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REMOVING TORTS

BETSY J. GREY*

ABSTRACT

The common law torts system generally governs the way private harms are addressed throughout the United States. But there is a notable exception when governments decide to oust or limit common law tort remedies for certain kinds of conduct. Examples are many, including state and federal legislation proposed or implemented during the COVID-19 pandemic to shield industries from liability; federal legislation shielding airlines from liability arising from the 9/11 attacks; federal legislation shielding gun manufacturers from claims stemming from violent crime; federal legislation granting immunity to social media platforms for harm from materials posted by third parties; and state workers' compensation programs shielding employers from liability for harms in the workplace.

This article does not specifically question the power of governments to override or preempt private law obligations; it assumes that the power exists. Instead, drawing from the examples above, the article explores from a policy perspective the competing interests involved in the exercise of that power—both the interests served and disserved by granting liability immunity. Given the important consequences of how this balance is struck, this article proposes a roadmap of factors and findings that governments should weigh before granting immunity to private industry. Without a general framework, the governmental process may appear to be—and may in fact be—arbitrary or the result of political favoritism and regulatory capture. When torts are removed, the significant values promoted by the common law, such as deterrence, redress, and exposure of substandard behavior, may be undermined and citizens may lose their confidence in the government's ability to protect them from harm. To justify that result, the interests advanced by granting immunity should be sufficiently compelling. Consequently, the decision-making framework includes four main areas of inquiry: 1) identifying the public interest served by protecting the industry from tort liability; 2) determining the reasonably anticipated threats to the industry from liability exposure, including the likelihood of successful lawsuits; 3) examining the likely impact of immunity on tort policies, particularly with regard to the accountability, deterrence, and compensation functions traditionally provided by torts; and 4) assuming that some immunity is warranted, tailoring immunity to minimize interference with tort policies.

*Jack E. Brown Chair in Law at Arizona State University's Sandra Day O'Connor College of Law. I thank Ellen Bublick, Erin Scharff, Joel Nomkin, and the organizers and participants of *Obligations X: Private Law and the State* in Banff, Canada for their insights and suggestions. Alyson Rish provided excellent research assistance.

I. Introduction

Torts dominate our system for addressing private harms in society, but the tort system has been under attack for decades. Critics portray the system as out of control, exploited by greedy plaintiffs who win excessive judgments that stymie industry. These attacks typically assume that market forces or regulation, without the specter of tort liability, will suffice to maintain sufficient standards of industry safety.

The attacks have had a good measure of success, inspiring federal and state legislation that immunizes a waterfront of industries from tort liability. Some of these protections have been temporary and targeted in response to specific emergencies, such as the recent measures enacted by Congress and the states to protect healthcare and other industries involved in the COVID-19 pandemic response. Likewise, in the wake of the 9/11 terrorist attacks, Congress quickly enacted legislation to shield the airline industry from tort exposure. Other immunity protections have no time limits, such as Congress's grant of immunity to gun manufacturers for personal injury claims stemming from violent crime and to social media platforms for harms from third-party-posted material. Perhaps most notable among these permanent liability

shields are the state workers' compensation programs that protect employers from tort liability for workplace harms. Drawing from these examples, this article examines the competing interests affected by the decision to grant tort immunity.

Tort law shifts the cost of injury from the injured to the injury-creator. Imposing this shift through tort liability pursues several values. It seeks to correct an unjust imbalance between the injured and the injury-creator and return the injured to the status quo ante through compensation. And it seeks to implement a fundamental premise of torts that liability will expose and deter substandard behavior. Removing or limiting the risk of liability through tort shields can compromise these values: it may encourage negligent behavior, fail to expose substandard behavior, forfeit adequate redress for harm, and undermine the trust and safety of victims. So too, whenever government grants immunity, it inevitably picks economic winners (those industries that receive immunity) and losers (those that don't and continue to face potential tort liability). This choice puts government's thumb on free market forces.

At the same time, governments have compelling interests, particularly in effectively promoting public safety and economic growth, which may be advanced by overriding tort liability in certain circumstances. Choosing to do so raises significant questions. How should governments strike the balance between promoting the societal benefits provided by granting immunity and the individual and societal benefits of torts? When should certain public interests displace other interests promoted by the tort system?

The answer to these questions requires a decision-making framework. Articulating and applying a consistent set of factors that accounts for both the public and private interests at stake is necessary to minimize the likelihood that tort immunity is simply the result of which industry holds the most lobbying power or based on assumptions that are not evidence-based. Without a general framework, the governmental process may appear to be—and may in fact be—arbitrary or the result of political favoritism and regulatory capture. A short-sighted decision-making process may result in decisions that are counterproductive or anti-democratic by cutting off access to the tort system and the norms it promotes. Citizens consequently may lose their confidence in the government's ability to protect them from harm. For these reasons, this article proposes factors that governments should make specific findings about and balance before granting immunity to private industry. The decision-making framework includes four main areas of inquiry: 1) identifying the public interest served by protecting the industry from tort liability; 2) determining the reasonably anticipated threats to the industry from liability exposure, including the likelihood of successful lawsuits; 3) examining the likely impact of immunity on tort policies, particularly with regard to the accountability, deterrence, and compensation functions traditionally provided by torts; and 4) assuming that some immunity is warranted, tailoring immunity to minimize interference with tort policies.

Scholars have spilled much ink on the value of granting businesses immunity from tort liability, especially in the context of tort reform.[1] Other scholars examine tort immunity from the viewpoint of government's constitutional power to do so.[2] Some scholars argue that tort liability impedes the development and implementation of new products and technologies because of unmanageable uncertainties about liability risks.[3] This article asks a different question. It assumes that state and federal governments have the power to shield businesses from tort liability and the exercise of that power may be warranted. But when that power is exercised, legislatures eliminate both the ability of victims to seek recourse from the tort system for harms suffered and the benefits of the regulatory function of torts. Such an extreme action demands a more thoughtful adjustment of the tort system via a concrete factor analysis. This article asks how governments can avoid inconsistent or unwarranted decision-making in exercising their power to remove torts. In proposing a decision-making framework, it argues for a presumption against granting tort immunity and identifies the factors and functional considerations to evaluate before granting immunity.

Part II briefly overviews examples of government interference with private tort remedies, focusing on the examples noted above. These examples vary in their breadth, settings, and goals: they address fostering specific industries as well as more systemic concerns stemming from public emergencies or compensation for workplace injuries. Some aim to act preemptively, while most act in response to an event or growing problem. Some of the examples provide alternative compensation schemes, but most do not. With these examples as the backdrop, Part III explores the impact on common law rights and remedies when tort displacement occurs. Certain values and incentives provided by the tort system, such as deterrence, oversight, transparency, and compensation, may be compromised or lost when a government

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[1] *See, e.g.*, Heidi L. Feldman, *From Liability Shields to Democratic Theory: What We Need from Tort Theory Now*, 14 J. Tort L. 373, 373–74 (2021) (describing laws that introduced doctrine designed to "eliminate or narrow grounds" for recovery for personal injury claims). Feldman captures these measures under a theory of "tort deflationism" which is the result of a "[f]ifty year surge in eliminative doctrines." *Id.* (arguing that tort deflationism traces its roots to modern American conservatism). *See* F. Patrick Hubbard, *The Nature and Impact of the "Tort Reform" Movement*, 35 Hofstra L. Rev. 436, 469–83 (2006); Michael L. Rustad & Thomas H. Koenig, *Taming the Tort Monster: The American Civil Justice System as a Battleground of Social Theory*, 68 Brook. L. Rev. 1, 4–5 (2002). *See generally* Andrew Popper, Materials on Tort Reform (3d ed. 2024).

[2] *See, e.g.*, Catherine M. Sharkey, *Against Categorical Preemption: Vaccines and the Compensation Piece of the Preemption Puzzle*, 61 DePaul L. Rev. 643, 652 (2012) ("So long as it is within its Commerce Clause authority, Congress can act to displace state law."); Robert L. Rabin, *Territorial Claims in the Domain of Accidental Harm: Conflicting Conceptions of Tort Preemption*, 74 Brook. L. Rev. 987, 990 (2009) (noting that preemption raises the constitutional question whether Congress "intended to displace tort law," but not its power to do so).

[3] *See, e.g.*, Kyle Graham, *Of Frightened Horses and Autonomous Vehicles: Tort Law and Its Assimilation of Innovations*, 52 Santa Clara L. Rev. 1241, 1266–68 (2012); Robert D. Spendlove, *Speed Bumps on the Road to Progress: How Product Liability Slows the Introduction of Beneficial Technology—An Airbag Example*, 13 Geo. Mason L. Rev. 1143, 1143–44 (2006).

exercises its power to eliminate tort remedies. Federalism principles may also counsel a strong reluctance to displace state tort remedies to avoid undermining the fundamental state interests in protecting the health and safety of its citizenry and redressing injuries. These values support the view that providing tort remedies is the default system, and removing torts is the exception. But these values must be balanced against the public needs addressed by displacing private tort remedies. Part IV therefore proposes guidelines for when the government should or should not invoke its powers to suspend private law remedies, which require fact-finding and the balancing of factors to determine which approach best serves the public interest. In this way, the article seeks to find a pathway that recognizes the benefits that both immunity shields and torts have to offer.

II. Government Displacement of Private Law Remedies

Historically, both state and federal governments have interfered with private tort law remedies, which Heidi Li Feldman refers to as "eliminative" tort doctrines.[4] The interferences have occurred in a variety of contexts, typically involving a public emergency or a product or service perceived as critical to the common good.[5] Often these interferences, which "limit[] an entity's exposure to litigation and liability," are intended to "allow[] that entity to devote its

[4] *See* Feldman, *supra* note 1, at 373–74 (describing "eliminative" measures, some of which fall under "tort reform"); Anthony Sebok, *The Deep Architecture of American COVID-19 Tort Reform 2020-21*, 71 DePaul L. Rev. 473, 473–74 (2022) (distinguishing tort reform from governmental response to emergencies stemming from public necessity); David A. Logan, *Juries, Judges, and the Politics of Tort Reform*, 83 Cin. L. Rev. 903, 904 (2015).

[5] *See* Kevin M. Lewis, Cong. Rsch. Serv., LSB10461, Federal Legislation Shielding Businesses and Individuals from Tort Liability: A Legal and Historical Overview 2–4 (2020) (listing examples of federal legislation that shields businesses from state tort liability, including the National Swine Flu Immunization Program of 1976, the National Childhood Vaccine Injury Act of 1986, the Westfall Act, the Bill Emerson Good Samaritan Food Donation Act, the Volunteer Protection Act of 1997, the Biomaterials Access Assurance Act of 1998, the Y2K Act, the Air Transportation Safety and System Stabilization Act, the Support Anti-terrorism by Fostering Effective Technologies (SAFETY) Act of 2002, the Project BioShield Act of 2004, the Protection of Lawful Commerce in Arms Act, the Public Readiness and Emergency Preparedness (PREP) Act, and the Coronavirus Aid, Relief, and Economic Security (CARES) Act). Other examples include blood shield laws, immunity for telecommunications providers, including internet platforms under the Communications Decency Act of 1996, and immunity from obesity-related lawsuits for purveyors of fast foods. *See* AZ Rev. Stat. § 32-1481 (2023) (granting blood banks immunity from claims brought in strict liability and warranty); Cara L. Wilking & Richard A. Daynard, *Beyond Cheeseburgers: The Impact of Commonsense Consumption Acts on Future Obesity-Related Lawsuits*, 68 Food & Drug L. J. 229, 229–30 (2013); Jeff Guo, *These 26 States Won't Let You Sue McDonald's for Making You Fat. The Surprising Consequence of Banning Obesity Lawsuits*, Wash. Post (May 28, 2015), https://www.washingtonpost.com/blogs/govbeat/wp/2015/05/28/these-26-states-wont-let-you-sue-mcdonalds-for-making-you-fat-the-surprising-consequence-of-banning-obesity-lawsuits/ [https://perma.cc/7XN7-D6JV].

time and resources to socially beneficial endeavors."[6] The interferences may also stem from a governmental decision to foster certain fledgling industries.[7] These measures can completely or partially restrict access to common law tort remedies.[8] This part briefly overviews five examples of governments intervening to reduce or remove the availability of state tort remedies for specific industries or defendants. These examples demonstrate the divergent legislative approaches to side-stepping tort remedies in different settings, driven by varying motivations for the displacements. The displacements have proven generally successful on their own terms—avoiding or reducing liability for particular industries or parties—although the need for and costs of intervention have been more difficult to measure.

A. Pandemic Liability Protections

Pandemic liability protections fell into two large buckets: protection for healthcare and non-healthcare industries. The COVID-19 pandemic triggered a public health emergency that brought health workers and vaccine manufacturers to the forefront, both in terms of addressing public health needs and facing greater exposure to liability. In response, both federal and state governments acted swiftly to provide broad liability protections to healthcare workers and vaccine manufacturers.[9] At the same time, some non-healthcare businesses were shuttered either by state action or by consumer and employee responses to the crisis. To encourage those businesses to resume normal business activities, some states provided liability protection from personal injury suits related to the virus.[10]

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[6] Lewis, *supra* note 5, at 4. *See* Victor Schwartz, Cary Silverman & Christopher E. Appel, *Respirators to the Rescue: Why Tort Law Should Encourage, Not Deter, the Manufacture of Products that Make Us Safer*, 33 Am. J. Trial Advoc. 13, 16 (2009) ("Prevention of injury is a basic objective of tort law. In some circumstances, however, this goal is at tension with traditional liability rules and the civil justice system is pressed to make a public policy tradeoff.").

[7] *See* Cary Silverman, Phil Goldberg, Jonathan Wilson & Sarah Goggans, Torts of the Future: Autonomous Vehicles, Addressing the Liability and Regulatory Implications of Emerging Technologies 1, 6 (2018), https://www.ali.org/media/filer_public/6a/26/6a26ebc5-3dfa-4c60-b1ba-7e596819ef43/dc-656837-v1-torts_of_the_future_autonomous_emailable.pdf [https://perma.cc/6HXA-34LR] (describing alternative liability theories for self-driving cars "without chilling the advancement of this life-saving technology," including no-fault insurance and a victim compensation fund).

[8] *See generally* Feldman, *supra* note 1, at 389–95 (describing various features of tort deflationism, which can range from complete removal of tort remedies to the reduction of grounds for recovery, such as allowing compliance with government standards as a complete defense, raising the level of culpability beyond negligence, raising the standard of proof, imposing a heightened pleading requirement, reducing damages, strengthening affirmative defenses, and creating explicit preemption provisions). *See* Logan, *supra* note 4, at 907 (explaining that tort reform represents "changes to procedure, changes to substantive law, and limits on available remedies"). In this article, I focus mainly on removing torts at the complaint stage, but the same trade-offs occur when tort liability is reduced or removed.

[9] *See* Feldman, *supra* note 1, at 375–79; Betsy J. Grey & Samantha Orwoll, *Tort Immunity in the Pandemic*, 96 Ind. L. J.: The Supp. 66, 69–71 (2022).

[10] *See infra* note 22 and accompanying text.

The main focus of COVID-19 related immunity protections was the healthcare industry. The federal government and some states had laws predating the pandemic that addressed liability protections for the healthcare industry during a public health emergency, reflecting the strong public interest in marshalling health care resources quickly during such emergencies. Two federal laws, the Public Readiness and Emergency Preparedness Act ("PREP Act")[11] and the Coronavirus Aid, Relief, and Economic Security Act ("CARES Act")[12] invoked liability protection for healthcare workers during the pandemic. The federal government originally enacted the PREP Act in 2005 to grant liability protections for healthcare workers in public health emergencies, and the Secretary of Health and Human Services (HHS) extended it to COVID-19 in 2020.[13] The purpose of granting immunity was to avoid the constraints that may occur with liability exposure. As one case opinion described, "Its evident purpose is to embolden caregivers, permitting them to administer certain encouraged forms of care (listed COVID 'countermeasures') with the assurance that they will not face liability for having done so."[14] Built into the PREP Act is the Countermeasures Injury Compensation Program, which offers some limited compensation for medical expenses, lost wages, and death benefits.[15]

The federal government enacted the CARES Act to shield healthcare professionals who volunteered during the COVID-19 emergency from liability, to encourage professionals to volunteer.[16] Additionally, the Secretary of HHS urged state governors to provide liability immunity to healthcare

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[11] 42 U.S.C. § 247d-6d.

[12] Coronavirus Aid, Relief, and Economic Security Act, Pub. L. No. 116-136 § 3215, 134 Stat. 281, 374–75 (2020).

[13] Declaration Under the Public Readiness and Emergency Preparedness Act for Medical Countermeasures Against COVID-19, 85 Fed. Reg. 15, 198 (Mar. 17, 2020). The immunity under the Act applies to claims for personal injury or property damage from use of virus countermeasures but does not protect against intentional misconduct. *Id.*

[14] Est. of Maglioli v. Andover Subacute Rehab. Ctr. I, 478 F. Supp. 3d 518, 529 (D.N.J. 2020).

