile, still deals in cognizable, individual harms to person and property and has been the domain of state authority for centuries.⁹ Nevertheless, tortious conduct increasingly flows across state boundaries via mass-market actors and increased communication technologies.¹⁰ Adjudication in tort disputes increasingly takes the form of “public” or “regulatory” law.¹¹ It is then, in light of federalism’s widespread influence in policy discussions across the spectrum, not surprising to find the integrity of state common law up for reconsideration in many tort cases.¹² This reconsideration forms the federalism function.

Like all debated “functions” of the tort law, the federalism function is one that coexists with others and lurks whether or not dispute stakeholders, advocates, or adjudicators are contemporaneously aware of it. More importantly, recognition of this function does not prescribe immediate outcomes in any given set of legal disputes. Rather, it requires that the adjudicator understand how it may be serving to collaterally arrange or rearrange contours of federal and state power. This recognition overlaps perhaps most with conceptions of torts as “public law”—conceptions that hail optimal deterrence, loss distribution, or social justice over other

7. See Jonathan H. Adler, *Marijuana and Federalism*, VOLOKH CONSPIRACY (Apr. 8, 2013, 7:27 AM), <http://www.volokh.com/2013/04/08/marijuana-and-federalism/>; Tamar Jacoby, *What if Justices Let States Make Immigration Policy?*, CNN, <http://www.cnn.com/2012/04/24/opinion/jacoby-immigration-supreme-court> (last updated Apr. 24, 2012, 8:58 AM).

8. See Luis Cabrera, *Introduction to GLOBAL GOVERNANCE*, GLOBAL GOVERNMENT: INSTITUTIONAL VISIONS FOR AN EVOLVING WORLD SYSTEM 1, 2 (Luis Cabrera ed., 2011).

9. DAN B. DOBBS ET AL., *THE LAW OF TORTS* 1 (2d ed. 2011); see *infra* note 23.

10. See *infra* Part V.B.3.

11. 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, 581 (2005).

12. See, e.g., *Wyeth v. Levine*, 555 U.S. 555, 573–81 (2009) (discussing the argument that federal drug regulation preempts state negligence claims).

competing functions in this area.¹³ Although some dispute the righteousness of treating torts as public law,¹⁴ that approach has garnered widespread theoretical and practical acceptance since the mid-twentieth century.¹⁵ On that account, this proposal is a logical extension of the current tendency to view torts as a preeminent legal site for social and economic engineering rather than simple compensation.¹⁶ In the struggle to balance federal and state power and cultural legitimacy of norms, tort law functions as the “front line”¹⁷ where such balancing has greatest impact.¹⁸ At the same time, my goal is also to confront simplistic arguments that unilaterally resist tort federalization in the name of American communitarianism. Those arguments, probably represent nostalgia for a mythic national past in which interpersonal disputes could be easily resolved through appeal to the putative common and heterogeneous wisdom of “community.”¹⁹ In accord with scholars of the history and sociology of nationalism and citizenship, I consider such a past socially constructed through its uncritical weaving into the tapestry of American legal culture—and therefore worthy of critical revisitation.²⁰

In the following pages, this Article will situate the federalism function among existing scholarly frameworks and assess the “contoured” approach to federal and state power balancing across the existing subject matter of torts. Part II will assess conflicting characterizations of tort law as on one hand “private” and on the other “public” law. Part III will define and explain competing functions of tort law with an eye to whether federalism fits the common criteria of these coexisting objectives, goals, purposes, and methods for adjudication. In Part IV, the Article will explore historical

13. See G. EDWARD WHITE, *TORT LAW IN AMERICA: AN INTELLECTUAL HISTORY* 178 (expanded ed. 2003); Michael L. Rustad, *Twenty-First Century Tort Theories: The Internalist/Externalist Debate*, 88 *IND. L.J.* 419, 422 n.18 (2013).

14. See, e.g., Linda S. Mullenix, *Mass Tort as Public Law Litigation: Paradigm Misplaced*, 88 *NW. U. L. REV.* 579, 580–81 (1994).

15. See John C.P. Goldberg, *Twentieth-Century Tort Theory*, 91 *GEO. L.J.* 513, 523–24 (2003); Alexandra B. Klass, *Tort Experiments in the Laboratories of Democracy*, 50 *WM. & MARY L. REV.* 1501, 1510 (2009).

16. See Klass, *supra* note 15, at 1509–10.

17. Abbe R. Gluck, *Intrastatutory Federalism and Statutory Interpretation: State Implementation of Federal Law in Health Reform and Beyond*, 121 *YALE L.J.* 534, 537 (2011).

18. See Mark Seidenfeld, *Who Decides Who Decides: Federal Regulatory Preemption of State Tort Law*, 65 *N.Y.U. ANN. SURV. AM. L.* 611, 631, 653 (2010).

19. See *infra* notes 31–32, 103–05 and accompanying text; see also *infra* Part VI.

20. See *infra* notes 31–32, 103–05 and accompanying text; see also *infra* Part VI.

and contemporary roles of *federalism* to understand why this process becomes so deeply implicated in the resolution of civil justice claims. Part V will explore patterns in modern tort federalization to draw observations about the way this process partakes in American nationhood and legal culture.²¹ Its first subpart explores federalization in the name of constitutional rights initially with respect to free speech in the theories of defamation, privacy, and emotional distress. It then looks to federalization under due process jurisprudence in public takings and civil damage awards. The second subpart reviews federal preemption—the displacement of state common law actions by express or implied national legislative purpose. That discussion will take the reader through preemption approaches in transportation and auto safety, food and drug regulation, environmental protection, and employment claims. Although jurisprudence across these discrete industries has cross-pollinated in recent decades, viewing them serially in this fashion, hopefully, will make better sense of the sociocultural logics underpinning preemption—even if the rules themselves still appear quite nebulous today.²² Finally, Part VI will offer a discussion of these various substantive areas to support the general proposition that current struggles to balance state and federal authority—the federalism function—form a legitimate new policy function of torts today.

II. FROM PRIVATE TO PUBLIC LAW

“The law of torts has traditionally been the province of state common law.” This truism forms some part of most introductory remarks on the federalization of tort law.²³ Its utterance serves several key narrative

21. Absent from Part V are discussions of mass tort litigation and federal tort reform. Though germane to an analysis of the social logic of federalism, these topics are distinct from those addressed here for particular reasons. The rules regarding mass tort actions are more properly the province of civil procedure and indeed are governed by the Federal Rules of Civil Procedure’s section on class action filing and removal. Meanwhile, federal tort reform has been well charted by numerous policy articles, white papers, and documentary films. *See, e.g.*, F. Patrick Hubbard, *The Nature and Impact of the “Tort Reform” Movement*, 35 HOFSTRA L. REV. 437, 439 (2006); HOT COFFEE: IS JUSTICE BEING SERVED? (HBO Films 2011). More importantly, it has been largely unsuccessful to date. *See* Hubbard, *supra*, at 483.

22. *See, e.g.*, Peter H. Schuck, *FDA Preemption of State Tort Law in Drug Regulation: Finding the Sweet Spot*, 13 ROGER WILLIAMS U. L. REV. 73, 81 (2008).

23. *See, e.g.*, Klass, *supra* note 15, at 1504 (“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.”); *see also* WARD FARNSWORTH & MARK F. GRADY, TORTS: CASES AND QUESTIONS, at xxxvii (2d ed. 2009) (“Until well into the twentieth century most

purposes. First, it creates a temporal break between tradition and modernity in the law. Even without further context, this characterization of torts past immediately evokes thoughts of a torts present and more importantly sets up the dynamic quality of the civil justice system for the future. Second, the above characterization serves to establish geopolitical variability in tort principles and dispositions across the various U.S. states, a quality that is often emphasized to remind students to resist easy generalization in this domain of the law.²⁴ Several have also described this over time as the experimental quality of tort law—one that situates it as an ideal “laboratory” for ductile social engineering experiments.²⁵ And finally, a third implication of the above truism is the possibility of a more localized cultural fit between rules of law, community values, and dispute outcomes.²⁶

These aspects of a torts-as-state-common-law formulation reveal an inherent conflict between visions and uses of torts as private and public law. On one hand, the closer cultural fit of traditional torts meant that the legal outcome of a dispute would resonate with local community values and satisfy private parties that corrective justice had been served. On the other hand, high variability between state rules would complicate the normative effect upon multistate actors, especially corporate tortfeasors, and burden national markets in goods and services with a layer of unpredictability. To mitigate the latter problem, efforts were needed to standardize tort liability in ways that could liberate large players in the national marketplace. For this to occur, torts would need to be reconceptualized as *primarily* a domain of public law.

According to many, this is indeed what happened. Alexandra Klass writes that among the two approaches, “[t]he first and dominant . . . 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.”²⁷ This shift has been credited

American tort law was common law. . . .”); Robert L. Rabin, *Federalism & the Tort System*, 50 RUTGERS L. REV. 1, 2 (1997) (“Tort law in America is built on the bedrock of state common law.”); Roger Transgrud, *Federalism and Mass Tort Litigation*, 148 U. PA. L. REV. 2263, 2266 (2000) (“[A]s we debate what to do about mass tort litigation, we are intruding into two areas that for two centuries have been left to the states.”).

24. See Klass, *supra* note 15, at 1504.

25. See *id.*

26. See Seidenfeld, *supra* note 18, at 631.

27. Klass, *supra* note 15, at 1505; see also *id.* at 1506 (“[T]he Supreme Court has failed to recognize the private law aspects of tort in its recent decisions, which has

to three lines of scholarly thought and their leading figures. John Goldberg lists these schools to be (1) *loss distribution* headed by Roger Traynor and Fleming James, (2) *loss shifting and deterrence* represented by William Prosser, and (3) *social utility* led by Guido Calabresi and Richard Posner.²⁸ “Although nominally private disputes,” Goldberg explains, “tort cases were, in their view, occasions for public lawmaking: an exercise by judges and juries of regulatory authority delegated to them by legislatures through the creation of the court system.”²⁹ With wide acceptance of the above theories, then, the past ninety years have seen a marked shift toward widespread acceptance of the public law conception.³⁰

In one sense, this move follows a larger evolutionary pattern described by social theorists toward the increased reliance upon abstract institutions as societies sought to manage larger populations and greater complexity. The German sociologist Ferdinand Tönnies once described this development memorably as a shift from *gemeinschaft* to *gesellschaft*—from a form of social organization rooted in communities and families to one based upon impersonal social relations represented by corporations, banks, and the state.³¹ Elsewhere, a similar shift was said to mark the emergence of modern nationalism as a preeminent form of belonging in the new states divided by vast distances, ethnic differences, and latent class conflict.³² Together, these parallel evolutionary theories seem to validate emergence of a public law conception of torts in the twentieth and early twenty-first centuries.

On the other hand, several have come to view federalization as a *counter-narrative*—a story that contradicts the larger story of American tort law as a body of doctrine rooted in community values properly represented by state common law. Accordingly, that story holds that

allowed it to displace more easily tort law under doctrines of preemption and due process.”). *But see* DOBBS ET AL., *supra* note 9, at 13 (“Many lawyers distinguishing regulation from tort law would perhaps think first of the procedural incidents of the two systems. Tort law is court law. The victim of a wrong sues. The victim does not rely on others to enforce rights. Suit is in a court (usually nearby) and one that is open to all individuals. Most notably, the facts in the suit are decided by a jury if either party requests it, not by a judge or an administrator. Probably no practicing lawyers would think that tort law and regulatory law systems are alike.”).

28. *See* Goldberg, *supra* note 11, at 581–82.

29. *Id.* at 581 (citing Goldberg, *supra* note 15, at 521–28; Leon Green, *Tort Law Public Law in Disguise* (pt. 2), 38 TEX. L. REV. 257 (1960)) (footnote omitted).

30. *Id.* at 583 (citing the 1930s as the decade of origin for this trend).

31. *See* FERDINAND TÖNNIES, *COMMUNITY AND CIVIL SOCIETY* 17–19 (Jose Harris ed., Jose Harris & Margaret Hollis trans., Cambridge Univ. Press 2001) (1887).

32. *See, e.g.*, BENEDICT ANDERSON, *IMAGINED COMMUNITIES* (new ed. 2006).

“[s]tates [a]re in a [b]etter [p]osition to [s]erve [l]ocal [n]eeds.”³³ Perhaps more importantly, the shift away from a pure common law corpus is said to marginalize the state court judge—a key figure whose position is said to render the person inherently more in tune with folk ideas of fairness—and the state legislature—a group more beholden to the local electorate and its “representation.”³⁴ Local attitudes and ideals change; legal doctrines may evolve to better achieve just outcomes.

But, support for state common law autonomy is not necessarily limited to private law exponents. There are also those who take the public law functions described above and suggest they apply best on a local scale; they have said state common law allows tort jurisprudence to better achieve social engineering through local experimentation.³⁵ In its implication of the law and culture nexus, this is a different kind of argument. Its common law basis allows not that tort law will change to match the culture but that tort law will be the instrument by which that culture is changed. The objective of change is to match better the vicissitudes of a local population set among the multitude of different local populations across the United States. Both arguments, one that favors state common law as more reflective of local culture and the other that favors it as a more efficient laboratory for experimentation, are variants of legal pluralism—the notion that different legal systems can coexist and correlate to serve better the needs of an extant cultural pluralism.³⁶ But is a closer fit between law and local culture—even if possible—a worthy objective to justify state law autonomy in torts? Are there moments when local variation in law and culture are undesirable? And what should be the criteria by which this will be determined?

Tension between the private and public law will remain, but selection between these does not dispose of power distribution between states and the federal government. Indeed, some have recently suggested that torts operates as a hybrid system. In accordance with Calabresi’s theory, the tort system has historically balanced *both* public and private law functions from its inception, and the system’s health may depend upon maintenance

33. John C. Toro, Note, *Why Principles of Federalism and Communitarianism Demand that Tort Law Be Left Up to the States*, 7 *GEO. J.L. & PUB. POL’Y* 655, 674 (2009).

34. *See id.* at 676.

35. *See* Klass, *supra* note 15, at 1505.

36. William Twining, *Normative and Legal Pluralism: A Global Perspective*, 20 *DUKE J. COMP. & INT’L L.* 473, 489 & n.53 (2010).

of this duality.³⁷ Even the newer civil recourse theory of Goldberg and Zipursky—holding that torts is premised upon private access to the public right to sue once someone has been injured—exhibits elements of both.³⁸ So, determination of whether to federalize or shield areas from federalization should be made not on whether doing so better serves private or public law but on the basis of whether liability for a particular type of conduct is otherwise immunized by the vicissitudes of scale. In settings where it is, federalization may be appropriate to overcome limitations of the local. Under this *contoured* approach, to extend what political scientist Morton Grodzins once famously called “marble cake” federalism, tort law should be federalized in some substantive areas of social and economic life although protected from federalization in select others.³⁹ Once the federalism function is recognized, these contours are properly the object of ongoing refinement by lower court adjudicators nationwide. In short, the federalism function recognizes that lower courts now bear considerable responsibility in refining the contours of cooperative federalism. The remaining Parts of this Article offer modest guidance to adjudicators faced with such choices.

III. THE SEVERAL FUNCTIONS OF TORT LAW

To say a core legal subsystem has essential functions is to enter a thicket of competing interests and propositions. The most generalizable goal of law as such is to regulate human behavior.⁴⁰ From there, one may begin to debate why that is a valid purpose, what the consequences should be for defying it, or to what depth legal subjects must accept their subservience to it. All such subsidiary discussion of law’s functions must be disclaimed as highly contested, contingent propositions that themselves serve those functions at the instant they describe them. For this reason, the several accepted functions of tort law are also headings for entire schools of thought, and the precise number or distinctions between them are the subject of some uncertainty. For expediency, I take the list of tort functions offered by Kenneth Abraham, which includes *corrective justice*, *optimal deterrence*, *loss distribution*, *compensation*, and

37. See Guido Calabresi, *Toward a Unified Theory of Torts*, 1 J. TORT L. 1, 1 (2007).

38. John C.P. Goldberg & Benjamin C. Zipursky, *Accidents of the Great Society*, 64 MD. L. REV. 364, 402–03 (2005).

39. MORTON GRODZINS, *THE AMERICAN SYSTEM: A NEW VIEW OF GOVERNMENT IN THE UNITED STATES* 14 (Daniel Elazar ed., Transaction Books 1984) (1960).

40. See, e.g., DOBBS ET AL., *supra* note 9, at 18 (“In medieval England, the law of torts, like the law of crimes, had modest aims, principally to discourage violence and revenge. Today’s tort law has much grander aims.”).

social justice.⁴¹ In this subpart, I briefly consider the unifying and distinguishing features of these functions to enable assessment of whether federalism itself merits addition to this list.

A. *Corrective Justice*

In part because *tort* derives from a Latin root meaning twisted, it is unsurprising to find the first policy function of tort law listed as corrective justice—the righting of wrongs on an intersubjective level.⁴² In several ways, other related characteristics of the tort law can be said to serve the corrective justice function. Such characteristics include the fault principle, whereby liability is not imposed without some determination of wrongful conduct, or the imposition of strict liability based on nonreciprocal risk creation.⁴³ In the abstract, judgments framed to serve the ideal of corrective justice appeal to an almost innate human value for fairness and balance in the world. Nature aside, these are also deeply rooted in social organization forms that predate modernity. There, law palpably derived from the cultural norms that bound individuals, families, and bands into communities.

Community standards might be embodied in an explicit custom Or they might be embodied only in the views of the jury that decides the case. If the jury is representative of the community as a whole, its verdict is likely to reflect the implicit standards of fault and liability that already exist at that time and that place. This, too, is a view of corrective justice.⁴⁴

And yet, the corrective justice function, despite its ability to make sense of the need for fault and nonreciprocity, is far from absolute. Frequently, cases must be disposed of without wrongs being righted because this policy aim is simply one of several.⁴⁵ Moreover, there are

41. KENNETH S. ABRAHAM, *THE FORMS AND FUNCTIONS OF TORT LAW* 17–23 (3d ed. 2007).

42. DOBBS ET AL., *supra* note 9, at 19–20 (“Tort law is at least partly rights-based. That is, it is at least partly based on ideals of corrective justice, ideals of righting wrongs, or (somewhat relatedly) ideals about accountability or personal responsibility for harm-causing conduct. Every claim is unique because it is about individual human beings, or at least individual corporations acting in particular circumstances.”).

43. *See id.* at 24, 26.

44. *Id.* at 26.

45. *See, e.g.,* *Sidis v. F-R Pub. Corp.*, 113 F.2d 806 (2d Cir. 1940). In *Sidis*, a “where are they now” article written profiling a former child prodigy who went to great lengths to avoid the limelight was nonetheless not an invasion of privacy. *Id.* at 807,

clear examples where community-based norms may have justified one outcome but a court arrived at a different one in the name of—rather than despite—corrective justice.⁴⁶

B. Optimal Deterrence

Optimal deterrence is a second function combining two concepts. First, *deterrence* may be most clear: tort rules seek to influence human behavior away from socially deleterious conduct and toward conduct the results of which are “socially useful.”⁴⁷ Deterrence takes specific and general forms, but with the shift toward a public law vision of torts, specific deterrence—the kind seeking to prevent *this* defendant from committing *this* harm again—is frequently left out.⁴⁸ General deterrence, the goal of influencing an entire industry or population, has meanwhile found primacy as an effective, efficient form of social engineering the further one ascends in the civil court hierarchy.⁴⁹

At the same time, courts have recognized that deterrence without precision is systematically negative. Thus, they balance an impulse to discourage harmful conduct against a need to protect *socially useful* conduct whose net impact on the society—usually judged in economic terms—is positive.⁵⁰ The appropriate deterrence required is found at the balance between discouragement of risk and encouragement of utility.⁵¹

Such balancing is nowhere more visible than in nuisance. Under the law of nuisance, courts require that the plaintiff’s harm be a “substantial and unreasonable interference with the use and enjoyment of another’s

809. Although the court acknowledged that the article “[could] be fairly described as a ruthless exposure of a once public character,” the court found for the defendant publisher on account of the competing interest of newsworthiness. *Id.*

46. See, e.g., *Grant v. Readers Digest Ass’n, Inc.*, 151 F.2d 733, 734–35 (2d Cir. 1945) (finding that a Massachusetts attorney could suffer reputational harm from being described as an “agent” of the Communist Party despite the “wrong thinking” nature of anti-Communist social fears); *Brzoska v. Olson*, 668 A.2d 1355, 1357 (Del. 1995) (holding that an HIV-positive dentist who continued to treat unknowing patients was not liable for battery because the patients’ fears of contracting the virus from mere presence were not “reasonable”).

