

The Tension Between Sovereign Immunity and Popular Sovereignty

By Aristede “Nat” Chakeres

Don G. McCormick Prize Winner

I. Introduction

One of the fundamental principles of American Revolution was the idea that legitimate sovereignty lay not with the government, but with the people.¹ Under English law, Blackstone recognized the “sovereign” to be the British parliament, which he defined as the House of Commons, the House of Lords, and the King acting together.² After the Revolution, the term “sovereign” could no longer mean what it meant under English law. Instead, Americans embraced the idea that the people themselves were the legitimate source of power, and were therefore the sovereign.³

This philosophical shift could arguably have implications for the validity of “sovereign immunity,” the immunity from suit enjoyed by the sovereign. At the most basic level, it would seem improper for a government to invoke sovereignty as the basis for immunity from suit if the government were not, in fact, the sovereign. The issue also has deeper problems beyond the semantic propriety of using the term “sovereign.” If, under the American political regime, the people are the legitimate source of ultimate power, then perhaps it is improper for a government to shield itself from compensating individuals for the harms it causes them. On the other hand, even though the people may

¹ As announced in the Declaration of Independence,

That to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed, — That whenever any Form of Government becomes destructive of these ends, it is the Right of the People to alter or to abolish it, and to institute new Government, laying its foundation on such principles and organizing its powers in such form, as to them shall seem most likely to effect their Safety and Happiness.

THE DECLARATION OF INDEPENDENCE, para. 2 (U.S. 1776).

² SIR WILLIAM BLACKSTONE, 1 COMMENTARIES ON THE LAWS OF ENGLAND 17 (American Students’ Edition, 3d ed. 1894) (facsimile ed).

³ See, e.g., James Wilson, Of the Law of Nations, in 1 THE WORKS OF JAMES WILSON 153 (Robert Green McCloskey ed., 1967).

be sovereign, they clearly vest their government with certain powers, and the successful exercise of those powers might require that the government receive certain protections and be treated, at least in some circumstances, like a “sovereign” entity. In particular, in dealings between governments, American governments (both state and federal) should not receive worse treatment because they are not “sovereign.” As will be argued in this paper, these intergovernmental considerations have federalism implications such that it may be more appropriate, in federal-state interactions, to consider states as “sovereigns.”

In this paper, I attempt to examine the extent to which the notion of popular sovereignty has affected America’s views on sovereign immunity. This paper does not attempt to settle the ongoing battles about whether the Constitution protects sovereign immunity, although those battles are examined in part because they have produced the most thorough critiques and defenses of sovereign immunity. I examine the debates surrounding the ratification of the U.S. Constitution and *Chisholm v. Georgia* because those events present insights into how the framers saw the issues of sovereignty and sovereign immunity. Since one framer, James Wilson, had unusually well-developed and pointed views on the topic, his views are examined in detail. I also examine the reasoning of late-20th century state judicial opinions abolishing common law sovereign immunity.

Constitutional and common law sovereign immunity meet very different fates, and I will argue that constitutional sovereign immunity has fewer conflicts with the idea of popular sovereignty. This is because the federalist rationale behind constitutional sovereignty, which is absent from common law sovereign immunity, makes the “sovereignty” being protected by the Constitution more akin to protection from

interference by another government, instead of protection from suit from citizens. Finally, practical fiscal considerations have always played a significant role in the sovereign immunity debate, and I conclude with a brief exploration of whether such considerations, when carried out by the judiciary, are consistent with popular sovereignty.

II. Background

A. **Sovereign Immunity - Definitions**

In its simplest terms, sovereign immunity is the immunity from suit enjoyed by government entities. That straightforward concept has its roots in the Constitution, the common law, and statutes, and it is subject to numerous exceptions and caveats. The doctrine's contours are too numerous to outline in detail, but in general it bars suits for monetary damages against state and federal governments, unless a statute says otherwise. The doctrine does *not* apply to suits for injunctive relief brought against state officers.⁴ Additionally, special rules of immunity apply to suits for monetary damages against state officers (as opposed to suits against states themselves).⁵ In contrast to state and federal governments, local governments enjoy no constitutional immunity from suit⁶ (although they may enjoy statutory immunity in certain jurisdictions). Government bodies entitled to sovereign immunity may waive their own immunity,⁷ and in certain circumstances

⁴ See *Ex Parte Young*, 209 U.S. 123 (1908).

⁵ For example, officers enjoy "qualified immunity" from suit if their conduct did not amount to a violation of clearly established law of which a reasonable person should have known. *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982).

⁶ JOHN E. NOWAK & RONALD D. ROTUNDA, *CONSTITUTIONAL LAW*, § 2.11, at 52 (7th ed. 2004). However, state laws sometimes limit the types of suits that can be brought against governments.

⁷ *Id.* at 56.

federal law may serve to abrogate the sovereign immunity of states without their consent.⁸

One primary source of this immunity from suit is the United States Constitution, which (as currently interpreted) protects the states from suits in both federal *and* state court.⁹ The Constitution also indirectly protects the federal government from suit by giving Congress the power to control the jurisdiction of the federal courts, thereby allowing Congress to limit the circumstances under which the federal government can be sued.¹⁰

The constitutional roots of sovereign immunity have been hotly contested in the U.S. Supreme Court within the past several decades, and a majority of the Court has held that the Constitution protects states from most suits arising under federal law.¹¹ In this debate, sovereign immunity is portrayed as a federalism issue – states are seeking the protection of sovereign immunity to avoid answering suits brought under statutes applied against them by Congress.¹² These suits, the states argue, undermine the sovereignty and the dignity of the states by forcing them to answer in court like common defendants.¹³ Furthermore, forcing states to pay monetary judgments to private parties impermissibly

⁸ Congress may abrogate the sovereign immunity of states when it acts to prevent the violations of constitutional rights pursuant to its powers under Section 5 of the Fourteenth Amendment. *Fitzpatrick v. Bitzer*, 427 U.S. 445, 456 (1976). Additionally, states can be subject to certain suits under the U.S. Constitution. *See, e.g.*, *Manning v. Mining & Minerals Div.*, 2006-NMSC-027, 144 P.3d 87 (allowing suit against state under the Takings Clause, but disallowing suit under the Contracts Clause).

⁹ *Alden v. Maine*, 527 U.S. 706 (1999).

¹⁰ *See* U.S. CONST. art. III, § 1 (“The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.”).

¹¹ *See Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 72 (1996) (barring suit based upon cause of action created by Congress pursuant to its commerce powers).

