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REFLECTIONS ON TORT AND THE ADMINISTRATIVE STATE

Robert L. Rabin*

INTRODUCTION

On the occasion of a festschrift dedicated to my contributions to scholarship on tort and the administrative state, I have been asked to identify the central themes in my work and provide some supporting commentary. At the outset, let me indicate my assent to Peter Schuck’s observation— with reference to my writings on the administrative state—that if the universe of scholars is divided into “lumpers” and “splitters,” my oeuvre is best seen as falling into the latter camp.1 I would extend that observation to my work in the torts field as well, and consistent with that proposition, I will resist the temptation to search for a single underlying leitmotif connecting the work I have done over the past four decades.2

Instead, I will mark off for commentary three discrete areas that identify pathways to which I have returned repeatedly, although not chronologically, to explore different features of the landscape.3 I will

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1. Peter H. Schuck, Professor Rabin and the Administrative State, 61 DePaul L. Rev. 595, 611 (2012). Schuck spells out his observation in these terms:

Those for whom a single value is paramount are relatively comfortable advancing bold, striking theories that seem crisp, consistent, coherent, and comprehensive theories that others can understand and apply with ease. Using the well-known taxonomy applied to characterize polar cognitive and analytical styles, such people will tend to be lumpers, not splitters.

Rabin—like me—is an inveterate splitter. He affirms the salience and legitimacy of the manifold values implicated by the administrative state, and he insists that all of them be given their due weight. Like any good splitter, he does not offer any overarching theory of what weight is due for each.

Id.

2. A complete bibliography of my scholarship, as of 2011, can be found in an Appendix to this Article.

3. Schuck’s thoughtful article addresses a fourth area of my scholarship—perhaps best (but imperfectly) identified as institutional studies of administrative decision making—which I discuss only in a lengthy footnote in this Article, see infra note 37, because it is less directly related to my work on intersecting themes of tort and the administrative state. See Schuck, supra note 1. This fourth category of scholarship—which tends to be empirical in method and based on data gleaned from interviews, document analysis, and occasionally participant observation—focuses primarily on priority setting, status, and eligibility determinations as endpoints, rather than
begin with historical perspectives on the evolution of tort and the administrative state. While I make no pretense to original-source research akin to the mainstay tradition of professional historians, I have been animated by an effort to better understand the underpinnings of common law doctrine and regulatory reform in earlier eras and to explore how those norms came to be transformed over time.

As a second identifiable area, I will turn to scholarship in which I have analyzed the comparative institutional efficacy of tort and regulation. Some of this writing has been aimed at exploring the regulatory limits that have been imposed (or proposed) on tort; in particular, through defense claims of regulatory compliance and tort preemption. Still other scholarly work of mine in this area has focused on the design of tort and administrative compensation schemes, particularly by examining, on various occasions, the ramifications of legislative no-fault plans.

As a third discrete area, I will address a set of concerns that thematically cluster in my scholarship: digging beneath the surface of tort doctrine. Here, my work comes from two quite different perspectives: one explores the tort system from a process vantage point and the other through a social-policy prism. Closely related to this work, in a more traditional vein of legal scholarship, I have at times pursued doctrinal analysis as an end in itself: it is a truism that before one can dig below the surface, it is necessary to clearly identify the surface (in this case, the doctrinal overlay). accident-centered fairness and efficiency goals related to tort and administrative compensation plans.

4. See infra notes 8–37 and accompanying text.
5. See infra notes 38–64 and accompanying text.
6. See infra notes 65–91 and accompanying text. There is certainly no inexorable character to this thematic breakdown. In an article for this Symposium that I found especially illuminating, John Goldberg and Benjamin Zipursky categorize my torts scholarship in an alternative three-part framework: (1) individualized versus bureaucratic compensation; (2) the fault principle and enterprise liability; and (3) formalism and realism. See John C.P. Goldberg & Benjamin C. Zipursky, Convergence and Contrast in Tort Scholarship: An Essay in Honor of Robert Rabin, 61 DEPAUL L. REV. 467 (2012). This schematic approach provides a pathway for exploring the considerable area of convergence between their own normative perspective of redress-centered tort rights and my predominantly descriptive and institutional analysis of tort and alternative compensation schemes. At the same time, their scheme is designed to provide a framework for exploring the inevitable distinctions between my inveterate "splitter" tendencies and policy preoccupations, and their commitment to an overarching philosophical position grounding tort in civil recourse to victim redress. For a more detailed articulation of their normative approach, see John C. P. Goldberg & Benjamin C. Zipursky, The Oxford Introductions to U.S. Law: Torts (2010).
7. A nice illustration of the tight nexus between policy and doctrinal analysis is Michael Green's contribution to this Symposium, which carefully parses the doctrinal articulation of the causation element in Federal Employers' Liability Act (FELA) cases. See generally Michael D.
Both the tort system and the administrative state have grown by leaps and bounds over the past century. Correspondingly, the opportunities for scholarship evaluating these developments, as well as tracing their roots in an earlier era, know virtually no limits. What follows is a discussion of some of the issues that have struck this particular academic observer as especially worthy of thematic exploration.

II. HISTORICAL PERSPECTIVES: TORT AND THE ADMINISTRATIVE STATE

A. Tort

In a classic article from the tort literature, Charles Gregory traced the origins of tort from an early pre-industrial era of trespass to the industrial revolution, which gave rise to negligence-based liability, to a mature phase of industrialization in which strict liability came to prominence. While not necessarily endorsing this pattern, influential legal historians such as Morton Horwitz and Lawrence Friedman correspondingly emphasized a tension generated by a strict-liability-based universe of tort-type principles and the perceived need for a less stringent standard of responsibility for injuries if economic growth were to flourish in the early stages of the industrial revolution; hence, a scaling back of responsibility for accidental harm from strict liability to negligence.

I called this thesis into question in an essay reassessing the development of the fault principle. As a baseline proposition, it seemed necessary to me to recognize the implications of the foundational notion, accurately noted by Friedman, that in fact there was nothing that could be characterized as a tort system prior to the industrial era. Scholarship to the contrary treats the highly restrictive universe of the writ system, which addressed tort-type injuries—writs of trespass and, somewhat later, case—as the foundation of a plenary system for redressing physical injury. This struck me as a fundamentally flawed.