47. See Christopher H. Schroeder, *Lost in the Translation: What Environmental Regulation Does that Tort Cannot Duplicate*, 41 WASHBURN L.J. 583, 591–92 (2002). *Social utility* is a pervasive and insufficiently examined concept in tort law, almost always defined in generalized, economic terms. It is italicized to signal the possibility of more nuanced sociological and anthropological understandings of social use value.

48. See *Klass*, *supra* note 15, at 1573; Schroeder, *supra* note 47, at 590 n.24.

49. See, e.g., *The T.J. Hooper*, 60 F.2d 737, 740 (2d Cir. 1932) (holding that industry-wide custom is relevant to but not dispositive of breach of a standard of care in negligence liability).

50. See *Klass*, *supra* note 15, at 1571, 1573.

51. See *id.*

property.”⁵² In requiring a determination of “unreasonableness,” courts have developed a multifactor test incorporating six to eight variables to consider.⁵³ Courts employ those factors to determine whether the “gravity of harm” outweighs the “utility of the conduct,” arguably making this balancing act the nucleus of the cause of action.⁵⁴ Interestingly, the one-time trump card of “coming to the nuisance” could have once easily defeated any utility-balancing argument.⁵⁵ Today, that defense has been subsumed as another factor to consider alongside that balance, and community norms can thus form some basis for adjudication or alternatively be cast aside altogether.⁵⁶

Finding expression patently in tort doctrines such as nuisance, optimal deterrence helps to organize subsidiary concepts such as harm and utility into one single notion by designating the sweet spot between these. It also functions in many cases to alter community-based norms as in, for example, the equivalency with coming to the nuisance. And finally, it appears to coexist alongside other policy functions—to “play nicely” with them as is apparently required for membership in the hallowed club of tort functions. Nevertheless, optimal deterrence adds another dimension in the form of balancing. It illustrates how appropriate balancing between competing needs where those needs are of comparable weight becomes a critical function of adjudication in torts.

C. *Loss Distribution*

Seemingly modern in its scalar vision of harm and justice, *loss distribution* is the aim of spreading costs incurred by harms to one party across a larger swath of population presumably in a better position to absorb those costs on an individualized basis.⁵⁷ A classic example is the finding of strict products liability for corporate tortfeasors in situations

52. See 66 C.J.S. *Nuisances* § 9 (2010).

53. See 4 RESTATEMENT (SECOND) OF TORTS §§ 826–828 (1979).

54. See *id.*

55. See *e.g.*, *Oetjen v. Goff Kirby Co.*, 49 N.E.2d 95, 99 (Ohio Ct. App. 1942).

56. See, *e.g.*, *City of Lebanon v. Georgia-Pacific Corp.*, No. Civ. 02-6351-AA, 2004 WL 1078982, at *3 (D. Or. May 11, 2004) (“[E]ven assuming that defendants could demonstrate . . . that the plaintiff knowingly ‘came to the nuisance,’ that fact, although pertinent, would not be dispositive.”).

57. See Guido Calabresi, *Some Thoughts on Risk Distribution and the Law of Torts*, 70 YALE L.J. 499, 505 (1961).

when fault is lacking.⁵⁸ Here, the corporate defendant may be asked to compensate a plaintiff for the plaintiff's losses on the presumption that the corporation can internalize the burdens of such compensation through product pricing.⁵⁹ A second archetype is the "no fault" auto insurance system in effect in some states today.⁶⁰

There is an apparent modernity to this reasoning; considerations of loss distribution predate modern products liability to the heyday of industrial capitalism in North America. Lawrence Friedman writes of early justifications for the "fellow servant" rule, which held that industrial employees could not sue for harm from negligent conduct of fellow employees at work,⁶¹ and the "charitable immunity" doctrine, which prevented malpractice liability claims against nonprofit hospitals.⁶² In each of these now unpopular doctrines, industrial-era courts were responding to a "deep pocket" mentality among injured plaintiffs and their counsel.⁶³ In that sense, courts were not ready to privilege distributive justice until the point at which accidents became unbearably high in frequency and industrial profits became concomitantly high in volume. This point is illustrated by the coinciding erosion of fellow servant rules and explosion in railroad accident deaths near the turn of the century.⁶⁴

Today, loss distribution does much of what its co-functions do. It helps reconcile utility and corrective justice by offering the chance for redistribution of surplus capital on the basis of harms created in the production of that surplus. It sits comfortably among the others and, perhaps more than them, lingers in the background in most cases outside of products liability and insurance contexts. And, it employs balancing in the sense that it requires courts, particularly in the products field, to limit loss spreading against the financial capacity for enterprise to absorb and pass on such costs without destroying their business operation.⁶⁵

58. See e.g., *Escola v. Coca Cola Bottling Co.*, 150 P.2d 436, 441 (Cal. 1944) (Traynor, J., concurring).

59. James R. Hackney, Jr., *The Intellectual Origins of American Strict Products Liability: A Case Study in American Pragmatic Instrumentalism*, 39 AM. J. LEGAL HIST. 443, 473-74 (1995).

60. Jeffrey O'Connell & David Partlett, *An America's Cup for Tort Reform? Australia and America Compared*, 21 U. MICH. J.L. REFORM 443, 485 (1988) ("[Automobile no-fault insurance] achieves loss distribution because it leaves fewer accident victims and their families without resources."); Susan Ladika, *Is No-Fault Insurance Finished?*, MSN Money (Sept. 18, 2012, 6:13 PM), <http://money.msn.com/auto-insurance/is-no-fault-insurance-finished>.

61. Comment, *The Creation of a Common Law Rule: The Fellow Servant Rule, 1837-1860*, 132 U. PA. L. REV. 579, 579 (1984).

62. LAWRENCE M. FRIEDMAN, *A HISTORY OF AMERICAN LAW* 416 (1973).

63. *Id.*

64. *Id.* at 423.

65. See Calabresi, *supra* note 57, at 522.

Finally, loss distribution engages in a form of social engineering to the extent that it treats surplus capital almost as a symbol for a common fund out of which to compensate victims of torts.⁶⁶

But the real significance of this tort function may be its incorporation of scale. This incorporation is best described as “modernist” in the sense that it properly understands the plight of the individual in the age of industrial capital as a transferrable object of corporate research, profiling, marketing, and surplus production. Far from revolutionary, this understanding is rather conciliatory; it offers corporate tortfeasors the option to internalize costs and pass them on to voluntary participants, rather than simply externalizing the costs of production onto the shoulders of harmed consumers. That conciliation itself may be seen as adding value through its public relations benefit. Further still, in recognizing the struggle between individual and corporate existence—and the role of sheer population sizes in the acceptance and rejection of moral citizenship and its financial surrogacy—the embrace of loss distribution policy in torts has greatly foreshadowed the federalism function.

D. Compensation and Social Justice

Victim compensation and social justice are more complicated points in a discussion of the functions of tort law. On one hand, they appeal to ideals of fairness and inclusivity. On the other, they do not often form the primary basis for court reasoning toward dispute outcomes.⁶⁷ In this way they serve what some have considered “secondary” functions⁶⁸: Their achievement satisfies cultural demands about law even when that achievement is not the stated basis for a decision.

66. This treatment is symbolic because under most conceptions, corporate wealth is not itself the basis for compensation but rather a marker of a company’s health such that it can more justifiably be asked to pass on the burden of its harm-inducing conduct in the form of higher product and service prices at market.

67. ABRAHAM, *supra* note 41, at 18–19 (“The desirability of providing compensation to a particular class of injury victims rarely explains the liens that are drawn to distinguish those who are and those who are not entitled to prevail in a tort claim. Rather, time after time, some other factor or factors explain the occasion for the imposition of tort liability or tort law’s refusal to impose liability. As Holmes put it with characteristically ruthless clarity over a century ago, ‘The general principle of our law is that loss from accident must lie where it falls’” (quoting OLIVER WENDELL HOLMES, *THE COMMON LAW* 76–78 (Mark DeWolfe Howe ed., Belknap Press 1963) (1881))).

68. *See id.* (“Rather, victims are provided compensation in order to serve the other goals of tort law, such as corrective justice and deterrence.”).

Limitations on the compensation function are best seen in cases of “pure economic loss.” There, a defendant has caused harm to a plaintiff amounting to no more than the loss of opportunity for financial gain or security. A common example is the loss of business that befalls a storefront on the far side of a bridge damaged and made impassable by the negligence of a ship captain on the river below. In such cases, the general rule has been to deny recovery under the “economic loss rule”—a common law doctrine barring recovery in the absence of some physical damage to the plaintiff or the plaintiff’s property.⁶⁹ Justification for this rule is twofold. First, the scope of liability in economic loss cases becomes too large given the speed and fluidity with which such loss spreads through an urban business community. Second, courts prefer to reserve liability of defendants for more tangible, verifiable personal injury and property damage given the often limited capacity to absorb such liability. If compensation were properly a primary function of the law, neither of these challenges would prevent liability for a party harmed in the purely economic sense.

Likewise, social justice is sometimes, though perhaps less rarely, served through tort litigation; when it is, such cases seem to meet a cultural expectation that law occasionally restore power imbalances in our society even apart from other functions. Commonly, due in part to the nature of risk creation and the nature of attorney compensation systems, such cases involve a “David versus Goliath” relationship where a relatively weak plaintiff or class succeeds against a powerful corporate or institutional entity. Such cases might include *Grimshaw v. Ford Motor Co.*, in which auto manufacturer Ford was held liable for choosing not to preemptively repair its autos with defective fuel tanks after assessing that aggregate settlement payouts would cost less than a recall.⁷⁰ At the same time, such cases have been the subject of considerable cultural backlash as seen in the marquee “hot coffee” case *Liebeck v. McDonald’s Restaurants, P.T.S., Inc.* and the attendant public reaction.⁷¹ The extent to which such backlash is an organic or manufactured response may remain a separate question for debate.

Tort law occasionally serves the functions of compensation and social justice but does so usually to reinforce the other functions listed above. For better or for worse, cases decided purely on “fairness” grounds in these categories do not stand up to doctrinal scrutiny and therefore do not form the basis for generalizable outcomes.

69. See, e.g., *Robins Dry Dock & Repair Co. v. Flint*, 275 U.S. 303, 308 (1927), *superseded by statute*, *Trans-America Pipeline Act*, 43 U.S.C. § 1651 (1973).

70. *Grimshaw v. Ford Motor Co.*, 174 Cal. Rptr. 348, 360–61, 391 (Ct. App. 1981).

71. No. CV-93-02419, 1995 WL 360309 (N.M. Dist. Ct. Aug. 18, 1994), *vacated*, 1994 WL 16777704 (N.M. Dist. Ct. Nov. 28, 1994); *HOT COFFEE*, *supra* note 21.

E. Common Features or “Metafunctions”

Upon synthesizing key characteristics of the varying functions of tort law, several themes emerge. First, all permit *social engineering*—the act of defining norms not to reproduce a social structure but to reshape one.⁷² One example might be the “AIDS cases” in battery that emerged in the 1990s. A lead case, *Brzoska v. Olson*, involved a dentist who continued to treat patients after learning of his infection with HIV and then later died from AIDS.⁷³ At the time the case arose in the late 1980s, the public perceived the risk of HIV infection from mere contact to be very high.⁷⁴ The Delaware Supreme Court, however, refused to judge risk through the eyes of the public and instead sought to endorse, and thus publicize, medical expert health risk assessments.⁷⁵ As it stated, “[B]ecause HIV is transmitted only through fluid-to-fluid contact or exposure, the reasonableness of a plaintiff’s fear of AIDS should be measured by whether or not there was a channel of infection or actual exposure of the plaintiff to the virus.”⁷⁶

Under classic tort law, battery is an “act[] intending to cause a harmful or offensive contact with the person of the other . . . and [where] harmful contact with the person of the other directly or indirectly results.”⁷⁷ The *Brzoska* facts may constitute a classic medical battery if the plaintiff patients were either subjectively harmed or objectively offended. Given that they were not independently harmed—their health was not made worse—the case turns upon whether a consented touching becomes unconsented and offensive when its circumstances involved greater perceived or actual health risk than originally known.⁷⁸

Brzoska might be interpreted in a few ways. As a case of optimal deterrence, the case represents a court instructing the public on how it should best assess health risks. For example, a judgment must be made as to the utility of any conduct, and this is weighed against the risks associated therewith. The goal is to deter as much risky behavior as possible before doing so creates a net loss in value to the society.

72. See Roscoe Pound, *A Survey of Social Interests*, 57 HARV. L. REV. 1, 30 (1943).

73. 668 A.2d 1355, 1357 (Del. 1995).

74. See *id.* at 1363.

75. See *id.*

76. *Id.* at 1362–63.

77. RESTATEMENT (SECOND) OF TORTS § 13 (1965).

78. See *Brzoska*, 668 A.2d at 1366.

Ascription of utility and risk values, however, need not be premised merely upon *existing* social attitudes, and in many cases, it is designed to counter those attitudes by developing new priorities in valuation. As a case of corrective justice, the opinion also represents courts departing from community standards as to what constitutes an “offense.” Again, the court decided that perceived health risk was insufficient and that actual risk gauged by the medical community was controlling.⁷⁹ More importantly, it self-consciously adopted this position to influence public rationality and the status of HIV patients more generally.

A second theme across the functions of tort law is the priority for *balancing interests*. To see this in practice from multiple angles, one might look to a classic nuisance case such as *Carpenter v. Double R Cattle Co.*⁸⁰ There, a plaintiff landowner brought a nuisance claim against an adjacent cattle feedlot that housed thousands of animals and generated a variety of harms.⁸¹ Doctrinally, nuisance is the “substantial and unreasonable interference with the use and enjoyment of another’s property.”⁸² By all means, the infestation of Carpenter’s property by noxious smells, swarms of bugs, and polluted wastewater from the adjacent feedlot constituted an interference with Carpenter’s use and enjoyment of his land. However, in determining the “unreasonableness” of this interference, the court adopted a classic cost-benefit utility balancing approach, asking whether the benefits created by the feedlot were exceeded by the degree of harm it was creating.⁸³ Again, this approach clearly exhibits the optimal deterrence function lingering behind the property tort of nuisance. On this basis, the court refused to impose any damage penalty on the defendant, effectively saying that to do so would be to “overdeter” net-beneficial conduct in a sparsely populated, agrarian state such as Idaho.⁸⁴

Not only was this choice the result of balancing utility and harm, as is commonly seen in nuisance reasonableness jurisprudence, but it also reflected two other less-explicit forms of balancing. First, it showed the court balancing tradition with modernity. In *Carpenter*, the industrial agriculture of Idaho is presented as the modern basis of that state’s subsistence pitted against the traditional individual right to be undisturbed on one’s homestead. Second, it reflects the balancing of nuisance’s private and public law priorities. The choice to allow Double R to continue its

79. *See id.* at 1363.

80. 701 P.2d 222 (Idaho 1985).

81. *Id.* at 224.

82. 66 C.J.S. *Nuisances* § 9 (2010).

83. *Carpenter*, 701 P.2d at 227.

84. *Id.* at 228.

operations unchecked was a choice to emphasize community subsistence over and above the need to compensate an individual for his lost use and enjoyment. Conceivably, on different facts such as greater population density or greater toxicity in the industrial discharge, the case would have come out in favor of Carpenter on each of the above balances. The case thus illustrates well the prevalence of balancing in general to what are commonly referred to as tort law's functions.

Finally, *Carpenter* might be viewed in terms of loss distribution as again illustrating the propensity for interest balancing in the tort law's main functions. Under simple loss distribution, the court is to weigh the capacity for one party's ability to absorb the costs of harm against the other party's capacity to do so. Under normal conditions in modern, urban environments, this calculus favors individual plaintiffs when institutions, governments, or corporate entities harm them, on the premise that costs of damage awards can be passed on to taxpayers or consumers. However, when such an entity is the only one of its kind, or the sole basis for community subsistence in an isolated area, and where it is unable to pass on such costs without failure, loss distribution dictates that the costs of harm should be borne by the plaintiff.

If social engineering and interest balancing are two common themes across these functions, *efficiency* is a third. This may take the form of either economic or judicial efficiency. Optimal deterrence and loss distribution say that behavior should be regulated, and costs of injury spread, only to the extent that doing so does not create a net economic burden to a society. Likewise, corrective, compensatory, and social justice all work toward minimizing the flow of litigation into courtrooms by requiring suits to be premised upon legitimate "wrongs." In early cases involving "social host" liability, for instance, courts grappled with assessing the legitimacy of claims against party hosts who serve alcohol to minors who then injure or kill third parties while driving home.⁸⁵ There, some judges felt extension of liability would open "floodgates to litigation" given the frequency of such conduct and the thirst for compensatory damages on the part of families and their counsel. The Supreme Court of Illinois elaborated on the fear of increased litigation:

85. See, e.g., *Charles v. Seigfried*, 651 N.E.2d 154, 155 (Ill. 1995).

We are realistic enough to know that in virtually every instance where an underage driver is involved in an alcohol-related car accident, a clever plaintiff's attorney would drag into court any and all adults who may qualify as a social host. The focus at trial would then shift from the drunk driver to the alleged social hosts.⁸⁶

Such statements reflect a traditional view of culpability emphasizing individual responsibility and control and the consequent use of this conception of culpability to curb the flow of social host suits into court.⁸⁷ Later cases deviating from this tradition did so with the requirement that liability be found only when the plaintiff is a third party and not the drunk driver.⁸⁸

Combined, the so-called functions of tort law have common characteristics that include social engineering, balancing, and efficiency considerations. If these functions are to be understood as policy goals, then the common features of those goals—or metafunctions—all appear to allow reshaping the social field by weighing disparate competing interests and resetting their balance to make more efficient use of resources. What, then, is federalism, and can it serve these goals?

IV. *FEDERALISM* DEFINED: POWER ALLOCATION AND SCALE

Generally understood, federalism is an arrangement of governance where sovereign authority is shared between central and local geopolitical units.⁸⁹ In the United States, the Federal Constitution sets limits for tort law so that where federal legislation is absent, state law has been heavily modified where it conflicts with federal constitutional rights.⁹⁰ The Constitution's Supremacy Clause provides that state law will be preempted in areas where federal law has either already acted or reserved the area for its own competence.⁹¹ This arrangement can be understood differentially in political, legal, and cultural terms. Politically, it requires leadership and institutions at both levels of authority with clear delineation of the roles and competencies served by each. In legal terms, federalism requires harmonization of rules and processes between both levels, and such harmonization usually entails designation of supremacy to the federal government in case of disagreements or uncertainties. And culturally,

86. *Id.* at 164.

87. See DAVID M. ENGEL, *The Oven Bird's Song: Insiders, Outsiders, and Personal Injuries in an American Community*, in *LAW AND COMMUNITY IN THREE AMERICAN TOWNS* 27, 32–33 (Carol J. Greenhouse et al. eds., 1994).

88. See, e.g., *Kelly v. Gwinnell*, 476 A.2d 1219, 1224 (N.J. 1984).

89. See *BLACK'S LAW DICTIONARY* 687 (9th ed. 2009).

90. See *DOBBS ET AL.*, *supra* note 9, at 39.

91. U.S. CONST. art. VI, cl. 2.

federalism is the process of balancing regional or local values and symbols against national ones.