¹² *Id.*

¹³ *Alden*, 527 U.S. at 714-15.

interferes with the power of states to democratically control their purse strings.¹⁴ These arguments have proven successful in protecting states from suit.¹⁵

Another major source of sovereign immunity has been the common law. For much of our country's history, this doctrine, created and enforced by the courts, has prevented states and local governments from being sued in tort in state court. In the latter half of the 20th century, the doctrine came into disfavor with courts. In striking down the common law doctrine, courts have not been shy about explaining their views on sovereignty and sovereign immunity.

A third major source of sovereign immunity is statutory. This body of law has become more important in light of the demise of common law sovereign immunity. An exploration of the philosophical justification for such statutes in light of America's vision of sovereignty would most likely be a rich topic with numerous parallels to an examination of constitutional and common law sovereign immunity, but such an exploration is not undertaken in this paper because legislative acts, as opposed to judicial doctrines, can be more fairly traced to the "people" themselves, since the legislature theoretically represents the popular will. Thus, statutory immunity has a conceptually distinct relationship with the notion of popular sovereignty, and it is not analyzed in depth in this paper.

B. Pre-revolutionary Sovereign Immunity: Practice and Theory

1. Colonial and English Practice

In determining how America's framers squared sovereign immunity with popular sovereignty, it is first necessary to outline the common understanding of sovereign

¹⁴ *Id.* at 749.

¹⁵ *See id.*

immunity in the colonies at the time of the Revolution. Various scholars and courts have disagreed about the scope of sovereign immunity in the colonies before the ratification of the Constitution and about the prevailing views of sovereign immunity at that time. On the one hand, the Supreme Court has recently argued that “[a]lthough the American people had rejected other aspects of English political theory, the doctrine that a sovereign could not be sued without its consent was universal in the States when the Constitution was drafted and ratified.”¹⁶ A number of scholars have attempted to examine pre-revolutionary English sovereign immunity. While the sovereign was personally immune from suit,¹⁷ the English courts allowed for mechanisms by which individuals harmed by the government could obtain redress through the court system. The first mechanism was the petition of right, whereby the crown would allow individuals to bring suits against the government.¹⁸ Although this petition was nominally granted as a matter of grace (as opposed to obligation), scholars have claimed that by the time of the revolution such petitions were normally granted.¹⁹ Furthermore, injured individuals could also bring suits against individual government officers.²⁰ Scholars have also argued that colonial charters allowed the colonies to sue and be sued,²¹ meaning that the newly independent state governments would not have been accustomed to the privilege of sovereign immunity.

Thus, while the doctrine of sovereign immunity was present at the time of the Revolution, exceptions served to limit its applicability, especially with regard to suits

¹⁶ Alden v. Maine, 527 U.S. 706, 715-16 (1999).

¹⁷ Edwin L. Borchard, *Government Liability in Tort (Part I)*, 34 YALE L.J. 1, 4 (1924).

¹⁸ *Id.* at 5.

¹⁹ *Id.*

²⁰ Louis L. Jaffe, *Suits Against Governments and Officers: Sovereign Immunity*, 77 HARV. L. REV. 1, 1 (1963).

²¹ John J. Gibbons, *The Eleventh Amendment and State Sovereign Immunity: A Reinterpretation*, 83 COLUM. L. REV. 1889, 1896 (1983).

against colonial officers. However, the doctrine was still widely known and recognized at the time of the Revolution, as demonstrated by its invocation in the ratification debates and early judicial opinions, and its presence in the writings of the founding generation. The question remained, however, whether the doctrine would be philosophically justifiable in America, given the Revolutionary concept that sovereignty resides with the people.

2. *Theory*

In seeking to answer whether sovereign immunity and popular sovereignty are compatible, it is helpful to examine the theoretical underpinnings behind English sovereign immunity at the time of the Revolution, at least as interpreted by American observers. Scholars have identified several justifications for sovereign immunity in the pre-revolutionary era.²² The first justification was the theory of absolute, divine right, which was embodied in the maxim “the king can do no wrong.”²³ Since he had divine authority, it was antithetical that the king would have to compensate individuals for acts done to them. This justification for sovereign immunity had eroded somewhat by the time of the Revolution, since the monarch could no longer claim an absolute right to govern.²⁴ Nonetheless, the idea remained with Americans that the King had, as a matter of privilege, the right to dictate the manner in which he would compensate individuals for harm done to them.²⁵ For shorthand purposes, this rationale will be termed the “privilege” rationale in this paper.

²² Edwin L. Borchard, *Governmental Responsibility in Tort (Part VI)*, 36 YALE L.J. 1, 17 (1926).

²³ *Id.*; see also 1 BLACKSTONE, *supra* note 2, at 34.

²⁴ See Borchard (Part I), *supra* note 17, at 2.

²⁵ See *id.*

The second theoretical justification for sovereign immunity was that, as the state was the source of the laws, it could not be expected to be bound by them.²⁶ There were two arguments implicit in this rationale. The first was practical – the enforcement of laws requires state force. The enforcement of laws against the state itself, however, would require some other force, and in an ordered state this other force is not present because the state has (or seeks) a monopoly on organized power.²⁷ The second was based in logic. If a state disobeyed a law, nothing would stop the state from simply changing the law to ensure its own compliance.²⁸ For shorthand purposes, this set of rationales will be deemed the “enforcement” rationale (due to its emphasis upon the logical and practical difficulties of enforcing judgments against governments).

C. Popular Sovereignty – American Style

A strong proponent of the idea of popular sovereignty was James Wilson, a Pennsylvania attorney, law professor, delegate to the Constitutional Convention, and United States Supreme Court Justice. Wilson had an abiding belief in the principles of the Revolution that were rarely tempered by a fear of practical difficulties. If popular sovereignty was philosophically inconsistent with sovereign immunity, Wilson would not hesitate to point out the inconsistency.

Wilson’s views on sovereign immunity necessarily derive from his views on sovereignty and the nature of the republican governments. In a series of lectures delivered at the University of Pennsylvania between 1790-92, Wilson articulated a theory

²⁶ Borchard (Part VI), *supra* note 22, at 17.

²⁷ *But see infra*, Part IV, for a discussion of how this rationale changes in a federalist system where multiple governments share power.