[15] *See Covered Countermeasures*, Health Res. & Servs. Admin. (HRSA), https://www.hrsa.gov/cicp/covered-countermeasures [https://perma.cc/CMR5-HHWY]; *Types of CICP Benefits*, HRSA, https://www.hrsa.gov/cicp/types-cicp-benefits [https://perma.cc/FYH8-UXMM]. Compensation provided under this program is more limited than potential tort redress. *See* Kevin J. Hickey & Erin H. Ward, Cong. Rsch. Serv., LSB10584, Compensation Programs for COVID-19 Vaccine Injuries, 1, 3 (2021) (noting that "[c]ompensation under CICP is limited to . . . reasonable medical expenses . . . loss of employment income," and "a set death benefit," but is subject to certain caps on awards and does not include pain and suffering damages). The provision of liability immunity was controversial. Three Democratic Senators, Kennedy, Harkin and Dodd, issued a press release criticizing the liability immunity provision of the bill: "Without a real compensation program, the liability protection in the defense bill provides a Christmas present to the drug industry and a bag of coal to everyday Americans." Steven L. Schooner & Erin Siuda-Pfeffer, *Post-Katrina Reconstruction Liability: Exposing the Inferior Risk-Bearer*, 43 Harv. J. on Legis. 287, 324 n.194 (2006) (citing Press Release, Sen. Edward Kennedy, Sen. Tom Harkin & Sen. Christopher Dodd, Kennedy Harkin and Dodd Protest Frist Liability Giveaway (Dec. 21, 2005)).

[16] *See* Coronavirus Aid, Relief, and Economic Security Act § 3215.

professionals for medical malpractice.[17] The CARES Act also provided $2 trillion in economic stimulus money for industries and individuals during the pandemic,[18] which was intended to "build faith in an economic rebound."[19]

Several states also had statutes predating the COVID-19 pandemic that protect healthcare providers from liability during public health emergencies.[20] These statutes generally protect against liability for physical injury or property damage unless the healthcare worker's conduct constitutes gross negligence or willful misconduct.[21] During the pandemic, other states passed similar liability shields for healthcare workers.[22]

Outside of the healthcare industry, states adopted liability shields focused on protecting the economic interests of businesses that could be affected by COVID-19. Thirty states enacted shields in 2020 and 2021 to immunize businesses from lawsuits that blamed them for a person's COVID-19 exposure, injury, or death.[23] A major goal of these statutes was to induce businesses to reopen without fear of litigation.[24] These statutes essentially eliminated negligence law for COVID-19 sufferers without offering a replacement or alternative way for the injured to obtain redress for negligent exposure of the virus.[25] Although legislatures did not substantially investigate the need for the liability shields, they were probably unnecessary because liability claims

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[17] *See* Letter from Alex M. Azar II, Sec'y of Health and Hum. Servs., to Governors (Mar. 24, 2020), https://www.nga.org/wp-content/uploads/2020/03/Governor-Letter-from-Azar-March-24.pdf [https://perma.cc/N7Q3-CHEA].

[18] *See* Gabriella Levine, *Giving Heroes Their Shields: Providing More Immunity to the Healthcare Industry During the COVID-19 Pandemic*, 36 J. of Civ. Rts. & Econ. Dev. 107, 136 (2022).

[19] *Id.*

[20] *See, e.g.*, Fla. Stat. § 768.13 (2022); La. Stat. Ann. §§ 29:735.5, 29:791; Grey & Orwoll, *supra* note 9, at 71.

[21] *See, e.g.*, Ark. Code Ann. § 12-87-111 (2009).

[22] *See, e.g.*, 2020 Alaska Sess. Laws Ch. 10 § 4; Ariz. Rev. Stat. Ann. § 12-516 (2021); 2020 Tenn. Pub. Acts 1; 2020 Va. Acts 7. Governors also responded to the pandemic by issuing executive orders to protect healthcare workers from liability. Ariz. Exec. Order No. 2020–27 (Apr. 9, 2020); R.I. Exec. Order No. 20–70 (Sept. 2, 2020). *See* Feldman, *supra* note 1, at 378 (observing that these state statutes addressing COVID-19 claims essentially "do away with negligence law, offering no replacement or alternative way for COVID-19 sufferers to hold accountable those whose careless conduct demonstrably caused their infections and resulting injuries"). *But see* Levine, *supra* note 18, at 129–30 (arguing that prior immunity measures were inadequate because of the unprecedented nature of COVID-19, "a lack of necessary equipment[,] and mental health issues amongst healthcare workers," and also that the healthcare industry is "critical to our literal and economic survival").

[23] *See* Chris Marr, *Dying Covid Liability Shield Laws Prompt Push for their Revival*, Bloomberg Law (Jan. 27, 2022), https://news.bloomberglaw.com/daily-labor-report/dying-covid-liability-shield-laws-prompt-push-for-their-revival [https://perma.cc/FR6H-SGZB]; *See* Feldman, *supra* note 1, at 376–77 (2021) (discussing state statutes); Sebok, *supra* note 4, at 486–88.

[24] *See, e.g.*, Fla. Stat. § 768.38 (2021) ("The threat of unknown and potentially unbounded liability to [certain] businesses, entities, and institutions, in the wake of a pandemic that has already left many of [them] vulnerable, has created an overpowering public necessity to provide an immediate and remedial legislative solution . . . [of] heightened legal protections against liability. . . .").

[25] *See* Feldman, *supra* note 1, at 378.

were unlikely to prevail given the challenge of proving causality.[26] In addition, state workers' compensation laws generally shield businesses from claims of injury or exposure to illness that occurs in the workplace, including COVID-19,[27] although a few states created exceptions to allow COVID-19 exposure claims to proceed.[28]

In one of the most sweeping drives for executing immunity on the federal level, then-Senate Majority Leader Mitch McConnell sought a nationwide liability shield law, the Safe to Work Act, which would have explicitly preempted state tort law for personal injury claims arising from COVID-19.[29] Its explicit purpose was economic protection. As stated in its findings, "Individuals and entities potentially subject to coronavirus-related liability will structure their decisionmaking to avoid that liability. [Various businesses and institutions] may decline to reopen because of the risk of litigation."[30] Accordingly, the proposed Act's purpose was to "ensure that the Nation's recovery from the coronavirus economic crisis is not burdened or slowed by the substantial risk of litigation."[31] These proposed protections garnered significant opposition from congressional Democrats, labor unions, and other groups and ultimately did not pass.[32] Some argued that these liability shields were really just a decoy to enact tort reform at the federal level.[33]

B. Limits on Airline Tort Liability Post-9/11

In the aftermath of the September 11, 2001 terrorist attacks, and faced with looming economic uncertainty and fears over bankruptcy, the airline industry lobbied intensely for help from the federal government, arguing

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[26] *See infra* notes 164–167 and accompanying text.

[27] *See* Feldman, *supra* note 1, at 378.

[28] *See, e.g.*, See's Candies, Inc. v. Superior Court, 288 Cal. Rptr. 3d 66, 73 (Cal. Ct. App. 2021) (concluding that the plaintiff's claims for her husband's death after she contracted COVID-19 were not preempted by the derivative injury doctrine of the Workers' Compensation Act).

[29] *See* Safe to Work Act, S. 4317, 116th Cong. (2020). An earlier sweeping federal attempt to intervene in state tort law involving products liability also failed. The Uniform Products Liability Act of 1979 would have limited remedies for products liability claims. *See generally* Model Uniform Product Liability Act, 44 Fed. Reg. 62714 (1979). This became the model for the Product Liability Fairness Act of 1995, H.R. 956, 104th Cong. (1995). Congress passed the Act, but it was vetoed by President Bill Clinton. The bill would have preempted state law, limiting the grounds of liability, defenses, and damages. *See* Feldman, *supra* note 1, at 381–82.

[30] Safe to Work Act, S. 4317, 116th Cong. § 2(a)(17) (2020).

[31] *Id.* § 2(b)(4).

[32] *See* Ana Swanson & Alan Rappeport, *Liability Shield Is a Stumbling Block as Lawmakers Debate Relief*, N.Y. Times (Aug. 5, 2020), https://www.nytimes.com/2020/08/05/us/politics/liability-shield-business-coronavirus.html. [https://perma.cc/N99Q-7G7U]; *Businesses Should Not Get a Free Pass, National Consumer Groups Tell Congress*, Public Citizen (May 6, 2020), https://www.citizen.org/news/businesses-should-not-get-a-free-pass-national-consumer-groups-tell-congress/ [https://perma.cc/LHU6-SURU].

[33] *See, e.g.*, Michael L. Rustad, *Your Right to Sue, Goodnight!*, NULR of Note (June 15, 2020), https://blog.northwesternlaw.review/?p=1487 [https://perma.cc/CE8A-U782].

that liability would crush a critical industry.[34] Eleven days after the attacks, Congress passed the Air Transportation Safety and System Stabilization Act ("ATSSSA") to aid airline carriers and compensate victims of the attacks.[35] In addition to creating a $5 billion bailout in direct relief for airline carriers,[36] ATSSSA capped the recovery amount in all tort liability lawsuits at the airlines' existing liability insurance limits.[37] American Airlines and United Airlines (whose planes were brought down by the terrorists) each carried approximately $1.5 billion in liability insurance.[38]

The Act was explicitly designed to ensure the airline industry remained competitive. The full title of ATSSSA includes its purpose: "An Act to preserve the continued viability of the United States air transportation system."[39] It was clear that Congress was concerned about protecting from liability costs an industry deemed critical to the economic well-being of the nation. As Representative Thomas Reynolds stated:

> We must remember that this is not just an industry giant that is suffering. This is a critical component to our way of life and a vital segment of our national economy. Our airlines move people and products across America and throughout the world. They serve not just business and tourism, but can, quite literally, determine whether we are able to compete in a global economy.[40]

These assertions and conclusions were taken at face-value, without any real investigation or fact-finding on the impact of tort liability on the industry. Consideration of other alternatives, like bankruptcy, did not come into play.[41]

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[34] *See* George W. Conk, *Will the Post 9/11 World Be a Post-Tort World?*, 112 Dickinson L. Rev. 175, 176 (2007); Laurence Zuckerman, *Some Airlines Say the Pace of Bailout Aid Is Too Sluggish*, N.Y. Times (Oct. 23, 2001), https://www.nytimes.com/2001/10/23/business/some-airlines-say-the-pace-of-bailout-aid-is-too-sluggish.html [https://perma.cc/S54P-QQAP] (discussing airline industry's concern that airlines are close to failing and the Air Transportation Stabilization Board is moving too slowly); Laurence Zuckerman, *Do All Airlines Deserve a Taxpayer Rescue?*, N.Y. Times (Oct. 21, 2001), https://www.nytimes.com/2001/10/21/business/do-all-airlines-deserve-a-taxpayer-rescue.html [https://perma.cc/4QWU-TZAH] (noting that "the pressure from state and national politicians to make sure that their home airlines survive is . . . enormous" and "after an intensive round of lobbying," the Office of Management and Budget gave the Air Transportation Stabilization Board "wide leeway to extend loans").

[35] Air Transportation Safety and System Stabilization Act, Pub. L. No. 107-42, 115 Stat. 230 (2001) (codified as amended in scattered sections of 49 U.S.C.) (hereinafter "ATSSSA").

[36] *See id.* § 101(a)(2).

[37] *See id.* § 408(a).

[38] *See* Noah H. Kushlefsky, *The Choice Between the Victim Compensation Fund and Litigation*, L.A. Lawyer (Sept. 2002) (citing Joseph B. Treaster, *A Nation Challenged: The Insurers; Sales Are Resumed for Coverage of Airlines for Terror Damage*, N.Y. Times (Sept. 25, 2001), https://www.nytimes.com/2001/09/25/business/nation-challenged-insurers-sales-are-resumed-for-coverage-airlines-for-terror.html [https://perma.cc/ASF3-PVKK]).

[39] ATSSSA, *supra* note 35, § 1.

[40] 147 Cong. Rec. H5884 (daily ed. Sept. 21, 2001) (statement of Rep. Thomas M. Reynolds).

[41] *See* Susanna Dokupil, *Rethinking the Airline Bailout*, The Federalist Soc'y (Dec. 1, 2003), https://fedsoc.org/commentary/publications/rethinking-the-airline-bailout [https://perma.cc/3ZGP-7GC4].

Given the significant magnitude of the injuries and the limited insurance funds available, Congress established the September 11th Victim Compensation Fund of 2001 ("VCF") as an alternative to litigation for victims.[42] By filing a claim through the VCF, claimants waived their right to file, or be a party to, a civil lawsuit for damages sustained from the attack.[43] While the VCF created an avenue for injured parties to bypass the daunting court system, and still obtain compensation, the prohibition on double-dipping also created a dilemma in choosing between legislative and judicial relief.

Congress rejected several elements of the traditional torts system in designing the VCF. It promoted a speedier adjudication of claims and discouraged the filing of tort claims,[44] while eliminating any consideration of legal responsibility from the equation.[45]

Nevertheless, the program's structure incorporated some but not all elements of the tort system with regard to damages.[46] A notable drawback of the VCF, as acknowledged by its Special Master Kenneth Feinberg, included these conflicting theories of damage awards.[47] On the one hand, the program followed the traditional tort equitable distribution model, which considers income levels in the compensation calculus, resulting in a maximum award of $7.1 million.[48] On the other hand, although the program did not establish a formal damage limit, Special Master Feinberg imposed a baseline payment of $250,000 for all claims[49] and an informal cap to promote equality and prevent excessive favoring of the wealthy over the financially disadvantaged.[50]

Despite this drawback, the program largely proved to be an efficient compensation mechanism that circumvented the tort system. Ninety-seven percent of those eligible to file a claim ultimately did so by the program's

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[42] The VCF's stated purpose was "to provide compensation to any individual (or relatives of a deceased individual) who was physically injured or killed as a result of the terrorist-related aircraft crashes of September 11, 2001." ATSSSA § 403.

[43] *Id.* § 405(c)(3)(B)(i).

[44] *See* Gillian K. Hadfield, *The September 11th Victim Compensation Fund: "An Unprecedented Experiment in American Democracy*" 8–9 (U. of S. Cal. L. Sch. Legal Studies Working Paper Series No. 3, 2005), https://law.bepress.com/cgi/viewcontent.cgi?referer=&httpsredir=1&article=1028&context=usclwps-lss [https://perma.cc/U4JD-MQM2] (noting the September 11th Fund reflects a "fundamental erosion of our understanding of courts as institutions of democratic accountability, participation, and governance").

[45] *See* ATSSSA § 405(b)(2).

[46] *See* Kenneth R. Feinberg, What is Life Worth? 36 (2005) (calling the fund a "tort-based compensation program" that was turned into "a type of social welfare program"); Matthew Diller, *Tort and Social Welfare Principles in the Victim Compensation Fund*, 53 DePaul L. Rev. 719, 720 (2003) (discussing the Fund as a public benefit program that draws from tort law).

[47] *See* Feinberg, *supra* note 46, at 34–36, 47–48.

[48] *See* Kenneth R. Feinberg, 1 Final Report Of The Special Master For The September 11th Victim Compensation Fund Of 2001 110 (2004).

[49] Feinberg, *supra* note 46, at 50.

[50] David W. Chen, *Man Behind Sept. 11 Fund Describes Effort as a Success, With Reservations*, N.Y. Times (Jan. 1, 2004), https://www.nytimes.com/2004/01/01/nyregion/man-behind-sept-11-fund-describes-effort-as-a-success-with-reservations.html [https://perma.cc/V49K-8T3K].

deadline.[51] Fewer than ninety people brought tort lawsuits against the airlines and other defendants seeking compensation higher than would be awarded under the VCF or attempting to establish responsibility for the attacks.[52]

Once the lawmakers had largely removed the private tort remedy, they also removed a significant avenue for investigating the causes of the attacks. Subsequently, President George W. Bush and Congress established the National Commission on Terrorist Attacks Upon the United States ("9/11 Commission") on November 27, 2002.[53] Along with preparing a full account of the circumstances surrounding the attacks, including preparedness for and the immediate response to the attacks, the Commission provided recommendations designed to guard against future attacks.[54] The 9/11 Commission Report, issued in July 2004, made forty-one recommendations to improve national security, but did not specifically address the failures of the airline industry.[55] In response, Congress adopted most of the Commission's proposals in several pieces of legislation.[56] However, some of the Commission's proposals remain unaddressed by Congress, such as calls to reorganize congressional oversight of intelligence and homeland security policy.[57]

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[51] *See* Feinberg, *supra* note 46, at 164–65; Chen, *supra* note 50; David W. Chen, *After Weighing Cost of Lives, 9/11 Fund Completes Its Task*, N.Y. Times, (June 15, 2004), https://www.nytimes.com/2004/06/15/nyregion/after-weighing-cost-of-lives-911-fund-completes-its-task.html [https://perma.cc/ZGW5-E8R7]. Claimants filing on behalf of deceased victims received almost six billion dollars in compensation. Feinberg, *supra* note 46, at 164.

[52] Feinberg, *supra* note 46, at 164. *See In re* September 11 Litigation, 280 F. Supp. 2d 279, 279, 301 (S.D.N.Y. 2003).

[53] *See About the Commission*, Nat'l Comm'n on Terrorist Attacks Upon the U.S. (2004), https://govinfo.library.unt.edu/911/about/index.htm [https://perma.cc/UAL3-3SPX].

