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TORT LAW AT THE FOUNDING

John C.P. Goldberg
INTRODUCTION

In his influential *History of American Law*, Lawrence Friedman suggests that tort first emerged as an important body of law in the late Nineteenth Century. Before then, Friedman tells us, tort law was “totally insignificant.” Implicit in his assessment is a judgment that a body of law is significant only insofar as it addresses a large-scale social problem as such. Thus for Friedman tort became significant when it was first called on to function as a compensation system; that is, as a governmental response (enfeebled by then-predominant commitments to laissez-faire individualism) to the “epidemic” of accidents brought on by the industrial revolution.

Friedman’s criterion for significance stacks the deck against tort law, which is neither public health law nor accident law. Of course accidents give rise to tort claims. And accidents can be fruitfully approached as a public health problem for which a compensation system might provide an adequate solution. However neither of these observations tells us what a tort is or what tort law does. A tort is a wrong, and tort law is a law of civil recourse. Or so Professor Zipursky and I maintain. Once one gains a better grasp of what a tort is and what tort law does, one will discover that tort is much more deeply woven into the fabric of our legal system than histories such as Friedman’s suggest.

This Article piggybacks on recent historical scholarship to help recover the extent to which tort—understood as a law of civil re-

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* Professor, Harvard Law School. Thanks to Dick Fallon, Noah Feldman, Jack Goldsmith, Don Herzog, David Konig, Tom Lee, Bruce Mann, Eric Nelson, James Pfander, John Witt, Adrian Vermeule, and Ben Zipursky, as well as the participants at the Florida State University College of Law Symposium on Civil Recourse Theory, for many helpful comments and suggestions. Remaining errors are mine.

1. Lawrence M. Friedman, *A History of American Law* 467 (2d ed. 1985) (dating the emergence of torts as a significant branch of law to the second half of the nineteenth century).
2. *Id.* at 467.
3. *Id.* at 468 (treating modern tort law as synonymous with accident law).
4. See generally John C.P. Goldberg & Benjamin C. Zipursky, *Torts as Wrongs*, 88 Tex. L. Rev. 917 (2010) (arguing that tort law is more satisfactorily understood as a law of wrongs and recourse than as accident law). As perhaps should go without saying in this context, civil recourse theory is a theory that Professor Zipursky and I have developed in numerous coauthored and sole-authored writings.
course—was an integral part of American legal practice and legal thought long before the industrial revolution. It will focus on three examples: the Declaration of Independence, the alien tort provisions of the Judiciary Act of 1789, and early federal legislation indemnifying officials who committed torts while discharging their official duties. Attending to these examples will further demonstrate that tort law has carried enormous political and legal significance for us from the very beginning.

I. TORT AND CIVIL RECOURSE

The civil recourse theory of tort is offered as a better interpretation of Anglo-American tort law than the utilitarian, efficient deterrence, and corrective justice theories that have tended to dominate modern torts scholarship. Central to tort law, on this interpretation, are three interlocking notions of responsibility. First, tort law identifies duties that individuals owe to others. These duties are of a distinctive kind. They are relational duties of noninjury: that is, duties to conduct oneself in certain ways toward certain persons so as to avoid injuring them (or, in some instances, so as to benefit them). For example, negligence law identifies a duty each person owes to others who foreseeably might be physically harmed by that person’s conduct. Roughly speaking, the duty is to avoid harming them by failing to take care against harming them. In placing relational duties of noninjury at the core of tort law, civil recourse theory stands apart most obviously from liability-rule conceptions of tort, but also from utilitarian and deontological theories that treat tort duties as universal in the sense of being owed to society at large, or to humanity. Torts, on this view, are failures to live up to responsibilities to act in certain ways toward others so as to avoid injuring them.

Second, civil recourse theory offers a particular understanding of liability as a form of responsibility. In keeping with its articulation of relational duties of noninjury owed by an actor to a potential victim, tort law treats the breach of this special kind of duty as an occasion for a response by the victim. One who breaches a relational duty of noninjury is (prima facie) subject to liability. Being subject to liability, in this context, means being vulnerable to a claim that is initiat-

5. 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, 559-68 (2005) (tracing the influence of Coke-Locke-Blackstone conceptions of tort in early U.S. legal history). I should state forthrightly that the attempt to extrapolate a moral from other scholars’ historical investigations is my project and not something for which they can be held responsible.


7. Id. at 260-63.

8. Id. at 265-66.
ed by the victim and backed by the power of the state. If the claim is successful, the victim can enlist the state’s aid in her effort to enjoin ongoing wrongful conduct or to demand something tangible from the wrongdoer in recognition of the wrong done to her. Because the wrongs recognized by tort law are all mistreatments of another, they are wrongs that generate a power in the victim to respond to the mistreatment. Torts are response-able wrongs.

Third, civil recourse theory emphasizes the degree to which tort law is a matter of political responsibility. Tort law is positive law: it is the product of judicial decisions and legislative acts. And yet it is not provided entirely at the whim of lawmakers. The provision of tort law is itself a responsibility, one that the state owes its citizens, rather than one that is owed between or among private citizens.9

Following Locke and others, we have suggested that this responsibility is rooted in the natural privilege of individuals to respond to wrongdoing. In a “state of nature,” individuals would enjoy privileges to engage in certain forms of self-help. These include the privilege to engage in self-defense to prevent imminent physical harm to oneself and also the privilege enjoyed by the victim of a wrong to assert himself against the wrongdoer in response to the wrong. Insofar as individuals delegate their natural privileges to governments, and insofar as governments justifiably deny individuals the privileges of self-help and self-assertion in the name of civil peace and justice, it becomes government’s responsibility to provide alternatives. Tort law is a fulfillment of this responsibility.