²⁸ Of course, states might come under political pressure to be bound by the same laws as non-state actors.

of sovereignty that is echoed elsewhere in Revolutionary-era political thought:²⁹ legitimate sovereignty, in a republican state, resides in the people, not in the government.³⁰ The source of authority among “free people” was the consent of the ruled, not the will of a superior.³¹ Moreover, sovereignty remained with the people even after they chose their form of government and their leaders.³²

Wilson viewed states as artificial persons composed of the citizens of the state.³³ He believed that individuals formed governments to protect their natural rights,³⁴ chiefly the right to pursue happiness.³⁵ Once those individuals joined together, they formed a “corporation.”³⁶ A state was but one form of a corporation,³⁷ and there could be smaller corporations formed within a state.³⁸ Corporations, Wilson believed, had moral rights and duties that were analogous to those for individuals.³⁹ Natural rights and duties were placed upon mankind by God,⁴⁰ but there was no corporeal authority that legitimately

²⁹ In the Federalist Papers, for example, James Madison argued that the ratification of the Constitution could be lawfully done upon “[t]he express authority of the people alone.” THE FEDERALIST No. 43, at 229 (James Madison) (George W. Carey & James McClellan, eds., 2001).

³⁰ James Wilson, Of the Law of Nations, *supra* note 3, at 153.

³¹ James Wilson, Of Municipal Law, *in* 1 THE WORKS OF JAMES WILSON 192 (Robert Green McCloskey ed., 1967).

³² James Wilson, Of Government, *in* 1 THE WORKS OF JAMES WILSON 304 (Robert Green McCloskey ed., 1967).

³³ James Wilson, Of Man, As Member of Society, *in* 1 THE WORKS OF JAMES WILSON 239 (Robert Green McCloskey ed., 1967).

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Id.* at 240.

³⁷ *Id.*

³⁸ *Id.* at 239-40.

³⁹ James Wilson, Of the Law of Nations, *supra* note 3, at 152; James Wilson, Of Man, As Member of Society, *supra* note 33, at 239-240.

⁴⁰ James Wilson, Of the Law of Nations, *supra* note 3, at 149.

existed to enforce those duties.⁴¹ Thus, mankind was forced to bind itself,⁴² and this self-rule was the only legitimate source of authority.⁴³

III. Immunity in America – Its History and Justifications

Having outlined the theoretical justifications behind sovereign immunity (at least as understood by Americans) and one robust version of the American vision of popular sovereignty, it is now possible to examine how Americans grappled with the interplay between the two concepts. In this section, I outline how Americans attempted to reconcile the two concepts (or argue against their possible reconciliation) in two contexts: the interpretation of the Constitution, and common-law tort lawsuits against states.

A. Immunity as a Constitutional Principle

1. Ratification Debates

Some of the early discussions about the scope of sovereign immunity in the Americas surrounded Article III, Section 2 of the Constitution, which provided for federal court jurisdiction over cases and controversies “between a State and Citizens of another State...and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.”⁴⁴ Some opponents of the Constitution objected that this language allowed for individual plaintiffs to hale states into court as defendants. While not one of the central points of contention during the ratification debates, it did come up in multiple states, and the debates reveal how some of the founders conceived of the appropriateness of sovereign immunity in America.

⁴¹ James Wilson, Of the General Principles of Law and Obligation, *in* 1 THE WORKS OF JAMES WILSON 112-113 (Robert Green McCloskey ed., 1967).

⁴² James Wilson, Of Municipal Law, *supra* note 31, at 192.

⁴³ *Id.*

⁴⁴ U.S. CONST. art. III, § 2.

a. Virginia

In the Virginia ratification debates, Patrick Henry (an opponent of the proposed Constitution) believed that the plain language of the text allowed for such suits.⁴⁵ The Constitution's backers, including John Marshall and James Madison, contended that the provision could not allow for states to be brought to court as defendants because such a result was contrary to the nature of sovereignty. According to Marshall, it was "not rational to believe that the sovereign power should be dragged before a court."⁴⁶ Madison flatly asserted that it was "not in the power of individuals to call any state into court."⁴⁷ Thus, at least in the context of sovereign immunity, Marshall and Madison did not believe that the assumption of sovereignty by the people themselves would prevent governments from asserting the right of the sovereign to refuse to answer a complaint in court. Although their comments do not provide a full explanation of why they believed "sovereigns" should be immune from suit, the comments appear to invoke the "enforcement" rationale of sovereign immunity, because they appeal to the difficulties of logic and power in enforcing the commands of a court upon the government. If their words are to be taken at face value, they evidently did not see an incompatibility between popular sovereignty and an "enforcement" based sovereign immunity.

Edmund Randolph saw the weakness in assuming that traditional notions of sovereignty held up in light of the Revolution and the text of the Constitution. Randolph asserted that the text would allow for states to be made defendants "*whatever the law of nations may say*."⁴⁸ Randolph's interpretation proved prophetic, as the Supreme Court in

⁴⁵ Patrick Henry, in 3 ELLIOT'S DEBATES ON THE FEDERAL CONSTITUTION at 543 (2d ed. 1861).

⁴⁶ John Marshall, in 3 ELLIOT'S DEBATES, *supra* note 45, at 555.

⁴⁷ James Madison, in 3 ELLIOT'S DEBATES, *supra* note 45, at 533.

⁴⁸ Edmund Randolph, in 3 ELLIOT'S DEBATES, *supra* note 45, at 573 (emphasis added).

Chisholm v. Georgia soon allowed for suits against states based upon the text of Article III.⁴⁹ Only one of the five Justices raised objections to such a construction based upon traditional notions of sovereignty.⁵⁰ Coincidentally, Randolph, as Attorney General, argued *Chisholm* on behalf of the federal government,⁵¹ and successfully convinced the court that the jurisdiction should lie in that case.

b. New York

The written debates over the Constitution in New York also touched upon the topic of sovereign immunity and whether Article III allowed for suits by individuals against states. In Federalist No. 81, written to persuade New Yorkers to support the proposed Constitution, Alexander Hamilton asserted that they were not. In one of the most extensive defenses of sovereign immunity to be found in the ratification debates, Hamilton asserted:

It is inherent in the nature of sovereignty, not to be amenable to the suit of an individual without its consent. This is the general sense, and the general practice of mankind; and the exception, as one of the attributes of sovereignty, is now enjoyed by the government of every state in the union....there is no colour to pretend that the state governments would, by the adoption of that [Constitution], be divested of the privilege of paying their own

⁴⁹ 2 U.S. (2 Dall.) 419 (1793).

⁵⁰ *Id.* at 429-450 (Iredell, J., dissenting).

⁵¹ *Id.* at 419.

debts in their own way, free from every constraint but that which flows from the obligations of good faith.⁵²

Hamilton's defense of sovereign immunity rested on several premises. First, he assumed that the government was the sovereign, and thus the government would be entitled to the privileges of sovereignty. Those privileges included the right to not be bound by any outside power. Second, by relying upon the "general practice of mankind," his argument assumed that American governments could borrow notions of governmental prerogative from other nations. Next, he asserted that the states each enjoyed immunity from suit.⁵³ This line of argumentation seems to invoke the "privilege" rationale of sovereign immunity – instead of focusing on the logical problems inherent in forcing governments into their own courts, the statement makes reference to the "privilege" of sovereigns and the fact that it is "shared" by every government in the world.