[54] *Id.*

[55] *See generally* Nat'l Comm'n on Terrorist Attacks Upon the U.S., The 9/11 Commission Report: Final Report of the National Commission on Terrorist Attacks Upon the United States (2004), https://govinfo.library.unt.edu/911/report/911Report.pdf [https://perma.cc/V4PF-8WX7]; Bipartisan Pol'y Ctr., Nat'l Sec. Preparedness Grp., Tenth Anniversary Report Card: The Status of the 9/11 Commission Recommendations (2011), https://bipartisanpolicy.org/download/?file=/wp-content/uploads/2019/03/CommissionRecommendations.pdf [https://perma.cc/P3T6-ZKX8].

[56] *See* Mark Fenster, *Designing Transparency: The 9/11 Commission and Institutional Form*, 65 Wash. & Lee L. Rev. 1239, 1243 (2008). Notably, the Intelligence Reform and Terrorism Prevention Act of 2004 established the position of Director of National Intelligence, the National Counterterrorism Center, and the Privacy and Civil Liberties Oversight Board. *See generally* Intelligence Reform and Terrorism Prevention Act of 2004, Pub. L. No. 108-458, 118 Stat. 3638 (codified in scattered sections of U.S.C.). Additionally, the Implementing Recommendations of the 9/11 Commission Act of 2007 instituted many remaining recommendations, including a risk-based system for determining distribution of federal security funds and a requirement to screen all cargo on passenger planes. *See* Implementing Recommendations of the 9/11 Commission Act of 2007, Pub. L. No. 110-53, § 1602, 121 Stat. 266, 477–80 (2007) (codified at 49 U.S.C. § 44901).

[57] Jordan Tama, *The 9/11 Commission*, in Encyclopedia of U.S. Intelligence 9, 12 (Gregory Moore ed., 2015). Governor Thomas Kean, the Chair of the Commission was "disturbed" and "alarmed" by the government's failure to act on some of the Commission's recommendations, such as securing international supplies of nuclear weapons, unifying radio frequencies for emergency workers, and appointing a federal civil liberties board. Philip Shenon, *Members of Sept. 11 Panel Press for Information on Terror Risk*, N.Y. Times (June 6, 2005),

C. Gun Manufacturer Liability

In 2005, Congress passed the Protection of Lawful Commerce in Arms Act ("PLCAA"), legislation intended to curtail civil liability actions against firearm manufacturers resulting from the misuse of their products by others.[58] This liability shield is unique in that the gun industry was not considered a critical industry like the healthcare industry during a public emergency or the airline industry facing overwhelming civil liability after terrorist attacks. Further, the shield is permanent, rather than a temporary measure aimed at a specific condition or incident.

The PLCAA was enacted following an uptick in lawsuits against manufacturers brought by individual victims of gun violence and by municipalities with a prevalence of gun violence, including lawsuits based on novel causes of action such as negligent marketing or public nuisance.[59] With heavy lobbying by the National Rifle Association ("NRA"),[60] the advocates of immunity argued that the lawsuits were creating a "crisis" that threatened the economic viability of the gun industry.[61] Opponents argued that the "tidal wave of

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https://www.nytimes.com/2005/06/06/politics/members-of-sept-11-panel-press-for-information-on-terror-risk.html [https://perma.cc/68WA-5KSK].

[58] *See* Protection of Lawful Commerce in Arms Act, 119 Stat. 2095 (codified as amended at 15 U.S.C. §§ 7901–03).

[59] *See* James L. Daniels, *Violating the Inviolable: Firearm Industry Retroactive Exemptions and the Need for a New Test for Overreaching Federal Prohibitions*, 38 J. Marshall L. Rev. 955, 962 (2005) (stating that at least thirty-three cities and municipalities had filed tort lawsuits against gun manufacturers between 1998 and 2004); Vivian S. Chu, Cong. Rsch. Serv., R42871, The Protection of Lawful Commerce in Arms Act: An Overview of Limiting Tort Liability of Gun Manufacturers 1 (2012).

[60] *See* Sheryl G. Stolberg, *Congress Passes New Legal Shield for Gun Industry*, N.Y. Times (Oct. 21, 2005), https://www.nytimes.com/2005/10/21/politics/congress-passes-new-legal-shield-for-gun-industry.html [https://perma.cc/WTS3-Y4ZC]; Sergio Munoz, *Why Isn't the Media Discussing the Unprecedented Law Giving Gun Makers and Dealers Immunity?,* Media Matters (Dec. 19, 2012), https://www.mediamatters.org/national-public-radio/why-isnt-media-discussing-unprecedented-law-giving-gun-makers-and-dealers [https://perma.cc/4RCC-WVM3]; Daniel Fisher, *Gunmaker Paid Up After Washington Sniper Killings, and May Yet Pay Again*, Forbes (Dec. 18, 2012), https://www.forbes.com/sites/danielfisher/2012/12/18/bushmaster-paid-after-malvo-killings-and-may-yet-pay-again/?sh=68cb940516a9 [https://perma.cc/EJJ7-XMHE] ("[G]un manufacturers have won double-barreled protection from Congress against the type of lawsuits that bedevil the makers of everything from toys to tractor-trailers."); Kimberly Wehle, *The Best Hope for Fixing America's Gun Crisis*, The Atlantic (June 19, 2022), https://www.theatlantic.com/ideas/archive/2022/06/us-gun-violence-mass-shooting-courts-tort-law/661283/ [https://perma.cc/T8GQ-9R8D].

[61] *See* 151 Cong. Rec. S9087, S9107 (daily ed. July 26, 2005) (statement of Sen. Max Baucus) (stating that "nuisance suits . . . threaten[] to put dealers and manufacturers out of business"); Sheryl G. Stolberg, *House Passes Bill to Protect Gun Industry From Lawsuits*, N.Y. Times (Oct. 20, 2005), https://www.nytimes.com/2005/10/20/politics/house-passes-bill-to-protect-gun-industry-from-lawsuits.html [https://perma.cc/8XQD-ZQRN]; *President Bush Signs "Protection of Lawful Commerce in Arms Act" Landmark NRA Victory Now Law*, Nat'l Rifle Ass'n Pol. Victory Fund (Oct. 26, 2005), https://www.nrapvf.org/articles/20051026/president-bush-signs-protection-of-lawful-commerce-in-arms-act-landmark-nra-victory-now-law [https://perma.cc/YU9U-Q7B2] (quoting NRA Executive Vice President Wayne LaPierre on how if third-party lawsuits against gun manufacturers are allowed to continue, "American

litigation" was exaggerated in both number and impact of the lawsuits.[62] The PLCAA became central to the gun control debate. Its proponents raised the specter of frivolous and costly lawsuits that would hold the law-abiding industry responsible for the acts of criminals, while its opponents argued that the PLCAA was merely an effort by the gun lobby to become the only business "exempt from longstanding principles of negligence, nuisance and product liability."[63]

Ultimately, Congress passed the PLCAA based on the view that it was unfair and socially harmful to hold gun manufacturers responsible for the actions of third parties under any circumstances. As the statute stated, it was premised on the belief that imposing liability on gun manufacturers for harm caused by others amounts to an abuse of the legal system, erodes public confidence in our Nation's laws, threatens the diminution of a basic constitutional right and civil liberty, invites the disassembly and destabilization of other industries and economic sectors lawfully competing in the free enterprise system of the United States, and constitutes an unreasonable burden on interstate and foreign commerce of the United States.[64]

In addition to these general purposes, the legislation even addressed specific causes of action, such as public nuisance and negligent marketing claims, stating that these liability actions "are based on theories without foundation in hundreds of years of the common law and jurisprudence of the United States and do not represent a bona fide expansion of the common law."[65] Thus, the statute was predicated on the sense that the lawsuits against the gun industry were not legitimate and stretched existing legal rights and doctrines.

The statute explicitly emphasizes the need to preserve access to guns in the face of these lawsuits: its purpose is "[t]o preserve a citizen's access to a supply of firearms and ammunition for all lawful purposes, including hunting, self-defense, collecting, and competitive or recreational shooting"[66] and to "prohibit causes of action against manufacturers . . . of firearms or ammunition products . . . for the harm solely caused by the criminal or unlawful

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companies will cease to make products," and that "[h]istory will show that this law helped save the American firearms industry from collapse").

[62] *See* Alden Crow, *Shooting Blanks: The Ineffectiveness of the Protection of Lawful Commerce in Arms Act*, 59 SMU L. Rev. 1813, 1821 (2006) (quoting Dan O'Connell, *Tort Reformers Score Some Wins*, The Kiplinger Letter (Nov. 8, 2005)). Some critics claimed the legislation was unnecessary because the lawsuits were "foundering." *See* Frank J. Vandall, *A Preliminary Consideration of Issues Raised in the Firearms Sellers Immunity Bill*, 38 Akron L. Rev. 113, 114–17 (2005).

[63] *See* Chu, *supra* note 59, at 1 (quoting *Brady Campaign to Prevent Gun Violence: Extreme Gun Lobby Trying Again to Protect Reckless Gun Dealers*, U.S. Newswire (Feb. 16, 2005)).

[64] 15 U.S.C. § 7901(a)(6).

[65] *Id.* § 7901(a)(7).

[66] *Id.* § 7901(b)(2).

misuse of firearm products or ammunition products by others when the product functioned as designed and intended."[67]

Congress also considered another factor in passing the statutes—that guns were extensively regulated and therefore tort liability was not critical to ensure gun safety. As Congress stated, "The manufacture, importation, possession, sale, and use of firearms and ammunition in the United States are heavily regulated by Federal, State, and local laws."[68]

Immunity under the PLCAA is limited rather than absolute. It contains six exceptions to the liability immunity,[69] but plaintiffs generally have had success with only one of them—the so-called "predicate exception."[70] That exception permits claims against gun manufacturers or sellers who have knowingly violated an underlying state or federal law (a "predicate statute") aimed at preventing criminals from obtaining guns.[71] To prevail on such a claim, the plaintiff must plead and prove that the defendant has both committed a tort and violated the underlying predicate statute.[72] Courts have diverged on whether the predicate statute must specifically target the gun industry, or whether it may have more general application.[73]

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[67] *Id.* § 7901(b)(1).

[68] *Id.* § 7901(a)(4).

[69] *Id.* § 7903(5)(A)(i)–(vi).

[70] *See* Hillel Y. Levin & Timothy D. Lytton, *The Contours of Gun Industry Immunity: Separation of Powers, Federalism, and the Second Amendment*, 75 Fla. L. Rev. 833, 850 (2023) ("Tort litigation against gun manufacturers is dominated by disagreements over the scope of PLCAA immunity.").

[71] 15 U.S.C. § 7903(5)(A)(iii).

[72] *See* Smith & Wesson Corp. v. City of Gary, 875 N.E.2d 422, 429–30 (Ind. Ct. App. 2007); City of N.Y. v. Beretta, U.S.A. Corp., 524 F.3d 384, 390 (2d Cir. 2008).

[73] *Compare Beretta*, 524 F.3d at 400–01, *and* Ileto v. Glock, Inc., 565 F.3d 1126, 1134 (9th Cir. 2009) (narrowly interpreting predicate exception as limited to statutes that specifically target the firearms industry), *with Smith*, 875 N.E.2d at 422, *and* Soto v. Bushmaster Firearms Int'l, LLC, 202 A.3d 262, 325 (Conn. 2019) (broadly interpreting predicate exception as not requiring statutes to directly address the firearms industry). In *Soto*, the most notable case promulgating the broad interpretation and circumventing the federal shield, the families of victims involved in the Sandy Hook school shooting sued Remington and multiple other gun manufacturers. 202 A.3d at 277. The families argued that Remington violated the Connecticut Unfair Trade Practices Act (CUPTA) of 1973, which permits recovery for personal injuries stemming from wrongful advertising practices. Conn. Unfair Trade Practices Act, Conn. Gen. Stat. § 42-110 (1973). After the Connecticut Supreme Court allowed the case to move forward, *Soto*, 202 A.3d at 325, the case eventually settled for $73 million. Rick Rojas, Karen Zraick & Troy Closson, *Sandy Hook Families Settle With Gunmaker for $73 Million Over Massacre*, N.Y. Times (Feb. 15, 2022), https://www.nytimes.com/2022/02/15/nyregion/sandy-hook-families-settlement.html [https://perma.cc/X29D-7KRR]. New York enacted a statute attempting to fall under the PLCAA's predicate exception by classifying the improper "sale, manufacturing, distribution, importing, or marketing of firearms" as a "public nuisance." N.Y. Gen. Bus. ch. 20, art. 39-DDDD, §§ 898(A)–(E) (2021). New York City was able to use the state statute to bring a claim against out-of-state firearm vendors without being preempted by the PLCAA. City of New York v. Bob Moates' Sport Shop, Inc., 253 F.R.D. 237 (E.D.N.Y. 2008).

D. Workers' Compensation Laws

In perhaps the most extensive use of liability shields, state governments, as a result of criticism that the tort system was inadequately compensating victims injured in the workplace, started to replace tort liability with no-fault workers' compensation schemes for occupational injuries in the early 1900s.[74] This liability immunity was unusual for a number of reasons. Unlike the previous examples of healthcare, airline, and gun-manufacturer liability shields, it is not industry-specific. Furthermore, both workers and employers advocated for the deployment of these schemes: "workers because of dissatisfaction with the uncertainty and delays associated with efforts to recover compensation for workplace injuries via negligence suits against employers . . . and employers because of frustration over the uncertainty and variability of jury awards for successful negligence claims by injured workers."[75]

As it turns out, these no-fault workers' compensation schemes present a double-edged sword for injured workers. They generally relieve workers of proving fault on the part of their employer and allow them to receive compensation for on-the-job injuries.[76] But in precluding tort liability, these mandatory schemes prevent workers from recovering the full panoply of common-law damages, including non-economic damages.[77] Over time, these differences have become more significant. Under this administrative scheme, payments are typically lower and minimize burdens on employers.[78] Thus, the replacement compensation scheme does not match the compensatory benefits of tort suits. Nor does it result in a finding of fault by the employer, largely removing the transparency and deterrent effects of the tort system.[79]

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[74] *See generally* Orin Kramer & Richard Briffault, Workers' Compensation: Strengthening the Social Compact (1991); Price V. Fishback & Shawn E. Kantor, *The Adoption of Workers' Compensation in the United States*, *1900-1930*, 41 J. L. & Econ. 305 (1998); Dan B. Dobbs, Paul T. Hayden & Ellen M. Bublick, Hornbook on Torts § 36.2 (2d ed. 2016) (describing the adoption and features of the workers' compensation system); *see also* Rabin, *supra* note 2, at 987.

[75] John C.P. Goldberg & Benjamin Zipursky, The Oxford Introduction to U.S. Law: Torts 22 (2010) [hereinafter Goldberg & Zipursky, Torts]; *see* Betsy J. Grey, *Homeland Security and Federal Relief: A Proposal for a Permanent Compensation System for Domestic Terrorist Victims*, 9 N.Y.U. J. Legis. & Pub. Pol'y 663, 704–06 (2006) [hereinafter Grey, *Homeland Security and Federal Relief*] (describing reasons for the emergence of workers' compensation programs).

[76] *See* Dobbs et al., *supra* note 74, at § 36.2.

[77] This is called the Grand Bargain, which was struck to ensure the adoption of workers' compensation laws. *See* Price V. Fishback & Shawn E. Kantor, A Prelude to the Welfare State: The Origins of Workers' Compensation (2000) (describing trend toward eliminating tort suits as an alternative to workers compensation). The exclusivity feature was critical to the acceptance of workers' compensations schemes by employers. *Id*. at 99–100, 105–07.

[78] *See* Feldman, *supra* note 1, at 393; Dobbs et al., *supra* note 74, at § 36.2.

[79] *See* Grey, *Homeland Security and Federal Relief*, *supra* note 75, at 706–09 (describing tradeoffs between worker's compensation systems and tort system).

E. Online Platforms

Internet service providers are granted immunity protections from tort liability for content that users post on their platforms under Section 230 of the Communications Decency Act of 1996 ("CDA").[80] Here, unlike the previous examples of immunity shields, Congress was acting preemptively. Introduced during the internet's infancy, Section 230 directly responded to a court decision finding that an internet service provider could be held liable for defamatory statements made by third parties if the provider rendered publisher-level control over its bulletin boards.[81] Fearful that the decision created a disincentive for internet service providers to regulate harmful information being posted on their sites, Congress amended the CDA to state that "[n]o provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider."[82] Section 230 also *allows* those services to "restrict access" to any content they deem objectionable without fear of liability, but it does not *require* that they remove anything, and it protects them from liability if they choose not to do so.[83]

Thus, Congress sought to encourage internet service providers to exercise protective control over the harmful postings on their sites by granting them immunity. While Section 230 immunizes online platforms from legal liability for the posts, comments, and other messages contributed by their users, it does not immunize them from liability for content that violates federal criminal law or intellectual property rights.[84] Some courts have interpreted the immunity protections of Section 230 broadly,[85] while other courts read the text of Section 230 more narrowly.[86]

On one hand, the benefits of Section 230 immunity are significant. The internet provides extraordinary access to information, education, cultural development, and intellectual activity, which Congress sought to protect and

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[80] Pub. L. No. 104-104, § 509, 110 Stat. 56, 137–39 (codified as amended at 47 U.S.C. § 230.

