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Articles

Of Sovereignty and Federalism

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Victims of government-sponsored lawlessness have come to dread the word "federalism." Whether emblazoned on the simple banner of "Our Federalism"[1] or invoked in some grander phrase,[2] the word is now regularly deployed to thwart full remedies for violations of constitutional rights. Consider, for example, the Burger Court. Rallying under flags of federalism, the Justices pushed back remedies for segregation in public schools,[3] denied relief to citizens threatened by racially discriminatory police brutality,[4] cut back federal habeas corpus for state prisoners convicted

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This essay is dedicated to the memory of my teacher, colleague, and friend, Robert M. Cover.

1. *See, e.g.*, Younger v. Harris, 401 U.S. 37, 44 (1971).

2. One of the Supreme Court's favorite formulations trumpets "principles of equity, comity, and federalism." *See, e.g.*, City of Los Angeles v. Lyons, 461 U.S. 95, 112 (1983); Rizzo v. Goode, 423 U.S. 362, 379 (1976).

3. *See, e.g.*, Milliken v. Bradley, 418 U.S. 717, 741–42 (1974) (invoking "local autonomy" and citing federalism principles of San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1, 50 (1973)).

4. *See, e.g.*, *Lyons*, 461 U.S. at 112; *Rizzo*, 423 U.S. at 379–80; *cf.* O'Shea v. Littleton, 414 U.S. 488, 499 (1974) (using "federalism" to deny relief to citizen threatened by racially discriminatory administration of criminal justice).

in tainted trials,[5] and forced lower federal courts to dismiss a broad range of suits challenging unconstitutional state conduct.[6]

So too, "sovereignty" has become an oppressive concept in our courts. A state government that orders or allows its officials to violate citizens' federal constitutional rights can invoke "sovereign" immunity from all liability—even if such immunity means that the state's wrongdoing will go partially or wholly unremedied.[7] When the national government invades constitutionally protected zones, "sovereign" immunity is once again wheeled out to defeat the remedial imperative.[8]

To be sure, our Constitution does embody structural principles of federalism and sovereignty. Yet that same document also guarantees certain fundamental individual rights against government. Is the Constitution therefore divided against itself? Is the way in which it constitutes political bodies at war with the legal rights that it constitutionalizes?

In this essay, I hope to offer a neo-Federalist answer—one that allows us to see how the Constitution's political structure of federalism and sovereignty is designed to protect, not defeat, its legal substance of individual rights.[9] I seek to counter the Supreme Court's version of federalism and

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5. *See, e.g.*, Engle v. Isaac, 456 U.S. 107, 128 (1982).

6. *See, e.g.*, Trainor v. Hernandez, 431 U.S. 434 (1977); Juidice v. Vail, 430 U.S. 327 (1977); Hicks v. Miranda, 422 U.S. 332 (1975); Huffman v. Pursue, Ltd., 420 U.S. 592 (1975); Samuels v. Mackell, 401 U.S. 66 (1971); Younger v. Harris, 401 U.S. 37 (1971).

The Court also invoked "federalism" to excuse crabbed definitions of individual constitutional rights against states. *See, e.g., Rodriguez*, 411 U.S. at 44, 50; *infra* note 252. This essay, however, focuses on the implications of federalism for *remedies* for admitted violations of constitutional rights.

7. *See, e.g.*, Edelman v. Jordan, 415 U.S. 651, 663-69 (1974); Hans v. Louisiana, 134 U.S. 1 (1890); Louisiana v. Jumel, 107 U.S. 711 (1883).

8. *See, e.g.*, Larson v. Domestic & Foreign Commerce Corp., 337 U.S. 682, 691 n.11 (1949).

9. I use the term "neo-Federalist" for three reasons. First, the term highlights the emphasis I place in my attempts to explicate the Constitution on *The Federalist* and other writings of Federalists like Alexander Hamilton, James Madison, and James Wilson. My neo-Federalism, however, sharply contrasts with the new federalism championed by the new Chief Justice. While purporting to follow the original intent of the framers of the Constitution (the Federalists), William Rehnquist has worked to implement a vision far more congenial to those who *opposed* the Constitution (the so-called Anti-Federalists). *See* Powell, *The Compleat Jeffersonian: Justice Rehnquist and Federalism*, 91 YALE L.J. 1317 (1982). The irony of the Chief Justice's rhetoric is enriched by the fact that the first "Federalists" were themselves arguably guilty of a similar rhetorical sleight of mind in 1787. While purporting to follow pure "federal" principles (hence their self-description), Hamilton *et al.* worked to implement a vision with strong "national" (in contradistinction to "federal") elements: They scrapped a pure federal league (the Articles of Confederation) for a Constitution founded on the sovereignty of a national People. *See infra* text accompanying notes 91-170.

Second, the neo-Federalist label flags the fact that I am reading Federalist writings at a distance of two centuries and through a lens colored by intervening historical events (such as the Civil War, Reconstruction, and the civil rights movement) and current schools of legal thought (such as legal process and law and economics). Neo-Federalism attempts to offer a *useable* past—a set of Federalist doctrines in harmony with post-Federalist developments and the realities of twentieth-century life and law.

Finally, the neo-Federalist tag connects this essay to an earlier essay, Amar, *A Neo-Federalist View of Article III: Separating the Two Tiers of Federal Jurisdiction*, 65 B.U.L. REV. 205 (1985). Both works are part of a larger project consisting of a series of neo-Federalist essays on the structure of the Constitution.

sovereignty with the framers' version—to replace "Our Federalism" with their federalism, and government sovereignty with popular sovereignty.

Section I of this essay revives the Federalist ideas that true sovereignty in our system lies only in the People of the United States, and that all governments are thus necessarily limited. These ideas pervade the Constitution and inform its structure of federalism. In the martial language of the eighteenth century, each limited government, state and national, can serve as a "sentinel" to "check" the other's "encroachments" on the constitutional rights reserved by the sovereign People.[10] Guided by emerging principles of agency law and organization theory, the Federalists consciously designed a dual-agency governance structure in which each set of government agents would have incentives to monitor and enforce the other's compliance with the corporate charter established by the People of America.[11]

Some of the terrain explored in Section I should be familiar ground to students of constitutional law today. Indeed, it is precisely the familiarity of that section's basic ideas that sharpens my neo-Federalist critique of current legal ideas in subsequent sections of this essay. Although judges and scholars often chant the mottoes of popular sovereignty and limited government, they have developed specific legal doctrines and thought patterns that misapply these basic ideas. In Sections II and III, I examine two areas of misapplication, involving governmental immunities and constitutional remedies.

In Section II, I argue that no government entity can enjoy plenary "sovereign" immunity from a suit alleging a violation of constitutional right. "We the People of the United States," through the Constitution, have delegated limited "sovereign" powers to various organs of government; but whenever a government entity transgresses the limits of its delegation by acting ultra vires, it ceases to act in the name of the sovereign, and surrenders any derivative "sovereign" immunity it might otherwise possess. Simply put, governments have neither "sovereignty" nor "immunity" to violate the Constitution. Whenever they do act unconstitutionally, they must in some way undo the violation by ensuring that victims are made whole. In many cases, only governmental liability can provide this assurance.[12]

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10. *See, e.g.*, THE FEDERALIST No. 51, at 322–23 (J. Madison) (C. Rossiter ed. 1961) [hereinafter all citations to *The Federalist* are to this edition].

11. Contemporary organization theory's emphasis on both agent incentives within organizations and competition among organizations meshes well with the Federalists' own interest in structuring incentives to translate private interest into public welfare. *See* O. WILLIAMSON, MARKETS AND HIERARCHIES (1975); Coase, *The Nature of the Firm*, 4 ECONOMICA 386 (1937); Fama, *Agency Problems and the Theory of the Firm*, 88 J. POL. ECON. 288 (1980); Jensen & Meckling, *Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure*, 3 J. FIN. ECON. 305 (1976).

12. Where government liability is not necessary to guarantee victims full redress (because, for example, other remedies against individual officers will fully compensate victims), the government

In Section III, I argue that a healthy competition among limited governments for the hearts of the American People can protect popular sovereignty and spur a race to the high ground of constitutional remedies. Each government can act as a remedial cavalry of sorts, eager to win public honor by riding to the rescue of citizens victimized by another government's misconduct. This argument both invokes and inverts conventional thinking about 42 U.S.C. section 1983, which provides a federal cause of action—a legal "sword"[13]—to victims of unconstitutional state conduct.[14] We are quick to see the many ways in which the national government can bid for its citizens' political affections by aiding those whose constitutional rights have been, or are about to be, invaded by persons acting under color of state law. Yet we often fail to note that federalism cuts both ways—that *states* can gain political goodwill by arming their citizens with remedies for constitutional wrongs threatened or perpetrated by *federal* officials. Perhaps this failure stems from the fact that no state has ever adopted a general "converse-1983"[15] cause of action expressly allowing suit against any federal agent who acts unconstitutionally. Yet state "private law" protections of liberty and property have historically furnished countless occasions for vindicating complementary constitutional "public law" protections of liberty and property against the federal government. For example, until the 1971 case of *Bivens v. Six Unknown Federal Agents*,[16] the only general damage remedy for a citizen victimized by federal violations of the Fourth Amendment derived from state trespass law. Moreover, if a single state were tomorrow to adopt a suitably worded converse-1983 statute—and the federal judiciary were to uphold the statute (as it should, I shall argue)—then competitive pressures among states might well goad other states to join the remedial campaign and enact like statutes. This interstate dynamic bears some similarity to the "race to the top" posited by many corporate law scholars.[17]

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may choose to immunize itself. *See infra* text accompanying note 262.

13. *Cf.* Dellinger, *Of Rights and Remedies: The Constitution as a Sword*, 85 HARV. L. REV. 1532 (1972) (arguing that courts should infer federal causes of action directly from Constitution).

14. 42 U.S.C. § 1983 (1982) reads:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

15. I use the term "converse-1983" to refer to any statute that would invert § 1983 by providing a general state-law-created cause of action against persons acting unconstitutionally under color of federal law. *See infra* text accompanying notes 343-60.

16. 403 U.S. 388 (1971).

17. *See, e.g.*, R. WINTER, GOVERNMENT AND THE CORPORATION (1978); Easterbrook & Fischel, *Antitrust and the Economics of Federalism*, 26 J.L. & ECON. 23 (1983); Romano, *The State Competition Debate in Corporate Law*, 8 CARDOZO L. REV. 709 (1987); Romano, *Law as a Product: Some Pieces of the Incorporation Puzzle*, 1 J.L. ECON. & ORG. 225 (1985); Winter, *State Law,*

Properly understood, federalism and sovereignty need not stand as cruel bars to full redress for unconstitutional conduct. Rather, they were originally understood to be, often have been, and can become once again, the very tools to right government wrongs. If federalism and sovereignty seem perverse today, it is only because our jurisprudence has perverted them, clumsily attempting to hammer legal devices for abused citizens into doctrinal defenses for abusive governments.

I. The Sovereignty of the People

A full constitutional account of sovereignty and federalism calls for two complementary inquiries. One inquiry is rather formal: We must examine the compact set of words that we call the Constitution. The other inquiry is broader: We must come to terms with some of the great historical events and symbols lying beyond and behind the words themselves—events and symbols that constitute the shared historical legacy of twentieth century Americans, and that have constituted us as the People that we are today.[18] In particular, we must confront the momentous constitutional issues at the heart of the American Revolution and the Civil War. Each of these epic military and political struggles can be seen as part of a constitutional debate about sovereignty and federalism.

In the Revolution and its wake, constitutional debate focused on whether sovereignty resided in government or in the People, and on how federalism should operate within Empire and Confederation. The Federalist Constitution responded to this debate with its own distinct vision of sovereignty and federalism. Yet that vision did not go unchallenged, and ratification did not end constitutional debate. Instead, extreme states' rights theorists, intellectual heirs of Anti-Federalist opponents of the Constitution, waged an increasingly fierce debate with the keepers of the Federalist flame over constitutional first principles. That debate, culminating in the Civil War, focused on whether sovereignty resided in the People of each state or in the People of the United States as a whole, and on how federalism should operate within Union.[19] The struggle ended with a re-

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Shareholder Protection, and the Theory of the Corporation, 6 J. Legal Stud. 251 (1977).

18. *Cf.* Cover, *The Supreme Court, 1982 Term—Foreword:* Nomos *and Narrative*, 97 Harv. L. Rev. 4, 4 (1983) ("No set of legal institutions or prescriptions exists apart from the narratives that locate it and give it meaning. For every constitution there is an epic . . . .").

19. Of course, in referring to the "Civil War" and not the "War Between the States," I am implicitly affirming the correctness of the nationalist view that sovereignty resided in the People of the United States as a whole. *See infra* text accompanying notes 91–170. If the People of each state were sovereign, the War would be most appropriately viewed as an international dispute between sovereigns, and not an internal (civil) war (or, more precisely still, a rebellion). Thus, the dispute about the dispute's label is microcosmic of one of the main constitutional issues underlying the dispute itself. *See generally* J. Randall, Constitutional Problems Under Lincoln 48–73 (rev. ed. 1963) ("The Legal Nature of the Civil War"). *But see* A. Stephens, A Constitutional View of the Late

affirmation and strengthening of the Federalist vision in the Reconstruction Amendments.

A. *The Revolutionary Debate*[20]

Ideas mattered to our revolutionary forebears. Colonial leaders took up arms in 1776 not simply because they found Parliament's actual policies during the 1760's and 1770's intolerable in fact, but also because—as a matter of principle—they could not accept the British idea that Parliament had legitimate authority to do anything it wanted to the colonies. Even worse than what Parliament had done in the past was what Britons claimed it could in theory lawfully do in the future.[21] In the war of ideas between Britain and America that preceded and inspired the military struggle over independence—an intellectual war whose battle lines were drawn over concepts of "*imperium*" and "empire"—a distinctly American vision of sovereignty and federalism began to crystallize.

1. *British Ideas*

The conventional British position understood "sovereignty" as that indivisible, final, and unlimited power that necessarily had to exist somewhere in every political society. A single nation could not operate with two sovereigns any more than a single person could operate with two heads; some single supreme political will had to prevail, and the only limitations on that sovereign will were those that the sovereign itself voluntarily chose to observe. To try to divide or limit sovereignty in any way was to create the "political monster" or "hydra" of "*imperium in imperio*"—"the greatest of all political solecisms."[22]

But where did this sovereignty reside in Britain? In the crown, of

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WAR BETWEEN THE STATES (Philadelphia 1868) (account of Vice President and chief constitutional theoretician of so-called Confederate States of America).

20. The history of the revolutionary and Confederation periods presented below is necessarily schematic and stylized. For a more nuanced and complete account, see B. BAILYN, THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION (1967), and G. WOOD, THE CREATION OF THE AMERICAN REPUBLIC, 1776-1787 (1969), on whom I have relied heavily.

21. Also, many colonists feared that any failure to assert their rights could be deemed a constructive waiver whose precedential force in a system governed by an unwritten constitution might enlarge future governmental power by a sort of adverse possession. *See* 1 J. STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 170 n.2 (1833) (quoting Edmund Burke); J. TAYLOR, CONSTRUCTION CONSTRUED 54 (Richmond 1820); Grey, *Origins of the Unwritten Constitution: Fundamental Law in American Thought*, 30 STAN. L. REV. 843, 875-79 (1978). The Boston Tea Party, for example, was held in response to a nominal tax on tea that had recently been *lowered* by the British, in what the outraged Bostonians viewed as a sly attempt to acclimate colonists to the principle of Parliament's plenary power of taxation. J. BLUM, E. MORGAN, W. ROSE, A. SCHLESINGER, K. STAMPP & C. WOODWARD, THE NATIONAL EXPERIENCE 94 (1973).

22. *See, e.g.*, THE FEDERALIST No. 15, at 108 (A. Hamilton); *id.* No. 44, at 287 (J. Madison); B. BAILYN, *supra* note 20, at 198-229; G. WILLS, EXPLAINING AMERICA: THE FEDERALIST 162-75 (1981); G. WOOD, *supra* note 20, at 344-54.

course, argued royal absolutists in the early seventeenth century.[23] God Almighty—the indivisible, unlimited sovereign of the universe—had vested indivisible, unlimited temporal authority in the King, God's sovereign agent on earth.[24] After the English Civil War of the 1640's and the Glorious Revolution of 1688, however, few in England embraced royal supremacy. According to the new understanding, ultimate political authority derived not from the divine right of kings, but from the consent of the governed. Legitimacy flowed up from the People, not down directly from God.[25] Yet the unorganized polity at large could not effectively wield sovereign power on a day-to-day basis in fashioning and administering laws. At best, the People could assert their power in those rare meta-legal moments, like the Glorious Revolution itself, when one monarch was ousted and another consented to. In ordinary times, then, where did effective sovereignty lie?

By the eighteenth century, the answer in Britain seemed clear: Sovereignty resided in the King-in-Parliament, that indivisible entity consisting of King, Lords, and Commons. Since all three "estates," or social orders, of the realm—the one, the few, and the many—were "virtually represented," the King-in-Parliament became the virtual embodiment of the abstract sovereignty of the People.[26]

For Britons, the beauty of the system lay in its perfect symmetry and balance. Although the theoretical power of the King-in-Parliament was necessarily boundless—as Samuel Johnson put it, "In sovereignty, there are no gradations. . . . [T]here can be no limited Government"[27]—in

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23. Robert Filmer was a leading exponent of this view. *See* B. BAILYN, *supra* note 20, at 199; G. WOOD, *supra* note 20, at 346. The work of the sixteenth century French jurist Jean Bodin is also of interest here. *See* J. BODIN, THE SIX BOOKES OF A COMMONWEALE (K. McRae ed. 1962).

24. Here we see the theological roots of both the absolutist definition of sovereignty, and its royal location. Although medieval scholastics like Aquinas and Anselm had more modest views of secular sovereignty than Bodin, Anselm's famous ontological proof of the existence of God and Aquinas' emphasis on the necessary omnipotence of God anticipate Bodin.

25. Again, however, theological arguments—in this case based on Puritan notions of the equality of all individuals before God—appear to have influenced sovereignty theory. *See* A. MCLAUGHLIN, THE FOUNDATIONS OF AMERICAN CONSTITUTIONALISM 22 (1961). Thomas Hobbes appears in this light as a transitional figure, reaching conclusions that resemble royal absolutism, but deriving those conclusions from social contract and not divine right. *See* T. HOBBES, LEVIATHAN (London 1651). John Locke's work has a more modern cast: Beginning with contractarian premises similar to Hobbes', Locke repudiates monarchial absolutism and champions parliamentary supremacy and popular sovereignty. *See* J. LOCKE, TWO TREATISES OF GOVERNMENT (London 1689).

26. Here too, theology may have helped shape sovereignty thinking: Consider the trinitarian doctrine of three-in-one indivisibility and the eucharistic notions of the wafer's actually or symbolically embodying Christ.

27. S. JOHNSON, *Taxation No Tyranny*, in POLITICAL WRITINGS 401, 423 (D. Green ed. 1977) (Yale Ed. of the Works of Samuel Johnson Vol. X). Sir William Blackstone's famous *Commentaries* also featured a powerful exposition of parliamentary sovereignty. In every government, "there is and must be . . . a supreme, irresistible, absolute, uncontrolled authority, in which the *jura summi imperii*, or the rights of sovereignty reside." 1 W. BLACKSTONE, COMMENTARIES *49. Since the "sovereign and uncontrollable authority in the making, confirming, enlarging, restraining, abrogating, re-

practice the balance of competing forces within the mixed system of government would preserve liberty. No law could be enacted without the approval of all three orders of society, and thus no one estate could tyrannize the others. The excellence of the British Constitution lay in the way in which it *constituted* the King-in-Parliament; by blending all three classical forms of government—monarchy, aristocracy, and democracy—the British Constitution achieved an Aristotelian "mean of means" that would avert the degeneration to which each pure "unmixed" form of government was vulnerable.[28]

2. *The American Response*

Rather different ideas were brewing on the other side of the Atlantic. During the 1760's and 1770's, many colonial leaders argued that various parliamentary enactments were void because they violated higher principles of the British Constitution reflected in revered texts like Magna Charta, and in fundamental unwritten and common law traditions. These colonists came to define the British Constitution not merely as the structure and arrangement of governmental institutions, but also as a set of substantive legal principles limiting the legitimate exercise of government power.[29] The British found such colonial notions curious at best. Since the King-in-Parliament was itself the virtual embodiment of the British Constitution and the British People, how could any principle, however venerable, supersede that body's sovereign will? Talk of "void" parliamentary enactments was nonsense—or treason.[30]

a. *The Corporate Analogy*

The colonial experience during the seventeenth and eighteenth centuries had prepared the ground for revolutionary ideas. In many colonies, written "constitutions" prescribed substantive limits on the powers of the colonial government.[31] Several of these colonial "constitutions" had originally

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pealing, reviving, and expounding of laws" resided in Parliament, *id.* at *160, that body could "do everything that is not naturally impossible. . . . [W]hat the parliament doth, no authority upon earth can undo." *Id.* at *161.

28. Without the competing tugs of aristocracy and democracy, kingship would easily slide into monarchial tyranny; so too, if left unchecked, aristocracy would decay into oligarchy; and democracy into mob rule. *See* B. BAILYN, *supra* note 20, at 66-93, 175-229; G. WILLS, *supra* note 22, at 97-107; G. WOOD, *supra* note 20, at 18-28, 197-206, 344-54.

29. *See* B. BAILYN, *supra* note 20, at 175-98; Grey, *supra* note 21.

30. In the words of the 1766 Declaratory Act that grated on colonial ears, Parliament "hath, and of right ought to have, full power and authority to make laws and statutes of sufficient force and validity to bind the colonies and people of *America* . . . in all cases whatsoever." An Act for the Better Securing the Dependency of His Majesty's Dominions in America Upon the Crown and Parliament of Great Britain, 1766, 6 Geo. 3, ch. 12.

31. *See* Grey, *supra* note 21, at 866 n.99.

been designed as corporate charters. The original Massachusetts Bay Company Charter, for example, provided for a "governor," a "deputy governor," eighteen "assistants," and regular "general court[s]" of freemen of the company—corresponding to what we would today refer to as a "private" corporation's president, vice-president, board of directors, and shareholder meetings, respectively.[32] The colonists generally came to understand these corporate charters as "constitutions" in the modern American sense—foundational political instruments constituting and limiting governmental power. The people of Massachusetts saw their charter not simply as prescribing the governance structure of a profit-seeking entity, but as establishing the framework of colonial mixed government, blending powers of the one (the "governor"), the few (the "assistants") and the many (the "freemen").[33]

Ordinary language eased this assimilation. Like Magna Charta itself, the Massachusetts document was a "great *charter*"—it was a written "compact" or "contract" among early inhabitants creating the "corporate" entity of the colonial "*body* politic." Contemporary corporate law also emphasized the basic continuity between "municipal" and "private" corporations, entities that might today be seen as sharply distinct.[34] No general incorporation laws existed then. Each corporation came into being only by special act of the sovereign; each corporate charter—whether incorporating a profit-seeking joint venture, a charitable organization,[35] a municipality, or a colonial government—was a tailor-made and limited grant of special sovereign privileges. As James Iredell wrote in 1793:

> The word "corporations," in its largest sense, has a more extensive meaning than people generally are aware of. Any body politic (sole or aggregate) whether its power be restricted or transcendent, is in this sense "a corporation." . . . In this extensive sense, not only each State singly, but even the *United States* may without impropriety be termed "corporations."[36]

The analogy between corporate charters and political constitutions had

32. *See* A. McLAUGHLIN, *supra* note 25, at 38-65.

33. *See* B. BAILYN, *supra* note 20, at 190. In Connecticut, the original corporate charter issued by the Crown in 1662 served as the state constitution throughout the Revolution and until 1818. *See* G. WOOD, *supra* note 20, at 276-78. Rhode Island's colonial corporate charter lasted even longer—until Dorr's Rebellion in the 1840's. *See* Luther v. Borden, 48 U.S. (7 How.) 1, 1 (1849).

34. *See* L. FRIEDMAN, A HISTORY OF AMERICAN LAW 166-69 (1973).

35. In addition to the established Anglican Church incorporated by law, many Puritan churches had "self-incorporated"—formed themselves into *bodies* of worship—by a mutual compact among individual Christians covenanting with each other and with God. This blending of covenant theology and social contract theory could not help but influence political ideology in the city on the hill. *See* A. McLAUGHLIN, *supra* note 25, 13-85.

36. Chisholm v. Georgia, 2 U.S. (2 Dall.) 419, 447 (1793) (opinion of Iredell, J.).

profound implications. Not all of these implications were universally perceived by colonial leaders, even as late as 1776. But slowly, subtly, the corporate analogy seeped deep into the thought patterns of the men who would eventually label themselves Federalists in 1787.

First, the analogy suggested that government power could be strictly bounded by its "charter." Just as corporate officials lacked lawful authority to go beyond the scope of their corporate charter, so conduct by government officials that transgressed substantive "constitutional" limitations was null and void. Herein lay fertile seeds of limited government—of the American conception of a constitution as a fence around, and not merely the frame of, government.[37]

Second, the fence could be maintained by judges following an emerging body of agency law doctrine. Like corporate officers, government officials were merely agents of principals who had prescribed limits on the agents' power in the founding charter. Judges could enforce these limits by denying legal effect to the constitutionally unauthorized acts of government agents. Thus were laid the foundations of judicial review. Note how agency principles carry the bulk of the argument in the key passages of *The Federalist* No. 78's classic defense of judicial review:

> There is no position which depends on clearer principles than that every act of a delegated authority, contrary to the tenor of the commission under which it is exercised, is void. No legislative act, therefore, contrary to the Constitution, can be valid. To deny this would be to affirm that the deputy is greater than his principal; that the servant is above his master; that the representatives of the people are superior to the people themselves; that men acting by virtue of powers may do not only what their powers do not authorize, but what they forbid. . . . [T]he Constitution ought to be preferred to the statute, the intention of the people to the intention of their agents.[38]

Finally, the corporate analogy helped to revolutionize the concept of "sovereignty" itself. Colonial governments undeniably fashioned and applied legal rules that directly regulated day-to-day life in the colonies. In this sense, they seemed to wield sovereign power. Yet the very notion of sovereignty as then understood in Britain suggested that sovereignty was unlimited. How, then, could the power of colonial governments be legally limited if the sovereign was by definition above the law? The ultimate American answer, in part, lay in a radical redefinition of *governmental*

37. *See* A. McLAUGHLIN, *supra* note 25, at 38–65, 104–28.

38. THE FEDERALIST No. 78, at 467 (A. Hamilton); *see also* R. BERGER, CONGRESS V. THE SUPREME COURT 14–16, 170–76 (1969) (noting agency law roots of judicial review); A. McLAUGHLIN, *supra* note 25, at 104–28 (similar).

"sovereignty." Just as a corporation could be delegated limited sovereign privileges by the King-in-Parliament,[39] so governments could be delegated limited powers to govern. Within the limitations of their charters, governments could be sovereign, but that sovereignty could be bounded by the terms of the delegation itself.

Yet Americans' redefinition of governmental sovereignty was only part of the answer, for they continued to subscribe to the British view that the source of delegated power—the *true* sovereign—must necessarily enjoy the essential attributes of indivisible, final, and unlimited authority.[40] Who, then, was the ultimate unlimited sovereign whose limited delegations both created and bounded government power? The American answer was at once traditional and arresting: True sovereignty resided in the People themselves. It was traditional, because one strand of Lockean thought had long recognized the inalienable (i.e., non-delegable) right of the People to alter or abolish their government through the exercise of the transcendent right of revolution—a right that the British People had exercised in the seventeenth century, and that Americans invoked in 1776.[41] It was arresting, because eighteenth-century British theorists like William Blackstone had blunted the possible radical implications of Locke by insisting that the King-in-Parliament—the government—virtually embodied the sovereignty of the People.[42] In dramatic contrast, the American understanding drove

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39. Or, it seems, by the King alone via the royal prerogative. *See* Chisholm v. Georgia, 2 U.S. (2 Dall.) at 448 (opinion of Iredell, J.); L. FRIEDMAN, *supra* note 34, at 166 n.30.

40. *See, e.g.*, THE FEDERALIST No. 15, at 108 (A. Hamilton); 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 34, 169, 172, 188, 287 (M. Farrand rev. ed. 1937) [hereinafter M. Farrand] (remarks of Gouverneur Morris, Charles Pinckney, James Wilson, William Paterson, and Alexander Hamilton); 2 *id.* at 346-47 (remarks of William Johnson); 1 J. DAVIS, THE RISE AND FALL OF THE CONFEDERATE GOVERNMENT 99-100, 141-56 (1958). *But see* THE FEDERALIST No. 39 (J. Madison) (suggesting divisibility of sovereignty); 4 J. MADISON, LETTERS AND OTHER WRITINGS OF JAMES MADISON 61, 293-94, 390-95, 419-20 (Philadelphia 1865) (similar). *See generally* G. WOOD, *supra* note 20 (discussing American ideas about sovereignty between 1776 and 1787).

41. Construed most broadly, such an inalienable right squared perfectly with the orthodox notion that the sovereign, as the source of all law, was necessarily above the law, and could not be bound by law absent ongoing consent. Locke himself, it seems, did not carry his principles to this apparently logical conclusion. Although sovereignty originally resided with the People, Locke suggested that they had to "give [it] up" to government so that day-to-day order could be maintained. The People could only *reclaim* their surrendered sovereignty—by revolution—if government breached faith with the People by "act[ing] contrary to their trust." J. LOCKE, THE SECOND TREATISE OF GOVERNMENT §§ 221, 243 (T. Peardon ed. 1952). In sharp contrast, the Americans came to believe that the People never parted with their ultimate sovereignty. Rather, they delegated certain sovereign powers to various governmental agents, but could revoke those delegations, and reclaim those powers, at any time and for any reason. *See, e.g.*, THE FEDERALIST No. 84, at 512-13 (A. Hamilton); McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 404 (1819); J. DAVIS, *supra* note 40, at 141.

The violent nature of revolution, it appears, induced Locke to limit strictly the legitimate occasions for the exercise of the People's right to revolt. Americans domesticated and defused violent revolution by channelling it into (relatively) peaceful conventions. *See infra* text accompanying notes 146-50. As a result, Americans could expand the People's right to "revolt"—to alter or abolish their government—into a right that could be invoked (by convention) on any occasion at the pleasure of the People.

42. *See* G. WOOD, *supra* note 20, at 344-54; *supra* text accompanying notes 26-28.

an analytic wedge between the government and its People, relocating sovereignty from the former to the latter. Government officials were "representatives," "agents," "delegates," "deputies," and "servants" of the People—but they were not the People themselves, virtually or otherwise. Therefore, government entities were sovereign only in a limited and derivative sense, exercising authority only within the boundaries set by the sovereign People. By thus relocating true sovereignty in the People themselves—"that pure, original fountain of all legitimate authority"[43]—Americans domesticated government power and decisively repudiated British notions of "sovereign" governmental omnipotence.[44]

The relocation of sovereignty from governments to the People raised three knotty and related questions. First, how could the People truly be sovereign given their obvious inability to collectively govern day-to-day affairs? Second, how could governments that lacked ultimate sovereignty legitimately command obedience? Finally, was not the creation of "limited" government a nonsensical attempt to divide necessarily indivisible sovereignty, thereby producing the solecism of *imperium in imperio*? Once again, agency principles furnished Americans with the critical tools of analysis. As sovereign, the People need not wield day-to-day power themselves, but could act through agents on whom they conferred limited powers. Within the sphere of these delegated powers, government agents could legitimately compel obedience in the name of their sovereign principal, but those agents lacked authority to go beyond the scope of their agency. So long as the People at all times retained the ability to revoke or modify their delegations, such agency relationships were in no sense a surrender or division of ultimate sovereignty.[45]

This change in thinking did not occur overnight. Considerable noise, literally and figuratively, punctuated the great constitutional debates be-

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43. THE FEDERALIST No. 22, at 152 (A. Hamilton); *see also id.* No. 49, at 313 (J. Madison) ("the people are the only legitimate fountain of power").

44. In the passionate words of James Wilson:

> Even in almost every nation, which has been denominated free, the state has assumed a supercilious pre-eminence above the people who have formed it: Hence the haughty notions of state independence, state sovereignty and state supremacy. . . . [A]s described by Sir William Blackstone and his followers. . . . the British is a despotic government. It is a Government without a people. In that government, as so described, the sovereignty is possessed by the Parliament: In the Parliament, therefore, the supreme and absolute authority is vested . . . . The King and these three estates together form the great corporation or body politic of the Kingdom. . . . What, then, or where, are the People? Nothing! No where! . . . From legal contemplation they totally disappear!

Chisholm v. Georgia, 2 U.S. (2 Dall.) at 461-62 (opinion of Wilson, J.) (emphasis altered); *see also* J.Q. Adams, Oration on the 4th of July, 1831, *quoted in* 1 J. STORY, *supra* note 21, § 209 n.1 ("It is not true, that there must reside in all governments an absolute, uncontrollable, irresistible, and despotic power; nor is such power in any manner essential to sovereignty. . . . The pretence of . . . [such power] existing in every government somewhere, is incompatible with the first principles of natural right.").

45. *See supra* note 41.

tween 1763 and 1789. Old words took on new meanings, as patriots struggled to build an intellectual framework that would order their thinking, affirm their deepest values, and make sense of the ideological spinning—the ideological revolution[46]—around them. Some, like James Wilson who "[m]ore boldly and fully than anyone else . . . developed the argument that would eventually become the basis of all Federalist thinking"[47] about sovereignty, evolved a careful and precise vocabulary in which government only had "power" but never "sovereignty."[48] Others, like Alexander Hamilton, James Madison, John Marshall, and James Iredell, used different words to the same effect. When they spoke of government as sovereign they meant sovereign in a necessarily limited sense. By definition, government's sovereignty was bounded; government was sovereign within its sphere of delegated power, and powerless beyond.[49]

b. *The State Constitution Experience*

After declaring independence in 1776, each individual colony faced the immediate challenge of forging a new constitutional regime to fill the legal void created by separation from Britain. Unevenly and tentatively at first, but with increasing confidence and clarity, Americans began to put ideas of popular sovereignty into practice by giving concrete legal meaning and institutional substance to the emerging theoretical distinction between the People and their representatives. North Carolina's new constitution, adopted in late 1776, began with a bold declaration of rights limiting the power of state officials. The declaration's opening words are noteworthy yet unsurprising: "[A]ll political power is vested in and derived from the people only."[50] A decade later, only a year before the North Carolina Supreme Court definitively construed the document to provide for judicial

46. *Cf.* G. WILLS, INVENTING AMERICA 51-53 (1979) (discussing etymological roots and eighteenth-century usage of word "revolution").