In an essay opposing the proposed Constitution, the Anti-Federalist author Brutus evinced a realist view of judicial power-grabbing to argue that the text of Article III would result in a ruinous avalanche of suits against states for damages. Brutus first argued that the plain text of the Constitution allowed for suits against states by individuals of different states.⁵⁴ This in itself he found objectionable – he argued it was "humiliating and degrading"⁵⁵ and asserted that no state had ever submitted to the

⁵² THE FEDERALIST No. 81, at 422-23 (Alexander Hamilton) (George W. Carey and James McClellan, eds., 2001).

⁵³ While it may be impossible to prove or disprove this statement, several state constitutions drafted near the time of the ratification of the Constitution allowed for suits against states subject to legislative approval. See PENN. CONST. of 1790, art. IX, § 11; DEL. CONST. of 1792, art. I, § 9; TENN. CONST. of 1796, art. XI, § 17.

⁵⁴ See Brutus, Essays of Brutus No. XIII (Feb. 21, 1788), in 2 THE COMPLETE ANTI-FEDERALIST ¶¶ 2.9.160-161, at 429 (Herbert J. Storing, ed., 1981).

⁵⁵ *Id.* ¶ 2.9.161, at 429.

jurisdiction of its courts in such a manner.⁵⁶ He also argued that, in the case of debts owed by states, the creditors never contemplated being able to bring states into court.⁵⁷

Brutus argued that in-state creditors would sell the debt to out-of-state creditors, effectively subjecting states to judicial authority with regard to all debts.⁵⁸ Although he did not raise the issue with regard to suits against states, Brutus's critique of diversity jurisdiction provided another mechanism by which creditors could reach states. Brutus feared that diversity jurisdiction would be turned into general jurisdiction by way of legal "fictions" akin to those fictions used by the King's Bench to enhance its jurisdiction in medieval England.⁵⁹ Federal courts might entertain the fiction that a party lived in a different state in order to declare that they had jurisdiction to hear the claim.⁶⁰

Brutus argued that the costs of forcing the states into court to answer for their debts would be immense.⁶¹ Since, according to Brutus, states were also hamstrung in their power to collect revenue under the Constitution,⁶² the federal judiciary would "crush the states beneath its weight."⁶³ Thus, while many of the proponents of the Constitution seemed to stay in the realm of the theoretical and the abstract in arguing that states were not subject to suit from individuals under the Constitution, Brutus was more open about the practical fears of forcing state governments into the federal court system. He also engaged the Constitution's defenders on the theoretical level by using the terms

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ *Id.* ¶ 2.9.162, at 429.

⁵⁹ Brutus, Essays of Brutus No. XII (Feb. 14, 1788), in 2 THE COMPLETE ANTI-FEDERALIST ¶ 2.9.157, at 427 (Herbert J. Storing, ed., 1981). Brutus recounts that the King's Bench originally only had jurisdiction over "trespasses and injuries *vi et armis*. *Id.* The court could also hear cases in which the defendant was in the custody of the court. *Id.* Thus, the court allowed plaintiffs to plead fallacious trespasses, bringing defendants into the custody of the court, and then the plaintiffs could proceed with other causes of action.

Id.

⁶⁰ *Id.*

⁶¹ Brutus, *supra* note 2, ¶¶ 2.9.164, .167, at 430-31 (Herbert J. Storing ed., 1981).

⁶² *Id.* ¶ 2.9.164, at 430.

⁶³ *Id.* ¶ 2.9.167, at 431.

“humiliating and degrading,” perhaps suggesting that he considered the states to be entitled to immunity from suit based upon a “privilege” rationale.

c. Pennsylvania

In Pennsylvania, James Wilson spoke in support of the proposed Constitution and admitted that Article III allowed for suits against states. If the debates in Virginia and New York are any indication, the idea that states would be subject to suits by private individuals was politically unpopular. Indeed, there was good reason for this. States had large war debts,⁶⁴ and forcing them into court to repay these debts might weaken them significantly. It is safe to assume that the debts were not widely held by the voting public, so they would not see a significant benefit of allowing for individual suits against states.

Notwithstanding the political unpopularity of his position, Wilson argued in Pennsylvania that “[i]mpartiality is the leading feature in this Constitution; it pervades the whole. When a citizen has a controversy with another state, there ought to be a tribunal where both parties may stand on a just and equal footing.”⁶⁵

In his Lectures on the Law several years afterwards, Wilson elaborated upon the theme of sovereign immunity. In his lectures, Wilson conceived of states as artificial “persons”⁶⁶ that were under a moral duty to follow natural law, even if there was no external authority to regulate them.⁶⁷ As “moral persons,” they could do wrong and right.⁶⁸ And this meant they could certainly harm individuals unjustly.⁶⁹ Wilson thought

⁶⁴ Jaffe, *supra* note 20, at 19 (citing the fear of paying war debts as the “prime cause” of the contraction of the right to sue governments in the United States).

⁶⁵ James Wilson, in 2 ELLIOT’S DEBATES, *supra* note 45, at 491.

⁶⁶ *Supra* Part II.C.

⁶⁷ *Id.* at 153-54.

⁶⁸ *Id.* at 160.

⁶⁹ *Id.*

it obvious that the *just* outcome when states mistreated individuals was that the individual received redress from the state.⁷⁰ The lack of an external power to ensure that the state did what was just was immaterial because *individuals* in a state of nature were duty-bound despite a similar lack of external authority.⁷¹ In other words, the only legitimate source of authority for humans was self-rule, and thus states and other corporations could very well rule themselves according to natural law as well.⁷² Some of those natural law duties included keeping promises and obligations and not harming others.⁷³

Wilson attacked sovereign immunity as a vestige of absolute monarchy that had no place in the American system of government. He thought it pernicious and antithetical to American ideals to believe that American officials could “do no wrong.”⁷⁴ Since, in America, the *people* are the sovereign, no government can assert that it is above the interests of the people.⁷⁵ Wilson claimed that notions of superiority and royal prerogative were being exposed as unsound in Great Britain,⁷⁶ but since they were so ingrained into the British legal regime it might be impossible to fully eliminated them without damage to the rest of the system.⁷⁷ However, since Americans only recognized those natural precepts of justice imposed upon mankind by God, jurisdiction to hear suits should no longer imply superiority of any kind.⁷⁸

⁷⁰ James Wilson, Of the Nature of Courts, 2 THE WORKS OF JAMES WILSON 497 (Robert Green McCloskey ed., 1967).