[81] *See* Stratton Oakmont, Inc. v. Prodigy Servs. Co., 1995 WL 323710 (N.Y. Sup. Ct. 1995).

[82] 47 U.S.C. § 230(c)(1).

[83] *Id.* § 230(2).

[84] *Id.* § 230(e).

[85] *See, e.g.*, Universal Comm. Sys., Inc. v. Lycos, Inc., 478 F.3d 413 (1st Cir. 2007); Ben Ezra, Weinstein, & Co. v. Am. Online, Inc., 206 F.3d 980 (10th Cir. 2000); Green v. Am. Online, 318 F.3d 465 (3d Cir. 2003); Westlake Legal Grp. v. Yelp, Inc., 43 Media L. Rep. 1417 (4th Cir. 2015) (finding Yelp not liable for allegedly defamatory customer review).

[86] *See* Chi. Laws. Comm. for Civ. Rts. Under L., Inc. v. Craigslist, Inc., 519 F.3d 666, 669 (7th Cir. 2008) (as amended) (finding that Subsection (c)(1) never mentions immunity and "cannot be understood as a general prohibition of civil liability for web-site operators and other online content hosts"). Section 230 does not protect the internet service provider from harms caused by their own conduct. *See* Erie Ins. Co. v. Amazon.com, Inc., 925 F.3d 135, 137 (4th Cir. 2019) (finding Amazon can be liable under a strict products liability claim if it was the seller of a defective product); Maynard v. Snapchat, Inc., 816 S.E.2d 77 (Ga. Ct. App. 2018) (holding Snapchat not immune from liability under a negligence and loss of consortium claim when the user got into an accident when she used Snapchat's Speed Filter while driving).

promote in the CDA.[87] There is a generally acknowledged need to protect online discussion on social media sites.[88] In enacting Section 230, Congress has recognized that social-media platforms provide a space for users to exchange ideas and information, which our society has a strong interest in maintaining, and facilitate innovation.[89]

On the other hand, society has a strong interest in encouraging platforms to police their sites for socially harmful content.[90] Although some advocates of Section 230 argued that marketplace incentives would sufficiently encourage social media companies to police their platforms because of the economic self-interest in protecting their valuable brands,[91] critics have argued that Congress significantly underestimated the cost and scope of the harm that social media posts can cause.[92] By granting platforms complete immunity from tort liability for the content that their users post, Congress reduced their incentives to remove harmful content proactively. When third parties post negative, harmful, and defamatory content, the individuals harmed cannot bring a tort claim against the provider for facilitating the dissemination of the harmful information. This can leave the harmed individual without legal recourse since the party who posted the information is often untraceable or jurisdictionally unreachable.[93]

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[87] 47 U.S.C. § 230(a)–(b). *See* Michael D. Smith & Marshall W. Van Alstyne, *It's Time to Update Section 230*, Harv. Bus. Rev. (Aug. 12, 2021), https://hbr.org/2021/08/its-time-to-update-section-230, [https://perma.cc/66P4-MRUV] (listing social benefits of social media to movements such as the Arab Spring, #BlackLivesMatter, and #MeToo.); Why Internet Matters, Internet for All, https://www.internetforall.gov/why#:~:text=High%2Dspeed%20Internet%20improves%20access,jobs%2C%20wherever%20they%20might%20live [https://perma.cc/2JUT-2QGZ].

[88] *See* Packingham v. North Carolina, 582 U.S. 98, 104 (2017) ("While in the past there may have been difficulty in identifying the most important places (in a spatial sense) for the exchange of views, today the answer is clear. It is cyberspace—the 'vast democratic forums of the internet' in general, . . . and social media in particular") (quoting Reno v. ACLU, 521 U.S. 844, 868 (1997).

[89] *See* Smith & Van Alstyne, *supra* note 87.

[90] *See infra* note 92 (listing examples of socially harmful content).

[91] *See* Smith & Van Alstyne, *supra* note 87 (noting when Section 230 was adopted, it seemed logical that social media platforms would police their platforms from harmful conduct out of economic self-interest).

[92] *See, e.g.*, Gonzalez v. Google LLC, 598 U.S. 617, 619 (2023) (suing Google when ISIS planned and executed coordinated attacks across Paris killing 130 people, including a 23-year-old U.S. citizen, claiming Google aided and abetted these attacks because ISIS used the Google-owned YouTube to spread their message); Smith & Van Alstyne, *supra* note 87 (noting possible impact of social media on January 6 Capitol riots, enabling of terrorist recruiting, and sexual exploitation of children); Daisuke Wakabayashi, *Legal Shield for Websites Rattles Under Onslaught of Hate Speech*, N.Y. Times (Aug. 6, 2019), https://www.nytimes.com/2019/08/06/technology/section-230-hate-speech.html [https://perma.cc/949H-9EGT].

[93] Problems abound with fake profiles, lack of information on the people behind the profiles, and deleted content. *See* Martin Moore, *Fake Accounts on Social Media, Epistemic Uncertainty and the Need for an Independent Auditing of Accounts*, Internet Pol'y Rev. (Feb. 7, 2023), https://policyreview.info/articles/analysis/fake-accounts-social-media-epistemic-uncertainty-and-need-independent-auditing [https://perma.cc/N2UB-5SWK] (discussing the extent and consequences of false accounts).

There is a growing movement to modify the immunity granted in Section 230.[94] Facebook's Mark Zuckerberg testified to Congress that he "welcome[s] the opportunity to discuss internet regulation" and that Facebook "would benefit from clearer guidance from elected officials."[95] Congressman Christopher Cox, a co-author of Section 230, has called for modifying Section 230 because "the original purpose of this law was to help clean up the Internet, not to facilitate people doing bad things."[96] Other countries have made various attempts at reform.[97]

III. Balancing the Costs and Benefits of Removing Common Law Tort Remedies

As these examples demonstrate, lawmakers at both the state and federal level have granted partial or complete immunity from tort liability to businesses in a wide range of areas.[98] The shields target a variety of goals, ranging from economic protection of a particular industry to the delivery of healthcare services during a public health emergency. Regardless of motivation, lawmakers typically cite as a justification for immunity the potentially detrimental impact of tort liability on the business involved. But there is another side to the coin: the negative impact of immunity on the interests served by the tort system. That impact must also be considered, especially given the weighty

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[94] *See* Danielle Keats Citron, *How to Fix Section 230*, 103 B.U. L. Rev. 713 (2023); Jamie Condliffe, *Are Lawmakers Too Eager to Weaken Big Tech's Legal Shield? It's Important That Lawmakers Not Rush To Revise a Law That Could Change The Internet As We Know It*, N.Y. Times (Aug. 19, 2019), https://www.nytimes.com/2019/08/16/technology/bits-section-230.html [https://perma.cc/8GS3-PVH8] (noting the bipartisan push for reform of Section 230; Republicans because they say it allows private media companies to censor conservative viewpoints and Democrats because they believe it would encourage large media platforms to take down problematic content). Two cases were before the United States Supreme Court last term, but the Court did not reach the merits of Section 230 in those cases. *See* Twitter, Inc. v. Taamneh, 598 U.S. 471, 500 (2023) (finding link between Twitter and a 2017 ISIS terrorist attack on a nightclub in Istanbul, Turkey, was too attenuated to justify holding Twitter liable for deaths that occurred); *Gonzalez*, 598 U.S. at 619 (declining to address applicability of Section 230 to claim that a platform's targeted recommended algorithm made it a content creator).

[95] *Mark Zuckerberg & Jack Dorsey Testimony Transcript Senate Tech Hearing November 17*, Rev (Nov. 17, 2020), https://www.rev.com/blog/transcripts/mark-zuckerberg-jack-dorsey-testimony-transcript-senate-tech-hearing-november-17 [https://perma.cc/MN6W-VJKZ].

[96] Alina Selyuh, *Section 230: A Key Legal Shield For Facebook, Google is About to Change*, NPR Morning Ed., (March 21, 2018), https://www.npr.org/sections/alltechconsidered/2018/03/21/591622450/section-230-a-key-legal-shield-for-facebook-google-is-about-to-change [https://perma.cc/U7P2-ZTKF].

[97] *See* Ashley Johnson & Daniel Castro, *How Other Countries Have Dealt with Intermediary Liability*, Information Technology & Innovation Foundation (Feb. 2021), https://itif.org/publications/2021/02/22/how-other-countries-have-dealt-intermediary-liability/ [https://perma.cc/WW7R-2LLT] (describing the three common approaches to intermediary liability in democratic countries outside of the United States: the awareness or actual knowledge approach, the notice and takedown approach, and the "mere conduit" approach).

[98] This article does not address judge-made immunity shields for governmental actors, although I borrow from the balancing test created for qualified immunity in those lines of cases.

policy considerations that have made the tort system such a central part of our legal fabric. Legislatures should make a consistent set of evidence-based findings and apply the principle of balancing before ousting tort remedies. This approach will force scrutiny of appropriate considerations to reduce the appearance of industry capture, promote protection of the integrity of the tort system and its functions, uphold federalism principles, and ensure that governments make informed decisions that create the correct incentives and normative outcomes.

The need to balance the interests at stake before displacing otherwise available remedies is not new. A prime example is the Supreme Court's approach to qualified immunity for federal employees and officials sued for constitutional violations. In *Harlow v. Fitzgerald*,[99] the Court determined that qualified immunity is the proper defense for executive branch officials and that qualified immunity must strike a delicate balance of competing interests.[100] In striking this balance, the first concern is that individuals may suffer constitutional deprivations at the hands of government officials.[101] This factor is very significant: "In situations of abuse of office, an action for damages may offer the only realistic avenue for vindication of constitutional guarantees."[102] This factor must be offset against the competing interest that "it cannot be disputed seriously that claims frequently run against the innocent as well as the guilty – at a cost not only to the defendant officials, but to society as a whole.[103] The Court described the countervailing costs: "These social costs include the expenses of litigation, the diversion of official energy from pressing public issues and the deterrence of able citizens from acceptance of public office."[104] The Court found that qualified immunity lowers the risk of officials being overly cautious in the exercise of their duties, and excessive reluctance of government agents to act is a danger to society.[105] Thus, the Court held that these actors are immune from personal liability as long as "their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known."[106] In sum, in deciding whether to allow this qualified immunity, the *Harlow* Court stressed the importance of balancing the need to provide a sufficient remedy for violations of law against the need to prevent the social costs of suits against the government employees.[107]

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[99] 457 U.S. 800 (1982).

[100] *Id.* at 813 ("the resolution of immunity questions inherently requires a balance between the evils inevitable in any available alternative").

[101] *Id.* at 814.

[102] *Id.* (citing Butz v. Economou, 438 U.S. 478, 506 (1978); Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 410 (1971)).

[103] *Id.*

[104] *Id.*

[105] *Id.*

[106] *Id.* at 818.

[107] *See id.* at 814. The purpose of qualified immunity is to "strike a fair balance between (1) the need to provide a realistic avenue for vindication of constitutional guarantees, and (2) the need to protect public officials who are required to exercise their discretion and the related

To be sure, *Harlow* addresses judicial—not legislative—grants of immunity, and it does so in the context of judging the liability of government—not private—actors. But its balancing analysis remains a useful model in this context as well. The Court recognized that immunity comes with significant societal costs. That is why it held that immunity for high-level government officials should be qualified and not absolute. And it provides the question this article addresses: if absolute immunity disserves public policy for leading government officials, shouldn't legislatures think twice before extending absolute immunity to private industry? Borrowing the balancing test from *Harlow*, this Part examines the benefits of providing a civil remedy for tort claims against the social costs of exposing certain private actors to tort liability.[108] It first outlines the values and functions served by the tort system, as well as the federalism concerns raised by displacing tort remedies. It then turns to the interests advanced by immunity measures. In the following Part, this article proposes factors that legislatures should consistently examine in weighing these competing considerations before granting immunity.

A. Framing the Functions and Goals of Tort Law

Tort law involves "the violation of a norm of conduct."[109] Scholars differ about the framing and goals of tort law, but several strong themes emerge. Among the many variations in tort theories,[110] the most commonly discussed involve corrective justice and social utility.[111]

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public interest in encouraging the vigorous exercise of official authority." Lee v. Sandberg, 136 F.3d 94, 100–01 (2d Cir. 1997) (quoting Jemmet v. Coughlin, 85 F.3d 61, 66 (2d Cir. 1996)). The public interest includes the policy interest in government accountability. *See* Joanna C. Schwartz, *After Qualified Immunity*, 120 Colum. L. Rev. 309, 312 (2020) (noting that the Supreme Court gradually "justified the doctrine on policy grounds—as a means of balancing an interest in government accountability against an interest in shielding government officials from the burdens of suit in insubstantial cases"). Since *Harlow*, the Supreme Court has broadened the qualified immunity standard. *See* Aaron L. Nielson & Christopher J. Walker, *Qualified Immunity and Federalism*, 109 Geo. L.J. 229, 244–45 (2020) (describing evolution of Supreme Court jurisprudence on qualified immunity since *Harlow*).

[108] The *Harlow* balancing test focuses on the risks of potential liability as well as its benefits and is distinguishable from the traditional cost-benefit analysis used in tort law to determine negligence. *See infra* notes 121–124 and accompanying text.

[109] Goldberg & Zipursky, Torts, *supra* note 75, at 2.

[110] *See* Feldman, *supra* note 1, at 390–91 (stating that tort theories "come from a range of sources including Kantian moral philosophy, virtue ethics, neo-classical economics, feminist theory, critical race theory, classical Lockean political theory, liberal egalitarianism, American legal realism, and philosophical pragmatism").

[111] *See* Christopher J. Robinette, *Can There Be a Unified Theory of Torts? A Pluralist Suggestion from History and Doctrine*, 43 Brandeis L.J. 369, 382 (2005) ("Economics-based deterrence and corrective justice have become the dominant theoretical approaches to torts . . . ."); Sebok, *supra* note 4, at 478 ("[T]he point of tort law is, or should be, to promote social welfare, or to facilitate compensation, or to provide persons with the opportunity to seek redress for the violation of rights that they have, qua their membership in a state that has promised to treat all persons as equals.").

Corrective justice is a rights-based theory.[112] Under this view, tort law seeks to right the wrongs done by a particular defendant to a specific plaintiff. Holding defendants liable for the harms they wrongfully caused is warranted because wrongdoers should bear the costs they impose on others.

The social utility theory of tort law looks more broadly to the social benefits involved in imposing liability.[113] This theory primarily seeks to provide a system of rules that furthers the common good and resolves disputes efficiently.[114] In seeking these solutions, this view considers the possibility of redistributing costs of liability or the impact of insurance.[115]

The classic goals of tort law under either theory include providing redress, preventing harm, and furthering accountability.[116] The tort system provides injured parties the legal rights to force the wrongdoer to provide redress for the injury. The "make-whole" requirement—that the injurer should restore the injured party back to the pre-injury position—is fundamental to American tort law.[117] Requiring defendants to provide compensation is just because of the wrong committed by the defendants.[118] Requiring defendants to pay compensation also advances social utility, because the economic costs of injury otherwise may be passed onto society.[119]

Harm prevention is a significant policy goal of tort law.[120] The system functions as a deterrent to others from engaging in similar wrongful conduct. This regulatory function of torts is often associated with the law-and-economics movement that started in the 1960s and 1970s,[121] although its roots in the common law are much deeper than that, including the classic cost-benefit analysis to determine negligence found in Judge Learned Hand's famous

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[112] Much has been written about the theory of corrective justice. *See, e.g.*, Robert L. Rabin, *Law for Law's Sake*, 105 Yale L. J. 2261 (1996); Jane Stapleton, *Evaluating Goldberg and Zipursky's Civil Recourse Theory*, 75 Fordham L. Rev. 1529 (2006); Steven Walt, *Eliminating Corrective Justice*, 92 Va. L. Rev. 1311 (2006).

[113] *See* Guido Calabresi, *Toward a Unified Theory of Torts*, 1 J. Tort L. 1 (2007).

[114] *Id.*; *See, e.g.*, Robert L. Rabin, *Some Thoughts on the Ideology of Enterprise Liability*, 55 Md. L. Rev. 1190 (1996).

[115] *See* Rabin, *supra* note 114, at 1193–94 (discussing enterprise liability and its risk spreading capacity).

[116] *See* Dobbs et al., *supra* note 74, at §§ 2.4–2.5.

[117] Logan, *supra* note 4, at 905.

[118] *Id.* § 2.4.

[119] *Id.*

[120] *See* Levin & Lytton, *supra* note 70, at 843 ("When litigation generates liability exposure, it can financially and reputationally incentivize an industry to change its conduct in ways that reduce the risk of harm.") (citing Robert D. Cooter, *Economic Theories of Legal Liability*, 5 J. Econ. Persps. 11 (1991)).

