TORT LAW FOR FEDERALISTS (AND THE REST OF US): PRIVATE LAW IN DISGUISE

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The question posed for this panel reads as follows: Should tort law be a form of public regulatory law? My answer is no. What I mean by that will become clearer in a moment, but let me offer an immediate set of qualifications. I do not mean to dispute that there are certain respects in which tort law is public. For one thing it is law, provided by government—no service, no sheriff, no tort law. For another, its operation can have widespread effects—a tort suit can change how cars are designed and how health care is delivered, for example. Finally, through its day-to-day operation, tort law undoubtedly promotes public objectives including deterrence of risky or otherwise undesirable conduct, maintenance of social cohesion, vindication of individual rights, affirmation of the equality of persons under law, and reinforcement of the ideal of limited government.[1]

But now consider the following question: What, in the first instance, does tort law promise to do that warrants retaining it as a distinctive facet of our law? (Or: What is it about tort law that renders it capable of delivering goods such as the ones just catalogued?) Because of tort law's unique features—plaintiff-initiated complaints, the right to a jury trial, litigation and adjudication turning on rules and concepts designed to help determine whether a person can be held

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1. *See* John C. P. Goldberg, *The Constitutional Status of Tort Law* (Oct. 5, 2004) (unpublished manuscript) (on file with Harvard Journal of Law & Public Policy) (articulating how tort law serves these values). To assert that the institution of tort law serves certain values is not to deny that tort law can and does generate socially undesirable consequences, such as litigiousness and waste. More importantly for present purposes, that assertion does not mean that *each tort case* is an occasion for judge and jury to fashion a result that will best serve those values (as opposed to being an occasion for following the rules, principles, and practices of the institution). For example, tort law generally permits victims to obtain some form of redress from their wrongdoers regardless of the wealth or status of either. Insofar as it does so, it reinforces a notion of equality: each person is answerable for wrongs to others; none enjoys immunity because of his or her exalted or lowly status. (Of course, some actors do enjoy special tort immunities, but immunities are hardly the rule. Indeed, they require special justification, if they can be justified at all, precisely because they violate the norm of equal accountability.) That tort law reinforces our commitment to civic equality hardly entails that, in any given tort case, a judge ought simply to examine the relative wealth and status of the parties before her and decide whether to impose liability by asking what result will best promote egalitarianism.

responsible for having injured another, etc.—its best justification is that, unlike all the other political and legal institutions we have for dealing with antisocial conduct and injuries (administrative regulation, criminal law, public welfare law, private insurance, bankruptcy, contract, etc.), it provides a means by which those who have been wronged can seek redress against those who have wronged them. By contrast, the tort system is not well designed to function as a form of disaster relief for injury victims because of its high transaction costs and its tendency to produce feast-or-famine compensation. It is also not well equipped to provide public safety regulation because of, among other things, judges' and jurors' lack of agenda control, their limited access to information, and their relative lack of expertise and accountability. In this sense, I maintain, tort law is not defensible as public regulatory law.

In providing a negative answer to the panel question, I have already declared myself to be outside the mainstream among torts professors. Indeed, most would profess puzzlement at its having been asked in the first place. To inquire whether tort law "should be" public regulatory law supposes that it could be something else—"should" implies "can." And very few scholars believe that it can. Instead, they would say that the real issue is whether, *given that* tort law is *of course* regulatory law, it should be celebrated or condemned. I will argue that tort law is poorly served—and poorly serves us—when academics attempt to describe and defend it as public regulatory law.

I

Let me illustrate my point by discussing a famous tort suit that raised issues ultimately decided by the U.S. Supreme Court in 2003: *State Farm Mutual Automobile Insurance Co. v. Campbell*.[2] State