⁷¹ *Id.*

⁷² *Id.*

⁷³ James Wilson, Of Man, As a Member of Society, *supra* note 33, at 232-33.

⁷⁴ James Wilson, Comparison of the Constitution of the United States, With That of Great Britain, in 1 THE WORKS OF JAMES WILSON 316-17 (Robert Green McCloskey ed., 1967).

⁷⁵ *Id.* at 317.

⁷⁶ *Id.* at 316.

⁷⁷ *Id.*

⁷⁸ *Id.* at 316-17.

Nor did Wilson give much credence to the argument that states would lose their dignity if forced to answer suits at the hands of individuals. In the context of foreign relations, Wilson acknowledged that maintaining the dignity of the state was a legitimate aim.⁷⁹ But in the context of domestic affairs, Wilson believed that the dignity of the state was no more than the aggregate of the dignity of its citizens.⁸⁰ Since the dignity of individual citizens was not degraded by appearing before a court, Wilson argued that the dignity of a state should not be so considered either.⁸¹

If mankind was forced to bind itself, then Wilson reasoned that corporations had to do the same.⁸² Thus, it was immaterial to Wilson that no higher external authority existed to regulate, for example, interactions between nations;⁸³ nations were bound by the self-imposed law of nations, which Wilson believed was really natural law as applied to nations.⁸⁴

d. Conclusion

In summary, the founders, in considering whether the Constitution allowed for suits against states, demonstrated a variety of approaches to the problem of sovereign immunity. In New York, Alexander Hamilton and Brutus both asserted that states were entitled to the “privilege” of only being sued subject their own consent. Of the two philosophical rationales used to defend sovereign immunity, the privilege rationale seems to be the weaker one. If popular sovereignty is a serious doctrine, it is unclear what “privilege,” if any, states should be entitled when dealing with the people. In Virginia,

⁷⁹ James Wilson, *Of the Law of Nations*, *supra* note 3, at 157. Wilson believed that promoting the dignity of a nation was important in order to ensure the proper tenor of conduct between countries. *Id.*

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² James Wilson, *Of the Nature of Courts*, *supra* note 70, at 497.

⁸³ James Wilson, *Of the Law of Nations*, *supra* note 3, at 153-54.

⁸⁴ *Id.* at 153.

Madison and Marshall both seemed to raise the problem of enforcement of judgments against governments. While this seems reasonable from a logical point of view, James Wilson argued that difficulties in securing enforceable judgments do not relieve republican governments from their obligations to do justice by the people, since the people are the sovereign.

2. *Chisholm v. Georgia and the Eleventh Amendment*

If the issue of sovereign immunity was not the centerpiece of the ratification debates, *Chisholm v. Georgia* catapulted the topic to prominence in the American political arena.⁸⁵ The purpose of this paper is not to take sides in the constitutional debate at issue in *Chisholm*, but instead to mine the reasoning of the case in order to examine the interplay between the theoretical justifications for sovereign immunity and popular sovereignty.

In *Chisholm*, the nascent Supreme Court was faced with the nettlesome issue of war debts owed by states. The plaintiff in the case, Alexander Chisholm, was the executor of the estate of a South Carolina merchant who had sold clothing and blankets to Georgia.⁸⁶ Chisholm claimed that the merchant had never received payment for the goods, a charge the State of Georgia denied.⁸⁷ When the case was brought to the Supreme Court, Georgia claimed that it was immune from suit.⁸⁸ The Supreme Court thus had to deal with the question of whether Article III, Section 2 of the Constitution allowed for federal jurisdiction over a suit prosecuted by a citizen against a foreign state.

⁸⁵ Jaffe, *supra* note 20, at 20.

⁸⁶ MELVYN R. DURCHSLAG, *STATE SOVEREIGN IMMUNITY: A REFERENCE GUIDE TO THE UNITED STATES CONSTITUTION* 29 (2002).

⁸⁷ *Id.* Georgia's position was that payment had been made to two agents, and that compensation should be sought from them. Unfortunately for Chisholm, one of the agents was insolvent, and the other was dead.

⁸⁸ *Id.*

Each Supreme Court justice wrote his own opinion in *Chisholm*, which frustrates legal researchers seeking to delineate its holding⁸⁹ but which also allows readers to discover a broader array of views with regard to sovereign immunity.

a. Iredell

Justice Iredell cast the lone dissenting vote in the case, although his view ultimately prevailed with the passage of the Eleventh Amendment⁹⁰ and with the affirmation of his reasoning in *Hans v. Louisiana*.⁹¹ In denying *Chisholm* the right to sue the State of Georgia in federal court, Justice Iredell argued that states are indeed sovereign, except for that portion of their sovereignty that was delegated under the Constitution.⁹²

Iredell sought to settle the case on non-Constitutional grounds. He claimed that the judiciary had no powers except those granted by Congress – in other words, the judicial powers under Article III were not self-executing.⁹³ Thus, he examined whether the judiciary had the power to hear the case under the Judiciary Act.⁹⁴ He construed the act as limiting the judiciary to exercising “those principles and usages of law already well known.”⁹⁵ He then examined whether suits by individuals against states (or their analogues) were accepted under the common law.⁹⁶ Since the states, in Iredell’s view, were still sovereign (except with respect to that portion forfeited to the federal

⁸⁹ See, e.g., *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 80 (1996) (Stevens, J., dissenting).

⁹⁰ U.S. CONST. amend XI.

⁹¹ 134 U.S. 1, 16 (1890).

⁹² *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419, 435 (1793) (Iredell, J., dissenting).

⁹³ *Id.* at 432.

⁹⁴ *Id.* at 433-34.

⁹⁵ *Id.* at 434.