[121] *See* Guido Calabresi, The Costs of Accidents 135, 155 (1970) ("[T]he search for the cheapest avoider of accident costs is the search for that activity which has most readily available a substitute activity that is substantially safer. It is a search for that degree of alteration or reduction in activities which will bring about primary accident cost reduction most cheaply."); Richard A. Posner, *A Theory of Negligence*, 1 Legal Stud. 29 (1972); Robinette, *supra* note 111, at 382–83.

BPL formula.[122] A central interpretation of this view draws from Judge Guido Calabresi's "cheapest cost avoider" theory,[123] which reasons that liability should lie with the defendant that is in the best position to reduce accidents and the costs of accidents.[124] Imposing liability should achieve an efficient solution to the problem of accidents in society. As Judge Richard Posner stated, "[T]he dominant function of the fault system is to generate rules of liability that if followed will bring about, at least approximately, the efficient—the cost-justified—level of accidents and safety."[125] In this way, tort law establishes the acceptable level of risk in society.[126]

Aside from these two main views of tort law, other scholars see the primary basis of tort law as providing a system that empowers plaintiffs to bring lawsuits against wrongdoers. Professors John Goldberg and Benjamin Zipursky are leading theorists of the "civil recourse theory."[127] This theory recognizes that people have substantive legal rights against mistreatment which give rise to the legal power to obtain redress,[128] but the tort system is "not fundamentally about a state or a sovereign commanding people to behave the way it wants them to behave so that it can achieve its purposes."[129] Instead, it is "a formalized version of informal, everyday practices of people holding themselves and each other [accountable]."[130] Under this view, tort law promotes the recognition of rights "rather than . . . the pursuit of community welfare goals."[131] The holders of these rights are entitled to the court's assistance in ensuring that the wrongdoer redresses the wrong.[132] Goldberg and Zipursky argue that a forum for publicly airing wrongs is vital to a democratic society. Although the civil

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[122] *See* Ellen M. Bublick, *Tort Common Law Future: Preventing Harm and Providing Redress to the Uncounted Injured*, 14 J. Tort L. 279, 285 (2021).

[123] Calabresi, *supra* note 121, at 193.

[124] *Id*.

[125] Posner, *supra* note 121, at 33.

[126] A subset of this view involves business enterprises that can better "distribute the risk" or "the loss" that results from accidental injury. The argument is that defendants can better absorb the costs of injury associated with business activities by raising prices. This view of "enterprise liability" has been fundamental to the development of products liability. *See* Gregory C. Keating, *The Theory of Enterprise Liability and Common Law Strict Liability*, 54 Vand. L. Rev. 1285 (2001).

[127] John C.P. Goldberg & Benjamin C. Zipursky, Recognizing Wrongs 112–14 (2020) [hereinafter Goldberg & Zipursky, Recognizing Wrongs]; John C.P. Goldberg & Benjamin C. Zipursky, *Thoroughly Modern Tort Theory*, 132 Harv. L. Rev. 184, 187 (2021); *see* Steven Schauss, *A Simple Model of Torts and Moral Wrongs*, 97 Notre Dame L. Rev. 1029, 1040 (2022) ("Goldberg and Zipursky are among the leading proponents of the view that tort is a law of genuine wrongs, not simply a law of (say) cost-optimizing liability rules.").

[128] Goldberg & Zipursky, *Thoroughly Modern Tort Theory*, *supra* note 127, at 187.

[129] Goldberg & Zipursky, Recognizing Wrongs, *supra* note 127, at 362.

[130] *Id.* at 361.

[131] Donal Nolan & Andrew Robertson, *Rights and Private Law*, in Rights and Private Law 1, 2 (Donal Nolan & Andrew Robertson eds., 2011).

[132] *Id.*

recourse theory has some detractors,[133] "the mechanism of right and remedy between injured and injurer is a key component of tort law."[134]

All of these theories recognize the significant benefits tort law extends to both wronged individuals and to society at large drawing from its redress, deterrence, and accountability functions. Several other critical social benefits are attributed to tort litigation. Most prominent is the function of transparency, stemming from information production. As Alexandra Lahav explains, "[L]itigation promotes transparency by forcing information out into the open that would otherwise remain hidden."[135] This benefit furthers accountability and enhances the democratic function of the courts.[136] Relatedly, the availability of tort remedies contributes to the sense of vindication and retribution typically gained through litigation.[137] These attributes help build confidence in the safety of products and services.

Still another significant benefit of tort litigation is that it fills in the gaps of government regulation.[138] Along with the common law tort system, positive law (statutes and regulations) may also address conduct that falls below some standard. Like tort law, the regulatory system serves to prevent injury and discourage harmful behavior. Agencies such as the federal Food and Drug Administration can issue regulations that set standards of conduct that can be enforced through fines or sanctions.[139] Historically, the tort and regulatory systems have operated in tandem, although common law operates ex post and positive law traditionally operates ex ante. But it is well-recognized that our regulatory agency systems are not completely comprehensive, and the tort system serves to fill in the gaps left by scarce resources or lack of expertise.[140] As Matthew Shapiro explains, private enforcement through civil litigation is necessary "because the United States has a weaker administrative state than

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[133] *See, e.g.*, Richard A. Posner, Reflections on Judging 359 (2013) (describing how the theory fails as a descriptive account of the structure of tort law); *id.* at 364 (arguing the theory lacks a definition of wrongs: "Where do we go to find out what is a 'wrong?'"); Jane Stapleton, *Taking the Judges Seriously v. Grand Theories*, Three Essays on Torts 24–25 (2021) (arguing the theory would cut off existing doctrine in the name of theory).

[134] Bublick, *supra* note 122, at 293.

[135] Alexandra Lahav, In Praise of Litigation 8 (2017).

[136] *Id.* at 4, 6.

[137] *See generally* Dinah Shelton, Remedies in International Human Rights Law (2d ed. 2006).

[138] *See* Matthew A. Shapiro, *Democracy, Civil Litigation, and the Nature of Non-Representative Institutions*, 109 Cornell L. Rev. 113, 182 (2024) ("[S]cholars have traditionally justified private enforcement as a way of *promoting* the rule of law by supplementing (often-deficient) public law enforcement efforts.") (emphasis in original).

[139] *See, e.g.*, 21 C.F.R. § 17.1 (2024) (describing FDA Civil Money Penalty Hearings); *Clinical Trials.gov - Notices of Noncompliance and Civil Money Penalty Actions*, Food & Drug Admin., https://www.fda.gov/science-research/fdas-role-clinicaltrialsgov-information/clinicaltrialsgov-notices-noncompliance-and-civil-money-penalty-actions [https://perma.cc/UF8U-T75N] (last visited Nov. 6, 2024).

[140] *See* Shapiro, *supra* note 138; Zachary D. Clopton, *Redundant Public-Private Enforcement*, 69 Vand. L. Rev. 285, 291–99 (2016).

many other Western liberal democracies and so must rely more heavily on private lawsuits to implement governmental regulatory policy."[141]

B. The Strong State Interest in Torts

In examining legislative displacement of state tort law, this article assumes the power to do so exists and focuses on whether the exercise of that power is sound as a matter of policy. Both the federal and state constitutions and laws counsel a strong reluctance to displace state tort remedies.[142] Federalism principles would suggest caution to avoid undermining the fundamental state interests in protecting the health and safety of their citizenry and redressing injuries. At the same time, statutes and constitutional provisions reflect the democratic will of state citizenry in providing redress for particular private wrongs.[143]

Much has been written on the values of federalism in our system of government.[144] Traditionally, the Supreme Court cites three main values of federalism: (1) it provides a check against the overreach of the federal government; (2) it fosters governments that can tailor policies to local needs; and (3) it uses the states as laboratories to develop new approaches to social problems.[145] Modern theorists support these values in various ways, but, fundamentally, all the theories make one basic assumption: states have diverging and distinct views on the issue involved.[146] I have argued elsewhere that this assumption holds true in the area of torts.[147] This diversity of views represents democracy at work.[148]

Although federalism decisions do not entirely sanctify certain areas of state regulation, they do consider whether federal regulations affect areas of local concern traditionally regulated by the states. Traditionally, these "local matters" include family, criminal, and property law.[149] Tort law is also arguably worthy of special protection as an area like criminal law, that reflects the

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[141] Shapiro, *supra* note 138, at 198; *see* Levin & Lytton, *supra* note 70, at 849 ("Tort litigation offers an opportunity for highly contextual, fact intensive examination of [the responsibility of gun makers for firearms-related violence], which is informed by various forms of expertise, subjected to the adversarial process, and, ultimately, tempered by the commonsense judgments of jurors. Regulation through litigation is not a panacea and ought not be idealized. But litigation does make often underappreciated contributions to advancing reasonable risk regulation.").

[142] *See infra* notes 144–59 and accompanying text.

[143] *See infra* notes 150–59 and accompanying text.

[144] *See generally* Erwin Chemerinsky, *The Values of Federalism*, 47 Fla. L. Rev. 499 (1995).

[145] *See* Gregory v. Ashcroft, 501 U.S. 452, 458 (1991).

[146] Betsy J. Grey, *The New Federalism Jurisprudence and National Tort Reform*, 58 Wash. & Lee L. Rev. 475, 513 (2002) [hereinafter Grey, *New Federalism Jurisprudence*].

[147] *See id.* at 513–18; *Examining Liability During the COVID-19 Pandemic*: *Hearing Before the S. Comm. on the Judiciary*, 116th Cong. 9–10 (2020) [hereinafter *COVID-19 Pandemic Hearings*] (testimony of David C. Vladeck, Professor, Georgetown University Law Center).

[148] *See* Robert J. Rabin, *Federalism and the Tort System*, 50 Rutgers L. Rev. 1, 11 (1997).

[149] *See* Grey, *New Federalism Jurisprudence*, *supra* note 146, at 534.

customary practices of the community and entails an exercise of state police powers to protect the health and safety of its citizens.[150]

State statutes and constitutional provisions reinforce the strong state interest in protecting the common law of torts. Every state chose to affirmatively create and protect common law tort actions at their founding.[151] Often, this occurred in the form of a statute that states passed to "receive" the common law.[152] In the mid-1800s, for example, the Territory of Arizona passed a "reception statute."[153] At the time of statehood in 1912, Arizona preserved the reception statute, embracing both the common law and common-law methodology.[154]

Also at the time of statehood and continuing to this day, the Arizona constitution's "anti-abrogation" clause preserved common law tort remedies.[155] Arizona courts vary in their interpretation, but the clause basically prohibits the state legislature from enacting any statute that divests a claimant from bringing suit in court for damages.[156] In one case, for instance, the Arizona Supreme Court held that a state statute that barred a claim for battery against a licensed health care professional violated the clause.[157] Although the claimant retained his right to bring a medical malpractice cause of action, the court held that a battery claim protected different interests and would be abrogated under the statute.[158] Many state constitutions have similar provisions protecting the private right to a civil remedy.[159]

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[150] *See* Medtronic, Inc. v. Lohr, 518 U.S. 470, 485 (1996) (noting "federalism concerns and the historic primacy of state regulation of matters of health and safety"); Grey, *New Federalism Jurisprudence*, *supra* note 146, at 518–35.

[151] Bublick, *supra* note 122, at 282 n.13 (noting that "[a]ll states other than Louisiana preserve common law tort actions, and Louisiana's tort actions derive from French civil law").

[152] *See generally* Ford W. Hall, *The Common Law: An Account of Its Reception in the United States*, 4 Vand. L. Rev. 791 (1951) (describing state reception statutes).

[153] *See* Bublick, *supra* note 122, at 282–83.

[154] *Id.* at 281; *see* Ariz. Rev. Stat. § 1-201 (2024).

[155] Ariz. Const. art. 18, § 6 ("The right of action to recover damages for injuries shall never be abrogated, and the amount recovered shall not be subject to any statutory limitation."); *See* Bublick, *supra* note 122, at 282; *see also* 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, 564 (2005) (noting several similar state constitutional provisions and arguing that when the Fourteenth Amendment was adopted, it was "meant to guarantee that states would attend to basic obligations, including the duty to provide law for the redress of wrongs").

[156] *See* J. Blake Mayes, Case Note, *Gunnell v. Arizona Public Service Company*: The Anti-Abrogation Clause as a Safeguard Against Legislative Shielding from Fault Liability, 46 Ariz. L. Rev. 179, 182–83 (2004); Gunnell v. Ariz. Pub. Serv. Co., 46 P.3d 399, 405 (Ariz. 2002) (en banc). Arizona courts have held that the anti-abrogation clause only protects causes of actions brought in tort. *See* Samaritan Health Sys. v. Superior Ct., 981 P.2d 584, 592 (Ariz. Ct. App. 1998).

[157] *See* Duncan v. Scottsdale Med. Imaging, Ltd., 70 P.3d 435, 443 (Ariz. 2003).

[158] *Id.*; *see* Roebuck v. Mayo Clinic, 536 P.3d 289, 292 (Ariz. Ct. App. 2023) (finding an Arizona statute granting immunity from claims of ordinary negligence brought against healthcare providers during a public emergency violates the anti-abrogation clause).

[159] *See* Thomas R. Phillips, *The Constitutional Right to a Remedy*, 78 N.Y.U. L. Rev. 1309, 1310 (2003) (illustrating some forty state constitutions that provide a right of access to the courts to obtain a remedy for injury). In discussing these state constitutional provisions, I do

These state statutes and constitutional provisions, reinforced by federalism concerns, reflect the critical need to protect the tort law mechanism of preventing harm, furthering accountability, and providing redress to injured parties.[160] They suggest that providing a private tort remedy is the default in our system of government and raise compelling policy concerns when legislatures remove them, both on the state and federal level.

C. Governmental Interests in Abrogating Tort Liability

When state or federal governments shield certain industries from tort liability exposure, they sometimes make a general finding that granting immunity is necessary to promote a larger public purpose, as demonstrated in the immunity statutes described in Part II. For example, the title of the ATSSSA made clear that the statute was designed to protect the competitiveness of the airlines.[161] Other times, legislatures may find that immunity shields are warranted to protect certain industries, like gun manufacturers or self-driving cars,[162] for other reasons that serve the public interest.

In virtually all cases, a significant assumption is that the traditional tort system unduly hinders (or fails to serve) legislative policy objectives.[163] But that assumption may be built more on rhetoric and hyperbole than hard

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not reach the ultimate question of whether citizens have a fundamental right to a remedy for private wrongs, although there is a very strong argument that one exists. *See generally* Goldberg, *supra* note 155. As Chief Justice John Marshall wrote in the landmark decision in *Marbury v. Madison*, quoting Blackstone, "it is a general and indisputable rule, that where there is a legal right, there is also a legal remedy by suit or action at law, whenever that right is invaded." 5 U.S. 137, 163 (1803). At the very least, this jurisprudence supports the argument that tort principles are so deeply embedded in our legal landscape that they should only be removed in the most extreme circumstances. *See supra* note 155.

[160] *Cf.* Rabin, *supra* note 2, at 1001 (noting when Congress acts to preempt tort claims, it legislates against a background norm of preserving tort law as a system of compensation).

[161] *See* ATSSSA, *supra* note 35, at § 1 and accompanying text (describing protection of the airlines under ATSSSA).

[162] *See supra* notes 64–67 (describing purposes of the PLCAA); *infra* note 187 (describing proposals to provide immunity for developers of self-driving cars).