2. State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408 (2003). My thinking on the subject of punitive damages has been heavily influenced by the work of Ben Zipursky and Tony Sebok. *See, e.g.*, Anthony J. Sebok, *Introduction: What Does It Mean To Say That A Remedy Punishes?*, 78 CHI.-KENT L. REV. 3 (2003); Anthony J. Sebok, *What Did Punitive Damages Do? Why Misunderstanding the History of Punitive Damages Matters Today*, 78 CHI.-KENT L. REV. 163 (2003); Benjamin C. Zipursky, BMW v. Gore *and the Double Aspect Problem in the Theory of Punitive Damages* (Oct. 5, 2004) (unpublished manuscript, on file with the Harvard Journal of Law & Public Policy). *See also* Thomas B. Colby, *Beyond the Multiple Punishment Problem: Punitive Damages as Punishment for Individual, Private Wrongs*, 87 MINN. L. REV. 583 (2003). Martin Redish and Andrew Mathews have recently argued that, given modern "regulatory" justifications of punitive damages, such awards violate principles of procedural due process because regulation in the name of the public good is being pursued and imposed at the behest of private actors who possess an immediate financial interest in the outcome of the regulatory process. *See* Martin H. Redish & Andrew L. Mathews, *Why Punitive Damages Are Unconstitutional*, 53 EMORY L.J. 1, 40–52 (2004). I would be more inclined to say instead that a court may

Farm issued auto insurance to the Campbells. After Mr. Campbell's careless driving caused a car accident, he was sued for negligence by the person he injured. State Farm took over the defense of the suit and willfully mishandled it. In particular, it declined an offer to settle the case at the rather modest limits of the Campbells' policy. State Farm's "bad faith" breach of the duty to defend resulted in a judgment against the Campbells that exceeded their coverage by more than $135,000 and put them in danger of losing their home.[3]

A Utah jury hearing the Campbells' claim against State Farm awarded them $2.5 million in compensatory damages (mostly for emotional distress). In addition, based on evidence of sharp practices employed by State Farm in handling other claims by other insureds, the jury awarded $145 million in punitive damages. Although the compensatory award was later reduced to $1 million, the punitive award was upheld by the Utah Supreme Court. The U.S. Supreme Court reversed, concluding that the punitive award was so excessive, as measured by the criteria set out in *BMW of North America, Inc. v. Gore*,[4] as to violate State Farm's due process rights.[5]

Campbell presents a delicate set of issues for Federalist Society members. Perhaps most fundamentally, it raises the question of whether the U.S. Supreme Court has any business invoking the vague guarantees of the Due Process Clause as a basis for second-guessing state common law.[6] However, I wish here to consider a different aspect of the decision.

According to Justice Kennedy's majority opinion, the problem with the Utah Supreme Court's ruling was *not* that it permitted *some*

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find a given punitive damage award unconstitutional if the *only* justification for the award, or its magnitude, is that it happens to serve public goals such as deterrence, as opposed to providing redress to the victim of a particularly egregious form of mistreatment committed by the tortfeasor upon the victim.

3. *See Campbell*, 538 U.S. at 413.

4. 517 U.S. 559, 574–75 (1996) (setting forth three "guideposts" to determine whether a punitive damages award is "grossly excessive": (1) the degree of reprehensibility, (2) the disparity between the harm suffered and the award, and (3) the difference between the award and relevant regulatory penalties).

5. *Campbell*, 538 U.S. at 416, 429.

6. Hence Justices Scalia and Thomas have largely rejected the *Gore* line of cases. *See, e.g.*, *Campbell*, 538 U.S. at 429 (Scalia, J., dissenting); *id.* at 429–30 (Thomas, J., dissenting); *cf.* Cooper Indus., Inc. v. Leatherman Tool Group, Inc., 532 U.S. 424, 443 (2001) (Thomas, J., concurring) (noting continued objection to *Gore*'s holding, but concurring that, in light of *Gore*, the standard of review for constitutional excessiveness of punitive damages awards should be *de novo*); *id.* at 443–44 (Scalia, J., concurring in the judgment) (same). The Chief Justice, by contrast, seems to have made his peace with this aspect of substantive due process. *See Campbell*, 538 U.S. at 411 (joining majority opinion).

punitive damages to be awarded to the Campbells.[7] Based on the evidence presented at trial, the jury acted reasonably in concluding that State Farm had willfully mistreated the Campbells. Rather, the problem was the *magnitude* of the jury award: "While we do not suggest there was error in awarding punitive damages based upon *State Farm's conduct toward the Campbells*, a more modest punishment for this reprehensible conduct *could have satisfied the State's legitimate objectives*, and the Utah courts should have gone no further."[8] In this one sentence resides a deep tension, a clue as to what makes modern punitive damages practices so seemingly suspect, and a suggestion for a better approach.