47. G. WOOD, *supra* note 20, at 530.

48. *See* R. Ross, The Federalists and the Problem of Sovereignty (1984) (unpublished manuscript on file with author).

49. *See, e.g.*, THE FEDERALIST No. 32, at 198 (A. Hamilton); *id.* No. 43, at 279 (J. Madison); *id.* No. 62, at 378 (J. Madison); McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 401, 404-10, 429-30 (1819) (Marshall, C.J.); Chisholm v. Georgia, 2 U.S. (2 Dall.) 419, 435-50 (1793) (opinion of Iredell, J.); Marshall, *A Friend of the Constitution*, in JOHN MARSHALL'S DEFENSE OF *MCCULLOCH V. MARYLAND* 155, 195 (G. Gunther ed. 1969). Given the Federalists' obvious redefinition of the term, their language of governmental "sovereignty" seems wholly innocuous. A century later, however, the Supreme Court began to inject lethal ammunition into this previously unloaded gun by ignoring or misunderstanding the Federalists' redefinition. *See, e.g.*, Hans v. Louisiana, 134 U.S. 1 (1890) (discussed *infra* text accompanying notes 207-08); *cf.* J. DAVIS, *supra* note 40, at 99, 142 (decrying "loose expressions" concerning government "sovereignty").

50. N.C. CONST. of 1776, in 5 F. THORPE, AMERICAN CHARTERS, CONSTITUTIONS AND ORGANIC LAWS: 1492-1908, at 2787 (1909). Note how the assertion that political power continues to be *vested in*, and not just *derived from*, the People goes beyond the Lockean formulation. *See supra* note 41.

review of state legislation, James Iredell underscored his state's rejection of the British parliamentary model:

> It was, of course, to be considered how to impose restrictions on the legislature . . . [to] guard against the abuse of unlimited power, which was not to be trusted, without the most imminent danger, to any man or body of men on earth. We had not only been sickened and disgusted for years with the high and almost impious language from Great Britain, of the omnipotent power of the British parliament, but had severely smarted under its effects. We . . . should have been guilty of . . . the grossest folly, if in the same moment when we spurned at the *insolent despotism* of Great Britain, we had established a *despotic* power among ourselves.[51]

Iredell elaborated this theme in a later speech: "Our government is founded on much nobler principles. The people are known with certainty to have originated it themselves. Those in power are their servants and agents; and the people, without their consent, may new-model their government whenever they think proper . . . ."[52]

In Massachusetts, the ratification process itself dramatized the new American understanding of popular sovereignty. The proposed state constitution of 1778 went down to defeat in a popular referendum in part because of the symbolic point that it had been framed by the legislature—the government—and not by a specially elected constitutional convention of the People themselves.[53] Two years later, a new draft constitution emerged from a special convention and won popular approval. Equally dramatic was the constitution's language: "All power residing originally in the people, and being derived from them, the several magistrates and officers of government, vested with authority, whether legislative, executive or judicial, are their . . . agents, and are at all times accountable to them."[54]

Similar dramas were played out in other states as the former colonists framed new constitutions during the decade after the Declaration.[55] The

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51. R. BERGER, *supra* note 38, at 35 (quoting 1786 address by Iredell on formation of North Carolina constitution).

52. 4 J. ELLIOT, THE DEBATES OF THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 9 (1888).

53. E. MORGAN, THE BIRTH OF THE REPUBLIC 89–90 (1977); *see infra* text accompanying notes 146–50.

54. MASS. CONST. of 1780, in 3 F. THORPE, *supra* note 50, at 1890; *cf.* PA. CONST. of 1776, Declaration of Rights art. IV, in CONVENTIONS OF PENNSYLVANIA 55 (Harrisburg 1825) ("That all power being originally inherent in, and consequently derived from the people; therefore all officers of government . . . are their trustees and servants, and at all times accountable to them."); MD. CONST. of 1776, Declaration of Rights art. II, in 3 F. THORPE, *supra*, at 1686 (similar).

55. The experience in New Hampshire is particularly noteworthy. *See* G. WOOD, *supra* note 20, at 341–42. Consider also Madison's remarks regarding the key distinction between a state's People

details vary from state to state, but it is enough to note here that various local dress rehearsals (for so they appear in retrospect) set the stage for the great act of popular sovereignty that was the framing and ratification of the Federalist Constitution.

B. *The Federalist Constitution*

The constitutional Convention of 1787 drew delegates from twelve states to Philadelphia to ponder anew the fate of the continent. Four main tasks faced the men who met there: creating a strong but limited central government, protecting individual rights against the states, dividing power within the central government, and dividing power between local and central officials. To perform each of these tasks, the Federalists leaned upon their new understanding of the sovereignty of the People. Indeed, this single idea informs every article of the Federalist Constitution, from the Preamble to Article VII.[56] It was thus no happenstance that the Federalists chose to introduce their work with words that ringingly proclaimed the primacy of that new understanding: "We the People of the United States . . . do ordain and establish this Constitution for the United States of America." James Wilson, who as a member of the Philadelphia Committee of Detail himself penned what became the Constitution's famous first three words, later explained:

> To the Constitution of the *United States*, the term SOVEREIGN, is totally unknown. There is but one place where it could have been used with propriety. But, even in that place it would not, perhaps, have comported with the delicacy of those, who ordained and established that Constitution. They might have announced themselves "SOVEREIGN" people of the United Staes [sic]. . . .[57]

1. *Creating Central Authority*

The Federalists' first job was to build a new central government that would be strong yet bounded. Under the discarded British understanding, the task seemed impossible by definition. If the national government were sovereign, how could its powers be limited? If not, how could it enjoy any

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and its government: "[The novelty of] American governments lies *in the total exclusion of the people in their collective capacity*, from any share in [government]," in favor of exclusive reliance on "the principle of representation." THE FEDERALIST No. 63, at 387.

56. *See infra* text accompanying notes 126–70.

57. Chisholm v. Georgia, 2 U.S. (2 Dall.) 419, 454 (1793) (opinion of Wilson, J.) (emphasis omitted). Although his name has unfortunately faded from American constitutional folklore, Wilson's role as a chief architect of the Constitution has long been recognized by historians. *See, e.g.*, M. FARRAND, THE FRAMING OF THE CONSTITUTION OF THE UNITED STATES 197 (1913) ("Second to Madison and almost on a par with him was James Wilson.").

legitimate authority to enforce its will? The Federalists dissolved the dilemma by crafting the Constitution as a set of broad yet bounded delegations of sovereign power from the sovereign People to various agents who would constitute the new central government. The limitations on that new government took the form of both express prohibitions—as in Article I, section 9 and the later Bill of Rights—and finite delegations. By carefully enumerating the powers granted, the framers made clear that the new government would enjoy no other general "sovereign" powers. Under the well-established rule of construction, *expressio unius est exclusio alterius*, the People retained all powers not expressly or impliedly delegated by enumeration—powers they could either give to other government agents in individual states, or withhold from all governments.[58] This structural canon of retained nondelegated powers was later made explicit by the text of the Tenth Amendment.

2. *Limiting State Governments*

The Federalists also worked to forge a strong set of federally enforceable individual rights against states—in Madison's words, to correct "the abuses committed within the individual states . . . by interested or misguided majorities."[59] The "multiplicity," "mutability," and "injustice" of extant state laws constituted a "dreadful class of evils" requiring a federal "remedy."[60] Indeed, Madison wrote Thomas Jefferson that "the evils issuing from these sources contributed more to that uneasiness which produced the Convention, and prepared the Public mind for a general reform, than those which accrued to our national character and interest from the inadequacy of the Confederation to its immediate objects."[61]

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58. *See* THE FEDERALIST No. 41, at 262-63 (J. Madison); *id.* No. 84, at 510-15 (A. Hamilton).

59. These abuses "were among the prominent causes of its [i.e., the Constitution's] adoption, and particularly led to the provision contained in it which prohibits paper emissions and the violations of contracts, and which gives an appellate supremacy to the judicial department of the U.S." 4 M. Farrand, *supra* note 40, at 86-87 (letter from James Madison to unknown party). At the Convention, Madison declared that the federal Constitution should "secure a good internal legislation & administration to the particular States[.] In developing the evils which vitiate the political system of the U.S. it is proper to take into view those which prevail within the States individually as well as those which affect them collectively . . . ." 1 *id.* at 318; *see also id.* at 316 (remarks of J. Madison) (similar); 2 *id.* at 26, 110 (remarks of Gouverneur Morris and Madison) (similar); J. MADISON, *Vices of the Political System*, in 2 THE WRITINGS OF JAMES MADISON 361, 365-69 (G. Hunt ed. 1901) (similar).

60. 1 M. Farrand, *supra* note 40, at 318-19 (remarks of J. Madison). Challenging William Paterson's "New Jersey Plan" to prop up the existing Articles of Confederation instead of redesigning government from the ground up, Madison argued that "[t]he rights of individuals are infringed by many of the state laws—such as issuing paper money, and instituting a mode to discharge debts differing from the form of the contract. Has the Jersey plan any checks to prevent the mischief? Does it in any instance secure internal tranquility?" *Id.* at 327.

61. 5 THE WRITINGS OF JAMES MADISON, *supra* note 59, at 27 (letter to T. Jefferson); *see also* 1 M. Farrand, *supra* note 40, at 134 (remarks of Madison to Roger Sherman) (similar). For further discussion of these and similar statements, see Amar, *supra* note 9, at 247 n.134 and sources cited

Once again, the sovereignty of the People lay at the heart of the Federalist solution. By ratifying the new Constitution, the People themselves could impose limitations on powers previously exercised by state governments. To deny this would be to deny the right of the principal to modify or revoke a power previously delegated to an agent, and to interfere with the sovereign right of the People to "alter or abolish" their governments at any time. But only direct ratification by the People in convention,[62] as proposed by the new Constitution, could securely limit state governments. The Articles of Confederation had not attempted to impose "internal" limitations on the power of each state government towards its own citizens—that was one of the document's chief flaws, in Federalist eyes[63]—but any effort to impose such restrictions might well have been illusory. Having been ratified only by state legislatures, how could the Articles have imposed any binding restrictions on those bodies in favor of individual rights? What a majority in one state legislature had done by ratification, a subsequent legislature could arguably undo by a similar majority. Only a document emanating from a higher source than a state legislature itself could undeniably bind that body.[64]

Although the Constitution's most sweeping assertions of federal power on behalf of individual rights lay three-quarters of a century and a Civil War away, the Federalists at Philadelphia succeeded in imposing significant federal restrictions on state power. Federal courts would prevent states from passing bills of attainder or ex post facto laws, coining money or emitting bills of credit, denying the privileges and immunities of out-of-staters, or impairing the obligation of contract; Congress would guarantee citizens of each state a republican state government by refusing to seat representatives from anti-republican regimes, and by helping to put down attempted insurrections and coups; and the President would retain ultimate command of state militias when they were called into national service.

3. *Dividing Power Horizontally: Bicameralism and Separation of Powers*

The third job confronting the framers was to allocate authority within the new central government. Once again, the Federalists consciously broke

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therein; Huntington, *The Founding Fathers and the Division of Powers*, in AREA AND POWER 191-92 (P. Maas ed. 1959).

62. *See infra* text accompanying notes 146-50.

63. *See supra* notes 59-61.

64. *See* THE FEDERALIST No. 22, at 152 (A. Hamilton); *id.* No. 43, at 279-80 (J. Madison); McCulloch v. Maryland 17 U.S. (4 Wheat.) 316, 404 (1819); 2 M. Farrand, *supra* note 40, at 88 (remarks of George Mason).

with British Blackstonian orthodoxy. Far from seeking to create an indivisible central organ to wield all national power, the Federalists labored to divide power among distinct agencies. To them, "[t]he accumulation of all powers . . . in the same hands . . . may justly be pronounced the very definition of tyranny."[65]

They viewed the Congress created under the Articles of Confederation as dangerous precisely because it was a single body invested with all powers conferred by that instrument. The only thing saving such a wretched system, they argued, was the skimpiness of the national powers delegated. The unicameral assembly created by the Articles lacked power to regulate commerce; to levy duties; to legislate directly upon, and directly tax, individuals; to nullify unjust internal state laws; to enact laws incidental to, or implied by, express enumerations; to nationalize state militias; to directly raise an army and navy; to appoint all military officers; to suppress internal insurrections, coups, and anti-republican governments; to directly execute its own enactments; to set up a general system of national courts; and to insist on observance of the Articles and its own enactments thereunder as supreme law overriding even state constitutions. Because the Federalists proposed to add all of these grand powers, and more, to the central government, they needed to effect a radical redesign of its internal architecture.[66] The evil to be avoided was plain enough: an indivisible national assembly that might view itself as the virtual embodiment of the People, unlimited in its powers—in short, Blackstone's Parliament:

> The representatives of the people, in a popular assembly, seem sometimes to fancy that they are the people themselves, and betray strong symptoms of impatience and disgust at the least sign of opposition from any other quarter . . . .[67]

> The legislative department is everywhere extending the sphere of its activity and drawing all power into its impetuous vortex.
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> . . . .
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> . . . [I]t is against the enterprising ambition of this department

65. THE FEDERALIST No. 47, at 301 (J. Madison); *see also id.* No. 48, at 311 (J. Madison) ("It will be no alleviation that these powers will be exercised by a plurality of hands, and not by a single one. One hundred and seventy-three despots would surely be as oppressive as one. . . . As little will it avail us that they are chosen by ourselves. An *elective despotism* was not the government we fought for. . . .") (quoting T. JEFFERSON, NOTES ON THE STATE OF VIRGINIA (London 1787)).

66. *See* THE FEDERALIST No. 22, at 151–52 (A. Hamilton); *id.* No. 84, at 517–18 (A. Hamilton); *id.* No. 38 (J. Madison); *see also* 2 M. Farrand, *supra* note 40, at 666–67 (Letter of Transmission from Convention President George Washington accompanying proposed Constitution); 1 *id.* at 34, 256, 287, 339 (remarks of Pierce Butler, Edmund Randolph, Alexander Hamilton, and George Mason).

67. THE FEDERALIST No. 71, at 433 (A. Hamilton).

> that the people ought to indulge all their jealousy and exhaust all their precautions.[68]

The Federalists' strategy for avoiding legislative tyranny was twofold. First, divide the legislature itself into two separate houses chosen in different ways and holding different terms of office. Each house would have strong institutional incentives to deny any grandiose claim made by the other that it alone was the true embodiment of the People.[69] Second, diffuse power further by creating independent national executive and judicial branches. Under the Articles, central executive and judicial officers were pitiful creatures of Congress, dependent on its pleasure for their place, tenure, salary, and power. In sharp contrast, the Federalist Constitution mandated the existence of a national executive and judiciary; rigidly fixed the tenure of the President and federal judges (qualified only by the possibility of removal upon impeachment and conviction for grave misconduct); guaranteed those officers' salaries; and vested them with large portions of power beyond legislative control.[70] Although their methods of selection and tenures of office varied, all national officials ultimately derived their authority from the People. The President and federal judges were as much agents of the People as the legislators were; each branch—each agency—was equal and co-ordinate.[71] And each agency would have incentives to win the trust and affection of the principal (the People) by exposing and resisting ultra vires acts of less faithful agencies. Lest management come to act as if it owned the corporation, the shareholders of America[72] created several sets of managers to keep an eye on each other as they minded the national store.[73] The classic formulation of the point is Madison's *The Federalist* No. 51:

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68. *Id.* No. 48, at 309 (J. Madison).

69. *See* THE FEDERALIST No. 51 (J. Madison); Ackerman, *The Storrs Lectures: Discovering the Constitution*, 93 YALE L.J. 1013, 1025–31 (1984); *cf.* G. WILLS, *supra* note 22, at 117–25 (emphasizing importance of legislative bicameralism in Madisonian theory).

70. *See* Amar, *supra* note 9, at 231–33, 246–54.

71. *See* G. WOOD, *supra* note 20, at 446–53, 547–62, 596–600; Ackerman, *supra* note 69, at 1025–31; Amar, *supra* note 9, at 231–33. Of course, Congress remained in many ways *primus inter pares*. Schematically, Article I precedes Articles II and III. Structurally, Congress must exercise the legislative power before the executive and judicial powers have a statute on which to act. Textually, the "necessary and proper" clause vests Congress with significant control over powers vested "in the Government of the United States, *or in any Department or Officer thereof*." U.S. CONST. art. 1, § 8, para. 18 (emphasis added); *see* Van Alstyne, *The Role of Congress in Determining Incidental Powers of the President and of the Federal Courts: A Comment on the Horizontal Effect of the Sweeping Clause*, LAW & CONTEMP. PROBS., Spring 1976, at 102. And historically, the Federalists expected Congress to be the most powerful—and thus most dangerous—branch. *See, e.g.*, THE FEDERALIST No. 51, at 322 (J. Madison) ("In republican government, the legislative authority necessarily predominates.").

72. *See supra* text accompanying note 36.

73. The relocation of sovereignty outside of government, combined with the application of agency law principles, created virtually infinite possibilities for governmental organization by defusing the

> [T]he great security against a gradual concentration of the several powers in the same department consists in giving to those who administer each department the necessary constitutional means and personal motives to resist encroachments of the others. . . . Ambition must be made to counteract ambition. . . .
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> This policy of supplying, by opposite and rival interests, the defect of better motives, might be traced through the whole system of human affairs, private as well as public. . . . [T]he private interest of every individual may be a sentinel over the public rights.[74]

The parallels between Madison's model of political competition and Adam Smith's (then new) model of economic competition are both self-conscious[75]—witness Madison's reference to "private as well as public" incentive systems—and powerful. Both models rely on overarching incentive structures to harness individual self-interest (whether ambition or avarice) in a way that promotes some larger public good (whether "public rights" or national wealth). Both models depend on competition to further liberty and forestall undesirable concentrations of power (whether tyranny or monopoly).

4. *Dividing Power Vertically: Federalism*

Finally, the Federalists faced the problem of allocating power vertically between central and local officials—the problem of federalism. The issue was notoriously difficult. In the mid-1770's, it had cracked open the British Empire. A decade later, and for different reasons, it was threatening to dissolve the existing confederacy of states. Yet again, the emerging Federalist principles of popular sovereignty and agency theory allowed a new constitutional solution.

a. *Federalism and the Empire*

Until quite late in the revolutionary debate, the colonists had been willing to concede, as a practical matter, parliamentary authority to regulate a small but important set of matters of truly imperial scope, such as foreign affairs and trade among different parts of the Empire. After all, someone had to have power to make these trans-colonial decisions if the Empire were to remain a viable entity, and Parliament seemed as good a choice as

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objection that separate governmental entities would result in a theoretically unacceptable *imperium in imperio*.

74. THE FEDERALIST No. 51, at 321-22 (J. Madison); *accord* 1 M. Farrand, *supra* note 40, at 421-22 (remarks of Madison).

75. Garry Wills makes a persuasive case for his thesis that Scottish enlightenment thought powerfully influenced the thinking of Madison and Hamilton. G. WILLS, *supra* note 22; *accord* D. ADAIR, FAME AND THE FOUNDING FATHERS (1974).

any. Yet the colonists categorically denied that an unrepresentative central assembly sitting months away in England should also have plenary control over truly internal affairs of colonial government like everyday taxation and legislation. Such domestic affairs should be exclusively regulated by local bodies. In short, the colonists were willing to refine and codify the rough de facto allocation of decisionmaking responsibility that had prevailed in the colonies before 1763.[76]

The British found the Americans' first proposals to constitutionalize federalism—for so we should view them with hindsight—theoretically incoherent. Perhaps a working balance between central and local authority had been achieved during the colonies' first century and a half, but local autonomy was purely a matter of parliamentary grace, not constitutional right.[77] Either Parliament or each colonial assembly was sovereign. If the former, Parliament enjoyed all power over all affairs, no matter how "internal." If the latter, then Parliament had no authority whatsoever, even to regulate imperial affairs, and a raw state of nature existed between Great Britain and America. The colonists' proposed constitutional division of authority was a nonsensical *imperium in imperio*; like sovereignty, the Empire was legally an all or nothing concept. Take it or leave it.[78]

Faced with this choice, the colonists left it.[79] Yet there remained the problem of weaving a new cloak of federalism to replace the imperial one cast off.

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76. *See* Declaration and Resolves of the First Continental Congress (1774), *reprinted in* DOCUMENTS OF AMERICAN HISTORY 82 (H. Commager 9th ed. 1973).

77. Hence the Declaratory Act accompanying parliamentary repeal of the Stamp Act. *See supra* note 30. Note again the problem of adverse possession/abandonment-by-nonuser posed in a system not governed by a written constitution. *See supra* note 21.

78. *See* B. BAILYN, *supra* note 20, at 198–229; A. MCLAUGHLIN, *supra* note 25, at 129–56; McLaughlin, *The Background of American Federalism*, 12 AM. POL. SCI. REV. 215 (1918).

79. Consider the prescient words of Edmund Burke counselling against Parliament's pedantic insistence on its theoretical omnipotence, given its willingness to continue to allow real local autonomy in practice:

> If, intemperately, unwisely, fatally, you sophisticate and poison the very source of government by urging subtle deductions and consequences odious to those you govern from the unlimited and illimitable nature of sovereignty, you will teach them by those means to call that sovereignty itself in question. When you drive him hard the boar will turn upon the hunters. If that sovereignty and their freedom cannot be reconciled, which will they take? They will cast your sovereignty in your face, nobody will be argued into slavery.

E. Burke, Speech on American Taxation, *quoted in* McLaughlin, *supra* note 78, at 231 n.25. That a practical accommodation might have been worked out between Britain and America, but for the theoretical sticking point of sovereignty, once again demonstrates the intellectual and ideological -indeed hyperlegal—dimensions of the dispute. *See* B. BAILYN, *supra* note 20, at 198–229; A. MCLAUGHLIN, *supra* note 25, at 129–56; McLaughlin, *supra*, at 230–31. For more discussion of the Revolution as a legal dispute, see Black, *The Constitution of Empire: The Case for the Colonists*, 124 U. PENN. L. REV. 1157 (1976); Greene, *From the Perspective of Law: Context and Legitimacy in the Origins of the American Revolution*, 85 S. ATLANTIC Q. 56 (1986).

b. *Federalism and the Confederation*

In relocating sovereignty from the government to the People, the revolutionary generation initially seemed to have in mind the People of each state, and not the People of the United States as a whole. The colonies united to declare their independence, but their Declaration proclaimed them to be "free and independent *states*"[80]—independent even of each other, save as they chose to concert their action.[81] In short, they were united states, not a unitary state; they were thirteen Peoples, not (yet) one People. Thus the sovereignty of the People—a concept that the colonists had wielded so skillfully as various newly-independent states adopted their own internal constitutions—proved a blunt instrument when the revolutionary generation turned to matters of inter-state governance. Their first formal instrument—the Articles of Confederation—was therefore strikingly traditional.

Under traditional jurisprudence, sovereign states could enter into treaties with one another, and might even join together in a perpetual federation, or league, without losing their sovereign status.[82] Such a federation would in no sense be an internal government exercising sovereign coercive powers over individuals; rather, it was an association of states, a "society of societies,"[83] that could coordinate joint action by its "sovereign" members. This sort of federation by mutual treaty was exactly what the Revolutionaries had in mind when they created the Articles. The document was not styled as a "constitution" (as were the new charters within each state) but as a "confederacy," a "firm *league* of friendship" entered into by "*different* states," each of which would "retain[] its *sovereignty*, freedom, and independence, and every Power, Jurisdiction and right, which is not by this *confederation* expressly delegated to the United States, in Congress assembled."[84] The central organ created was not so much a national

80. The Declaration of Independence para. 32 (U.S. 1776) (emphasis added).

81. *See* Ware v. Hylton, 3 U.S. (3 Dall.) 199, 224 (1796); J. DAVIS, *supra* note 40, at 86, 118; 1 M. Farrand, *supra* note 40, at 324, 340 (remarks of Luther Martin); J. TAYLOR, NEW VIEWS OF THE CONSTITUTION OF THE UNITED STATES 2-3 (Washington City 1823); Fletcher, *A Historical Interpretation of the Eleventh Amendment: A Narrow Construction of an Affirmative Grant of Jurisdiction Rather than a Prohibition Against Jurisdiction*, 35 STAN. L. REV. 1033, 1068 n.156 (1983); Van Tyne, *Sovereignty in the American Revolution: An Historical Study*, 12 AM. HIST. REV. 529 (1906).

82. As the Swiss jurist Emmereich de Vattel put it: "The deliberations in common will offer no violence to the sovereignty of each member." E. VATTEL, THE LAW OF NATIONS bk. I, ch. I, § 10 (London 1760).

83. *See* C. MONTESQUIEU, THE SPIRIT OF LAWS (D. Carruthers ed. 1977); Diamond, *The Federalists' View of Federalism*, in ESSAYS IN FEDERALISM 21 (1961); Diamond, The Federalist *on Federalism: "Neither A National Nor a Federal Constitution, But A Composition of Both,"* 86 YALE L.J. 1273 (1977) [hereinafter *The Federalist on Federalism*].

84. Articles of Confederation, 1781, arts. I–III (emphasis added). Note also the description of a side deal between two or more states within the league as a "Treaty." In contrast, the Federalist Constitution refers to such an agreement as a "compact" in contradistinction to a state "Treaty, Alli-

"legislature" (that word appears only in the document's reference to individual state governments) as an international assembly of ambassadors. The very word chosen to describe the central assembly, "Congress," suggested its inter-sovereign character,[85] and so did its organizational structure. Each state legislature would appoint a "delegat[ion]" of between two and seven members, with each delegation to vote as a bloc casting one vote, regardless of its size or its state's population; delegations were to be paid by state governments which could alter salaries at will to keep delegates in line; state governments expressly retained the right to "recall" and replace their ambassadorial delegates "at any time"; and each delegate was guaranteed a sort of diplomatic immunity from state arrest and imprisonment.[86] Finally, to prevent delegates from developing unduly strong attachments to the union, each was to be elected annually, was forbidden to hold "any"[87] remunerative "office under the United States" (there was no similar proscription against holding other *state* offices), and was ineligible to serve in Congress for more than three out of any six consecutive years.

Although the Congress enjoyed some important powers on paper, it had no means of carrying them out or of compelling compliance. It could not directly tax or legislate upon individuals; it had no explicit "legislative" or "governmental" power to make binding "law" enforceable as such in state courts; it lacked authority to set up its own general courts; and it could raise troops and money only by "requisitioning" contributions from each state. On paper, such requisitions were "binding." In fact, they were mere requests. As one contemporary writer put it, Congress "may declare every thing, but do nothing."[88]

By the time of the Philadelphia Convention, the Confederation was in shambles. Various states refused to honor requisitions, flouted official judgments in the very limited category of controversies committed to central courts, enacted laws repudiating earlier treaties entered into by Con-

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ance, or Confederation" with outside nations. The former is approvable by Congress; the latter, absolutely prohibited. U.S. CONST. art. I, § 10.

85. Consider, for example, the "Congress" of Vienna or Edmund Burke's famous statement that Parliament was not "a *congress* of ambassadors." E. Burke, Speech to the Electors of Bristol, *quoted in* G. WOOD, *supra* note 20, at 175. By contrast, no state legislature in the 1770's and 1780's was labeled a "Congress" by its state constitution. *See infra* note 134.

86. In an anonymous essay defending *McCulloch v. Maryland*, John Marshall wrote that "[t]he confederation was, essentially, a league; and Congress was a corps of ambassadors, to be recalled at the will of their masters." Marshall, *supra* note 49, at 199. In an earlier essay, Marshall described members of Congress as "ministers plenipotentiary." Marshall, *A Friend to the Union*, in JOHN MARSHALL'S DEFENSE OF *McCulloch v. Maryland*, 78, 86 (G. Gunther ed. 1969); *see also* 1 M. Farrand, *supra* note 40, at 256 (remarks of Edmund Randolph) (labelling Congress under Articles "a mere diplomatic body").

87. Not "any other," suggesting that congressional delegates were *state* officers.

88. 1 J. STORY, *supra* note 21, § 246 (emphasis omitted) (quoting unidentified author).

gress, waged unauthorized local wars against Indian tribes, conducted negotiations with foreign nations independently of Congress, and maintained standing armies without congressional permission—all in clear contravention of the Articles.[89] In short, the "United States" in 1787 was not much more than the "United Nations" is in 1987: a mutual treaty conveniently dishonored on all sides. Indeed, it was precisely the Articles' status as a fallen treaty that Madison seized on to justify the Philadelphia Convention's bold declaration that its new Constitution would go into effect among any nine states that chose to ratify it—notwithstanding the Articles' clear requirement that all amendments to it be unanimously adopted:

> A compact between independent sovereigns, founded on ordinary acts of legislative authority, can pretend to no higher validity than a league or treaty between the parties. It is an established doctrine on the subject of treaties that all the articles are mutually conditions of each other; that a breach of any one article is a breach of the whole treaty; and that a breach, committed by either of the parties, absolves the others, and authorizes them, if they please, to pronounce the compact violated and void. Should it unhappily be necessary to appeal to these delicate truths for a justification for dispensing with the consent of particular States to a dissolution of the federal pact, will not the complaining parties find it a difficult task to answer the *multiplied* and *important* infractions with which they may be confronted? The time has been when it was incumbent on us all to veil the ideas which this paragraph exhibits. The scene is now changed, and with it the part which the same motives dictate.[90]

c. *Federalism and the Constitution*

The Philadelphia delegates thus had the benefit of two previous efforts to achieve a theoretically acceptable and practically workable federalism. The imperial model had proved unacceptable because it centralized all power, denying individual state governments any role as independent centers of authority. In the language of the time, it was a pure "consolidation" that "melted down" all states into one monstrous "common mass."[91] It was too "national." The Articles of Confederation, on the other hand, had failed because there was insufficient gravitational pull from the center

89. *See* J. MADISON, *supra* note 59.

90. THE FEDERALIST NO. 43, at 279–80 (J. Madison). For additional statements of Madison and others to similar effect, see 1 M. Farrand, *supra* note 40, at 122–23, 314–17, 485; 2 *id.* at 93 (remarks of Madison); J. MADISON, *supra* note 59, at 365; 4 J. ELLIOT, *supra* note 52, at 308 (remarks of Charles Cotesworth Pinckney at South Carolina ratifying convention); *id.* at 230 (remarks of James Iredell at North Carolina ratifying convention).

91. McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 403 (1819); G. WILLS, *supra* note 22, at 169–75; G. WOOD, *supra* note 20, at 524–32 ("Consolidation or Confederation").

to counter the centrifugal tendencies of each state. The system was too "federal."[92] What America needed, then, was some third model that balanced centripetal and centrifugal political forces—a harmonious Newtonian solar system in which individual states were preserved as distinct spheres, each with its own mass and pull, maintained in their proper orbit by the gravitational force of a common central body.[93] It was exactly such a system—"in strictness, neither a national nor a federal Constitution, but a composition of both"[94]—that the Federalists conceived in Philadelphia.

Once again, the heart of the issue was sovereignty. The Articles had crumbled because they had been erected on the uneven and shifting foundation of the sovereignty of the People in each state. The imperial model had failed because it asserted the omnipotent sovereignty of the central assembly, Parliament. Yet to state the matter this way was to glimpse a third and more promising alternative: Sovereignty must be vested in the People of the United States as a whole. Such a system could shore up the inherent instability of the Articles of Confederation. It could also avoid the monumental centralism of the imperial model by relocating sovereignty from the national assembly to the People of the nation. The People could limit the delegated authority of the national government and stipulate that certain powers be reserved for the government of each state.

Agency theory helped the Federalists conceptualize such a system in legal terms. Consider, for example, Madison's *The Federalist* No. 46:

> The federal and State governments are in fact but different agents and trustees of the people, constituted with different powers, and designed for different purposes. The adversaries of the Constitution seem to have lost sight of the people altogether in their reasonings on this subject; and to have viewed these different establishments not only as mutual rivals and enemies, but as uncontrolled by any common superior in their efforts to usurp the authorities of each other.

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92. The etymology of the word "federal" is noteworthy: Based on the Latin *foedus* (meaning treaty or covenant), and its cognate *fides* (faith), a federal union is one relying on good faith and voluntary compliance of member states, instead of direct governmental coercion of individuals. *See The Federalist on Federalism*, *supra* note 83, at 1279–80. In this light, Article XIII of the Articles of Confederation strongly confirms the document's purely federal nature: "we . . . solemnly plight and engage *the faith* of our respective constituents." (emphasis added). *Cf.* THE FEDERALIST No. 33, at 204 (A. Hamilton) (distinguishing between "a mere treaty, dependent on the good faith of the parties" and a "government, which is only another word for POLITICAL POWER AND SUPREMACY"); 1 M. Farrand, *supra* note 40, at 34 (remarks of Gouverneur Morris) (similar).

93. For examples of exactly this sort of Newtonian imagery, see THE FEDERALIST No. 9, at 73 (A. Hamilton); *id.* No. 15, at 111 (A. Hamilton); 1 M. Farrand, *supra* note 40, at 153, 165, 276 (remarks of John Dickenson, James Wilson, James Madison, and William Paterson). For a fascinating discussion of the effect of Enlightenment thought on the patriot generation, see G. WILLS, *supra* note 22; G. WILLS, *supra* note 46.

94. THE FEDERALIST No. 39, at 246 (J. Madison).

> These gentlemen must here be reminded of their error. They must be told that the ultimate authority, wherever the derivative may be found, resides in the people alone . . . .[95]

As with separation of powers, federalism enabled the American People to conquer government power by dividing it. Each government agency, state and national, would have incentives to win the principal's affections by monitoring and challenging the other's misdeeds.