The three notions of responsibility I have just outlined are at work even in the simplest “A hits B” case. In defining the tort of battery, for example, the law identifies a duty of noninjury owed by one to others (viz., a duty to refrain from intentionally touching another in a harmful or offensive manner), it empowers a response by a person who is the victim of a breach of that duty, and it thereby fulfills the state’s responsibility to provide an avenue of recourse to the victim against the wrongdoer. However, the three senses of responsibility come together in a particularly vivid manner when the alleged tortfeasor is a government official—as, for example, in the domain of “constitutional torts.” When a person claims to have been unjustifiably beaten or confined by a police officer, the gist of her claim is that the officer violated a legally recognized duty of noninjury owed to her, such that she is now entitled to act against the officer and/or the relevant governmental unit by bringing a claim for damages or injunctive relief. Implicit is the further claim that government is responsible to provide a legal avenue of recourse to victims of wrongs even when the wrongdoer is one of its own—a public official acting under a

9. Id. at 268-69.
claim of authority. In other words, according to civil recourse theory, a government’s responsibility to enact a law of civil recourse is a responsibility to apply that law not only to private citizens, but also to its officials.10

Terms like “redress,” “natural privilege,” and “state of nature” are part of the abstract discourse of legal and political theory. And the idea of a government being responsible to provide a law of wrongs—including law under which its own officials can be held responsible—may seem not merely abstract but unrealistic. Who is to see to it that this responsibility is heeded? Yet all are longstanding features of English legal discourse and practice, at least as it has been interpreted by prominent lawyers and legal commentators since the time of Coke and Hale. Their ideas, as well as Locke’s, in turn informed the systematic and highly influential reconstruction of English law offered by Blackstone in his Commentaries, and by that route their ideas were received into American law.11

II. OUR FOUNDING LAWSUIT

David Armitage has helpfully observed that the Declaration of Independence can be divided into five parts.12 First, it identifies the occasion for its issuance.13 A “People” who have heretofore been political subjects but who now claim the “separate and equal station to which the Laws of Nature and of Nature’s God entitle them” must, out of “a decent respect to the opinions of mankind,” make a case for that claim.14 Second, the Declaration identifies the premises from which this effort at justification would proceed.15 Government is instituted by the consent of the governed to secure certain rights. When a government demonstrates by a “long train of abuses and usurpations” a design to destroy these rights, a people are entitled, and indeed obligated, to institute a new government that promises to better secure those rights.16 Third, the Declaration details the “repeated injuries and usurpations” that establish King George’s tyrannical designs and therefore justify the formation of a new polity.17 Fourth, it explains that the colonists—having repeatedly “Petitioned for Redress” to the crown only to be met with “repeated injury”—have ex-

10. To say that a government bears this responsibility is not to say that it must treat public officials and private citizens on identical terms. There might be reasons uniquely applicable to public officials that warrant defining the duties of noninjury under which they act differently from the duties of noninjury under which private citizens act.
11. See Goldberg, supra note 5, at 531-39.
13. The Declaration of Independence para. 1 (U.S. 1776) [hereinafter The Declaration].
14. Id.
15. Id. at para. 2.
16. Id.
17. Id.
hausted other avenues of recourse. Finally, the Declaration concludes with an act of self-assertion and a plea. It announces the dissolution of the colonies’ connections to the British crown and asserts their new standing as a free, independent union with all the attributes of nationhood. At the same time, by insisting that the colonies “of Right ought to be” free and independent, the Declaration invites validation of its assertions.

Armitage describes the Declaration as “an announcement in the form of an argument, possibly patterned according to rules of logic that Thomas Jefferson . . . had learned during his student days.” Still more to the point is Garry Wills’s suggestion that the Declaration was conceived by Jefferson as a legal document patterned according to those that Jefferson read, copied and annotated under the tutelage of George Wythe and in Jefferson’s eight years of law practice. As explained recently by David Konig, Jefferson’s legal studies and practice included the preparation of detailed reports of cases from the English courts, as well as the study of Coke and Blackstone. Although Jefferson would later come to disdain ordinary law practice and to reject Blackstone’s constitutional thought as incompatible with republican principles, Jefferson at the time of the Declaration was not a law skeptic or court skeptic in the mold of Bentham. Rather, he embraced a “Whig” conception of the common law, including England’s unwritten constitution, as the protector of English liberties against governmental predations. In keeping with this outlook, he was drawn to the idea that ordinary civil litigation—for example, an action for trespass brought against occupying British troops—could be used to hold English officials accountable for violations of their legal obligations.

18. Id. at para. 4.
19. Id. at para. 6.
20. Id.
Konig tells us that Jefferson was particularly impressed by John Holt, Chief Justice of the King’s Bench, for a set of opinions in which Holt articulated the notion that government officials must be legally answerable to victims of their wrongs.27 One Holt dissent appears to have struck a particular chord with Jefferson.28 The underlying suit was a “simple action on the case” brought against two English postmasters alleging that a postal employee’s mishandling of plaintiff’s letter had caused the plaintiff economic loss.29 Whereas his colleagues declined to impose liability, Holt argued that the officials ought to be held liable under ordinary principles of negligence.30 According to Konig, Jefferson took from this opinion and others the notion that English common law, rightly understood, would hold liable an official who commits an injurious wrong in the course of his official duties on about the same terms as a private citizen.31 In the language of Jefferson’s case notes, “‘for misfeasance of a deputy an action will lie against him, not qua officer, but qua tort-feasor.’”32

If one keeps in mind that Jefferson quite obviously understood what it meant for someone to be a “tort-feasor,” the legalistic aspects of the Declaration fall into sharper relief. The document reads as a tort complaint. It alleges grave and repeated “injuries.”33 In this context, the term “injuries” carried a particular meaning, referring not merely to harms or depredations, but to wrongfully caused harms—i.e., breaches of duties of noninjury.34 The familiar legal phrase *damnum absque injuria* helps capture the idea. It was used by lawyers to describe an instance in which one person harmed another (*damnum*) but did not wrong them (*absque injuria*).35 To say there was no “injury” was just to say that there had been no breach of a duty of noninjury. Conversely, a claim of “injury” was a claim to have suffered harm as the result of conduct recognized by the law as wrongful—that is, a tort.