The tension resides in the evident shift of focus that takes place between the first two clauses of the sentence. In explaining why *some* punitive award was appropriate, the Court's focus is the Campbells' claim for what State Farm did to them. Yet in assessing the size of the award, the majority opinion ceases to be concerned with what was done to the Campbells and instead asks whether the award the Campbells stood to receive was necessary to further the interests of the State of Utah in punishing and deterring bad behavior. What is initially cast as an entitlement of the Campbells is quickly recast as an interest of the State. What started out as a claim for private redress brought by the victim of a wrong has become a claim brought on behalf of the public to vindicate its interest in maintaining sound insurance practices.[9]

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7. *Campbell*, 538 U.S. at 419–20.

8. *Id.* (emphasis added).

9. The Court's focus on Utah's interest in enforcing punitive awards is driven in part by the need to paper over a serious problem that attends the constitutionalization of tort law, namely, the problem of state action. *See* Redish & Mathews, *supra* note 2, at 25–27 (discussing state action doctrine in the context of constitutional review of punitive damages awards). At least since *New York Times Co. v. Sullivan*, 376 U.S. 254, 265 (1964) (stating that judicial application of state tort law counts as state action for purposes of constitutional analysis), the Court has simply assumed away the state action problem, essentially adopting the unsatisfactory position—unsatisfactory because it proves too much—that the judicial system's oversight of private litigation counts as state action. *Some* applications of state tort law surely do amount to state action. *Sullivan* provides a particularly striking example of tort law as a form of state action, because there a public official was quite deliberately attempting to use state defamation law to silence his political critics. *See* John C. P. Goldberg, *Judging Reputation: Realism and Common Law in Justice White's Defamation Jurisprudence*, 74 U. COLO. L. REV. 1471, 1476–78 (2003). Likewise, to the extent the result in a particular tort case suggests that the state judiciary is presiding over a system of tort law that is functioning for all intents and purposes as a regulatory scheme and no longer functioning as a system of private law, the state action requirement may also be met. *Cf.* Zipursky, *supra* note 2, at 31–32 (suggesting that the three-pronged due process test of *Gore* can be understood as a test for determining when a particular tort judgment crosses over the line between providing private redress and functioning as public regulatory law in disguise).

I want to suggest that *Campbell* provides a clear example of the sort of slippage that legal academics have promoted and that has led us into a bind in our thinking about punitive damages and other subjects within torts. Many Federalist Society members will be unsympathetic with Professor Bogus's claim that large punitive awards are desirable from a regulatory perspective.[10] But he is right about one thing, and the Supreme Court agrees with him in this particular instance: corporations and individuals commit egregious wrongs that permit a certain kind of punitive response via the legal system.[11] Where he goes astray, in my view, is in thinking—as the Supreme Court does—about the justification in terms of the state's regulatory objectives. What is at stake in *Campbell* is not Utah's interests in obtaining retribution on behalf of its citizens or in deterring sharp business practices, but the Campbells' interest in vindicating their rights not to be mistreated in the way that they were. Thus, the proper question for the jury was not: How much money may be extracted from State Farm in order to vindicate the laws of Utah or to promote better insurance-company behavior in Utah? Instead, the question should have been: How much money will it take to make things right for the Campbells, not just in the sense of compensating them for their losses, but in the sense of providing them with *satisfaction*—a remedy adequate to acknowledge and avenge State Farm's predatory conduct towards them?[12]

The reader might be inclined to regard this explanation as a game of semantics, but I don't think it is. Ask yourself: What sort of award will be sufficient to cause State Farm and other well heeled insurance

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10. *See* Carl T. Bogus, *Fear-Mongering Torts and the Exaggerated Death of Diving*, 28 HARV. J. L. & PUB. POL'Y 17 (2004).

11. *See Campbell*, 538 U.S. at 416.