It is tempting here simply to invoke the Constitution's famous first seven words—"We the People of the United States"—and be done with it. For at first blush, they seem to furnish irrebuttable proof that the sovereignty of one united People, instead of thirteen distinct Peoples, provided the new foundation of the Federalist Constitution. The temptation is all the greater because of the (quite literal) primacy of these words in the text itself, their centrality in the minds of both pro- and anti-ratification leaders in the various state conventions,[96] and their prominence in the early landmark opinions of the Supreme Court.[97] Yet while the best reading of the Constitution supports the unitary People thesis,[98] we must resist the temptation to place exclusive reliance on the Preamble's opening phrase. Any argument based solely on these words proves too much. The Declaration of Independence was made "in the Name, and by the Authority of *the* good People [not Peoples] of these colonies," and the Articles of Confederation spoke of "*the* people [again singular] of the different states in the

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95. *Id.* No. 46, at 294 (J. Madison). Note also the words of Wilson: "When the principle is once settled that *the people* are the source of authority, the consequence is, that they . . . can distribute one portion of power to the more contracted circle, called state governments; they can furnish another portion of power to the government of the United States." 2 J. ELLIOT, *supra* note 52, at 444 (remarks at Pennsylvania ratifying convention).

96. *Compare* 2 J. ELLIOT, *supra* note 52, at 497–99 (remarks of James Wilson at Pennsylvania ratifying convention) ("This . . . is not a government founded upon compact; it is founded upon the power of the people. They express in their name and their authority, '*We, the people, do ordain and establish*,' &c. . . . [T]he system itself tells you what it is; it is an ordinance and establishment of the people.") *with* 2 *id.* at 134 (remarks of Anti-Federalist Samuel Nasson at Massachusetts ratifying convention) (if Constitution's opening phrase "does not go to an annihilation of the state governments, and to a perfect consolidation of the whole Union, I do not know what does") *and* 3 *id.* at 44 (remarks of Anti-Federalist Patrick Henry at Virginia ratifying convention) ("The fate . . . of America may depend on this. . . . Have they made a proposal of a compact between the states? If they had, this would be a confederation. It is otherwise most clearly a consolidated government. The question turns, sir, on that poor little thing—the expression, We, the *people*, instead of the *states*, of America."); *and* A. MASON, THE STATES RIGHTS DEBATE 135 (2d ed. 1972) (quoting remarks of Anti-Federalist Robert Whitehill at Pennsylvania ratifying convention) (" 'We the people of the United States,' is a sentence that evidently shows the old foundation of the union is destroyed, the principle of confederation excluded, and a new and unwieldy system of consolidated empire is set up, upon the ruins of the present compact between the states."); *see also* G. WOOD, *supra* note 20, at 524–32 ("Consolidation or Confederation").

97. *See, e.g.*, McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 403–05 (1819) (Marshall, C.J.); Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304, 324 (1816) (Story, J.); Chisholm v. Georgia, 2 U.S. (2 Dall.) 419, 454, 463 (1793) (opinion of Wilson, J.); *id.* at 471 (opinion of Jay, C.J.).

98. *See infra* text accompanying notes 126–70.

union."[99] Yet, as we have seen, neither of these documents, taken as a whole, is best understood as proclaiming that Americans were one sovereign People.[100] Nor is the question of *which* People were sovereign a purely pedantic one whose nuances we need not ponder. On this question hinges nothing less than a proper understanding of the most momentous issues in the subsequent history of American federalism—issues framed by the great antebellum debate between states' rightists and nationalists.

C. *The Civil War Debate*

The ratification of the Federalist Constitution both reflected and reinforced the emerging American consensus that the People were sovereign and that governments were therefore necessarily limited.[101] On this point, men who agreed on little else—Thomas Jefferson and Alexander Hamilton,[102] Spencer Roane and John Marshall,[103] John C. Calhoun and Joseph Story[104]—spoke with one voice. Yet if, to quote Jefferson's first in-

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99. The Declaration of Independence para. 32 (U.S. 1776) (emphasis added); Articles of Confederation, 1781, art. IV (emphasis added).

100. Indeed, as late as 1787, Marylanders still called their state "the nation." G. WOOD, *supra* note 20, at 356. *See generally* J. DAVIS, *supra* note 40, at 82–120 (presenting states' rights interpretation of Declaration and Articles).

101. This consensus existed, of course, among a very limited set of prominent white male property owners. Yet the idea of popular sovereignty could serve as a benchmark to measure the obvious deficiencies in America's system of political participation, and as a pole star to guide democratic progress. *See infra* text accompanying notes 164–70.

102. *Compare* T. JEFFERSON, *Notes on The State of Virginia*, in THE PORTABLE THOMAS JEFFERSON 23, 170, 176 (M. Peterson ed. 1975) ("[T]o render a form of government unalterable by ordinary acts of assembly, the people must . . . [choose] special conventions to form and fix their government . . . [and] to bind up the several branches of government by certain laws, which when they transgress their acts shall become nullities . . . .") *with* THE FEDERALIST No. 22, at 152 (A. Hamilton) ("The fabric of American empire ought to rest on the solid basis of THE CONSENT OF THE PEOPLE. The streams of national power ought to flow immediately from that pure, original fountain of all legitimate authority.").

103. *Compare* Roane, *Hampden*, in JOHN MARSHALL'S DEFENSE OF *McCULLOCH v. MARYLAND* 106, 142–43 (G. Gunther ed. 1969) ("The old confederation, I admit, was adopted by the legislatures of the several states: but the validity of that adoption may well be questioned. That adoption took place, in the infancy of our republic, and when we had not emancipated ourselves from the opinion, which still prevails in Europe, that the sovereignty of states abides in their kings, or *governments. That* is, in this country, and at this day, an outrageous heresy. None but the *people* of a state, in exclusion of its government, are competent to make or reform a government of whatever nature. The governments are their deputies, for limited and defined objects.") *with* Marbury v. Madison, 5 U.S. (1 Cranch) 137, 175 (1803) (Marshall, C.J.) ("That the people have an original right to establish, for their future government, such principles as, in their opinion, shall most conduce to their own happiness, is the basis on which the whole American fabric has been erected. . . . This original and supreme will organizes the government, and assigns to different departments their respective powers . . . [and may] establish certain limits not to be transcended by those departments.").

104. *Compare* J. CALHOUN, *Letter to General Hamilton on the Subject of State Interposition*, in 6 WORKS OF JOHN C. CALHOUN 144, 151 (New York 1855) ("sovereignty resides elsewhere—in the people, not in the government") *with* 3 J. STORY, *supra* note 21, § 1609 ("No man in a republican government can doubt, that the will of the people is, and ought to be, supreme. . . . The constitution is the will, the deliberate will, of the people.").

augural address, Americans were "all republicans . . . all federalists"[105] on the issue of the sovereignty of the People, the two parties had very different "Peoples" in mind.[106]

To states' rightists (the Anti-Federalists and Republicans of the early antebellum period, the Confederates of the 1860's), the People of each state were sovereign. Each People had their own unique set of government agents (state government) and a set of agents in common with the Peoples of other states (the federal government).[107] The Constitution was a purely federal compact among thirteen sovereign principals to coordinate certain joint activities by employing a common agency. To these states' rightists, the Constitution marked no sharp break with the sovereignty structure of the Articles of Confederation.[108] At most the Constitution simply made clear that sovereignty did not reside in state legislatures, as the Articles could have been (mis)interpreted as implying, but in state Peoples.[109]

To nationalists (the Federalists of the early antebellum era, the Unionists of the 1860's), the People of the United States as a whole were sovereign. The People had a unique set of national agents representing the whole (the federal government) and various sets of local agents representing parts of the whole (state governments).[110] The Constitution was not an inter-sovereign compact or treaty, but a supreme statute deriving from the supreme sovereign legislature—the People of the nation.[111] These nationalists either argued that the Constitution sharply broke with the preexisting structure of sovereignty,[112] or claimed that ever since the Declaration of Independence, Americans had been one People notwithstanding a purely formal reading of the text of the Articles of Confederation.[113]

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105. T. JEFFERSON, *First Inaugural Address*, in T. JEFFERSON, *supra* note 102, at 292.

106. The work of my colleague Jeff Powell contains excellent insights into this debate. *See generally* Powell, *The Original Understanding of Original Intent*, 98 HARV. L. REV. 885 (1985) [hereinafter Powell, *Original Intent*]; Powell, *Joseph Story's Commentaries on the Constitution: A Belated Review*, 94 YALE L.J. 1285 (1985) [hereinafter *Story's Commentaries*].

107. *See, e.g.*, *Amphictyon*, in JOHN MARSHALL'S DEFENSE OF *McCULLOCH V. MARYLAND* 52, 56 (G. Gunther ed. 1969); J. CALHOUN, *supra* note 104, at 151-52.

108. *See, e.g.*, J. CALHOUN, *supra* note 104, at 158; J. DAVIS, *supra* note 40, at 154-56.

109. *See, e.g.*, Roane, *supra* note 103.

110. The language of "whole" and "parts" is, of course, a hallmark of Chief Justice Marshall's opinion in McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 405, 435-46 (1819); *see also* Washington, *Farewell Address*, in 1 MESSAGES AND PAPERS OF THE PRESIDENTS 213, 215-17 (J. Richardson ed. 1898) (similar); A. LINCOLN, *Message to Congress in Special Session*, in 4 THE COLLECTED WORKS OF ABRAHAM LINCOLN 421, 435 (R. Basler ed. 1953) (similar).

111. *See Original Intent*, *supra* note 106, at 904-05, 915-17, 922-24; *Story's Commentaries*, *supra* note 106, at 1302-06.

112. This, I believe, was John Marshall's view. *See infra* text accompanying note 155.

113. Professor Powell sees Justice Story's *Commentaries* as the classic exposition of this view. *Story's Commentaries*, *supra* note 106, at 1303-04. Shades of it may also be found in Chief Justice Jay's opinion in Chisholm v. Georgia, 2 U.S. (2 Dall.) 419, 470-71 (1793).

James Madison attempted to straddle the states' rightist-nationalist debate by suggesting that ultimate sovereignty had somehow been divided between the People of each state and the People of America as a whole. *See supra* note 40. On this point, the father of the Constitution was uncharacter-

Nationalists and states' rightists could offer complementary—indeed, virtually identical—accounts of how the sovereignty of the People enabled the Constitution to empower yet limit federal officers, to impose restrictions on state governments, and to separate and divide power within the federal government. On such questions, it did not much matter which People were sovereign, but only that "the People" were and that governments were not. On issues of federalism, however, divergent understandings of sovereignty pointed the two parties in opposite directions.

On the level of day-to-day government, the two parties' visions yielded conflicting implications for the scope of federal legislative and judicial power. Consider first the scope of Congress' legislative powers under Article I—the first question of *McCulloch v. Maryland*.[114] If the Constitution was in fact a compact among thirteen sovereign Peoples, then arguably Article I should be strictly construed, in accordance with the traditional rule that treaties generally be interpreted narrowly. Indeed, this was exactly Jefferson's interpretive strategy in arguing against the constitutionality of the first national bank.[115] If, however, the Constitution was not a treaty among different Peoples but a grant of power by one People to a special set of national agents, then Hamilton's rejoinder to Jefferson gained weight:

> This restrictive interpretation of [Article I] is also contrary to this sound maxim of construction; namely, that the powers contained in a constitution of government, especially those which concern the general administration of the affairs of a country, its finances, trade, defense, etc., ought to be construed liberally in advancement of the public good.[116]

Consider next the scope of the Supreme Court's appellate jurisdiction over state courts—the issue in *Martin v. Hunter's Lessee*.[117] States' rightists found it hard to believe that the sovereign People of Virginia had delegated the last word on the meaning of the federal compact (at least as it applied to Virginia) to a federal judiciary beyond their exclusive control.[118] Nationalists, however, found it equally implausible that the sovereign People of America had intended to forbid agents of "the whole" to

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istically without followers. Almost every other major figure thought that ultimate sovereignty was indivisible and therefore had to reside solely in either a state or a continental People.

114. 17 U.S. (4 Wheat.) 316 (1819).

115. *See* T. JEFFERSON, *Opinion on the Constitutionality of a National Bank*, in 5 THE WRITINGS OF THOMAS JEFFERSON 284 (P. Ford ed. 1895); *Original Intent*, *supra* note 106, at 888, 931.

116. A. HAMILTON, *Opinion as to the Constitutionality of the Bank of the United States*, in 3 WORKS OF ALEXANDER HAMILTON 455 (H. Lodge ed. 1885); *see Original Intent*, *supra* note 106, at 913–17.

117. 14 U.S. (1 Wheat.) 304 (1816).

118. *See, e.g.*, Roane, *supra* note 103, at 148–51.

review judicial decisions about the meaning of the Constitution rendered by agents of a local "part."[119]

Of course, as a logical matter, the question whether the People of the state or of the Union were sovereign did not necessarily dictate the allocation of power between state and federal government. Even if the Constitution was an inter-sovereign compact, it obviously contemplated an exceptionally tight federation whose nature and purposes might warrant deviation from the general rule that treaties be narrowly construed.[120] Similarly, there was nothing in the logic of sovereignty that would have prevented the People of Virginia from giving federal judicial agents the last word (vis-a-vis state agents) on constitutional meaning. Conversely, even under the nationalist premise of unitary sovereignty, the existence of local agents with general legislative and judicial jurisdiction might argue against an overly broad reading of the powers of central authorities. Nevertheless, the states' rights vision did at least support a rebuttable interpretive presumption favoring state legislatures over Congress, and state courts over the federal judiciary.

When we move from the allocation of power between state and federal agents to the allocation of power between federal agents and the People of a state themselves, in convention assembled,[121] an even starker contrast emerges. If the People of South Carolina were sovereign, they necessarily retained the inalienable right to judge for themselves whether the federal compact had been breached.[122] And if, *in convention*, the People of South Carolina determined that a material and substantial breach had occurred (regardless of what federal judges or Peoples in other states thought), was it not their sovereign right to withdraw—to secede—from the compact?[123] And did not this greater power of legitimate secession subsume the lesser of nonacquiescence in—nullification of—any particular action of federal agents deemed unconstitutional by the popular convention? If, on the

119. *See, e.g.*, Marshall, *supra* note 49, at 200-14; D. WEBSTER, *The Constitution Is Not a Compact Between Sovereign States*, in 3 WORKS OF DANIEL WEBSTER 448, 479-86 (Boston 1851).

120. *See* Marshall, *supra* note 49, at 169-71.

121. *See infra* text accompanying notes 146-50.

122. *See* J. CALHOUN, *Address on the Relation Which the States and General Government Bear to Each Other*, in 6 J. CALHOUN, *supra* note 104, at 59, 75 (Fort Hill address).

123. *See generally* J. DAVIS, *supra* note 40 (using sovereignty theory to justify Confederate secession); A. STEPHENS, *supra* note 19 (same). Lincoln brilliantly described the "sophism" of secession as follows:

> The sophism itself is, that any state of the Union may, *consistently* with the national Constitution, . . . withdraw from the Union, without the consent of the Union, or of any other state. The little disguise that the supposed right is to be exercised only for just cause, themselves to be sole judge of its justice, is too thin to merit any notice. . . . This sophism derives much—perhaps the whole—of its currency, from the [false] assumption that there is some omnipotent, and sacred supremacy pertaining to . . . [the People of] each State of our Federal Union.

A. LINCOLN, *supra* note 110, at 433.

other hand, the People of America collectively were sovereign, then, in the words of the states' rightist John C. Calhoun, "there is an end of the argument. The claimed right for a State [People] of defending her reserved powers against the General Government, would be an absurdity."[124]

Thus the great constitutional issues of the antebellum era—congressional power and interposition, *McCulloch* and *Martin*, nullification and secession—all turned to some degree on *which* People were sovereign. And the first seven words of the Constitution only frame, but do not (without more) answer, the all-important question. Indeed, the Constitution's consistent use of the phrase "the United States" as a plural noun only serves to cast further doubt on the self-evident correctness of the conventional reading of the Preamble's opening phrase.[125] However, a closer look at the rest of the Constitution reveals several other provisions that can help the Preamble's overworked opening words bear the argumentative load.

1. *The Unitary People*

At the outset, let us look at the Preamble's *final* seven words. What is being ordained and established is a "Constitution for the United States of America." Not a "league," however "firm," not a "confederacy" or a "(con)federation," not a "compact" among states, but a *constitution* created by a single People for internal government, styled after earlier state prototypes.[126] In this light, Chief Justice Marshall's immortal words in *McCulloch* take on added meaning: "[I]t is *a constitution* we are expounding."[127]

We should also note the ways in which the Preamble subtly but suggestively altered the purposive language of the Articles. Under the earlier instrument, "the said states" had leagued together "for their common defense, the security of their Liberties, and their mutual and general welfare."[128] The Federalist Preamble speaks instead of providing for "the common defense," promoting "the general Welfare" (significantly, the word "mutual" is dropped), and securing "the Blessings of Liberty." And

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124. J. CALHOUN, *supra* note 104, at 146.

125. U.S. CONST. art. I, § 9, para. 8; *id.* art. II, § 1, para. 7; *id.* art. III, § 2, para. 1; *id.* art. III, § 3, para. 1; *see* 1 M. FARRAND, *supra* note 40, at 416 (remarks of James Wilson). We should also note that artful repetition of the words "the United States" enabled the framers to avoid any explicit textual description of the central government as "federal" or "national." *See id.* at 335.

126. *See* U.S. CONST. art. VI, para. 3 (distinguishing "this Constitution" from old "Confederation"); J. MADISON, *supra* note 59, at 365 (distinguishing "a league of sovereign powers" and a "political constitution by virtue of which they are become one sovereign power").

127. 17 U.S. (4 Wheat.) 316, 407 (1819).

128. Articles of Confederation, 1781, art. III.

it adds references to "establish[ing] Justice" and "insur[ing] domestic Tranquility"—internal matters of government that had lain beyond the limited inter-sovereign scope of the Articles. Truly, the Constitution could hardly be more straightforward in articulating its (literally) primary purpose: the formation of a "more *perfect Union.*"[129] Finally, we must not neglect the silence roaring between the lines of the Preamble: Nowhere is there any reference to the "sovereignty" of the People of "each state" that had been the express animating principle of the Articles.[130]

In fact, the word "sovereignty" never appears in the Constitution,[131] not even in the Tenth Amendment, the Federalist Constitution's counterpart of the Confederation's Article II.[132] Ironically, that Amendment, today typically seen as a pure states' rights provision, contains language that more strongly supports the unitary People thesis than does the Preamble's seemingly more nationalistic opening phrase. For it is exactly the juxtaposition of the Amendment's plural reference to "the states, respectively" and its singular reference to "the People" (and not "their respective People[s]")—a juxtaposition the Preamble lacks[133]—that underscores the unity of the American People and strongly confirms that the Preamble means exactly what it seems to mean at first glance.

Between the Preamble and the Tenth Amendment lie various provisions that strengthen the unitary People thesis. The first six articles ex-

129. *See infra* note 152. Whatever union had existed in America under the Confederation had been imperfect, because each state People had retained its status as a distinct sovereign entity and thus, for example, its right to secede. *See* Chisholm v. Georgia, 2 U.S. (2 Dall.) 419, 453 (1793) (opinion of Wilson, J.) ("people of the *United States* form a NATION"); 2 M. Farrand, *supra* note 40, at 666-67 (Letter of Transmission from Convention President George Washington accompanying proposed Constitution) ("It is obviously impracticable in the federal government of these States, to secure all rights of independent sovereignty to each, and yet provide for the interest and safety of all . . . . In all our deliberations on this subject we kept steadily in our view, that which appears to us the greatest interest of every true American, the consolidation of our Union, in which is involved our prosperity, felicity, safety, perhaps our national existence."); Washington, *supra* note 110, at 217 ("To the efficacy and permanency of your union a government for the whole is indispensable. No alliances, however strict, between the parts can be an adequate substitute. . . . Sensible of this momentous truth, you have improved upon your first essay by the adoption of [the] Constitution . . . which at any time exists till changed by an explicit and authentic act of the whole people . . . ."). Leading Anti-Federalists well understood the import of the Preamble's reference to "perfect union." *See, e.g.*, Yates, *Brutus*, in THE ANTIFEDERALISTS 345 (C. Kenyon ed. 1985) (Constitution creates "union of the people of the United States considered as one body").

130. *Cf.* CONST. OF THE CONFEDERATE STATES OF AMERICA preamble (1861) ("We, the people of the *Confederate* States, *each State* acting in *its sovereign* and *independent* character . . .") (emphasis added).

131. *Cf.* Chisholm v. Georgia, 2 U.S. (2 Dall.) at 454 (opinion of Wilson, J.) (quoted *supra* text accompanying note 57).

132. *Compare* U.S. CONST. amend. X ("The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.") *with* Articles of Confederation, 1781, art. II ("Each state retains its sovereignty, freedom and independence, and every Power, Jurisdiction and right, which is not by this confederation expressly delegated to the United States, in Congress assembled.").

133. For other, less illuminating, constitutional references to "the people," see U.S. CONST. art. I, § 2; *id.* amends. I, IV, IX.

plicitly establish a national "government" with "legislative,"[134] "executive" and "judicial" powers—all words carefully omitted from the Articles of Confederation's description of its general assembly. The national legislature's pronouncements are expressly described as "laws" enforceable even in state courts. And the provision authorizing the legislature to pass all laws "necessary and proper" to implement its enumerated powers purposely reverses the international law spin of the language of the Articles, which explicitly required a narrow interpretation of federal power.[135] Moreover, the national government can directly carry out its "laws" by reliance on its own, rather than state, executive and judicial officers. Indeed, even when state courts sit as original tribunals in cases arising under the Constitution or national laws, the Constitution requires that some national court sit in appellate review.[136] The first house of the national legislature is directly elected by individuals who are to be proportionately represented, in sharp contrast to the Confederation's one state, one vote rule; and Congress can directly legislate upon, and tax, these individuals.[137] The Constitution defines treason as levying war against, or giving aid or comfort to, enemies of the United States, not any individual state.[138] Taken together, all of these provisions tend to suggest that the Federalist Constitution was simply a continental version—deriving from

134. As with their self-description as "Federalists," *see supra* note 9, supporters of the Constitution rhetorically de-emphasized their break with the Articles of Confederation by continuing to use the word "Congress." *Cf.* 2 M. Farrand, *supra* note 40, at 135, 152 (first description of Constitution's new bicameral legislature as "Congress" appearing in Committee of Detail drafts, two months after opening of Convention). This rhetorical continuity masked dramatic differences between "Congress" under the Articles and "Congress" under the Constitution. The latter was a true "legislature" and was indeed described as such in the Constitution itself. The framers thus developed vocabularies that would have been oxymoronic twenty years earlier—*e.g.*, "limited sovereignty" and "legislative Congress." Unsurprisingly, later states' rightists placed heavy reliance on the Constitution's use of the word "Congress." *See, e.g.*, J. TAYLOR, *supra* note 81, at 5-6.

135. *Compare* U.S. CONST. art. 1, § 8, para. 18 *with* Articles of Confederation, 1781, art. II. *See generally* THE FEDERALIST No. 33, at 201-04 (A. Hamilton); *id.* No. 44, at 283-86 (J. Madison). Even the Tenth Amendment purposely omits the word "expressly," which had been the centerpiece of Article II of the Articles. *See* McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 406 (1819); 1 ANNALS OF CONG. 790 (J. Gales ed. 1789).

136. *See* Amar, *supra* note 9, 229-59.

137. Here we see the obvious influence of revolutionary ideology that taxation or legislation without representation is tyranny. Under the Articles, only state governments were represented, and thus only they—and not individuals—could be "requisition[ed]". The Federalists mandated individual representation precisely because they proposed to allow the national government to tax and legislate directly upon individuals. *See* U.S. CONST. art. I, § 2, para. 3 (linking representation and direct taxation by prescribing same formula to compute both).

138. The language of the treason clause reflects careful consideration. The Convention explicitly rejected earlier drafts defining treason as "adhering to the enemies of the United States, *or any of them*," precisely to make clear that a citizen's paramount allegiance was owed to the sovereign People of the United States, and not to the People of any state, in the event of conflict between the two. 2 M. Farrand, *supra* note 40, at 345-49 (emphasis added); *see* 3 *id.* at 223 (remarks of Luther Martin before Maryland legislature).

one continental People—of earlier state constitutions (deriving from state Peoples) under the league.

The supremacy clause clinches the case. Consider what would happen if the People of South Carolina, having adopted the Federalist Constitution, reconvened at some later time to amend their state constitution. In convention, they adopt an amendment inconsistent with the federal Constitution. In a subsequent lawsuit, which law would a state judge be obliged to follow? If the People of South Carolina were sovereign, the answer would plainly be the state constitution as amended. The sovereign People's right to alter or abolish their government at any time is an inalienable attribute of sovereignty, and the sovereign's judicial agents (state judges) are bound to enforce the sovereign's will even if that will violates an earlier treaty (here, the federal compact) under international law.[139] Yet the supremacy clause explicitly compels even state judges to disregard the attempted amendment—a rule plainly inconsistent with the sovereignty of the People of each state.[140] It is worthy of special note that when the supremacy clause was first introduced at Philadelphia by the strident Anti-Federalist Luther Martin, it pointedly failed to specify the supremacy of the federal Constitution over its state counterparts.[141] Seen through the lens of sovereignty theory, Martin's outrage at the Convention's subsequent modification of the clause is understandable, for the modification decisively repudiated his view that the new Constitution should remain a compact among thirteen sovereign Peoples.[142] A more subtle alteration of Martin's language further undercut his purely confederate design: Whereas Martin's proposal spoke of federal statutes as "the supreme law of the *respective States*,"[143] the Convention proclaimed the Constitution to be "the supreme law of *the land*."[144] Once again the implication was continental: one Constitution, one land, one People.[145]

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139. 2 M. Farrand, *supra* note 40, at 93 (remarks of Madison). This is indeed the federal rule. *See The Chinese Exclusion Case*, 130 U.S. 581 (1889).

140. This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and *the Judges in every State shall be bound thereby*, any Thing in the *Constitution* or Laws of any State to the Contrary notwithstanding.

U.S. CONST. art. VI, para. 2 (emphasis added); *cf.* 4 J. ELLIOT, *supra* note 52, at 187 (remarks of Governor Johnston at North Carolina ratifying convention) ("The Constitution must be the supreme law of the land; otherwise, it would be in the power of any one state to counteract the other states, and withdraw itself from the Union."); 3 *id.* at 55 (remarks of Patrick Henry at Virginia ratifying convention) ("Suppose the people of Virginia should wish to alter their government; can a majority of them do it? No; because they are connected with other men, or, in other words, consolidated with other states.").

141. 2 M. Farrand, *supra* note 40, at 28–29.

142. *See* R. BERGER, *supra* note 38, at 75, 240; 3 M. Farrand, *supra* note 40, at 287 (Luther Martin's Reply to Landholder); Fletcher, *supra* note 81, at 1065.

143. 2 M. Farrand, *supra* note 40, at 28 (emphasis added) (Martin proposal).

144. *Id.* at 603 (emphasis added) (Committee of Style revision).

145. *See* THE FEDERALIST No. 2, at 38 (J. Jay) ("Providence has been pleased to give this one

But if earlier state constitutions and the Articles had established the sovereignty of the People of "each state," how, apart from sheer *ipse dixit*, did the Constitution derive the sovereignty of one American People? How did thirteen separate sovereign Peoples magically "consolidate" into one common People? The answer lies in the seventh and final Article: "The Ratification of the Conventions of nine States shall be sufficient for the Establishment of this Constitution between the States so ratifying the Same."

The word "conventions" is used here as an eighteenth century term of art, denoting a special assembly of the People themselves, convened for the special purpose of expressing direct popular sovereignty.[146] Each state's ratifying convention was superior to its ordinary legislature, for the convention *was* in theory the virtual embodiment of the People of that state.[147] It was thus a meta-legal body that could legitimately alter the state's constitution.[148] Since the Federalist Constitution would give national officers powers that had previously been vested exclusively in various state agents, or reserved by the People of each state, under various state constitutions, its adoption would require a pro tanto repeal of those constitutions. Such a modification obviously required the assent of the People themselves.[149] By ratifying the Federalist Constitution, the People

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connected country to one united people—a people descended from the same ancestors, speaking the same language, professing the same religion, attached to the same principles of government, very similar in their manners and customs. . . . [This] band of brethren, united to each other by the strongest ties, should never be split into a number of unsocial, jealous, and alien sovereignties.").

146. *See* G. WOOD, *supra* note 20, at 306–89; Ackerman, *supra* note 69, at 1058–70.

147. *Cf.* McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 403 (1819) ("[T]he people acted upon [the Constitution] in the only manner in which they can act safely, effectively, and wisely, on such a subject, by assembling in Convention.").

Why was it sensible for Americans to transubstantiate a convention into the virtual embodiment of the People? After all, as with an ordinary legislative assembly, a convention assembly may improve the ultimate quality of public deliberation, *see, e.g.*, THE FEDERALIST No. 55, at 342 (J. Madison), but only by excluding most citizens, thereby raising fiduciary/agency problems. An answer based on organization theory/incentive analysis might focus on how a ratification convention is structured differently from an ordinary legislature in ways that enhance monitoring and improve public accountability. First, the People select convention delegates in a special election. Second, delegates are generally convened to consider a single issue (ratification). Third and related, the basic choice set is binary (yes-no), reducing agenda manipulation problems and decreasing the monitoring problems that exist in an ordinary legislature with virtually infinite possibilities of side deals and vote trading. Fourth, conventions immediately disband and disperse among the People, reducing the problem of legislators entrenching themselves and developing their own institutional perspectives. Finally, a convention enhances a sense of public-spiritedness and individual moral responsibility among both voters and delegates. Calling a "convention" signals to all concerned that the polity is entering a high-stakes moment when basic ground rules will be hammered out. Interestingly, criminal juries (deciding the single issue of individual guilt or innocence) possess many more convention attributes than do ordinary legislatures. *Cf.* Note, *Choosing Representatives by Lottery Voting*, 93 YALE L.J. 1283 (1984) (comparing legislatures and juries). For further thoughts on the nature of conventions, see B. Ackerman, Discovering the Constitution (1986) (unpublished manuscript on file with author).

148. Note how Americans legalized and channelled the more lawless-sounding right of revolution. *See* G. WOOD, *supra* note 20, at 342, 613–15; Ackerman, *supra* note 69, at 1020–24, 1058–62.

149. *See* 2 M. Farrand, *supra* note 40, at 92–93 (remarks of Madison).

of each state would exercise their primal power to "alter or abolish" their form of government by withdrawing powers previously delegated to one set of agents and redelegating those powers to a different set.[150]

Ratifications by state conventions, however, would have far more transcendent consequences. It was by these very acts that previously separate state Peoples agreed to "consolidate" themselves into a single continental People. Before ratification, the People of each state were indeed sovereign—and for that very reason could not be bound by the new Constitution if they chose not to ratify, no matter what any of the other sovereign Peoples chose to do.[151] Thus, although Article VII required only nine states to ratify, it *confirmed* the *pre-existing* sovereignty of the People of each state by proclaiming that the Constitution would go into effect only between the nine or more states ratifying.[152] The ratifications themselves thus formed the basic social compact by which formerly distinct sovereign Peoples, each acting in convention, agreed to reconstitute themselves into one common sovereignty. The Gettysburg Address notwithstanding, it was in 1788, and not 1776, that "a new *nation*" was legally "brought forth upon this continent."[153]

This reading of Article VII synthesizes the antithetical views of extreme states' rightists like Roane and Calhoun, who argued that Americans never became one People, and ardent nationalists like Story and Lincoln, who suggested that Americans had always been one People after Independence.[154] This synthesis is precisely the middle position staked out in vari-

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150. *See McCulloch*, 17 U.S. at 404; Chisholm v. Georgia, 2 U.S. (2 Dall.) 419, 463-64 (1793) (opinion of Iredell, J.); G. WOOD, *supra* note 20, at 532-36.

151. *See* 1 M. Farrand, *supra* note 40, at 179 (remarks of William Paterson) ("Let [large states] unite if they please, but let them remember that they have no authority to compel the others to unite."); *id.* at 123, 483, 541, 593 (similar remarks of James Wilson, Elbridge Gerry, and Gouverneur Morris); *see also* 2 *id.* at 92-93, 475 (overwhelming Convention rejection of proposals to bind any state People to new Constitution absent their consent).

152. The Preamble's reference to *forming* a more perfect union also seems to recognize the separateness of state Peoples in 1787. *Cf.* An Act for rendering the Union of the two Kingdoms more intire and compleat, 1707, 6 Anne, ch. 6 (formal union of Scotland and England); 1 M. Farrand, *supra* note 40, at 198, 493 (remarks of Benjamin Franklin and Rufus King) (discussing success of union between England and Scotland); *id.* at 462 (remarks of Nathaniel Gorham discussing success of unions of previously separate colonies to form Massachusetts, Connecticut, and New Jersey).

153. A. LINCOLN, *The Gettysburg Address*, in 7 THE COLLECTED WORKS OF ABRAHAM LINCOLN, *supra* note 110, at 23 (emphasis added). For a more elaborate exposition of Lincoln's view that one nation emerged immediately and unproblematically from the Declaration of Independence, see his Special Session Message to Congress, fittingly delivered on July 4, 1861:

> The original [states] passed into the Union even *before* they cast off their British colonial dependence . . . . [T]he object [of the Declaration of Independence] plainly was not to declare their independence of *one another*, or of the *Union* . . . . The Union is older than any of the States; and, in fact, it created them as States.