Political contours of American federalism are most apparent. Each state is governed by analogous tripartite branches of executive, judicial, and legislative authority although details and nomenclature within each may differ.⁹² And administrative departments are often also analogous in shape and function so that, for example, California has its own state-level Environmental Protection Agency tasked with enforcing that state's own regulations in a manner largely similar to the Federal Environmental Protection Agency.⁹³ Demand for such political institutions is largely secured by the Constitution's Tenth Amendment, which states in relevant part that "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."⁹⁴ Thus, each state retains in theory significant political autonomy and must function as a sovereign over numerous aspects—highway safety for instance—of people's everyday life.⁹⁵ In this regard, with a view only to institutions and leadership, the political dimensions of American federalism appear to leave considerable power in the hands of each state.

Behind institutions and leadership sits the legal authority through which they operate and regulate behavior. The proper legal dimensions of federalism afford less local autonomy than the distribution of political power that flows from them. In addition to the Tenth Amendment's reservation clause, Article I, Section 8 of the Constitution provides enumerated powers for federal authorities. These include the power to collect taxes, borrow on credit, regulate transnational and interstate commerce, establish naturalization rules, establish bankruptcy rules, coin money and punish counterfeiting, establish post offices, protect copyrights, establish federal tribunals, punish crimes on the high seas, declare war, raise an army, provide a navy, develop military governance, call upon the military to maintain the Union, arm and discipline the military,

92. *State and Local Government*, WHITE HOUSE, <http://www.whitehouse.gov/our-government/state-and-local-government> (last visited Apr. 21, 2014).

93. See CAL. ENVTL. PROTECTION AGENCY, <http://www.calepa.ca.gov/> (last updated Mar. 20, 2014); *Laws and Executive Orders*, U.S. ENVTL. PROTECTION AGENCY, <http://www2.epa.gov/laws-regulations/laws-and-executive-orders> (last updated Mar. 16, 2014).

94. U.S. CONST. amend. X.

95. See Amy Lehman, Briefly Noted, *Dormant Commerce Clause Revisited: Kassel v. Consolidated Freightways Corp.*, 35 U. MIAMI L. REV. 388, 388 (1981) (quoting *Bibb v. Navajo Freight Lines, Inc.*, 359 U.S. 520, 524 (1959)).

legislate for the District of Columbia and other federal properties, as well as pass any laws “necessary and proper” for the execution of the above tasks.⁹⁶ In the eyes of many, the Necessary and Proper Clause can provide the empowering authority for most federal legislative efforts, particularly when paired with the Interstate Commerce Clause.⁹⁷ That reading, however, has been disfavored in Supreme Court jurisprudence since *United States v. Lopez*, in which a federal statute barring guns from school areas was struck down as exceeding the scope of federal commerce power.⁹⁸ This principle was reaffirmed in *National Federation of Independent Business v. Sebelius*, where the Roberts Court again reinforced limitation on federal commerce power in the domain of health insurance despite finding federal authority under the taxation clause.⁹⁹ Outside the enumerated powers of Article I, federal authority has been extended by constitutional amendments.¹⁰⁰

Finally, underlying the political and legal worlds of federalism sits a cultural dimension that acts in mutual feedback with these other levels. If political institutions and leadership are shared between state and federal levels and if legal authority is granted to federal and state bodies on different matters of competence, then these follow from an implicit agreement that cultural matters are also best divided between state and federal levels of governance. Culture, here, includes all symbols, practices, and belief systems of a society. As it relates to politics and law, culture is the extra-legal array of norms and customs that underpin legal authority and the efficiency by which it regulates a population.¹⁰¹ Language, for instance, is one such custom; although it need not be universal, its predominance may be requisite to the widespread understanding and agreement of legal norms. Religion is a second example; the predominance of individual religious communities in certain states of the Union—Mormons in Utah for example—has differentially shaped legal rules in those states where complete national uniformity in the form of federal law might prove untenable or inefficient.¹⁰² Freedom of religion,

96. U.S. CONST. art. I, § 8.

97. See, e.g., J. Randy Beck, *The New Jurisprudence of the Necessary and Proper Clause*, 2002 U. ILL. L. REV. 581, 616–19 (discussing the expansion of federal power in pre-*Lopez* Commerce Clause jurisprudence and its interdependence with the Necessary and Proper Clause).

98. See 514 U.S. 549, 561 (1995).

99. See 132 S. Ct. 2566, 2587, 2594, 2600 (2012).

100. See, e.g., U.S. CONST. amend. XVIII.

101. See Ilhyung Lee, *In re Culture: The Cross-Cultural Negotiations Course in the Law School Curriculum*, 20 OHIO ST. J. ON DISP. RESOL. 375, 410 (2005).

102. See, e.g., Dawn House, *State Defends Mormon Church Influencing Utah Liquor Laws*, SALT LAKE TRIB. (Jan. 22, 2012, 4:57 PM), <http://www.sltrib.com/sltrib/money/53341059-79/state-liquor-utah-laws.html.csp> (examining the purported influence of the

meanwhile, is sufficiently general and fundamental as to justify federal protection. Though the manner in which cultural domains are divided among state and federal authorities may be interpreted differently, the *fact of* such division can hardly be disputed.

For those who believe federalization is intrinsically a bad thing, tort law has traditionally been comprised of common law rules hailing from customary norms that emerge from community life and social organization.¹⁰³ Such arguments fetishize *community* and misread the manner in which federalism already deals with culture. This use of *community* is problematic for several reasons. First, it taps into nationalist narratives in which a large population of individuals separated by great distances and ideological positions must imagine themselves as descendants of a common folk past.¹⁰⁴ As many have pointed out, this imagination of common roots has formed the basis for fascist political projects and mass xenophobia—particularly in Europe where ethnic diversity is abundant and geopolitical territory scarce.¹⁰⁵ Second, it ignores the great diversity extant and emergent in American cities and towns across the nation. Resistance to such diversity was precisely one undercurrent of the “states’ rights” movement that opposed civil rights in the 1950s.¹⁰⁶ Even discounting that past, the present ethnoracial diversity of the American landscape does not support resistance to tort federalization in the name of unitary community. This is not to suggest uniformity at the level of federal law is preferable but rather that the choice whether or not to federalize an area such as tort law should not be made based upon a mythically common community when its existence is increasingly aspirational rather than empirical.

Mormon Church on the Utah State Legislature in the ban of happy hours, among other liquor-related legislation).

103. See, e.g., Robert C. Post, *The Social Foundations of Privacy: Community and Self in the Common Law Tort*, 77 CALIF. L. REV. 957, 957 (1989) (examining the influence of changing norms on the evolution of the right to privacy).

104. See Eric Hobsbawm, *Introduction: Inventing Traditions*, in *THE INVENTION OF TRADITION* 1, 1–5 (Eric Hobsbawm & Terence Ranger eds., 1983).

105. See ROBERT O. PAXTON, *THE ANATOMY OF FASCISM* 32–42 (2004).

106. See Thelton Henderson, Justice, U.S. Dist. Court, N. Dist. of Cal., Social Change, Judicial Activism, and the Public Interest Lawyer, in 12 WASH. U. J.L. & POL’Y 33, 39 (2003).

Finding the suitable balance between state and national cultural uniformity is a key purpose of federalism.¹⁰⁷ Scholars who argue against federalization in the name of community perhaps misread the concept to necessarily imply full federal incursion into state competency based upon fears of a slippery slope of federal intervention. These fears are unjustified at the very least because national governments cannot generally—particularly in the United States example—easily govern vastly separated and diverse populations. They rely upon states for collaboration in this effort and must therefore leave in local governments a substantial degree of sovereignty.

Viewed in this light, federalism appears to match the metafunctions of tort law that characterize recognized functions such as optimal deterrence and loss distribution. First, it enables large-scale social engineering—the refinement of a social order in ways that exceed current realities. Indeed, the civil rights example offers ideal illustration of the way federalism allowed genesis of a new social order likely impossible under unchecked states’ rights. Had the Supreme Court chosen to favor community in that example, the nation as a whole might have retained a racially segregated urban landscape for years to come. Although the states have been described as ideal “laboratories” for social experimentation in the area of tort law,¹⁰⁸ this observation reminds us that the state is not the exclusive geopolitical unit on which such experimentation is possible or desirable.

Second, like other functions, federalism also entails critical balancing of key social and legal interests. At the most general, this takes the form of power balancing.¹⁰⁹ Concentrated too far in the hands of states, political authority over citizens might encourage some states to discriminate against citizens of other states and recent migrants.¹¹⁰ Concentrated too far in the hands of national government, such authority might privilege interests at the seat of power and disfavor marginal territories or political minorities.¹¹¹ The balance between levels affords protection of individual rights against local interests, as well as protection of local interests against burial under national priorities and projects.

Finally, federalism may be construed as an ongoing quest for efficiency. Many would disagree with this claim by pointing to government

107. See Glenn S. Koppel, *The Fruits of Shady Grove: Seeing the Forest for the Trees*, 44 AKRON L. REV. 999, 1000–01 (2011).

108. Klass, *supra* note 15, at 1507, 1510.

109. See Robert Justin Lipkin, *Federalism as Balance*, 79 TUL. L. REV. 93, 94 & n.1 (2004).

110. Cf. U.S. CONST. art. IV, § 2, cl. 1 (requiring that each state extend to all persons the privileges and immunities of citizenship afforded in other states).

111. See Lipkin, *supra* note 109, at 113–14.

expenditures of tax revenue. But the operations of government and the arrangement that leads to its authority are two separate matters. And again, in certain areas of competence such as overseas military operations or foreign trade, the national government is usually able to act far more effectively. Likewise, the maintenance of city streets or building codes and inspection practices are likely more effective when performed by local policy experts and technicians. Though it may often get such competence allocations wrong, *federalism*, here, is the ongoing effort to refine them.

As a process concerned with the distribution of political, legal, and cultural authority between local and national levels of governance, federalism exhibits several of the qualities associated with existing functions of tort law. cursory review of those functions—corrective justice, optimal deterrence, loss distribution, and to some extent compensatory and social justice—reveals common characteristics shared among them. These characteristics include the capacity for social engineering, interest balancing, and pursuit of resource efficiency. These characteristics, or metafunctions, all seem to be served on some level by federalism.

But, as more than a concept, federalism looms large over state common law with the capacity to retool existing doctrine and formulate new rights and liabilities. It changes jurisprudence in matters historically rooted in medieval England or Roman city-states, alters the strategies and tactics of legal advocacy, and redefines social expectations of law in culture. Part V below is a survey of the diverse areas in which the federalization of tort law has already taken place and a modest evaluation of the results such developments have brought.

V. CURRENT PATTERNS OF FEDERAL INCURSION INTO STATE LAW TORT CLAIMS

Notwithstanding the torts-as-state-common-law formulation described above, federal authority has reshaped tort doctrine in a number of readily identifiable ways. Each of these has had a concomitant impact upon legal culture—the symbols and practices employed by adjudicators, legal professionals, and laypeople involved in the following types of cases. The first may be grouped around *constitutional rights* implicated through the tort system. These include, among other things, First Amendment protection of free expression and its implication in tort actions, including defamation or false light. The second type can be grouped as *federal preemption* cases—claims arising under common law tort theory, most often negligence or products liability, but preempted by federal legislative

act that supersedes state claims under the Supremacy Clause.¹¹² Preemption cases of this kind range widely in subject matter from transportation to medical devices to environmental harms. The current Part presents each of these areas, describing legal claims and arguments comprising each with particular interest in any common pattern to make sense of current contours of tort federalization.

A. *Constitutional Rights*

Civil liability in certain areas of tort law risk violation of a defendant's key constitutional rights. Where this has been the case, state court jurisprudence has been modified by constitutional requirements to safeguard those rights. Although the relative accuracy rate of post-federalization rulings in this area remains a critical area of further investigation, this subpart presents only the main areas where fundamental rights have justified federal incursion.

1. *The First Amendment: Defamation, Privacy, and Emotional Distress*

Liability for reputational and dignitary harms to the person is the clearest area in which state law doctrines have become federalized. Here, state rules have been modified by additional language meant to ensure First Amendment protection for speech.¹¹³ Common law rules were not entirely supplanted, but the influence of federal law beginning in 1964 marked a tidal shift in tort jurisprudence wherein state court judges were asked to apply a constitutional test to ensure protection of a plaintiff's reputation or privacy did not also constrain or chill valued speech.¹¹⁴ Through this balancing approach, harmful speech in this area of constitutional law is considered "less protected" speech.¹¹⁵ To understand why the First Amendment suddenly required changes to reputational and dignitary tort theories in the early 1960s, it is useful to take a historical approach by looking first at what the common law theories required for both a prima facie case and privileges and then looking at what the new rulings added or subtracted from those. Most importantly, it will be useful to note the ambient cultural context in which such rulings arose, for therein lies the first key to assessing the propriety of tort federalization.

112. U.S. CONST. art. VI, cl. 2.

113. See *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 279–80 (1964).

114. See *id.*

115. See ERWIN CHEMERINSKY, *CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES* 1046 (3d ed. 2006).

Under modern rules, tort liability for speech-related conduct that damages a public figure plaintiff's reputation requires application of the "actual malice" standard.¹¹⁶ This test requires that the defendant have harmed the plaintiff through the utterance of a statement that is demonstrably false and that the utterance have been made with knowledge of or reckless disregard for the falsity of the statement.¹¹⁷ Actual malice has been held to apply as a safeguard against chilling effects on truthful speech—particularly of the kind involving political or public matters on which free exchange of ideas would be most desirable.¹¹⁸ The test was first articulated by Justice Brennan's majority opinion in the seminal defamation case *New York Times v. Sullivan*,¹¹⁹ but it was later applied in speech cases brought under theories of *false light*, *public disclosure*, and *emotional distress*.¹²⁰

The federalization of defamation through the actual malice standard is a fascinating development. It captures succinctly what is probably at stake in all areas of federal incursion: the proper balance between cultural uniformity and cultural alterity where alterity is manifested in the normative differences between discrete jurisdictional units or between the present and the past. Defamation protects the plaintiff's reputation from false assertions of fact, however the value of reputation may itself have changed over time since the theory's development under British common law.¹²¹ Provisionally adopting the evolutionist view of law and society, modern law is marked by move from "status to contract" where social relations depend less upon an individual's social position and more upon the individual's bargained for, legally cognizable relationships.¹²² Early protection of individual reputation under British common law might be read as a holdover from this premodern stage of sociolegal

116. DOBBS ET AL., *supra* note 9, at 1178 (discussing the "*Times-Sullivan*" rule).

117. *Id.*

118. See David A. Anderson, *Is Libel Law Worth Reforming?*, 140 U. PA. L. REV. 487, 532–33 (1991). The desirability of free speech on matters of political or public concern is a premise originating with the Constitution's Framers in response to their specific cultural condition under British rule. See CLYDE AUGUSTUS DUNIWAY, *THE DEVELOPMENT OF FREEDOM OF THE PRESS IN MASSACHUSETTS* 123 (1906). It should not be taken for granted as a "universal" in either the spatial or temporal sense.

119. *N.Y. Times*, 376 U.S. at 279–80.

120. See *infra* notes 144–58 and accompanying text.

121. See 3 RESTATEMENT (SECOND) OF TORTS § 559 cmt. e (1977).

122. See HENRY SUMNER MAINE, *ANCIENT LAW: ITS CONNECTION WITH THE EARLY HISTORY OF SOCIETY AND ITS RELATION TO MODERN IDEAS* 140–41 (1986).

evolution. Indeed, the common law cause of action for libel or slander permitted “presumed” damages for certain types of utterances without proof of actual harm because, it was thought, certain verbal assaults necessarily damaged one’s reputation.¹²³

The common law claim for libel or slander required basic elements that are still necessary today. The plaintiff must have shown that a defendant made a “defamatory statement”—tending to cause harm to one’s reputation in a community—that was sufficiently “concerning” the plaintiff rather than vague or objectless and that this statement was “publi[shed]” or communicated to at least one other person.¹²⁴ Under this basic prima facie case, the cultural situation of the plaintiff could be narrowly drawn and figured prominently. First, the element of defamatoriness was relatively subjective: it could be damaging in the eyes of a tangible community, for example, a village; a vocational community, for example, shoemakers; or a spiritual community, for example, Orthodox Jews. Under modern rules, this narrowness is captured in the doctrinal recognition of “substantial and respectable minority” opinion to establish defamatoriness.¹²⁵ Similarly, the “concerning” requirement asked that the plaintiff show cognizable membership in a group in cases where the plaintiff was not mentioned by name but defamed by association with a named group.¹²⁶ These elements of the common law claim invoked a high degree of cultural specificity. Such specificity may have been appropriate under early modern conditions where *community* stood for something concrete, where social relations rarely crossed large geographic spaces, and where political interests tended to remain local for practical and economic reasons. But, a difficulty arose as these simple conditions evolved into more complex social realities. How, in short, could local norms as to reputational harm be applied to speech-uttering defendants operating at distances remote from the cultural milieu in which the above assessments were always made?

A litany of conditional and absolute privileges available as defenses to the common law case were already applied to this problem. The conditional privileges were those that could be raised to defeat a complete prima facie case in the absence of scienter or malice on the part of the defendant.

123. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 349 (1974).

124. *See* 3 RESTATEMENT (SECOND) OF TORTS § 558 (1977) (modern definition of *defamation*); WILLIAM L. PROSSER, *LAW OF TORTS* § 111 (4th ed. 1971) (common law definition of *defamation*).

125. *See* 3 RESTATEMENT (SECOND) OF TORTS § 559 cmt. e (1977). Although perceptions of a community of Orthodox Jews has been held sufficiently significant to establish that a statement was “defamatory,” *Braun v. Armour & Co.*, 173 N.E. 845, 845 (N.Y. 1930), perceptions of a prison inmate community have been held to be the opposite, *Saunders v. Bd. of Dirs., WHYY-TV*, 382 A.2d 257, 259 (Del. Super. Ct. 1978).

126. *See* 3 RESTATEMENT (SECOND) OF TORTS § 564A (1977).

So long as a damaging false statement was made without intent to harm the plaintiff, the defendant could be absolved of liability for reputational harm that resulted. Absolute privileges were those that could shield liability even for such statements made with ill intent. Among these privileges, two major themes that would have pertained to *New York Times* were news media and political status. Under the “fair report” privilege, for instance, reporting on truthful proceedings or documentation from public sources was shielded from liability even when false and reputationally damaging.¹²⁷ Under the judicial proceedings and legislative acts privileges, judges and elected representatives were shielded from false and reputationally damaging statements made in the course of their related business.¹²⁸ Although these are only a few examples of the many privileges applied under the common law in defamation cases, they begin to raise the question why a federal standard was necessary to counterbalance tort protection for reputation with constitutional guarantees on free speech.

That federal standard, the actual malice test, emerged in a case of unique historical and political significance. *New York Times Co. v. Sullivan* saw a claim from an Alabama police chief against a nationally circulating print media outlet for statements it published regarding his treatment of civil rights demonstrators.¹²⁹ The demonstrations were symptomatic of widespread racial tensions around the country and targeted local attitudes on race and law enforcement practices specific to the Deep South.¹³⁰ From the defendant’s perspective, Alabama local community practices regarding race were backwards and justified not only the public unrest described in the *New York Times* but also the defendant’s self-assessment of the propriety of its reporting on that unrest.¹³¹ New York, not Alabama, in short, was to provide the cultural basis for judgments on reputational harm to segregationists or repressive police practices. From the plaintiff’s perspective, the urban, northern news media did not comprehend local attitudes on difference and tradition. More importantly, the *New York*

127. *E.g.*, *Hudak v. Times Publ’g Co.*, 534 F. Supp. 2d 546, 559 (W.D. Pa. 2008) (citing *Sciandra v. Lynett*, 187 A.2d 586, 588–89 (Pa. 1963)).

128. *See, e.g.*, *Powell v. McCormack*, 395 U.S. 486, 503 (1969) (legislative acts privilege); 3 RESTATEMENT (SECOND) OF TORTS § 586 (1977) (judicial proceedings privilege).

129. 376 U.S. 254, 256 (1964).