[163] *See, e.g.*, Est. of Magioli v. Andover Subacute Rehab. Ctr. I, 478 F. Supp. 3d 518, 529 (D.N.J. 2020) (stating purpose of the PREP Act "is to embolden caregivers, permitting them to administer certain encouraged forms of care . . . with the assurance that they will not face liability for having done so"); 147 Cong. Rec. H5884 (daily ed. Sept. 21, 2001) (Statement of Rep. Thomas Reynolds) (indicating the goal of ATSSSA was to save an industry that contributes greatly to our national economy); 147 Cong. Rec. S17511 (daily ed. Sept. 21, 2001) (Statement of Sen. John McCain) (commenting that the bill "remov[es] the specter of devastating potential liability from the airlines"); Lewis, *supra* note 5 (giving examples of legislative findings that the tort system is a hindrance and that industries seek stability and predictability, which tort law impedes); *cf.* Dobbs et al., *supra* note 74, at § 36.1 (noting deep-seated criticisms of tort methods of resolving disputes, allocating compensation, and promoting deterrence); Robert L. Rabin, *Some Thoughts on the Efficacy of a Mass Toxics Administrative Compensation Scheme*, 52 Md. L. Rev. 951 (1993) (arguing that legislatively devised no-fault alternatives to tort system are "triggered by a sense that common-law adjudication [is] an overly expensive, time-consuming, and poorly adapted process for deciding personal injury claims"); Roland Christensen, *Behind the Curtain of Tort Reform*, 2016 B.Y.U. L. Rev. 261, 264 (2016) ("In essence, tort reform is a political agenda developed in response to perceived problems with the current tort system.").

evidence.[164] Various studies question the true impact that the threat of tort litigation may have had on the industries that ultimately were protected by liability shields.[165] For example, during the pandemic, "[b]usiness groups cited an 'emerging threat' of 'unfounded lawsuits against them alleging that their customers and employees were infected with COVID-19.'"[166] This "avalanche" of "unfounded" cases never came to fruition.[167] But, as one scholar observed, "tort reform advocates infected the business community with a highly contagious panic about frivolous litigation as a pretext for launching a successful tort immunization campaign to save it."[168] So too, some scholars have questioned whether lawsuits brought by victims of the 9/11 attacks against the airlines would have been successful, given the weakness of the claims.[169] Similar claims about the need to provide partial immunity from medical malpractice claims have also been debunked.[170] Thus, the shields may not have been necessary to protect industry. But even more significantly, removing tort liability in reaction to unfounded threats of widespread litigation would also remove

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[164] The McDonald's hot coffee case is often used as an example of how the tort system allowed a frivolous lawsuit to succeed. *See* Liebeck v. McDonald's Rests., P.T.S., Inc., 1995 WL 360309 (D.N.M. 1994). Various authors have debunked that claim as hyperbole. *See, e.g.*, Mark B. Greenlee, Kramer v. Java World*: Images, Issues and Idols in the Debate over Tort Reform*, 26 Cap. U. L. Rev. 701, 718–24 (1997); Michael McCann, William Haltom & Anne Bloom, *Java Jive: Genealogy of a Juridical Icon,* 56 U. Miami L. Rev. 113, 117 (2001); Boyle v. Christensen, 251 P.3d 810, 814 (Utah 2011) (concluding attorney's improper reference to the McDonald's coffee case warranted reversal of jury verdict); *see also* Christopher J. Roederer, *Democracy and Tort Law in America: The Counter-Revolution*, 110 W. Va. L. Rev. 647, 680 (2008) (describing "tort tales" proponents of tort reform use to make categorical arguments); Logan, *supra* note 4, at 904 (addressing the same concepts as Roederer); Scott DeVito & Andrew Jurs, *An Overreaction to a Nonexistent Problem: Empirical Analysis of Tort Reform from the 1980s to 2000s*, 3 Stan. J. Complex Litig. 62 (2015); Andrew F. Popper, *Backlash: After 40 Years of Tort Reform Noise, Let's Change the Tone, Undo the Harm, and Correct the Big Lie*, 49 J. Legis., 52, 65 (2022) ("Argument by anecdote has become characterized, by default, as an acceptable statistical construct."); *cf.* Kathryn Zeiler, *Medical Malpractice Liability Crisis or Patient Compensation Crisis?*, 59 DePaul L. Rev. 675, 676 (2010) ("Until recently, rhetoric about the liability system and its relationship to both insurance markets and provider supply dominated tort reform debates. While claims made by both proponents and opponents may seem intuitive, they are often unsubstantiated.").

[165] *See* Dobbs et al., *supra* note 74, at § 36.1 (describing studies addressing criticisms such as liability insurance costs, arbitrary results, excessive liability, increase in litigation, and increase in mass tort litigation).

[166] Timothy D. Lytton, *Responsive Analysis: Public Health Federalism and Tort Reform in the U.S. Response to COVID-19*, 71 DePaul L. Rev. 417, 422 (2022).

[167] *See id.* at 422–23. Very few personal injury claims for COVID-19 exposure were filed. *Id.* Most COVID-19-related claims were lawsuits brought against insurers for business losses or for civil rights violations. *Id.*

[168] *Id.* at 425.

[169] *See* Conk, *supra* note 34, at 189–91 (noting roadblocks to lawsuits involving duty and proximate cause).

[170] *See* Zeiler, *supra* note 164, at 680 ("[D]ata does not substantiate rhetorical claims that the number of medical malpractice claims steeply increased prior to the passage of the statutory noneconomic damages cap. . . . [S]tudies suggest that much of the rhetoric missed the mark.") (order modified); Christensen, *supra* note 163, at 270 ("While tort reform has in some cases lessened payouts by insurance companies, it has rarely, if ever, been found to be directly correlated with business growth through decreases in malpractice premiums.").

access to courts for vindication of all claims, including legitimate ones, thereby undermining the normative values of tort liability. Criticism of liability shields does not mean that shields are never appropriate. The real question is whether legislatures have a fair basis for concluding that the purported need for such shields outweighs the damage they do to the interests served by the tort system. Lawmakers have the authority, capacity, and experience to explore the factual basis for legislation.[171] It is part of their job, and they should do it when balancing the pros and cons of removing torts. How to balance those needs and benefits is the subject of the following Part.

IV. Legislative Framework for Deciding Whether to Create Liability Immunity

In balancing costs and benefits of granting immunity, I start with this premise: legislatures should have a strong factual and policy basis for ousting or limiting the availability of tort remedies, regardless of the industry or service involved, whether acting *ex post* (like the 9/11 immunity legislation) or *ex ante* (like Section 230 granting immunity to social media platforms). No less should be expected given the important functions of the tort system and the strong state interests in providing tort remedies to its citizens, addressed in Part III above. Shields do far more than protect industry from potential litigation. They remove access to the courts for all claims—whether frivolous or credible—against an industry. Removing court access without a valid basis can erode the fundamental norms that access to the tort system promotes, without truly providing the protection the industry seeks. For instance, allowing valid tort claims to proceed reinforces the regulatory function of torts by forcing the industry to internalize the costs credible victims would otherwise have to bear. The deterrence and compensatory values of torts would be lost if all claims against the industry were precluded. This consideration draws directly from the *Harlow* test, which requires balancing the need to provide a sufficient remedy for violations of law against the social costs of lawsuits against defendants. Accepting that a number of weak, likely unsuccessful tort claims may arise against a defendant is not sufficient grounds to overcome the extreme step of removing all access to the courts. Moreover, without a record that genuinely supports the grant of immunity, the shield may indicate arbitrary decision-making and political favoritism toward one industry over another.[172] To avoid those results, this Part outlines the considerations that legislatures should consistently and seriously weigh before ousting tort recovery.

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[171] *See* Neal Devins, *Congressional Factfinding and the Scope of Judicial Review*, 50 Duke L. J. 1169, 1177–80 (2001) (describing process of legislative fact finding); Caitlin E. Borgmann, *Rethinking Judicial Deference to Legislative Fact-Finding*, 84 Ind. L. J. 1, 6 (2009) ("federal courts have generally deferred to congressional and state legislative fact-finding").

[172] *See* Logan, *supra* note 4, at 928–29 (describing legislative and agency capture).

When lawmakers consider adopting liability immunity, several factors weigh in the balance. These factors include four main areas of inquiry: (1) identifying the public interest served from granting immunity; (2) determining the reasonably anticipated threats to the industry from liability exposure, including the likelihood of successful lawsuits; (3) examining the likely impact of immunity on tort policies, particularly with regard to the accountability, deterrence, and compensation functions traditionally provided by torts; and (4) tailoring warranted immunity to minimize interference with tort policies. More specifically, these inquiries should force examination of considerations such as the critical nature of an industry, the need to act swiftly or the ability to act more deliberately, the degree of existing regulation, the efficiency gains and costs of removing torts, and the availability of an alternative compensation remedy or other substitute measures. In weighing the competing considerations, some factors will weigh more heavily than others. At bottom, imposing tort removal should materially advance an important public interest without significantly undermining the foundational goals of tort law.

A. What is the Basis for Singling Out the Industry for Protection?

The paramount consideration in granting immunity is determining the public interest served in singling out a certain industry for protection, unencumbered by the shadow of liability for wrongful behavior. As a congressional report explained, "limiting an entity's exposure to litigation and liability can protect that entity from the cost and inconvenience of defending against lawsuits and paying monetary judgments, allowing that entity to devote its time and resources to socially beneficial endeavors."[173] In theory, injured people will shoulder the costs of their injuries to promote the continuing viability of those services or industries for general societal benefit.

This may be a worthy goal, but lawmakers need to precisely define the social benefit sought by shielding a particular defendant from liability to strike the appropriate balance. The public interest at issue generally falls under two broad categories: enhancing public safety and promoting economic growth. These interests fall along a sliding scale. The most acute public interests stem from public health emergencies when the healthcare industry must be empowered to respond quickly.[174] Governments may need to prioritize access to some health-related products or services, like vaccines or healthcare workers, during these emergencies.[175] This was starkly demonstrated during the

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[173] Lewis, *supra* note 5, at 4; *cf.* Shapiro, *supra* note 138, at 118–19 (noting that "[c]onservative political interests have long decried litigation as 'inefficient,' 'abusive,' and bad for business and advocated civil justice 'reform'").

[174] *See* Public Health Service Act, 42 U.S.C. § 319 (granting authority to Secretary of HHS to declare a public health emergency).

[175] *See* Lewis, *supra* note 5, at 4 ("[M]itigating an entity's liability exposure can encourage that entity to engage in high-risk but socially desirable activities, such as providing healthcare services during a public health emergency.").

COVID-19 pandemic when the federal government and some state governments invoked their power to shield healthcare service providers, as well as vaccine manufacturers, to encourage their participation in meeting the demands of the emergency.[176] In addition to industries that provide life-saving services, other critical industries like grocery stores argued for liability protections during the pandemic based on public need.[177] The public more readily accepts the need to override private remedies when it involves meeting public health needs in an emergency.[178]

Economic concerns for non-critical businesses (like gyms or bars) during an infectious-disease public-health emergency do not weigh as heavily in the balance. The assumption is that the services or products offered by these industries do not directly address the public emergency and the main concern is protecting their economic well-being. Perhaps as an opportunity to pass broad tort reform measures, Congress attempted, but failed, to provide immunity for all businesses potentially subject to "coronavirus-related liability" that might inhibit them from reopening, as discussed earlier.[179] The failure to pass this legislation was partially due to the inability to make out an adequate argument for the need to grant across-the-board immunity protection.[180] This would be a difficult showing. On the one hand, it is unlikely that the economic impact of a public health emergency is evenly distributed among non-critical industries.[181] On the other hand, post-pandemic analysis does not show any noticeable economic difference in recovery between the protected and unprotected businesses granted by states for virus-related exposure cases, questioning the need for any protection in the first instance.[182]

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[176] *See supra* notes 11–22 and accompanying text.

[177] *See* Kevin M. Lewis, Wen W. Shen, Joshua T. Lobert & Jon O. Shimabukuro, Cong. Rsch. Serv., COVID-19 Liability: Tort, Workplace Safety, and Securities Law 24 (2020); Robert Yeakel, *Commonsense COVID-19 Liability Protections for Independent Grocery*, Nat'l Grocers Ass'n (2020), https://www.nationalgrocers.org/news/commonsense-covid-19-liability-protections-for-independent-grocery/ [https://perma.cc/7GRS-CQHB] (arguing for liability protections for grocery stores).

[178] *See* Grey & Orwoll, *supra* note 9, at 71–72.

[179] *See* Safe to Work Act, *supra* note 30.

[180] *See supra* notes 29–33 and accompanying text.

[181] Some businesses even flourished during the pandemic, including delivery services, at home fitness equipment companies, cleaning products and services, and online retailers like Amazon. *See* Rohit Arora, *Which Companies Did Well During the Coronavirus Pandemic*, Forbes (Dec. 10, 2021) https://www.forbes.com/sites/rohitarora/2020/06/30/which-companies-did-well-during-the-coronavirus-pandemic/ [https://perma.cc/4RJJ-4Z7E]; *The Businesses that Experienced a Boom During the Pandemic*, CEO Magazine (Feb. 2, 2022) https://www.theceomagazine.com/business/innovation-technology/business-boom-pandemic/ [https://perma.cc/5FH5-X5L3].

[182] *See infra* notes 196–201 and accompanying text and *infra* note 234. Some scholars suggested that liability insurance coverage is the main reason why businesses started up again during the pandemic. *See infra* note 201. The hardest hit industries were those with closed settings, like cruise ships and nursing homes. Both industries have protocols in place for infectious disease outbreaks, although reports indicated that these protocols were insufficiently applied. *See* Grey & Orwoll, *supra* note 9, at 72–74.

Non-health public emergencies, like terrorist attacks, may also require a swift, uniform governmental response that affects private businesses. But providing immunity in the face of these public emergencies may also stem from heavy industry lobbying and not comprehensive or unbiased information. Congress's immediate response to the 9/11 attacks was to limit the liability of airlines and protect the industry from allegedly immobilizing liability costs; its secondary goal was to address the victims of the attacks.[183] It is not clear whether the immunity shield granted to airlines was necessary to ensure the continuing viability of the industry, but the industry was very effective in persuading Congress that it was, and Congress did not do even a modicum of fact-finding at the time.[184]

Outside of large-scale public emergencies, offering immunity protections sometimes focuses less on addressing an acute social need and more on providing broad-based economic assistance to certain industries. When this occurs, legislatures need to make specific findings on the importance of singling out an individual industry for protection. Technologies or products that substantially improve public health or safety overall would weigh higher in the balance. The classic example is the long-term public health interest in ensuring the availability of childhood vaccines. After the vaccine manufacturers threatened to leave the market when facing the possibility of strict liability in tort for vaccine injury,[185] Congress acted to ensure the continuing supply of childhood vaccines. It created an intricate administrative scheme to protect the industry from widescale liability while offering victims an alternative method of compensation.[186] Congress also offered fostering growth of fledgling industries as a justification for *ex ante* liability shields. For example, as the possibility of self-driving cars entered the marketplace as a safer alternative to human-driven cars, some scholars advocated for liability immunity to encourage growth of the industry.[187]

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[183] *See* Grey, *Homeland Security and Federal Relief*, *supra* note 75, at 668.

[184] *See* Conk, *supra* note 34, at 180–81 (noting that the real concern of the airline industry was that the carriers were not adequately insured for ground victims, but these claims may have had a good chance of dismissal).

[185] *See* Betsy J. Grey, *The Plague of Causation in the National Childhood Vaccine Injury Act*, 48 Harv. J. on Legis. 344, 350–51 (2011) [hereinafter Grey, *Plague of Causation*]; Nora Freeman Engstrom, *A Dose of Reality for Specialized Courts: Lessons from the VICP*, 163 U. Pa. L. Rev. 1631, 1660–65 (2015).

[186] *See id.*

[187] *See generally* Gary E. Marchant & Rachel A. Lindor, *The Coming Collision Between Autonomous Vehicles and the Liability System*, 52 Santa Clara L. Rev. 1321 (2012); Omri Ben-Shahar, *Should Carmakers Be Liable When A Self-Driving Car Crashes?*, Forbes (Sept. 22, 2016), https://www.forbes.com/sites/omribenshahar/2016/09/22/should-carmakers-be-liable-when-a-self-driving-car-crashes/#7c5dcb848fb2 [https://perma.cc/M634-L5HA] ("If the self-driving capacity increases liability [of suppliers of safer products], it might distort the choice between old and new technology, weaken the incentive to innovate, and ultimately hurt the car users that the liability regime sought to protect.").

Granting shields *ex ante* should allow for more thorough fact-finding and deliberation. It turns out that these calls for immunity were premature and it is more likely that technological problems have held back the projected growth of the industry.[188]

Shields have also been granted in response to industry threats to withdraw from the market. As mentioned above, a paramount example of this is the vaccine industry liability protection granted under the National Childhood Vaccine Injury Act,[189] which encourages the pharmaceutical industry to remain in the vaccine market by permanently limiting liability and providing compensation through a government program to individuals who may become ill as a result of a vaccination.[190] Vaccines are considered critical to the social good and the shield did not raise significant objections—in fact, it was welcomed, in conjunction with its administrative scheme—when created.[191] Another example is the Price-Anderson Act, which limits liability of the nuclear power industry to protect it from overwhelming litigation costs.[192] This shield was criticized as underestimating the risks inherent in atomic energy and allowing reactors to carry inadequate insurance, which would result in taxpayers bearing most of the costs for a catastrophic nuclear accident.[193]

The gun industry shield under the PLCAA implicated a different interest: the need to protect an industry that supports a "fundamental right" to carry guns.[194] Congress granted the liability immunity to protect this fundamental right, although arguably, ensuring the availability of guns on the market does not represent an important public necessity equivalent to ensuring delivery of

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[188] Matt McFarland, *Self-Driving Cars Were Supposed to Take Over the Road. What Happened?*, CNN Business (Nov. 1, 2022), https://www.cnn.com/2022/11/01/business/self-driving-industry-ctrp/index.html [https://perma.cc/Y4WH-BYEE].

[189] National Childhood Vaccine Injury Act of 1986, 42 U.S.C. §§ 300aa-1–34.

[190] *Id.*; *see* Bruesewitz v. Wyeth LLC, 562 U.S. 223, 228–29 (2011) (noting that Congress enacted NCVIA "to stabilize the vaccine market and facilitate compensation" in exchange for significant tort liability protections for vaccine manufacturers).

[191] *See* Engstrom, *supra* note 185, at 1658–59 ("The National Childhood Vaccine Injury Act ultimately received broad and bipartisan support.").

[192] Price-Anderson Act, 42 U.S.C. § 2210. Listed among the congressional findings is the following statement: "In order to protect the public and to encourage the development of the atomic energy industry, in the interest of the general welfare and of the common defense and security, the United States may make funds available for a portion of the damages suffered by the public from nuclear incidents, and may limit the liability of those persons liable for such losses." 42 U.S.C. § 2012(i). The Act was extended to December 31, 2025, pursuant to the Energy Policy Act of 2005, Pub. L. No. 109-158, 119 Stat. 594 (codified as amended in scattered sections of U.S.C.).