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Green, The Federal Employers' Liability Act: Sense and Nonsense About Causation, 61 DePaul L. Rev. 503 (2012). The FELA, a tort hybrid that sought to partially embrace the contemporaneous welfare aspirations of the workers' compensation model, has spawned case law on causation that, as Green points out, is notable for its lack of clarity.


premise. Rather than denoting a comprehensive liability system, the
writ system created isolated islands of redress for physical injury in a
sea of no-liability. Viewed from a broader perspective, there was no
liability in this pre-industrial era for any form of accidentally gener-
ated emotional or economic harm and only the barest trace of liability
for accidentally generated physical injury (as distinguished from inju-
ries caused by intentional tort-like misconduct).12

Once the dominant role of no-liability in the pre-industrial era was
recognized, any tension between strict (or "absolute") liability and
fault became a seriously distorted point of entry into an understanding
of the role of negligence in the industrial era. Instead, it became criti-
cal to assess the emergence of tort in the context of competing, longer
established systems of legal rights and obligations. In particular, the
contract paradigm dominated tort in the case of workplace injuries
through defenses—assumption of risk and the fellow-servant doc-
trine—that overshadowed and vitiated negligence liability throughout
the latter half of the nineteenth century. In like fashion, the contract
paradigm imposed a privity limitation on recovery for product
injuries.13

Similarly, a more venerable property law regime was superimposed
on land-occupier liability, establishing substantial limitations on fault-
based recovery in this sphere of accidental harm.14 Along with these
competing legal regimes, the fault principle, as embodied in liability
for negligent conduct, was also compromised by a wide array of no-
duty rules (as mentioned, putative claims for stand-alone emotional
and economic harm) and a host of immunities.15

It does not follow, of course, that the emerging framework of negli-
gence doctrine was wholly illusory. But importantly, fault liability
manifested itself most robustly within the confines of interpersonal
harm among strangers, where no status relationships associated with
preexisting commitments to no-duty (or limited-duty) rules were dom-

12. This is not to suggest that there was no recognition of the legitimacy of claims for non-
economic harm in the pre-industrial era. Indeed, in another historical article, I developed the
point that the recognition of claims for harm irrespective of any physical injury can be traced
back to early cases in the era of the writ system involving recognized categories of assault, false
imprisonment, and defamation, in which intangible loss was explicitly identified as a legitimate
basis for recovery. See Robert L. Rabin, Pain and Suffering and Beyond: Some Thoughts on
Recovery for Intangible Loss, 55 DePaul L. Rev. 359, 365 (2006) [hereinafter Rabin, Pain and
Suffering]. But in each instance, these early categories of liability involved conduct unrelated to
accidental harm: assault and false imprisonment are found at the dawning of the age of recovery
for intentional misconduct, and defamation was historically a strict liability claim.
14. See id. at 933–34.
15. See id. at 949, 959.
Only gradually, over the course of the twentieth century, did these limitations break down and lead to a far more pervasive reliance on the fault principle.17

This early foray into reassessing the place of fault in the regime of recovery for accidental harm required a corresponding reassessment of the place of strict liability as well. But in propounding the thesis that fault arose in a dominant universe of no-liability rather than strict liability, I noted a necessary qualification: it did not follow that strict liability was entirely absent from the landscape.18 To the contrary, Rylands v. Fletcher19 and the blasting cases,20 in particular, created identifiable islands of strict liability that coexisted with both no-liability and an emerging fault system in the early industrial era.

Viewed from a contemporary vantage point, what is most striking about these early constrained impulses to recognize responsibility for physical harm irrespective of fault is their grounding in notions of corrective justice: Rylands enjoined land occupiers to so use one’s land as to avoid injury to a neighbor; the blasting cases dictated that developers engage in profitable activity in a fashion that avoided the imposition of nonreciprocal injuries on an innocent victim.21

From a historical perspective, I pointed out the sharp turn from fairness concerns in these nineteenth-century precedents to a modern-day economic justification for strict liability, which corresponds to the broader conception of liability for abnormally dangerous activities.22 In Chavez v. Southern Pacific Transportation Co., in which defendant railroad argued in fairness terms that when a carrier is required to accept dangerous cargo, it is “unjust” to impose strict liability, the court concluded that California courts would not create such an exception even though § 521 of the Restatement (Second) of Torts rejected strict liability in such a situation:

If California predicated liability solely upon the “fairness” rationale appearing in [Green v. General Petroleum Corp., 270 P. 952 (Cal. 1928)], it might well find that strict liability was inappropriate.

16. See id. at 947.
21. Id. at 926; Rylands, 1 L.R. Exch. at 279–80.
Under the Green rationale strict liability is imposed because the ultrahazardous actor intentionally exposes others to a serious danger—an anti-social act is being redressed. Where the carrier has no choice but to accept dangerous cargo and engage in an ultrahazardous activity, it is the public which is requiring the carrier to engage in the anti-social activity. The carrier is innocent.

But, there is no logical reason for creating a “public duty” exception when the rationale for subjecting the carrier to absolute liability is the carrier’s ability to distribute the loss to the public. Whether the carrier is free to reject or bound to take the explosive cargo, the plaintiffs are equally defenseless. Bound or not, Southern Pacific is in a position to pass along the loss to the public. Bound or not, the social and economic benefits which are ordinarily derived from imposing strict liability are achieved. . . A more efficient allocation of resources results. Thus, the reasonable inference to be drawn from the adoption of the risk distribution rationale in Smith v. Lockheed Propulsion Co., [56 Cal. Rptr. 128 (Ct. App. 1967)], is that California would . . . find that carriers engaged in ultrahazardous activity are subject to strict liability.23

This turn to an enterprise liability rationale for assigning responsibility to ultrahazardous (or abnormally dangerous) activities resonates with the spirit of the contemporaneous embrace of strict products liability—similarly relying on the twin engines of risk spreading and optimal deterrence to move beyond a fault requirement as the standard of liability.24

At this juncture, one can hardly ignore turning back to the birthright of these intellectual foundations in the workers’ compensation movement at the beginning of the century.25 And once so motivated, the natural move is to broader historical reflections on the administrative state—to which I turn next.

B. The Administrative State

From an accident law perspective, workers’ compensation is indeed the natural point of departure for comprehending the bond between


24. In his contribution to this Symposium, Gregory Keating offers an illuminating, harm-based reading of Rylands v. Fletcher that places major emphasis on the rise of enterprise-responsibility thinking in the search for a satisfying moral basis for tort theory. See Gregory C. Keating, Recovering Rylands: An Essay for Bob Rabin, 61 DEPAUL L. REV. 543 (2012). The introductory section of his article also provides a very thoughtful rendition of my article on the historical development of the fault principle. Id. at 543–49.

25. My effort to forge these links can be found in Robert L. Rabin, Past as Prelude: The Legacy of Five Landmarks of Twentieth-Century Injury Law for the Future of Torts, in EXPLORING TORT LAW 52, 60–66 (M. Stuart Madden ed., 2005).
tort and the birth of the administrative state. And the story of how a failed tort remedy for industrial injuries gave rise to the first nationwide movement to a legislative no-fault tort replacement system has been carefully chronicled.

My principal contribution to this historical literature is an essay in which I assess the political milieu in which the two principal no-fault movements of the twentieth century—workers' compensation and motor vehicle injury compensation—arose. It is my view that the rise of workers' compensation cannot be fully explained without careful attention to the Progressive Era context in which it swept the states, a period in which there was widespread legislative activity addressing work-related health and safety issues, such as child-labor and maximum-hour legislation. Workers' compensation, I argue, was part and parcel of this broader set of concerns about the plight of industrial workers and reaped the benefit of this more expansive movement.