12. I realize that this characterization puts a somewhat compensatory cast on punitive damages. Still, I do not think it collapses the distinction between compensatory and punitive damages—a charge that has from time to time been leveled against the sort of view articulated here. *See, e.g.*, Fay v. Parker, 53 N.H. 342, 380–81 (1873) (arguing that punitive damages are just a form of emotional distress damages). All damage payments in a tort context are compensatory in the minimal or thin sense of being payments to which a tort victim has a right by virtue of having been victimized; they are payments that help make things right as between victim and tortfeasor. But they are not all compensatory in the sense of being paid to make up for harm caused to the victim's body or psyche: they are not, in this sense, part of "make whole" damages. Thus, in principle, a tort plaintiff might be able to make out a valid claim for punitive damages even if the evidence were to show that she was not physically injured and that she stoically withstood her mistreatment.

That punitive damages are compensatory in this broad sense is also compatible with the traditional notion that such awards are, or ought to be, "exemplary." The victim of a certain kind of wrong, in this view, is entitled to extract from the wrongdoer an added increment of damages in order for the victim to gain the additional satisfaction of personally seeing to it that the wrongdoer is made an example of.

companies to take notice that, when in Utah, they had better behave themselves? A very big number might come to mind, perhaps even one in the hundreds of millions. Now ask yourself: How much money are the Campbells entitled to extract from State Farm, on top of damages for any losses they suffered, in recognition of the fact that State Farm consciously shirked its duty to protect their interests so that it might serve its own? Monetizing is a subjective business, but however we answer the latter question, it won't run into the multi-millions. Perhaps $100,000 or even $1 million might constitute an appropriate number, but certainly not $100 million.[13] In short, if we ask a different question about punitive damages—a question prompted by a conception of tort law as a law of private redress—we get a different order of answer than if we ask questions that presume a conception of tort law as public regulatory law.

Of course the Court in *Campbell* reached the conclusion that the $145 million award was excessive.[14] So in that sense, the worst excesses associated with treating tort law as public law were not realized. But why weren't they? The answer may be that despite its disparagement by legal academics, the notion of tort law as private law still has some hold on judges, even Supreme Court Justices.

The Court's principal stated reason for knocking down the punitive award was that the jury heard much evidence about misconduct by other State Farm employees in other states with respect to other kinds of insurance policies and other insureds.[15] The Campbells' attorneys introduced this evidence to show that State Farm's treatment of the Campbells was part of a nationwide policy of practices by which the insurer sought to reduce payouts on claims and increase profits. This was error because it permitted the jury to award

> punitive damages to punish and deter conduct that bore no relation to the Campbells' harm. A defendant's dissimilar acts, independent from the acts upon which liability was premised, may not serve as the basis for punitive damages. A defendant should be punished for the conduct that harmed the plaintiff, not for being an unsavory individual or business. Due process does not permit courts, in the calculation of punitive damages, to adjudicate the merits of other parties' hypothetical claims against a defendant under the guise of... reprehensibility analysis... . Punishment on these bases

13. Mrs. Campbell, widowed during the course of the litigation, eventually obtained a punitive award of just over $9 million. *See Campbell v. State Farm Mut. Auto Ins. Co.*, 98 P.3d 409, 420 (Utah), *cert. denied*, _ U.S. _, 125 S.Ct. 114 (2004).

14. *Campbell*, 538 U.S. at 429.

15. *Id.* at 423–24.

> creates the possibility of multiple punitive damages awards for the same conduct; for in the usual case nonparties are not bound by the judgment some other plaintiff obtains.[16]

The Court's main points are that unrelated misdeeds "may not serve as the basis for [a given plaintiff's] punitive damages,"[17] and that a person may not be punished for "being an unsavory individual."[18] The latter assertion is a red herring. A punitive award is always predicated on the showing of a completed tort, so the defendant is not being punished merely for being unsavory. Meanwhile, the former seems hard to justify given the Court's nominally regulatory approach to punitive damages. If such damages are meant to serve a state's interest in deterring socially undesirable behavior, then why won't evidence of other bad acts by the tortfeasor help shed light on how great its propensity is to break the law, and help determine how much of an incentive is needed to correct for that propensity? The Court attempts to shore up its position by arguing that the imposition of damages based on evidence of other bad acts also violates notions of procedural due process and excessive punishment—"hypothetical" claims end up being litigated and defendants run the risk of being punished repeatedly for the same conduct.[19] But these explanations seem wanting too. The defendant has a full and fair opportunity to rebut assertions that it engaged in other forms of wrongful conduct. And other states' courts can take into account previous punitive awards in deciding how much punishment is necessary to serve those states' respective interests.