In the manner of a legal complaint, the Declaration also asserts that the colonists, by virtue of having been legally wronged, were now authorized by law to respond through the pursuit of particular
remedies.\textsuperscript{36} In the first instance, they were entitled to petition the crown for relief.\textsuperscript{37} Petitions having proved inadequate, however, the people were further empowered to withdraw their allegiance, to constitute for themselves a new government, and to seek a judgment as to the validity of their assertion of independence.\textsuperscript{38} Independence is cast and justified as the securing of a remedy for a wrong done. And the remedy is claimed to be one to which the colonists are entitled as a matter of legal right.\textsuperscript{39}

Of course there are some obvious disanalogies between the Declaration and an ordinary tort complaint. The Declaration is not a conventional pleading document. It is not a lawsuit filed by one individual against another in an ordinary law court. It does not allege the commission of a garden-variety tort. And it does not seek the standard tort remedy of money damages. Beyond all this, there is a sense in which the Declaration attests to the failure of ordinary law. After all, English law authorized the colonists to invoke the mechanism of petitioning to secure their rights, and that mechanism had failed them.

These observations notwithstanding, it is still cogent to characterize the Declaration as a tort complaint. On behalf of a class of persons it asserts the commission of the same injurious legal wrong against each of them and seeks a remedy, authorized by law, on behalf of the each of them as against the wrongdoer. The relevant law, however, is not ordinary common law, but constitutional and international law.

Jefferson’s assertion that the colonists’ claims were authorized by the English Constitution marked a fundamental break from Blackstone. Blackstone was prepared to acknowledge that the English people, as a last resort, were entitled to withdraw support for a government that had violated the terms of the unwritten English constitution.\textsuperscript{40} But he insisted that this entitlement could not properly be described as a right under law. A legal right presupposes law, and law (according to Blackstone, following Hobbes) presupposes a sovereign.\textsuperscript{41} The act of dissolving the sovereign could not be an act authorized by law because such an act is a destruction of the very source of law. By contrast, Jefferson believed that the colonists’ renunciation of English sovereignty could be defended not merely as a justified act, but as the assertion of legal rights and the exercise of legal powers.\textsuperscript{42}

\textsuperscript{36} The Declaration, supra note 13, at para. 2.
\textsuperscript{37} See id. at para. 4.
\textsuperscript{38} See id.
\textsuperscript{39} Id. at para. 1.
\textsuperscript{40} See 1 William Blackstone, Commentaries *238. This paragraph draws on the discussion of Blackstone in Goldberg, supra note 5, at 555-58.
\textsuperscript{41} See 1 Blackstone, supra note 40, at *46.
\textsuperscript{42} John Phillip Reid, Constitutional History of the American Revolution: The Authority of Rights 236-37 (1986).
To be sure, “tyranny” was no ordinary tort: it would not be found alongside “trespass” in eighteenth century law digests. It was nonetheless a violation of the law governing the relation of the sovereign to each of his subjects. The colonists claimed for themselves the rights to liberty and security afforded by the unwritten English constitution. These rights in turn tracked those guaranteed by the “Laws of Nature” invoked in the Declaration’s opening paragraph. Today there is greater skepticism about unwritten constitutional law and natural law. (This may be in part because some of what used to fall under these headings is now described in the more sociological idiom of “customary international law.”) But it would have been perfectly cogent for Jefferson to maintain that sovereigns are subject to authoritative norms—including norms forbidding tyrannical acts against subjects—that are authoritative by virtue of deriving from custom that is consonant with first principles or basic assumptions about human nature. He could thus assert with a straight face that tyranny, qua authoritative norm violation, really was of the same genus as more prosaic torts, even if a distinct species.

In addition to claiming that the colonists were the victims of a legal wrong, the Declaration further maintains that their manner of responding, including the issuance of the Declaration itself, was authorized by and in keeping with legal requirements. As previously noted, the Declaration acknowledges that the declarants bore the burden of making a certain showing. As they were the ones suing for independence, they were required to prove their cause of action and demonstrate their entitlement to relief. The claimed entitlement to the extraordinary remedy of independence further required the demonstration of the inadequacy of ordinary forms of relief. Hence the Declaration’s emphasis on the crown’s repeated denials of requests for relief made through petitions for redress.

43. Id. at 5.
44. THE DECLARATION, supra note 13, at para. 1. John Reid has argued that natural law was “irrelevant” to the Declaration’s identification of the rights enjoyed by the colonists. See Reid, supra note 42, at 88-92. This is overstated, if only because English jurists tended to understand the English Constitution as consonant with, and indeed the best instantiation of, natural law principles. See Goldberg, supra note 5, at 532-33.
45. See Armitage, supra note 22, at 42 (arguing that the Declaration must be understood as responsive to then-contemporary understandings of international law as a body of norms applicable to states); id. at 61-62 (discussing ways in which the Declaration straddled natural-law and positivist conceptions of international law); see also Reid, supra note 42, at 236-37 (emphasizing the Declaration’s underpinnings in pre-positivist Whig constitutionalism); Edward Dumbauld, Independence Under International Law, 70 Am. J. INT’L L. 425, 426-27 (1976) (describing Jefferson’s adherence to principles of international law when serving as Secretary of State).
46. WILLS, supra note 22, at 57-64 (describing ways in which the Declaration built on the established practice of petitioning for the redress of constitutional violations).
As Armitage emphasizes, the Declaration is addressed to a particular audience: the established nations of the world. In this respect, too, it differs from an ordinary legal complaint that requests of a court the issuance of a judgment. Again, these differences only highlight the ways in which the Declaration aimed to adapt the framework of tort law for a special kind of claim. Here one must appreciate the manner in which other nations were being addressed. To use Jefferson’s own later description—one highlighted by Wills—the Declaration was “‘an appeal to the tribunal of the world.’” The juxtaposition of the terms “appeal” and “tribunal” indicate that the term “appeal” is not only being used in its colloquial sense to refer to a plea for understanding and support, but also in a legal sense. As Wills notes, it was common practice at this time for a complainant in an ordinary lawsuit to supplement a bare-bones pleading with a “declaration” articulating the grounds of the complaint and the relief sought. The Declaration is just that sort of document. It articulates a cause of action and seeks an adjudication by other nations in their capacity as a tribunal.