Similarly, auto no-fault legislation had its moment in the sun—succeeding in the legislative forums in half the states—during the brief window when proactive politics reigned in the late 1960s and early 1970s, which I have referred to as the Public Interest Era. This was the period in which Congress not only passed a bevy of protective environmental legislation, but also demonstrated a strong interest in auto safety and health concerns; in particular, enacting the Auto Safety Act and the Clean Air Act motor vehicle emissions standards. Once again, the spirit of reform was strong, and it moved in the direction, among others, of protective legislation for the victims of motor vehicle injuries: the auto no-fault movement was a political beneficiary of the times. The other side of the coin, as I see it, is evident in the failure of auto no-fault to find even a scintilla of political success once the Public Interest Era ran its course.

26. An interesting nineteenth-century antecedent is the regulatory regime for bursting boilers, discussed in John G. Burke, Bursting Boilers and the Federal Power, 7 TECH. & CULTURE 1 (1966). But this regime marks the intercession of regulation as a complement to a (weak) tort remedy; contrary to workers' compensation, it did not address victim compensation.


30. See id. at 1289-90.

31. For comprehensive discussion, see Nora Freeman Engstrom, An Alternative Explanation for No-Fault's "Demise," 61 DEPAUL L. REV. 303 (2012). Engstrom's detailed analysis of the demise of the auto no-fault movement convincingly suggests another contributing factor: The converging patterns of routinization in settlement practices and "broader yet shallower compen-
Viewing these two principal no-fault movements through a wide-angle lens, I speculate that broadly conceived no-fault legislation is dependent on a political environment that corresponds to shared health and safety concerns of a more sweeping nature. In the absence of this animating spirit, special interests supporting the status quo—representing tort, private industry, and insurance—coalesce around an innate American concern about governmentally mandated social welfare programs.

A century or more of growth of the American administrative state, of course, would be viewed through a radically restricted lens if all that was recorded was the adoption of legislative compensation schemes for victims of accident-related harms to health and safety. The worker-protective labor legislation in the Progressive Era, just discussed, was but a single aspect of a broader emerging commitment to federal health and safety legislation, ranging from meat inspection to purity in food and drugs.

The auto-related health and safety legislation of the Public Interest Era—my backdrop for discussing the origins of auto no-fault plans—similarly was but one manifestation of the aspirations in the domains of environmental and consumer protection realized a half century after the Progressive Era. Midway between these two periods of regulatory expansion—devoted largely to health and safety concerns—came the Great Depression, ushering in the New Deal, a radically transformed vision of the federal government's responsibility to stimulate the economy through public-works and economic-incentives programs and, at the same time, provide assurances of economic security to the individual.

My broader interests in these developments led to a stand-alone essay, apart from the linkage of administrative no-fault to tort-type redress—tracing the sweep of regulatory reform from the establishment in the Populist Era of the first independent federal regulatory agency, the Interstate Commerce Commission, through the Progressive, New Deal, and Public Interest Eras. I described the regulatory...

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33. At times, however, these special interests regarded narrowly focused tort reform as being in their best interest. See generally Robert L. Rabin, Accident Law Plans Revisited, 64 Md. L. Rev. 699 (2005) [hereinafter Rabin, Accident Law Plans].


35. See generally Rabin, Federal Regulation, supra note 29. That article closes with a postscript on deregulation, which was in high gear at the time of writing. See id. at 1315-26.
legislation of the Progressive Era, characterized by the establishment of weak regulatory inspection regimes in the areas of meat inspection and pure food and drugs, as a policing model of governmental regulation, which correspondingly seemed to me the central thrust of the Public Interest Era’s legislative agenda as well:

The policing model closely corresponded to a widely shared philosophical and political perspective that stressed the limited responsibility of government for economic well-being; essentially, this perspective was premised on an autonomous market-controlled economy. But adherents to this view were willing to concede that the market systematically generated certain “excessively competitive” practices such as the manufacture of products that seriously endangered health and safety . . . . When these practices occurred repetitively and constituted a nationwide problem, various factions—often including producer interests—regarded federal regulation as superior to the ad hoc approach of the pre-existing forms of government regulation, the judicially fashioned common law and state regulatory practices.36

In this regard, much of the regulatory legislation in both periods can be viewed as either complementing or responding to the inadequacies of tort litigation. This was not so in the New Deal Era, when tort and no-fault languished, relatively speaking. Rather, as I have suggested, the New Deal legislative agenda was largely grounded in a panoply of large-scale economic security and public-works strategies—strategies that stand apart from the intersecting domains of tort and administrative compensation.37

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36. Id. at 1192.
37. My engagement with the politics of regulatory reform across the course of the twentieth century was an outgrowth of earlier work of a more focused variety, in which I explored, in a series of case studies, the internal dynamics of exercising low-visibility administrative discretion. The initial project was Robert L. Rabin, Do You Believe in a Supreme Being—The Administration of the Conscientious Objector Exemption, 1967 Wis. L. Rev. 642 (documenting the resistance of the Selective Service System to implementation of the liberal definition of the requisites of belief in a supreme being by the U.S. Supreme Court in United States v. Seeger, 380 U.S. 163 (1965)). For subsequent work in this vein, see Robert L. Rabin, Agency Criminal Referrals in the Federal System: An Empirical Study of Prosecutorial Discretion, 24 Stan. L. Rev. 1036 (1972) (analyzing the manner in which administrative discretion was exercised by the Department of Justice in deciding which referrals for criminal prosecution by federal agencies would be pursued); Robert L. Rabin, Implementation of the Cost-of-Living Adjustment for AFDC Recipients: A Case Study in Welfare Administration, 118 U. Pa. L. Rev. 1143 (1970) (describing the federal oversight of grievances against state practices in the implementation of a cost-of-living adjustment for welfare recipients under the Aid to Families with Dependent Children program); Robert L. Rabin, Preclusion of Judicial Review in the Processing of Claims for Veterans’ Benefits: A Preliminary Analysis, 27 Stan. L. Rev. 905 (1975) (discussing the tension between the Veterans Administration’s implementation of its high-volume benefit system and assuring due process in individual claims); and Robert L. Rabin, Ozone Depletion Revisited: EPA Regulation of Chlorofluorocarbons, Regulation, Mar.–Apr. 1981, at 32 (reviewing the options considered by the Environmental Protection Agency, including resort to an innovative marketable-permits sys-
Those intersecting domains become central to my work when I have addressed, in a variety of essays, the comparative institutional efficacy of tort and no-fault. I next turn to a discussion of this area.

III. TORT AND THE ADMINISTRATIVE STATE: COMPARATIVE INSTITUTIONAL EFFICACY

The crossroads of tort and administrative activity can be viewed from two quite distinct—albeit converging—perspectives, and I have done so in my writing: perspectives that address themes of regulation and compensation.