Perhaps *Campbell*'s recitation of reasons seems unsatisfactory because the Court had already backed itself into a corner by framing the issue in the case as whether the Utah Supreme Court could reasonably conclude that a $145 million award was necessary to serve the interests of the State.[20] Because of this initial (mis-)framing, the Court is forced to convey its concerns about the award awkwardly and indirectly, as problems of evidence and procedure. I would argue that its expressions of concern over punishment for dissimilar acts points to a deeper and more substantive issue. The problem is not that the *Campbell* jury got to hear some unduly prejudicial evidence. Rather, it is that the punitive phase of the trial was geared to asking

16. *Id.* at 422–23 (citations omitted).
17. *Id.*
18. *Id.* at 423.
19. *See id.*
20. *See* discussion *supra* pp. 5–6.

the wrong question—the public law question.

The question that should have been asked at trial was a private law question: How much money may the Campbells fairly extract from State Farm given its deliberate mistreatment of them?[21] In turn, if we assume—contra Justices Scalia and Thomas—that the result reached by the lower courts truly generated a constitutional issue, that issue should have been framed as follows: Could a tolerably fair process for adjudicating the Campbells' claim of mistreatment by State Farm generate the conclusion that the Campbells were entitled to extract $145 million from State Farm for what it did to them? With the issue so framed, the Court's conclusion—that, in this instance, the justice provided by the Utah courts failed to comport with minimum standards of fairness—becomes quite a bit more comprehensible.

II

The wrongs-based view of tort law that I have sketched and invoked as a basis for bolstering the U.S. Supreme Court's decision to intervene in *Campbell* contains various aspects that should appeal to members of the Federalist Society even apart from this view's ability to explain why certain perceived excesses in the tort system ought to be reined in.[22] To note but one such aspect, its roots can be traced back to the likes of William Blackstone and Adam Smith.[23] If modern Federalists are seeking a conception of tort law consonant with some of the basic tenets of classical liberalism, then a wrongs-based view is for them.

Still, the adoption of a view of tort law as private law will not be

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21. On this approach, evidence of related bad acts, including out-of-state bad acts, might be deemed admissible to help establish the willfulness or maliciousness with which the tortfeasor acted toward the victim(s), although presumably such evidence would quickly become duplicative and prejudicial. Still, the issue before the judge and jury would remain the same: to what extent did the tortfeasor egregiously mistreat the person(s) now seeking relief?

22. Even here, one must be prepared to take the bitter with the sweet: the same approach to punitive damages might also call for a substantial reduction of awards toward which a certain kind of political conservative might be favorably disposed. For example, consider *Jacque v. Steenberg Homes, Inc.*, 563 N.W.2d 154, 166 (Wis. 1997), in which the Wisconsin Supreme Court—erroneously, in my view—rejected a *Gore* challenge to a $100,000 punitive award awarded to a property owner for a willful but harmless trespass across his field.

23. *See* ADAM SMITH, LECTURES ON JURISPRUDENCE 5–14, 103–40 (R. L. Meek et al. eds., Liberty Classics 1982) (1762-63) (positing the preservation of rights as the first end of government, and elaborating the ways in which the law serves that end by identifying and responding to wrongs through punishment and the provision of redress to victims); John C. P. Goldberg, *Twentieth-Century Tort Theory*, 91 GEO. L.J. 513, 516–19 (2003) (outlining a Blackstone-inspired account of tort law).

painless. If what is desired by the members of this group is a conception that always produces a desired political end-result, such as minimal tort liability for corporate defendants, then the private-law, wrongs-based conception I have sketched here will not get them there. If, by contrast, what is desired is an approach to tort law that connects to liberal traditions and renders it more coherent and principled, then a wrongs-based view should be taken very seriously indeed.