Nor was the idea of nations operating as a tribunal merely rhetorical. The colonists could claim that their assertion of independence constituted a legitimate exercise in lawful self-help. But it was left to the nations of the world—particularly the European powers—to adjudicate this claim. Not unlike a domestic court adjudicating an individual’s claim to be entitled to possess property that he had already seized from another under a claim of right, these nations would decide whether to recognize the justness of the colonists’ complaints and, hence, the right of the colonists to have established the United States of America. The Declaration was declaratory in the sense of an assertion. At the same time, it sought declaratory relief in the form of a pronouncement from other nations on the validity of its assertion.

The colonists’ pursuit of this form of relief was of course pragmatically motivated. Their immediate goal was to clear the way for support from France, as well as Spain and Holland. To do so, however, they had to establish themselves as something other than rebellious

47. Armitage, supra note 12, at 31.
48. Wills, supra note 22, at 335 (emphasis added) (quoting Jefferson’s papers).
49. The term “appeal” was once used to describe a certain kind of first-level legal proceeding, as well as a request for higher court review of a lower court decision. An “appeal of felony,” for example, was a suit brought by the victim of a serious crime requesting that the state impose punishment on the alleged felon at the behest of the victim. David J. Seipp, The Distinction Between Crime and Tort in the Early Common Law, 76 B.U. L. Rev. 59, 61-62 (1996). The Declaration was perhaps an “appeal” in both senses. It initiates a proceeding, but it is also an appeal from the King’s prior refusal to grant relief pursuant to the colonists’ petitions for redress.
50. See Wills, supra note 22, at 335.
52. Wills, supra note 22, at 325-30.
British subjects. If they could not, other nations who supported their cause would be deemed under international law to have declared war against Britain by intervening in its domestic affairs. The colonists’ declaring themselves to be independent was a necessary step toward earning recognition as a free-standing confederation with the powers and responsibilities conferred on nations by international law. However, it was not sufficient. Also required was a judgment of the major European powers that their assertion was justified. The central ambition of the Declaration was to demonstrate the colonists’ entitlement to this judgment. Indeed, the document’s most fundamental and radical claim is that the colonists’ status as victims of oppression at the hands of their sovereign, the unavailability to them of ordinary forms of relief, and their successfully having united as a “People” capable of self-governance entitled the federated states to recognition as an independent political entity. In this respect, the Declaration really was a pleading, one that sought a declaratory judgment as to the independent status of the United States under international law, with independence constituting a remedy as against royal predations. In turn, the question of whether to grant to the United States the legal rights and privileges of statehood was to be determined by the European powers, applying then-prevalent standards of international law. Initially, none of them ruled favorably. In two years’ time, however, France reversed course, as did Holland after another four years. Soon thereafter, the colonists prevailed when Britain formally recognized U.S. independence.

The Declaration is the work of a logician and a rhetorician. But it is first and foremost the work of a lawyer. It connects rights and responsibilities on the same terms as does tort law, understood as a law of civil recourse. Jefferson’s document invokes the idea of a primary duty of noninjury. In this case, it is the duty of a government not to deprive its subjects of their civil and political rights. It offers allegations that this duty has been breached. It asserts that the breach

53. Id. at 325-26.
54. Mikulas Fabry, Recognizing States: International Society and the Establishment of New States Since 1776, at 7 (2010) (noting adverse consequences associated with the failure of a putative state to obtain recognition by established states); see also Dumbauld, supra note 45, at 425-26 (observing that, in declaring independence, the Founders acknowledged that the United States was subject to the rules of international law).
55. Fabry, supra note 54, at 27.
56. Id. at 25 (noting that the colonists asserted their independence on “novel” terms that emphasized their right to recognition as a self-determining people who had demonstrated their ability to self-govern).
57. Id. at 30 (discussing the efforts of the French government to justify to the British government, under international law principles, its decision to recognize the United States as independent).
58. Id. at 27.
59. Id. at 29, 33.
60. The Declaration, supra note 13, at para. 3.
entitles the victims to redress through ordinary channels (petition).\textsuperscript{61} And, it adds that, because this relief has proved unavailable, resort is authorized to political self-help.\textsuperscript{62} Even this asserted privilege is granted by law (namely, the English Constitution as an expression of natural law) and exercised under law. Hence it is subject to a determination by a tribunal—the tribunal of nations—as to the validity of the claims of wrongdoing and the assertion of an entitlement to independence as recourse against tyranny.

Though extraordinary in application, this is the language of tort law. Far from being a chapter in our later history, tort law is in our political DNA. The concept of a tort figured centrally in setting the terms on which our nation was founded. Tort law—understood as law defining relational, injurious legal wrongs that generate in victims a legal right of recourse and a corresponding legal liability in the wrongdoer—supplied the framework through which Jefferson asserted the colonists’ entitlement to independence. The Declaration of Independence is our founding lawsuit.