A. LINCOLN, *supra* note 110, at 433-34.

154. Story's argument that the practice of Revolutionary government confirmed the sovereignty of one American People rested heavily on the facts that the continental Congress under the Articles had always wielded large portions of "sovereign" power over international affairs of the highest import, and that the People generally considered members of Congress to be *their* direct agents and not just

ous nineteenth century writings of Chief Justice Marshall.[155] Perhaps more important, the nation-creating implications of Article VII ratification were evident to Americans during the ratification period itself. Thus *The Federalist* No. 33 likened state ratification of the Constitution in convention to a social compact among individuals to form one body politic:

> If individuals *enter into* [i.e., form through social compact] a state of society, the laws of that society must be the supreme regulator of their conduct. If a number of [pre-existing] political societies *enter into* a larger political society, the laws which the latter may enact, pursuant to the powers intrusted to it by its constitution, must necessarily be supreme *over those societies and the individuals of whom they are composed. It would otherwise be a mere treaty, dependent on the good faith of the parties, and not a government . . . .*"[156]

By July 4, 1788, ten state conventions had already ratified the Federalist Constitution—enough to put the new document into effect under Article VII. " 'Tis done," wrote Dr. Benjamin Rush on the twelfth anniversary of the Declaration to which he had been a signatory. "We have become a nation."[157]

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delegates of their state governments. Yet those points cast doubt only on the notion that Revolution-era continental government rested on the sovereignty of state governments; they do not affirmatively establish the sovereignty of the People of America in contradistinction to the People of each state. Even in the work of the great Justice, it seems that the garbled nature of the sovereignty debate created analytic confusion and a conflation of two distinct dichotomies: government versus People and state versus national.

155. *See, e.g.*, Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 187 (1824) (Marshall, C.J.) ("[R]eference has been made to the political situation of [the] States, anterior to [the Constitution's] formation. It has been said, that they were sovereign, were completely independent, and were connected with each other only by a league. This is true. But, when these allied sovereigns converted their league into a government, when they converted their Congress of Ambassadors, deputed to deliberate on their common concerns, and to recommend measures of general utility, into a Legislature, empowered to enact laws on the most interesting subjects, the whole character in which the States appear, underwent a change . . . ."); Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 389, 413-14 (1821) (Marshall, C.J.); Marshall, *supra* note 49, at 195-200; *see also* D. WEBSTER, *supra* note 119, at 454-55, 472-77 (similar).

156. THE FEDERALIST No. 33, at 204 (A. Hamilton) (emphasis added); *accord* J. MADISON, *supra* note 59, at 365 (defining "constitution" as "instrument by which [separate states] *are become* one sovereign power" (emphasis added)); *see* 2 M. Farrand, *supra* note 40, at 666 (Letter of Transmission from Convention President George Washington accompanying proposed Constitution) ("Individuals *entering into society*, must give up a share of liberty to preserve the rest.") (emphasis added); 1 J. ELLIOT, *supra* note 52, at 334 (ratification instrument of Rhode Island) (referring to "social compact," and not inter-sovereign "federal" compact or compact between pre-existing People and its rulers); *id.* at 322, 326 (ratification instruments of Massachusetts and New Hampshire) (similar); 3 *id.* at 657 (Declaration of Rights and Amendments of Virginia ratifying convention) (similar). *See generally* J. LOCKE, *supra* note 41, § 14 (distinguishing between league and pact "to enter into one community and make one body politic"); A. MCLAUGHLIN, *supra* note 25, at 66-85 (similar); G. WOOD, *supra* note 20, at 259-305 (discussing social compact ideas).

157. C. BOWEN, MIRACLE AT PHILADELPHIA 310 (1986). The leading Anti-Federalist pamphlets shared this understanding of Article VII ratification. *See* Lee, *Letters of a Federal Farmer*, in PAMPHLETS ON THE CONSTITUTION OF THE UNITED STATES 277, 311 (P. Ford ed. 1888) ("[W]hen the people [of each state] shall adopt the proposed constitution it will be their *last* and supreme act; it will

This understanding of Article VII is reinforced by comparing it with Article V, which provides that ratification by conventions of three-fourths of the states suffices to amend the Constitution in a way that will bind even nonratifying states. Even as late as July, 1788, the People of New York, as a distinct sovereign entity, were legally free to vote down the new Constitution and refuse to comply with it.[158] However, New Yorkers knew that *if* they ratified the document in convention, they would lose their freedom to disregard any subsequent constitutional proposal agreed to by enough other conventions. Nowhere was the Constitution's break with the Articles of Confederation—and indeed, all other multiple-sovereign, federal regimes[159]—more dramatic.[160] Simply put, Article VII recognized the pre-existing sovereign right of any non-ratifying state to *secede* from its sister states;[161] Article V prospectively abolished that sovereign right for each state People who joined the Union, thereby melting themselves into the larger common sovereignty of the People of America.[162] E Pluribus Unum.[163]

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be adopted not by the people of New Hampshire, Massachusetts, &c., but by the people of the United States . . . ." (emphasis added)); *The Address and Reasons of Dissent of the Minority of the Convention of the State of Pennsylvania to Their Constituents*, in THE ANTIFEDERALISTS 46 (C. Kenyon ed. 1985) [hereinafter *Pennsylvania Minority*] (Preamble worded in "style of a compact between individuals entering a state of society, and not that of a confederation of States"); *Agrippa*, in *id.* at 150 (similar); Yates, *supra* note 129, at 345 ("this constitution, if it is ratified, will not be a compact entered into by states, in their corporate capacities, but an agreement of the People of the United States, as one great body politic"); *see also* 3 J. ELLIOT, *supra* note 52, at 22, 44 (remarks of Anti-Federalist Patrick Henry) ("If the states be not the agents of this compact, it must be one great, consolidated, national government, of the people of all the states. . . . Here is a resolution as radical as that which separated us from Great Britain.").

158. Indeed, North Carolina and Rhode Island did not ratify the new Constitution until months after it had gone into operation in the other states under Washington's presidency.

159. The point made here about Article VII is in some ways the mirror image of the point made earlier about Article VI. The People of the United States may amend their Constitution in a way that violates the state constitution of South Carolina, but the People of South Carolina may not amend their state constitution in a way that violates the Constitution of the United States. Both of these conclusions logically follow from the same premise: Only the People of the United States as a whole are sovereign. Conversely, both articles are logically inconsistent with the states' rights theory of popular sovereignty. *See* 2 M. Farrand, *supra* note 40, at 557–58 (remarks of Elbridge Gerry and Alexander Hamilton).

160. *Cf.* 1 M. Farrand, *supra* note 40, at 250 (remarks of William Paterson) (discussing amendment provisions of Articles of Confederation) ("This is the nature of all treaties. What is unanimously done, must be unanimously undone.").

161. *See, e.g.*, THE FEDERALIST No. 43, at 280 (J. Madison) ("no political relation can subsist between assenting [i.e., ratifying] and dissenting States"). Strictly speaking, it is perhaps more accurate to view the ratifying states as seceding from the Confederation by abrogating the Articles. In any event, a recurrent theme of *The Federalist* and the earlier Philadelphia Convention is that government under the Articles is at an end, and that the two alternatives are therefore "*re*union" under the Federalist Constitution, *id.* (emphasis added), or dissolution (i.e., secession) and recombination of individual states into two or more competing nations/confederacies. *See* THE FEDERALIST No. 1, at 37 (A. Hamilton); *id.* No. 8, at 71 (A. Hamilton); *id.* No. 15, at 112 (A. Hamilton); *id.* No. 23, at 157 (A. Hamilton); 1 M. Farrand, *supra* note 40. *See generally* THE FEDERALIST No. 5 (J. Jay) (discussing evils that would result "should the people of America divide themselves into three or four nations"); *id.* Nos. 6–8 (A. Hamilton) (similar).

162. Admittedly, the text of Article V does not address secession in so many words—nothing in

2. *Confederate Vestiges, Union Responses*

The sovereignty of the People of the United States marked a sharp break with the logic of the Articles. Yet the break was not a completely clean one. In several crucial respects, the Federalist Constitution seemed to fall short of perfecting the sovereignty of the People of America. To begin with, many persons, slaves being the most obvious example, found themselves excluded from "the People" by a definitional fiat that seriously eroded the moral force of the Federalist vision of popular sovereignty.[164]

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the Constitution does. Nevertheless, the plain import of that Article and the rest of the document is flatly inconsistent with the states' rights theory of popular sovereignty that underlies the claimed right of secession. It is a great mistake to assume that the secession question was some purely abstract hypothetical that the pragmatic Federalists left open for future resolution. The spectre of imminent secession haunted their every thought. *See supra* note 161. Indeed, we do well to remember, as Jefferson Davis so vigorously insisted, that the Constitution itself was born in an act of secession. *See* 1 J. DAVIS, *supra* note 40, at 99–103. Davis, however, drew the wrong conclusion from this premise: He presumed continuity between the Constitution and the Articles regarding the ongoing permissibility of secession in the very same breath in which he established a *dis*continuity between them created by secession itself. One of the Federalists' paramount goals was to constitute their new system in a way that would give no color to later state claims of a right to secede. *See, e.g.*, 1 M. Farrand, *supra* note 40, at 467 (remarks of Hamilton) ("This was the critical moment for forming . . . [a national] government. . . . It is a miracle that we are here . . . . It would be madness to trust to future miracles."); 2 *id.* at 92–93 (remarks of Madison) (The "true difference between a *league* or *treaty*, and a *Constitution*" is that "in the case of treaties . . . a breach of any one article by any of the parties, frees the other parties from their engagements. In the case of a union of people under one Constitution, the nature of the pact has always been understood to exclude such an interpretation."); *cf.* THE FEDERALIST No. 22, at 152 (A. Hamilton) (similar); *id.* No. 11, at 91 (A. Hamilton) (speaking of "strict and indissoluble" union); 2 J. ELLIOT, *supra* note 52, at 463 (remarks of James Wilson at Pennsylvania ratifying convention) ("bonds of our union ought therefore to be indissolubly strong"). It should also be noted that no state convention attempted to reserve the right of secession. *See* 11 THE PAPERS OF JAMES MADISON 189 (R. Rutkind & C. Hobson eds. 1977) (letter from James Madison to Alexander Hamilton) ("Constitution requires an adoption *in toto*, and *for ever*"); A. MCLAUGHLIN, A CONSTITUTIONAL HISTORY OF THE UNITED STATES 214–19 (1935). Madison's, Hamilton's, and Jay's brilliant discussions of the threats to *internal* liberty and tranquility that would arise from disunion—the need for standing armies, the strengthening of executive power, the dangers of European intrigue and intervention in American affairs—powerfully confirm and justify the impermissibility of unilateral secession under "the more perfect union" formed under the Federalist Constitution. *See* THE FEDERALIST No. 5 (J. Jay); *id.* Nos. 6–8 (A. Hamilton); 1 M. Farrand, *supra* note 40, at 464–65 (remarks of Madison). The strongest historical evidence against secession, however, was not what the Federalists said but what they did not say. To my knowledge, no major proponent of the Constitution sought to win over states' rightists by conceding that states could unilaterally nullify or secede in the event of perceived national abuses. The Federalists' silence is especially impressive because such a concession might have dramatically improved the document's ratification prospects in several states. Instead, the Federalists sought to blunt Anti-Federalist concern about federal abuses by emphasizing bicameralism, separation of powers (especially judicial review), refinements in principles of representation, future amendments under Article V, and various federalism checks short of interposition, nullification, and secession. *See generally infra* Section III.

163. "Out of many, one." Thus, the most important thing that the Constitution constitutes is neither the national government, nor even the supreme law, but one sovereign national People, who may alter their government or supreme law at will. To turn the words of the arch states' rightist Spencer Roane against him, "The *people* only are supreme. The Constitution is subordinate to them. . . . '[T]he authority of constitutions over government, and of the people over constitutions, are truths which should be ever kept in mind.' " Roane, *supra* note 103, at 130–31 (quoting Virginia Report of 1799).

164. Indians, women, and the poor also faced barriers to equal political participation.

Indeed, the Constitution itself provided no clear definition of national citizenship. Yet if the People of America were sovereign, then one's American citizenship was all-important, and should never have been treated as simply derivative of one's state citizenship under state constitutions, or subject to virtually limitless manipulation by ordinary legislation.[165] Additionally, the suggestion of Article V that no state could lose its equal representation in the Senate without its own consent appeared to crimp the sovereign power of the People of the nation to alter their government by constitutional amendment. Harking back to the pure federalism of the Articles' requirement of unanimous amendment, the Senate clause of Article V seemed to deny the sovereign right of the People of America to impose their changed will on a tiny but recalcitrant localized minority.

It is remarkable that the Reconstruction Amendments can be seen as perfecting the Federalist Constitution by trimming off its confederate vestiges. For our purposes, the most significant constitutional development of this era was not the general federal guarantee of individual rights against states embedded in the due process and equal protection clauses, provisions that dominate current constitutional scholarship. While of course momentous, these clauses can be seen as simply expanding the substantive scope of the Federalist Constitution's Article I, section 10 catalogue of federally enforceable individual rights against states. Of far greater significance here are the Thirteenth Amendment's abolition of slavery; the Fourteenth's constitutional definition of national birthright citizenship and its prohibition against exclusion by definitional fiat; the Fourteenth and Fifteenth Amendments' specific protections of equality of franchise; and the process of ratification itself, which, as Professor Ackerman has pointed out, swept aside the formal limitations of Article V in order to vindicate the American People's sovereign right to alter their government.[166]

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165. Even if not strictly compelled by the logic of sovereignty, surely a popular—that is, a constitutional—rule defining who counted as part of the polity was called for (just as Parliament would never dream of delegating the power to set the qualifications of its members to some other body). Instead, however, the Constitution could be read as allowing the vital issue of national citizenship to be decided by state law except in cases of naturalization. The complex legal issues concerning the source of antebellum citizenship were never fully resolved. *See* J. KETTNER, THE DEVELOPMENT OF AMERICAN CITIZENSHIP 1608-1870, at 248-351 (1978).

166. Thus, I share Professor Ackerman's view that popular amendment cannot be cabined by the formal niceties of Article V. *See* Ackerman, *supra* note 69, at 1056-69 (arguing that Constitution can be and has been amended by modes of popular referenda transcending purely "formal" reading of Article V); B. Ackerman, *supra* note 147 (similar). My argument is simply the structural complement of Professor Ackerman's basic textual one; he points to the textual references to "Conventions" in Article V, whereas I am offering here a structural account of the sovereignty of the American people that undergirds the textual reference to "Conventions."

The constitutional amendments of the Progressive era carry on the Reconstruction tradition, both in extending participation to a group of persons previously excluded from politics by definitional fiat, *see* U.S. CONST. amend. XIX (women's suffrage), and in further eroding the Senate clause of Article V, *see id.* amend. XVII (direct election of senators).

3. *The Role of the States*

Relocating sovereignty in the People of the United States in the late 1780's did not obliterate all state lines; it only established that any power exercised by state Peoples and state governments was ultimately subject to the absolute control of the American People.[167] Nothing prevented that sovereign from adopting a constitution that allowed state structures to continue to exist and wield delegated power.[168] Such was the design of the Federalist Constitution. For example, Article V itself generally looked to states, rather than individuals, as the unit of measure for tallying ratifications of constitutional amendments.[169] Indeed, states were woven into the

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167. Notwithstanding the Supreme Court's slogan that ours is "an indestructible union, composed of indestructible states," Texas v. White, 74 U.S. (7 Wall.) 700, 725 (1869), "We the People of the United States" may choose to destroy states by constitutional amendment. Of course, there are excellent reasons why we should choose not to. *See infra* Section III.

More realistically, Americans might desire to amend the Constitution to require periodic redistricting of state boundaries to ensure that the Senate's equally represented states have equal size, or to modify equal representation itself. Not only would these amendments be constitutional, despite the special limitations of Article V's Senate clause, but such amendments could come into being even without satisfying the Article's general mechanism of tallying ratification according to a one state, one vote rule. To contest this is to deny the sovereign right of the People to alter their government at any time for any reason, and to attempt to bind the *source* of all law—the sovereign People—with a law of its own creation. *See supra* text accompanying notes 22-45. Of course, the obvious objection to my argument is that it ignores the clear mandate of Article V to the contrary. Only two brief responses can be sketched here. First, as Professor Ackerman has persuasively argued, a sensitive reading of Article V's reference to "Conventions" suggests that the framers themselves recognized the futility and foolishness of any hard and fast mode of channelling future acts of true popular sovereignty. *See* Ackerman, *supra* note 69, at 1058-62; B. Ackerman, *supra* note 147. Second and more fundamental, the People of 1787 were incapable of binding a future convention of the People, even if they had tried. Indeed, the modes by which various state ratifying conventions exercised popular sovereignty in 1787-1788 seemed to violate the formal provisions for constitutional amendment prescribed by preexisting state constitutions. *See A Republican Federalist*, in THE ANTIFEDERALISTS, *supra* note 129, at 112, 121-22 (Massachusetts); *Pennsylvania Minority*, *supra* note 157, at 32-33 (Pennsylvania). *See generally* Kahn, *Gramm-Rudman and the Capacity of Congress To Control the Future*, 13 HASTINGS CONST. L.Q. 185 (1986) (discussing legitimacy problems raised whenever body tries to bind itself). Nor does this understanding of the inalienable right of (a deliberate majority of) the People to change their government render Article V a nullity. It continues to have legal force as the rule of recognition for ordinary constitutional amendment, and moral force as a promise made by the sovereign—even though such a promise cannot be legally enforced by the sovereign's judicial agents against the sovereign absent its ongoing consent. *See infra* text accompanying notes 185-88. Thus, disregard of Article V in, say, 1790 would have been a plain breach of faith with those who voted for the Constitution in reliance on the mechanisms of that Article. Any breach of faith argument, however, seems limited to the founding generation itself, and loses much of its force when applied to Reconstruction (when the limitations of Article V were first transcended, *see* B. Ackerman, *supra* note 147) or to the twentieth century: None of the original voters were/are around to call "foul" persuasively.

168. For example, the People of America could in 1788 choose to deviate from proportionate representation in selecting their Senate, just as the People of Maryland did in 1776. *See* MD. CONST of 1776 arts. XIV-XV, in 3 F. THORPE, *supra* note 50, at 1693-94 (giving unequal sized counties equal weight in selecting state Senators); *infra* note 169.

169. For an important qualification, see *supra* notes 166-67; *cf.* T. JEFFERSON, *A Draft Constitution for Virginia*, in THE PORTABLE THOMAS JEFFERSON, *supra* note 102, at 242 n.1 ("It is proposed that this bill, after correction by the Convention, shall be referred by them to the people to be assembled in their respective counties and that the suffrages of two thirds of the counties shall be requisite to establish it."); J. CALHOUN, *supra* note 104, at 146 (if People of America are sovereign, states would "bear to the Union the same relation that counties do the states"); 6 CONG. DEB. 269

very fabric of the new national government's political departments.[170] Finally, and most importantly for our purposes, the Federalist Constitution preserved the independent lawmaking authority of state governments. The language of the Tenth Amendment simply distilled the underlying structural logic of the original Constitution: Wherever authorized by its own state constitution, a state government can enact any law not inconsistent with the federal Constitution and constitutional federal laws.

Thus, state governments would continue to enjoy power to make law, power derived from the sovereign People. To what extent did that derivative "sovereignty" also imply a "sovereign" immunity from legal liability? To that question we now turn.

II. Sovereign Immunity and the Federalist Constitution

The sovereignty of "We the People of the United States" is admittedly an abstraction—an idea. But abstractions often have legal consequences. And the single idea of popular sovereignty generates a powerful set of legal implications covering a vast range of constitutional issues from limited government and judicial review to federalism and separation of powers to nullification and constitutional amendment. In one vital area of contemporary jurisprudence, however, the Supreme Court has fashioned doctrine wholly antithetical to the Constitution's organizing principle of popular sovereignty. By allowing both federal and state governments to invoke "sovereign immunity" from liability for constitutional violations, the Court has misinterpreted the Federalist Constitution's text, warped its unifying structure, and betrayed the intellectual history of the American Revolution that gave it birth. In effect, the Court has transformed "sovereignty" into the very tool of government supremacy that our Revolutionary forebears wielded pen and sword to destroy.[171]

(1830) (remarks of Sen. Edward Livingston) (similar).

170. *See* Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 Colum. L. Rev. 543 (1954). The point is strongest with respect to the Senate, which preserved two central features of the Congress under the Articles: election by state legislatures and equal representation of each state. Yet even here, these similarities should not blind us to the many ways in which the Federalists constituted the Senate as an entity more nationalistic than the old Congress. The Federalists replaced bloc voting by states with per capita voting by Senators; increased sixfold the term of office (and thus enhanced the likelihood of Senators' developing national sentiments and attachments); abolished recall by state legislature; eliminated all limitations on reelection; required salaries to be paid by the national government; and gave the Senate, as well as the House, powers to discipline and even expel its members and compel their attendance (powers lacking under the Articles, given Congress's status as a mere diplomatic assembly). *See* 4 J. Elliot, *supra* note 52, at 60 (remarks of William Davie at North Carolina ratification convention); *The Federalist on Federalism*, *supra* note 83, at 1281-82.

171.

> Was, then, the American Revolution effected, was the American Confederacy formed, was the precious blood of thousands spilt, and the hard-earned substance of millions lavished, not that the people of America should enjoy peace, liberty, and safety, but that the governments of the

Although the issue of sovereign immunity for constitutional wrongs implicates both state and federal governments—both are limited under the Constitution—the issue first arose under the Federalist Constitution in *Chisholm v. Georgia*, a case concerned only with state immunity.[172] A detailed review of *Chisholm*—the first major constitutional case decided by the Supreme Court—will illuminate the text of the Eleventh Amendment, which overruled the case, as well as general structural principles of state and federal sovereign immunity.

A. *Chisholm v. Georgia*

In 1792, the executor of a South Carolina merchant brought an assumpsit action in the Supreme Court against the state of Georgia for breach of a war supplies contract. Georgia declined to argue the case at bar and instead filed a written objection asserting the state's "sovereign" immunity from suit.[173] Five Justices heard the case and delivered individual seriatim opinions. Perhaps because Georgia's tactics created an awkward procedural posture requiring the state to present sovereign immunity as a jurisdictional bar rather than a defense on the merits of assumpsit, all five Justices tended to collapse the two distinct questions posed by the case. First, the jurisdictional issue proper: Did the Court have original jurisdiction to entertain the case? Second, the rule of decision question: Did an action in assumpsit lie in federal court for a state's breach of a contract it had made with a citizen? Four Justices answered yes to both questions; Justice Iredell dissented.

The jurisdictional issue called for close examination of Article III and the Judiciary Act of 1789. The former vests the federal judiciary with jurisdiction over nine separate but overlapping categories of cases. The first three are defined by subject matter; all federal question and admiralty cases, for example, are cognizable in federal court regardless of the identity of the parties to the suit. The last six categories are defined by party status. Federal diversity jurisdiction over controversies "between cit-

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individual States, that particular municipal establishments, might enjoy a certain extent of power and be arrayed with certain dignities and attributes of sovereignty? We have heard of the impious doctrine in the old world, that the people were made for kings, not kings for the people. Is the same doctrine to be revived in the new, in another shape—that the solid happiness of the people is to be sacrificed to the views of political institutions of a different form? It is too early for politicians to presume on our forgetting that the public good, the real welfare of the great body of the people, is the supreme object to be pursued; and that no form of government whatever has any other value than as it may be fitted for the attainment of this object . . . . [A]s far as the sovereignty of the States cannot be reconciled to the happiness of the people, the voice of every good citizen must be, Let the former be sacrificed to the latter.

THE FEDERALIST No. 45, at 289 (J. Madison).

172. 2 U.S. (2 Dall.) 419 (1793).

173. C. JACOBS, THE ELEVENTH AMENDMENT AND SOVEREIGN IMMUNITY 48 (1972).

izens of different states" is today probably the best known example, but three other diverse party categories are of special importance in framing the issue of state sovereign immunity: "Controversies between two or more States;—between a State and Citizens of another State; [and between] . . . a State . . . and foreign States, Citizens or Subjects."[174] Even in the absence of a federal question or admiralty issue, any of these diverse party configurations suffices to confer federal jurisdiction. Indeed, in these three state diversity categories, Article III provides for original jurisdiction in the Supreme Court itself, a grant confirmed by the language of section 13 of the Judiciary Act of 1789.[175]

As a civil suit brought by a citizen of one state against another state, *Chisholm* seemed to fall squarely within the language of both Article III and the Judiciary Act. Georgia apparently argued that these texts should be read to confer jurisdiction only where a state brought suit against an out-of-state citizen, but not vice versa.[176] Yet as the four majority Justices noted, the text of Article III on its face applies symmetrically to both party alignments.[177] The implication of symmetry is even stronger in the language of section 13,[178] given that other portions of the Judiciary Act are expressly asymmetric.[179]

In response to the contention that Georgia's sovereign status required an extremely narrow reading of the jurisdictional provisions of Constitution and statute—an early version of a strict construction, states' rights, clear statement doctrine—the majority Justices offered two related arguments. First, American states were not "sovereign" in the same way European governments claimed to be:

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174. U.S. CONST. art. III, § 2, para. 1.

175. Section 13 provides:

> [T]he Supreme Court shall have exclusive jurisdiction of all controversies of a civil nature, where a state is a party, except between a state and its own citizens; and except also between a state and citizens of other states, or aliens, in which latter case it shall have original but not exclusive jurisdiction.

1 Stat. 73, 80 (1789).

176. Professor Maeva Marcus has kindly furnished me with a copy of a Dec. 14, 1792 resolution of the House of Representatives of Georgia, which apparently served as the text of Georgia's remonstrance before the Supreme Court. *See* General Advertiser (Philadelphia), Feb. 6, 1793.

177. *See, e.g.*, *Chisholm*, 2 U.S. at 466 (opinion of Wilson, J.) ("Causes, and not parties to causes, are weighed by justice, in her equal scales: On the former solely, her attention is fixed: To the latter, she is, as she is painted, blind.") (emphasis deleted).

178. *See supra* note 175.

179. In implementing the Article III grant of jurisdiction over "controversies to which the United States shall be a Party," section 9 of the Act provided for district court jurisdiction only when the United States was party plaintiff. Section 13 itself distinguished between suits brought *against* "ambassadors, or other public ministers" and suits brought *by* them.

It is unlikely that Congress overlooked the issue of a state defendant's amenability to suit at the behest of an out-of-state citizen plaintiff, for the issue had been hotly debated only months earlier during the ratification process. *See* Fletcher, *supra* note 81, at 1047-52; Gibbons, *The Eleventh Amendment and State Sovereign Immunity: A Reinterpretation*, 83 COLUM. L. REV. 1889, 1902-14 (1983).

> In *Europe* the sovereignty is generally ascribed to the *Prince*; here it rests with the people; there, the sovereign actually administers the Government; here, never in a single instance; our Governors are the agents of the people . . . .
>
> [Federal jurisdiction] enforces this great and glorious principle, that the people are the sovereign of this country, and consequently that fellow citizens and joint sovereigns cannot be degraded by appearing with each other in their own Courts to have their controversies determined.[180]

Second, in adopting the Constitution, the sovereign American People had imposed important limitations on the "sovereign" powers of state officers, limitations that necessarily implied that states could be sued in federal court. Article III conferred federal jurisdiction in controversies "between two or more States." Obviously, one of these states had to be a defendant; the provision was meaningless otherwise.[181] Similarly, effective vindication of various individual constitutional rights against states might require a compulsive suit against the state itself in federal court under the Article III grant of federal question jurisdiction.[182] These provisions, the majority Justices noted, argued conclusively against any general theory of a state's "sovereign" immunity from suit in federal court.

Up to this point, the majority's logic was impeccable. Yet upon reaching this analytic juncture, the majority leaped to a conclusion that simply did not follow from its premises, committing what in our post-*Erie*[183] world seems an obvious category mistake. Having established the Court's power to entertain the case (and the suability of Georgia in a *jurisdictional* sense), the majority proceeded to opine that a cause of action in assumpsit would properly lie (and that the state was properly suable in this *substantive* sense) notwithstanding any immunity from assumpsit liability under state law.[184] Under the common law of Georgia and, apparently, every other state, no cause of action lay for a breach of contract by the state itself. At common law, such contracts, though perhaps morally binding, were not legally enforceable.[185]

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180. *Chisholm*, 2 U.S. at 472, 479 (opinion of Jay, C.J.).

181. *See id.* at 421–22 (oral argument of Edmund Randolph); *id.* at 450–51 (opinion of Blair, J.); *id.* at 466–67 (opinion of Cushing, J.); *id.* at 473 (opinion of Jay, C.J.).

182. *See id.* at 422 (oral argument of Randolph); *id.* at 465 (opinion of Wilson, J.); *id.* at 468 (opinion of Cushing, J.).

183. Erie R.R. v. Tompkins, 304 U.S. 64 (1938) (federal jurisdiction does not necessarily include power to disregard state substantive law as rule of decision in federal court).

184. Chief Justice Jay's opinion on this point, however, is murky. Despite broad language in earlier passages, his final paragraph seems to leave open the possibility of recognizing future substantive defenses raised by the state defendant. *See Chisholm*, 2 U.S. at 479.

185. As Alexander Hamilton wrote: "The contracts between a nation and individuals are only binding on the conscience of the sovereign, and have no pretensions to a compulsive [i.e., legal] force. They confer no *right of action* independent of the sovereign will." THE FEDERALIST No. 81, at 488

What, then, justified the majority's disregard of Georgia's immunity from liability under her own law? After all, the Tenth Amendment plainly reserves to states the power to fashion any law, common or statutory, not inconsistent with the higher laws of the federal Constitution, congressional statutes, or state constitutions. Indeed, section 34 of the Judiciary Act—the so-called Rules of Decision Act—expressly charges federal courts to follow "the laws of the several states" as residuary "rules of decision" in trials at common law.[186]

We must be clear about what the Court did *not* say. The majority Justices did not claim that Georgia's common law rule of state immunity violated any higher law, constitutional or statutory. In particular, they did not claim that such a common law rule might violate the Constitution's contracts clause.[187] Plaintiff never raised the contracts clause or any other violation of federal right. Jurisdiction rested exclusively on diverse party status. Indeed, had the Court viewed *Chisholm* as a contracts clause case as well as a diverse party suit, a serious question might have arisen about its appropriateness for the original jurisdiction of the Supreme Court, whose general federal question jurisdiction was only appellate.[188]

The majority's only arguments for recognizing an assumpsit cause of action against Georgia were arguments sounding in what would today be labelled "general common law." In this respect, *Chisholm* anticipated *Swift v. Tyson*,[189] which allowed federal courts sitting in diversity cases to disregard state common law as defined by state courts, and instead fashion their own judge-made law. At oral argument in *Chisholm*, plaintiff ar-

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(emphasis added).

186. The Judiciary Act of 1789, § 34, 1 Stat. 73, 92. As an assumpsit action in federal court, *Chisholm* fell squarely within the terms of section 34, yet none of the five Justices mentioned that section.

187. Although *Chisholm* does contain several references to the clause, *see* 2 U.S. at 422 (oral argument of Randolph); *id.* at 465 (opinion of Wilson, J.); *id.* at 469 (opinion of Cushing, J.), these were simply illustrative of future cases that might come before the Court.

188. This question was eventually resolved in Cohens v. Virginia, 19 U.S. (6 Wheat.) 264 (1821). In light of subsequent cases like Fletcher v. Peck, 10 U.S. (6 Cranch.) 87 (1810) (applying contracts clause to state contracts), the absence of the contracts clause from the analysis and oral argument in *Chisholm* seems curious. One possible explanation is that the clause was not intended to have any retroactive effect on contracts with states made before ratification. To give state creditors a legally enforceable claim when they had only bargained for a moral obligation might have been viewed as unjust enrichment. Indeed, such a dramatic change in legal rules in the middle of the contract seems wholly antithetical to the spirit of the contracts clause itself. *See Chisholm* 2 U.S. at 479 (opinion of Jay, C.J.) ("I am far from being prepared to say that an individual may sue a State on bills of credit issued before the Constitution was established, and which were issued and received on the faith of the State, and at a time when no ideas or expectations of judicial interposition were entertained or contemplated."). Alternatively, perhaps the clause was designed only to prevent the impairment of a preexisting legal obligation, but not to create a legal obligation where none had previously existed, as with state contracts. Under this logic, *Fletcher* itself is suspect. This thesis might also explain why Hamilton nowhere mentions the contracts clause to qualify his sweeping claim that state contracts never legally bind the state.

189. Swift v. Tyson, 41 U.S. (16 Pet.) 1 (1842).

gued that assumpsit liability followed automatically from the state's capacity, as a juridical entity, to make a promise. The continental jurist Vattel was the only authority cited for this bold proposition.[190] Similarly, Justice Wilson simply invoked "general principles of right and equality" and "general jurisprudence" in support of his claim that "a State, for the breach of a contract, may be liable for damages."[191]

Indeed, the state-citizen diversity case of *Chisholm* foreshadowed the citizen-citizen diversity suit of *Swift* in an even more precise way: Whereas *Swift* established a jurisprudence of general commercial law, *Chisholm* rested in part upon principles of general corporate law. According to Justice Cushing, "[A]ll states whatever are corporations or bodies politic. The only question is, what are their powers? . . . I think assumpsit will lie, if any suit; provided a state is capable of contracting."[192] A similar general corporate law motif can be heard in Chief Justice Jay's language:

> [T]he obvious dictates of justice, and the purposes of society . . . [demand that] in certain cases one citizen may sue forty thousand; for where a *corporation* is sued, all the members of it are actually sued, though not personally, sued . . . . Will it be said, that the fifty odd thousand citizens in Delaware being *associated* under a State Government, stand in a rank so superior to the forty odd thousand of Philadelphia, *associated* under their *charter*, that although it may become the latter to meet an individual on an equal footing in a Court of Justice, yet that such a procedure would not comport with the dignity of the former?[193]

Although Justice Iredell dissented, his opinion accepted many of the majority's premises. He wholeheartedly agreed with the majority view that ultimate sovereignty lay in the People; that by adopting the Constitution, the People had imposed important limitations on states; and that states were therefore sovereign only in a limited and derivative sense.[194]

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190. *Chisholm*, 2 U.S. at 428.
191. *Id.* at 456, 458, 465.
192. *Id.* at 468–69.
193. *Id.* at 472 (emphasis altered).
194.

> Every state in the Union in every instance where its sovereignty has not been delegated to the United States, I consider to be as completely sovereign, as the United States are in respect to the powers surrendered. The United States are sovereign as to all the powers of Government actually surrendered.