[193] *See* Pub. Citizen, Price-Anderson Act: The Billion Dollar Bailout for Nuclear Power Mishaps (2004), https://www.citizen.org/wp-content/uploads/price_anderson_fact-sheet.pdf [https://perma.cc/36XQ-G8C3].

[194] *See supra* notes 64–67 and accompanying text.

vaccines or nuclear power.[195] Granting this shield raised considerable objections from gun control advocates.[196]

B. What Are the True Threats to the Industry Posed by the Tort System?

When lawmakers make specific findings about the necessity of providing immunity, they should also identify the true threats posed by tort exposure. Overblown cries of crippling liability should not substitute for evidence.

For example, many commentators questioned proposed shields for businesses from COVID-19 transmission lawsuits, given how difficult these tort claims would be to prove.[197] Plaintiffs would have a difficult time meeting their burden to prove the elements of duty, breach, and causation.[198] Strong defenses, like compliance with regulations, assumption of risk, and comparative fault, were also available to defeat claims.[199] Ultimately, the feared deluge of COVID-19 related exposure cases did not materialize, and several were dismissed early in the litigation.[200] Furthermore, lawmakers assumed that the shields were critical to encouraging businesses to reopen, but that assumption was not supported by the data.[201] Of course, industries prefer to stop lawsuits at the pleadings stage, which liability immunity would allow.[202] But that protection may be unnecessary and overbroad.

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[195] Allowing immunity to the gun industry has been fraught with political disputes. Many have argued that liability immunity is misguided and has allowed gun-related criminal activity to flourish. *See, e.g.*, Jon S. Vernick, Lainie Rutkow & Daniel A. Salmonal, *Availability of Litigation as a Public Health Tool for Firearm Injury Prevention: Comparison of Guns, Vaccines, and Motor Vehicles*, 97 Am. J. of Pub. Health 1991, 1991 (2007) (arguing that "absence of litigation and product safety rules for firearms is a potentially dangerous combination" for public health).

[196] *See* Sheryl Gay Stolberg, *Congress Passes New Legal Shield for Gun Industry*, N.Y. Times (Oct. 21, 2005), https://www.nytimes.com/2005/10/21/politics/congress-passes-new-legal-shield-for-gun-industry.html [https://perma.cc/WTS3-Y4ZC].

[197] *See COVID-19 Pandemic Hearings*, *supra* note 147, at 12 (testimony of David C. Vladeck); Feldman, *supra* note 1, at 379 ("[T]his causation hurdle would likely function as a *de facto* liability shield. . . .").

[198] *See* Feldman, *supra* note 1, at 379; Grey & Orwoll, *supra* note 9, at 68–69.

[199] *See* Grey & Orwoll, *supra* note 9, at 80.

[200] *See* Feldman, *supra* note 1, at 379; Grey & Orwoll, *supra* note 9, at 76; *see generally* Robert H. Klonoff, *COVID-19 Aggregate Litigation: The Search for the Upstream Wrongdoer*, 91 Fordham L. Rev. 385 (2022) (arguing that while COVID-related cases initially raised prospect of litigation crisis, most cases received hostile treatment from courts).

[201] Grey & Orwoll, *supra* note 9, at 66–67; *see also* Josh Czackes, Tom Baker & John Fabian Witt, *Why We Don't Need COVID-19 Immunity Legislation*, Balkinization (Sept. 26, 2020), https://balkin.blogspot.com/2020/09/why-we-dont-need-covid-19-immunity.html [https://perma.cc/G96T-6DMG] (arguing liability insurance coverage is main reason why businesses started up again during pandemic, despite fact that Congress did not deliver immunity for businesses).

[202] Bankruptcy has been another route that businesses have used to avoid tort liability, even for inchoate claims. Asbestos manufacturers were the first to use this strategy on a large scale, *see* Robert Jones, *The Manville Bankruptcy: Treating Mass Tort Claims in Chapter 11 Proceedings*, 96 Harv. L. Rev. 1121, 1122 (1983) ("Manville thus appears to be attempting to use the bankruptcy power largely as a tool to limit the aggregate size of its current and future liabilities liabilities . . . . If successful, Manville's strategy will have a profound effect on all asbestos-related tort litigation."), but it is not viable in all circumstances. *See* Harrington v. Purdue Pharma L.P., 144 S. Ct. 2071 (2024) (holding that Bankruptcy Code

In defining the problem lawmakers seek to address with liability shields, they need to distinguish between tort- and non-tort-related issues. Some scholars emphasize the need to distinguish between a perceived problem with the tort system and perceived problems with non-tort-system factors, such as the jury system or evidence law.[203] If the true goal is to "eliminat[e] non-tort sources of distortion,"[204] then bypassing the tort system through liability shields may be misguided.[205]

Furthermore, providing immunity is not a one-size-fits-all exercise; specific findings on the projected burden of tort liability on a particular industry are critical. This was one of the objections to the sweeping protections proposed in the Safe to Work Act legislation.[206] Classically, tort doctrine is individualized; it embraces "dissimilarities in the type of parties to a tort claim, the complexity of evidence, and differences in the nature and extent of typical losses,"[207] and different industries face different liability challenges. In deciding whether to protect a certain industry from tort liability, legislatures should examine the data to determine the likelihood of the industry's activities inflicting injury on the public, the seriousness of the injury, and the costs of loss prevention for that particular industry. These factors borrow from the traditional BPL Hand formula for tort liability often used to define breach of duty or fault.[208] Applying them in the immunity context would give legislatures a structured approach to determine the true threats to industry posed by exposure to liability. The availability and extent of insurance should also enter the mix.[209] Considering these factors will allow legislatures to weigh the degree and costs of liability the industry faces, without immunity intervention.

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does not authorize a release and injunction that, as part of a plan of reorganization under Chapter 11, effectively seek to discharge claims against a nondebtor without consent of affected claimants). Use of waivers from liability have also increased, protecting service providers and product manufacturers from facing tort liability. *See* Edward K. Cheng, Ehud Guttel & Yuval Procaccia, *Unenforceable Waivers*, 76 VAND. L. REV. 571, 574 (2023) (discussing widespread use of unenforceable waivers to deter litigation). The availability of the regulatory compliance defense also provides a work-around from tort liability. *See* Robert L. Rabin, *Keynote Paper: Reassessing Regulatory Compliance*, 88 GEO. L. J. 2049, 2053 (2000) (explaining regulatory compliance as strategy to circumvent tort liability).

[203] *See* Sebok, *supra* note 4, at 485 (suggesting that removal of tort remedies may be stemming from problems with tort system "in practice, not in theory").

[204] *Id.* at 485.

[205] *See id.* ("My only point here is to identify these types of tort reform as a variety, however misguided, of tort positive tort reform.").

[206] *See* Tom Spriggle, *The SAFE TO WORK Act: Not So Safe for American Employees*, FORBES, (Sept. 21, 2020) https://www.forbes.com/sites/tomspiggle/2020/09/21/the-safe-to-work-act-not-so-safe-for-american-employees/ [https://perma.cc/AP2P-8NVU] (STWA applies to injuries from COVID-19 exposure when patronizing or visiting a business, service, or school).

[207] Feldman, *supra* note 1, at 398 (describing pluralist argument for reconciliation of tort theory).

[208] *See* DOBBS ET AL., *supra* note 74, § 12.4.

[209] The amount of insurance available to the nuclear power energy industry was critical to the federal government's decision to step in to provide secondary insurance. *See* Price-Anderson Act, 42 U.S.C. § 2210(b) ("The amount of primary financial protection required shall be the amount of liability insurance available from private sources.").

In projecting these costs, mere representation by an industry that it will be crushed if forced to face liability is inadequate evidence.[210] The fear of significant litigation that conflicts with social interests must be reasonable, and specific data must be used to show that this is a true threat. Do the anticipated lawsuits have a reasonable basis? What is the degree of risk posed by the product or service? How likely is it to occur?[211] What is the likelihood of a plaintiff successfully proving each element of tort liability, or the effectiveness of potential defenses such as assumption of risk? Many industries maintain data on the type, frequency, and success of legal claims brought against their industry. This historical data would be relevant to the need for tort removal, even when the specific liability threat is novel.[212] It is important to remember, however, that although data considered by lawmakers are typically provided by the industry,[213] not all industries have the same level of data available to make these projections. Accordingly, the traditional economic analysis of loss prevention (including the BPL Hand formula) may lend itself more easily to some industries than others. For example, the cost of exposing vaccine developers to liability may be less predictable because there may be less data available than for other products on the market. With new technology, the industry may not have the benefit of empirical evidence.[214] A recommendation from an independent expert committee, if available, would be very helpful in supporting a liability shield.[215]

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[210] *See* Ana Swanson & Alan Rappeport, *Businesses Want Virus Legal Protection. Workers are Worried*., N.Y. Times (June 12, 2020), https://www.nytimes.com/2020/06/12/business/economy/coronavirus-liability-shield.html [https://perma.cc/4ATH-EURH] (trial lawyer association executive explained in reference to COVID-19 exposure lawsuits that the current push for liability protections reflected a long-standing effort by corporations to secure more legal protection in times of crisis, including after the Sept. 11, 2001, attacks and swine flu epidemic. 'They have been doing this for decades,' she said. 'Every time there is a crisis, that's what they do.'). *See* Strauss v. Belle Realty Co., 482 N.E.2d 34, 38 (1985) (Meyer, J., dissenting) (criticizing majority decision for "blind acceptance" of representation by defendant electric power provider that it would be "crushed" if exposure to liability were allowed).

[211] Nora Engstrom gives an excellent description of the origins of the Vaccine Injury Compensation Program, with a textbook example of presenting strong evidence and arguments made by industry for liability protection. *See* Engstrom, *supra* note 185, at 1655–59 (describing the rise in lawsuits filed for childhood vaccine injury, the impact on the market and threats of manufacturers' withdrawal, and industry demands for protection from liability).

[212] *See, e.g.*, Malcolm Gladwell, *The Engineer's Lament*, The New Yorker (Apr. 27, 2015), https://www.newyorker.com/magazine/2015/05/04/the-engineers-lament [https://perma.cc/JE8R-JXGN].

[213] Using industry-generated data for government decision-making is not unusual. For example, the FDA relies on industry to test a drug for safety and effectiveness and submit the data to the agency, which then reviews the data but does not retest the drug. *See Development and Approval Process/Drugs*, U.S. Food & Drug Admin. (Aug. 8, 2022), https://www.fda.gov/drugs/development-approval-process-drugs [https://perma.cc/X6YS-PKAB].

[214] *See* Spendlove, *supra* note 3, at 1170.

[215] *Cf.* Engstrom, *supra* note 185, at 1657–58 (describing how the American Academy of Pediatrics warned of the danger of childhood vaccine supply shortages and the CDC's request to doctors to postpone the childhood vaccine DTP "booster" shots to older children to ensure adequate supply for infants).

Of course, the amount of evidence that legislatures can reasonably be asked to accumulate before making the delicate decisions about removing torts necessarily depends on the nature and context of the problem before it. As Senator John McCain stated during debate after 9/11 on the ATSSSA, "the effect on the airlines of the September 11 terrorist attack put Congress in the unenviable position of having to take immediate action to prevent the collapse of the aviation industry as a result of the federally ordered grounding of all aircraft and the anticipated reduction of air travel."[216] But legislative speed is far less justified when no emergency is presented. In the normal course, Congress and state legislatures could be more demanding in requiring industry to produce supporting data.

C. What is the Likely Impact of Immunity on Tort Goals and Policies?

As *Harlow* explained in deciding whether to extend qualified immunity to government actors, the need to protect potential tortfeasors from liability exposure should be weighed against the need to provide a sufficient remedy to victims for violations of law.[217] In conducting that balancing in this setting, it is critical to recognize that tort law is a significant instrument used to regulate health and safety and that liability immunity weakens the ability of states to protect their citizens through this avenue. Consequently, lawmakers must specifically recognize the interests at risk in removing tort liability, particularly regarding the accountability, deterrence, and compensation functions traditionally provided by torts.

Looming large is the loss of deterrence for risk-creating actors. By removing tort remedies, public trust in products and services may be harmed. For example, immunity may have removed the incentive to provide the level of care required to protect nursing home residents and workers during the pandemic.[218]

Relatedly, protecting injurers from tort liability can result in the loss of accountability for wrongful conduct. As described earlier, many theorists base tort law on a foundation of legal accountability between the injurer and the injured, justified by principles of corrective justice.[219] This accountability

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[216] 147 Cong. Rec. S17511 (daily ed. Sept. 21, 2001) (statement of Sen. John McCain).

[217] *See* Harlow v. Fitzgerald, 457 U.S. 800, 814–15 (1982) (identifying qualified immunity as the best attainable accommodation of competing values).

[218] A report by the New York State Attorney General found that immunity protection at the state level may have led nursing home facilities to make "financially motivated, rather than clinically motivated" decisions. N.Y Off. Att'y Gen., Nursing Home Response to COVID-19 Pandemic 39 (Jan. 30, 2021), https://ag.ny.gov/sites/default/files/2021-nursinghomesreport.pdf [https://perma.cc/927J-LJRB]. *Cf.* David A. Simon, Carmel Shachar & I. Glenn Cohen, *Innovating Preemption or Preempting Innovation?*, 119 Nw. U. L. Rev. Online 137, 160–61 (2024) (arguing that the Supreme Court should not preempt lawsuits against *de novo* devices as a normative matter regarding forced risk internalization).

[219] *See* Feldman, *supra* note 1, at 392 (referring to this as "injurer-to-injured legal accountability").

function can be reduced or eliminated altogether through immunity legislation.[220] Removing tort remedies abrogates the ability to address injustice through compensation, and most immunity statutes do not offer replacement compensation to victims of wrongdoing.

Accordingly, legislatures should make specific findings on whether other measures could address the tort functions affected or lost through immunity and how effective they are. In theory, loss of deterrence from immunity could be addressed through the marketplace or through government regulation. On one end of the spectrum, advocates of eliminating or reducing access to tort remedies often argue that the market will provide sufficient deterrence from overly risky activities, and thus intervention through tort action is unwarranted.[221] This argument assumes that the market functions perfectly, which unfortunately is not true. Among other things, market regulation is dependent on consumers' access to complete information, which is typically limited.[222] Litigation may close an informational gap in the relevant market.[223] Relatedly, lawmakers need to ensure that liability shields are not counterproductive. Liability protections may have the unintended consequence of encouraging a race to the bottom—they may protect businesses that practice lower safety standards and give them a competitive edge over businesses that maintain higher standards of care.[224] Such a result would affect the trust of the citizenry in the safety of industries, both shielded and unshielded.

On the other end of the spectrum, the availability of comprehensive government regulation theoretically could provide adequate deterrence to wrongful conduct. There may even be fines or enforcement actions available.[225] But the tort and regulatory systems are meant to operate in tandem. As the

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[220] *See id.* ("Though tort deflationism thus anticipates some injurer-to-injured legal accountability, it also expects that it should be as cabined as possible, including by legislative codification.").

[221] *See id.* ("[T]he market itself will curb excessively unsafe practices from producers, sellers, and service providers . . . .").

[222] *See* Jennifer Arlen, *The Essential Role of Empirical Analysis in Developing Law and Economics Theory*, 38 Yale J. on Reg. 480, 482 (2021) (noting that "empirical analysis can reveal that, contrary to theory, decision-makers regularly do not have the information they need to make material decisions"); Jill Riepenhoff, Jamie Grey & Lee Zurik, *Defective: The Federal Government Knows That Consumers Are Using Hundreds of Dangerous Everyday Products*, 7 News WWNYTV (Nov. 14, 2022), https://www.wwnytv.com/2022/11/14/defective-federal-government-knows-that-consumers-are-using-hundreds-dangerous-everyday-products/ [https://perma.cc/4NTZ-URRK] (stating Consumer Product Safety Commission is aware of hundreds of potentially dangerous products of which the public is unaware).

[223] *See supra* notes 135–36 and accompanying text.

[224] *See COVID-19 Pandemic Hearings*, *supra* note 147, at 3–6 (testimony of David C. Vladeck) (arguing that liability protections would be "counterproductive" because they only protect the "non-compliant" and removing liability would leave consumers and employees feeling unsafe).

[225] *See, e.g.*, *ClinicalTrials.gov - Notices of Noncompliance and Civil Money Penalty Actions*, Food & Drug Admin., https://www.fda.gov/science-research/fdas-role-clinicaltrialsgov-information/clinicaltrialsgov-notices-noncompliance-and-civil-money-penalty-actions [https://perma.cc/UF8U-T75N] (last visited Nov. 6, 2024) (FDA can issue civil penalties for noncompliance with requirements for clinical trial information).