130. *See id.* at 256–58.

131. *See id.* at 256–57, 260–62.

Times article was factually inaccurate and painted a single local police chief as an enemy of progress.¹³²

This opposition, exaggerated here for clarity, implicated two major facets of cultural change in the early 1960s period: civil rights activism and growing news media hegemony. Elsewhere under U.S. constitutional law, the Supreme Court supported the civil rights movement by rendering invalid de jure racial segregation.¹³³ Discounting the widely supported “states’ rights” rhetoric used to justify local autonomy in the area of civil rights, the federal judiciary decided in effect that the states had to be brought into conformity with national, for example, urban or metropolitan, attitudes on race.¹³⁴ In this move, the Court further converted race from a purely cultural issue into a legal one.

Similarly, the application of federal authority to tort law in defamation using the underlying civil rights fact pattern of *New York Times* was no coincidence. As many have pointed out since, the purpose of the actual malice standard was not to protect harmful but easily proven true statements, nor harmful but unverifiably false statements; the former could survive a common law claim with truth as an absolute defense, while the latter was not worthy of protection a priori.¹³⁵ Nor was the goal to discourage harmful but easily proven false statements; these statements were already deterred under the common law. Rather, the main object of the actual malice standard and new burdens was to protect harmful but unverifiably true statements—exactly those utterances that would be valuable in public criticism of segregationist or other culturally obstructionist public officials.

The emergence of tort federalization in a news media case is also unsurprising given the twentieth-century emergence of nations as “imagined” or “represented” communities.¹³⁶ The advent of modern nation-states occurred in a period when population size, urban living, and social complexity combined to prevent individual members of modern societies—subjects of the new statehood—from ever knowing most members of their general community.¹³⁷ Accordingly, nationhood emerged to bind these members together through shared symbols and practices across vast expanses of space, climate, and erstwhile cultural

132. *Id.* at 258.

133. *Brown v. Bd. of Educ.*, 347 U.S. 483, 495 (1954).

134. *See id.*; Patrick M. Garry, *Federalism’s Battle with History: The Inaccurate Associations with Unpopular Politics*, 74 UMKC L. REV. 365, 378 (2005).

135. *Cf.* Anderson, *supra* note 118, at 521–22, 524.

136. *See, e.g.*, ANDERSON, *supra* note 32, at 6 (discussing the problematic notion of community in the modern world); JOHN D. KELLY & MARTHA KAPLAN, REPRESENTED COMMUNITIES: FIJI AND WORLD DECOLONIZATION 4 (2001).

137. *See supra* notes 31–32, 103–05 and accompanying text.

differences. Reaching across these distances, the new “print capitalism” of newspapers and trade books permitted ideas and images to circulate more widely, freely, and quickly than they ever had before. Knowledge disparities that may have once characterized early modern American society—as between working and propertied classes—were reduced. More importantly, the common circulation of ideas and imagery participated in the creation of a “uniform” American nation.

That uniformity was deeply contingent upon circumscription of insider and outsider units. The U.S. civil rights movement, with which *New York Times* was concerned at a metalevel, was about this circumscription. Its participants sought both symbolic and materialist inclusion of African-Americans through equal application of existing law and new federal legislation. Social exclusion of nonwhites prior to *Brown v. Board of Education* strengthened claims about cultural uniformity across the American landscape. Despite observable linguistic and religious differences among the many white immigrants who arrived on American shores since the Revolution, a mainstream white population existed largely in direct contradistinction to the “black”—and “brown”—populations excluded under segregation. Even if segregation only directly impacted southern states, its survival permitted symbolic differentiation in both northern and southern regions regardless of local rules. This contradistinction required maintenance of black outsiders in order to perennially construct and maintain a uniform white insider status. On this account, federalization of norms was not necessary to bring about uniformity.

As the nation warmed to the objectives of the civil rights movement, insiders became less uniform in two respects. First, they now included white as well as nonwhite communities. Second, the white population was divided over the cultural primacy of segregation.¹³⁸ In such a context, federalization became necessary to restore uniformity across the now larger insider national population.¹³⁹ Such federalization took different forms. The first and most proximate, discussed further below, came in the form of federal preemption via legislation at the national level.¹⁴⁰ The second was that of constitutional protection for fundamental rights. In the latter category, the actual malice standard emerged to significantly

138. See, e.g., Herbert H. Hyman & Paul B. Sheatsley, *Attitudes Toward Desegregation*, 211 SCI. AM. 16 (1964).

139. See, e.g., ABRAHAM, *supra* note 41, at 254–59 (supporting the idea that antiracist nation building may have been the partial impetus behind the decision in *N.Y. Times*).

140. See *infra* Part V.B.

modify tort liability for reputational harms in cases where freedom of speech could be chilled by the threat of a common law defamation suit.¹⁴¹

Protection of free speech in this fashion almost explicitly served the uniformity function of federalization in common law. In *New York Times*, Justice Brennan was clearly interested in uniformity as the terminus of social change on the subject of civil rights.

The general proposition that freedom of expression upon public questions is secured by the First Amendment has long been settled by our decisions. The constitutional safeguard, we have said, “was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people.” “The maintenance of the opportunity for free political discussion to the end that government may be responsive to the will of the people and that changes may be obtained by lawful means, an opportunity essential to the security of the Republic, is a fundamental principle of our constitutional system.” “It is a prized American privilege to speak one’s mind, although not always with perfect good taste, on all public institutions,” and this opportunity is to be afforded for “vigorous advocacy” no less than “abstract discussion.” The First Amendment, said Judge Learned Hand, “presupposes that right conclusions are more likely to be gathered out of a multitude of tongues, than through any kind of authoritative selection. To many this is, and always will be, folly; but we have staked upon it our all.”¹⁴²

Applied to the facts of that case, this reasoning suggested that the *New York Times* should *not* be liable for making assertions of fact that are damaging and false but not known to be false or consciously disregarded as such when reporting on a police official.¹⁴³ Such freedom from liability best guarantees that true statements regarding such an official will be protected and says that the information contained in such statements is of especially high value to the social change taking place at different rates around the country at that time. Here, information is in the service of change, change is in the service of uniformity, and uniformity is in the service of—at least one vision of—equality.

Although not every defamation case is about underlying race relations, subsequent extension of the new standard appeared frequently to pivot on fact patterns arising amid rapid social change. First, the standard was extended from defamation analysis into the invasion of privacy torts—notably false light. At common law, the false light claim created liability for a defendant who “gives publicity to a matter concerning another that

141. See *supra* notes 115–19 and accompanying text.

142. *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 269–70 (1964) (citations omitted) (quoting *NAACP v. Button*, 371 U.S. 415, 429 (1963); *Roth v. United States*, 354 U.S. 476, 484 (1957); *Bridges v. California*, 314 U.S. 252, 270 (1941); *Stromberg v. California*, 283 U.S. 359, 369 (1931); *United States v. Associated Press*, 52 F. Supp. 362, 372 (S.D.N.Y. 1943)).

143. See *id.* at 287–88.

places the other before the public in a false light . . . if . . . the false light in which the other was placed would be highly offensive to a reasonable person.”¹⁴⁴ At face value, the theory is most distinct from defamation insofar as harm is to the dignity—right to be seen as oneself—rather than the reputation of the plaintiff and insofar as the “publicity” required under the theory had to be more substantial than the mere third person required in defamation. Furthermore, the claim is available even where the information publicized is “technically true” but implies clearly an objectionable false light; a classic example of this is the apolitical individual photographed walking in front of a political rally whose photo is later used in print to illustrate that individual’s attendance at the rally.

This common law rule was then supplemented by the actual malice requirement. In the seminal case *Time, Inc. v. Hill*, a private figure plaintiff sued another news media defendant for publishing photos of a reenactment of a hostage crisis in which the plaintiffs had been the victims.¹⁴⁵ The photos suggested that the Hill family had been brutalized by their captors, although the true story included far less physical conflict than that which was depicted.¹⁴⁶ The Court concluded that a false light claim in such media defendant cases would require actual malice.¹⁴⁷ Although the Court concluded the additional test could have been met at the time, it is uncertain today whether it would be on the same facts given the nonpublic figure status of the plaintiffs.¹⁴⁸ Nevertheless, requirement of the actual malice standard in privacy cases involving the creation of a false light by media defendants is still necessary and serves an informational uniformity function similar to that found in the defamation cases.

A second privacy tort federalized under *New York Times* was public disclosure of private facts. Designed like other privacy theories to protect a dignitary interest in one’s solitude, the public disclosure tort is intimately and inversely related to another party’s right to express oneself in the public sphere.¹⁴⁹ Hence, *Cox Broadcasting Corp. v. Cohn* decided in 1978 that such expression was constitutionally protected when it conveyed

144. 3 RESTATEMENT (SECOND) OF TORTS § 652E (1977).

145. 385 U.S. 374, 377–78 (1967).

146. *See id.*

147. *Id.* at 390.

148. *See id.* at 393–94.

149. *See* 3 RESTATEMENT (SECOND) OF TORTS § 652A (1977); John A. Jurata, Jr., Comment, *The Tort that Refuses To Go Away: The Subtle Reemergence of Public Disclosure of Private Facts*, 36 SAN DIEGO L. REV. 489, 498, 544 (1999).

facts that were already public record.¹⁵⁰ There, a broadcast news reporter included in one story the name of a Georgia rape victim not previously identified in the press.¹⁵¹ The young woman's name had been obtained lawfully from an indictment in circulation in the courtroom during the suspect's hearing.¹⁵² A Georgia statute had previously deemed such a victim's name not to be a matter of public concern; however, this provision was overturned on the basis of First and Fourteenth Amendment protections on free speech.¹⁵³

The extension of actual malice moved beyond reputation and privacy to reach a third theory of liability: emotional distress. For emotional harm caused by an intentional act of human expression—intentional infliction of emotional distress (IIED)—the Supreme Court held in *Hustler Magazine, Inc. v. Falwell* that public figures must show the statement was made with actual malice.¹⁵⁴ There, *Hustler Magazine* published a parodic advertisement for a veritable liquor brand featuring a fake “testimonial” by the Reverend Jerry Falwell describing an incestuous act with the latter's own mother.¹⁵⁵ *Hustler* itself was a media defendant while Falwell was a “public figure” under standard *New York Times* jurisprudence.¹⁵⁶ The unanimous Court suggested that to permit public figure recovery for IIED without modification would allow public figure plaintiffs to make a prima facie case for liability on the very same conduct that, under defamation, would require actual malice.¹⁵⁷ Further, because the standard *New York Times* test must be met to “convincing clarity” rather than the usual civil burden of “more likely than not,” IIED in its unmodified form provided a significant “end run” around the speech protections created in *New York Times*.¹⁵⁸

The lead cases introducing and extending actual malice to defamation, false light, public disclosure, and IIED exhibit several common characteristics. The most obvious is that they seek legal recourse for harmful acts of expression that were committed by media defendants. Furthermore, the questionable utterance in each pertains to one or another socially unacceptable behavior: racism, kidnapping, rape, and incest. These common threads are no coincidence: the actual malice requirement is intended to protect harmful but unverifiably true statements about public

150. 420 U.S. 469, 496 (1975).

151. *Id.* at 471–74.

152. *Id.* at 472.

153. *Id.* at 471–72, 496.

154. 485 U.S. 46, 56 (1988).

155. *See id.* at 48.

156. *See id.* at 47, 57.

157. *See id.* at 47, 52–53.

158. *See N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 279, 285–86 (1964).

figures or matters of public concern.¹⁵⁹ The risk of liability for such statements will be justifiable to news media only when those statements are of heightened public interest. Thus, in most cases where actual malice applies, the subject matter will be a socially controversial one.

But the question is why nationwide uniformity, wrought by federalization through First Amendment jurisprudence, is acceptable in this domain. The answer is culture based. Americans over the twentieth century came to view themselves as part of a national “public sphere”—a forum for the exchange of ideas and information on matters of society, politics, and economy.¹⁶⁰ As described *supra*, genesis of this public sphere was necessary for the development of modern nationhood.¹⁶¹ But, for purposes of understanding federalism, it is not the emergence of a nationwide public sphere that matters most but the regulation of it through application of norms necessarily national in scope. In other words, public debates about “Americanness” itself in the latter twentieth century made federalization of tort in defamation, privacy, and emotional distress more acceptable, if not desirable.

Today, little has changed except that perhaps an expansion of this collective reflection on self-identity now includes notions of belonging that far transcend our national borders. No better example exists than the concept of *human rights*—a distinctly twenty-first century term that seems to suggest universalism but is often used for clear differentiation and distancing between “us and them,” “self and other.”¹⁶² In response to this globalization of self-identity,¹⁶³ should legal norms governing expression also be globalized? One relatively recent illustration of this open issue was the publication of cartoons by newspapers in Europe. That episode, in which Muslims across Europe and beyond protested graphical depiction of the Islamic prophet out of religious conviction, caused many to question whether “First Amendment” rights were to be subordinated out of fears of terrorism.¹⁶⁴ In this climate, grassroots

159. See *supra* note 135 and accompanying text.

160. See Blandine Chelini-Pont, *Religion in the Public Sphere: Challenges and Opportunities*, 2005 BYU L. REV. 611, 614.

161. See *supra* notes 103–04.

162. See, e.g., ROBERT MEISTER, *AFTER EVIL: A POLITICS OF HUMAN RIGHTS* 1 (2011).

163. See generally ANTHONY GIDDENS, *MODERNITY AND SELF-IDENTITY: SELF AND SOCIETY IN THE LATE MODERN AGE* (1991) (discussing “[t]he question of modernity” in terms of “globalising influences on the one hand and personal dispositions on the other”).

164. Gene Policinski, *Riots over Muhammad Cartoons Challenge Freedoms*, FIRST AMEND. CENTER (Feb. 7, 2006), <http://www.firstamendmentcenter.org/riots-over-muhammad>

religious leaders took the initiative to publically burn Qurans in apparent reaffirmation of the American constitutional right to do so.¹⁶⁵ That the debate mobilized legalistic, constitutional discourse is most significant, particularly as doing so displaced simpler discussions about basic respect and humility in the face of other people's values.

2. *The Fourteenth Amendment: Public Takings and Damage Awards*

Outside reputational and dignitary harms, state tort law has received narrow federal influence by constitutional authority in harms to property. Here, traditional harms to property remain defined through state common law jurisprudence. But, in a rare set of cases involving government destruction or impairment of private property, courts have sometimes held law enforcement and emergency relief agencies liable for violation of the Fifth Amendment's Takings Clause, which extends to the states through the Fourteenth Amendment.¹⁶⁶ Under the takings clause, federal and state authorities have the power of *eminent domain*—the ability to take private property for public use—provided that they offer “just compensation” in exchange.¹⁶⁷ Constitutional in appearance, this doctrine is at bottom perhaps a contractual one: it permits a forced sale of property where the first mover is the state and the aim of the transaction is some form of public benefit.¹⁶⁸

The question, then, in a number of tort fact patterns, is when such action constitutes a “taking.” For a private actor, liability for impairment of another's property attaches under the theories of trespass to chattels or conversion. Trespass to chattels is “intentionally . . . dispossessing another of the chattel, or . . . using or intermeddling with a chattel in the possession of another.”¹⁶⁹ Conversion, meanwhile, is an “intentional exercise of dominion or control over a chattel which so seriously interferes with the right of another to control it that the actor may justly be required to pay the other the full value of the chattel.”¹⁷⁰ In lay terms, a conversion is a more complete or more egregious trespass. Technically, conversion is a tort against an ownership interest while trespass is a tort against the

-cartoons-challenge-freedoms; Nicholas Watt, *Danish Paper Sorry for Muhammad Cartoons*, GUARDIAN (Jan. 30, 2006), <http://theguardian.com/media/2006/jan/31/religion.saudi-arabia>.

165. Dan Murphy, *Why the Planned Koran Burning Causes Outrage and Alarm*, CHRISTIAN SCI. MONITOR (Sept. 8, 2010), <http://www.csmonitor.com/World/Global-News/2010/0908/Why-the-planned-Koran-burning-causes-outrage-and-alarm>.

166. See, e.g., *Wegner v. Milwaukee Mut. Ins. Co.*, 479 N.W.2d 38, 42 (Minn. 1992).

167. U.S. CONST. amend. V.

168. See *Kelo v. City of New London*, 545 U.S. 469, 477 (2005).

169. 1 RESTATEMENT (SECOND) OF TORTS § 217 (1965).

170. *Id.* § 222A.

property integrity itself. In either case, a private individual is subject to liability for conduct that satisfies the above tests.

Such conduct, of course, is defensible under the doctrines of public and private necessity. Private necessity is an incomplete privilege that avoids liability but requires payment of damages on the theory that the trespass or conversion benefitted a single or narrow group of beneficiaries.¹⁷¹ Destruction of the plaintiff's property, in short, helped get them—but only them—out of harm's way. The common illustration is the stranded hiker who breaks into a wooded cabin to take shelter from a snowstorm. The hiker's trespass—both to the real and personal property—will be privileged, but he is still required to compensate the plaintiff. Public necessity, meanwhile, is a complete privilege and entitles a single defendant to escape all liability on the theory that the defendant's actions benefitted the general public.¹⁷² In practice, the distinction between small groups and a larger public is, predictably, not well defined. Courts have found benefit to groups as small as a boatload of ferry passengers to constitute a sufficient “public” for the complete privilege.¹⁷³

When government agencies such as law enforcement trespass to or convert private property, it almost always resembles a scenario of public necessity. In one common fact pattern, an armed fugitive takes shelter in a single home within a densely occupied neighborhood. The suspect refuses to surrender and insists on going down in a blaze of gunfire. To avoid that outcome, local SWAT officers use a bulldozer to strip the fugitive of his safe haven. Does the SWAT agency have a duty to compensate the safe but dispossessed homeowner?

Two classic doctrines say “no.” The first is sovereign immunity—a principle that predates the American Revolution in English common law¹⁷⁴ but is also enshrined in the Eleventh Amendment to the Constitution.¹⁷⁵ Without recourse to the Eleventh Amendment, state attorneys general defending law enforcement normally need only invoke the common law or state constitutional provisions that iterate this principle. Under those, if the agency had acted within its “discretionary function,” it may be

171. *Id.* § 197 & cmt. a.

172. *Id.* § 196 & cmt. a.

173. *See* *Mouse's Case*, (1609) 77 Eng. Rep. 1341, 1341 (K.B.).

174. *See* *Alden v. Maine*, 527 U.S. 706, 713 (1999).

175. *See* *Hans v. Louisiana*, 134 U.S. 1, 11 (1890).

immune to tort liability for property impairment or destruction.¹⁷⁶ The second principle, already mentioned above, is public necessity.

If successful, a public takings argument against governmental tortfeasors for property harm defeats these defenses. First, it may mean that the actions of the state actor constitute a deprivation of property without due process—a clear constitutional rights violation for which the state cannot claim immunity. Second, it may mean that the same privileged action by a private individual to save his neighborhood—for instance destroying another’s home to create a firebreak amid a brushfire—would be unprivileged if committed by law enforcement. The fate of such state action cases turns upon the state’s interpretation of the action. In some jurisdictions, a SWAT action of the kind described above amounts to an exercise of eminent domain and bars the public necessity defense.¹⁷⁷ In others, an almost identical tactical decision has been deemed an exercise of state “police power” and thus not in conflict with the defense of public necessity.¹⁷⁸ Leaving aside the question of whether SWAT officers exercise discretionary or ministerial functions, the court in the latter case simply said that tactical police decisions do not constitute takings under eminent domain.¹⁷⁹

Federal influence on state tort law in this area of doctrine is anomalous. On one hand, it reflects the influence of the well-established constitutional principle of due process in government torts. On the other, even with the split interpretations of eminent domain and police power authority,

176. *Scheuer v. Rhodes*, 416 U.S. 232, 247–48 (1974) (“[I]n varying scope, a qualified immunity is available to officers of the executive branch of government, the variation being dependent upon the scope of discretion and responsibilities of the office and all the circumstances as they reasonably appeared at the time of the action which liability is sought to be based.”).