⁹⁶ *Id.* at 435. *But see infra* Part III.B for an argument that state courts actually developed common law sovereign immunity following *Chisholm*.

government),⁹⁷ Iredell concluded that the only possible analogue was a suit against the crown.⁹⁸ He examined in some detail various authorities on when individuals could bring suits for damages against the crown,⁹⁹ and although he acknowledged that there was a petition – the petition of right to the King – and a procedure for such suits,¹⁰⁰ he argued that the need for a petition and the procedural strictures demonstrated that it was within the King’s discretion to hear the suit,¹⁰¹ and furthermore he doubted the petition’s vitality in an era of parliamentary supremacy in fiscal matters.¹⁰²

Analogizing to suits against states, Iredell assumed that legislative bodies and their agents could not be sued.¹⁰³ Unfortunately for plaintiffs, no other person of state government had the authority to bind the state because no other person could authorize expenditures.¹⁰⁴ In other words, no one else had “colour to represent the sovereignty of the state.”¹⁰⁵ Since individuals had no method to sue the state, all they could do was request relief from the “discretion and good faith of the Legislative body.”¹⁰⁶

Iredell’s view seems to have been that the common law recognized a suit against the sovereign when the King was sovereign, although that suit was ultimately allowed based upon the King’s good graces. However, since sovereignty resides in the legislature, no suit can be brought against them or their agents. As will be demonstrated in Part III.B, his view of the common law was accepted by early American state courts in denying recovery to plaintiffs who sued state governments. Iredell invoked both the

⁹⁷ *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419, 435 (1793) (Iredell, J., dissenting).

⁹⁸ *Id.* at 437.

⁹⁹ *Id.* at 437-445.

¹⁰⁰ *Id.* at 439.

¹⁰¹ *Id.* at 445.

¹⁰² *Id.*

¹⁰³ *Id.*

¹⁰⁴ *Id.* at 446.

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

“privilege” and the “enforcement” rationales of sovereign immunity. On the privilege prong, he was careful to argue that the King had discretion in deciding whether to allow a Petition of Right. As for the enforcement prong, he concluded that suing the legislature was a matter of practical impossibility, since in his view no court could force a legislature to expend funds. Interestingly, Iredell’s decision was devoid of any mention of popular sovereignty. He simply stated, without elaboration, that the states were sovereign except to the extent they forfeited their sovereignty to the federal government.

b. Blair

Justice Blair eschewed the passionate defense of popular sovereignty present in the opinions of Justices Wilson and Jay. Instead, Blair’s opinion did two noteworthy things. First, he read the plain meaning of the text that allowed for states to be defendants, concluding that the provision meant what it said.¹⁰⁷ Second, he methodically picked apart each of the justifications for sovereign immunity. In attacking the privilege rationale, Blair implicitly rejected traditional notions of sovereignty by refusing to consider foreign authorities. He deemed “their likeness...not sufficiently close” to America’s form of government.¹⁰⁸ However, he did decide to demonstrate solicitude toward the state by declining to issue a default judgment based upon its failure to appear in the case.¹⁰⁹ Blair also attacked the “enforcement” rationale by stating that it was the Court’s role to uphold the law as it understood it; if there were enforcement problems, the court could “leave it to those departments of Government which have higher powers.”¹¹⁰

¹⁰⁷ Chisholm v. Georgia, 2 U.S. (2 Dall.) 419, 451 (1793) (Blair, J.).

¹⁰⁸ *Id.* at 450.

¹⁰⁹ *Id.* at 452-53.

¹¹⁰ *Id.* at 452.

Blair, therefore, while not mentioning popular sovereignty, found both the rationales justifying sovereign immunity to be insufficient under the American system of government. He was not completely unmindful of the privilege sought by the state, however, but he seemed totally unpersuaded by the enforcement rationale, essentially arguing that any problems should be worked out by another branch of government.

c. Wilson

Wilson's views on whether the Constitution allowed for suits against states were probably not in doubt, given that he had already made his views known on that precise question during the Pennsylvania ratification debates and in his lectures on the law at the University of Pennsylvania.¹¹¹

In his *Chisholm* opinion, Wilson stayed true to the ideas espoused in his lectures and at the Pennsylvania ratification debates. He reiterated the idea that states were nothing more than “artificial persons” made up of assembled individuals, and that they could be bound by natural duties and obligations in the same manner as individuals.¹¹² He argued that states were therefore morally bound to meet obligations and to be just in their dealings with others.¹¹³ Thus, as a matter of justice, Wilson believed that it was the right thing for states to do to make themselves amenable for redress in court.¹¹⁴ Wilson illustrated this point by providing examples of other governments, from Athens to Spain to Prussia to the Saxon Kings, that were amenable to suit.¹¹⁵

Wilson's *Chisholm* opinion also emphasized the superiority of the people to their government. He accused the states of hiding behind the term “sovereign” in attempting

¹¹¹ *Supra* Part III.A.1.c.

¹¹² *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419, 455 (1793) (Wilson, J.).

¹¹³ *Id.*

¹¹⁴ *Id.*

¹¹⁵ *Id.* at 459-61.

to evade their obligations,¹¹⁶ which he thought misleading since the people were the true sovereign in America.¹¹⁷ The very concept of sovereignty, Wilson argued, was derived from feudal times, when the lord had to establish legitimacy of his rule.¹¹⁸ Such a concept had no place in a society founded upon the consent of the people.¹¹⁹

d. Cushing

Like Justice Blair, Justice Cushing did not look at the experiences of other countries in determining whether the Constitution allowed for suits against states.¹²⁰ For Cushing, the determining factor was the purpose behind the Constitution and behind government itself: to protect the rights of individuals.¹²¹ The rights of individuals, Cushing argued, were therefore more prized than the rights of states.¹²² In allowing for suits against states, Cushing acknowledged that the reasoning might be extended to suits against the United States, and appeared ready to accept that reading if it were a “necessary consequence.”¹²³ However, he was clearly uncomfortable with the idea that individuals could sue the United States government, and thought that this case did not settle the question.¹²⁴

Cushing’s reasoning that the rights of individuals are the end of government is a clear indication that he thought popular sovereignty trumped the “privilege” of a state to refuse to answer a lawsuit. Cushing did not explicitly address the enforcement rationale,

¹¹⁶ *Id.* at 456.

¹¹⁷ *Id.*

¹¹⁸ *Id.* at 457-58.

¹¹⁹ *Id.* at 458.

¹²⁰ *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419, 466 (1793) (Cushing, J.). Justice Cushing did acknowledge that the inquiry might be “elucidated” by the law or practice of England, but never undertook such a comparison. *Id.*

¹²¹ *Id.* at 468.

¹²² *Id.*

¹²³ *Id.* at 469.