Id. at 435 (emphasis omitted). Further, he wrote, states possess "as to every thing simply relating to themselves, the fullest powers of sovereignty, and yet in some other defined particulars [are] subject to a superior power composed out of themselves for the common welfare of the whole." *Id.* at 447. Both state and central governments derive "authority from the same pure and sacred source[:] . . . *The voluntary and deliberate choice of the people.*" *Id.* at 448.

Indeed, Iredell even acknowledged that for some purposes, states might usefully be treated as corporations.[195] On all these basic points, then, the *Chisholm* Court was unanimous.

Yet for Iredell these premises did not lead to the majority result of a general federal corporate law of state assumpsit liability. If the majority anticipated *Swift v. Tyson*'s doctrine of a general federal common law, Iredell presaged *Erie Railroad Co. v. Tompkins*' repudiation of that doctrine.[196] The liability of the state in assumpsit, he argued, should be determined not by general federal common law, but by antecedent state law.[197] And under a state common law rule of unquestioned constitutionality, no assumpsit lay against Georgia. For Iredell, Georgia's "sovereign" immunity was therefore exactly coextensive with her derivative "sovereign" lawmaking capacity: A state could use its lawmaking power to adopt rules immunizing itself from liability, as long as such immunity frustrated no higher-law restrictions on the state's limited sovereignty.

Thus, Iredell carefully limited his discussion to pure diverse party cases against states, in which jurisdiction did not rest upon a substantive federal cause of action based on a congressional statute or the self-executing provisions of the Constitution. The particular question before the Court was for Iredell a narrow one: "[W]ill an action of *assumpsit* lie against a State? This particular question [must be] . . . abstracted from the general one, viz. Whether, a State can in any instance be sued?"[198] Although no assumpsit suit lay against Georgia on principles of "general jurisprudence," Iredell conceded that a different result might obtain in a federal question case "relat[ing] to the execution of the . . . authorities of the general Government (which it must be admitted are full and discretionary, within the restrictions of the Constitution itself)." In such cases, state "sovereignty has . . . been . . . delegated to the United States . . .

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195. *Id.* at 447 (quoted *supra* text accompanying note 36). For further illustrations of the Federalists' self-conscious analogy between state governments and corporations, see 1 M. Farrand, *supra* note 40, at 331–32 (remarks of Rufus King); *id.* at 323, 328 (remarks of Hamilton); *id.* at 357, 471 (remarks of Madison); *id.* at 552 (remarks of Gouverneur Morris); Gibbons, *supra* note 179, at 1896–98.

196. *See supra* note 183.

197. Since he read the relevant congressional statutes to incorporate state law, Iredell did not reach the question of *congressional* power to displace state law rules of decision in diversity-type controversies. On this count, the *Erie* Court went further when it suggested that the diversity and necessary and proper clauses standing alone did not empower Congress to enact a general federal statutory rule of decision or to authorize a general federal common law.

Iredell also diverged from *Erie* in his emphasis on state law at the time of the ratification of the Constitution and adoption of the Judiciary Act instead of at the time of the lawsuit. This freezing of state law more closely resembles the static conformity methodology of the federal Process Acts of 1789 and 1792, *see* C. WRIGHT, THE LAW OF FEDERAL COURTS § 61 (4th ed. 1983), than the dynamic conformity methodology required by *Erie* and the Rules of Decision Act. On this point, as elsewhere, the *Chisholm* Court's failure to focus on the latter act both reflected and generated dubious analysis.

198. *Chisholm*, 2 U.S. at 430.

wherein the separate sovereignties of the States are blended in one common mass of supremacy."[199]

In closing, Iredell did write that he was inclined to believe that full vindication of congressionally-created and constitutional rights would never require "a compulsive suit against a State for the recovery of money." However, he took special pains to make clear that his musings on this "delicate topic" were pure dicta subject to reconsideration should the issue squarely arise in a subsequent case.[200]

B. *The Eleventh Amendment*

The Court's decision in *Chisholm* provoked a chorus of calls around the country for a constitutional amendment. The text eventually agreed upon—"The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or subjects of any Foreign State"—was undeniably designed to repudiate the majority analysis in *Chisholm* and overrule its holding. From that simple starting point, the Supreme Court has arrived at the following interpretation of the case and the Amendment: The defect of *Chisholm* was its failure to recognize absolute state sovereign immunity from citizen suits in all circumstances, and this defect was corrected by enshrining such immunity in the Constitution. No individual can sue her own or any other state in federal court unless the defendant's constitutional immunity is in some special way waived or abrogated.[201] Sovereign immunity ousts all federal jurisdiction, whether in law, equity, or admiralty; whether the suit is based on state law, congressional statute, or the Constitution itself; and whether or not state liability would most fully remedy a constitutional wrong perpetrated by the state itself. The state thus enjoys "sovereign" immunity even when it has violated a limitation on that sovereignty imposed by the ultimate sovereign, the American People.

All of this is, in a word, nonsense. There exists another reading of the

199. *Id.* at 432, 435.

200. *Id.* at 449–50.

201. The Court has conceded that Congress has power under the Civil War Amendments to abrogate states' immunity, *see* Fitzpatrick v. Bitzer, 427 U.S. 445 (1976), and that a state may waive its immunity, *see* Clark v. Barnard, 108 U.S. 436 (1883), but has manipulated clear statement doctrines to choke off both abrogation and waiver, *see* Atascadero State Hosp. v. Scanlon, 473 U.S. 234 (1985); Quern v. Jordan, 440 U.S. 332 (1979); Edelman v. Jordan, 415 U.S. 651 (1974). The Court's claim that this hostility is justified by its general rule against inferring "the surrender of constitutional rights," *Atascadero*, 473 U.S. at 238 n.1, is doublespeak. Current Eleventh Amendment jurisprudence typically protects a classic *un*constitutional right—the right of the state to violate plaintiffs' constitutional rights and get off scot-free. As for the Court's self-proclaimed concern with avoiding constructive waivers of constitutional rights, consider Wainwright v. Sykes, 433 U.S. 72 (1977) (expanding category of waiver of constitutional rights by criminal defendants).

Eleventh Amendment that does far more justice to constitutional text, history, and structure. More important, this neo-Federalist reading does far more justice to the People of the United States, to those revolutionaries who dedicated their lives to bequeath us limited governments, and to those today who claim their distinctive legacy of the rule of law under constitutional government. Under this reading, the defect of *Chisholm* was its displacement of the prevailing state common law of government immunity with a "general" common law of state assumpsit liability *in a case presenting no question of substantive federal law.* The Amendment's cure for *Chisholm*'s case of *Swift*'s disease, however, was not the *Erie* prescription that federal courts follow state law in diverse party cases, but the simple elimination of two categories of diverse party jurisdiction: those involving noncitizen or foreign plaintiffs and state defendants.[202] This ju-

202. This way of conceptualizing *Chisholm* and the Eleventh Amendment raises two interesting questions. First, why did the framers of the Amendment opt for jurisdictional repeal instead of an *Erie*-style rule of decision amendment? Second, if the evil of *Chisholm* was simply its creation of a federal common law, why didn't the Eleventh Amendment's jurisdictional repeal include ordinary diversity cases as well, where federal courts predictably might also attempt to apply (and in fact later did apply) a general federal common law? Each question admits of a variety of answers, only a few of which may be tentatively sketched here.

In answer to the first question, I would stress that: (1) Following Georgia's lead in *Chisholm* itself, states' rights advocates tended to frame the sovereign immunity issue in jurisdictional (and not rule of decision) terms, a conceptualization that tended to lead to a jurisdictional solution. (2) A clear rule of decision amendment strictly binding federal courts might well have been more difficult to draft than a jurisdictional repeal that could simply track the language of Article III. After all, the language of the Rules of Decision Act itself seems crystalline, yet all of the Justices in *Chisholm* had ignored it. (3) States' rights advocates, distrustful of the ways in which federal courts might continue to manipulate rules of decision once seized of jurisdiction, may well have preferred a clear repeal of federal jurisdiction. (4) Federalists committed to a strong national judiciary may also have preferred jurisdictional repeal as setting a less dangerous precedent than an amendment directing federal courts on how to decide cases on the merits. *Cf.* United States v. Klein, 80 U.S. (13 Wall.) 128 (1871) (suggesting constitutional limits on congressional power to dictate how Article III courts decide cases).

In answer to the second question, I would note that: (1) Shortly after the adoption of the Eleventh Amendment, proposals to repeal diversity jurisdiction were in fact made. *See infra* note 233. (2) Symbolically and ideologically, states' rightists found the prospect of a federal common law in diversity cases less offensive than federal common law liability of *the state itself.* (3) Politically, the highly charged issue of repayment of state Revolutionary War debts directly implicated the citizen-state diversity clauses but not the ordinary citizen-citizen diversity clause. *See* Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 406 (1821) (Amendment animated by specific concern over war debt, rather than general theory of state sovereignty); Gibbons, *supra* note 179, at 1926–41. (4) Doctrinally, a federal common law in at least some citizen-citizen diversity cases was probably seen as less offensive to states' rightists than an analogous common law in citizen-state diversity cases like *Chisholm.* In *Chisholm*-type cases, the law of virtually every state was identical in immunizing the state from suit absent its consent. A federal common law rule of liability would therefore displace the policy of all the states. In the quintessential citizen-citizen diversity case, however, state law would predictably differ: Northern state laws would be pro-creditor; Southern laws, pro-debtor. In a typical diversity suit between a Northern creditor and a Southern debtor, a "neutral" federal common law rule "splitting the difference" between divergent state laws (each biased by parochialism) would be comparatively less threatening to states' rights, since not even a state law rule of decision would satisfy "sovereign" demands of all interested states. Blind federal court deference to the law of one state would necessarily be at the expense of the "states' rights" of the other state. Put another way, the justification for federal jurisdiction—and even a federal common law in some situations—was much stronger in citizen-citizen diversity cases where predictable state court parochialism at the choice of law stage might have exac-

risdictional repeal, however, was not designed as a barrier cutting across the other jurisdictional grants of Article III. The party alignments specified by the Eleventh Amendment would no longer provide an *independent basis* for jurisdiction (as they had in *Chisholm*), but the existence of such an alignment would not *oust* jurisdiction that was independently grounded—for example, in federal question or admiralty cases.[203]

1. *The Inadequacy of Current Doctrine*

If the Eleventh Amendment was meant to enshrine the general immunity of state "sovereigns" from private suits in federal courts, it was abysmally drafted. Not only does the text nowhere mention "state sovereign immunity," but the limitations in the text itself are inexplicable if we assume (as does the Court) that the Amendment's purpose was to secure general immunity.

The last fourteen words of the Amendment plainly restrict its scope to suits in which noncitizens are plaintiffs. Yet if, as the Court has held, the Amendment's framers meant to bar federal jurisdiction over federal question suits brought by noncitizens,[204] why did the framers not also oust federal jurisdiction in analogous federal question suits brought by citizens, where the possibilities of state court prejudice were far smaller? It is hard to believe that the framers with one hand invoked federal power to protect out-of-staters with the diversity and privilege and immunity clauses while with the other hand seeking to discriminate against them with the Eleventh Amendment.[205] The Amendment's limitation to cases "in law and equity" is also curious if the Amendment is read to embody a general principle of sovereign immunity. The three basic categories of cases familiar to the framers were law, equity, and admiralty.[206] If the states were to be immune in law and equity, why not in admiralty as well?

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erbated relations among states. *See* Friendly, *In Praise of* Erie*—and of the New Federal Common Law*, 39 N.Y.U. L. REV. 383, 401-02 (1964). State court comity and reciprocity were far more likely in *Chisholm*-type cases where fewer conflicts among state laws would exist.

203. Professor Willie Fletcher and Judge John Gibbons have both recently published important articles that offer readings of the Eleventh Amendment similar to the one put forth here. *See* Fletcher, *supra* note 81; Gibbons, *supra* note 179; *see also Atascadero*, 473 U.S. at 258-90 (Brennan, J., dissenting) (following Fletcher-Gibbons approach to Eleventh Amendment). Although Professor Fletcher, Judge Gibbons, and I all reach similar conclusions about the Amendment's meaning, we do so by way of somewhat different paths. While Professor Fletcher stresses the importance of federal court jurisdiction over cases involving federal statutes, and Judge Gibbons emphasizes the need for such jurisdiction in treaty cases, my main emphasis is on the third prong of "federal question" jurisdiction: cases arising under the Constitution itself. I also seek to locate the Eleventh Amendment in a more general structural framework of Federalist sovereignty theory, implicating federal as well as state sovereign immunity.

204. *See, e.g.*, Louisiana v. Jumel, 107 U.S. 711 (1883).

205. *See infra* text accompanying note 236.

206. *See* 3 J. STORY, *supra* note 21, § 1683 ("[A] suit in the admiralty is not, correctly speaking, a suit in law, or in equity; but is often spoken of in contradistinction to both."); Amar, *supra* note 9,

The Supreme Court has resolved the tension between comprehensive sovereign immunity and the textual restrictions of the Eleventh Amendment by finding immunity in cases where the Amendment by its own terms does not apply. In *Hans v. Louisiana*,[207] the Court held that federal jurisdiction was ousted where a citizen had sued his own state. *Hans* was a case arising under the federal Constitution—this time, the plaintiff had claimed that his state *was* violating the contracts clause—so federal jurisdiction was rooted in the "arising under" clause of Article III; nevertheless, the Court extended the sovereign immunity bar of the Eleventh Amendment to block the suit. Similarly, in *Ex parte New York*,[208] plaintiffs' federal suit in admiralty was supported by an explicit grant of Article III jurisdiction—the "admiralty and maritime" clause—but jurisdiction was ousted by the Supreme Court's extension of the Eleventh Amendment bar.

A coherent vision of blanket state sovereign immunity virtually compels the results in *Hans* and *Ex parte New York*; if noncitizen suits are barred in law and equity, there is simply no good reason *not* to extend sovereign immunity to citizen and admiralty suits. The problem, of course, is that the results in *Hans* and *Ex parte New York* contradict the unambiguous limitations of the Eleventh Amendment's text—a contradiction that suggests the clear error of the Supreme Court's first interpretive premise that the Amendment is in fact concerned with sovereign immunity. If coherence of general sovereign immunity doctrine is achieved only by mangling the Amendment's text, the obvious lesson should be that the Amendment was not designed to embody any such doctrine.

Worse yet, *Hans* and *Ex parte New York* succeed in patching holes in the Court's sovereign immunity theory only by tearing constitutional fabric in other spots. Even in some areas where Congress may constitutionally regulate state behavior, the Supreme Court denies it the power to provide for full enforcement of its regulations in federal court. By reading the Eleventh Amendment's "state sovereign immunity" restrictions on federal *judicial* power to go far beyond the Tenth's "residuary state sover-

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at 253.

207. 134 U.S. 1 (1890). Strictly speaking, it appears that the *Hans* Court rested its decision not on the Eleventh Amendment itself, but on general principles of state sovereign immunity tacitly limiting Article III. Subsequent opinions of the Court, however, have cited *Hans* as an Eleventh Amendment case, *see, e.g.*, Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 238 (1985), once again demonstrating the Court's tendency to equate the Amendment with the very different principle of sovereign immunity. *See, e.g.*, Pennhurst State School & Hosp. v. Halderman, 465 U.S. 89, 98 (1984) (Amendment's "greater significance lies in its affirmation that the fundamental principle of sovereign immunity limits the grant of judicial authority in Art. III"); *Ex parte* New York, 256 U.S. 490, 497 (1921) ("That a State may not be sued without its consent is a fundamental rule of jurisprudence . . . of which the Amendment is but an exemplification.").

208. 256 U.S. 490 (1921).

eignty" restrictions on federal *legislative* power, the Court has created a curious category of cases in which Congress may pass laws operating directly on states that can be enforced (if at all)[209] only in state courts.[210] The result is an inexplicable throwback to the jurisdictional regime of the Articles of Confederation, which the Federalists viewed as "extremely defective" and violative of obvious first principles of government.[211] "If there

209. The obligation of state courts to entertain all federal claims that federal courts are barred from hearing by the Court's sovereign immunity doctrine rests largely on the slender dicta of General Oil Co. v. Crain, 209 U.S. 211, 226-27 (1908). *Cf.* Employees v. Department of Pub. Health & Welfare, 411 U.S. 279, 293-98 (1973) (Marshall, J., concurring in result) ("The issue . . . is merely the susceptability of the States to suit before federal tribunals."); *Atascadero*, 473 U.S. at 240 n.2 (structure of federalism determines which court will hear complaints against state, not whether they will be heard).

210. *See, e.g.*, *Atascadero*, 473 U.S. 234; *Employees*, 411 U.S. 279.

211. *See* Osborn v. Bank of United States, 22 U.S. (9 Wheat.) 738, 818-19 (1824) (Marshall, C.J.). It might be argued that Congress had no power under the original Constitution to legislate directly on states qua states. This argument, however, has properly been rejected by the Supreme Court. *See, e.g.*, Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528 (1985); *see also* THE FEDERALIST No. 36, at 220-21 (A. Hamilton) (federal government may continue to levy requisitions on state governments); Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304, 343 (1816) ("It is a mistake [to think] that the constitution was not designed to operate upon states, in their *corporate* capacities." (emphasis added)); Chisholm v. Georgia, 2 U.S. (2 Dall.) 419, 464 (1793) (opinion of Wilson, J.) (similar). In any event, the basic point is simply that if and when Congress may constitutionally pass laws directly binding states, federal courts may not be barred from deciding all cases arising under these laws.

The Court has recently hinted in a footnote that state courts may be obliged to entertain suits that the Eleventh Amendment withholds from federal courts, and that these state court dispositions of federal questions can be reviewed on appeal by the Supreme Court. *Atascadero*, 473 U.S. at 238 n.2. This concession is inadequate and incoherent. It is inadequate because it still denies Congress power to use federal *trial* courts to enforce its own laws. The Court's position is exactly the one staked out by the extreme Anti-Federalist opponents of the Constitution, like Luther Martin, who argued that the national judiciary should only be allowed to exercise appellate review over state trial courts. Because the Federalists knew that state trial courts could not always be trusted to enforce federal rights, and that federal appellate review would not always suffice to protect these rights against state court hostility or indifference, they insisted—*successfully*—upon empowering Congress to establish federal trial courts that could entertain all federal cases. *Atascadero*'s approach simply ignores the great Madisonian compromise at the base of Article III. *See* Amar, *supra* note 9, at 212-14, 233. The Court's concession is incoherent because it, in effect, forces state courts to hear certain suits—if there is no compulsion, the Court's point is meaningless—and then uses the state "consent" thus extorted to support federal appellate jurisdiction.

Just as the Federalists designed the federal judicial power to be coextensive with the legislative, they designed the original jurisdiction of lower federal courts to be potentially coextensive with the Supreme Court's appellate jurisdiction. *Atascadero* thus knocks out two of the basic pillars of Article III, both prominently featured in each of the three great Marshall Court opinions on federal jurisdiction: *Osborn*, 22 U.S. at 818-21; Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 384-99 (1821); *Martin*, 14 U.S. at 329-36.

Elsewhere in the same footnote, the Court serves up the following misstatements: "our Eleventh Amendment doctrine is necessary to support the view of the federal system held by the Framers of the Constitution"—nothing could be further from the truth, *see infra* text accompanying notes 235-36; "the Framers believed that the States played a vital role in our system and that strong state governments were essential to serve as a 'counterpoise' to the power of the Federal Government"—a statement that is profoundly true but equally irrelevant in a suit brought by a citizen claiming that a state has violated federal law; and "[t]he Constitution never would have been ratified if the States and their courts were to be stripped of their sovereign authority except as *expressly* provided by the Constitution itself" (emphasis added)—a statement flatly contradicted by Madison in THE FEDERALIST No. 44, at 283-86 (noting framer's self-conscious choice to avoid word "expressly" in Constitution's "necessary

are such things as political axioms, the propriety of the judicial power of a government being coextensive with its legislative may be ranked among the number."[212] The Federalist Constitution's provision that the federal judicial power under Article III would extend to *all* cases arising under laws passed under Article I could not have more plainly repudiated the Confederation's jurisdictional scheme.[213] And federal question suits brought against states themselves are exactly the sort of cases in which state courts are most likely to lack the commitment and political independence to enforce federal rights unflinchingly.[214]

The Federalist Constitution also guaranteed that federal jurisdiction would extend to all cases arising under the Constitution itself. Federal judges insulated from parochial politics were to play a special role in safeguarding various constitutionally guaranteed individual rights against state governments.[215] The Supreme Court's Eleventh Amendment jurisprudence mocks these solemn promises: Federal jurisdiction is barred even when citizens seek relief against states that have violated constitutional rights.

The Court itself has recognized the problems of following general sovereign immunity to its logical conclusion, and has therefore tried to limit that immunity through various doctrinal gymnastics and legal fictions. The most famous, the fiction of *Ex parte Young*,[216] allows citizens to sue for injunctive relief against a state violating the federal Constitution or

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and proper" clause because of problems created by inclusion of word in Articles of Confederation, 1781, art. II), and the first Congress, *see* 1 ANNALS OF CONG. 790 (J. Gales ed. 1789) (objecting to attempt to insert "expressly" into Tenth Amendment), and Chief Justice Marshall in McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 406 (1819) (making same point about Tenth Amendment).

To top it all off, the Court cites—of all things—*Martin v. Hunter's Lessee* to support its vision of federalism. This citation does a disservice to the memory of Joseph Story, whose vision of federal jurisdiction simply could not be more distant. *See* Amar, *supra* note 9, at 210–15. *Compare* Stone v. Powell, 428 U.S. 465, 493 n.35 (1976) (citing *Martin* in support of proposition that state judges and federal judges are fungible) *with Martin*, 14 U.S. at 344–47 (explicitly denying such fungibility). The *Atascadero* footnote is emblematic of the Burger Court's sloppy use of history and misunderstanding (or deliberate perversion) of the Federalist tradition.

212. THE FEDERALIST No. 80, at 476 (A. Hamilton); *see also* Amar, *supra* note 9, at 250–52 (discussing axiom of coextensive jurisdiction); Fletcher, *supra* note 81, at 1074 (same).

213. It is, of course, possible to read the Eleventh Amendment as radically inconsistent with the provisions of the original Constitution—after all, the Amendment did modify the Philadelphia document. Nevertheless there are compelling reasons not to read the Amendment as a gross rupture of constitutional first principles. *See infra* text accompanying note 236.

214. As a logical matter, the gap between federal legislative and judicial power was created not by *Hans* itself but by reading the Amendment as a jurisdictional bar ousting federal question jurisdiction whenever there exists a certain party configuration. The roots of this mistake lie in a case, decided a few years before *Hans*, that raised a similar contracts clause issue, Louisiana v. Jumel, 107 U.S. 711 (1883). The *Jumel* suit, however, was brought by a non-Louisianian, and thus the Court held that federal question jurisdiction was ousted by the literal words of the Eleventh Amendment. As a practical matter, *Hans* is the more important case since it dramatically enlarges the jurisdictional hole created by *Jumel*; most federal question claims against states are claims against one's own state.

215. *See* Amar, *supra* note 9, at 222–29, 246–50; *supra* text accompanying notes 64–65.

216. 209 U.S. 123 (1908).

federal statutes by pretending to sue a state official. The *Young* fiction covers suits against officers in their official capacities—suits that can compel officers to pay money out of the state treasury, rather than their own pockets.[217] The fiction that such suits are merely brought against individuals, and not the state, is transparent. The "state" itself, after all, is an artificial juridical person and can act only through state officials. If these women and men are enjoined in their official capacities then, as a practical matter, the state is itself enjoined. Indeed, in cases like *Young* involving violations of constitutional rights, the cause of action itself typically requires the plaintiff to prove that defendant is a state actor wielding state power.[218]

If the fiction of *Ex parte Young* were fully extended to all citizen suits based on the constitutional wrongs of states, perhaps little harm would result from the Court's interpretation of the Eleventh Amendment. "Sovereign" immunity would dissolve into a technical matter of writing one word instead of another in the caption of the complaint. Immunity would simply be a matter of pleading, of politeness.[219] In *Edelman v. Jordan*,[220] however, the Court cabined the *Young* fiction to suits for prospective relief. Federal courts may enjoin state officials in their official capacity to pay money out of the state treasury for future obligations, but may not order them to charge the public fisc to make whole victims of past constitutional wrongdoing. Perversely, a state government that spends money to avoid violating the Constitution ends up financially worse off than one that cynically flouts higher law until ordered into prospective compliance.

The obvious lack of principle underlying the *Edelman* distinction merely reflects a much deeper paradox in the Court's attempt "to promote the supremacy of federal law [and yet] accommodate[] . . . the constitutional immunity of the States."[221] The *Edelman* Court "declined to extend the fiction of *Young* to encompass retroactive relief, for to do so would effectively eliminate the constitutional immunity of the States."[222] But the Court has created its own false dilemma here by wrongly conceptualizing the "constitutional immunity of the States" as in tension with—indeed, as the logical negation of—the "supremacy of federal law." The result would be comic were it not so tragic: The Court heroically

217. *See, e.g.*, Milliken v. Bradley, 433 U.S. 267 (1977).

218. *Young* itself, for example, involved no individual private law tort by the defendant; the sole basis for the suit was the claim that defendant, as a *state* official, was about to execute an unconstitutional *state* law that offended the due process clause's restrictions on *state* action.

219. *Cf.* Chisholm v. Georgia, 2 U.S. (2 Dall.) 419, 460 (1793) (opinion of Wilson, J.) (King's immunity from suit in Britain "is only in the *form*, not in the *thing*").

220. 415 U.S. 651 (1974).

221. Pennhurst State School & Hosp. v. Halderman, 465 U.S. 89, 105 (1984).

222. *Id.*

struggles to promote both higher-law limitations on states and the states' "immunity" to violate those limitations. It is no wonder the Court's Eleventh Amendment case law is incoherent; in law, as in logic, anything can be derived from a contradiction.[223] All we are left with is an *ad hoc* mishmash of *Young* and *Edelman*, of full remedy and state sovereignty, of supremacy and immunity, of law and lawlessness.[224] The icon of the federal courthouse open to remedy all constitutional wrongs gives way to a burlesque image of a doctrinal obstacle course on the courthouse steps.[225]

In the end, the Supreme Court's vision of state sovereign immunity warps the very notion of government under law. The Court's invocation of state "sovereign" immunity in cases where the state plainly is not sovereign—because it has acted ultra vires—resurrects the British theory of governmental supremacy that was anathema to the framers. It puts governments above, not under, the law. It makes government officers masters, not servants, of the People. James Madison put it bluntly: "[A]s far as the

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223. Further examples of incoherent doctrine: (1) The Eleventh Amendment is a subject matter bar that—unlike all others—may be waived (despite the fact that the Amendment nowhere suggests that "consent" can cure a jurisdictional defect) and—unlike other waivable bars (like personal jurisdiction, venue, and service of process)—may be raised at any time in the lawsuit. (2) When a state violates the Constitution or ordinary congressional legislation, it is immune from damages, but when it violates a court order it is not. Not only does this improperly give each state one free bite at constitutional rights, it seems to turn the Eleventh Amendment's special restriction on *judicial* power on its head. (3) The absence of a damage remedy encourages more intrusive and coercive injunctive relief, which, ironically, may be enforced by damages for noncompliance. (4) When Congress legislates under section 5 of the Fourteenth Amendment it can unilaterally lift state sovereign immunity, yet section 1 of that same Amendment apparently does not cure the jurisdictional defect, despite its self-executing nature. (5) Federal courts apparently cannot order specific performance of a state contract whose breach violates the contracts clause, but they can order specific performance of analogous obligations created by other federal law.

224. In *Pennhurst*, 465 U.S. 89, the Supreme Court further limited *Young* by declining to apply its fiction to a citizen suit seeking purely prospective relief on the basis of a state law claim pendent to the jurisdiction-conferring federal claim. Although *Pennhurst* might seem a dramatic extension of the Eleventh Amendment's jurisdictional bar, the case in fact can be read as returning to the core meaning of the Amendment: Where no higher law applies, where no federal question exists, federal courts should not have jurisdiction over private citizen suits against states. Although federal question jurisdiction did exist in *Pennhurst*, and therefore the Amendment by its terms did not strictly apply, the principles underlying it should perhaps inform the discretionary assertion of pendent jurisdiction over state-law claims. *Cf.* Aldinger v. Howard, 427 U.S. 1 (1976) (statutory limitation on federal jurisdiction should inform exercise of pendent jurisdiction).

But to reconceptualize *Pennhurst* in this way is to see yet again the flaw of *Edelman*. If the rationale for declining jurisdiction in *Pennhurst* is the absence of any federal right requiring vindication, the simple converse is that where such a federal right is asserted, jurisdiction should always be upheld—whether the relief sought is retrospective or prospective. The very same reasons that justified *Young* applied equally in *Edelman*: the need to provide full vindication of federal rights against states, vindication that will sometimes require retrospective damages. Perhaps unwittingly, *Pennhurst*'s analysis invites us to reorient the Eleventh Amendment's axis from the prospective-retrospective line of *Edelman* to the state law-federal law distinction involved in both *Pennhurst* and *Chisholm*.

225. *See* Fletcher, *supra* note 81, at 1044 (calling case law "jerry-built" and "complicated" by "use of fictions"); Wolcher, *Sovereign Immunity and the Supremacy Clause: Damages Against States in Their Own Courts for Constitutional Violations*, 69 CALIF. L. REV. 189, 195, 197, 210-12 (1981) (noting that "curious rules" of Eleventh Amendment and "elaborate structure of fiction and artifice" force plaintiff to "negotiate . . . through judicial avoidance doctrines").

sovereignty of the States cannot be reconciled to the happiness of the people, the voice of every good citizen must be, Let the former be sacrificed to the latter."[226]

2. *The Advantages of Neo-Federalism*

The neo-Federalist reading of the Eleventh Amendment suffers from none of the crippling ailments of the Court's approach. To begin with, it makes perfect sense of all the words of the Amendment itself. The Amendment was limited to cases in "law and equity" precisely because its framers intended to leave plenary federal jurisdiction over "all cases of admiralty and maritime jurisdiction" undisturbed. It is quite implausible to assume—as the Court must—that the Amendment's omission of admiralty was a mere drafting oversight. In 1793, admiralty was universally considered to be one of the most important categories of federal jurisdiction.[227] Similarly, the Amendment was restricted to suits brought by noncitizen and foreign plaintiffs precisely because only the presence of these private plaintiffs would give rise to independent diverse party jurisdiction where a state was party defendant. The text does not speak sweepingly of state "sovereign immunity," but instead tracks the technical "judicial power shall extend" language of the Article III jurisdictional grants, precisely because it was simply designed to restrict two of those grants.

The Amendment's legislative history supports this parsing of the text. Professor Charles Warren uncovered an alternative amendment that he believed was introduced in the House of Representatives immediately after *Chisholm* came down, but never seriously considered.[228] Although other scholars have expressed doubt about whether the proposal was in fact ever officially introduced,[229] its undisputed existence confirms what should be obvious anyway: If the Eleventh Amendment's framers had intended a broad sovereign immunity principle applicable even in federal question cases, they knew the words:

> [T]hat no State shall be liable to be made a party defendant in any of the Judicial Courts established or to be established under the authority of the United States, at the suit of any person or persons, citizens or foreigners, or of any body politic or corporate whether within or without the United States.[230]

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226. THE FEDERALIST No. 45, at 289 (J. Madison); *cf.* T. JEFFERSON, *supra* note 102, at 164 ("[a]n *elective despotism* was not the government we fought for").

227. *See* Amar, *supra* note 9, at 253–54.

228. 1 C. WARREN, THE SUPREME COURT IN UNITED STATES HISTORY 101 (1922).

229. Gibbons, *supra* note 179, at 1926 n.186.

230. 1 C. WARREN, *supra* note 228, at 101.

By contrast, it would have been difficult to come up with wording that expressed better than does the Amendment's final text a simple desire to effect a partial repeal of two technical diverse party grants.

Even the Court has long argued that the Amendment was designed to parallel Justice Iredell's dissent in *Chisholm*.[231] Yet as noted above, Iredell carefully limited his rationale to diverse party cases; he expressly avoided a judgment (although he did venture admittedly tentative opinions) on the questions of state sovereign immunity in federal question or admiralty cases—questions not posed by *Chisholm* itself. The Court thus reads the Amendment to go far beyond Iredell's dissent in *Chisholm*, whereas the neo-Federalist reading follows Iredell by carefully limiting the scope of the Amendment to diverse party cases.[232]

A specific language change made by the drafters offers further evidence of their narrow intent. The original draft language of the Amendment provided that the judicial power "shall not extend" to noncitizen and foreign plaintiff suits against states in law and equity. That language, however, might have been interpreted to mean that the federal judicial power could never extend to cases presenting these party alignments, even when such cases were independently grounded in, say, a federal question. Perhaps because of this ambiguity, the original text failed to pass, and was subsequently modified by replacing the phrase "the judicial power shall not extend" with the language "the judicial power shall not *be construed* to extend." This modification softened the Amendment to conform to the framers' intent that the judicial power should not be construed to extend to the enumerated diverse party suits *as such*, but would extend to these diverse configurations whenever jurisdiction was independently based on another affirmative jurisdictional grant.[233]

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231. Hans v. Louisiana, 134 U.S. 1, 12–19 (1890).

232. Interestingly, the "Constitution" of the Confederate States of America, which generally tracks the language of the Federalist Constitution, modified the language of Article III by adding the following italicized phrases: "The judicial power shall extend to . . . controversies . . . between a State and citizens of another State, *where the State is plaintiff*; . . . and between a State . . . and foreign states, citizens, or subjects; *but no State shall be sued by a citizen or subject of any foreign state.*" CONST. OF THE CONFEDERATE STATES OF AMERICA art. III, § 2 (1861) (emphasis added). Thus, the Confederates chose language that simply limited two party-defined jurisdictional categories without in any way establishing the general "sovereign immunity" of states, or ousting federal question and admiralty jurisdiction—exactly the same result as the Eleventh Amendment of the Federalist Constitution, properly read.