177. *See Wegner v. Milwaukee Mut. Ins. Co.*, 479 N.W.2d 38, 42 (Minn. 1992).

178. *See Customer Co. v. City of Sacramento*, 895 P.2d 900, 913 (Cal. 1995). In accepting public necessity, the court rejected the eminent domain analogy:

In the present case an action for inverse condemnation does not lie, because the efforts of the law enforcement officers to apprehend a felony suspect cannot be likened to an exercise of the power of eminent domain. This is not a case in which law enforcement officers commandeered a citizen’s automobile to chase a fleeing suspect, or appropriated ammunition from a private gun shop to replenish an inadequate supply. Conceivably, such unusual actions might constitute an exercise of eminent domain, because private property would be taken for public use. . . . Application of the just compensation clause in the present case would mean, for example, that every time a police officer fires a weapon in the line of duty, that officer exercises the power of eminent domain over any property that the officer reasonably could foresee might be damaged as a result.

Id. (citation omitted).

179. *Id.* at 905–06.

as the court in *Wegner v. Milwaukee Mutual Insurance Co.* said, this may be decided by “basic notions of fairness and justice.”¹⁸⁰

Constitutional due process has had further influence upon awards of punitive damages—obliquely interpreted as a form of takings. Although not by any means limited to application in tort cases, these limits have had pronounced influence in tort cases where windfall punitive judgments might previously have stood as incentive for plaintiffs to litigate and for defendants to settle. Removal of the risk of disproportionate punitive judgment has, no doubt, also removed from the plaintiffs’ bar a significant bargaining chip.

This development was ushered in by the seminal case of *BMW of North America, Inc. v. Gore*. There, the Supreme Court reiterated its position that a punitive damage award could be the subject of a due process challenge if it was “grossly excessive.”¹⁸¹ In *Gore*, the plaintiff Ira Gore had purchased a new BMW automobile from a dealer in Alabama.¹⁸² The dealer delivered the car to Gore without disclosing the fact that it had suffered a pre-delivery scratch and been repainted.¹⁸³ An internal BMW policy said that presale damage repair that cost less than three percent of the retail price would not be disclosed to dealers or customers.¹⁸⁴ In this case, the damage totaled less than two percent.¹⁸⁵ Gore asserted that this amounted to fraud under Alabama tort law and prevailed in winning \$4000 in compensatory damages in a jury verdict at trial.¹⁸⁶ Alleging that the conduct was part of a nationwide scheme totaling nearly 1000 retouched vehicles, Gore also convinced the jury to award \$4 million in punitive damages.¹⁸⁷ In its words, the jury found the conduct “gross, oppressive, and malicious.”¹⁸⁸ The trial court denied a motion to reduce that amount, holding that it was not “grossly excessive,” and the Alabama Supreme Court agreed but reduced it to \$2 million on other grounds.¹⁸⁹

180. 479 N.W.2d at 42.

181. *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 562 (1996) (quoting *TXO Prod. Corp. v. Alliance Res. Corp.*, 509 U.S. 443, 454 (1993)) (internal quotation marks omitted).

182. *Id.* at 563.

183. *Id.*

184. *Id.* at 563–64.

185. *Id.* at 564.

186. *See id.* at 565.

187. *Id.* at 564–65.

188. *Id.* at 565.

189. *Id.* at 566–67 (quoting *BMW of N. Am., Inc. v. Gore*, 646 So. 2d 619, 629 (Ala. 1994), *rev'd*, 517 U.S. 559).

The Supreme Court granted review to determine whether this amount was grossly excessive or necessary to further the “State’s legitimate interests in punishing unlawful conduct and deterring its repetition.”¹⁹⁰ In making this evaluation, the Court reflected upon the wide diversity of states’ policies:

No one doubts that a State may protect its citizens by prohibiting deceptive trade practices and by requiring automobile distributors to disclose presale repairs that affect the value of a new car. But the States need not, and in fact do not, provide such protection in a uniform manner. Some States rely on the judicial process to formulate and enforce an appropriate disclosure requirement by applying principles of contract and tort law. Other States have enacted various forms of legislation that define the disclosure obligations of automobile manufacturers, distributors, and dealers. The result is a patchwork of rules representing the diverse policy judgments of lawmakers in 50 States.

That diversity demonstrates that reasonable people may disagree about the value of a full disclosure requirement. Some legislatures may conclude that affirmative disclosure requirements are unnecessary because the self-interest of those involved in the automobile trade in developing and maintaining the goodwill of their customers will motivate them to make voluntary disclosures or to refrain from selling cars that do not comply with self-imposed standards. Those legislatures that do adopt affirmative disclosure obligations may take into account the cost of government regulation, choosing to draw a line exempting minor repairs from such a requirement. In formulating a disclosure standard, States may also consider other goals, such as providing a “safe harbor” for automobile manufacturers, distributors, and dealers against lawsuits over minor repairs.¹⁹¹

In addressing the grossly excessive question, the Court was in effect eliminating some of the wide diversity it describes here. Because of the different expectations on disclosure nationwide, the Alabama Supreme Court had said that a punitive award far in excess of the compensatory damage award was an undue effort to deter lawful conduct in states beyond the one at issue.¹⁹² The U.S. Supreme Court agreed but further took issue with the Alabama court. It assessed the punitive award according to (1) the degree of reprehensibility of the conduct; (2) the disparity between the compensatory award and the punitive award; and (3) the difference between the punitives awarded here and in similar cases.¹⁹³ The Court reasoned that BMW’s conduct within the jurisdiction was not of a high degree of reprehensibility,¹⁹⁴ the compensatory-punitive ratio of 1:500 was too high,¹⁹⁵ and the assumption that a lower sanction would not have proven deterrent was unjustifiable.¹⁹⁶ Finally, affirming that

190. *See id.* at 568.

191. *Id.* at 568–70 (footnotes omitted).

192. *Id.* at 567 (citing *Gore*, 646 So. 2d at 627).

193. *Id.* at 575.

194. *Id.* at 580.

195. *Id.* at 583.

196. *Id.* at 585.

even large, mass-market tortfeasors were entitled under due process to notice of their legal requirements before a large punitive judgment could be assessed against them,¹⁹⁷ the Court held the damage amount to be excessive and reversed and remanded.

Although the majority criticized the 1:500 ratio in *Gore*, it stipulated that a mathematical formula as to excess amounts could not be prescribed.¹⁹⁸ Nevertheless, the Court in *State Farm Mutual Automobile Insurance Co. v. Campbell* reached a numerical ratio guideline to determine excessive awards in cases of ordinary economic damage amounts.¹⁹⁹ Curtis Campbell had caused a fatal auto accident in which one was killed and a second person disabled.²⁰⁰ His insurance provider State Farm resisted liability and declined to settle for an amount within Campbell's \$50,000 policy coverage.²⁰¹ The company took the dispute to trial and made assurances to Campbell and his family that they would never be held liable and required no independent counsel.²⁰² Instead, a Utah jury found Campbell liable for nearly \$150,000, and State Farm refused to appeal.²⁰³ Then, in the suit against State Farm for several claims including fraud and emotional distress, the Campbells won \$2.6 million in compensatory damages and \$145 million in punitives, which were ultimately reduced to \$1 million and \$25 million respectively.²⁰⁴ The Utah Supreme Court reinstated the \$145 million punitives, and the U.S. Supreme Court granted review.²⁰⁵ It held that under the first *Gore* prong, the reprehensibility of State Farm's conduct could be assessed only in relation to the Campbells and was therefore small, and under the second prong, the 1:145 ratio was excessive.²⁰⁶ As the Court reasoned,

We decline again to impose a bright-line ratio which a punitive damages award cannot exceed. Our jurisprudence and the principles it has now established demonstrate, however, that, in practice, few awards exceeding a single-digit

197. *Id.* at 585–86.

198. *Id.* at 582.

199. 538 U.S. 408, 425 (2003).

200. *Id.* at 412–13.

201. *Id.* at 413.

202. *Id.* (quoting *Campbell v. State Farm Mut. Auto. Ins. Co.*, 65 P.3d 1134, 1142 (Utah 2001), *rev'd*, 538 U.S. 408).

203. *Id.*

204. *Id.* at 415.

205. *Id.* at 415–16.

206. *Id.* at 423–24, 426.

ratio between punitive and compensatory damages, to a significant degree, will satisfy due process.²⁰⁷

B. Federal Preemption

The richest and most extensive area of tort federalization occurs in federal preemption by congressional act. Here, multiple complex canons of doctrine and interpretation intersect to create a flexible tapestry of cooperation and disjuncture between state and federal sovereign powers. Among these arise questions of congressional intent, institutional competency, judicial efficiency, and the cultural history of American federalism itself. Underpinning those are perhaps even deeper issues about nationhood and national uniformity in a vast geopolitical and pluralist landscape.

1. Authority and Types

Authority for federal preemption of state tort law originates with the Supremacy Clause of the Constitution's Article VI. Its language says that

[t]his Constitution, and the laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby.²⁰⁸

Although constitutional supremacy requires no further elaboration, the Court has established a body of doctrine that says legislative supremacy must be assessed with recourse to congressional intent and that where such intent is ambiguous, it will read federal legislation with a “presumption against preemption”—a doctrine inscribed into the canons of statutory interpretation.²⁰⁹ Preemption may ultimately be found for one of two reasons: either the law expressly preempts state causes of action on the same subject matter or it creates through purpose and structure an implied preemption of such claims. As some have pointed out, anti-preemption provisions typically enjoy greater deference.²¹⁰

207. *Id.* at 425.

208. U.S. CONST. art. VI, cl. 2.

209. *See, e.g.*, *Bates v. Dow Agrosciences LLC*, 544 U.S. 431, 449 (2005) (applying the presumption against preemption in a tort context). Several have argued that this presumption is deployed so erratically across the case law as to be nearly unusable. *See, e.g.*, Caleb Nelson, *Preemption*, 86 VA. L. REV. 225, 298 (2000); Catherine M. Sharkey, *Products Liability Preemption: An Institutional Approach*, 76 GEO. WASH. L. REV. 449, 458 (2008).

210. *See, e.g.*, Catherine M. Sharkey, *What Riegel Portends for FDA Preemption of State Law Products Liability Claims*, 103 NW. U. L. REV. 437, 443, 447 (2009).

Express preemption is relatively straightforward and requires a finding of clear language on the face of the federal statute indicating that the legislation removes the right of a class of tort victims to seek redress in state court.²¹¹ Where such express language is clear, the court's primary task is to determine whether the state statute or common law claim is one that the federal statute comprehends to preempt. Thus, in *Altria Group, Inc. v. Good*, the Court held that the Federal Cigarette Labeling and Advertising Act did not preempt a claim under a Maine trade practices law enabling a suit for fraudulent misrepresentation of cigarette smoking risks.²¹² "If a federal law contains an express pre-emption clause, it does not immediately end the inquiry because the question of the substance and scope of Congress' displacement of state law still remains."²¹³ Accordingly, even express provisions articulating intent to preempt have been discarded.²¹⁴

Implied preemption is more nuanced. A federal statute may overcome the presumption against preemption if it addresses subject matter, notwithstanding the absence of any explicit language to preclude a state law or claim, that would place enforcement in conflict with the state rule, or subject matter in an area of social or economic life that Congress has claimed as its domain.²¹⁵ These two forms are often known as *conflict* preemption and *field* preemption.²¹⁶ Conflict preemption allows the court to displace state law on the basis that its application stands in direct conflict with a federal rule.²¹⁷ More rare in the context of tort preemption, field preemption allows a court to invalidate a state rule if it intervenes where Congress has not directly legislated but intended to "occup[y] the field."²¹⁸ Although determination of intent to "occupy" a field is a matter of substantial debate, even the clearer notion of normative "conflict" is a matter of substantial controversy.²¹⁹

211. Schuck, *supra* note 22, at 79.

212. 555 U.S. 70, 91 (2008).

213. *Id.* at 76.

214. See, e.g., *infra* notes 380–82 and accompanying text.

215. See *English v. Gen. Elec. Co.*, 496 U.S. 72, 79 (1990).

216. See *Gracia v. Volvo Europa Truck, N.V.*, 112 F.3d 291, 294 (7th Cir. 1997).

217. See *English*, 496 U.S. at 79.

218. *Pet Quarters, Inc. v. Depository Trust & Clearing Corp.*, 559 F.3d 772, 780 (8th Cir. 2009).

219. See Eric S. Almon, Comment, *Preemption of State Failure-To-Warn Claims After Wyeth v. Levine: The Regulatory Function of State Tort Law*, 45 U.S.F. L. REV. 215, 224–25 (2010).

Finally, another important distinction must be made between regulatory preemption and tort preemption. Under regulatory preemption, a state may be precluded from implementing its own regulatory rule over a substantive area because the federal regime has been held to expressly or impliedly preempt such action.²²⁰ In such instances, it is important to note, no individual claim is necessarily left uncompensated. Rather, the state is precluded from exercising its oversight. This differs from common law tort preemption in that the latter involves decisions whether or not private causes of action can be maintained under state tort law given federal legislation or agency policy.²²¹ If the court decides that they cannot, an individual is often left without redress because the tortfeasor has complied with a federal statute or agency provision. Some have argued that this critical feature makes federal preemption of tort claims a constitutional issue.²²² Those claims, they suggest, represent a fundamental civil right effectively denied under color of federal law, and therefore, such denials demand systematic substitution of an alternative scheme for compensation akin to workers' compensation or superfund rules.²²³ This argument resembles those that say denial of state governmental tort liability under sovereign immunity *itself* constitutes a taking and demands federal court review.²²⁴ Notwithstanding these significant objections to preemption regimes, the courts have interpreted federal statutes to preclude common law tort actions in a variety of different but clustered cases. In most instances, these acts of Congress are beyond constitutional review and assumed to fall within the ambit of Article I authorities—most commonly the commerce power.²²⁵ Because these statutes are thusly directed at specific social and economic behaviors within that purview, cases arising under them are clustered around substantive aspects of sociocultural life in a manner that permits modest generalization about patterns of tort federalization through preemption. As some have said, preemption is in many respects among the last holdouts of horizontal

220. See Jack W. Campbell IV, *Regulatory Preemption in the Garcia/Chevron Era*, 59 U. PITT. L. REV. 805, 821–22 (1998).

221. See Robert J. Katerberg, Note, *Patching the “Crazy Quilt” of Cipollone: A Divided Court Rethinks Federal Preemption of Products Liability in Medtronic, Inc. v. Lohr*, 75 N.C. L. REV. 1440, 1494 (1997).

222. Goldberg, *supra* note 11, at 529.

223. See *id.* at 572, 593, 626.

224. See, e.g., Jack M. Beermann, *Government Official Torts and The Takings Clause: Federalism and State Sovereign Immunity*, 68 B.U. L. REV. 277, 312 (1988).

225. See *infra* notes 355–56 and accompanying text.

federalism jurisprudence.²²⁶ A closer look at its sociocultural implications is thus highly instructive.

2. *Social and Economic Activity*

Preemption cases have arisen around key substantive areas of national social and economic life. Several of these areas have sedimented into detailed, nuanced canons of doctrine for when federal statutes or regulatory compliance may preclude a tort claim in state court. These canons cover, among other things, the fields of transport and aviation, food and drug, environmental protection, and labor relations. In proposing a federalism function to tort law, we must understand the role state court adjudicators play in finding that tort suits in these areas are preempted. When such findings are made, the state court judge acts, in effect, as the “front-line” in the unique and comprehensive enactment of American federalism.²²⁷ This then raises the following questions: why are these specific areas the most preempted, and why are we most comfortable asking state courts to defer on them? This is a different goal than assessing the propriety of any one preemption decision.

a. *Transport and Aviation Safety*

Congress’s authority to regulate transport and aviation is well settled.²²⁸ It derives from the Commerce Clause in perhaps the most sensible manner of all authorities discussed here.²²⁹ Highway and air travel implicate movement across state lines and in their physicality demand a certain uniformity of parameters across the national landscape. Thus, automobile safety requirements should probably remain uniformly reliable across state boundaries first because the products themselves are made and sold in different places, second because once sold they carry people and goods across these lines, and third because they make use of and interact closely with the interstate highway system.

226. See, e.g., Michael S. Greve, *Against Cooperative Federalism*, 70 *MISS. L.J.* 557, 558 (2000).

227. Gluck, *supra* note 17, at 544.

228. See, e.g., *Allegheny Airlines, Inc. v. Vill. of Cedarhurst*, 132 F. Supp. 871, 879 (E.D.N.Y. 1955).

229. See *id.*

Automobile safety is governed by, among other laws and entities, the National Highway and Traffic Safety Administration (NHTSA).²³⁰ In the wake of Ralph Nader’s 1960s push for greater vehicle safety, the Highway Safety Act of 1970 created the administration within the Department of Transportation.²³¹ Over the years, the NHTSA has promulgated standards regulating the level of minimum safety required for cars sold across states.²³² Then, in *Geier v. American Honda Motor Co.*, the Supreme Court reviewed a state common law tort claim for the serious injury of a young motorist who, in 1992, while driving a Honda Accord, collided with a tree.²³³ Under the NHTSA’s Federal Motor Vehicle Safety Standard (FMVSS) 208, Honda was required to have equipped some of its 1987 vehicles with “passive restraint” systems.²³⁴ This requirement gave Honda discretion as to which system—lap belts, shoulder belts, airbags, and so forth—it would implement.²³⁵ Ms. Geier’s Accord was given only lap and shoulder belts, and the issue for the district court was whether Honda’s failure to install airbags was, in light of its compliance with FMVSS 208, shielded from liability under state court products liability claims.²³⁶ The district court found that the standard’s express preemption provision covered precisely this kind of common law claim.²³⁷ But, although the NHTSA did articulate express preemption, it also contained a “‘savings’ clause”—language seeking to preserve the state cause of action.²³⁸ Despite this tension, the appeals court found implied preemption because the state cause of action would interfere or be in conflict with the purpose of the national standard.²³⁹ The Supreme Court, in a 5–4 decision authored by Justice Breyer, agreed with the appeals court.²⁴⁰

In 2011, the Court heard a similar set of issues in *Williamson v. Mazda Motor of America, Inc.* There, a unanimous court upheld the findings in *Geier* that neither an express preemption clause nor a savings clause would dispose of conflict preemption, but it found that the state court

230. *Who We Are and What We Do*, NHTSA, <http://www.nhtsa.gov/About+NHTSA/Who+We+Are+and+What+We+Do> (last visited Apr. 21, 2014).

231. See Jerry L. Mashaw & David L. Harfst, *Regulation and Legal Culture: The Case of Motor Vehicle Safety*, 4 YALE J. ON REG. 257, 258 n.4 (1987); *Who We Are and What We Do*, *supra* note 230.

232. *Who We Are and What We Do*, *supra* note 230.

233. 529 U.S. 861, 865 (2000).

234. *Id.* at 864–65.

235. *See id.* at 875.

236. *Id.* at 865, 881.

237. *Id.* at 865.

238. *Id.* at 865–66 (citing 15 U.S.C. § 1397(k) (1988)).

239. *Id.*

240. *Id.* at 863, 865.

claim for failure to install shoulder belts in a rear inner car seat were not in conflict with a later version of FMVSS 208.²⁴¹ Said the Court, “Like the regulation in *Geier*, the regulation here leaves the manufacturer with a choice. And, like the tort suit in *Geier*, the tort suit here would restrict that choice. But unlike *Geier*, we do not believe here that choice is a significant regulatory objective.”²⁴²

Aviation safety, meanwhile, is regulated under the Federal Aviation Act of 1958 (FAA), which established the Federal Aviation Administration following a series of disastrous air collisions between civilian and military planes.²⁴³ Although other federal statutes regulate the air industry, including the Airline Deregulation Act, which establishes standards as to “rates, routes and services,” or the General Aviation Revitalization Act, which limits aircraft manufacturer liability, the FAA is the primary piece of legislation that arises in safety cases.²⁴⁴ There, the issue is always whether, notwithstanding the FAA’s express preemption and savings clauses, there is a question regarding displacement of state safety rules. In common law tort claims, this most directly affects application of an airline standard of care.