In the private law model, tort law empowers those who have been wronged to seek redress from those who have wronged them. The class of wrongs, in this view, might be fairly expansive and might evolve over time with economic, social, and political changes. For example, there is nothing inherent in a wrongs-based view that requires tort law to give way to contract law simply because the tortfeasor and victim turn out to have been in a position to negotiate with one another. The parties in *Campbell*, it is worth recalling, were in a pre-existing contractual relationship. To endorse the award of any tort damages to the Campbells, and particularly punitive damages, presumes that it is at least sometimes acceptable for courts to impose an involuntary obligation onto a relationship whose terms were set by contract.[24] The action for bad-faith breach of an insurer's duty to defend alleges the breach of an obligation that exists on top of contract—a duty that has its "source in the law."[25] Thus, although it is true that judges analyzing tort claims must be sensitive to the norms of the neighboring body of private law of contract, it is not the case that they should recognize tort only when the parties cannot contract. Rather, a wrongs-based view will sometimes demand or suggest that judges identify duties and wrongs notwithstanding contract or the potential for contract.[26]

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24. It would be outside the scope of these remarks to discuss whether the cause of action for an insurer's bad-faith breach of its duty to defend an insured is best understood as a contract or tort action. Likewise, this is not the place to reflect upon whether, all things considered, the action ought to be eliminated so as to leave the insured with ordinary contract remedies, which would presumably preclude the award of punitive damages. *But see* Curtis Bridgeman, Note, *Corrective Justice and Contract Law: Is There a Case for Punitive Damages?*, 56 VAND. L. REV. 237, 260–74 (2003) (arguing that a corrective justice conception of contract law might sometimes justify the award of punitive damages for certain contract breaches, including breaches of the sort complained of in "bad faith" claims against insurers). Here I am content to note that the type of misconduct that can support such a claim—a deliberate and self-serving breach of a duty to protect the insured's financial interests in a situation in which the insured is likely to be facing a personal crisis—is sufficiently distinct from other sorts of contract breaches that it may warrant special treatment.

25. MacPherson v. Buick Motor Co., 111 N.E. 1050, 1053 (N.Y. 1916).

26. *Cf.* Beul v. ASSE Int'l, Inc., 233 F.3d 441, 445 (7th Cir. 2000) (Posner, J.) ("Negligence in the performance of a contract that foreseeably results in personal injury ...

Likewise, as Professor Epstein long ago emphasized, a wrongs-based view is compatible with, and may even demand, the imposition of certain arguably onerous forms of liability, including strict liability.[27] In a similar vein, no less a figure than Judge Easterbrook has recognized that torts come in various shapes and sizes and sometimes impose liability for breaches of duty that do not constitute morally culpable acts.[28] Even fault-based wrongs recognized by tort law can set a demanding standard of conduct, whether because fault is measured "objectively," because a tortfeasor runs the risk of having to pay damages out of proportion to the nature of his wrongdoing, or because the law of agency often saddles entities—even entities that are in the relevant respects behaving responsibly—with liabilities flowing from the wrongful acts of individual employees.[29]

Finally, as noted above, there is no reason to treat the category of torts as a static set. Causes of action can sometimes be eliminated, as has happened in many jurisdictions for torts such as alienation of affections and criminal conversation.[30] New torts are also minted. Of these, some are explicitly generated by statute, as has been the case with statutes generating causes of action for employees who are injured by age, disability, gender, or race discrimination. Others are articulated by judges under the influence of statutes through the doctrines of negligence per se and implied rights of action.[31] Still others emerge out of judicial efforts to rationalize scattered common law precedents, as was the case with courts' recognition in the first half of the twentieth century of claims for invasion of privacy and

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is actionable under tort law.").

27. *See* Richard A. Epstein, *A Theory of Strict Liability*, 2 J. LEGAL STUD. 151, 189 (1973) ("[T]he rules of liability should be based upon the harm in fact caused and not upon any subsequent determination of the reasonableness of the defendant's conduct.").

28. *See* Burns Philp Food, Inc. v. Cavalea Cont'l Freight, Inc., 135 F.3d 526, 529 (7th Cir. 1998) (Easterbrook, J.) (observing that under Illinois law the tort of trespass has a strict liability component, in that a person who intends to make contact with a particular piece of land commits a trespass if that land happens to be owned by someone else, even if the trespasser has no reason to know that the land is in fact owned by someone else).