233. Senator Henry Clay proposed a constitutional amendment in 1807 in language that carefully tracked the Eleventh Amendment's: "The judicial power of the United States shall not be construed to extend to controversies between citizens of different States . . . nor between a State or the citizens thereof, and foreign States, citizens, or subjects." 16 ANNALS OF CONG. 76 (1807). The intent of this amendment was clear: The judicial power should no longer extend to the listed cases *ipso facto*, but it could where *other* sections of Article III so provided. *See id.* at 216 (remarks of James Elliot). Under Clay's amendment, mere diversity of citizenship was obviously not intended to oust independently granted (federal question or admiralty) jurisdiction. So too with the Eleventh Amendment.

Some scholars have conjectured that the words "shall not be construed" were inserted into the

The "shall not be construed" clause of the Eleventh Amendment thus harmonizes with the identical language in the Ninth Amendment: "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people." Here, the enumeration of rights does not automatically deny, repeal, or abrogate other natural rights. Those rights may continue to be judicially enforced in the absence of contrary superior positive law—congressional or constitutional. Similarly, in the Eleventh Amendment, the judicial power does not automatically extend to enumerated suits, but suits may lie if provided for by positive law—congressional or constitutional.[234]

Finally, the neo-Federalist reading preserves various basic structural principles of the original Constitution repudiated by the Court's doctrine—the coextensiveness of judicial and legislative power; the coextensiveness of original and appellate jurisdiction; the critical importance of plenary federal jurisdiction in admiralty and federal question cases; the structural superiority of the federal judiciary to state judiciaries; the special role of federal judges in protecting individual rights against states; and the need for suits against states themselves to enforce these rights. I have

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Eleventh Amendment to correct what the Amendment's framers regarded as the Supreme Court's misconstruction of the original diverse party grants in *Chisholm*. The language of Clay's amendment, however, belies this hypothesis. In 1807, it was clear that Article III did extend federal jurisdiction to cases between individuals with diverse citizenship. Clay evidently inserted the "shall not be construed" clause to make clear that his amendment was simply repealing an earlier affirmative jurisdictional grant, not creating a new jurisdictional bar. The same clause was designed to serve the same purpose in the Eleventh Amendment.

The "misconstruction" thesis also seems at odds with the abundant evidence suggesting that, on the jurisdictional issue proper, *Chisholm* was firmly grounded. *See supra* text accompanying notes 173-83.

234. It thus turns out that a proper reading of the Eleventh Amendment can help to inform interpretation of the Ninth, which has itself been the subject of much confusion. (The neo-Federalist reading thus clarifies important connections, currently obscured by Supreme Court doctrine, among the Ninth, Tenth, and Eleventh Amendments.) Under the interpretation offered here, the "natural" or pre-existing rights "retained" by the People and declared by the judges would be "subconstitutional" in that they could be trumped by legislative enactment. The Ninth Amendment authorizes federal judges to engage in the making of a species of what Professor Monaghan has labelled "constitutional common law"; judicial derivation of natural law is both approved and democratically cabined. Monaghan, *The Supreme Court 1974 Term—Foreword: Constitutional Common Law*, 89 HARV. L. REV. 1 (1975). This reading of the Ninth Amendment is buttressed by recent work on the history of natural law in America. According to Professor Robert Cover, Americans in the 18th and 19th centuries generally viewed judicially derived natural law as interstitial law that could be overridden by legislative enactment. R. COVER, JUSTICE ACCUSED: ANTISLAVERY AND THE JUDICIAL PROCESS 34 (1975).

This interpretation of the Ninth Amendment may help to resolve two seemingly unconnected problems currently bedevilling constitutional scholars. First, what is the constitutional *source* of constitutional common law? Professor Monaghan's efforts to answer this question seem uncharacteristically weak. *See* Monaghan, *supra*, at 8, 13, 23, 34-38; *see also* Schrock & Welsh, *Reconsidering the Constitutional Common Law*, 91 HARV. L. REV. 1117, 1118-45 (1978) (criticizing Monaghan on this point). Second, how can the Ninth Amendment be taken seriously yet limited? Interestingly, in Dean Ely's exhaustive Sherlock Holmesian proof-by-elimination concerning the meaning of the Ninth Amendment, the one possibility he overlooks is constitutional common law. J. ELY, DEMOCRACY AND DISTRUST 34-41 (1980).

discussed the first five of these principles at length elsewhere.[235] I shall therefore simply note here that if the Supreme Court's interpretation is correct, it is amazing that the Amendment was supported by so many Federalists—without whose support the Amendment could not have succeeded—willing to dismantle so much of what they had worked so hard so recently to erect.[236] The sixth and final structural principle—the remedial imperative of government liability—requires additional elaboration and furnishes perhaps the strongest reason of all for rejecting the Court's Eleventh Amendment doctrine.

C. *The Remedial Imperative of Government Liability*

To say that the Eleventh Amendment embodies no general principle of state sovereign immunity is only to begin constitutional inquiry. Even in the absence of a specific textual niche for sovereign immunity, we must examine the structure of the Constitution to see whether such immunity is implicit in our constitutional order. For example, there is no obvious source of national sovereign immunity analogous to the Eleventh Amendment, yet countless suits against the federal government have been barred by general sovereign immunity principles of mysterious origin. Indeed, much of the case law of federal sovereign immunity has been directly assimilated, with little explicit analysis or justification, to state sovereign immunity cases—an assimilation that once again suggests that the real workhorse in sovereign immunity doctrine is not the text of the Eleventh Amendment. Assuming that no Eleventh Amendment sovereign immunity exists, the question becomes, does the rest of the Constitution imply governmental immunity?[237]

In *Monaco v. Mississippi* the Court wrote:

> Manifestly, we cannot . . . assume that the letter of the Eleventh

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235. *See* Amar, *supra* note 9. In that essay, I attempted to establish that the Federalists viewed the first three jurisdictional categories of Article III—which include the admiralty and federal question grants—as far more important than the last six diverse party categories. While the Court reads the Eleventh Amendment to cut deeply into the first three "critical" categories, the neo-Federalist reading reinforces the two-tiered approach to Article III by viewing the Amendment as merely trimming off portions of "second tier" categories that were much less important from the outset.

236. "The roster of those favoring the amendment includes the names of ardent nationalists, as well as states' rights men." C. JACOBS, *supra* note 173, at 71. "That there was no design, on the part of its framers, to effect a revolution in federal-state relations seems clear." *Id.* at 92.

237. Put another way, do strong reasons exist to try to cram sovereign immunity into the Eleventh Amendment despite the obviously uncomfortable fit? *Cf.* H. HART & A. SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW 806-07 (tent. ed. 1958) (Court has abandoned words of Eleventh Amendment and treated it "as if it were a precedent to the opposite of *Chisholm v. Georgia*"). Unfortunately, the Court has misread the anti-*Chisholm* precedent of the Eleventh Amendment by going far beyond the "holding" of Iredell's dissent. *See supra* text accompanying note 231. In effect, the Court has read the Eleventh Amendment as if it were a precedent to the opposite of the rest of the Constitution. *See infra* text accompanying notes 240-60.

> Amendment exhausts the restrictions upon suits against non-consenting States. Behind the words of the constitutional provisions are postulates which limit and control. . . . There is . . . the postulate that States of the Union, still possessing attributes of sovereignty, shall be immune from suits, without their consent, save where there has been "a surrender of this immunity in the plan of the convention."[238]

But contrary to *Monaco* and the rest of the Court's sovereign immunity case law,[239] the Constitution draws its life from postulates that limit and control lawless governments, not postulates that limit and control citizens in their efforts to vindicate constitutional rights, nor postulates that limit and control federal courts in their efforts to provide that vindication. The real postulates "behind the words of the constitutional provisions" are these: (1) Ultimate sovereignty resides in the People of the United States, not in governments. Governments—state and national—enjoy only limited and delegated sovereign power. When these governments violate the commands of the highest Sovereign embodied in the Constitution, they are no longer acting in their derivative sovereign capacity, and thus have no "sovereign" immunity. (2) The legal rights against governments enshrined in the Constitution strongly imply corresponding governmental obligations to ensure full redress whenever those rights are violated. (3) Full and adequate remedies for constitutional wrongs committed by governments will often call for governmental liability. In these cases, there necessarily has been—to reclaim the words *Monaco* borrowed from Hamilton—"a surrender of immunity in the plan of the convention [i.e., the Constitution]."

The first postulate simply distills the theory of popular sovereignty animating the Federalist Constitution.[240] The second is equally straightforward. Few propositions of law are as basic today—and were as basic and

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238. 292 U.S. 313, 322-23 (1934) (footnote omitted) (quoting THE FEDERALIST No. 81 (A. Hamilton)).

239. Despite the plain words of Article III, *Monaco* held that no federal jurisdiction existed over a suit brought by a foreign nation against an unconsenting state. *Id.* at 320-32. Unless state courts are forced to hear such cases—a compulsion that seems at least equally, if not more, offensive to state "sovereignty"—needless international confrontations might arise embroiling citizens in all the other states of the union. It was exactly to avoid such international incidents that the Federalists gave national tribunals the power to entertain "Controversies . . . between a State . . . and foreign States." U.S. CONST. art. III, § 2; *see* Chisholm v. Georgia, 2 U.S. (2 Dall.) 419, 424 (1793) (oral argument of Randolph); *id.* at 451 (opinion of Blair, J.); *id.* at 467 (opinion of Cushing, J.); *id.* at 473 (opinion of Jay, C.J.). Nothing in the Eleventh Amendment in any way alters this jurisdictional grant, as Chief Justice Marshall forcefully noted in Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 406 (1821). The parochialism of *Monaco* is staggering; nowhere else has the Court applied state sovereign immunity principles outside the context of a private citizen's suit against a state. *See* South Dakota v. North Carolina, 192 U.S. 286 (1904) (upholding jurisdiction when *state* plaintiff sues unconsenting state defendant on virtually identical cause of action to that ousted in *Monaco*); United States v. Texas, 143 U.S. 621 (1892) (upholding jurisdiction where U.S. is plaintiff).

240. *See supra* text accompanying notes 56-170.

universally embraced two hundred years ago—as the ancient legal maxim, *ubi jus, ibi remedium*: Where there is a right, there should be a remedy. The proposition that every person should have a judicial remedy for every legal injury done him was a common provision in the bills of rights of state constitutions;[241] was invoked by *The Federalist* No. 43 in a passage whose very casualness indicated its uncontroversial quality;[242] and was the cornerstone of analysis in one of the most important and inspiring passages of *Marbury v. Madison*:

> The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury. One of the first duties of government is to afford that protection. . . .
>
> . . . "[I]t is a general and indisputable rule, that where there is a legal right, there is also a legal remedy by suit, or action at law, whenever that right is invaded". . . . "[E]very right, when withheld, must have a remedy, and every injury its proper redress."
>
> The government of the United States has been emphatically termed a government of laws, and not of men. It will certainly cease to deserve this high appellation, if the laws furnish no remedy for the violation of a vested legal right.[243]

The third step of analysis focuses on how the very existence of sovereign immunity will often drive a wedge between legal right and effective remedy. Granted, not all may have recognized this fact at the time of the adoption of the federal Constitution. Iredell in *Chisholm* closed his opinion with the self-described dictum that "every word in the Constitution may have its full effect without involving [the] consequence" of allowing "a compulsive suit against a state for the recovery of money."[244] Similarly, John Marshall's opinion in *Cohens v. Virginia* seemed to imply that full vindication of constitutional rights against states might not require affirmative suits against the state; individual rights, Marshall hinted, might be fully protected by affirmative suits against individual officers in their private capacity, and by the ability of citizens to invoke constitutional rights defensively in suits brought *by* states.[245]

Even if these arguments were colorable in the eighteenth and early

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241. *See* Gibbons, *supra* note 179, at 1898 n.44 (citing constitutions of Delaware, Maryland, and Massachusetts); *see also* 3 J. ELLIOT, *supra* note 52, at 658 (Declaration of Rights and Amendments of Virginia ratifying convention).

242. "But a right implies a remedy . . . ." THE FEDERALIST No. 43, at 274 (J. Madison).

243. 5 U.S. (1 Cranch.) 137, 162-63 (1803) (quoting 3 W. BLACKSTONE, *supra* note 27, at *23, *109).

244. 2 U.S. (2 Dall.) 419, 449-50 (1793).

245. 19 U.S. (6 Wheat.) 264, 402-03 (1821).

nineteenth centuries,[246] they fail today. To begin with, in the eyes of Iredell and Marshall any possible government immunity was offset by strict liability on the part of individual government officers. For example, in *Osborn v. Bank of the United States*, Marshall noted that the defendant Ohio officer would have been personally liable to the plaintiff bank even had he acted in compliance with a state law that he reasonably but incorrectly believed to be fully constitutional.[247] Today, most individual government officers enjoy either qualified or absolute immunity from personal liability. As Professor Engdahl has noted, courts since the mid-nineteenth century have opened up a wide remedial gap by creating expansive official immunities without correspondingly relaxing government immunity.[248]

Even abolition of the current structure of individual immunity would often only narrow twentieth century gaps between right and remedy.[249] Individual officers will frequently be (at least partially) judgment-proof. Pervasive and systematic illegality will not always be traceable to specific individuals who can be called to account. The state entity itself will often

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246. They did not represent the dominant view of the Federalists. *See infra* text accompanying notes 253-55. Yet even if I am wrong on that count, the error is not fatal to my structural argument here. Rather, we would be left with the following puzzle: The framers of the Constitution believed (1) that there should be full remedies for violations of constitutional rights, and (2) that such remedies would never require government liability. If (1) and (2) are inconsistent today because of changed circumstances, the question becomes, which should yield? The issue here is admittedly devilish, but a sensitive reading of the Constitution suggests that (2) should yield because full remedies were woven into the fabric of the document in a way that government immunity was not. *See infra* text accompanying notes 256-60. The Constitution is better read as in effect imposing the risk of changed circumstance on lawless governments and not constitutional rights-holders.

To take a similar example, the framers believed both that Congress should have power to legislate upon all truly interstate commerce, and that such legislation would never seriously intrude on state legislatures, since most commerce was purely intrastate. Because of changed circumstances, these propositions are inconsistent today. Transportation and communications technologies have vastly increased the proportion of truly interstate commerce. Once again, the issue is tricky, but a sensitive reading of the Constitution suggests that the prerogatives of state legislatures should yield, because the coterminous nature of congressional power and interstate commerce was built into the Constitution itself. If interstate commerce expands, so does congressional power under the commerce clause. The Constitution imposes the risk that changed technological circumstances might expand the national economy upon state legislatures.

247. Osborn v. Bank of the United States, 22 U.S. (9 Wheat.) 738, 839 (1824) ("The appellants expressly waive the extravagant proposition, that a void act can afford protection to the person who executes it, and admit the liability of the defendants to the plaintiffs . . . ."); *see also* Little v. Barreme, 6 U.S. (2 Cranch) 170, 179 (1804) (obedience to presidential orders does not immunize naval officer from liability for unlawful seizure); Marbury v. Madison, 5 U.S. (1. Cranch) 170 (1803) (office does not create immunity from accountability for illegal acts).

248. Engdahl, *Positive Immunity and Accountability for Governmental Wrongs*, 44 U. COLO. L. REV. 1 (1972); *accord* P. BATOR, P. MISHKIN, D. SHAPIRO & H. WECHSLER, HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 1410-23 (2d ed. 1973); Dellinger, *supra* note 13, at 1553-59; Gibbons, *supra* note 179, at 1943 n.295; *see also* Declaration and Resolves of the First Continental Congress, *supra* note 76, at 84 (objecting to parliamentary attempt to immunize errant government officials from private damage suits).

249. *Cf.* P. SCHUCK, SUING GOVERNMENT 55-121 (1983) (strict individual liability without indemnification may create perverse incentives and compound already excessive risk aversion of government officials).

be the source and the unjustly enriched beneficiary of illegal conduct by individual officials. Furthermore, general principles of modern tort theory and enterprise liability suggest that the governmental entity will often be in a far better position than any individual officer to restructure official conduct in a way that avoids future violation of rights. Thus, many of the same reasons that support entity liability for private corporations argue persuasively for similar entity liability for governments[250]—a point sharpened by the Federalists' conception of governments as limited corporations, and by their use of agency principles and incentive analysis as linking concepts in a more general system of political economy structuring the law of both governmental and profit-seeking organizations.[251]

Additionally, many legal rights today are affirmative rights against the government itself. If the Constitution obliges a state to provide minimal education to its children,[252] this affirmative right cannot be fully protected by the ability of a citizen to raise her claim defensively in a state-initiated proceeding. Likewise, this right cannot be adequately protected by the possibility of suit against a private person, since the obligation is that of the state qua state.

Furthermore, Iredell's and Marshall's musings notwithstanding, the dominant view of the Federalists was that full vindication of constitutional rights would sometimes require direct suit against government. Even in the absence of today's more expansive vision of affirmative rights, the framers recognized that affirmative relief would often be essential to protect negative rights[253]—especially where the government violation could not be prevented *ex ante*, and where the government would enjoy the fruits of its past violations. In the words of Attorney General Edmund Randolph, who had earlier played a vital role in the Philadelphia Convention and the Virginia ratification debates:

> The common law has established a principle, that no prohibitory act shall be without its vindicatory quality . . . . In our solicitude for a

250. *See generally id.*

251. *See supra* text accompanying notes 31-49, 72-75. Judge Gibbons has noted that no state constitution explicitly provided for sovereign immunity, and that, on the contrary, the charters of several states expressly provided that the state could be sued, in conformity with the general rule that corporations were suable. *See* Gibbons, *supra* note 179, at 1896-98.

252. The Supreme Court has expressed doubt about the existence of this right to minimal education and invoked principles of "federalism" in support of its view. San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1, 44 (1973). Nevertheless, I use an education hypothetical because I believe *Rodriguez* was as misguided as the Burger Court's Eleventh Amendment cases analyzed above, raising a serious question whether the Court's general misuse of "federalism" and "state sovereignty" to constrict constitutional remedies is paralleled by a general misuse of these principles to constrict constitutional rights. The question lies beyond the scope of this essay, but I hope to present the reasons behind my admittedly conclusory statement here about *Rodriguez* in a subsequent essay on the Civil War Amendments and the meaning of freedom.

253. For a modern explication of this vision, see Dellinger, *supra* note 13.

> remedy, we meet with no difficulty, where the conduct of a state can be animadverted on through the medium of an individual. . . . But this redress goes only half way; as some of the preceeding unconstitutional actions must pass without censure, unless states can be made defendants. What is to be done, if, in consequence of a bill of attainder, or an ex post facto law, the estate of a citizen shall be confiscated, and deposited in the treasury of a state? What, if a state should adulterate or coin money below the congressional standard, emit bills of credit, or enact unconstitutional tenders, for the purpose of extinguishing its own debts? What, if a state should impair her own contracts? *These evils, and others which might be enumerated like them, cannot be corrected, without a suit against the State.*[254]

Chief Justice Marshall's own opinion for the Court in *Marbury* also cut strongly against a broad view of sovereign immunity. Following the logic of *ubi jus, ibi remedium*, he expressly declared the appropriateness of mandamus—affirmative judicial relief against an executive officer in his official capacity—to fully protect a vested legal right. Marshall quickly dismissed the notion that a defendant government official could enjoy any British-style "sovereign immunity" from a suit charging a violation of vested rights.[255] At one level, then, *Marbury*'s logic could be described as follows: If the only full and adequate remedy for ultra vires action by government requires a pro tanto abrogation of sovereign immunity, so be it.

It therefore seems evident that at least in some cases, blanket government immunity from liability conflicts with the Constitution's structural principle of full remedies for violations of legal rights against government. What, then, can possibly justify the invocation of sovereign immunity in those cases? Surely not the text of the Constitution, for we have already seen that governmental claims to sovereign immunity have no textual basis.[256] Nor can it be persuasively argued that the structural principle of full remedies is somehow necessarily qualified or limited by an equally

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254. Chisholm v. Georgia, 2 U.S. (2 Dall.) 419, 422 (1793) (oral argument) (emphasis added). Note how Randolph's first sentence invokes the remedial imperative. Moments earlier, he had argued that the Constitution imposed legal limits on the powers of government. *Id.* at 421–22; *cf. id.* at 423 (Constitution derives from People). Indeed, the overall structure of his oral argument precisely parallels the three-step structure of my argument in this section.

255. Marbury v. Madison, 5 U.S. (1 Cranch.) 137, 164–66, 170–71 (1803).

256. *See supra* notes 201–36 and accompanying text. Absent such a clear statement from the People themselves in the Constitution, we should strain against reading the document as containing partially hollow promises. Yet even without a principle of interpretive generosity directing us to read the Constitution as "the best it can be," *see* R. DWORKIN, LAW'S EMPIRE (1986), the document and its background structure of late eighteenty-century American jurisprudence offer little support to modern-day Legal Realists who attempt to tailor rights to fit remedies rather than vice versa. *See generally* Coleman & Kraus, *Rethinking the Theory of Legal Rights*, 95 YALE L.J. 1335 (1986) (critiquing legal realist understanding of rights and remedies).

valid structural postulate of absolute government immunity from all suits. The latter principle is simply not part of our Constitution's structure. Its sole basis is the British idea that the sovereign government, as the source of all law, cannot itself be bound by any law absent its consent.[257] As we have seen, literally every article of the Federalist Constitution and every amendment in the Bill of Rights rests on the repudiation of the British view.[258] Thus, to accept the plenary sovereign immunity of governments as a structural principle is necessarily to reject the first postulate of popular sovereignty.[259] Put another way, to try to straddle the inconsistent principles of effective remedy and sovereign immunity is to fall into the logical contradiction at the center of the Court's Eleventh Amendment jurisprudence.[260]

It must be emphasized that the structural argument outlined here does not eliminate all "sovereign immunity." It does not make governments suable for anything and everything, as the Court's free-wheeling approach in *Chisholm* threatened to do. A defining feature of a government is that it operates under legal rules that substantially differ from those applicable to private citizens. What would be obviously tortious for a private citizen is often standard operating procedure for a government—taxation, for example. Thus so long as governments act within the scope of their delegated authority, they may choose to exercise their sovereign power by immunizing themselves from rules that apply to private citizens. On this count, *Chisholm* was wrongly decided and rightly repudiated. When governments act ultra vires and transgress the boundaries of their charter, however, their sovereign power to immunize themselves is strictly limited by the remedial imperative.[261] A government may immunize itself, even for

257. It might also be argued that because government entities have no authority to violate constitutional norms, responsibility for violations cannot be attributed to these entities, but rests solely with individual government officials. Under this fiction, *government* can by definition "do no wrong"; thus, if a wrong has occurred, "government" did not do it—even if government policy allowed or even prescribed the individual wrongdoing. This fiction has properly been rejected by the Court at the rights-violation stage, *see* Home Tel. & Tel. Co. v. City of Los Angeles, 227 U.S. 278 (1913), and therefore has no legitimate place in constricting remedies. The fiction has also been rejected in private corporation law: A corporation may be liable for the torts of its agents even if their actions were ultra vires—a point that the Supreme Court has noted in the sovereign immunity context while utterly misunderstanding its implication for government corporate liability. Larson v. Domestic & Foreign Commerce Corp., 337 U.S. 682, 693–95 (1949); Pennhurst State School & Hosp. v. Halderman, 465 U.S. 89, 113 n.24 (1984) (citing 10 W. FLETCHER CYCLOPEDIA OF THE LAW OF PRIVATE CORPORATIONS § 4877, at 350 (rev. ed. 1978)).

258. *See supra* text accompanying notes 56–170.

259. *See supra* text accompanying note 240.

260. *See supra* text accompanying notes 216–25.

261. Thus, the *Chisholm* Court erred in concluding that because state governments were not fully sovereign in every respect, they could *never* immunize themselves from liability. Today's Court commits an equal and opposite error in concluding that because state governments are "sovereign" in some limited and derivative respects, they can *always* immunize themselves from liability. The proper analysis is more discriminating. Where governments are acting within the bounds of their delegated

ultra vires acts, but only if other remedies—for example, strict liability suits against non-judgment-proof individual officers—can guarantee victims full redress.[262]

If we seek textual confirmation of this structural analysis, we need look no further than the Tenth Amendment. This should not be surprising, for once we have stripped away the Court-fashioned encrustations obscuring the true meaning of the Eleventh Amendment, the Tenth becomes a far more logical place to search for the theory of sovereignty embodied in the Constitution. Indeed, no other provision of the Constitution focuses so clearly on the triangular interrelations among the national government, the state governments, and the People themselves: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

As we have already seen, the final clauses of this Amendment confirm the ultimate sovereignty of a unitary American People.[263] Consistent with that sovereignty, the Amendment betrays an obvious concern with keeping all governmental power strictly within the limits of the People's delegations. The national government is not to exercise "powers not delegated to [it] by the Constitution;" and states are not to exercise any powers "prohibited" by the Constitution, "delegated" to national agents, or "reserved

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"sovereign" power, they may partake of sovereign immunity; where not, not. *See* Dellinger, *supra* note 13, at 1557.

262. *See* Hart, *The Power of Congress To Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 HARV. L. REV. 1362, 1366–70 (1953) (noting congressional power to choose among full and adequate remedies); Bivens v. Six Unknown Federal Agents, 403 U.S. 388, 397 (1971) (similar). A slightly different way to conceptualize the matter is to see the government as a nondelegable surety for the misdeeds of its officials. Like other sureties, or corporations liable under respondeat superior, a government may have an independent claim against individual wrongdoers when their wrongdoing results in entity/surety liability. *See* Dellinger, *supra* note 13, at 1553–59.

It might be asked why the Constitution should be read to require *full* remedies for constitutional violations—after all, remedies for violations of legal rights are often qualified in various ways, *e.g.*, through statutes of limitation. This question, however, ignores the fundamental difference between constitutional wrongs and other legal violations. *See* Butz v. Economou, 438 U.S. 478 (1978). Unlike other legal rights created and subject to qualification, modification, and limitation by government, constitutional rights derive from a higher source than government itself. Their very purpose is to keep government honest. Thus, absent a clear statement by the People in the Constitution itself, the document should not be read to create gaps between right and remedy manipulable by government. This argument harmonizes with the general rule for constitutional rights disfavoring denials of relief absent a knowing and intelligent waiver of these rights. *See, e.g.*, Henry v. Mississippi, 379 U.S. 443 (1965).

Similarly, any argument that governments simply cannot afford to offer full remedies for constitutional violations rings hollow given that governments spend so much to pay other expenses—including liability judgments in nonconstitutional tort cases pursuant to statutory waivers of sovereign immunity—not mandated by constitutional norms. If government's resources are finite, these discretionary expenditures surely must take a back seat to payments mandated by constitutional principles; any other system smacks of impermissible discrimination against constitutional rights. To argue that governments "cannot afford" to guarantee full remedies is to argue that the regime of rights that the framers embedded in the Constitution is simply unworkable. This is an argument that should be required to bear a very heavy burden of proof.

263. *See supra* text accompanying notes 131–33.

. . . to the people" through state constitutions.[264] Strictly speaking, the Tenth Amendment affirms the sovereignty of the People, not the sovereignty of state governments: It resoundingly affirms the structural conclusion that governments have no sovereignty to violate the Constitution and get away with it.

In fact, the Amendment can be seen as containing a tantalizing suggestion that the very division of delegated sovereign powers between two different sets of agents can promote the ultimate sovereignty of the People. In particular, the Amendment hints that the reservation of limited lawmaking "powers . . . to the States respectively" is somehow connected to preventing the federal government from exercising "powers not delegated to" it. Limited state governments can help maintain limits on the national government. It is now time to explore that hint in greater detail.

III. A Neo-Federalist View of Federalism

Analysis of the power of each government, state and national, to "check" unconstitutional conduct by the other follows naturally from analysis of government liability for constitutional wrongs: Both concepts stem from the framers' more general principles of popular sovereignty and limited government. Just as the sovereign immunity issue turns on a proper understanding of the revolutionary debate, so the issue of intergovernmental relations is framed by the Civil War debate. Whereas the Court's sovereign immunity doctrine misapplies the lesson of the Revolution, contemporary constitutional scholarship tends to misunderstand certain federalism issues because it misreads the message of the Civil War. By interpreting the War as establishing the supremacy of the national government, instead of the national People, contemporary scholarship has overlooked the myriad ways in which states may usefully and permissibly check federal lawlessness. Fittingly, each set of structural and historical misunderstandings has a textual complement: The Court overreads the Eleventh Amendment as enshrining state sovereign immunity, and contemporary scholars tend to overread the supremacy clause as embodying the supremacy of the federal government instead of the supremacy of "We the People" through the Constitution.

The basic proposition here is simple: Constitutional federalism is a two-edged sword for constitutional justice. Under this view of federalism, each constitutionally limited government can deploy its powers to police the constitutional limits on the other's powers and remedy the other's consti-

264. *See* 3 J. Story, *supra* note 21, § 1900 (state constitutions mark Tenth Amendment boundary between those nonnational powers "reserved to the States respectively" and those powers reserved "to the people").

tutional violations. In contrast to the Court's doctrine of sovereign immunity, we need to see how the limited sovereignty of state and federal governments promotes and vindicates the ultimate sovereignty of the People.

A. *The Riddle of* The Federalist

Let us begin by considering again Madison's *The Federalist* No. 51, in which he suggests that federalism and separation of powers work in similar ways:

> [T]hose who administer each department [must have] the necessary constitutional means and personal motives to resist encroachments of the others.
>
> . . . [T]he constant aim is to divide and arrange the several offices in such a manner as that each may be a check on the other—that the private interest of every individual may be a sentinel over the public rights. . . .
>
> . . . In the compound republic of America, the power surrendered by the people is first divided between two distinct governments, and then the portion allotted to each subdivided among distinct and separate departments. Hence a double security arises to the rights of the people. The different governments will control each other, at the same time that each will be controlled by itself.[265]

Madison's point here is crisper than the cliché that diffusion of political power will generally prevent tyranny. He implies that the Constitution's structure of government will help assure compliance with the specific *legal rights* established by that instrument. He speaks of "the *rights* of the people" and the structural incentives that "control" against governmental "encroachments."[266]

Madison's analogy between separation of powers and federalism invites careful attention. For separation of powers plainly has a legal as well as a political dimension; it establishes structures and institutions—like judicial review—whose very purpose is to assure government compliance with the specific legal rights embodied in the Constitution. The question thus be-

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265. THE FEDERALIST No. 51, at 321–23 (J. Madison).

266. His language in *The Federalist* No. 48 is to similar effect:

> [P]ower is of an *encroaching* nature and . . . ought to be effectually restrained from passing *the limits assigned to it.* After discriminating, therefore, *in theory*, the several classes of power, . . . the next and most difficult task is to provide some practical security for each, against the invasion of the others. . . . [It is not] sufficient to mark, with precision, the *boundaries of these departments in the constitution* of the government, and to trust to *these parchment barriers* against the *encroaching* spirit of power. . . . [T]he powers of government should be so divided and balanced among several bodies of magistracy as that no one could *transcend their legal limits* without being effectually checked and restrained by the others.

THE FEDERALIST No. 48, at 308–11 (J. Madison) (emphasis added).

comes, what similar structural features vindicating constitutional rights animate federalism?

The key words of *The Federalist* that can help us unlock this riddle appear in a seldom-quoted passage of Hamilton's No. 28:

> [I]n a confederacy the people, without exaggeration, may be said to be entirely the masters of their own fate. Power being almost always the rival of power, the general government will at all times stand ready to check the usurpations of the state governments, and these will have the same disposition towards the general government. The people, by throwing themselves into either scale, will infallibly make it preponderate. *If their rights are invaded by either, they can make use of the other as the instrument of redress.*[267]

Hamilton's point here, like Madison's in *The Federalist* No. 51, is not simply that a federal system is a good thing because it diffuses power, but the more precise and intriguing claim that federalism will serve to "check" "usurpations" and "redress" invasions of "the people's" legal "rights." We should note the symmetry of Hamilton's language here; like Madison, he speaks of each government checking the lawlessness of the other. We should also note the richness of Hamilton's imagery. He weaves together language of checks and balances (the word "check" is followed by a balancing image of the people "throwing themselves into either scale");[268] of military might (each government "will at all times stand ready" to thwart the others' attempts to "invade[]" the rights of citizens); of political competition/agency incentive analysis (governments are "rivals" with competing "dispositions"; the People are their "masters");[269] and technical legal doctrine ("rights" and "redress" are paired). To understand fully the Federalists' vision of federalism, we must understand how all these images were interrelated. In particular, we must see how federalism was designed to check and balance at least three types of interpenetrating power: military, political, and legal. The Federalists were quite clear-eyed in recognizing that a system that distributed these three

267. THE FEDERALIST No. 28, at 180-81 (A. Hamilton) (emphasis added). Earlier Hamilton defined "confederacy" to include any system—even one predicated on the sovereignty of one People—retaining both local and central government entities. *Id.* No. 9, at 75-76. As Professor Diamond has shown, such a linguistic coup deviated from earlier definitions of confederacy. *See* Diamond, *The Federalists' View of Federalism*, *supra* note 83, at 23-33; *see also supra* notes 9, 134 (discussing other Federalist linguistic coups).