A. The Regulatory Perspective

Two closely related defenses—regulatory compliance and preemption—stand squarely at the crossroads of tort and regulation. In an article on the former, I spelled out the distinction between the two:

The Supremacy Clause of the United States Constitution provides the governing principle [for recognizing federal preemption]: federal enactments override any state law addressing the same subject matter. Nonetheless, when Congress has remained silent on the question of whether state tort law should co-exist with federal regulatory authority . . . that is not necessarily the end of the matter. A state court could decide that it should pay deference to the comprehensive regulatory scheme and bow to the [regulatory] assessment of safety and efficacy as a matter of common law, even though it was not required to do so in any formal sense by congressional mandate. In doing so, the state court would recognize a regulatory compliance defense, as distinguished from a constitutional requirement to give the regulatory scheme preemptive effect.38

In that article, I indicated why the courts have traditionally been unwilling to treat regulatory compliance as an absolute defense, relegating it to “some evidence” of due care on the part of the defendant.39 I then proceeded to argue that in most circumstances this

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39. Both the Restatement (Third) of Torts: Liability for Physical and Emotional Harm and the Restatement (Third) of Torts: Products Liability give it only nondeterminative, “some evidence” status, reflecting the view of most state courts. RESTATENMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 13 cmt. b (2010) (“[I]n products-liability cases, despite the quasi-contractual relationship between the consumer and the manufacturer, the latter’s compliance with custom in designing its product is only some evidence of the adequacy of the product’s
lukewarm embrace made sense. The easiest case for limiting the de-
fense is when a defendant’s compliance has been with a regulatory
standard that was meant to serve as a floor on health or safety protec-
tion, rather than setting an optimum level; common sense suggests
that there is no reason to displace a tort assessment of due care when
the regulatory process had the more modest aim of providing only
baseline protection.

When the regulatory standard is avowedly set as an optimal level of
protection, the case for denying judicial deference out of hand be-
comes more subtle. The superior expertise of a regulatory agency un-
dertaking a comprehensive optimality review weighs heavily in favor
of judicial deference. Nonetheless, there are powerful arguments on
the other side. As a baseline proposition, no matter how rigorous the
agency process is, in the end it is a standard-setting process that does
not offer compensation to the unfortunate victim suffering injury de-
spite regulatory compliance. And in this regard it is critical to note
that compliance, in some instances, is with a standard set before the
risks imposed on prospective victims were fully understood. In addi-
tion to the singularity of tort in doing double duty—offering compen-
sation as well as playing a deterrence-animated regulatory role—tort
may play an educational role regarding health and safety risks and
serve as an antidote against misleading product-promotional
activities.40

This is not to say that there are no circumstances under which judi-
cial deference to regulatory compliance is warranted:

It is certainly possible to conceive of discrete cases in which the
regulatory benefits of uniformity and expertise could be regarded as
substantial, making the correlative claims for tort liability—based
on preserving state sovereignty, avoiding regulatory immunity over-
breadth, promoting public information, and even affording compen-
sation—seem weak by comparison.41

But I would put the emphasis on “discrete cases”: flat-out deference,
even in the case of a comprehensive regulatory scheme, suffers from
the disabilities that I have just mentioned.42

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41. Id. at 2082–83.
42. For a forceful statement of the contrary view, see Peter Huber, Safety and the Second Best:
The regulatory preemption defense is quite another matter because of its constitutional underpinning.\textsuperscript{43} As I have indicated, there is no question of discretionary judicial deference here; the Supremacy Clause displaces state action, including common law tort claims that are in conflict with federal law.\textsuperscript{44} Indeed, this circumstance became a key initiative in the tort reform efforts of the George W. Bush Administration, as federal regulatory agencies proactively proclaimed preemption in a wide array of regulatory settings.\textsuperscript{45} But the critical question is whether such a federal–state conflict exists, and this has been a consistent bone of contention, generating a series of U.S. Supreme Court decisions over the past two decades.\textsuperscript{46}

\textsuperscript{43} U.S. Const. art. VI, cl. 2 ("[T]he Laws of the United States . . . shall be the supreme Law of the Land; . . . any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.").

\textsuperscript{44} For a recent reassertion of this point, see Altria Group, Inc. v. Good, 555 U.S. 70, 76 (2008) ("Our inquiry into the scope of a statute’s pre-emptive effect is guided by the rule that ‘[t]he purpose of Congress is the ultimate touchstone’ in every pre-emption case." (alteration in original) (quoting Medtronic, Inc. v. Lohr, 518 U.S. 470, 485 (1996)) (internal quotation marks omitted)).

\textsuperscript{45} See generally Catherine M. Sharkey, Preemption by Preamble: Federal Agencies and the Federalization of Tort Law, 56 DePaul L. Rev. 227 (2007).

\textsuperscript{46} The principal Supreme Court decisions addressing tort preclusion in a federalism context are Bruesewitz v. Wyeth LLC, 131 S. Ct. 1068 (2011) (finding preemption of design-defect claims under the National Childhood Vaccine Injury Act of 1986); Williamson v. Mazda Motor of America, Inc., 131 S. Ct. 2561 (2011) (rejecting preemption and distinguishing Geier v. American Honda Motor Co., 529 U.S. 861 (2000), on the grounds that the present regulation of rear seatbelts, allowing the option of lap-only or lap-and-shoulder belts under the National Traffic and Motor Vehicle Safety Act, did not preclude design-defect claims for the lesser protection); PLIVA, Inc. v. Mensing, 131 S. Ct. 2567 (2011) (preempting a failure-to-warn claim against a generic-drug manufacturer on the grounds that only a showing of substantial equivalence to a branded version of the drug, which had been approved by the FDA, was required); Wyeth v. Levine, 555 U.S. 555 (2009) (refusing to preempt a claim of implied preemption for failure to warn under the prescription drug provisions of the Food, Drug, and Cosmetics Act); Riegel v. Medtronic, Inc., 552 U.S. 312 (2008) (holding that, contrary to Medtronic, Inc. v. Lohr, 518 U.S. 470 (1996), preemption applied to a Medical Device Amendments claim involving the premarketing approval provisions applicable to the defendant’s balloon catheter device); Good, 555 U.S. 70 (reaffirming that the preemption provisions of the federal cigarette warning legislation applied only to failure-to-warn claims and not to fraudulent-misrepresentation claims); Bates v. Dow Agrosciences LLC, 544 U.S. 431 (2005) (refusing to preempt a claim of inadequate warning under the Federal Insecticide, Fungicide, and Rodenticide Act after finding no inconsistency with the agency-approved warning); Sprietsma v. Mercury Marine, 537 U.S. 51 (2002) (holding that neither the Federal Boat Safety Act of 1971 nor the Coast Guard’s decision not to promulgate specific regulations preempted the plaintiff’s state common law claim that her boat motor was unreasonably dangerous); Buckman Co. v. Plaintiffs’ Legal Commission, 531 U.S. 341 (2001) (preempting a stand-alone claim of fraud in the FDA’s approval process of a manufacturer’s orthopedic bone screws under the Medical Device Amendments); Geier, 529 U.S. 861 (finding preemption under the National Traffic and Motor Vehicle Safety Act of 1966 of a design-defect claim for failure to require seatbelts); Lohr, 518 U.S. 470 (holding that there is no preemption of a tort claim for failure to warn of risks associated with an allegedly defective pacemaker under the “substantial equivalency” provisions of the Medical Device Amendments);
Most of the cases taken by the Court have involved express preemtion provisions in the regulatory legislation.\textsuperscript{47} Whether a common thread can be found in these cases—each of which is, by definition, grounded in both a distinct regulatory scheme and a correspondingly distinct preemption provision—has been sharply questioned by commentators, who in turn disagree on the appropriate framework for interpreting elusive statutory language.\textsuperscript{48} To complicate matters still further, the Court has recently extended its reach into the area of implied preemption in a case involving the prescription drug provisions of the Food, Drug, and Cosmetic Act.\textsuperscript{49}