III. EMPOWERING ALIENS TO SUIT FOR TORTS

The Judiciary Act of 1789 was among the First Congress’s most important enactments, establishing as it did the structure of the federal courts. Section 9 of Chapter 20 of that Act is now commonly referred to as the Alien Tort Statute (ATS). As originally enacted, it stated that federal district courts “shall . . . have cognizance, concurrent with the courts of the several States, or the circuit courts, . . . of all causes where an alien sues for a tort only in violation of the law of nations or a treaty of the United States.”\textsuperscript{63}

A version of this law is still on the books today and has been interpreted by the U.S. Supreme Court to grant jurisdiction to federal courts to hear suits by foreign citizens alleging violations of their human rights at the hands of foreign officials and perhaps other actors who aid and abet those violations.\textsuperscript{64} It is very unlikely, however, that human rights litigation is what anyone had in mind back in 1789.\textsuperscript{65} Instead, as Thomas Lee first demonstrated,\textsuperscript{66} Section 9 almost

\begin{itemize}
  \item \textsuperscript{61} Id. at para. 4.
  \item \textsuperscript{62} Id. at paras. 4-6.
  \item \textsuperscript{64} See Sosa, 542 U.S. at 729. For a discussion of the current split among federal courts of appeal on the issue of corporate aiding and abetting liability under the ATS, see Flomo v. Firestone Natural Rubber Co., 643 F.3d 1013, 1017 (7th Cir. 2011). The Supreme Court is poised to resolve at least some aspects of this split. See Kiobel v. Royal Dutch Petrol. Co., 132 S. Ct. 472 (2011) (granting petition for writ of certiorari).
  \item \textsuperscript{65} It does not necessarily follow that modern ATS litigation is therefore illegitimate. Even if litigation of the sort seen today is not what the enacting Congress contemplated,
certainly had as its main objective the more mundane task of enabling foreign citizens to pursue in federal court ordinary tort claims alleging personal injury and property damage.

As Lee explains, the term “alien,” as used in Section 9, refers to a private citizen of a foreign nation, as opposed to either a U.S. citizen or a foreign official. U.S. citizens, of course, already enjoyed the protections of domestic tort law. Foreign officials did not need the help of the ATS because their suits fell within the trial jurisdiction of the U.S. Supreme Court. Although foreign private citizens were thus the intended beneficiaries of the ATS, not all such persons were in need of, or qualified for, the benefit of its jurisdictional grant. Aliens with high-stakes claims—those exceeding $500—would benefit from a separate provision of the Judiciary Act. And among those with claims worth less than $500, the ATS, according to Lee, empowered suit only by persons tortiously injured while present in the United States or U.S.-controlled areas under the auspices of a “safe conduct.”

Safe-conduct status was conferred on particular individuals by the issuance of a government document such as a passport. It was also conferred on large classes of actors by treaty provision or by customary international law. For example, foreign merchants in the United States on business purposes were deemed by custom to be the beneficiaries of an implied safe conduct. Thus, by virtue of the ATS, a British merchant who, while doing business in the United States, was detained or roughed-up by a local sheriff could file a claim in federal district court against the sheriff for false imprisonment or battery. He thereby stood to obtain a remedy for the wrong done that might not have been forthcoming in local or state courts.

the significance of that fact for the right reading of the statute will depend on matters of statutory interpretation.


67. Lee, supra note 66, at 851-56.

68. Judiciary Act of 1789 § 11, 1 Stat. at 78; see Bellia & Clark, supra note 66, at 509.

69. Lee, supra note 66, at 871.

70. Id. at 874.

71. Id. at 874-75.

72. Id. at 837.

73. Id. at 897-98 (providing this example). Bellia and Clark offer a reading of the ATS's grant of jurisdiction that is both broader and narrower than Lee's. It is broader in supposing that the ATS made the federal courts available to any alien who was a citizen of a nation friendly to the United States and who suffered a certain kind of tort at the hands of a U.S. citizen, regardless of whether the tort was committed while the alien enjoyed the benefit of a safe conduct (and, indeed, regardless whether the tort occurred in the United States or U.S.-controlled territory). It is narrower in supposing that the provision applied
For present purposes, the most notable feature of the ATS is the fact of its enactment. Amidst the tumult and uncertainty of the early years of the Republic, with a new, untested, and controversial federal government having just been established, why would Congress have thought it important that foreigners be empowered to pursue tort claims in federal court?

The first-level answer resides in pragmatic concerns characteristic of international relations. It was important for the new and still fragile nation to avoid giving Britain and other powers reasons to “cut off trade, or even to wage renewed war.” More generally, the provision sent a signal to those who would do business in the United States that they would benefit from the law’s protections when in this country. But this explanation in turn incorporates certain political and legal norms—norms that ultimately explain why the failure to provide federal jurisdiction over alien tort claims might be the sort of thing that would incite retaliation from foreign powers.

Indeed, today one might fairly wonder how the First Congress could possibly have concluded there was a need for the provision of federal court jurisdiction over standard-issue tort claims, especially given a separate provision granting jurisdiction over high-value claims. Contemporary courts, including the U.S. Supreme Court, have supposed that the impetus for the alien tort provision must have been something grander, pointing to a pair of politically embarrassing incidents involving the mistreatment of foreign officials. This supposition rests on the further supposition that it is implausible to believe that the First Congress would have thought it important to ensure that our courts were receptive to suits raising humdrum claims for battery or trespass to chattels.

As Lee demonstrates, these suppositions are mistaken. While incidents involving dignitaries probably contributed to a general concern for the unavailability of recourse to foreign citizens, the need to ensure an adequate avenue of recourse for foreign officials was dealt with in a separate jurisdictional provision. The ATS was instead adopted for the benefit of private citizens wishing to bring standard-issue tort claims. And it was adopted for their benefit because of the longstanding recognition in Anglo-American law, and international law, of the importance attached to a government’s performance of its obligation to provide recourse to victims of wrongs.