Supreme Court noted in the context of a medical device preemption case, state tort actions can aid, rather than hinder, the functioning of agency regulation.[226] Moreover, government regulation varies significantly in degree. Does the shield protect a highly regulated industry, like airplanes or pharmaceuticals, or is it an area subject to less regulation, where tort remedies may be more critical in "filling in the gaps" left by regulation?[227] Furthermore, some agency oversight is more effective than others. The standards may not be comprehensive and up-to-date, and some agencies may be inadequately funded. OSHA, which oversees workplace safety conditions, has historically been seen as weaker than other agencies like the FDA.[228] During the pandemic, for example, nursing homes had notoriously high rates of COVID-19 cases.[229] The industry lobbied heavily for liability protections.[230] Critics argued that providing immunity would mask long term problems with the industry, which were not effectively addressed by regulation.[231]

Tort functions of transparency and accountability of harm-causing actors could be addressed through other mechanisms, but it is important to ensure the adequacy and availability of alternative investigatory methods. These investigations are typically conducted by the executive branch. For example, the President appointed a special commission to investigate the causes of the 9/11 attacks and determine the fault of the government or airline industry.[232]

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[226] Bates v. Dow Agrosciences, 544 U.S. 431, 451 (2005) (quoting Ferebee v. Chevron Chem. Co., 736 F.2d 1529, 1541–42 (D.C. Cir. 1984)); *see* Timothy D. Lytton, *Tort Claims for the Coverup of Child Sexual Abuse: Private Litigation, Corporate Accountability, and Institutional Reform*, 72 DePaul L. Rev. 289, 315–18 (2023) [hereinafter Lytton, *Tort Claims*] (describing the virtues of tort litigation operating in tandem with regulation, including countermanding regulatory capture); Rebecca L. Haffajee, *The Public Health Value of Opioid Litigation*, 48 Harv. J. L. Med. Ethics 1, 12 (2020) (arguing that opioid litigation "addressed many regulatory and market failures that occurred around prescription opioid analgesics and has achieved numerous civil tort litigation objectives").

[227] For example, no federal agency has the authority to regulate the safe design of firearms. In fact, the agency charged with overseeing the safety of most household products, the Consumer Product Safety Commission, is expressly forbidden from regulating firearms or ammunition. *See* Consumer Product Safety Commission Improvements Act of 1976, Pub. L. No 94-284 § 3(e), 90 Stat. 503, 504 (1976) ("The Consumer Product Safety Commission shall make no rule or order that restricts the sale or manufacture of firearms [or] firearms ammunition."); Champe Barton, *Lawmakers Push for Guns to be Regulated Like Other Products*, The Trace (April 27, 2023) (discussing calls to repeal law and allow Consumer Product Safety Commission to regulate firearms).

[228] *See* David C. Vladeck, *Preemption and Regulatory Failure*, 33 Pepp. L. Rev. 95, 101 (2005) ("The FDA is perhaps the most capable federal safety agency."). Often this disparity is due to unequal funding. Even after it created the Consumer Product Safety Commission, Congress never adequately funded it in relation to the breadth of its charge. *See* David G. Owen & Mary J. Davis, Products Liability and Safety 11 (7th ed. 2015).

[229] Grey & Orwoll, *supra* note 9, at 72.

[230] *Id.*

[231] Grey & Orwoll, *supra* note 9, at 73–74. *See* Betsy J. Grey, *Against Immunizing Nursing Homes*, U. Chi. L Rev. Online 9–10 (2021) (pointing to COVID-19 pandemic's fallout as evidence of long term problems of immunity in nursing homes).

[232] Intelligence Authorization Act for Fiscal Year 2003, Pub. L. No. 107-306, § 601-02, 116 Stat. 2408. *See* The 9/11 Comm'n, The 9/11 Commission Report (2004).

These processes were unsatisfactory to many, however, and even the Chairman of the 9/11 Commission complained that the Commission's recommendations were not being implemented.[233] The recommendations also did not address the airlines' negligence.

Supporting the economic well-being of industry is often cited as a goal in granting immunity. Are there other feasible ways to support industries to accelerate growth, outside of liability immunity? Other avenues include offering tax credits and subsidies,[234] bankruptcy,[235] liability insurance,[236] and alternative systems of compensation. However, economists have criticized promotion of particular key industries through tax credits and subsidies. They have argued that governments are not adept at picking winning industries, that positive effects from industrial promotion can be hard to identify, and that policies favoring particular industries can be captured by special interests.[237] The choice of approach may be driven by which one is more politically feasible.[238] And it may have the added benefit of catalyzing private investment in the same industry.[239]

When the availability of tort remedies is removed, the costs of the harm remain on the injured, but compensation can be addressed through substitute systems of compensation. Lawmakers should make specific findings about the viability of providing an alternative no-fault compensation system.[240] As a paramount matter, providing public compensation to redress a wrong would help address the tort goal of making the victim whole. But it may also circumvent the unresolved question of whether there is a fundamental right to a common law remedy. When workers' compensation laws were introduced and subsequently challenged, the Supreme Court suggested in dicta that a legislature could not substantially interfere with parties' rights under the common

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[233] *See* Shenon, *supra* note 57.

[234] Lourdes Germán and Joseph Parilla, *How Tax Incentives Can Power More Equitable, Exclusive Growth*, Brookings (May 5, 2021), https://www.brookings.edu/articles/how-tax-incentives-can-power-more-equitable-inclusive-growth/ [https://perma.cc/6LEU-8JBV].

[235] *See* Susanna Dokupil, *Rethinking the Airline Bailout*, The Federalist Soc'y (Dec. 1, 2003), https://fedsoc.org/commentary/publications/rethinking-the-airline-bailout [https://perma.cc/YS9C-3X2G].

[236] *See* Josh Czackes, Tom Baker & John Fabian Witt, *Why We Don't Need COVID-19 Immunity Legislation*, Balkinization (Sept. 26, 2020), https://balkin.blogspot.com/2020/09/why-we-dont-need-covid-19-immunity.html [https://perma.cc/QY4B-NSR5] (arguing that liability insurance coverage is the main reason why businesses started up again during the pandemic, despite the fact that Congress did not deliver immunity for businesses).

[237] *See* Paul Krugman, Opinion, *Biden and America's Big Green Push*, N.Y. Times (Aug. 20, 2023), https://www.nytimes.com/2023/08/17/opinion/biden-green-ira-industrial-trade.html [https://perma.cc/9RQC-NQJV] (criticizing economists who would warn against favoring particular industries with promotional policies).

[238] *Id.*

[239] *Id.* (using example of electric vehicles to illustrate this point).

[240] *See* Grey, *Plague of Causation*, *supra* note 185, at 352–55 (describing no fault compensation system for injuries caused by childhood vaccines); Grey, *Homeland Security and Federal Relief*, *supra* note 75, at 671–77 (describing the 9/11 Victim's Compensation Fund).

law without providing a "reasonably just substitute."[241] This line of cases suggests, at the very least, the importance of considering an alternative no-fault compensation system when legislatures remove access to torts.

Even so, providing alternative schemes when tort remedies are removed is the exception rather than the rule. Several reasons explain this history. The schemes may not be viable politically or practically.[242] And they are ad hoc creations; they have no standard format. Funding for alternative compensation systems range from direct government funding to funding by the risk-generating activity, either through special taxation of the industry or insurance premiums.[243] The government can also create a reinsurance pool, which has been used to protect high-risk, critical industries.[244] The funds typically address a continuing activity[245] that imposes significant risk and are intended to supply a form of social insurance against injury.[246] Some schemes create an exclusive remedy while others allow the option of using the common law tort system, although they include incentives not to do so.[247]

Creating an administrative scheme of payment for injuries, like workers' compensation or the 9/11 Victim Compensation Fund, can offer several advantages over traditional tort remedies. In theory, they can lower the costs of the system and the payments for injury, by standardizing and limiting damages, while also lowering transaction costs for the parties and the administering body involved.[248] This is a lesson from mass tort litigation, such as

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[241] N.Y. Cent. R.R. Co. v. White, 243 U.S. 188, 201 (1917). At the very least, it is not clear whether Congress may displace tort claims already accrued without offending the Constitution. *See* Duke Power Co. v. Carolina Env't Study Grp., 438 U.S. 59, 87–88, 93 (1978) (noting but not reaching the question of whether the Price-Anderson Act, which imposed a cap on liability for nuclear accidents from federally licensed nuclear power plants, had to provide a satisfactory quid pro quo for the liability limitation, since the Act provided a "reasonable, prompt, and equitable mechanism" for compensation); *see generally* Phillips*, supra* note 159 (describing argument for a fundamental right to a remedy)*; COVID-19 Pandemic Hearings*, *supra* note 147, at 2 (testimony of David C. Vladeck) ("It is also far from clear that the Constitution permits Congress to simply wipe away state liability rules without enacting substantive legislation imposing federal regulatory oversight or an alternative compensation system, or both."); Sebok, *supra* note 4, at 479.

[242] *See* Grey, *Homeland Security and Federal Relief*, *supra* note 75, at 678–80 (describing criticisms of the 9/11 fund, including a failure to treat all victims of terrorism equally).

[243] *See* Dobbs et al., *supra* note 74, §§ 36.8–36.9 (discussing various compensation funds and industry tax funds).

[244] *See* Grey & Orwoll, *supra* note 9, at 83 (discussing nuclear power industry and insurance pools).

[245] *See supra* notes 190–93 and accompanying text (discussing funds for childhood vaccine programs and nuclear power). The 9/11 Victim's Compensation Fund, with its sunset provision, is an exception to the typical application. *See supra* note 51 and accompanying text.

[246] *See* Grey, *Homeland Security and Federal Relief*, *supra* note 75, at 693 ("Compensation systems generally address a continuing activity that results in a tort and are intended to provide a form of social insurance against risk.").

[247] Workers' compensation systems are exclusive channels for employer-employee accountability. Feldman, *supra* note 1, at 395.

[248] *See* Feldman, *supra* note 1, at 395 (describing how administrative compensation systems typically exclude noneconomic damages); Grey, *Homeland Security and Federal Relief*, *supra* note 75, at 693 ("[I]n exchange for equity, efficiency, and a minimal burden of proof,

tobacco and asbestos litigation, in which the size and extent of the claims exert pressures to create fixed compensation systems for efficiency and move away from the traditional adversarial model of tort litigation for awarding individualized damages.[249] Alternative models can lower the level of proof required of the claimant.[250] But these no-fault compensation systems necessarily involve a series of trade-offs.[251] Generally this means trading more accurate redress (and more accurate, individual corrective justice) for more widespread (although usually lower) compensation on a greater scale.[252]

Some critics argue that benefits in alternative compensation systems such as workers' compensation are too limited and the increasing number of disputed claims have raised transaction costs.[253] Others argue that temporary government funds for victims' injuries, such as the 9/11 Fund, arbitrarily addressed some victims but not others similarly situated.[254] As noted, critics argue that creating these efficiencies comes at the expense of offering individual corrective justice in disputes between private parties.[255]

Furthermore, even if legislatures attempt to replace some of the functions of torts by providing alternative compensation systems, regulating industry, or investigating causes of injury, other functions of torts may be lost through tort removal. Ultimately, removing tort remedies would rob citizens of a vital function of civil litigation, namely the opportunity to use the power of the courts to seek accountability for the loss suffered by the plaintiffs.[256]

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compensation systems sharply reduce the amount of compensation to a fraction of what could be recovered under the traditional tort system."); *but see* Engstrom, *supra* note 191, at 1631 (arguing that "VICP system has largely failed to expedite adjudications and rationalize compensation decisions").

[249] *See* Samuel Isacharoff & John Fabian Witt, *The Inevitability of Aggregate Settlement: An Institutional Account of American Tort Law*, 57 Vand. L. Rev. 1571, 1619–25 (2004) (describing asbestos class actions that resolved into aggregated settlement structures); Francis E. McGovern, *The What and Why of Claims Resolutions Facilities,* 57 Stan. L. Rev. 1361, 1362, 1365, 1379–81 (2005) (describing pressures to create claims resolution facilities to meet demands for more efficient payment of damages and move away from traditional adversarial model).

[250] A prime example of lowering the level of proof required of the claimants occurs in the workers compensation schemes, which eliminate the requirement of proving the employer's fault. Dobbs et al., *supra* note 74, at § 36.2.

[251] *See* Grey, *Homeland Security and Federal Relief*, *supra* note 75, at 709–10 ("First, it is important to realize that a no-fault compensation system necessarily engenders a series of trade-offs.").

[252] *See id.* (exploring reduced accuracy in awards but more populations served).

[253] *See* Dobbs et al., *supra* note 74, §§ 36.1–36.2; Grey, *Homeland Security and Federal Relief*, *supra* note 75, at 708–09 (examining critiques of workers' compensation programs from various viewpoints).

[254] *See* Grey, *Homeland Security and Federal Relief*, *supra* note 75, at 678–80 (discussing criticisms of the 9/11 Fund from different sources).

[255] *See* Roger H. Transgrud, *Mass Trials in Mass Tort Cases: A Dissent*, 1989 U. Ill. L. Rev. 69, 76 (1989) (arguing that efficiency in mass torts comes at a cost of offering corrective justice in disputes arising between private parties).

[256] *See* Hadfield, *supra* note 44, at 11–12, 16–17, 20–21; Goldberg & Zipursky, Recognizing Wrongs, *supra* note 127, at 357–58 (summarizing the limits of what tort law can deliver those wronged).

In addition, it deprives the victims of the expressive function of tort law.[257] Alternative systems also deprive courts of the opportunity to develop the law of obligations. Some scholars have raised the question about the constitutionality of federal liability shields, given that tort law historically is in the state purview.[258] Furthermore, tort law allows a jury of citizens to decide whether private injuries should be addressed through compensation. In that way, it serves a fundamental democratic value.[259] Immunity supplants that democratic citizen function with government dictate.

Consequently, victims may not achieve the same sense of justice and accountability that torts can offer. And although these alternative systems have significant deficiencies—often depriving the victim of their "day in court," an accounting and retribution, and the potential for a larger compensatory award[260]—most often, the government offers nothing at all, as in the case of immunity for gun manufacturers, so victims may be left without recourse altogether.[261]

D. Assuming That Some Immunity is Warranted, How Long and How Broad Should It Be?

The scope of interference—from partial to total elimination of tort remedies—is an important legislative consideration.[262] Lawmakers should define the parameters of immunity with precision. Given the presumption against liability immunity and the lawmakers' burden of justification, the shield should be narrowly tailored, balanced, and shaped to impose the least possible interference with tort remedies.

Many variables affect liability shields. The shields can differ by type of lawsuits, degree of culpability, class of defendants, types of claims, or types and amount of damages.[263] Additionally, some liability shields may be more limited in time, like the CARES Act, which required continual renewal or reappropriation, or may grant open-ended protection, like gun manufacturers under the PLCAA. The need for shields may lessen over time as the crisis abates and risks are better managed. During the pandemic, for example, most

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[257] *See* Lytton, *Tort Claims*, *supra* note 226, at 305 (exploring the benefits of tort system beyond monetary redress).

[258] *See COVID-19 Pandemic Hearings*, *supra* note 147, at 2 (testimony of David C. Vladeck).

[259] *See* Logan, *supra* note 4, at 920 (stating the jury reflects the notion of direct democracy); *Cf.* Shapiro, *supra* note 138, at 176 (arguing arbitration "stifles the development of legal doctrine by relegating legal claims to a form of dispute resolution that needn't resolve disputes according to law").

[260] In theory, this problem could be addressed partly by allowing tort litigation as a parallel option, as in the 9/11 Fund, but often the tort option is limited with restricted damages to encourage use of the alternative system.

[261] The gun-wielding criminal, the primary tortfeasor, is frequently unreachable or judgment proof.

[262] Arguably, even limited shields can have a large impact on the availability of tort remedies, which is the intent of the shields. *See* Lewis, *supra* note 5, at 5.

[263] *Id.* at 5.

shields for healthcare workers were tied to the duration of the public health emergency.[264] As COVID-19 infection rates decreased, the broad liability protections were likely no longer necessary.[265] Removing immunity reintroduced the incentives for industries to remain abreast of the state of the knowledge on the virus, which was ever-changing.[266]

V. Conclusion

The relationship between public and private interests is always a delicate balance, but this is especially true when governments take extraordinary measures and insulate an industry from tort liability. Redressing private wrongs through tort law has been a part of the American legal landscape from its inception. Although legislatures have considerable leeway to alter or eliminate access to tort redress, they should do so only in exceptional circumstances, given the stakes at issue. This article offers a framework of factors to consider before legislatures exercise their power to remove torts. The framework requires lawmakers to make specific findings on the public interest served by granting immunity; the true threats to the industry from liability exposure, the impact on tort policies and functions served by torts, and creating the minimal interference with those policies. Addressing these factors serves the goal of weighing the cost of removing access to the courts to vindicate rights through the tort system against the need to protect an identified public interest. The framework approach will offer consistency in decision-making, made as free as possible from interest group politics or ad hoc decisions, and help ensure that granting immunity does not come at too great a cost.

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[264] Grey & Orwoll, *supra* note 9, at 72.

[265] *See* Chris Marr, *Dying Covid Liability Shield Laws Prompt Push for their Revival*, Bloomberg L. (Jan. 27, 2022), https://news.bloomberglaw.com/daily-labor-report/dying-covid-liability-shield-laws-prompt-push-for-their-revival [https://perma.cc/6RRP-L8Y4]. (waning interest in extending provisional state liability shields enacted during the pandemic).

[266] *Id*.