My own view on the scope of preemption is substantially grounded in the same factors that seem most salient in the companion area of regulatory compliance, just discussed.\textsuperscript{50} Assuming the statutory language and supporting evidence of legislative intent provide limited guidance on the scope of the express preemption provision—or correspondingly, on the intent to imply preemption—the Court must proceed on the assumption that Congress was sensitive to considerations of comparative expertise in the forums of regulation and tort; comparative access to risk-related information at the time of injury; and desirability of providing victim compensation.\textsuperscript{51}

\textsuperscript{47} And to confound matters at times, the same regulatory legislation may feature a savings clause as well. See, e.g., Geier, 529 U.S. at 894–95 (Stevens, J., dissenting) (discussing provisions of the National Traffic and Motor Vehicle Safety Act of 1966).


\textsuperscript{49} Levine, 555 U.S. 555.

\textsuperscript{50} See generally Robert L. Rabin, Territorial Claims in the Domain of Accidental Harm: Conflicting Conceptions of Tort Preemption, 74 BROOK. L. REV. 987 (2009) [hereinafter Rabin, Territorial Claims].

\textsuperscript{51} In this Symposium and her earlier work, Catherine Sharkey takes a more forceful position on the futility of treating congressional intent as the touchstone for preemption analysis. See Catherine M. Sharkey, Against Categorical Preemption: Vaccines and the Compensation Piece of the Preemption Puzzle, 61 DePAUL L. REV. 643 (2012). Reviewing the Supreme Court’s line of preemption decisions, see supra note 46, in the context of ambiguous congressional preemption provisions, Sharkey concludes that barely disguised judicial policy preferences, rather than principles of statutory interpretation, dominate the case law. She proposes an “agency reference model,” in which a court would condition preemption on an extant administrative record of thorough risk–benefit or risk–risk analysis of a plaintiff’s claim under state tort law, as the appropriate test for ruling on the displacement of tort. Id. Illustratively, she offers a detailed analysis of how the methodology might have played out in Bruesewitz. For Sharkey’s earlier exposition of the agency reference model, see Catherine M. Sharkey, Products Liability Preemption: An Institutional Approach, 76 GEO. WASH. L. REV. 449 (2008).
While these considerations are not at all certain to simultaneously point in the same direction, I have suggested that they do provide a working test for resolving preemption cases:

I would read conflict preemption narrowly, confining it... to cases in which plaintiff's claim is based on agency action grounded in the same evidence-based risk/benefit inquiry as the tort process would entail.

Under this narrowly-framed preemption defense, what are the principal types of tort claims that survive? Most importantly, claims should survive that are based on substantial new evidence of risk arising after a product design has been approved if the agency has failed to weigh in on the new findings in a determinate manner at the time of product use by the injury victim...

This category of surviving claims is a logical consequence of containing the comparative institutional competence argument for regulatory preemption within its own domain. If the tort claim rests on an assertion that substantial post-approval new evidence of risk has come to light, and has neither been incorporated into a revised warning, nor rejected by the agency as insubstantial, the foundational risk/benefit analysis on which agency certification was based is inapposite. Hence, the tort claim is not an effort to revisit and supersede the regulatory approval process.52

Notably, both regulatory compliance and preemption are defenses that conjure up a zero-sum game: if either defense is recognized, the tort claimant is without a remedy. But this need not be the case. As we have seen earlier, there is a third way: Beginning with the workers’ compensation movement, displacement of tort has occasionally been coupled with another building block of the administrative state, a legislative no-fault compensation scheme. In the following section, I return to a discussion of no-fault, assessing its structural features and goals.

B. Compensation Schemes

In an essay assessing the case for a no-fault compensation scheme for toxic harms, I identified four foundational issues that must be resolved in giving serious consideration to any such scheme: (1) scope of coverage, (2) level of benefits, (3) retention of tort, and (4) source of

52. Rabin, Territorial Claims, supra note 50, at 1001-02 (footnote omitted).

A second critical category of surviving claims should be those grounded in misrepresentations made to the agency in the certification or post-approval process. Once again, this limitation on the scope of preemption follows from a purposive analysis of congressional intent. The agency's certification process is not duplicated by a tort claim based on risk/benefit information that should have been provided to the agency but was not. 

Id. at 1002.
I labeled the threshold scope of coverage determination "designating a compensable event"—adopting earlier usage by proponents of medical malpractice reform. In auto plans, where entitlement to benefits can be defined in terms of physical injury, this is a fairly straightforward inquiry. By contrast, the intangible nature of toxic harms, combined with the scientific uncertainty in establishing causation, raises questions of establishing clear boundaries of eligibility not unlike the difficulties confronted in toxic tort cases.

In fact, this threshold eligibility issue has almost certainly played a major role in undermining the case for no-fault in other principal areas of accidental harm. In product harm cases, for example, how is one to make entitlement determinations for bicycle injuries or falls from ladders without resorting to a fault-based determination of victim responsibility? And in medical event cases, how is one to determine whether post-procedure physical disability is a result of the medical intervention or simply an unavoidable continuing consequence of the claimant's presenting problem? These questions may not be insuperable—New Zealand has for almost forty years addressed accidental harm through a regime of comprehensive no-fault. But there are serious obstacles to broad-based product or medical no-fault legislation, particularly in a political culture predisposed to being highly skeptical about social welfare reform.

A second critical issue is setting the limits on compensation. On this score, the workers' compensation model has been influential along a number of dimensions: (1) in denying open-ended recovery for pain-and-suffering loss; (2) in allowing relatively full recovery for medical loss; and (3) in limiting recovery—either through scheduling or percentage reduction—for wage loss. In a later essay discussing no-fault developments in the years following the eclipse of auto plans, I highlighted the adoption of focused no-fault schemes for vaccine-related injuries, black-lung disease, and birth-related defects. In each of these cases, the workers' compensation model casts a long shadow: Invariably, there has been resort to scheduling of recoverable wage loss and sharp restrictions on non-economic loss recovery.

54. Id. at 964.
57. See Rabin, Accident Law Plans, supra note 33. In that article, I also feature the September 11th Victim Compensation Fund. See id. at 710-13.
Workers’ compensation has been less influential on a third critical issue,决定 whether to retain a tort option—an option universally rejected in state workers’ compensation schemes. To the contrary, virtually every other major no-fault legislation plan has either treated no-fault as a floor with generous resort to tort for more serious injury cases (such as motor vehicle injury plans) or allowed for waiver of no-fault recovery in favor of access to tort (such as the National Vaccine Injury Compensation Program).

Finally, a fourth critical issue is the funding of the plan. Like designating a compensable event, this would be a complicated issue in a toxic harms scheme: Would contributions be required from all chemical manufacturers? From drug manufacturers, as well? There is an obvious interplay here between designating the compensable event and specifying funding sources. The more all-encompassing the concept of “toxic” harms, the wider the network of potentially responsible funding sources. By contrast, where the risks are generated by easily identifiable sources, such as vaccine manufacturers, the financing issue (a per-dose tax, under the Vaccine Act) is more easily resolved.