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74. Lee, supra note 66, at 837.
75. Id. at 859-66 (discussing a 1784 incident involving a French official (Marbois) and a 1787 incident involving a Dutch official (van Berckel)).
76. Id. (explaining that the Marbois and van Berckel incidents gave rise to a separate provision granting federal court jurisdiction over officials’ tort claims).
Blackstone, Lee explains, deemed violations of safe conducts an offense against the law of nations and a “just ground of a national war.”77 Blackstone elaborated his position as follows. A sovereign (the “prince”) owes it to his subjects to see that justice among them is done. This is an affirmative responsibility of government, requiring, among other things, that he establish courts that operate according to law and that punish wrongdoing and provide redress to victims of wrongs.78 Having courts enforce laws that identify, enjoin, punish, and provide recourse for wrongs is a basic right—a right to the protections of the law.

Blackstone recognized that, in the case of a tort committed in Britain by a British subject against a foreign citizen, the foreign sovereign might be unable, practically, to fulfill this responsibility. Although he was entitled to arrange for punishment of the wrongdoer and recourse for the victim,79 it would sometimes be “not in the power of the foreign prince to cause justice to be done to his subjects by the very individual delinquent.”80 Because, in this special case, the foreign sovereign lacks the power to do that which it is his responsibility to do, he is entitled to call upon his subjects for assistance that will enable him to discharge his duty. In short, he could legitimately require “the whole community” to join him in rising up against Britain to enable him to provide justice to the aggrieved citizen.81

To forestall this undesirable prospect, English law had long recognized the King’s authority to grant express and implied safe conducts. To grant a safe conduct is to place the grantee “under the protection of the king and the law”—to confer on him the same rights to law and recourse that British citizens would enjoy while in areas under British control. Thus, said Blackstone, “any violation of either the person or property of such foreigner may be punished by indictment” as an offense against the king, who has in effect pledged to other nations to provide for the foreigner’s safety.82 He might have added, as did Vattel in his work on international relations, that the king would also be required to see to it that the victim received reparations from the tortfeasor.83

77. Id. at 871-72 (citing 4 BLACKSTONE, supra note 40, at *68).
78. 3 BLACKSTONE, supra note 40, at *115-16 (noting that for those wrongs “committed in the mutual intercourse between subject and subject,” the crown is “officially bound to [provide] redress in the ordinary forms of law”).
79. The authority to punish wrongdoing was widely understood to be universal, rather than being an authority that a sovereign could exercise only with respect to its own citizens. See RICHARD TUCK, THE RIGHTS OF WAR AND PEACE: POLITICAL THOUGHT AND THE INTERNATIONAL ORDER FROM GROTIIUS TO KANT 81-86, 171 (1999) (discussing the thought of Grotius and Locke).
80. 4 BLACKSTONE, supra note 40, at *68-69.
81. Lee, supra note 66, at 69.
82. Id.
83. Id. at 872 (discussing Vattel).
Turning back to the Judiciary Act, Lee explains as follows:

[A] safe conduct signified a sovereign obligation on the part of the United States to prevent injury to the person or property of an alien within its territory . . . . Where a safe conduct was implicated, the United States assumed correlative duties to punish the injurer under its criminal laws . . . and to oblige the injurer to pay damages for the injury.84

In sum, the alien tort provision was a statutory recognition and fulfillment of the government’s obligation to extend to certain foreigners the same right to the protection of the laws enjoyed by its own citizens. It was included in the Judiciary Act of 1798 in large part because of a post-Revolutionary War track record suggesting that state courts could not be trusted to fulfill this obligation.85 The Founders—and the nations with which they hoped to establish constructive relations—regarded the failure to live up to this obligation as a failure to live up to a basic governmental responsibility, one not merely posited as a matter of political theory but recognized in international law.86

Like the Declaration, the ATS attests to the centrality of tort law, understood as a law of civil recourse, to the founding era. The relevant provision of the Judiciary Act invokes the word “tort” advisedly. It did not emerge out of a preternatural desire among the Founders to have the fledging federal courts serve as fora for the vindication of what are now taken to be universal human rights.87 It was justified on the narrower and more legalistic grounds that individuals are entitled to an avenue of legal recourse against wrongdoers for the wrongs done to them, and that a state bears a concomitant responsibility, recognized in international law, to give them a means of seeking and obtaining meaningful redress.

IV. TAKING RESPONSIBILITY FOR OFFICIAL WRONGDOING

In a recent article, James Pfander and Jonathan Hunt discuss the congressional practice, commenced in the early years of the Republic, of indemnifying federal officials who had been held liable, or were in danger of being held liable, for wrongs committed in the course of

84. Id. at 873.
85. See Bellia & Clark, supra note 66, at 494-507 (reviewing instances of state courts failing to provide recourse to foreign citizens).
86. Id. at 507 (“[T]he ATS is best understood as one of several means by which the First Congress sought to ensure that the United States would comply with its obligations under the law of nations and avoid giving foreign nations just cause for war.”).
performing their official duties. Because of the common law doctrine of sovereign immunity, claims by alleged victims of official wrongdoing were not litigated as suits against the government. Yet, this did not render tort law irrelevant to official misconduct, because immunity was not understood to extend to individual officials. For example, a ship owner seeking damages for an allegedly wrongful seizure of his ship by a U.S. warship could bring a claim in trespass against the captain of the warship. Likewise, if a federal revenue officer, acting pursuant to a federal court judgment, mistakenly seized the property of a person other than the judgment-debtor, the property owner could bring a trespass claim against the officer.

In keeping with the common law's definition of the tort of conversion, liability was not fault-based. Instead, it would attach to any intentional seizure of property that proved to be unjustified, even if the official who seized the property did so in the reasonable but mistaken belief that he was authorized to seize it. A warship captain who seized another's ship in the reasonable belief that the other ship was engaging in activity that would justify its seizure faced liability if it turned out that the captain, though acting reasonably, was mistaken. Only if the seizure were in fact authorized would liability be avoided.