¹²⁴ *Id.*

although it obviously did not trouble him enough to require much analysis. However, in his uneasy feeling about the implications of the holding to suits against the United States, Cushing indicated that he was not as willing as Wilson to throw the courthouse doors wide open to suits against governments based solely on the principles of popular sovereignty.

e. Jay

Like Wilson, Jay challenged the notion that the states really had the right to call themselves “sovereign” at all. Prior to the Revolution, Jay argued, the people were subjects of the British Crown; however, the Revolution heralded the passage of sovereignty to the American people.¹²⁵ The people of the United States were the true sovereigns of the nation, because they were the source of authority.¹²⁶ Jay contrasted this with feudal Europe, where the king was the source of authority.¹²⁷

Additionally, Jay argued, it was legal to sue a corporation that operated under a charter, if the corporation had caused harm.¹²⁸ Suing a corporation, in his view, was akin to suing the individuals comprising it.¹²⁹ Jay pointed out that the City of Philadelphia was nothing more than a corporation operating under a charter, and that it was susceptible to suit.¹³⁰ Jay found no reason why an incorporated city should be susceptible to suit but a state, which was nothing more than a similar collection of citizens, should not.¹³¹

¹²⁵ *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419, 470-71 (1793) (Jay, C.J.). Jay believed that the people of the entire nation were one sovereign, and rejected the view that a compact of states (or citizens within different states) created the national Constitution. *Id.* at 471.

¹²⁶ *Id.*

¹²⁷ *Id.*

¹²⁸ *Id.* at 472.

¹²⁹ *Id.*

¹³⁰ *Id.*

¹³¹ *Id.* at 472-73.

Jay dismissed the argument that the dignity of states would be degraded by their being sued. His response was that the Constitution also contemplated suits between states, and that if such suits were not beneath the dignity of states, suits against citizens of other states should not be either.¹³² Jay found this result consistent with the nation's principles of providing equality and justice for all citizens.¹³³

Jay was not as cavalier as Wilson or Blair in terms of dismissing the enforcement prong. He was hesitant, like Justice Cushing, about extending the reasoning to cases involving the federal government. In leaving open the question of whether citizens could sue the United States in federal court (which would require the executive branch to enforce any judgment against the United States), Jay stated:

I wish the State of society was so far improved, and the science of Government advanced to such a degree of perfection as that the whole nation could in the peaceable course of law, be compelled to do justice, and be sued by individual citizens. Whether that is, or is not, now the case, ought not to be thus collaterally and incidentally decided: I leave it a question.¹³⁴

Jay's analysis, like those of the other justices in the majority, indicated a preference for popular sovereignty over the rationales advanced in support of traditional sovereign immunity. Jay was unwilling to completely discount the enforcement rationale of sovereign immunity, but at least with regard to diversity suits against states, he was unwilling to read sovereign immunity into the constitution.

f. The Eleventh Amendment

¹³² *Id.* at 473.

¹³³ *Id.* at 477.

¹³⁴ *Id.* at 478.

Taken together, the opinions of the four members of the *Chisholm* majority represented a strong repudiation of traditional sovereign immunity in light of popular sovereignty and the liberal principles upon which the Constitution was based. The opinions were also generally devoid of much mention of the practical concern that suits to recover debts from states might severely harm their finances. Whether because they rejected the Supreme Court’s interpretation of the propriety of sovereign immunity (as some later courts have claimed),¹³⁵ or because they feared the practical consequences for their budgets (as some later scholars have claimed),¹³⁶ lawmakers wasted little time in overturning *Chisholm* by amending the Constitution. The amendment stripped the federal courts of jurisdiction over suits prosecuted against states by “Citizens of another State, or by Citizens or Subjects of any Foreign State.”¹³⁷

3. Post Eleventh Amendment History to the Present

Even though, at the time of the founding, there was some difference of opinion regarding the propriety of sovereign immunity in a nation where the people themselves are sovereign, that difference in views seems to have receded rather quickly after the ratification of the Eleventh Amendment. In the view of Edwin Borchard (who was writing in 1926), “[t]he eleventh amendment...though confined to the federal courts, restored the ancient doctrine [of sovereign immunity] to full effect, and the courts...have accepted it as immutable....”¹³⁸ Indeed, in *Hans v. Louisiana* the Supreme Court broadened the interpretation of the Eleventh Amendment to protect states from suits

¹³⁵ See *Hans v. Louisiana*, 134 U.S. 1, 16 (1890); *Alden v. Maine*, 527 U.S. 706, 720-21 (1999).

¹³⁶ Jaffe, *supra* note 20, at 19; Gibbons, *supra* note 21, at 1926-27.

¹³⁷ U.S. CONST. amend. XI.

¹³⁸ Borchard, *supra* note 22, at 38.

brought by their *own* citizens (despite the fact that the Amendment only explicitly prohibits suits brought by citizens of different states).¹³⁹

In *Hans v. Louisiana*, the Supreme Court went beyond the literal text of the Eleventh Amendment and held that the amendment barred suits brought against states by citizens of their own state.¹⁴⁰ The Court ruled that a construction of the U.S. Constitution that allowed for such suits was contrary to the clear intent of the framers as demonstrated by the passage of the Eleventh Amendment – the intent to not subject states to suits in federal court.¹⁴¹

The *Hans* view of this intent to protect states from suit was upheld in a series of decisions in the 1990s. In *Seminole Tribe of Florida v. Florida*, the Court found that Congress could not create a cause of action against the states under the mantle of its commerce powers.¹⁴² The Court was concerned with the federalism implications of such a cause of action – in particular, that Congress could impede the “sovereignty” of states.¹⁴³ In *Alden v. Maine*, the Court extended its holding from *Seminole Tribe* to bar a congressionally created cause of action from being brought in *state* court.¹⁴⁴ The court justified this decision by arguing that states had an essential sovereignty and dignity that the Constitution sought to protect, and Congress would be violating that sovereignty if could force states to answer claims for monetary damages, regardless of the court in which such claims were brought.¹⁴⁵

¹³⁹ *Hans v. Louisiana*, 134 U.S. 1 (1890).

¹⁴⁰ *Id.*

¹⁴¹ *See id.* at 16. Of course, as the evidence from the ratification debates in Part III.A.1 demonstrates, the framers were at least partly divided on the issue of whether the Constitution provided for federal jurisdiction over suits against states.

¹⁴² 517 U.S. 44 (1996).

¹⁴³ *Id.* at 54.

¹⁴⁴ 527 U.S. 706 (1999).

¹⁴⁵ *See id.* at 730-31.