This four-variable framework seems critical to me in assessing the desirability and potential efficacy of any no-fault scheme. I bring it to bear in a particularly critical light in my essays on the most widely noted no-fault scheme of the present era, the September 11th Victim Compensation Fund (9/11 Fund). This scheme departed dramatically from the traditional no-fault model discussed above:

In sharp contrast to the traditional model, the Fund rejects the tradeoff central to the conception of workers’ compensation: that in return for benefits available without reference to fault, those eligible under the scheme are limited to recovery of economic loss—with the wage loss component of any such recovery further subject to scheduled limitations based on type of harm and ceilings reflecting notions of horizontal equity. [O]ther no-fault compensation schemes enacted since . . . [1970] adopt the workers’ compensation premise—although, in some instances, allowing for relatively modest, fixed-sum pain and suffering. Instead, the Fund was designed to allow recovery of economic loss, defined to include not just medical expenses and loss of present earnings, but loss of business or employment opportunities—presumably future lost income—to the ex-

tent recovery for such loss is allowed under applicable State law. Along with this strikingly open-ended, individualized approach to future economic loss, the Fund provided for non-economic loss recovery, not in the fixed-sum, limited terms found in some no-fault schemes (assuming any non-economic loss is recognized), but with allowance of losses for physical and emotional pain, suffering, inconvenience, physical impairment, mental anguish, disfigurement, loss of enjoyment of life, loss of society and companionship, loss of consortium (other than loss of domestic service), hedonic damages, injury to reputation, and all other nonpecuniary losses of any kind or nature.59

In short, the 9/11 Fund was a tort-centric social welfare scheme (an oxymoron?), which at the same time—in a contrasting gesture to horizontal equity—placed substantial restrictions on traditional tort recognition of collateral source recovery.60

In Victim Compensation Fund, cited above, I offer some speculative thoughts on the singular nature of the milieu in which the 9/11 Fund was enacted as an explanation of this odd conjunction of tort and no-fault precepts: a mix of sentiments expressing concern about protecting the airline industry and recognizing the sacrifice of an especially sympathetic class of innocent victims.61 Whatever the case, my critique was meant to be viewed not simply as an assessment of fairness and efficacy in the treatment of 9/11 survivors, but also as a vehicle for exploring the question of what should be done, from a compensation perspective, in the event of future terrorist incidents.62

In this regard, the focus on victims of terrorism, in itself, raises fundamental fairness issues: Is there a persuasive case for no-fault compensation of such victims, as distinguished from a compensation scheme that would embrace victims of natural and industrial disasters,

59. Rabin, Accident Law Plans, supra note 33, at 710–11 (footnotes omitted) (internal quotation marks omitted).

60. The Fund had a strikingly expansive netting of collateral sources available to the victim, which by contrast appeared to reflect a norm of horizontal equity among claimants. See id. at 711 & n.81. These tort-centric and inconsistent statutory provisions were softened, to some extent, by Special Master Kenneth Feinberg’s implementing regulations. Among other sharp distinctions from traditional no-fault schemes, the 9/11 Fund was financed exclusively through benefits awarded by the Department of the Treasury.

61. See generally Rabin, Victim Compensation Fund, supra note 58.

62. Id. at 770. In her contribution to this Symposium, Myriam Gilles presses beyond the borders of both my articles on 9/11 and my earlier projects assessing the case for governmentally enacted no-fault schemes by focusing on the BP oil spill and the subsequently established Gulf Coast Claims Facility (GCCF)—a privately established compensation fund. See generally Myriam Gilles, Public–Private Approaches to Mass Tort Compensation: Some Thoughts on the Gulf Coast Claims Facility, 61 DePaul L. Rev. 419 (2012). Her article raises intriguing questions about whether the GCCF offers a viable alternative to governmental no-fault as still another alternative to traditional tort in mass-claim scenarios.
as well? And even within the confines of terrorist acts, should victims of a catastrophe like 9/11 receive different treatment from victims of domestic terrorism or, for that matter, more localized terrorist acts by suicide bombers? From a retrospective vantage point, is it possible to identify characteristics of workplace or motor vehicle injuries that establish a satisfying foundation for no-fault compensation carve-out?\textsuperscript{63}

In the end, as other scholars have long noted, the focus on the foundational structure of no-fault—even a comprehensive scheme like New Zealand's—elides the baseline issue of whether accidental death or injury should be afforded welfare protection beyond that available to victims of natural disease and disability.\textsuperscript{64}

IV. DIGGING BENEATH THE SURFACE OF TORT DOCTRINE

Just as compensation schemes can be placed under the microscope for close analysis from dual perspectives of process and policy, so too can the tort system be scrutinized along similar lines. As the branch of the common law most closely associated with addressing the issues of incentives to safety and compensation for injuries from accidental harm, the tort system has inevitably been thrust into the dual role of social barometer, responding to claims for redress from injury, and social engineer, reflecting and shaping norms of safe conduct. Initially, I will offer a critique from a process perspective and then turn to policy themes underlying the surface of tort doctrine.

A. Process Perspective

In the early 1990s, following a period of expansive growth in the area of products liability, there remained one corner of the field where forty years of litigation had yielded not a single successful effort: tobacco tort litigation. In a spirit of inquiry, I engaged in research that offered a broader commentary on the consequences for liability when the adversary process radically departs from its assumptions of a level playing field.\textsuperscript{65} In fact, virtually none of the tobacco tort cases in the first forty years of litigation ever found their way into the courthouse. A no-holds-barred defense strategy by the tobacco industry, employing leading corporate law firms without constraints


\textsuperscript{64} See, e.g., Peter Cane, Atiyah's Accidents, Compensation and the Law 15–16 (7th ed. 2006). For a proposal embracing and articulating this broad-based social welfare perspective, see Stephen D. Sugarman, Doing Away with Personal Injury Law (1989).

on litigation resources, simply overwhelmed the resource-strapped plaintiffs' attorneys contesting the cases.

Indeed, even in the limited number of cases that reached the courthouse, success was never forthcoming. Still another salient feature of the tort process—the prominent role played by the jury—worked to the disadvantage of the plaintiffs. Relying on assumption of risk and freedom of choice, tobacco attorneys were successful in staging the litigation before juries as a morality play in which plaintiffs came off as undeserving of redress. On this score, it was not until the mid-1990s, with the release of internal documents severely damaging the reputation of the industry, that plaintiffs were able to achieve a measure of success before juries: The industry at that point, in some jury venues, had been turned into the party wearing the black hat.66

Increasingly, tort litigation in recent years has taken on a more impersonal, managerial character—particularly in the case of mass torts.67 But there is no doubt that in a wide array of cases, from slip-and-fall to professional malpractice, issues of adequate resources to stay the course and the critical influence of juries—so prominent in the tobacco litigation—continue to be mainstays of the tort system in action. And indeed, tort litigation remains a high-risk venture for tobacco plaintiffs to this very day.68

But to view the dynamics of tort exclusively through the trial-level litigation process is to overlook the proverbial forest for excessive attention to the trees. This is not the hazard posed by traditional tort scholarship, which is devoted to parsing and explaining common law appellate court doctrine, from the landmark opinions of Judge Benjamin Cardozo to the most recent decisions marking new pathways in the common law of tort.69 What remains largely hidden beneath the surface in this scholarship are the dynamics of the appellate decision-making process, particularly in effectuating seismic change in the landscape of tort law.