29. *See, e.g.*, Walter v. Wal-Mart Stores, Inc., 748 A.2d 961, 964, 967–68 (Me. 2000) (upholding entry of judgment as a matter of law and a $550,000 verdict against Wal-Mart for a customer who was injured by an employee's accidental substitution of one prescription drug for another, which resulted in part from his failure to abide by company protocols for checking prescriptions).

30. *See, e.g.*, Helsel v. Noellsch, 107 S.W.3d 231, 231 (Mo. 2003) (en banc) (abolishing the tort of alienation of affections).

31. *See* JOHN C. P. GOLDBERG, ANTHONY J. SEBOK & BENJAMIN C. ZIPURSKY, TORT LAW: RESPONSIBILITIES AND REDRESS 325–40, 356–74, 659–80, 686–702 (2004) (excerpting and discussing cases in which courts recognize rights of action that permit victims to seek redress from actors whose statutory violations cause injuries to them).

intentional infliction of emotional distress.[32]

These brief observations suggest that a conception of tort law as private law should not be mistaken as a godsend for the National Manufacturer's Association. Adherents of a wrongs-based conception could, I believe, have endorsed mid-twentieth-century judges' recognition of the new cause of action for strict products liability, at least on some versions of it.[33] Likewise, they can and no doubt will identify and endorse new causes of action in years to come.

These same observations also raise a set of jurisprudential questions that may be of interest to members of this group. It goes almost without saying that one of the Federalist Society's overarching ambitions has been to articulate an appropriately constrained conception of the judicial role, particularly with respect to the adjudication of constitutional cases. The notion is that judges ought to adopt an interpretive methodology that will tend to reduce the influence of their "subjective" political preferences by tethering their decisions to "objective" criteria, such as the "plain words" of the U.S. Constitution and statutes, as well as "facts" about the intentions or understandings of the Framers and legislatures.[34] Such an approach is sometimes described as "formalist," in opposition to more free-wheeling approaches. What happens when these sorts of formalist commitments are applied to an area such as tort law? Do they translate into a rejection of the sort of flexibility I have associated with a wrongs-based view, or might they provide a reason to endorse such a view?

My view is that a private-law, wrongs-based conception of tort law actually embodies a commitment to a form of judicial "restraint," yet does not do so by means of a commitment to the particular formalist interpretive methodologies just mentioned. As was suggested by the discussion of *Campbell*, a private law vision of tort offers a specific conception of what judges ought to be doing (and what they ought not to be doing) in resolving the legal questions that arise in a tort suit. Their job, it suggests, is not to use the occasion of ordinary tort

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32. *See, e.g.*, Hinish v. Meier & Frank Co., 113 P.2d 438, 448 (Or. 1941) (recognizing the actionability of invasion of privacy); Atlanta Hub Co. v. Jones, 171 S.E. 470, 472 (Ga. App. 1933) (upholding a debtor's right to recover damages for emotional distress intentionally inflicted by a creditor who showed her a handgun while demanding payment).

33. *See, e.g.*, Greenman v. Yuba Power Prods., Inc., 377 P.2d 897, 900 (Cal. 1963) (upholding strict product liability against power tool manufacturer without proof of negligence).

34. *See, e.g.*, Raoul Berger, *Originalist Theories of Constitutional Interpretation*, 73 CORNELL L. REV. 350, 353 (1988).

litigation to issue public safety regulations, or set up ad hoc schemes of disaster relief. Instead, their job is to determine—usually in conjunction with a jury—whether a given actor (or set of actors) has committed a legal wrong against a putative victim (or victims) and, if so, to provide an appropriate remedy. The point is not that judges ought to be indifferent to considerations of public welfare in adjudicating the issues of wrong or remedy; often a good judge will take those sorts of consideration into account in a close case when gauging whether a defendant can be said to have committed a wrong against a victim, or in identifying the sort of remedy that might be appropriately provided. But giving consideration to public policy in the course of assessing whether a wrong has been done, or a remedy is to be ordered, is a far cry from supposing that the "real" question before a court in a tort case is whether, all things considered, it would serve the public interest to have *D* pay some money to *P*. Again, the Utah courts might have correctly concluded that the imposition of a $145 million fine on State Farm would serve the public interest. But that question was not the question for them to be entertaining.