268. For further images of checks and balances, see THE FEDERALIST No. 9, at 72 (A. Hamilton).

269. Although Hamilton's precise language is that the People are "masters of their *own fate*" and not "masters of their competing agents," a double entendre seems intended. *Cf. id.* No. 46, at 294 (J. Madison) (federal and state governments are "different agents and trustees of the people," "mutual rivals" controlled by a "common superior").

types of power in radically divergent ways would be unstable in the long run.[270] It is thus no coincidence that Hamilton's final three words in this passage, describing each government as a potential "instrument of redress," are words that work well on all three levels—military, political, and legal. Nor is it purely coincidental that on each of these levels, there are powerful analogies between separation of powers and federalism, the two great structural principles of the Constitution. For in separating and dividing power, whether horizontally or vertically, the Federalists pursued the same strategy: Vest power in different sets of agents who will have personal incentives to monitor and enforce limitations on each other's powers.[271]

B. *Military Checks and Balances*

The Constitution dramatically expanded the central government's military powers. Under the Articles, Congress could raise troops only by "requisitioning" each state for its proportionate "quota" of men (determined by white population). Each state legislature retained the power to "raise, . . . cloath, arm and equip" its troops, and to appoint all regimental officers "of or under the rank of colonel."[272] To raise the funds to pay for these men and materiel, Congress once again had to rely on state governmental compliance with a quota system (this time based on wealth). The unworkability of this requisition system—no mechanism short of war existed to enforce states' obligations, so they quite predictably flouted them[273]—led the Federalists to empower the new national government to directly raise its own army, to directly tax individuals to pay for that army, and to appoint all its officers. In addition, the new Constitution broke with the Articles by authorizing the new central government to nationalize state militias "to execute the Laws of the Union, suppress Insurrections and repel Invasions."[274]

The very awesomeness of these military powers induced the Federalists to balance power more carefully *within* the national government. In England, the King theoretically had the power both to declare war and to command troops.[275] Under the Articles, both of these powers resided, at least on paper, in a single unicameral assembly, Congress. By contrast, the Constitution split these powers between legislature and executive. The

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270. *See, e.g.*, *id.* Nos. 8, 23-29, (A. Hamilton); *id.* Nos. 41, 43, 48, 51 (J. Madison).
271. *See, e.g.*, *id.* Nos. 17, 26, 28, 66, 72, 84 (A. Hamilton); *id.* No. 51 (J. Madison).
272. Articles of Confederation, 1781, art. IX, para. 5; *id.* art. VII.
273. For accounts of the free riding and race to the bottom created by congressional impotence, see THE FEDERALIST No. 22 (A. Hamilton); J. MADISON, *supra* note 59.
274. U.S. CONST. art. I, § 8, paras. 12-15.
275. *See* THE FEDERALIST No. 69, at 417-18 (A. Hamilton).

former could declare war, but the latter would serve as commander-in-chief. Similarly, Congress could lay down "rules for the government and regulation" of military forces, but the President would execute these rules; Congress could authorize military appropriations (for up to two years), but the President would superintend actual military disbursements; Congress could provide rules for nationalizing state militias, but the President would command them whenever they were called into service.[276]

The Federalists struck a similar, though today less noted, vertical balance of military power. For despite the vastly increased practical power of the central government—including the power to quell local insurrections—states still retained one vital check. Although they were forbidden to keep any professional "Troops . . . in time of Peace without Congressional consent," they were expressly charged with the "Appointment of the officers, and the Authority of training the Militia according to the discipline prescribed by Congress."[277] These militias were ultimately subject to nationalization in times of emergency, but their loyalties were likely to be local. State governments would train these men, equip them, and appoint their officers. If the national government had ultimate "title" to these men and arms, state governments had "possession"—and the Revolutionary War experience had shown that possession was no small thing. In the event that the central authorities tried to use a national standing army to suspend the Constitution and forcibly subjugate the People—a spectre made vivid by contemporary historical accounts of Stuart tyranny in England, and the birth of despotism in other countries[278]—the various state militias could serve as organized and independent pockets of military resistance.

> In a single [nonfederal] State, if the persons entrusted with supreme power become usurpers, the different parcels, subdivisions, or districts of which it consists, having no distinct government in each, can take no regular measures for defense. The citizens must rush tumul-

276. *Cf.* Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 644 (1952) (Jackson, J., concurring) ("[The President] has no monopoly of 'war powers,' whatever they are. While Congress cannot deprive the President of the command of the army and navy, only Congress can provide him an army or navy to command.").

277. U.S. CONST. art. I, § 10, para. 3; *id.* § 8, para. 15; *see* 1 M. Farrand, *supra* note 40, at 172 (remarks of Elbridge Gerry).

278. *See* B. BAILYN, *supra* note 20, at 55–159. One additional point must be kept in mind: In 1787, it was taken for granted that George Washington—a general—would be selected as the first President under the Constitution (assuming Virginia's ratification). Although the general was largely above suspicion himself, his fellow officers—including Hamilton and the Order of the Cincinnati—were widely seen (perhaps with some justice) as lacking his fabled commitment to civilian supremacy. *See generally* M. JENSEN, THE NEW NATION 67–84, 261–65 (1950) (discussing Order, and Hamilton's personal involvement in military machinations of notorious Newburgh affair of 1783).

> tuously to arms, without concert, without system, without resource . . . .[279]

In the United States, by contrast, should tyrannous national leaders attempt a coup,

> the State governments with the people on their side would be able to repel the danger. . . . [The standing army] would be opposed [by] a militia amounting to near half a million of citizens with arms in their hands, officered by men chosen from among themselves, fighting for their common liberties and united and conducted by governments possessing their affections and confidence. . . . [L]ocal governments . . . . could collect the national will and direct the national force . . . .[280]

The very existence of small but expandable popular "shadow" armies organized by state governments could deter abuse of a much larger professional standing army organized by the national government—much as a would-be monopolist must take into account not only actual competitors but "shadow" competitors organized to enter the market if prices rise too high.[281] In the words of *The Federalist*: "[T]he existence of subordinate governments, to which the people are attached and by which the militia officers are appointed, forms a barrier against the enterprises of ambition, more insurmountable than any which a simple [as distinguished from a "compound" or dual-agency] government of any form can admit of."[282] By balancing military power between two jealous governments, the People would retain greater control over both. The national government could forcefully put down any purely local coup or insurrection threatening the republican government of a single state, but could be thwarted in any genuine scheme of national tyranny by an alliance of local militias led by state governments. "[A]s [the People] will hold the scales in their own hands, it is to be hoped [they] will always take care to preserve the constitutional equilibrium between the general and the State governments."[283]

The Federalist's discussion of the military check of federalism may strike modern readers as dangerous and embarrassing:[284] Dangerous be-

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279. THE FEDERALIST No. 28, at 180 (A. Hamilton).

280. *Id.* No. 46, at 299-300 (J. Madison).

281. *See, e.g.*, United States v. Waste Management, Inc., 743 F.2d 976 (2d Cir. 1984) (Winter, J.).

282. THE FEDERALIST No. 46, at 299 (J. Madison).

283. *Id.* No. 31, at 197 (A. Hamilton); *see also id.* No. 11, at 87 (A. Hamilton) (using language identical to that of *The Federalist* No. 28 to describe how American People could benefit from balance of military power among *European* governments: America's navy "would at least be of respectable weight if *thrown into the scale* of either of two contending parties" (emphasis added)).

284. It may also strike some as antiquated. Whether guerrilla resistance orchestrated by state

cause it seems to invite—indeed, to celebrate—widespread state resistance to national authority; embarrassing because it seems to vindicate the position later taken by extreme states' rights theorists on behalf of nullification and, ultimately, secession. As we ponder the full meaning of Appomattox and Little Rock, we may wonder, can *The Federalist* be serious about this? And so the above-quoted passages tend to be dismissed ("Hamilton will say anything to win Anti-Federalist votes") or repressed ("a few isolated passages about the peculiarly eighteenth century issue of standing armies have little to teach us today in the aftermath of two Reconstructions").

Both of these reactions are unjustified. The political insincerity of *The Federalist* has been widely exaggerated. Too often, the fact that *The Federalist* worked brilliantly on a political level becomes a blanket excuse for the cynic to abdicate responsibility to take the text seriously on any other level.[285] True, the Papers are a shrewd political tract, but they are also a great work—perhaps this country's greatest work—of applied political philosophy. And Publius (the pen name of the joint authors of *The Federalist*) will not say just anything to win Anti-Federalist votes. In other passages, for example, he is emphatic that the ultimate judicial resolution of constitutional issues concerning the boundary between state and national powers must rest with *national* courts.[286] What's more, Publius plainly considers the military argument an important one. It is featured prominently in two different papers—one by Hamilton, one by Madison—and alluded to in several others. And of course, the subsequent

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militias is a plausible scenario in the event of an attempted coup in an age of supersophisticated federal weaponry is a question I leave to those with stronger credentials in military technology. *But see infra* text accompanying note 292.

285. I consider *The Federalist* to be the best single extra-textual source in explicating the Constitution. First, the Papers were consciously quoted and used more than any other source during the ratification period. When the Constitution was presented to the People themselves for their approval, *The Federalist* was the gloss that supporters of the Constitution regularly used to explain and defend the text to others. Second, the Papers brilliantly and elegantly package Federalist ideology by collecting in one place the myriad and interconnected Federalist arguments in the air in 1787–1788. Finally, and perhaps in recognition of both of these features of the Papers, the Supreme Court, its oral advocates, and political pamphleteers, *see, e.g.*, Marshall, *supra* note 49, at 193–94; Roane, *supra* note 103, at 113, generally accorded the work a special status very early on. Indeed, a catalogue of pre-1825 Supreme Court cases in which the Papers are invoked as special authority by bench or bar reads like a list of landmarks: Osborn v. Bank of the United States, 22 U.S. (9 Wheat.) 738 (1824); Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1 (1824); Cohens v. Virginia, 19 U.S. (6 Wheat.) 264 (1821); United States v. Smith, 18 U.S. (5 Wheat.) 153 (1820); Houston v. Moore, 18 U.S. (5 Wheat.) 1 (1820); Dartmouth College v. Woodward, 17 U.S. (4 Wheat.) 518 (1819); McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819); Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304 (1816); Fletcher v. Peck, 10 U.S. (6 Cranch) 87 (1810); Stuart v. Laird, 5 U.S. (1 Cranch) 299 (1803); Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803); Calder v. Bull, 3 U.S. (3 Dall.) 386 (1798); Penhallow v. Doane's Administrators, 3 U.S. (3 Dall.) 54 (1795).

286. *See* THE FEDERALIST No. 22, at 150 (A. Hamilton); *id.* No. 39, at 245 (J. Madison); *id.* No. 82 (A. Hamilton); *cf. supra* note 162.

adoption of the Second Amendment only underscores the "necess[ity]" of a "well regulated Militia" to "the security of a free State."[287]

Properly understood, Publius' argument for the military check of federalism is extremely limited, yet equally important—and is in no way mooted by the Civil War or the civil rights crusade. Publius is not arguing for a general right of state militias, or anyone else, to engage in armed resistance whenever they believe that national authorities are acting unconstitutionally. Under ordinary circumstances, the People's remedies are political and legal, not military. And Publius makes clear that these political and legal questions are to be resolved, under ordinary circumstances, in *national* fora—Congress, the executive branch, and federal courts. The key qualification, of course, is the phrase "under ordinary circumstances." And by hypothesis, the scenario painted by Publius as the occasion for militia opposition is the extraordinary worst case of an attempted national coup. No political or legal remedies exist in this situation. Presumably national courts have been shut down, or, at best, their judgments are unenforceable. The only applicable law is martial law, enforced by gun and sword. In such a scenario, the only remedy left to the People would be military. As Hamilton carefully notes, recourse to arms in such an event would be justified by the traditional Lockean right to revolt whenever the government openly breaches its contract with the People: "If the representatives of the people betray their constituents, there is then no resource left but in the exertion of that original right of self-defense which is paramount to all positive forms of government . . . ."[288]

This theory, it must be stressed, was not the one invoked by secessionists in 1861, nor could it have been. The national political channels remained open—Lincoln had won the Presidency, but the race was fair; the national courts remained open—if anything, the Taney Court stood as a shameless apologist for Southern interests;[289] and the national military had taken no steps to threaten civilians—on the contrary, Southern citizens launched the attack on Fort Sumter.[290] The "moderate" Confederate theory of secession rested on the right of each state convention to decide for itself whether the federal compact had been materially breached, regardless of what the federal courts or the Peoples of other states believed.[291] An even more extreme version of Confederate ideology rested

287. U.S. CONST. amend. II.

288. THE FEDERALIST No. 28, at 180 (A. Hamilton).

289. *See, e.g.*, Dred Scott v. Sandford, 60 U.S. (19 How.) 393 (1857).

290. *See* A. LINCOLN, *supra* note 110, at 421–26; A. LINCOLN, *First Inaugural Address*, in 4 THE COLLECTED WORKS OF ABRAHAM LINCOLN 264–71 (R. Basler ed. 1953) [hereinafter *First Inaugural Address*.

291. Southern complaints about the failure of several Northern states to enforce vigorously the federal Fugitive Slave Law seem largely makeweight. In any event, secession would only exacerbate

secession not on claims of federal usurpation, but rather on the sovereign right of the People of each state to alter or abolish their government at any time for any reason—even in violation of a pre-existing treaty. As we have seen, both these Confederate theories were premised on a view of sovereignty plainly inconsistent with the Federalist Constitution.

When we move from the Civil War era to our own, the military check of federalism might appear largely unnecessary given the seeming improbability of an attempted national coup in late twentieth century America. Yet this happy state of current affairs is perhaps partly due to the military check itself. The sturdy contemporary ethos of civilian supremacy that makes an attempted military takeover unlikely today draws much of its strength from an unblemished history of due subordination of the national military. That history, in turn, may well have been influenced by the military check. Of course we can never know what might have happened had the Federalists eliminated state militias; but perhaps the strongest evidence of the effectiveness of the framers' system of military checks is two centuries of civilian supremacy that have made a military coup almost unthinkable.[292]

C. *Political Checks and Balances*

The ability of state governments to help implement the People's right to revolt in extraordinary times is paralleled by their ability to help enforce the People's constitutional rights under more ordinary circumstances.[293] Once again, the independent and pre-existing organizational structures of state governments were seen as incipient pockets of resistance—here, political resistance—to unconstitutional federal conduct. The People could

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the issue of fugitive slaves, and many other tensions between North and South. *See First Inaugural Address*, *supra* note 290, at 264-71.

292. *Cf. supra* note 278; 4 D. MACONE, JEFFERSON AND HIS TIME 7-11 (1970) (Republican leaders ready to use state militias to resist should lame duck Congress attempt to violate clear dictates of Article II by designating someone other than Aaron Burr or Thomas Jefferson as President in 1801; same Republican leaders willing to acquiesce peacefully should Congress lawfully opt for Burr over Jefferson, notwithstanding latter's superior moral and political claim to office).

293. Between the poles of military revolution and ordinary protection of existing constitutional rights is the case of constitutional amendment. Once again, the Federalist Constitution gave state governments a central role, by allowing two-thirds of the state legislatures to force Congress to call a constitutional convention. U.S. CONST. art. V. The Federalists knew that constitutional amendment might be necessary to check abuses by the national legislature, and they therefore carefully provided for modes of amendment that would not require congressional concurrence. *See* 1 M. Farrand, *supra* note 40, at 22 (Madison's 13th Virginia Resolution). Hamilton's words concerning amendments have a familiar ring: "We may safely rely on the disposition of the State legislatures to erect barriers against the encroachments of the national authority." THE FEDERALIST No. 85, at 526.

Once again, however, constitutional federalism is symmetric: Because the Federalists knew that constitutional amendment might be necessary to check abuses of *state* governments, they also carefully provided for modes of ratification that would enable Congress to side-step state legislatures and directly appeal to the People in convention assembled. U.S. CONST. art. V.

confidently confer broad powers upon national agents precisely because they had also created a second set of specialized agents to monitor the first set and orchestrate resistance to its abuses. State legislatures would bring together persons with a special interest in and aptitude for political affairs whose daily duties would necessarily require them to attend closely to national politics.[294] At the first sign of a national abuse of power, they could sound a general alarm, communicating information and advice to their constituents and thereby winning their favor. The performance of colonial governments in monitoring Parliament and mobilizing opposition to various schemes of imperial oppression between 1763 and 1776 furnished an obvious historical precedent,[295] conjuring up an image of the state legislature that in some ways resembles the self-image of the institutional press today. In the words of *The Federalist*:

> Independent of parties in the national legislature itself, . . . the State legislatures, who will always be not only vigilant but suspicious and jealous guardians of the rights of the citizens against encroachments from the federal government, will constantly have their attention awake to the conduct of the national rulers, and will be ready enough, if anything improper appears, to sound the alarm to the people, and not only to be the VOICE, but, if necessary, the ARM of their discontent.[296]

> It may safely be received as an axiom in our political system that the State governments will, in all possible contingencies, afford complete security against invasions of the public liberty by the national authority. Projects of usurpation cannot be masked under pretences so likely to escape the penetration of select bodies of men, as of the people at large. The legislatures will have better means of information. They can discover the danger at a distance; and possessing all the organs of civil power and the confidence of the people, they can at once adopt a regular plan of opposition, in which they can combine all the resources of the community.[297]

> Every government would espouse the common cause. A correspondence would be opened. Plans of resistance would be concerted. One spirit would animate and conduct the whole. . . . A few representatives of the people would be opposed to the people themselves; or rather one set of representatives would be contending against thir-

294. Here and elsewhere, the Federalists recognized the efficiency of specialization of labor. *See* G. WILLS, *supra* note 22, at 108–11.

295. *Cf.* McLaughlin, *supra* note 78 (noting overlap between "states rights" and "individual rights" rhetoric in colonial arguments against Parliament).

296. THE FEDERALIST No. 26, at 172 (A. Hamilton). Note how the reference to "the ARM of . . . discontent" anticipates the military check argument.

297. *Id.* No. 28, at 181 (A. Hamilton); *accord id.* No. 84, at 516–17 (A. Hamilton).

> teen sets of representatives, with the whole body of their common constituents on the side of the latter.[298]

The nation's first major constitutional crisis after ratification was resolved in a fashion strikingly consistent with *The Federalist*'s vision of state legislatures as political watchdogs. In 1798, congressional supporters of President John Adams enacted several bills of dubious constitutionality designed in large part to stifle critics of the administration. The ability of the opposition press to attack the Alien and Sedition Acts was chilled by the prospect of prosecution under the Acts themselves. But if the Constitution's general protections for freedom of speech and the press under the First Amendment were somewhat unclear in 1798, the special constitutional protections for opposition speech in state legislatures were undeniable. These bodies thus took the lead in politically challenging Adams and the Acts. The legislatures of Virginia and Kentucky adopted resolutions declaring the Acts dangerous and unconstitutional, and inviting sister legislatures to do the same.[299] Despite some grand and ambiguous claims in the resolutions themselves, these enactments had no *legal* force.[300] Nonetheless, they served as useful *political* "instruments of redress" in alerting the People to the threat to their liberties and mobilizing political opposition to the Adams men. Although political agitation at the state level was unsuccessful in securing immediate repeal of the offensive legislation, it effectively transformed the national election of 1800 into a popular referendum on these bills. And with the accession of Thomas Jefferson to the Presidency and the electoral triumphs of the anti-Adams party in congressional races, enforcement of the Acts stopped, and they were quietly allowed to expire under their own terms in 1801.[301] The constitutional crisis was thus ultimately resolved by political decisions within the

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298. *Id.* No. 46, at 298 (J. Madison). Madison's second sentence here seems to be a rather direct allusion to the intercolonial committees of correspondence that had emerged in the 1770's to coordinate opposition to parliamentary abuses.

299. Eight years earlier, the Virginia legislature had adopted resolutions denouncing as unconstitutional the federal government's assumption of state war debts. *Virginia Resolutions on the Assumption of State Debts*, in DOCUMENTS OF AMERICAN HISTORY, *supra* note 76, at 155–56 (describing state legislators as "guardians . . . of the rights and interests of their constituents" and "sentinels placed by them over the ministers of the federal government, to shield it from their encroachments, or at least to sound an alarm when it is threatened with invasion"). This 1790 declaration is an important link in the historical chain connecting the anti-parliamentary activity of colonial legislatures before 1776 with the resolutions of 1798. Note especially the use of the revealing word "ministers" to describe federal officers.

300. Madison, one of the chief architects of the resolutions, later conceded as much. *See* J. MADISON, *The Virginia Report of 1800*, in THE MIND OF THE FOUNDER: SOURCES OF THE POLITICAL THOUGHT OF JAMES MADISON 299, 346 (M. Meyers ed. 1973) [hereinafter *The Virginia Report of 1800*]; J. MADISON, *Letter to the* North American Review, in *id.* 531, 541–44.

301. *See* Powell, *Original Intent*, *supra* note 106, at 924–27.

national government itself, but under political conditions powerfully affected by the "alarm" that state legislatures had sounded.[302]

Unsurprisingly, the structure of horizontal separation of powers creates analogous incentives for signalling and political organizing. Even (or perhaps especially) if his veto is overridden, a President's veto message can serve as an important warning to the People that national legislators are attempting to breach the constitutional walls on their powers. So too with a judicial opinion, even (or perhaps especially) one that the political branches refuse to enforce. Indeed, Professor Ackerman's accounts of the elections of 1866 and 1936 as constitutional referenda of sorts neatly parallel mine here of the election of 1800, with the interesting difference that these later referenda were signalled by and organized around horizontal constitutional disputes between different branches of the national government.[303]

In fact, the analogy between separation of powers and federalism is even more precise, for both operate on a legal as well as a political level. A presidential veto on constitutional grounds has *legal* force. So does a federal court declaratory judgment that an act of Congress is unconstitutional. Likewise, state governments are more than mere political bodies. Unlike the press, a state legislature can do more than simply sound a political alarm.[304] Unlike the Virginia and Kentucky resolutions, not all actions by state legislatures need be viewed as naked declarations devoid of legal force. The Tenth Amendment reminds us that state governments have residuary powers to enact *law*. As we shall see, this fact has dramatic implications for the vindication of constitutional rights.

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302. The very magnitude of federal operations in the 20th century, combined with the rise of professional lobbyists, political parties, and the national media, may have reduced state legislatures' comparative institutional competence as watchdogs. Even today, however, state governments retain a comparative institutional advantage over nongovernmental watchdogs in one key respect. States furnish opponents of national policy with an opportunity to secure actual hands-on experience running government, thereby strengthening their credibility as qualified candidates in the next set of national elections. In a nonfederal system, any who would challenge an abusive national leadership must do so from either a minority "shadow government" position within the national government, or a leadership position outside civil government—*e.g.*, the military or private corporations. Twentieth century America has had its share of national leaders coming from outside government—consider, for example, Herbert Hoover, Dwight Eisenhower, and (perhaps) Lee Iacocca—but it has also regularly tapped leaders of state government, such as Jimmy Carter and Ronald Reagan. Publius would not have been surprised by this state of affairs. *See* THE FEDERALIST Nos. 45, 56 (J. Madison).

303. *See* Ackerman, *supra* note 69, at 1051–70.

304. Professor Rapaczynski has offered an important analysis of how constitutional protections of state governments can be justified on organizational theory grounds similar to those used to support constitutional protections of press and association. *See* Rapaczynski, *From Sovereignty to Process: The Jurisprudence of Federalism After Garcia*, 1985 SUP. CT. REV. 341. But as Professor Rapaczynski himself recognizes, one vital difference between state governments and other specially-protected organizations is that states wield limited "sovereign" powers to enact laws, *id.* at 389–91—a recognition in some tension with his general inclination to reject the usefulness of sovereignty theory.

D. *Legal Checks and Balances*

The general structure of separation of powers enables each national branch to thwart a national law it deems unconstitutional—Congress by declining to pass it; the President by vetoing it (or, if it is a criminal statute, by declining prosecution or pardoning those convicted); and the federal courts by engaging in judicial review. Of course, there are limits and exceptions to this general feature of one-branch veto. The President's veto may be overridden; conversely, a simple congressional majority, once having passed a law, cannot repeal it, even if it later deems the law unconstitutional, without the concurrence of the President. Nevertheless, built into the general structure of the Constitution is a libertarian bias based on checks against constitutionally suspect laws and in favor of the broadest of the various constructions of the constitutional right given by the three branches.[305]

The structure of separation of powers thus protects constitutional values by providing three separate, overlapping, and mutually reinforcing remedies—legislative, executive, and judicial—against unconstitutional federal conduct. A similar mechanism of overlapping legal remedies for constitutional wrongs is at work in the structure of federalism. A state government may violate the Constitution, yet fail to provide victims with a sufficient range of causes of action to ensure a full remedy for the wrong. Suppose complete redress in a particular situation requires joint and several strict liability of all state officials who participate in unconstitutional conduct, or entity liability of the state government itself, yet state law provides for neither. The beauty of constitutional federalism is that the *federal* government can furnish aggrieved individuals a supplemental remedy. Section 1983 is one example of such a federal remedy.[306]

There are structural reasons to believe that the federal supplemental remedy may systematically tend to be more generous than state-furnished remedies. To begin with, federal officials were not the perpetrators of the wrong, and thus will suffer no political embarrassment from any judicial proceedings that might publicize that wrongdoing. On the contrary, legislators in Congress can score political points among their constituents by casting themselves in the role of heroes rescuing victimized citizens from villainous state officials. Best of all, the rescue operation costs the federal government little: State officials, after all, will have to foot the liability bill. In any event, the citizen victims will typically enjoy the best of both

305. *See* THE FEDERALIST No. 73, at 443-44 (A. Hamilton); Amar, *supra* note 9, at 222-24, 258 n.170, 263 n.191.

306. 42 U.S.C. § 1983 (1982).

worlds, since they can invoke both state and federal remedies for the state wrong.[307]

Conversely, where the national government has violated constitutional rights, it may fail to provide adequate federal causes of action to fully remedy its own wrongs. It is not just coincidence that for over a century Congress has provided section 1983, a general cause of action against persons who violate constitutional rights "under color of state law," but no analogous cause of action against unconstitutional actions of federal officials[308]—a discrepancy narrowed, but not eliminated, by Congress only under pressure from the Supreme Court's holding in *Bivens v. Six Unknown Federal Agents*.[309] Once again, the beauty of federalism is that another government can provide citizens with additional causes of action. For reasons symmetrical to those canvassed above, state remedies should systematically tend to be more generous than those offered by Congress.[310] Once again, federalism's political incentives will help to enforce legal rights and vindicate the maxim, *ubi jus ibi remedium*.

Thus, far from justifying a gap between constitutional right and remedy, as the Court at times implies, federalism abhors a remedial vacuum. Citizens can rely on the federal government to provide supplemental remedies for constitutional wrongs committed by states, and vice versa.[311] Seen

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307. All of this of course presupposes that significant sections of the polity continue to cherish constitutional values, and that governmental officials can thus improve their standing with constituents by affirming constitutional symbols. As Professor Charles Black has made clear, the Constitution cannot in the long run survive without ongoing popular affirmation. C. BLACK, THE PEOPLE AND THE COURT (1960). The only thing that the document itself can do—but it is a big "only thing"—is to structure institutions and symbols in ways that guard against temporary lapses and ever nudge us to affirm our better selves.

308. *See* Wheeldin v. Wheeler, 373 U.S. 647, 652 (1963) ("Over the years Congress has considered the problem of state civil and criminal actions against federal officials many times. But no general statute making federal officers liable for acts committed 'under color,' but in violation, of their federal authority has been passed." (citation omitted)).

309. 403 U.S. 388 (1971).

310. Indeed, there are stronger reasons to expect generous state law remedies for federal wrongs than vice versa. Every federal remedy is ultimately paid for by Americans—Congress' constituency—even though the expenditure is "off budget." By contrast, a state law remedy may politically externalize cost altogether by imposing at least part of the ultimate financial burden on out-of-staters. *See infra* text accompanying notes 352–55; *cf.* THE FEDERALIST No. 45, at 296 (J. Madison) ("A local spirit will infallibly prevail much more in the members of Congress than a national spirit will prevail in the legislatures of the particular states.").

311. It might be said that the development of national parties reduces the willingness of officials in one government to embarrass officials of their own party in another government. But to say this is to say that political parties have blurred the Federalists' vertical separation of powers by fostering collusion among entities that were designed to compete against each other for popular sympathy. *See* THE FEDERALIST No. 27 (A. Hamilton); *id.* Nos. 45–46 (J. Madison). For similar reasons, the party system may have distorted horizontal competition within the national government. Perhaps this is one of the reasons that Madison in 1787 was so hostile to the notion of national parties. In any event, the point about national parties seems less applicable to a general congressional remedy that applies in all states, Democratic and Republican. Interestingly, the Republican framers of section 1983 designed it to apply to the then-Republican states of the North as well as the then-Democratic states of the South. *See* Monroe v. Pape, 365 U.S. 167, 183 (1961).

in this light, the Tenth Amendment appears as the symmetrical counterpart of the enforcement clauses of the Civil War Amendments.

1. *Historical Examples*

The ability of the federal government to remedy state lawlessness may seem virtually self-evident given the central place of section 1983 in contemporary legal discourse.[312] Yet history provides equally dramatic examples of state remedies against federal abuses, which contemporary scholarship has tended to ignore.

a. *Fourth Amendment*

Consider first an example from the Fourth Amendment. Before the Supreme Court decided *Bivens v. Six Unknown Federal Agents* in 1971, the only damage remedy generally afforded to individuals whose homes had been unconstitutionally searched by federal agents was provided by the state common law of trespass. Without this state law cause of action, a citizen simply had no standing to get into court to challenge the constitutionality of the search and be compensated for the wrong done. Thus, for nearly the first two centuries of our constitutional history, only state law—created by dint of the reserved lawmaking power of states—furnished any redress for a species of concededly unconstitutional conduct by federal officials.

The structure of these pre-*Bivens* cases was quite simple: The ultimate issue before the court concerned the federal Constitution, but standing was conferred by the vertically-pendent state law cause of action.[313] Plaintiff would sue defendant federal officer in trespass; defendant would claim federal empowerment that trumped the state law of trespass under the principles of the supremacy clause; and plaintiff, by way of reply, would play an even higher supremacy clause trump: Any federal empowerment was ultra vires and void because of Fourth Amendment limitations on

312. For some interesting variations on the theme of federal protection of individual rights, see Cover & Aleinikoff, *Dialectical Federalism: Habeas Corpus and the Court*, 86 YALE L.J. 1035 (1977); Cover, *The Uses of Jurisdictional Redundancy: Interest, Ideology, and Innovation*, 22 WM. & MARY L. REV. 639 (1981).

313. *See* Wheeldin v. Wheeler, 373 U.S. 647, 652 (1963) ("When it comes to suits for damages for abuse of power, federal officials are usually governed by local law. Federal law, however, supplies the defense, if the conduct complained of was done pursuant to a federally imposed duty, or immunity from suit." (citations omitted)); *id.* at 656 (Brennan, J., dissenting) (citing cases); Dellinger, *supra* note 13, at 1538-39 ("[T]he contemplated method [of Fourth Amendment] enforcement, the Government asserted [in *Bivens*], must have been a state common law action for damages in which the amendment would have operated to prevent defenses such as justification by reason of a general warrant." (citing Brief for Respondents at 11)); Gibbons, *supra* note 179, at 1943 n.296, 1948 n.320 (state law causes of action against federal officers "commonplace" during nineteenth century); *see also* Hill, *Constitutional Remedies*, 69 COLUM. L. REV. 1109, 1124, 1128-29 (1969) (citing cases).

federal power itself. If, but only if, plaintiff could in fact prove that the Fourth Amendment had been violated, defendant's shield of federal power would dissolve, and he would stand as a naked tortfeasor.

The structure of these cases is illustrative of the myriad ways in which constitutional "public law" protections are intricately bound up with—indeed, presuppose—a general backdrop of "private law" protections defining primary rights of personal property and bodily liberty.[314] Alexis de Tocqueville explicated this subtle interplay in *Democracy in America*: "The Americans hold that it is nearly impossible that a new [unconstitutional] law should not injure some private interest by its provisions. . . . [I]t is to these interests that the protection of the Supreme Court is extended."[315] And as Publius noted, in the same passage in which he spoke of states as "counterpoises" to federal power, *states* would typically define and protect these primary rights, thereby enlisting the affections of their citizens:

> There is one transcendent advantage belonging to the province of the State governments . . . . [They will be] the immediate and visible guardian of life and property, . . . regulating all those personal interests and familiar concerns to which the sensibility of individuals is more immediately awake, . . . impressing upon the minds of the people affection, esteem, and reverence towards the government.[316]

The Court's decision in *Bivens v. Six Unknown Federal Agents*[317] does not moot the importance of federal-state remedial competition. In the best tradition of the remedial principles set forth in *Marbury v. Madison*,[318] the *Bivens* Court inferred a damage action directly under the Fourth Amendment. Yet the promise of this move was only partially fulfilled. Although we have seen that full remedies for constitutional violations will often require governmental liability,[319] lingering notions of sovereign immunity induced the *Bivens* Court to recognize only a cause of action against individual (and possibly judgment-proof) federal officers. Individual liability makes a good deal of analytic sense where standing is conferred by a cause of action that in no way depends upon state action. A

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314. *See generally* Hart, *The Relations Between State and Federal Law*, 54 COLUM. L. REV. 489 (1954).

315. 1 A. DE TOCQUEVILLE, DEMOCRACY IN AMERICA 154–55 (Bradley ed. 1945).

316. THE FEDERALIST No. 17, at 120 (A. Hamilton); *accord id.* No. 45, at 292–93 (J. Madison) ("The powers reserved to the several States will extend to all the objects which, in the ordinary course of affairs, concern the lives, liberties, and properties of the people . . . . "); *cf.* U.S. CONST. amend. V (imposing obligation on *federal* government to accord "due process" to legal interests in "life, liberty, or property" protected, *inter alia*, by *state* law).

317. 403 U.S. 388 (1971).

318. 5 U.S. (1 Cranch) 137 (1803).

319. *See supra* text accompanying notes 244–60.

trespass cause of action applies to all individuals, whether or not the trespasser wears a uniform. By contrast, the *Bivens* cause of action is itself predicated upon a *governmental* wrong, and thus seems naturally to call for *governmental* liability.[320] That the Court did not restructure the case as *Bivens v. United States* is yet another unfortunate residue of the *Young* fiction.[321]

Moreover, even the cause of action that the *Bivens* Court did approve was subsequently qualified by a set of individual immunities that threaten to widen further the gap between right and remedy. Consider, for example, the case in which a federal magistrate wrongly issues a search warrant without probable cause. Assuming the warrant is issued *ex parte* and immediately executed, it is hard to imagine how the citizen victim could prevent the unconstitutional search from taking place. And after her home has been searched, she may still lack a federal remedy. The magistrate is absolutely immune; the federal agents are likely to enjoy good faith immunity—they did, after all, have a warrant; and the Federal Torts Claims Act may not apply. In this situation, state remedies such as trespass may continue to help plug the remedial gap.[322]

Apart from misguided doctrinal concerns about sovereign immunity, the Court's hesitation in *Bivens* and its progeny probably stems from a lingering doubt about whether remedy-fashioning is a more legislative than judicial function, and from an awareness of the special political vulnerability of federal judges in suits involving coercive relief against agents in coordinate branches of government.[323] On both of these counts, remedial competition between the political branches of state and national govern-

320. *See* Wolcher, *supra* note 225, at 285–86.