Under this regime, federal officers could face potentially ruinous liability for understandable mistakes committed in the course of discharging their official duties. However, they had available to them a mechanism by which to ameliorate this risk. They could petition Congress to enact a private bill that would authorize a payment to the official for the amount of his liability. According to Pfander and Hunt, an early precedent for this form of relief lay in a bill successfully sought on behalf of the Danish owner of a ship that had been wrongfully seized and that resulted in an 1802 enactment by Congress providing direct compensation to the owner. Likewise, in response to the July 1800 seizure of the schooner Charming Betsy by Captain Alexander Murray, a subsequent court judgment holding

89. Vicki C. Jackson, Suing the Federal Government: Sovereignty, Immunity, and Judicial Independence, 35 GEO. WASH. INT’L L. REV. 521, 525 (2003) (noting that the common law doctrine of sovereign immunity allowed for various forms of governmental liability, including liability of individual federal officials for their torts, “even if they were [committed] pursuant to a presidential order”).
90. Id. (offering this example).
91. However, evidence of good faith would provide a ground for refusing a claim for punitive damages. Pfander & Hunt, supra note 88, at 1923. As Pfander and Hunt observe, liability of this sort served as a counterweight to the incentives created by the fact that officials would often stand to profit personally from valid seizures through commissions and forfeitures. Id. at 1917.
92. Id. at 1880-86 (discussing legislation compensating one Paolo Paoly for damages awarded in a judicial proceeding that determined that the capture of his ship was wrongful).
Murray liable to the schooner’s owner for wrongfully seizing it, and the filing by Murray of a petition for a private bill, Congress in 1805 enacted a law that indemnified Murray on the ground that his actions, though tortious, were taken in a good faith effort to discharge his duties.93

Over the next three decades, the indemnification process became routinized. Typically, a petition would be filed in the House of Representatives and referred to a standing House committee that would review the merits of the claim. In turn, the Committee would issue a report and recommendation which, if favoring indemnification and adopted by both houses, would become law. Pfander and Hunt identify dozens of instances of petitions for indemnification filed in Congress between 1789 and 1860, with sixty percent of these resulting in legislation appropriating funds either to indemnify the petitioning official or to pay victims directly.94

As a predicate to relief, the petitioner would have to make a showing that his actions were consistent with his instructions or within the scope of his authority.95 The House Committee adjudicated this issue in the manner of a court, receiving evidence, applying certain principles of agency law, and citing earlier dispositions of petitions as precedents.96 Indeed, for ease of reference, prior dispositions were gathered in a compendium compiled by the clerk of the House.97 These practices and procedures were sufficiently judicial in nature that indemnification for acts undertaken within the scope of an official’s authority was widely understood to be “more as a matter of right than as a matter of legislative grace.”98 Such was the view expressed by the Taney Court in an 1836 decision, Tracy v. Swartwout.99 In effect, there was a recognized responsibility on the part of Congress to indemnify officials for tort liabilities incurred in discharging their official duties, with Congress retaining for itself the job of determining if a given official had discharged his duties in good faith so as to trigger the duty to indemnify.

Pfander and Hunt’s study of the antebellum practice of indemnification is an important addition to the literature suggesting that it is mistaken to suppose that the doctrine of sovereign immunity served as anything like a complete bar to the imposition of liability on the

93. Id. at 1900-01.
94. Id. at 1867.
95. Id. at 1906-07.
96. Id. at 1910.
97. Id. at 1910-11.
98. Id.; see also id. at 1911-12.
99. Id. at 1912-13. “[S]ome personal inconvenience may be experienced by an officer who shall be held responsible in damages for illegal acts done under instructions of a superior; but, as the government in such cases is bound to indemnify the officer, there can be no eventual hardship.” Id. (quoting Tracy v. Swartwout, 35 U.S. 80, 98-99 (1836)).
U.S. government. The doctrine instead is better understood as having operated to “direct[] the individual's application for redress into the proper procedural channels.” A complainant alleging official misconduct was required to sue the individual official to obtain a judicial determination that a tort had in fact been committed. Then, usually at the behest of that official, Congress would take on the task of determining whether the official's tort was committed in the course of a good-faith effort to discharge his duties. In these cases, “sovereign immunity” meant only that the question of whether an official had acted within the scope of his duties was not for the courts: they were deemed incompetent to make judgments as to the appropriate occasions for spending taxpayer money in satisfaction of liabilities incurred by federal officials. Instead, the “within-the-scope-of-duty” inquiry was a matter for Congress. And yet, it was not a purely discretionary decision. Upon receiving a petition for indemnification, Congress was to decide the scope-of-duty question in accordance with precedent and principle.

The quasi-judicial practice of congressional indemnification reveals that petitioning Congress for redress was not merely notional but was taken seriously as a means of asserting a kind of claim more forceful than a mere plea for consideration. It thereby suggests that American practice in this respect tracked Blackstone’s view that petitions could constitute a genuine form of legal redress. The practice also gives lie to the notion that sovereign immunity entailed that government could simply disavow responsibility for wrongs committed by officials. Government was responsible for acts committed by officials in the good faith pursuit of their official duties. It is true that the determination of the “good faith” issue would only follow on a judicial judgment that a tort had been committed, and on a petition from the tortfeasor to Congress requesting indemnification. And it is also true that Congress reserved for itself the authority to make that determination, a reservation to which courts acquiesced. But it hardly followed that Congress was free to absolve itself of responsibility

100. See Jackson, supra note 89, at 541-52 (discussing this literature, but also noting that Congress’s control over the federal courts de facto has historically given Congress a great deal of power to determine the scope of governmental liability).
102. Id. at 1868.
103. Id.
104. Id.
105. Pfander and Hunt explain that, in certain instances—for example, those in which the official had disappeared—Congress would pay the victim directly rather than refuse to pay on the ground that its only duty was to indemnify the official. Id. at 1919.
106. See James E. Pfander, Sovereign Immunity and the Right to Petition: Toward a First Amendment Right to Pursue Judicial Claims Against the Government, 91 Nw. U. L. Rev. 899, 921-26 (1997) (discussing Blackstone’s views). I do not mean to take a position on whether Pfander is correct to assert that a constitutional doctrine of sovereign immunity violates the First Amendment’s petition clause.
as it saw fit, and this was not the practice. Instead, the question of whether the official had committed a wrong while discharging his duties in good faith was *adjudicated* in Congress, and indemnification was seen as something to which officials who had acted in good faith were entitled as a matter of right.