To date, there is no unified Supreme Court holding as to the overall preemptive effect of the FAA. Instead, there are a variety of fact-specific jurisdictional interpretations over, inter alia, safety standards for pilot training and conduct,²⁴⁵ overhead luggage storage,²⁴⁶ and adequate warnings in situations of air turbulence.²⁴⁷ In *Abdullah v. American Airlines, Inc.*, a widely influential case involving failure to give verbal warnings and personal injury during air turbulence en route from New York to San Juan, Puerto Rico, the Third Circuit held that the FAA preempts state rules for air safety but preserves state damage rules.²⁴⁸ In effect, as

241. *Williamson v. Mazda Motor of Am., Inc.*, 131 S. Ct. 1131, 1133–36, 1139–40 (2011).

242. *Id.* at 1137.

243. Michael J. Holland, *Federalism in the Twenty-First Century: Preemption in the Field of Air Safety*, 78 DEF. COUNS. J. 11, 12 (2011).

244. 49 U.S.C. §§ 40101, 41713 (2006).

245. *See, e.g., French v. Pan Am. Express, Inc.*, 869 F.2d 1, 5 (1st Cir. 1989).

246. Holland, *supra* note 243, at 18–19 (citing *Margolies-Mezvinsky v. U.S. Air Corp.*, No. CIV. A 98-1526, 2000 WL 122355 (E.D. Pa. Jan. 1, 2000)).

247. *Id.* at 16–18 (citing *Abdullah v. Am. Airlines, Inc.*, 181 F.3d 363 (3d Cir. 1999)).

248. 181 F.3d at 365, 376.

modified by subsequent case law in the Third Circuit,²⁴⁹ *Abdullah* established a federal standard of care for airline safety for personal injury harms that occur in the air. Taking the FAA at its word, this standard of care demands that “[n]o person may operate an aircraft in a careless and reckless manner so as to endanger the life or property of another.”²⁵⁰ Meanwhile, other courts, including at least one in the Second Circuit, have rejected FAA preemption of state safety standards.²⁵¹ “Although an impressive array of cases have followed *Abdullah*,” writes one commentator,

there are number of cases that have examined the doctrine, found it to be wanting, and held that the *Abdullah* case, which is binding only in the Third Circuit, is not persuasive and that there was no overall intent by Congress to preempt negligence claims if plaintiffs were unable to show a violation of the federal standard of care.²⁵²

The question of preemption in auto and aviation safety may not be settled uniformly with recourse to the language of the Highway Safety Act of 1970 or the FAA. As in all preemption cases, decisions turn on the quixotic determination of congressional intent—often in opposition to prima facie reading of the statutes themselves—combined with fact-driven analysis of whether *this* precise manner of harm was contemplated in the rulemakers’ scope.²⁵³

b. Food and Drug

Food and drug safety is a second axis around which federal preemption cases have clustered. This is likely because the sector is so pervasive, covering some twenty-five percent of U.S. consumer spending,²⁵⁴ and because defendants in these fields are now more often than not mass-market interstate and international actors. Classically, harm from food and drug products has been recoverable under state negligence and

249. See *Elassaad v. Independence Air, Inc.*, 613 F.3d 119, 127 (3d Cir. 2010) (holding that *Abdullah* preemption does not extend to the disembarkation process); *Abdullah*, 181 F.3d at 376.

250. 14 C.F.R. § 91.13(a) (2013).

251. See *Sakellaridis v. Polar Air Cargo, Inc.*, 104 F. Supp. 2d 160, 164 (E.D.N.Y. 2000).

252. *Holland*, *supra* note 243, at 23.

253. In *Levy v. Continental Airlines, Inc.*, for example, the court decided whether to extend a ruling on harm from a bag that had fallen from an overhead compartment to harm from a ceramic bowl that had fallen from the same. No. 07-1266, 2007 WL 2844592, at *1–4 (E.D. Pa. Oct. 1, 2007); see also *Holland*, *supra* note 243, at 18, 28 (citing *Abdullah*, 181 F.3d at 376) (discussing *Abdullah*’s holding).

254. Gardiner Harris, *The Safety Gap*, N.Y. TIMES, Nov. 2, 2008, at MM44.

products liability laws.²⁵⁵ After 1976, medical devices were separated and regulated with express congressional intent to preempt state tort law, and after 2009, tobacco products were brought within food and drug regulatory powers also through congressional act.²⁵⁶ For historical reasons, notwithstanding significant juridical overlap between them, this subpart separately describes federal preemption of tort first in drug regulation, then in medical devices, and finally in tobacco products.

i. Pharmaceuticals

Congress passed the Federal Food and Drug Act in 1906 as the “first significant public health law” that prohibited the manufacture and distribution of adulterated or misprinted drugs.²⁵⁷ The Act was initially viewed as a supplement to state common law regulation and civil remedies.²⁵⁸ In 1938, Congress then passed the Federal Food, Drug, and Cosmetic Act (FDCA), which innovated a new “premarket approval” process that included labeling oversight.²⁵⁹ At that time, if a drug was unsafe, the Food and Drug Administration (FDA) carried the burden to prove this to forestall distribution.²⁶⁰ In 1962, this was amended so that the manufacturer carried the burden to show “safety” and “effectiveness” for market approval, and Congress added a savings clause protecting state tort claims except in cases of “direct and positive conflict” with the FDCA.²⁶¹ For purposes of congressional intent for federal preemption in food and drug industries, no further changes were made to FDA authority before the seminal case of *Wyeth v. Levine* reached the Supreme Court. This is especially significant because, as many have pointed out, “the purpose of Congress is the ultimate touchstone in every pre-emption case.”²⁶²

255. See, e.g., *Hazelton v. Safeway Stores, Inc.*, 745 P.2d 309, 310 (Kan. Ct. App. 1987).

256. See *infra* notes 298–99, 327–28 and accompanying text.

257. *Wyeth v. Levine*, 555 U.S. 555, 566 (2009).

258. See *id.*

259. *Id.*

260. *Id.*

261. *Id.* at 567 (citing Federal Food, Drug, and Cosmetic Act (FDCA) §§ 102(c), 104(b), 202, Pub. L. No. 87-781, 76 Stat. 780, 781, 784, 793 (1962) (codified as amended at 21 U.S.C. §§ 321, 355(d)–(e) (2006))).

262. *Id.* at 565 (quoting *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996)) (internal quotation marks omitted).

Diana Levine was an independent professional musician who had dedicated her life to creativity and service. As she explained,

Back in 1989, my husband and I started a label, called Rebop Records, which I did to combine my passion for music and songwriting, and my love for kids. I played bass, guitar and piano. Sometimes, I'd play with my sister, who lives nearby, or my husband in local bands. The label was designed to provide rock and roll that kids and parents could enjoy together.²⁶³

After a long history of migraine headaches and associated nausea, Levine went to a Vermont clinic in 2000 for treatment for these symptoms.²⁶⁴ As per custom, the clinic administered Demerol for the migraine and Phenergan for the nausea.²⁶⁵ However, whereas the clinicians normally administered Phenergan via intramuscular injection, on this occasion, the staff administered the drug via “push IV”—a system similar to intravenous drip except the drug is actively pumped into the vein.²⁶⁶ Unfortunately, as known to drug manufacturer Wyeth, Phenergan administered by push IV created risks of causing gangrene and amputation in some patients.²⁶⁷ To avoid this risk, health professionals could simply use alternative methods of delivery such as intramuscular injection—the method with which Levine was familiar.²⁶⁸

Sadly, Levine contracted gangrene as a result of the mistake and—within weeks—lost her right hand to amputation.²⁶⁹ Although her music performance career was largely over, her legal battle had just begun. Levine’s claims against the clinic and staff were settled early, but she was forced to litigate against Wyeth.²⁷⁰ Then, in March 2004, following trial, a Vermont court awarded damages in the final amount of \$6.7 million.²⁷¹ In a special verdict, the jury found that Wyeth had been negligent and strictly liable for distributing Phenergan with a defective warning label that omitted the risk of gangrene from push IV delivery.²⁷²

263. Ed Silverman, *Preemption and Amputation: Diana Fights Wyeth*, PHARMALOT (Feb. 20, 2008, 1:00 PM), http://www.licensinglaw.net/BusinessTransactions_files/Wyeth_v_Levine.pdf.

264. *Id.*

265. *Wyeth*, 555 U.S. at 559.

266. *Id.*

267. *See id.* at 559–60.

268. *See id.* at 559–60 & n.1 (“Phenergan can be administered intramuscularly or intravenously [Wyeth’s warning stated that d]ue to the close proximity of arteries and veins in the areas most commonly used for intravenous injection, extreme care should be exercised to avoid perivascular extravasation or inadvertent intra-arterial injection.”).

269. *Id.* at 559.

270. *See id.*

271. *Levine v. Wyeth*, No. 670-12-01 Wncv, 2004 WL 5452938 (Vt. Super. Ct. Mar. 17, 2004).

272. *Wyeth*, 555 U.S. at 562.

The problem for Wyeth and its attorneys, however, was that the extant label on Phenergan had been approved by the FDA first in the 1950s, then with supplements in the mid-1970s.²⁷³ Wyeth filed a third application in 1981 in light of new labeling rules, but the agency failed to conclusively respond to that request for seventeen years.²⁷⁴ In 1987, the agency requested Wyeth revise its label to include risks of arterial exposure of the kind later suffered by Levine.²⁷⁵ In 1988, Wyeth again submitted an application incorporating those risks, but it went entirely unanswered.²⁷⁶ Finally, in 1996, the agency ordered Wyeth to maintain the contents of its extant label, and in 1998, it approved the 1981 application.²⁷⁷ In its post-trial motion, Wyeth argued that the jury verdict must be discarded because of these contradictions.²⁷⁸ How, it asked, could it be liable in state court when it met and was prevented from exceeding “minimum standards” set by the FDA for adequate risk warning?²⁷⁹ Compliance with the state warning standard, it said, would run afoul of the agency’s label approval process. Adherence to the FDA’s process, meanwhile, ran afoul of state products liability and negligence law.²⁸⁰ For Wyeth, this was a prime case for conflict preemption.

The trial judge denied the motion for judgment as a matter of law requested on the basis of conflict preemption.²⁸¹ It referred to an FDA exception for label approval that allowed manufacturers to change their warnings provisionally in light of new risks.²⁸² For the trial court, as well as on appeal at the Vermont Supreme Court, this provisional change process meant state and federal law in this instance were simply not in conflict with one another and that compliance with both was possible.²⁸³ Interpreting the Vermont decision to uphold the trial court, the Supreme Court later wrote, “[T]he jury verdict established only that Phenergan’s

273. *Id.* at 561.

274. *Id.* at 561–62.

275. *Id.* at 561.

276. *Id.* at 561–62.

277. *Id.* at 562.

278. *See id.*

279. *See id.* at 562–63.

280. *See id.*

281. *See id.*

282. *Id.* at 562.

283. *See id.* at 562–63 (quoting *Levine v. Wyeth*, 2006 VT 107, ¶ 6, 183 Vt. 76, 944 A.2d 179).

warning was insufficient. It did not mandate a particular replacement warning.”²⁸⁴

The Supreme Court granted certiorari in part to settle the growing uncertainty in FDA preemption.²⁸⁵ Wyeth argued not only that state and federal labeling rules warranted conflict preemption but that alternatively, they deserved application of a form of field preemption.²⁸⁶ According to Wyeth, even if compliance with both standards was not impossible, the state rule was at least an “obstacle” to fulfilling congressional intent to place drug labeling oversight squarely in the hands of experts at the FDA.²⁸⁷ In the majority opinion, Justice Stevens rejected both arguments. The first still fell short for reasons outlined by the trial and Vermont Supreme Courts. Stevens fixed upon 21 C.F.R. section 314.70(c), the 1982 regulation that created the “Changes Being Effected” provisional approval for new warnings.²⁸⁸ “[T]his ‘changes being effected’ (CBE) regulation,” he wrote,

provides that if a manufacturer is changing a label to “add or strengthen a contraindication, warning, precaution, or adverse reaction” or to “add or strengthen an instruction about dosage and administration that is intended to increase the safe use of the drug product,” it may make the labeling change upon filing its supplemental application with the FDA; it need not wait for FDA approval.²⁸⁹

As to the second argument, the court distinguished its recent holding in *Geier*. Whereas the NHTSA safety law in *Geier* had contained an express preemption clause, the FDA regulation and amendments did not. Whereas the FMVSS 208 in *Geier* had prescribed a specific range of passive safety restraint systems, leading the Court to infer congressional intent to promote this variety over and above a state-specific definition of *defect*, the FDA regulation and amendments did not prescribe any specific language for drug labeling and rather prescribed only labels that were adequate.²⁹⁰ Both statutes had savings clauses, but the *Wyeth* court felt that enforcement of food and drug—industries so pervasive and minute in their labeling—required the cooperation of state courts adjudicating common law products liability and negligence actions.²⁹¹ This interpretation of the FDCA was guided by the agency’s own history and circumscribed functions:

284. *Id.* at 565.

285. *See id.*

286. *See id.* at 589, 594 (Thomas, J., concurring).

287. *Id.* at 594 (quoting *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)) (internal quotation marks omitted).

288. *See id.* at 568 (majority opinion).

289. *Id.* (quoting 21 C.F.R. § 314.70(c)(6)(iii)(A), (C) (2008)).

290. *See id.* at 580.

291. *See id.* at 567, 581.

[T]he FDA traditionally regarded state law as a complementary form of drug regulation. The FDA has limited resources to monitor the 11,000 drugs on the market, and manufacturers have superior access to information about their drugs, especially in the post-marketing phase as new risks emerge. State tort suits uncover unknown drug hazards and provide incentives for drug manufacturers to disclose safety risks promptly. They also serve a distinct compensatory function that may motivate injured persons to come forward with information.²⁹²

The dissenting Justices did not share this view of *Wyeth's* distinction from *Geier*. If anything, they said, *Wyeth's* attempts to modify its label and the FDA's long silence and later mandate to hold the current line were strong indications that the company should not bear responsibility for Levine's amputation.²⁹³ Seeming to sidestep the CBE process that would render a label change possible, Justice Alito dwelled upon ultimate FDA responsibility for determining label "adequacy" and rehashed the long-settled causation issue of the case.²⁹⁴ He then concluded ultimately that state court juries were ill-equipped to properly decide the technical question of adequacy delegated to a federal agency.²⁹⁵ Interestingly, however, despite this low opinion of the lay jury, Alito did not rule out shared federal-state oversight. "To be sure," he wrote, "state tort suits can peacefully coexist with the FDA's labeling regime, and they have done so for decades. But this case is far from peaceful coexistence. The FDA told *Wyeth* that *Phenergan's* label renders its use 'safe.' But the State of Vermont, through its tort law, said: 'Not so.'"²⁹⁶

ii. *Medical Devices*

Since the mid-1970s, medical devices have been treated distinctively from pharmaceuticals under FDA authority. Under historic FDA oversight, the agency could mandate only withdrawal of unsafe devices but did not maintain a regime of premarket approval.²⁹⁷ By the mid-seventies, injury from implanted devices such as heart pacemakers and intrauterine devices had skyrocketed, prompting Congress to pass the 1976 Medical Device

292. *Id.* at 578–79 (footnote omitted).

293. *See id.* at 628 (Alito, J., dissenting).

294. *Id.* at 605, 612–21.

295. *Id.* at 626.

296. *Id.* at 628 (citation omitted).

297. *See Medtronic, Inc. v. Lohr*, 518 U.S. 470, 475 (1996).

Amendments (MDA).²⁹⁸ The MDA established a three-tiered classification of devices with different approval protocols for each. Although Class I and II devices included simple products such as bandages and home pregnancy tests, respectively, Class III included more invasive and potentially harmful products such as pacemakers and breast implants.²⁹⁹ Class III devices were subject to the FDA’s “premarket approval” (PMA) process; however after immediately recognizing the impracticability of reviewing the safety and efficacy of each and every device, Congress established major exemptions to PMA if the product had already been in the market or if it was “substantially equivalent” to an extant approved device.³⁰⁰ Whereas full PMA review entails on average 1200 hours of work for the agency, the “substantial equivalence” exemption process on average requires something closer to twenty.³⁰¹

The MDA offered a stark case study in the persisting ambiguities in federal preemption of state regulation, negligence, and products liability. Prior to 1976, states including California and New Jersey had passed legislation regulating specific devices and demanding premarket approval.³⁰² As many have said, further development and enforcement of such state-specific rules may mean certain unpredictability and impracticability for device manufacturers operating on a national scale. Cognizant of this, the MDA was given an express clause that appears emphatic in its preemptive effect:

[N]o State or political subdivision of a State may establish or continue in effect with respect to a device intended for human use any requirement—(1) which is *different from, or in addition to*, any requirement applicable under this chapter to the device, and (2) which relates to the *safety or effectiveness* of the device or to any other matter included in a requirement applicable to the device under this chapter.³⁰³

Several items render this clause unclear for statutory interpretation by lower court judges. Definition of phrases such as “different from” and “in

298. See Michael D. Green & William B. Schultz, *Tort Law Deference to FDA Regulation of Medical Devices*, 88 GEO. L.J. 2119, 2129, 2131 (2000) (citing S. REP. NO. 94-33, at 6 (1975)).

299. See 21 U.S.C. § 360c (2012); *Learn if a Medical Device Has Been Cleared by FDA for Marketing*, FDA, <http://www.fda.gov/medicaldevices/resourcesforyou/consumers/ucm142523.htm> (last updated Apr. 24, 2009).

300. 21 U.S.C. § 360e (2012).

301. *Medtronic*, 518 U.S. at 477 (citing *Medical Devices and Drug Issues: Hearings Before the Subcomm. on Health & the Env’t of the H. Comm. on Energy & Commerce*, 100th Cong. 384 (1987) (statement of James S. Benson, Deputy Director, Center for Devices and Radiological Health, Food and Drug Administration)).

302. See *N.J. Guild of Hearing Aid Dispensers v. Long*, 384 A.2d 795, 806 (N.J. 1978); H.R. REP. NO. 94-853, at 45–46 (1976).

303. 21 U.S.C. § 360k(a) (2012) (emphasis added).

addition to” is one such item, while the statute’s own subsequent savings clause is another.³⁰⁴

The effect of such ambiguities has led to complex and, some would say, draconian interpretations of the MDA—a point illustrated in *Medtronic v. Lohr*. There, Lora Lohr, a recipient of a pacemaker device made by Medtronic, experienced symptoms of heart failure when her implanted device suddenly failed three years into service.³⁰⁵ The failure required Lohr to undergo emergency heart surgery, and she later sued the manufacturer in negligence and products liability.³⁰⁶ After successfully removing the suit to federal court, Medtronic argued that it had complied with the FDA approval process and that the claims were thus preempted.³⁰⁷ In this case, the Medtronic model was approved under the abbreviated substantially equivalent process discussed above.³⁰⁸ The company argued that its compliance with the amended FDA rules should preempt any state common law claim.³⁰⁹ Although the district court agreed and dismissed the action, the Eleventh Circuit reversed on preemption of the negligence claim but affirmed as to the manufacture and warning defect claims.³¹⁰ Viewing this distinction as arbitrary, the Supreme Court voted to reinstate the common law claims insofar as the MDA did not intend to preempt all common law actions such as this.³¹¹ The Court held that the MDA’s “substantially equivalent” language was not sufficiently specific to preempt common law claims.³¹²

Finally, in 2008, *Riegel v. Medtronic, Inc.* modified the rule from *Lohr*. Charles Riegel and his wife sued Medtronic under New York common law for a balloon catheter that ruptured during Riegel’s heart surgery.³¹³ Although the device had been clearly labeled for maximum inflation pressure, Riegel’s surgeon inflated the balloon beyond that maximum before it finally burst.³¹⁴ Riegel developed a heart block, was put on life

304. See 21 U.S.C. § 360h(d) (2012).

305. *Medtronic*, 518 U.S. at 480–81.