321. Ironically, *Young* was also the source of the *Bivens* Court's willingness to entertain suit directly under the Constitution even if no private tort suit lay. *See supra* note 218. It was this use of the Constitution as a self-executing cause of action, that was *Young*'s analytic breakthrough—and not the notion that a government official acting unconstitutionally was "stripped" of immunity, a notion of much earlier vintage. *See, e.g.*, Osborn v. Bank of the United States, 22 U.S. (9 Wheat.) 738, 837–39 (1824). *Bivens* merely extended the injunctive principles of *Young* to suits for damages at law.

322. Although some of the language of the *Bivens* majority suggests the desirability of remedial uniformity, *see, e.g.*, 403 U.S. at 395; *id.* at 409 (Harlan, J., concurring in judgment), the Court's true concern was with a constitutional remedial floor, and not with uniformity of Fourth Amendment remedies per se. Plainly, *Bivens*' holding in no way automatically ousts supplemental state law remedies that might be more generous in certain respects (*e.g.*, on the individual immunity issue) than the Court-fashioned cause of action. Dellinger, *supra* note 13, at 1540. The continued permissibility of at least some broader state law causes of action suggests that the *Bivens* remedy itself does not exhaust the full range of the Fourth Amendment right, but may have been limited by institutional concerns. *See infra* text accompanying notes 323–25. If this were not so, any additional state law remedy would seem to be *pro tanto* an illegitimate tax on federal instrumentalities. *See infra* text accompanying notes 351–55.

323. Consider for example *Marbury v. Madison*. The most politically delicate part of Chief Justice Marshall's opinion was not his assertion of the power of federal courts to decline to apply acts of Congress they deemed unconstitutional, but his earlier claim that the judicial department could, in appropriate cases, order coercive relief directly against a defendant officer of the executive branch. *Cf.* 1 A. DE TOCQUEVILLE, *supra* note 315, at 106–07.

ment can strengthen judicial resolve. In confronting lawless conduct by one government, the federal courts need not stand alone if they can draw upon the remedial law and political support of a competing government. Thus, state governments can help federal courts implement truly full remedies that these courts—for purely institutional reasons—might hesitate to order on their own.[324] Separation of powers and federalism can reinforce each other here, creating possibilities for useful alliances between state governments and federal courts to keep the rest of the federal government honest.[325]

b. *Habeas Corpus*

States need not confine their remedies to damages, nor have they historically. The ability of states to vindicate constitutional values through injunctive relief was perhaps nowhere more dramatic than in early state habeas corpus cases: State habeas offered a way for those imprisoned by federal officers in violation of their federal constitutional rights to win their freedom. In the mid-nineteenth century, however, the Supreme Court called into question this tradition of libertarian federalism. In *Ableman v. Booth*[326] and *Tarble's Case*,[327] the Court held that principles of national supremacy forbade state courts to inquire into the lawfulness of federal detention. Yet the Court's analysis in these cases was shaky, and its language quite sloppy. For example, scholarship by William Duker has established that the very purpose of the habeas non-suspension clause of Article I, section 9, was to protect the remedy of *state* habeas from being abrogated by the federal government;[328] the language of non-*suspension* obviously presupposes a pre-existing (state) common law habeas remedy. The non-suspension clause is powerful textual evidence confirming the general structural postulate that state remedies were intended to play a vital role in checking federal misconduct.[329] The clause also illustrates yet again the interplay of common law and constitutional

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324. On underenforcement of legal norms created by institutional limitations of federal courts, see Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91 HARV. L. REV. 1212 (1978); Brest, *The Conscientious Legislator's Guide to Constitutional Interpretation*, 27 STAN. L. REV. 585 (1975); Fiss, *Groups and the Equal Protection Clause*, 5 PHIL. & PUB. AFF. 107, 175-77 (1976); Michelman, *Welfare Rights in a Constitutional Democracy*, 1979 WASH. U.L.Q. 659; Note, *A Norm-Based Remedial Model for Underinclusive Statutes*, 95 YALE L.J. 1185 (1986).

325. *Cf. Bivens*, 403 U.S. at 428 (Black, J., dissenting) ("[T]he fatal weakness in the Court's judgment is that neither Congress *nor the State of New York* has enacted legislation creating such a right of action. For us to do so [alone] is, in my judgment, an exercise of power that the Constitution does not give us." (emphasis added)).

326. 62 U.S. (21 How.) 506 (1859).

327. 80 U.S. (13 Wall.) 397 (1872).

328. W. DUKER, A CONSTITUTIONAL HISTORY OF HABEAS CORPUS 126-80 (1980).

329. Especially because the non-suspension clause is the original Constitution's most explicit reference to remedies. *See* Hill, *supra* note 313, at 1118 n.42.

protections of liberty. The common law would furnish the cause of action that assured judicial review; the Constitution would furnish the test on the legal merits of confinement.

The principle of national supremacy that the Court invoked in *Ableman* and *Tarble's Case* seems irrelevant on the facts of those cases. The Constitution, and not the national government, is supreme in our legal system. Indeed, the Constitution's supremacy clause specifically charges state courts with the obligation to abide by it as the supreme law of the land.[330] That was precisely what the state courts in *Ableman* and *Tarble's Case* were doing when they sought to inquire into the legality of federal detention.

The Supreme Court's habeas doctrine reflects apparent concern that state courts might rule improperly on the merits—that is, on the question of the constitutionality of detention. But resolution of the merits by a state court would present a federal question that would trigger Supreme Court appellate review under the relevant jurisdictional statutes. Congress could go even further by providing for removal from state to federal court whenever it appeared that the lawfulness of detention would turn on the resolution of a federal question. Of course, in this removed proceeding, federal courts would be obliged to enforce the vertically-pendent state law habeas remedy—but this is precisely the point: Congress should not automatically be able to oust any state remedy it deems "inconvenient." Full compliance with constitutional norms is often "inconvenient" from the government's point of view. *Ableman* and *Tarble's Case* can be justified only if they are understood simply as attributing to Congress a desire for exclusive federal court jurisdiction in habeas proceedings against federal officers.[331] So understood, these cases should not be read to allow a federal court vested with exclusive jurisdiction to disregard—to suspend—the state-law habeas remedy. Jurisdiction must be distinguished from the rule of decision, as the Tenth Amendment, the Rules of Decision Act, and the Eleventh Amendment's repudiation of *Chisholm* all make clear.

c. *State Legislative Power and Federal Judicial Supremacy: A Neo-Federalist Synthesis*

The role of the states suggested by this neo-Federalist vision is at once similar to and different from state court "interposition." According to

330. U.S. CONST. art. VI, para. 2 ("This Constitution . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby.").

331. This is, I believe, the prevailing understanding of *Ableman* and *Tarble's Case* among federal jurisdiction scholars. *See, e.g.*, Sager, *The Supreme Court, 1980 Term—Foreword: Constitutional Limitations on Congress' Authority To Regulate the Jurisdiction of the Federal Courts*, 95 HARV. L. REV. 17, 80-84 (1981).

nineteenth century states' rights theorists, state courts had to be given unreviewable power to hold federal conduct unconstitutional; only through this "interposition" of state court judges, it was argued, could federal encroachments against the Constitution be prevented.[332] In a more restrained version of this argument, Professor Henry Hart and other twentieth-century scholars have argued that Congress may *choose* to give state courts final jurisdiction over federal statutory and constitutional questions.[333] Yet the text and structure of Article III clearly seem to mandate that the last word on all federal question cases be vested in the federal judiciary, either at trial (via removal or exclusive federal jurisdiction[334]) or on appeal from state courts.[335] The neo-Federalist view offered here is fully consistent with the constitutional supremacy of federal over state courts.[336] The constitutionality of the federal conduct challenged in any given case would always pose a federal question whose ultimate resolution, along with all other federal questions raised, would always lie with federal courts. The role of the states is solely to provide victims of constitutional wrongs with the chance to have their federal rights defined and fully protected in federal court.[337] Thus, interposition theorists were right in believing that states had a vital part to play in vindicating individual constitutional rights against federal encroachments;[338] they were wrong in claiming that the Constitution's script gave state courts the last word on federal questions.[339]

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332. *See supra* text accompanying notes 117–19.

333. *See generally* Amar, *supra* note 9, at 215–16, 220–29 (canvassing Hart school scholarship).

334. Congressional power to provide for exclusive federal jurisdiction in federal question cases—indeed in any category of Article III cases or controversies—is well established. *See* The Moses Taylor, 71 U.S. (4 Wall.) 411, 428–31 (1867).

335. *See* Amar, *supra* note 9.

336. Even in constitutional disputes involving conflicting federal and state claims, federal courts can be seen as impartial umpires, since federal judges enjoy significant constitutional independence from the political branches of the federal government. Though this independence is not total, federal judges typically enjoy far more independence from their legislature than do state judges from theirs. *See id.* at 226–29, 233–38; *cf.* Marshall, *supra* note 49, at 208–12 (noting Senate's role in confirmation of federal judges).

337. Many have noted that Congress can typically confer Article III standing by creating a statutory right whose violation may be prosecuted in federal court. *See, e.g.*, Linda R.S. v. Richard D., 410 U.S. 614, 617 n.3 (1973); Berger, *Standing To Sue in Public Actions: Is It a Constitutional Requirement?*, 78 YALE L.J. 816 (1969). It is less noted, but equally true, that state legislatures can likewise confer standing. This way of thinking about standing might require re-examination of the holdings of Massachusetts v. Mellon, 262 U.S. 447 (1923), and Doremus v. Board of Educ., 342 U.S. 429 (1952).

338. One of the main arguments for state interposition in Madison's *Virginia Report* of 1800 stressed that many constitutional encroachments by federal officers might not be challengeable in Article III courts. *See The Virginia Report of 1800*, *supra* note 300, at 305–06. However, if state governments can confer standing and force an Article III test of a wide range of dubious federal activity, there is little need to swallow the bitter pill of interposition in order to counteract federal judicial impotence.

339. Whereas the Hart school emphasizes the role of some state officials as *judicial* agents (impliedly independent of politics), the neo-Federalist view emphasizes the role of all state officials as *state* agents (impliedly independent of the national government). Neo-Federalist remedies may be

The 1882 Supreme Court case of *United States v. Lee*[340] elegantly dramatizes this neo-Federalist synthesis. If the case did not exist, one would be tempted to invent it. George Lee, son of General Robert E. Lee, brought suit in ejectment to recover possession of the family estate in Arlington, Virginia, the site of today's Arlington Cemetery. Federal military officers were occupying the lands under claim of federal title, the validity of which Lee disputed. During the Civil War, Congress had imposed on the land a nominal property tax that, under the terms of the statute, had to be paid in person by the land's owner. General Lee, otherwise engaged at the time, graciously declined Congress's invitation to walk unarmed into the enemy camp. Payment was tendered by others on Lee's behalf, but the government refused to accept. The government then foreclosed on the estate, and bought the land itself (at a bargain price) at the auction. Over the defendants' vigorous assertions of sovereign immunity, the Supreme Court held for Lee because the federal government's actions had violated the Fifth Amendment's due process and takings clauses.

Yet it was a state law cause of action that had enabled Lee to get into an Article III court in the first place. The case stands as a poetic reminder of the ways in which, short of interposition, nullification, secession, and Civil War (a war that perhaps could also have been captioned *United States v. Lee*)[341] states may serve as the "instrument of redress" for unconstitutional federal conduct.[342]

2. *A Neo-Federalist Future: Converse-1983*

A neo-Federalist view of constitutional remedies helps us to see more clearly what we have been doing all along: Perhaps without always realiz-

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furnished by either state judges fashioning common law or state legislators enacting statutes. The allocation of authority between these branches, and their internal organizational structure, are basically issues of state constitutional law. Since the Federalist Constitution nowhere prescribes the mechanism of appointment, tenure of office, salary guarantees, mode of removal, or substantive jurisdiction of state judges, the document evidently presumes that these officers may at times be "judges" in name only, little different from state legislators. The Hart school notwithstanding, it is unlikely that the Federalists placed their "ultimate" reliance on state judges qua judges. *See* Amar, *supra* note 9, 235–38.

340. 106 U.S. 196 (1882).

341. *See supra* note 19. It is perhaps worthy of note that final military judgment was entered at the Appomattox *Courthouse*.

342. Both *Tarble's Case*, decided in 1872, and *Lee*, handed down a decade later, obliged the Justices to begin to define the Civil War's implications for federalism. The holding of *Tarble's Case* correctly affirmed the supremacy of the federal judiciary over state judicial systems, *see* Amar, *supra* note 9, at 235–38, but the language seemed to go further. At times, the *Tarble* Court seemed to trivialize the legitimate role of states in protecting *constitutional* supremacy from federal encroachments. *Lee*'s holding backed away from this extreme view, yet the Court's language was less than resounding in affirming the permissibility and value of state law checks against federal unconstitutionality. *But cf.* Hill, *supra* note 313, at 1124–25 (reading *Lee* to derive cause of action directly from Constitution rather than state law).

ing it, states have furnished, and are continuing to furnish, remedial aid and comfort to citizens victimized by federal unconstitutionality. Yet neo-Federalism is more than an historical connect-the-dots exercise through which we can see a larger pattern emerging from seemingly unrelated cases such as *Bivens*, *Tarble's Case*, and *United States v. Lee*. To reconceptualize past events is to imagine future possibilities. A brief exploration of one possible remedial scheme that states might try to adopt in the future will help to illuminate the scope and the limits of state power.[343]

Once the symmetry of the legal check of federalism is understood, a state government might be inclined to adopt a simple state statute inverting the language of 42 U.S.C. section 1983 in something like the following manner:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of [the United States], subjects, or causes to be subjected, any citizen of [this state] or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

Would such a converse-1983 statute be permissible? At first blush, it might seem vulnerable to the following criticism: Unlike the other state law causes of action canvassed above, which applied generally against both private actors and government officials, a converse-1983 statute explicitly singles out the federal government as its target. It thus offends the basic principles of *McCulloch v. Maryland*[344]; it is an impermissibly discriminatory tax on federal instrumentalities. And the legitimacy of section 1983 itself does not necessarily prove the constitutionality of a converse-1983 statute, for as Chief Justice Marshall noted in *McCulloch*, very different principles are involved when the nation taxes a state. The part is represented in, and therefore may legitimately be bound by, the whole, but the reverse is not true.[345]

This line of criticism, while forceful, must be qualified. There is all the difference in the world between a state's attempt to thwart a legitimate, "necessary and proper" course of conduct adopted by the national government—the issue in *McCulloch*—and an otherwise analogous attempt to thwart illegitimate, ultra vires conduct that lacks constitutional sanc-

343. Although attempting to address in at least cursory fashion the major constitutional issues posed by the generic converse-1983 statute, I shall not try to canvass the complex set of subsidiary questions that would be presented in the actual drafting of any particular statute.

344. 17 U.S. (4 Wheat.) 316 (1819).

345. *Id.* at 435-36.

tion.[346] A converse-1983 action does single out federal officials, but they *deserve* to be singled out. They wield extraordinary powers, capable of extraordinary abuse.[347] The framers expected and desired—indeed, relied on—states to keep a special eye on the federal government.[348]

A close reading of *McCulloch* itself confirms these principles. Chief Justice Marshall structures his opinion as a response to two questions. First, he considers whether the federal government can constitutionally create a national bank. Only after answering this question in favor of the federal government does he consider the second question of whether Maryland may nevertheless tax that bank. The clear implication of this way of structuring the analysis (and of several artfully drafted passages in the Court's discussion of the second question[349]) is that if the Bank had been unconstitutionally chartered, then Maryland could have taxed it.[350] It would have been an improperly authorized entity that could in no way partake of federal tax immunity.

McCulloch may nonetheless help to define the limits of permissible state remedies. For example, if a state were to provide for a minimum of one million dollars of presumed damages to any citizen whose home was unconstitutionally searched by the federal government, the remedy should

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346. The converse-1983 statute proposed in the text is narrowly tailored: It penalizes only unconstitutional federal conduct. As Dean Ely has pointed out, a good fit with a legitimate purpose goes a long way towards relieving suspicions of unconstitutional motivation. J. ELY, *supra* note 234, at 145-48.

Nevertheless, the very existence of a converse-1983 cause of action might be thought to threaten legitimate federal operations by subjecting federal officers to possibly frivolous lawsuits. This danger, however, is not unique to converse-1983 suits—it applies equally to trespass suits, to *Bivens* suits, to habeas suits, and indeed, to virtually all litigation under the "American rule." Should Congress want to protect legitimate operations from bad-faith harrassment, it should not be allowed to oust all converse-1983 actions: Such a reaction would itself be a poorly tailored proposal that would equally immunize illegitimate federal conduct and destroy legitimate legal claims of victims. *See infra* text accompanying notes 361-67. Congress could, however, provide for fee-shifting, which would tend to discourage frivolous claims against federal officers while fully preserving the rights of citizens who can prevail on the merits. Moreover, under the principles of the Tenth Amendment and *Erie*, the "arguably procedural" nature of a federal fee-shifting proposal would clearly justify its application in federal courts entertaining converse-1983 cases. *See* Ely, *The Irrepressible Myth of Erie*, 87 HARV. L. REV. 693 (1974).

347. *See* Bivens v. Six Unknown Fed. Agents, 403 U.S. 388, 391-95 (1971).

348. Of course, a state could eliminate all concern about discrimination by extending its converse-1983 statute to its own officers. While sufficient to save the statute's constitutionality, such an extension of the statute should not be necessary. The point is obviously an important one, for many of the political incentives that would generate a converse-1983 statute flow precisely from its asymmetric quality. If federal judges forced state governments to police themselves as vigorously as they police the federal government, many would police *neither* well. At least in the area of constitutional misdeeds, a certain amount of competition (and even discrimination) is positively desirable—"ambition must be made to counteract ambition" to protect "the rights of the people."

349. *See* 17 U.S. at 425-30 (speaking of "*constitutional* laws of the Union," "laws made *in pursuance* of the constitution," "*legitimate* operations of a supreme government," and of federal "*right* . . . to preserve" the bank (emphasis added)); *see also id.* at 427 ("The power of Congress to create, and of course to continue, the bank, was the subject of the preceding part of this opinion; and is no longer to be considered as questionable.").

350. Or at least, very different ground rules about state taxation would have applied.

fail as an impermissible "tax" on federal operations. In a very limited sense, some violations of the Constitution by the federal government are inevitably necessary—if not, strictly speaking, proper—exercises of federal power. Thus, the creation of a state remedy that goes far beyond what is required to make the victim whole—a tax masquerading as a remedy—would violate *McCulloch* principles.

A slightly different formulation could perhaps be derived from a comment in *McCulloch*'s closing paragraph: "This opinion . . . does not extend to a tax paid by the real property of the bank, in common with the other real property within the State . . . ."[351] This passage might support the following test for federal courts: A converse-1983 statute should be upheld so long as the burden of proof and damage provisions are roughly analogous to those under comparable causes of action that apply against private citizens. Because potential defendants under these other statutes are represented in the legislature, these statutes are unlikely to contain excessively punitive liability rules; thus this "nondiscrimination" test and the "nontax" test outlined above are unlikely to yield sharply divergent results.

Even under current Court doctrine, no sovereign immunity bar would stand in the way of a converse-1983 statute. As a doctrinal matter, sovereign immunity is inapplicable to damage suits against government officials in their individual capacities, where defendants have to pay out of their own pockets. As a practical matter, a converse-1983 statute—especially if it provided for strict liability, as it could consistently with *McCulloch*[352]—might well force the federal government to indemnify its officers. Without a promise of indemnification for negligent or good faith (but nonetheless unconstitutional) conduct, who would agree to work for the government?[353]

Direct indemnification (or higher salaries to compensate employees for their additional liability risk) would require payment from general funds. The benefits of a converse-1983 statute would be local, but the costs would be dispersed. In such a situation, every state legislature would have incentives to follow the lead of the first state whose converse-1983 statute was upheld by federal courts. The structure of payoffs may seem to create

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351. 17 U.S. at 436.

352. I am assuming that the various individual immunities that currently limit *Bivens* actions, *see* Butz v. Economou, 438 U.S. 478 (1978), derive not from the limited nature of the federal constitutional right itself, but from *institutional* limitations on federal courts creating a margin of underenforcement. *See supra* text accompanying notes 323–25; *cf.* Pierson v. Ray, 386 U.S. 547 (1967) (construing section 1983 as providing for various immunities of state officers in absence of clear congressional statement to contrary).

353. *See* Jaffe, *Suits Against Governments and Officers: Damage Actions*, 77 HARV. L. REV. 209, 227–28 (1963). For a careful examination of the differences between individual liability *cum* indemnification and direct entity liability, see P. SCHUCK, *supra* note 249, at 82–121.

the potential for a classic "race to the bottom," yet I believe we should more properly view the political incentives as inducing a race to the top, a race to the banner of *ubi jus, ibi remedium*, a healthy race refereed by federal judges[354] ready to keep the contestants within the bounds of *McCulloch* and *Bivens*.[355]

Indeed, federal courts should allow states to go one step beyond individual strict liability in fashioning converse-1983 remedies. As we have seen, full remedies for constitutional wrongs will often call for direct government liability.[356] Yet the federal government may hesitate to create a cause of action against itself, so the question arises whether state governments can create such a cause of action. As a practical matter, the question is almost identical to that raised by a strict liability converse-1983 statute, since, as noted above, such a statute would likely oblige the federal government to absorb the ultimate cost. As a doctrinal matter, of course, the cases are different because current Court doctrine would immunize the federal sovereign from suit. Yet we have seen that current doctrine rests on a fatally flawed understanding of sovereignty and should be dis-

354. Every converse-1983 case would raise at least two federal questions. First, did the defendant violate the federal Constitution? Second, did the state remedy go beyond simply making plaintiff whole? The last word on these federal questions must in every case lie with an Article III court, and not a state court. *See supra* text accompanying notes 332–42. As a constitutional matter, Article III appellate review of state court decisions would suffice. If, however, Congress were concerned about state trial court overexuberance, it could of course always provide for removal or exclusive federal jurisdiction. *Id.* Thus, any concern about "abuse" of converse-1983 must ultimately be framed as a concern about federal courts, and not state governments. Indeed, state lawmakers might do well to borrow a page from certain long-arm jurisdiction statutes by simply authorizing damages "up to the limits" of the state's constitutional authority. Such open-ended language would once again leave federal courts with the task of defining and enforcing those limits.

355. Recent Supreme Court cases have dramatically restricted the use of the exclusionary rule to remedy Fourth Amendment violations. *See, e.g.*, United States v. Leon, 468 U.S. 897 (1984). Some state legislatures might try to respond by providing for a state exclusionary remedy applicable not just against state police officers, as Justice Brennan's scholarship invites, *see* Brennan, *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489 (1977) (state constitutions may provide individuals with rights against state government that go beyond federal constitutional minima), but against federal agents as well. Such an effort, however, faces problems on two fronts.

First, a plausible argument can be made that the exclusionary rule overcompensates its beneficiaries by excluding unlawfully seized evidence that probably would have been seized anyway had the police followed the proper procedures *ex ante*. Put another way, the exclusionary rule may be applied in situations where, more likely than not, the *illegality* of a search—due to, say, a technical defect of the warrant—was not a but-for cause of the seizure of evidence. (In this respect, the exclusionary rule's overcompensation of victims is analogous to the hypothetical involving one million dollars of presumed damages, *supra* text accompanying note 351.)

Second, a state exclusionary rule would raise knotty Tenth Amendment and *Erie* issues insofar as it attempted to bind federal judges. The rule undeniably excludes material and probative evidence from trials whose primary focus is the criminal defendant's guilt or innocence. A federal rule that rejected exclusion in favor of promoting the truth-seeking function of that trial is more than "arguably procedural." *See* Ely, *supra* note 346. Unlike the other substantive causes of action considered above, the procedural nature of the exclusionary rule could perhaps limit the extent to which it necessarily binds federal courts as a residuary rule of decision.

356. *See supra* text accompanying notes 244–60.

carded.[357] A state law combining converse-1983 principles with rules of entity liability and respondeat superior should be upheld, so long as the liability provisions aimed at U.S.A., Inc. roughly track rules for private corporations under analogous state laws.

The complete absence of converse-1983 laws from state statute books today may seem to undercut the descriptive force of the neo-Federalist view that state legislatures have incentives to "race" to protect citizens against federal abuse.[358] However, there may be a quite simple explanation: State legislatures have not passed these statutes because they have been unaware of their constitutional authority to do so, and more generally, unaware of their special role and responsibility in protecting their constituents from federal lawlessness. This is perhaps a reflection of the inadequacy of contemporary legal discourse about federalism: In discarding the extremism of nullification and interposition, we have also thrown away a rich antebellum tradition emphasizing state protection of constitutional norms against the federal government.[359] Today's nationalists wrongly interpret the Civil War and the civil rights movement as establishing the supremacy of the national government, instead of the supremacy of the Constitution. They overread *McCulloch* and are overly hostile to states. By contrast, the Justices seem bent on invoking state sovereignty only as a paradoxical check against legitimate congressional and constitutional rights.[360] They overlook *McCulloch* and are overly hostile to remedies. Neither side has pursued a line of analysis that would welcome converse-1983 statutes. And so the legal imaginations of our state lawmakers have been unduly limited.

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357. *Id.*

358. Of course, state common law causes of action have always helped to keep the federal government in check. *See supra* text accompanying notes 312–42. But after the Civil War, state remedies against federal misconduct did not keep pace with expanded congressional remedies against state lawlessness: Congress adopted section 1983, but states failed to extend their antebellum common law tradition to the more self-conscious device of converse-1983 statutes.

359. *Compare Amphictyon*, *supra* note 107, at 58–59 (speaking of right and duty of states as "sentinels of the public liberty" to "remonstrate against the encroachments of power" and "resist the advances of usurpation, tyranny and oppression" and citing *The Federalist* No. 28) *and* 1 J. STORY, *supra* note 21, §§ 289–291 ("Perhaps, from the very nature and organization of our government . . . there will . . . be a strong line of division between those, who adhere to the state governments, and those, who adhere to the national government. . . . [T]his very division of empire may . . . be the means of perpetuating our rights and liberties, by keeping alive in every State at once a sincere love of its own government, and a love of the Union, and by cherishing in different minds a jealousy of each, which shall check, as well as enlighten, public opinion.") *with* Choper, *The Scope of Judicial Power Vis-à-Vis the States: The Dispensability of Judicial Review*, 86 YALE L.J. 1552, 1611 (1977) ("the assertion that federalism was meant to protect, or does in fact protect, individual constitutional freedoms has no solid historical or logical basis").

360. *See supra* note 211.

3. *The Remedial Dialogue*

One final set of complications should be noted. The variety of remedies adopted by different states might create a crazy quilt of legal intricacies threatening to confound efficient and uniform execution of national operations, and perhaps tending to erode the sense of national identity that the Constitution was meant to symbolize. In such a situation, Congress might seek to preempt these various state remedies with a uniform regime of exclusive federal remedies. Yet we must not bow too quickly to this assertion of federal power; the remedial imperative must be harmonized with, rather than sacrificed to, the desiderata of government efficiency and national unity.

The Tenth Amendment can aid analysis here. The reserved lawmaking power of the states means that state-created remedies are automatically in force, unless displaced by a federal law falling within the finite (though broad) powers of the national government. Congress enjoys no *explicit* power to preempt state remedies for unconstitutional federal conduct. Moreover, whereas congressional power to create federal remedies for federal constitutional wrongs seems obviously "necessary and proper," the power of Congress to destroy state remedies is not so obviously implicit in our constitutional structure. Furthermore, where the state is performing a vital and (to borrow from the lexicon of recent Tenth Amendment case law) "traditional" state function[361] of policing against federal constitutional wrongs, countervailing federal power should not be lightly assumed.[362] To give Congress plenary power to nullify any state remedy it disliked would disturb the careful constitutional balance of federalism, and would ultimately imperil individual constitutional liberty by weakening an important check against federal abuse.[363]

Congress must not be allowed to use national uniformity as a pretext to

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361. United Transp. Union v. Long Island R.R., 455 U.S. 678, 683 (1982) (quoting National League of Cities v. Usery, 426 U.S. 833, 852 (1976)).

362. *See generally* Nagel, *Federalism as a Fundamental Value:* National League of Cities *in Perspective*, 1981 SUP. CT. REV. 81. Although Professor Nagel's analytic framework to my mind fails to justify the Court's holding in *National League of Cities*, the framework would, it seems, justify strict judicial review of any congressional attempt to preempt state law remedies against unconstitutional federal conduct.

363. The government's brief in *Bivens* buttressed its argument that federal courts should not infer a damage remedy directly under the Constitution by pointing to the role of states in restraining abuses of federal power. On the issue before the *Bivens* Court, this argument borders on non sequitur: Federalism and separation of powers are not mutually exclusive, but mutually reinforcing and complementary structures for fully vindicating constitutional rights. *See supra* text accompanying notes 323–25. The government's argument, however, does suggest why congressional attempts to destroy state remedies should receive special scrutiny. Indeed, it is noteworthy that in response to myriad and at times obstructionist lawsuits against federal officials based on state law causes of action in the nineteenth century, Congress responded not by attempting to destroy the causes of action themselves, but simply by providing for removal jurisdiction. *See* Gibbons, *supra* note 179, at 1948 n.319.

deny full remedies for federal unconstitutional conduct. Uniformity is just as well served by uniformly full, as by uniformly inadequate remedies. Thus, to demonstrate a bona fide purpose—such as the avoidance of an obstacle course of diverse state law remedies—Congress should be obliged to provide an exclusive federal remedy that is as effective as the fullest state remedy[364] it seeks to displace.[365] Unless Congress furnishes such a remedy, federal courts should invalidate any effort to preempt state remedies.[366] Hence, even where states are denied the last word on remedies for federal constitutional wrongs, they have the power to compel a dialogic response from Congress that is more generous to aggrieved citizens than the congressional *status quo ante*.[367]

IV. CONCLUSION

The neo-Federalist view sketched here recognizes the vital role of federal courts, but also emphasizes the important part that other institutions—such as Congress, state courts, and state legislatures—can play in shaping and promoting constitutional values. The argument here is not merely historical, but hortatory: Even if states have not always taken seriously their role in protecting individual constitutional rights against the federal government, they should do so. All those who wield the power of government—Court and Congress, state judge and state legislator—should take seriously the obligation to use that power to promote the ultimate sovereignty of the People as embodied in the Constitution.[368]

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364. This assumes, of course, that the state remedy itself is not overcompensatory, and therefore voidable by federal courts even without congressional intervention. *See supra* text accompanying notes 351-55.

365. Even if this rule were rejected, federal courts could at least deploy a clear statement doctrine allowing them to follow state remedial law absent express congressional preemption.

366. Any state law remedy—whether judge-made or statutory—for a violation of a congressionally created right is subject to a strict preemption analysis. The question is always one of congressional intent: Did Congress, as the source of the right, intend to allow the particular supplemental state remedy? *See* Note, *State Incorporation of Federal Law: A Response to the Demise of Implied Federal Rights of Action*, 94 YALE L.J. 1144, 1157-62 (1985). Here, by contrast, we deal with rights not of congressional creation, rights *against* the federal government. In this area, the remedial role of state governments is one of constitutional entitlement, not congressional suffrance.

367. Once again, the analogy between separation of powers and federalism is instructive. The remedial dialogue between the states and Congress contemplated here closely parallels the Court-Congress remedial dialogue contemplated by the Supreme Court's creation of "constitutional common law" in *Bivens*. In *Bivens*, the Court fashioned a damage remedy in the first instance for federal violations of the Fourth Amendment, but indicated that this remedy could be displaced if Congress chose to create an alternative, "equally effective" remedy. Bivens v. Six Unknown Fed. Agents, 403 U.S. 388, 397 (1971). In fact, Congress later took up the Court's invitation to participate in a remedial dialogue when it amended the Federal Torts Claims Act in the wake of *Bivens*. *See* Pub. L. No. 93-253, § 2; 88 Stat. 50 (1974) (codified as amended at 28 U.S.C. § 2680(h) (1982)).

368. At the outset of this essay, I posed the question whether our Constitution was "divided against itself." *See supra* text accompanying note 9. We are now in a position to see the answer to that question. Unlike the Confederations of the 1780's and 1860's, the Federalist Constitution securely rests on the sovereignty of a unitary People. Although the Constitution does divide power among

Today's Court seems to have lost sight of the People—and so it has transmogrified doctrines of federalism and sovereignty into their very antitheses. Sovereign immunity allows "sentinels" hired to uphold the law to become gunmen who are a law unto themselves. And "Our Federalism" perverts a structure designed to assure full remedies for constitutional wrongs into a system that regularly frustrates the remedial imperative. Whenever the rhetoric of "states' rights" is deployed to defend states' wrongs, our servants have become our masters; our rescuers, our captors.[369]

The Constitution is two hundred years old this year. Perhaps the best way we could celebrate this enduring document would be to ask whether current legal doctrines do full justice to it, to its makers, and to ourselves.

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competing agents, it does so precisely to protect that unitary People: The Constitution's compound structure is in harmony with its substantive themes of popular sovereignty and limited government.

369.

> The perverted use of *genus* and *species* in logic and of *impressions* and *ideas* in metaphysics, have never done mischief so extensive or so practically pernicious, as has been done by *States* and *sovereigns*, in politics and jurisprudence; in the politics and jurisprudence even of those, who wished and meant to be free. . . .
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> . . . .
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> . . . [S]tates and governments were made for man . . . [yet] his creatures and servants have first deceived, next vilified, and at last oppressed their master and maker. . . .
>
> . . . Let a state be considered as subordinate to The People.

Chisholm v. Georgia, 2 U.S. (2 Dall.) 419, 454–55 (1793) (opinion of Wilson, J.) (emphasis altered).