Built into the practice of indemnification through petition are the connections among the multiple senses of responsibility that civil recourse theory identifies as the hallmark of tort law. Although they benefited from certain special privileges, officials, just as ordinary citizens, were subject to certain duties of noninjury, including a duty not to convert the property of others. Violations of that duty permitted a response, through law, by the property owner against the official. The law, in turn, discharged government’s duty to enable victims of wrongs to obtain redress for wrongs done to them. Beyond this, Congress acknowledged a responsibility to adjudicate the question of whether the official in question was entitled to indemnification for having committed the tort while discharging his official duties in good faith. This, too, was understood as a responsibility, not merely a matter of largesse.

That Congress in the early decades of the republic stood ready to make good on claims against federal officials is another testament to the degree to which tort law was taken seriously. Officials were understood as owing legal duties not to mistreat citizens that, if breached, subjected them to liability. In turn, the federal government, as principal, understood itself to be obligated to stand behind its agents and make good on their tort debts, even to the point of setting up elaborate institutional procedures that required affirmative legislative acts to fulfill its obligation. Today, by contrast, individual officials are largely immunized from liability and often governmental entities are as well. 107 And even as the Federal Tort Claims Act and state counterparts have routinized and in some ways expanded upon early Congressional practice by authorizing the judicial imposition of liability on governments for officials’ torts, those statutes have at the same time empowered courts to expand governmental immunity. 108

107. See, e.g., Richard H. Fallon, Jr., *Asking the Right Questions About Officer Immunity*, 80 Fordham L. Rev. 479, 483-84 (2011) (observing that, in the post-Warren Court period, the U.S. Supreme Court has “expanded state sovereign immunity, made it difficult to establish constitutional violations by cities and counties, selectively stiffened justiciability doctrines, cut back on the *Bivens* cause of action for damages against federal officials who have violated constitutional rights, and elevated the burdens of pleading in suits against government officials”) (footnotes omitted); Jackson, *supra* note 89, at 563-67 (2003) (reviewing limitations on governmental tort liability). Of course sovereign immunity also dates back to the founding era and, as Fallon cogently argues, immunities might sometimes serve the cause of responsibility by creating a space in which official responsibilities can be acknowledged. Fallon, *supra*, at 481-95.

108. See, e.g., United States v. Gaubert, 499 U.S. 315, 324-35 (1991) (interpreting the discretionary function exemption to the FTCA to apply to any official decision calling for an
The notion that officials and government entities can be held legally responsible by victims of their wrongs is in many instances giving way to the notion that government may act with impunity toward its citizens.

CONCLUSION

Understanding tort law as a law of civil recourse enables us to see that tort was central to our system of law at the founding. Evidence for this claim resides not only in the foregoing examples but in Justice Marshall’s famous invocation of the *ubi jus ibi remedium* maxim in *Marbury v. Madison*,109 in the guarantees of open courts and remedies found in early state constitutions, and elsewhere.110 Indeed, the idea that tort law is a relative newcomer is at least in one respect exactly backwards. It is only in the modern era that we encounter the view that government enjoys powers without responsibilities, such that the granting of an avenue of recourse to victims of wrongs against wrongdoers is taken to be a matter of legislative grace111 and such that officials and governments are said to benefit from broad immunities from liability.

It perhaps should go without saying that the foregoing observations are not offered out of general nostalgia for the way things once were. In many regards, we can only count our blessings to be rid of the old ways. Nor does any particular policy prescription immediately flow from my historical analysis. Tort law has in some respects expanded its reach well beyond anything members of the Founding era could envision, and that fact alone cautions against simply applying older notions of the proper place of tort law in contemporary circumstances.

Still, it is far from obvious that we are moving in the right direction when it comes to thinking about rights and responsibilities. To a degree that is difficult to define, we (at least those in the legal academy) have lost our feel for tort’s character as a law of civil recourse. In doing so, we are in danger of losing sight of our rights and our responsibilities, including responsibilities that citizens owe one another and responsibilities that government owes its citizens.

There is something darkly ironic in the thought that tort law is a modern invention. Early American lawyers understood what it meant for the law to identify conduct as tortious. In doing so, they grasped what many today at least profess to find mysterious, namely, the idea

exercise of judgment or discretion in connection with the furtherance of a government mandate or policy).

110. Goldberg, *supra* note 5, at 559-64.
111. The prevailing view among lawyers today seems to be that, so long as Congress acts within its constitutionally allotted authority, it is free to enact federal legislation that renders state tort law null and void without having to provide a substitute for it. *Id.* at 527-28, 588.
that law should (among other things) identify forms of mistreatment and empower victims of mistreatment to respond to those who have wronged them. The idea of a tort—a legally defined injurious wrong for which the victim is entitled to an avenue of recourse—was an organizing concept for the Founders. So too was the idea that government bears a responsibility—indeed, a legal responsibility—to provide a law of recourse to its citizens, and even to “aliens.” And so too was the idea that officials and governments themselves are subject to being held accountable through tort law for their injurious legal wrongs. In each of these respects, theirs was an era of tort law whereas ours is an era of tort reform.