68. For the limitations of tort litigation as compared to regulatory strategies for reducing tobacco use, see Robert L. Rabin, Tobacco Control Strategies: Past Efficacy and Future Promise, 41 Loy. L.A. L. REV. 1721 (2008). As I spell out in that article, I view three sets of regulatory initiatives—informational strategies, workplace and public-place restrictions, and taxation—as playing a far more important role than tobacco litigation in reducing tobacco use in recent decades.
In *Torts Stories*, my co-editor Stephen Sugarman and I edited a collection of essays devoted to explicating the context in which ten landmark tort cases emerged.\(^{70}\) My contribution, an essay on *Rowland v. Christian*, examined a keystone of the much-noted heyday of California Supreme Court activism in the latter part of the twentieth century.\(^{71}\) My research indicated that the court, in abolishing the long-preexisting categorical limitations on land-occupier liability for accidental harm, pursued its own agenda of systematically recharacterizing tort duties from rules to standards, with total indifference to the legal arguments both parties to the litigation had relied on in their briefs and before the lower courts—essentially, conflicting views of the correct interpretation of the preexisting land-occupier categories.

It is, of course, a fundamental jurisprudential precept of the common law tradition that doctrinal change is grounded in adversarial presentation of the facts and applicability of existing legal principles. While *Rowland* and other case studies revealing a disjuncture between the litigation process and the aspirations of the court are not meant to suggest wholesale indifference to this commitment, they offer another take on the adversary process in action, discussed above in the context of tobacco tort claims—an updated version, perhaps, of the Legal Realist perspective of an earlier era.\(^{72}\)

### B. A Policy Perspective

It should go without saying that a sharp divide between process and policy is misguided. *Rowland* can stand as an illustration of the point. My examination of the case file—including the lower court arguments and opinions, and briefing before the California Supreme Court—left no question but that the abolition of the categories of trespasser, licensee, and invitee in favor of a general standard of due care owed to all entrants by land occupiers emerged in the first instance, freshly-minted, in the Supreme Court's landmark opinion.\(^{73}\) Process is melded with policy by shifting the focal point to attempting an explanation for why the court made this move.

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\(^{70}\) See *Torts Stories*, supra note 17.


\(^{72}\) For a particularly striking illustration of this disjuncture, see James A. Henderson, Jr., *MacPherson v. Buick Motor Company: Simplifying the Facts While Reshaping the Law*, in *Torts Stories*, supra note 17, at 41.

As I have suggested above, during the rough span of two decades, between 1960 and 1980, the California Supreme Court was powerfully influenced by the enterprise liability rationale articulated a generation earlier by Justice Roger Traynor in his famous concurring opinion in *Escola v. Coca Cola Bottling Co. of Fresno*: The twin notions of relying on tort law as an agency for creating incentives to greater safety and for widely distributing the costs of injuries.74 This rationale flowed beyond the bounds of strict liability for product injuries (where it had its home) to a broad recasting of the scope of duty in negligence cases, embracing a conception of due care unbounded by rule-based limitations like the categories in land-occupier cases.75 As Justice Peters put it in *Rowland*, "A man's life or limb does not become less worthy of protection by the law nor a loss less worthy of compensation under the law because he has come upon the land of another without permission or with permission but without a business purpose."76

Viewed from a slightly different angle, *Rowland* is, in fact, a nice illustration of yet another prominent theme in tort law, the tension between rules and standards—a theme crystallizing the issue of how much weight to attach, policy-wise, to the quest for predictability in accident law.77 I pursued this theme more broadly in an essay devoted to identifying its many strands in the weave of liability for negligent conduct, ranging from recreational-activity injuries to claims for stand-alone economic loss.78 In this regard, should ski resorts be allowed to impose "hold-harmless," no-duty limitations on injured skiers claiming lack of due care (a no-duty rule), or should such efforts to contract out of tort liability be overridden by a general obligation of "reasonable" conduct (a standard of conduct)? Should claims for negligently caused stand-alone economic loss be governed by the economic loss rule precluding tort liability, or should these claims be limited only by a foreseeableability-based standard?79

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75. See Schwartz, *supra* note 71, at 651–52. For a highly critical contemporary view of these developments, see James A. Henderson, Jr., *Expanding the Negligence Concept: Retreat from the Rule of Law*, 51 IND. L.J. 467 (1976).
77. The classic cases posing this issue are *Baltimore & Ohio Railroad v. Goodman*, 275 U.S. 66 (1927), and *Pokora v. Wabash Railway*, 292 U.S. 98 (1934).
79. In Anthony Sebok's contribution to this Symposium, see Anthony G. Sebok, *The Failed Promise of a General Theory of Pure Economic Loss: An Accident of History?*, 61 DePAUL L.
Notably, one finds a counterpart policy concern about promoting predictability at the core of the tension in the measurement of damages between a make-whole and a scheduling approach. Pain and suffering is a highly subjective concept; administering it case by case is an open invitation to sacrifice a considerable degree of predictability for attentiveness to the individual victim's plight. To the contrary, scheduling of damages takes on the actuarial perspective of an insurance-based approach.

These tensions in the law of tort resonate with present-day concerns. Advocates of limitations on recovery for non-economic loss, punitive damages, and joint and several liability—"tort reform," in its modern guise—hoist the banner of greater predictability; opponents raise fairness objections to slighting individual recovery. On a longer view, ever since Oliver Wendell Holmes offered an intellectual framework for the law of tort in The Common Law, predictability has served as a foundational norm, both for its adherents and its detractors.

REV. 615 (2012), he focuses on my two articles on economic loss in tort, written twenty years apart: Robert L. Rabin, Tort Recovery for Negligently Inflicted Economic Loss: A Reassessment, 37 STAN. L. REV. 1513 (1985), and Robert L. Rabin, Respecting Boundaries and the Economic Loss Rule in Tort, 48 ARIZ. L. REV. 857 (2006). Professor Sebok skillfully focuses on J'Aire Corp. v. Gregory, 598 P.2d 60 (Cal. 1979), to demonstrate how my views have evolved over that period. In J'Aire, a building contractor who failed to meet his promised date for completing repairs to a restaurant was sued for economic loss by the lessor of the premises, not the owner with whom the defendant had contracted. J'Aire Corp., 598 P.2d at 61. The California Supreme Court recognized a tort duty running to the lessor plaintiff in a holding that I now believe would best be regarded as falling within the no-duty scenario that I refer to as an invocation of tort as an alternative remedy in the context of disappointed contractual expectations. Id. at 63. The other two scenarios that I identify in the later article are (1) when a defendant creates a dangerous condition or causes physical harm with resultant economic loss to an unrelated third party and (2) when a negligent misrepresentation or performance of an obligation results in third-party economic loss. In the 1985 article, I viewed the J'Aire decision in a more favorable light in view of its third-party beneficiary configuration and the lack of any discernible impact on the ripple-effect and widespread-loss concerns that frequently animate no-duty categorizations in this stand-alone economic loss area.