306. *Id.* at 481.

307. *Id.*

308. *Id.* at 480.

309. *Id.* at 481.

310. *Id.* at 483 (citing *Lohr v. Medtronic, Inc.*, 56 F.3d 1335, 1349–50 (11th Cir. 1995), *aff’d in part, rev’d in part*, 518 U.S. 470).

311. *Id.* at 501.

312. *Id.* at 494.

313. *Riegel v. Medtronic, Inc.*, 552 U.S. 312, 320 (2008).

314. *Id.* at 320.

support, and required an emergency bypass operation.³¹⁵ A New York district court held that the claims for strict liability, breach of warranty, negligence, and loss of consortium were all preempted under the MDA.³¹⁶ The Second Circuit affirmed each of these on the basis that any successful claim would impose standards on the device different from those established in the PMA process, which Medtronic had followed without incident.³¹⁷

In a majority opinion by Justice Scalia in which Roberts, Kennedy, Souter, Thomas, Breyer, and Alito joined, the Court distinguished *Lohr*. Under their analysis, the preemption issue turned on the differential between full premarket approval and the lesser FDCA § 510(k) substantial equivalence process.³¹⁸ Although the latter did not establish precise requirements as to “safety and effectiveness” in labeling and manufacturing, the former—the extensive PMA process prescribed by the MDA—did. Said the Court,

Premarket approval . . . imposes “requirements” under the MDA as we interpreted it in *Lohr*. Unlike general labeling duties, premarket approval is specific to individual devices. And it is in no sense an exemption from Federal safety review—it *is* federal safety review. . . . [T]he attributes that *Lohr* found lacking in § 510(k) review are present here. . . . [T]he FDA requires a device that has received premarket approval to be made with almost no deviations from the specifications in its approval application, for the reason that the FDA has determined that the approved form provides a reasonable assurance of safety and effectiveness.³¹⁹

The Court then grappled with whether the requirements imposed under successful common law claims were “different from”³²⁰ the FDA requirements established through PMA. First, it said that the common law nature of the duties entailed in the negligence and other claims should be treated similarly to state regulatory rules in determining “different from.” Citing both *Bates v. Dow Agrosciences LLC* and *Cipollone v. Liggett Group, Inc.*, it said that “[a]bsent other indication, reference to a State’s ‘requirements’ includes its common-law duties.”³²¹ Justice Ginsburg’s dissenting opinion reminded the Court that congressional intent to remove common law recourse was lacking, but the majority took a

315. *Id.*

316. *Id.*

317. *Id.* at 321 (quoting *Riegel v. Medtronic, Inc.*, 451 F.3d 104, 121 (2d Cir. 2006)).

318. *Id.* at 321–22.

319. *Id.* at 322–23.

320. *See* 21 U.S.C. § 360k(a) (2012).

321. *Riegel*, 552 U.S. at 324.

position seemingly at odds with what it had previously said about legislative purpose.³²²

It is not our job to speculate upon congressional motives. If we were to do so, however, the only indication available—the text of the statute—suggests that the solicitude for those injured by FDA-approved devices, which the dissent finds controlling, was overcome in Congress’s estimation by solicitude for those who would suffer without new medical devices if juries were allowed to apply the tort law of 50 States to all innovations.³²³

Finally, the majority allowed that common law claims premised on violation of the federal regulatory duties would not be “different from or in addition to” and that in that case, the Riegels could have succeeded.³²⁴ Although the Riegels argued that this was the case for their claims, the majority relied upon their arguments at trial that Medtronic had violated common law duties despite compliance with the MDA.³²⁵

After *Riegel*, then, preemption of medical device claims is determined by a two-fold analysis of whether the state claim imposes new “requirements,” and whether those are “different from or in addition to” the federal rules. The first question seems to turn on, among other things, the difference between full premarket approval and FDCA § 510(k) exceptional approval for extant and substantially similar devices and the second upon whether the claims assert negligence or strict liability *on the basis of breach* of federal regulatory duties or *despite compliance* therewith. In any case, the Court has repeatedly expressed deep suspicion of lay state juries determining liability in the presence of coexisting federal regulatory standards—a fact that adds another dramatic layer to the federalization of civil justice.³²⁶

322. *Id.* at 345 (Ginsburg, J., dissenting); *see, e.g.*, *Bates v. Dow Agrosciences LLC*, 544 U.S. 431 (2005).

323. *Riegel*, 552 U.S. at 326 (majority opinion).

324. *See id.* at 330 (quoting 21 U.S.C. § 360k(a)(1)) (internal quotation marks omitted).

325. *Id.*

326. *See, e.g.*, *Wyeth v. Levine*, 555 U.S. 555, 628 (2009) (Alito, J., dissenting) (“Regardless of the FDA’s reasons for not contraindicating IV push for these drugs, it is odd (to say the least) that a jury in Vermont can now order for Phenergan what the FDA has chosen not to order for mustard gas.”); *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 504 (1996) (Breyer, J., concurring); *supra* text accompanying note 323.

iii. Cigarettes

Although cigarette safety and labeling are now regulated under the FDA, for most of recent history, these arenas of regulation came simply under the freestanding Federal Cigarette Labeling and Advertising Act (FCLAA) of 1965 requiring a “conspicuous label warning of smoking’s health hazards to be placed on every package of cigarettes sold in this country.”³²⁷ That Act was then amended by the Public Health Cigarette Smoking Act of 1969.³²⁸

In *Cipollone v. Liggett Group, Inc.*, the Supreme Court heard arguments on behalf of a New Jersey man whose mother died of lung cancer following roughly forty years of smoking.³²⁹ The defendant Liggett had advertised itself as a healthier alternative to other cigarette brands, and evidence showed that the victim had in fact relied on such advertising.³³⁰ In district court, the plaintiffs alleged claims under New Jersey state law, including design defect, failure to warn, negligence, breach of express warranty, and fraudulent misrepresentation.³³¹ The defendant argued all state law claims arising after 1965 were preempted by the Public Health Cigarette Smoking Act of 1969.³³² Although it found that the Act was intended to create a national standard, the district court found that it did not preempt common law claims.³³³ At the Second Circuit, the decision was reversed on the grounds that although the Act did not expressly preempt common law claims, such claims were in *conflict* with the federal law.³³⁴ Said that court, “Where the success of a state law damages claim necessarily depends on the assertion that a party bore the duty to provide a warning to consumers in addition to the warning Congress has required on cigarette packages, such claims are preempted as conflicting with the Act.”³³⁵ Following the denial of certiorari, the district court on remand held that most of the claims were indeed preempted but that the jury could be instructed on negligence—breach of duty to warn—and express

327. *Cipollone v. Liggett Grp., Inc.*, 505 U.S. 504, 504 (1992) (citing Pub. L. No. 89-82, 79 Stat. 282 (1965) (codified as amended at 15 U.S.C. §§ 1331–1340 (1988))).

328. *Id.* at 515 (citing Pub. L. No. 91-222, 84 Stat. 87 (1969) (codified as amended at 15 U.S.C. §§ 1331–1340 (1988))).

329. *Id.* at 508.

330. *See id.* at 509–10.

331. *Id.*

332. *Id.* at 510.

333. *Id.* (citing *Cipollone v. Liggett Grp., Inc.*, 593 F. Supp. 1146, 1148, 1153–70 (D.N.J. 1984), *rev’d*, 789 F.2d 181 (3d Cir. 1986)).

334. *Id.* at 511.

335. *Id.* (quoting *Cipollone v. Liggett Grp., Inc.*, 789 F.2d 181, 187 (3d Cir. 1986)).

warranties.³³⁶ Following a finding of contributory fault on the part of Mrs. Cipollone, the jury awarded only her husband damages for breach of express warranty in the amount of \$400,000.³³⁷ The Second Circuit then affirmed, and the Supreme Court granted certiorari to reconsider preemption.³³⁸ The Court held that the 1965 Act did not preempt common law damages but the 1969 Act did preempt failure to warn and what it called warning “neutralization”—the defeat of an otherwise effective warning by additional extraneous information or representations.³³⁹ It also held that the 1969 law did not preempt express warranty, fraud and misrepresentation, and conspiracy claims.³⁴⁰

The *Cipollone* plurality was then clarified in 2008’s *Altria Group, Inc. v. Good*. There, a Maine plaintiff brought suit against Philip Morris for fraudulent misrepresentation under a state unfair trade practices law.³⁴¹ Philip Morris had marketed its “light” cigarettes as a safer alternative to regular brands, and the plaintiff allegedly relied upon that advertising while smoking “lights” for over fifteen years during which time he developed cancer.³⁴² The merits of the misrepresentation were never reached at trial as the district court treated the claims under *Cipollone* as “failure-to-warn or warning neutralization” claims and dismissed on the grounds of federal preemption.³⁴³ The First Circuit on appeal reversed, treating the claim more properly as one for the intentional tort of fraudulent misrepresentation.³⁴⁴ On review, the Supreme Court agreed and held that common law fraud could not be expressly or impliedly preempted by the FCLAA.³⁴⁵ Although the Act did contain two express preemption clauses, these were written to prescribe accurate labeling as to the risks of smoking to human health.³⁴⁶ It was not, the Court said, written to eclipse a common law “duty not to deceive.”³⁴⁷

336. *Id.* at 512 (citing *Cipollone v. Liggett Grp., Inc.*, 649 F. Supp. 664, 669–75 (D.N.J. 1986)).

337. *See id.*

338. *See id.*

339. *Id.* at 527, 530–31.

340. *Id.* at 531.

341. *Altria Grp., Inc. v. Good*, 555 U.S. 70, 72–73 (2008).

342. *Id.*

343. *See id.* at 75.

344. *See id.*

345. *Id.* at 91.

346. *Id.* at 79.

347. *Id.* at 81.

In a rich dissenting opinion, Justice Thomas distinguished between *Cipollone*'s plurality test, which he described as a "predicate-duty" approach, and one he advocated, originating from Justice Scalia's *Cipollone* dissent, which Scalia described as a "proximate application" approach.³⁴⁸ Under predicate duty, the *Cipollone* plurality had premised its finding of nonpreemption on the duties intended by Congress in passing the FCLAA and subsequent amendments.³⁴⁹ There, as in *Altria*, the Court said, Congress meant to create regulatory duties to disclose accurate health information and not common law-type duties to represent oneself or one's product truthfully.³⁵⁰ Justice Thomas, meanwhile, advocated Justice Scalia's proximate application approach that focused upon the deterrent rather than compensatory function of the coexisting common law claim.³⁵¹ In advocating for Justice Scalia's position, Justice Thomas left aside his belief in jury incapacity to decide such claims accurately and consistently and seemingly condemned the coexistence of even valid jury awards: "Applying the proper test – *i.e.*, whether a jury verdict on respondents claims would 'impose an obligation' on the cigarette manufacturer 'because of the effect of smoking upon health,' . . . respondents' state-law claims are expressly preempted by § 5(b) of the Labeling Act."³⁵²

c. Environment

Environmental regulation forms the third large cluster of federal preemption decisions. Here, scale is an even more stark and controversial leitmotif. On one hand, effective environmental conservation demands policies to apply uniformly on very large scales—often national or international in scope.³⁵³ On the other hand, this is one area in which lawmakers may wish to permit a state and local "race to the top."³⁵⁴ For the betterment of the environmental future, which is then preferable: legal uniformity or legal innovation? This debate immediately implicates federalism and federal preemption.

348. *Id.* at 96–99 (Thomas, J., dissenting) (internal quotation marks omitted).

349. *Id.* at 94 (citing *Cipollone v. Liggett Grp., Inc.*, 505 U.S. 504, 528–29 (1992)).

350. *Id.* (citing *Cipollone*, 505 U.S. at 528–29).

351. *See id.* at 96.

352. *Id.* at 109 (quoting *Cipollone*, 505 U.S. at 554 (Scalia, J., concurring in part and dissenting in part)) (citation omitted).

353. *See* Paul S. Weiland, Comment, *Federal and State Preemption of Environmental Law: A Critical Analysis*, 24 HARV. ENVTL. L. REV. 237, 248 tbl.1 (2000).

354. *See id.* *See generally* Lincoln L. Davies, *State Renewable Portfolio Standards: Is There a "Race" and Is It "To the Top"?*, 3 SAN DIEGO J. CLIMATE & ENERGY L. 3 (2011) (discussing scholars who believe "state renewable portfolio standards . . . signify a regulatory 'race to the top'").

Congress has regulated environmental pollution for decades under the commerce power reserved to it in Article I.³⁵⁵ At the same time, authority to regulate matters of public health and safety is considered one of the “police powers” reserved to the various states under the Tenth Amendment.³⁵⁶ Because of this dual authority and because of the sheer geographic scale on which pollution migrates, environmental protection has been shared between state and federal governments.

For example, the Environmental Protection Agency’s (EPA) air quality regime under the Clean Air Act allows the agency to set National Ambient Air Quality Standards (NAAQS) and then to require states to “develop a general plan to attain and maintain the NAAQS in all areas of the country and a specific plan to attain the standards for each area designated nonattainment for a NAAQS.”³⁵⁷ The EPA sets minimum standards, and the states are expected to implement them in ways best tailored to their regional needs. This is especially valuable given the distinct industrial pollutants common to different states, as well as the way geography can help or hinder air quality control.³⁵⁸ This State Implementation Plan regime lends itself to a Brandeisian view of federalism as state experimentation,³⁵⁹ but the approach has its critics—notably those in corporate America who would like to see national uniformity imposed by “ceiling preemption.”³⁶⁰ Under ceiling preemption, the states would be required not only to implement air quality regulations that maintain minimum standards but also to abstain from regulations that exceed a certain common level of regulation.³⁶¹ Proponents of this approach point to California, which obtained a preemption waiver from the EPA early

355. U.S. CONST. art. I, § 8, cl. 3.

356. U.S. CONST. amend. X; James G. Hodge, Jr., *Implementing Modern Public Health Goals Through Government: An Examination of New Federalism and Public Health Law*, 14 J. CONTEMP. HEALTH L. & POL’Y 93, 102 (1997).

357. *State Implementation Plan Status and Information*, U.S. ENVTL. PROTECTION AGENCY, <http://www.epa.gov/airquality/urbanair/sipstatus/index.html> (last updated Feb. 25, 2013).

358. See Kathryn B. Thomson, *Message from the Vice Chair*, AIR QUALITY COMMITTEE NEWSL. (ABA, Chicago, IL), Aug. 2006, at 2.

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

360. See Brian T. Burgess, Note, *Limiting Preemption in Environmental Law: An Analysis of the Cost-Externalization Argument and California Assembly Bill 1493*, 84 N.Y.U. L. REV. 258, 269 (2009) (citing Felicity Barringer, *A Coalition for Firm Limit on Emissions*, N.Y. TIMES, Jan. 19, 2007, at C1).

361. *Id.* at 258.

on and has passed more stringent auto and greenhouse emissions legislation over recent decades.³⁶²

Two fears about California's leadership have circulated. The first is that the rules imposed in that state simply push the fiscal burden of meeting those standards onto other states that may not benefit from them so that, for instance, consumers of a certain automobile in Texas must pay more for it to meet expectations of the California rule.³⁶³ Although a popular argument, this "cost-externalization" critique has been criticized as overblown.³⁶⁴ Second, proponents of ceiling preemption fear that without it the states are free to adopt fifty different levels of emissions controls.³⁶⁵ The variance between California and states such as Michigan or Ohio may be significant, but there is more to the picture. As some have said, states are often quick to follow the lead of environmental mavericks in clusters.³⁶⁶ So, for example, over twelve states have mercury controls, twenty-eight states have renewable energy requirements of utilities, twenty states took steps to reduce general greenhouse emissions, and nineteen states have followed, or are considering following, California to exceed EPA auto emissions controls.³⁶⁷

These growing clusters have been labeled "emerging consensus" and merit special deference according to some.

362. See Richard L. Revesz, *Federalism and Environmental Regulation: A Public Choice Analysis*, 115 HARV. L. REV. 553, 588 (2001); Burgess, *supra* note 360, at 263 (citing 42 U.S.C. § 7543(b)(1) (2006)).

363. See Burgess, *supra* note 360, at 274.

364. *Id.* at 298.

365. *Id.* at 287 (citing Danny Hakim, *California Leads on Warming*, N.Y. TIMES, July 9, 2004, at C1).

366. See, e.g., David A. Wirth, *The EU's New Impact on U.S. Environmental Regulation*, FLETCHER F. WORLD AFF., Summer 2007, at 91, 96 (2007) (discussing the influence of strict environmental jurisdictions, such as California, that exert pressure on surrounding jurisdictions to adopt similar or equivalent regulations).

367. See Howard A. Learner, *Restraining Federal Preemption when There Is an "Emerging Consensus" of State Environmental Laws and Policies*, 102 NW. U. L. REV. 649, 649–50 (2008) (citing *Greenhouse Gas Emissions Targets*, CENTER FOR CLIMATE & ENERGY SOLUTIONS, <http://www.c2es.org/us-states-regions/policy-maps/emissions-targets> (last visited Apr. 21, 2014)); *Greenhouse Gas Reporting and Registries*, CENTER FOR CLIMATE & ENERGY SOLUTIONS, <http://www.c2es.org/us-states-regions/policy-maps/ghg-reporting-and-registries> (last visited Apr. 21, 2014); *Renewable and Alternative Energy Portfolio Standards*, CENTER FOR CLIMATE & ENERGY SOLUTIONS, <http://www.c2es.org/us-states-regions/policy-maps/renewable-energy-standards> (last visited Apr. 21, 2014); *State Mercury Programs for Utilities*, NAT'L ASS'N CLEAN AIR AGENCIES (Dec. 7, 2006), <http://www.4cleanair.org/Documents/StateTable.doc>.

In such cases, courts should apply the Supremacy Clause with more restraint and should not imply congressional intent to preempt state environmental laws absent a clear statement of preemptory language or a very clear and fundamental conflict between federal and state laws. If Congress is firmly convinced that adoption of a particular environmental policy by a growing number of states would undermine the efficacy of a national regulatory scheme, then Congress should clearly state its intention to preempt state action. Otherwise, implied preemption should be applied narrowly in the environmental policy context in order to recognize the states' traditional police powers over public health and safety and regulation of land uses.³⁶⁸

In application, this emerging consensus rule could prove complicated. Conceivably, defining in terms of numbers or chronology the terms *consensus* or *emerging* may further deepen the jurisprudential mire on preemption. But in theory, and for reasons further spelled out below, this approach to ceiling preemption in environmental regulation is right on the mark. It seems to adopt not a rote, formalist application of existing federalism jurisprudence but a realist, progressive approach that incorporates federalism's key purpose: a quest for the proper balance between national and local legal culture. More importantly, it permits in the field of environmental protection a state "race to the top" of a kind that would achieve the EPA's objectives more quickly and efficiently than if the agency acted unilaterally or restrictively.³⁶⁹ The "clear statement rule" advocated above has already been applied in several cases arising over California and Vermont environmental policies.³⁷⁰ A similar thrust pervaded the 2007 Supreme Court decision in *Massachusetts v. EPA*, which allowed twelve states to successfully compel the EPA to enforce federal greenhouse gas emissions rules.³⁷¹

Although the Clean Air Act has prompted innovations such as State Implementation Plans and a clear statement rule for emerging consensus policies,³⁷² the Clean Water Act (CWA) has been held not to preempt civil damages for maritime accidents. In *Exxon Shipping Co. v. Baker*, the Court considered, among other things, whether common law punitive damages levied against Exxon for its massive oil disaster in Prince

368. Learner, *supra* note 367, at 651.

369. *See id.* at 656.

370. *Id.* at 660 (citing *Cent. Valley Chrysler-Jeep, Inc. v. Goldstene*, 529 F. Supp. 2d 1151 (E.D. Cal. 2007); *Green Mountain Chrysler Plymouth Dodge Jeep v. Crombie*, 508 F. Supp. 2d 295 (D. Vt. 2007)).