By offering a narrower self-conception for judges presiding over tort cases than do public law conceptions, a private law account of tort carries with it a built-in commitment to a certain kind of judicial restraint. Yet, as suggested above, this sort of restraint is not achieved through the deployment of methodologies such as textualism or originalism. Quite the opposite, the wrongs-based view has long given judges leeway to identify new wrongs or new iterations of old wrongs in light of changes in other areas of law, as well as economic, technological, demographic, and sociological changes. In sum, the restraint associated with the embrace of a private law view of tort will reside in judicial acceptance of a particular understanding of what tort law aims to do, and a corresponding willingness to treat the key concepts of tort doctrine—injury, cause, unreasonableness, duty, et al.—as instantiations of that aim, rather than mere empty labels that provide judges with opportunities to make policy.[35] My hunch is that, were they to consider the matter, modern-day Federalists might find this sort of "pragmatic conceptualism"[36] quite consistent with their

35. *See* John C. P. Goldberg & Benjamin C. Zipursky, *The* Restatement (Third) *and the Place of Duty in Negligence Law*, 54 VAND. L. REV. 657, 732–36 (2001) (discussing the advantages of a non-concept-skeptical approach to negligence and the drawbacks of the dominant skeptical approach).

36. Benjamin C. Zipursky, *Pragmatic Conceptualism*, 6 LEGAL THEORY 457, 457–59 (2000). Needless to say, one might object that a "mere" conception cannot constrain decisionmaking. Yet one might just as readily—if not more readily—doubt the ability of

commitment to a notion of judicial restraint.

CONCLUSION

Suppose that the idea of tort law as private law proves attractive to at least some members of this group. Are there any other obstacles to their endorsing it? Some scholars, including Professor Priest in his panel remarks, offer a surprising objection: their view is that it is too late to do so.[37] The horse—the public law conception of torts—is out of the barn and now must be destroyed. But even if they are right about the problem, why is the right response to shoot the poor creature? Why not instead coax it back into the barn?

The supposition seems to be that American law is fated to endorse a full-blown public law view of tort law. Yet there was a time not too long ago when American lawyers took for granted a wrongs-based conception of tort. It was only in the early- to mid-twentieth century that the public law vision gained dominance through the works of scholars understandably enthralled with the reformist potential of Holmesian skepticism and Legal Realism.[38] Today their views are orthodoxy; it is thanks to them that lawyers are trained to regard tort law as public law. But, as this potted history suggests, orthodoxies come and go. Moreover, as decisions like *Campbell* suggest, the pull of private law remains strong. Dean Leon Green once famously described tort law as public law in disguise.[39] Today, about a half-century later, the disguise has been dropped: every year in classrooms

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printed words or historical data to constrain decisionmaking. In short, anyone who is attracted to textualism or originalism is estopped from asserting this sort of objection against conceptualism.

37. Professor George Priest, Should Tort Law be a Form of Regulatory Law?: Remarks at the Federalist Society Student Symposium (Feb. 20, 2004) (transcript on file with the Harvard Journal of Law & Public Policy).

38. *See* John C. P. Goldberg, *Unloved: Tort in the Modern Legal Academy*, 55 VAND. L. REV. 1501, 1504–12 (2002) (briefly rehearsing this intellectual history).

39. Leon Green, *Tort Law Public Law in Disguise*, 38 TEX. L. REV. 1, 257 (1959-1960).

around the country, law students are taught that tort law is public law because it has to be.

Yet our lawyerly intuitions—indeed, even the intuitions of the most public-law-oriented Court in our judicial system—tell us otherwise. It is time to listen to those instincts. To gain a genuinely realistic sense of what tort law actually does, what it can do, and what it ought to do, we must dispense with the notion that tort law ought to be public regulatory law because that is the only thing that it can be. It is time to recognize that tort law, as it functions today, is private law in disguise.