80. See Rabin, The Pervasive Role of Uncertainty, supra note 78, at 443–49.


83. Interestingly, Holmes seems to have regarded a foreseeability-based negligence principle as the undergirding for achieving predictability for the consequences of risk-related conduct. See generally Oliver Wendell Holmes, Jr., The Common Law 77–129 (1881). It seems far from clear that a foreseeability-based negligence approach can be reconciled with his predilection for rules over standards. Rather, it may reflect his overriding concern for respecting individual autonomy to the maximum extent feasible.
Closely akin to policy concerns about the predictability of tort liability, expressed in the rules–standards dialectic, are the constraints articulated as “floodgates” and “crushing loss.” The classic instance of the latter is the well-known case of Strauss v. Belle Realty Co., arising out of the electric power blackout of New York City in 1977, in which the court imposed a privity limitation on tort claims out of concern about the financial implications of this catastrophic event. By contrast, the floodgates concern focuses not on the crushing losses associated with a single concededly negligent event, but the administrative feasibility of establishing a limiting principle on repetitive claims of a similar nature.

Not all of these constraints are economic in character. Liberal thought in the nineteenth century reflected two converging precepts: promoting economic growth and limiting governmental restraints on individual action. The latter precept was reflected in still another leitmotif in the emerging law of tort: a distinction between misfeasance and nonfeasance, reflecting a dominant social norm distinguishing between governmental restraint on active misconduct and governmental compulsion to engage in welfare-enhancing conduct. This commitment to respecting individual autonomy serves as a continuing constraint in tort law on a duty of affirmative action—albeit with somewhat diminished vitality—captured in the old adage that one should not be required to be his brother’s keeper.

For related reasons, the courts have only cautiously subscribed to the notion that there should be responsibility for what I have labeled “enabling torts”—third-party acts of endangerment that set the stage for harm-

84. See Strauss v. Belle Realty Co., 482 N.E.2d 34, 36–37 (N.Y. 1985). The classic instance of the crushing-loss concern in tort is the water company cases, which include a landmark opinion of Judge Cardozo denying recovery to a property owner for a claim of negligent failure to supply adequate water for fire-fighting purposes. H.R. Moch Co. v. Rensselaer Water Co., 159 N.E. 896, 897–98 (N.Y. 1928) (“An intention to assume an obligation of indefinite extension to every member of the public is seen to be the more improbable when we recall the crushing burden that the obligation would impose.”).


86. In H.R. Moch Co. v. Rensselaer Water Co., Judge Cardozo made a weak effort to buttress his articulation of a no-duty rule for water companies by resort to the “time-honored formula” distinguishing between misfeasance and nonfeasance. 159 N.E. at 898.

ful conduct by others directed at an innocent victim with whom the
defendant has had no direct contact.88

What these no-duty and limited-duty rules illustrate is the complex
interplay between bedrock social norms about responsibility for harm-
ing others and aspirations to promote productive commerce in goods
and services that undergird the tort system. Without question, liability
for negligent conduct serves as a robust default principle in modern-
day tort law.89 But competing economic, sociopolitical, and ethical
norms qualify its reach.90 It comes as no surprise, then, that just as
digging beneath the surface of tort law reveals some semblance of a
patchwork effort by the courts to reconcile competing policy consider-
ations with a strong desire to generate a coherent system of doctrinal
principles, tort scholars continue to engage in animated debate over
the intellectual foundations of tort law.91

V. CONCLUDING THOUGHTS

As a point of departure, let me state a commonplace: A stream is
fed by many sources. That is the best metaphor I can offer to explain
the course that my scholarly career has taken. Some of my work—
perticularly the historical perspectives—has its origins in pedagogy;
that is, attempting to document a sound analysis of the roots of evolv-


89. Two especially interesting articles in this Symposium explore fundamental aspects of the robust character of negligence as the default principle in accidental harm cases. Kenneth Abraham’s contribution to this Symposium identifies themes of strict liability that have been incorporated into negligence doctrine, contributing to its continued vitality as the dominant default principle in accidental harm cases. See Kenneth S. Abraham, Strict Liability in Negligence, 61 DePaul L. Rev. 271 (2012). Mark Geistfeld’s article, The Coherence of Compensation-Deterrence Theory in Tort Law, 61 DePaul L. Rev. 383 (2012), reconciles the twin pillars of compensation and deterrence, which have been subjected to criticism as providing an incoherent theoretical foundation for a negligence-based law of accidents. For the critical view, see John C.P. Goldberg, Twentieth-Century Tort Theory, 91 Geo. L.J. 513 (2003). Geistfeld argues that a compensation-based system of negligence liability manifests a proper regard for the competing priorities of protecting individual interests in security and liberty, which are the core aspirations of accident law.

90. For an ambitious effort to identify categorical justifications for no-duty rules, spelling out six such categories, see Stephen D. Sugarman, Why No Duty?, 61 DePaul L. Rev. 669 (2012).

91. For interesting efforts to systematically characterize the competing scholarly camps, see Goldberg, supra note 89; John Fabian Witt, Contingency, Immanence, and Inevitability in the Law of Accidents, 1 J. Tort L. 1 (2007).
ing doctrinal and regulatory patterns initially explored in the classroom.

Other work has its origins in academic symposia and workshops in which I have been asked to address a particular topic. Many of the essays identified as digging beneath the surface of tort doctrine fall into that category.

And then, as might be expected, I would trace much of my work to the enterprise—so highly valued by academics—of pure intellectual engagement animated by especially provocative policy developments, such as the enactment of the 9/11 Fund, the rising prominence of tort preemption, or the public health concerns associated with tobacco use.

There is, of course, a considerable degree of interplay among these sources of inspiration. When I initially considered the provisions of the 9/11 Fund against the backdrop of my long-standing interest in no-fault compensation schemes, I was certain that it would generate a scholarly response on my part. This could fly under the banner of pure intellectual engagement. But it also reflected a pedagogical impulse to broaden my classroom discussion of alternative remedies to tort. And the series of essays that I wrote on different aspects of the scheme were a product of distinct invitations to present in a range of workshop and conference settings. A similar interplay of triggering influences could be traced to much of my other work as well.

As I remarked at the outset of this essay, it has been foreign to my nature to view tort and the administrative state through the prism of an overarching framework of philosophical, economic, or sociopolitical precepts. Instead, I have indulged the academic license to take my scholarship wherever my intellectual curiosity pointed at any given time. Without meaning to disparage tort and the administrative state in the slightest, I commonly make reference to a patchwork design. The same can be said for the pattern traced by my own work, once removed, in attempting to better understand the contours of the system.
APPENDIX

PUBLICATIONS OF ROBERT L. RABIN

A. Books


B. Articles, Book Chapters, and Review Essays