371. 549 U.S. 497, 505 & n.2, 534 (2007).

372. *See State Implementation Plans*, U.S. ENVTL. PROTECTION AGENCY, <http://www.epa.gov/r02earth/air/sip> (last updated Apr. 6, 2011).

William Sound, Alaska in 1989 were preempted by the CWA.³⁷³ The defendant company had already stipulated to the negligence of its employee ship captain, and the trial court found it liable in respondeat superior for the managerial acts of its employee in the scope of employment.³⁷⁴ Exxon did not dispute its liability for compensatory damages, and the punitive damages awarded at trial had already been reduced on appeal at the Ninth Circuit.³⁷⁵ The Supreme Court found that the CWA did not preempt punitive damages—much like compensatories—but it remanded for a reassessment of the amount in light of common law maritime damage rules.³⁷⁶

d. Employment

Finally, aspects of employment law have seen a number of high-profile cases in which employers and insurance providers raised federal preemption to fend off liability for torts related to workplace safety, wrongful discharge, and employee benefits.

In 1974, Congress passed the Employment Retirement Income Security Act (ERISA).³⁷⁷ The law came in response to several scandalous corporate liquidations that left tens of thousands of employees unable to redeem benefits to which they would have been entitled.³⁷⁸ The law was also intended to create uniformity across our federal topography.³⁷⁹ Within ERISA, at § 514(a), Congress included an express preemption clause that precludes state laws that “relate to any employee benefit,” and perhaps predictably, the courts struggled over the next decades to elaborate the phrase “relate to.”³⁸⁰ Thus, in 1995’s *New York Conference of Blue Cross & Blue Shield Plans v. Travelers Insurance Co.*, the Court considered a New York public health law imposing surcharges on commercial insurance providers—but not Blue Cross—that made the former more expensive and less competitive.³⁸¹ The district and appeals courts agreed with Travelers and the other commercial insurer plaintiffs that the law was preempted under ERISA, but the Supreme Court disagreed, finding

373. 554 U.S. 471, 476, 481 (2008).

374. *Id.* at 479–80.

375. *Id.* at 480–81 (citing *In re Exxon Valdez*, 270 F.3d 1215, 1236, 1246–47 (9th Cir. 2001)).

376. *Id.* at 488–90, 513–15.

377. Pub. L. No. 93-406, 88 Stat. 829 (codified as amended in scattered sections of 26 and 29 U.S.C.).

378. See James G. McMillan, III, Comment, *Misclassification and Employer Discretion Under ERISA*, 2 U. PA. J. LAB. & EMP. L. 837, 840–41 (2000).

379. See *id.* at 842.

380. Employment Retirement Income Security Act § 514(a), 29 U.S.C. § 1144 (2006).

381. 514 U.S. 645, 649 (1995).

that in spite of § 514's clear express preemption clause, the public health law did not properly "relate to" employee benefits as that had come to be understood in its decisions such as *Shaw v. Delta*.³⁸² Again invoking the presumption against preemption, the Court found that Congress's intent was indeed to "avoid a multiplicity of regulation" and "permit nationally uniform" oversight but that *Travelers* was distinguishable because surcharges directly affected only ultimate plan costs and not administrative decisions as to benefits coverage.³⁸³

In 2004, the Court squarely considered common law tort preemption under ERISA. *Aetna Health Inc. v. Davila* saw two tort suits against health maintenance organizations (HMOs) in the wake of public concern over the rise of managed care and its attenuation of the physician-patient relationship.³⁸⁴ The plaintiffs asserted negligence actions against insurance providers Aetna and Cigna under the Texas Health Care Liability Act—a statute that imposed a duty of ordinary care upon HMOs in making treatment decisions.³⁸⁵ In the first suit, the HMO had refused to pay for certain physician-recommended medication. The patient neither objected nor purchased the drug and sought reimbursement, and the patient took the alternative plan-covered medication before suffering a severe reaction and requiring hospitalization.³⁸⁶ In the second suit, the HMO refused to grant a patient's physician-recommended, postoperative request for an extended hospital stay after its own discharge nurse deemed the request unsatisfactory. The patient was discharged on schedule and suffered severe complications and required additional care.³⁸⁷ The majority opinion authored by Justice Thomas found both claims preempted under

382. *Id.* at 651–53, 661–62 (citing *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 98 & n.19 (1983); *Travelers Ins. Co. v. Cuomo*, 14 F.3d 708, 718 (2d Cir. 1994), *rev'd*, 514 U.S. 645; *Travelers Ins. Co. v. Cuomo*, 813 F. Supp. 996 (S.D.N.Y. 1993), *rev'd in part*, 63 F.3d 89 (2d Cir. 1995)).

383. *See id.* at 657–58.

384. 542 U.S. 200, 204 (2004); *see also* Susan Dorr Goold & Mack Lipkin, Jr., *The Doctor–Patient Relationship: Challenges, Opportunities, and Strategies*, 14 J. GEN. INTERNAL MED. S26, S26 (1999) (“The rapid penetration of managed care into the health care market raises concern for many patients, practitioners, and scholars about the effects that different financial and organizational features might have on the doctor-patient relationship.”).

385. *Aetna*, 542 U.S. at 204–05 (citing TEX. CIV. PRAC. & REM. CODE ANN. §§ 88.001–.003 (West 2004 Supp. Pamphlet)).

386. *Id.* at 205.

387. *Id.*

§ 502(a) of ERISA.³⁸⁸ The Court quoted its own language from a prior case:

“The detailed provisions of § 502(a) set forth a comprehensive civil enforcement scheme that represents a careful balancing of the need for prompt and fair claims settlement procedures against the public interest in encouraging the formation of employee benefit plans. The policy choices reflected in the inclusion of certain remedies and the exclusion of others under the federal scheme would be completely undermined if ERISA-plan participants and beneficiaries were free to obtain remedies under state law that Congress rejected in ERISA. The six carefully integrated civil enforcement provisions found in § 502(a) of the statute as finally enacted provide strong evidence that Congress did *not* intend to authorize other remedies that it simply forgot to incorporate expressly.”³⁸⁹

The Court was unanimous in finding express preemption of tort liability.³⁹⁰ But in a sharply terse concurrence, Justices Ginsburg and Breyer commented that “[b]ecause the Court has coupled an encompassing interpretation of ERISA’s preemptive force with a cramped construction of the ‘equitable relief’ allowable under § 502(a)(3), a ‘regulatory vacuum’ exists: ‘Virtually all state law remedies are preempted but very few federal substitutes are provided.’”³⁹¹ For some commentators, this elision of civil redress would form the basis for a potential due process challenge.³⁹²

The foregoing has been an elliptical overview of select social and industrial practices around which federal preemption cases have clustered. It is by no means an exhaustive inventory of national approaches to preemption and indeed leaves out important yet more complex areas in which the Supreme Court has not yet resolved discrepancies among the circuits and states on preemption. Even in cases in which the Court granted certiorari, its holdings have often left preemption standards unclear for the lower courts to apply.

In cases where federal law creates a remedy, one alternative to preemption is exhaustion. Exhaustion theory says that to be eligible for the federal remedy, a plaintiff must first pursue available administrative remedies.³⁹³ Then and only then, it holds, will a plaintiff’s claim properly become federal. This requirement already exists in several areas. Title VII of

388. *Id.* at 204, 214.

389. *Id.* at 208–09 (quoting *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 54 (1987)).

390. *Id.* at 202, 204.

391. *Id.* at 222 (Ginsburg, J., concurring) (quoting *DiFelice v. Aetna U.S. Healthcare*, 346 F.3d 442, 456 (3d Cir. 2003) (Becker, J., concurring)).

392. *See, e.g.*, Goldberg, *supra* note 11, at 529.

393. *E.g.*, 42 U.S.C. § 1997e(a) (2006) (“No action shall be brought with respect to prison conditions under section 1983 of this title, or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted.”).

the Civil Rights Act, for instance, requires an employment discrimination claim to first exhaust administrative procedures before being certified in federal court.³⁹⁴ It has also been proposed for unsettled matters such as federal review of governmental torts under the Takings Clause.³⁹⁵ Some have argued that an exhaustion requirement can actually strengthen state sovereignty by first entrusting immunity decisions to state courts.³⁹⁶

3. *Sociocultural Denominators and Legal Geography*

Under traditional federalism, federal legislative and judicial deference to the states is premised upon social and cultural “fit” between the creation and enforcement of local norms and the specific realities and experience of the objects of those norms.³⁹⁷ When Congress asks state court adjudicators to defer to federal law, it is in effect making a decision about legal geography; in this or that substantive domain, it is saying, a national norm is more desirable or efficient. As the pages above suggested, the most highly developed areas in which this has taken place form well-defined subject matters or competencies.

In transportation and aviation, preference for national-in-scope norms seems sensible on the basis of dynamism. People, goods, and machines flow across state borders with ever-increasing speed and frequency. Although this development would appear most obviously to track technological change, we must not forget that it is also a preeminently social phenomenon. People ride planes, trains, and automobiles to get to other people for recreation, work, dealmaking, and education. As this has increased, so too has demand for uniform liability rules for the systems that manage these transport channels. As in other areas, uniformity here serves to establish and manage expectations of care on the part of prospective plaintiffs, but it also shapes expectations on the part of prospective defendants such as automakers and airlines as to the scope and nature of prospective liability. This is more significant than simple predictability of corporate liability claims. It is also a matter of nationalizing transport culture in a way that further facilitates movement itself.

394. DOBBS ET AL., *supra* note 9, at 1294 n.28 (citing 42 U.S.C.A. §§ 2000e-5(e)-5(f) (2006)).

395. *See, e.g.*, Beermann, *supra* note 224, at 330.

396. *See, e.g., id.* at 332–33.

397. *See* Samuel Issacharoff & Catherine M. Sharkey, *Backdoor Federalization*, 53 UCLA L. REV. 1353, 1353 (2006).

Food and drug cases also invoke movement and space. There, with increasing frequency, consumable goods for human alimentation or health and wellness move rapidly across state lines. Alternatively, encounters with these products may also be more dynamic as a result of faster human interstate migration. Two aspects of this movement are significant. First, as with all mass-market dynamics, it is motivated by efficiency so that either the end retailer seeks greatest profit or the end user seeks to expend the fewest resources to benefit from the product. Once technology permits rapid transportation, as above, this mutual will to efficiency drives a search for goods from cheaper producers at ever-wider geographic orbits. Second, food and drug products are ingested into the human body in ways that place recognition of their harm and its etiology beyond the reasoning of laypersons. Thus, Red 40 or Vioxx will affect their end users in ways they may be able to feel—eventually—but not easily explain. This is only partly about expertise, and indeed evidentiary complexity in such cases may be similar before state or federal tribunals. It is also about ex ante behavior based on informational transparency. Deference to individual state liability rules in food and drug cases would not only allow highly variable rules about risk disclosure, it could allow informational discrepancies to prevail given that ideas decreasingly respect state borders. Thus, risk management associated with these products is probably best accomplished through centralization and ex ante regulatory controls, which are both embodied in the current FDA regime. Notwithstanding disclosure fraud, it may be preferable that the agency prescribe and enforce national care levels and liability rules.

Medical devices are especially sensitive to preemption for several of the same reasons. As they become cheaper and less invasive, they become more accessible to the general public. As insurance providers cover an increasing array of devices, laypersons are more likely to elect to use them. And as the market—and profitability—for such devices increases, they become more and more like high-tech consumer goods: part designer status symbol, part cyborgian immortality, and part incomprehensible cipher to the average user. The same reasoning about mass-market action and harm can be applied to products liability cases. Although, it is significant that products liability is a more varied subject area with preemption recognized only in certain pockets requiring regulatory control. The standard, run-of-the-mill products liability case still falls under state common law. Indeed, this is one area where high variance prevails across the states, some of which adhere to classic strict liability rules

and some of which have adopted principles resembling the Restatement (Third) of Torts' negligence hybridization.³⁹⁸

So, in the introductory vignette above, where a little boy is burned by a toy baking oven, the child can and probably should bring his claim under state products liability for manufacturing or design defect. In that action, he need show only that the product departed from intended design or that the entire product line could have been made with a reasonable alternative design. In the former claim, a jury may be asked to decide whether there was such a departure or such a reasonable alternative and then to assess damages based upon aggregate medical expenses and pain and suffering. The manufacturer would resist these assessments for two widely circulating reasons. First, how can civil juries comprised of six to twelve lay individuals assess reasonable design alternatives—particularly in higher technology products? Second, state court juries tend to be more sympathetic to individual plaintiffs than to abstract, wealthy corporations.³⁹⁹ If the defendant can remove to federal court, it will likely attempt to do so. Better still, if it can access any form of preemption argument, it will probably attempt to do that as well. Although the Supreme Court has not established federal preemption for compliance with federal toy safety regulations, it is conceivable under current jurisprudence that it may one day do so.

VI. DEFENDING CURRENT CONTOURS

Modern application of First Amendment, Fourteenth Amendment, and federal preemption doctrines to state common law torts is still a highly complicated proposition. In areas of defamation for example, it remains uncertain how the *New York Times* standard is to apply to nonmedia defendants.⁴⁰⁰ In governmental property torts, it is not clear how to coherently distinguish a public taking from a fair exercise of police power.⁴⁰¹ And in application of *Williamson*, *Altria*, and *Riegel*, it will be difficult to say with certainty whether state courts have faithfully

398. See Heather M. Bessinger & Nathaniel Cade, Jr., *Who's Afraid of the Restatement (Third) of Torts?*, Wis. L.J. (Sept. 17, 2010, 2:33 PM), <http://wislawjournal.com/2010/09/17/whos-afraid-of-the-restatement-third-of-torts/>.

399. See Richard J. Pierce, Jr., *A Comment on Imperfect Alternatives: Choosing Institutions in Law, Economics, and Public Policy*, 83 CALIF. L. REV. 941, 950 (1995) (book review).

400. See *supra* Part V.A.1.

401. See *supra* Part V.A.2.

reproduced the minute reasoning leading to implied conflict preemption based on semantics.⁴⁰²

For at least these reasons, some wish to see full autonomy for state tort doctrines or eventual displacement of common law claims in the name of federal uniformity. The communitarian argument for autonomy holds that individual justice is culturally contingent and thus justifiably subject to community variance.⁴⁰³ Individual communities, then, are best suited to assess liability and damage theories. And yet, the proper community of any one plaintiff or defendant depends upon a cultural authenticity or homogeneity that is becoming increasingly rare, increasingly suspect, and normative rather than descriptive.⁴⁰⁴ Unitarians, on the other hand, advocate for nationally uniform norms to promote “economies of scale.”⁴⁰⁵ Without such norms, they argue, mass-market actors cannot operate with optimal efficiency and states are able to “externalize” economic costs of higher care onto the remaining states and their consumers.⁴⁰⁶

Underlying each is a quest for an all-or-nothing approach that turns on destruction or canonization of state common law autonomy. Such an approach would likely be simpler to apply and more predictable for parties. And, if compensation were the sole purpose of tort law, and if this system were still construed primarily as private law, that goal would be paramount. Yet the evolution of torts toward public law over the past century makes prediction of individual liability less important. On the contrary, if torts is public law, then its primary charge is to interpret and sanction proper relations between political and social institutions, and resolution of individual disputes becomes a salutary byproduct of this. In reality, as Calabresi has suggested, torts jurisprudence is usually serving both roles.⁴⁰⁷

Therefore, the struggle to locate a proper balance between state and federal authority is not an obstacle to tort law. It is and should be recognized as one of the very functions of tort jurisprudence today. This federalism function joins other well-established policy functions as another among several priorities shaping individual decisions, as well as intragovernmental institutional relationships. Like those other functions, it may not be foregrounded in each and every dispute but rather may interact with those in cases of unique significance to the topography of American legal culture. Perhaps more importantly, then, the federalism

402. See *supra* Part V.B.

403. See *supra* notes 4, 33–34 and accompanying text.

404. See *supra* notes 31–32, 103–04 and accompanying text.

405. See, e.g., William W. Buzbee, *Asymmetrical Regulation: Risk, Preemption, and the Floor/Ceiling Distinction*, 82 N.Y.U. L. REV. 1547, 1603 (2007).

406. *Id.* at 1608 & n.216 (citing Issacharoff & Sharkey, *supra* note 397, at 1385–89).

407. See Calabresi, *supra* note 37.

function is the first of these policy functions to occupy itself directly with the layout of American legal geography.

In addressing questions of legal geography, the federalism function resists the all-or-nothing approaches described above. What it presupposes, instead, is a contoured approach whereby certain sectors of our social and economic life are better regulated on a federal level and others are better addressed through local norms. Although generalization regarding the common threads of federalization is admittedly fragile, the above survey reveals a general trend toward federalization in areas of social and economic life that demand a uniform national legal culture. From the ethnoracial dynamics underlying *New York Times* to the high-tech biopolitical dynamics of *Lohr* and *Riegel*, from the socially risqué subject matter of *Hustler Magazine* to the fast interstate transportation dynamics of *Geier* and *Williamson*, the lead cases on tort federalization all occupy themselves in one form or another with tort harms amid rapid cultural change resulting from new relationships with machines, physical space, human “otherness,” and human physiology.

This raises still further questions. For instance, why are federal norms better suited to fast changing social fields? Additionally, should social change be the proper object of a nationalized legal culture? Though purely theoretical, my answers for these queries rest on the interplay between law and modern nationhood. A far cry from the putatively pure, premodern tribal societies of *Ancient Law*, modern nation-states are geographically dispersed, multicultural, polyglot complexes of human beings, communities, institutions, and ideologies.⁴⁰⁸ Where once they coalesced through imputed, shared, mythic national pasts, today the “imagined community” model is confounded by rapid and ongoing movement facilitated by information and technological advancements that not only alter regional demographics quickly but also call into question the integrity of any form of shared past, mythic or otherwise.⁴⁰⁹ It is these areas of social and economic practice—ones elsewhere associated with globalization more generally—that have become the predominant object of tort federalization. Put otherwise, federalization of American civil justice has become a powerful tool for nation-building in the age of global governance.

408. See MAINE, *supra* note 122.

409. See *supra* notes 31–32, 103–04 and accompanying text.

VII. CONCLUSION

The several states in the U.S. federal system have become front lines for nation building through the growth of doctrines that permit lower courts to refine the proper contours of American legal geography. In this growth of cooperative federalism, the common law tort system—an adjudication venue known to sit close to the ground where law meets culture—has taken on an even more significant public law role. Accordingly, federalism has risen as a significant—though still nondeterminative—function of the tort system.

The choice between local and national norms is a choice between heterogeneous and uniform legal cultures. If the evolutionary theories are to be believed, uniformity was an important feature of early law as it permitted the transition from cultural customs to legal proscriptions. As European and American societies transitioned into industrial modernity, they brought together disparate peoples into large states bound together as nations through the circulation of common symbols, practices, and historical memory. In the United States, the shared national past was sufficiently strong to bind together fifty disparate states whose sovereignty was shared with a remote federal government. Throughout the first centuries of this history, this arrangement permitted significant state autonomy in the development and application of tort law—liability for civil wrongs ranging from harm to reputation and physical autonomy to personal property and emotional well-being.

Over the past century, cultural homogeneity underpinning a common American nationhood has become attenuated. This change has resulted from greater migration of people and goods into and across the country, as well as more rapid circulation of ideas and imagery through high-tech advancements. Instead of bringing with them a concomitant increase in state autonomy over civil liability disputes, these changes have wrought greater federal influence into state common law rules and processes. Through that influence, jurists have developed and served the federalism function. Where other tort functions are preoccupied with economic concerns such as cost spreading and optimal social utility, the federalism function is an immanently cultural one: it seeks the proper arrangement of American legal geography. Where some would prefer law to simplify the world in which we live, the ingenuity of this approach lies in its ability to instead mirror the complexity of that world. Through that mirror, one sees an image in which norms operate most accurately on geographic scales best suited to the discrete socioeconomic practices from which they were born.