The Court has recognized several areas where individuals can sue states under federal law. First, individuals can sue states for monetary damages pursuant to some congressionally created causes of action, but only if the causes of action are, in reality, necessary to protect against constitutional violations.¹⁴⁶ The Court has struck down several causes of action in recent years for not being “congruent and proportional” to the purported constitutional violations they were meant to prevent.¹⁴⁷ Next, if individuals decide not to seek monetary relief, they can sue state officials to enjoin them from performing activities that are contrary to federal law.¹⁴⁸ Although this type of action, called an *Ex Parte Young* action, is seemingly broad in scope, the Court has recently expressed stressed that it views the action as a “narrow” exception to the sovereign immunity states normally enjoy under the U.S. Constitution.¹⁴⁹

In its recent sovereign immunity jurisprudence, the Supreme Court seems to have accepted the “privilege” rationale for sovereign immunity – states, as sovereigns, are entitled to the privilege of not having to be haled into court by private citizens without their consent. In these majority opinions, there has been very little discussion of the concept of popular sovereignty, and whether shielding states from suits is consistent with a government run for the benefit of the people. Not surprisingly, this jurisprudence has been controversial, drawing bitter dissents. In Part IV, I will attempt to reconcile this protection of sovereign immunity with the demise of common law sovereign immunity.

¹⁴⁶ See *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62 (2000).

¹⁴⁷ See *id.*; *City of Boerne v. Flores*, 521 U.S. 507, 519 (1997).

¹⁴⁸ *Ex Parte Young*, 209 U.S. 123 (1908).

¹⁴⁹ *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 76 (1996).

B. Immunity at Common Law

With regard to tort claims in state courts, claims fell into two categories: suits against municipalities and suits against states themselves. At common law, early American state courts protected both classes of defendants by way of sovereign immunity. In the case of municipalities, many state courts followed the lead of Massachusetts, which in the 1812 case *Mower v. Inhabitants of Leicester* ruled that a stagecoach owner could not sue a town unless a statute provided a cause of action.¹⁵⁰ Other states followed suit in providing for sovereign immunity for local governments.¹⁵¹ With respect to state governments, state courts seemed to follow the lead of the Eleventh Amendment in denying relief to individual claimants (even though the Eleventh Amendment only appeared to apply to the federal courts).¹⁵²

This is not to say that individuals were completely without redress when they were harmed by government actors. While the doctrine of sovereign immunity took away direct actions against the state or federal government, individuals could still sue individual governmental officers in tort.¹⁵³ However, this remedy was decidedly inferior to the remedy of suing a state directly, since it would considerably more difficult to collect from an officer who might be insolvent. One commentator characterized officer suits as “often useless.”¹⁵⁴ Ironically, through the early 20th century, it was *more* difficult to recover for harms caused by governments than in the United States than in Britain, because common law sovereign immunity had stripped individuals of *any* right

¹⁵⁰ 9 Mass. 247 (1812).

¹⁵¹ *Stone v. Ariz. Hwy. Comm’n*, 381 P.2d 107, 110 (Ariz. 1963) (explaining history of common law sovereign immunity).

¹⁵² See Jaffe, *supra* note 20, at 20.

¹⁵³ *Id.* at 2.

¹⁵⁴ Borchard, *supra* note 22, at 39.

of recovery against the government, while the British Petition of Right had least provided some relief.¹⁵⁵

In the later part of the 20th century, aided by considerable scholarly criticism,¹⁵⁶ state courts changed their approach toward sovereign immunity.¹⁵⁷ Many state courts abolished common law doctrines of sovereign immunity that had protected states from suit. Some of those courts used strong language in panning the doctrine. The California Supreme Court called sovereign immunity “an anachronism, without rational basis, [that] has existed only by the force of inertia.”¹⁵⁸ The chief evil of sovereign immunity, according to the California court, was that it denied individuals the opportunity to obtain meaningful relief.¹⁵⁹ Courts also rejected with disgust what they saw as the underlying assumption of sovereign immunity – that the sovereign government can do no wrong. They have argued that this assumption flies in the face of the very principles upon which the American Revolution was fought – specifically, the people ridding themselves of royal caprice. In a somewhat simplified gloss on the history of sovereign immunity, the Colorado Supreme Court attributed sovereign immunity in its current form to the machinations of the Tudor monarchs, particularly Henry VIII, as they attempted to wrest power from the church. The court thunderously announced that:

¹⁵⁵ *Id.*

¹⁵⁶ *See, e.g.,* Borchard, *supra* note 17; Borchard, *supra* note 22; Jaffe, *supra* note 20.

¹⁵⁷ Restatement (2d) of Torts, § 895B, commentary. The Restatement contains a list of all the states that have judicially and/or legislatively abolished sovereign immunity for torts. The states that have judicially abolished immunity for state and/or local governments are: Alabama (local govns.); Alaska (local govns.); Arizona (both state and local govns.); California (both); Colorado (both); District of Columbia (local); Idaho (both); Illinois (local); Indiana (both); Kansas (state); Kentucky (local); Maine (both); Massachusetts (both); Michigan (both); Minnesota (local); Missouri (both); Nebraska (local); Nevada (local); New Hampshire (local); New Jersey (both); New Mexico (both); North Dakota (local); Pennsylvania (both); Rhode Island (local); West Virginia (local); Wisconsin (local). *Id.*

¹⁵⁸ *E.g.,* *Muskopf v. Corning Hospital Dist.*, 359 P.2d 457, 460 (Cal. 1961).

¹⁵⁹ *Id.*

The monarchical philosophies invented to solve the marital problems of Henry VIII are not sufficient justification for the denial of the right of recovery against the government in today's society. Assuming that there was sovereign immunity of the Kings of England, our forbears won the Revolutionary War to rid themselves of such sovereign prerogatives.¹⁶⁰

Not all state courts jumped on the bandwagon in panning the doctrine of sovereign immunity as an archaic, corrupt concept. The Kansas Supreme Court, in abolishing sovereign immunity, noted that the founders responsible for the importation of sovereign immunity to the United States surely were not attempting to imbue our governments with a cloak of absolutist impunity. Indeed, the court argued that “[u]nder our form of government the legal sovereignty is in the people.”¹⁶¹ But that observation did not automatically mean that governmental immunity from suit was inappropriate. The Kansas Court found a much more plausible reason for why sovereign immunity had caught hold in America: “the people, in the exercise of their governmental power, through the states, did not wish to be sued and harassed in carrying out their governmental functions.”¹⁶² The court nonetheless decided that judicially created distinctions between different government functions should be eliminated and government agencies should be liable for negligence.¹⁶³

In the second half of the 20th century, states were quick to jettison sovereign immunity as inimical to America's ideals of fairness and justice. In attacking sovereign immunity, the focused their fire most heavily upon the doctrine's privilege rationale,

¹⁶⁰ *Evans v. Bd. of County Comm'rs*, 482 P.2d 968, 969 (Colo. 1971).

¹⁶¹ *Carroll v. Kittle*, 457 P.2d 21, 26 (Kan. 1969).

¹⁶² *Id.*

¹⁶³ *Id.* at 27.

often with biting language. While arguing that they were upholding the values of the American Revolution, few courts mentioned popular sovereignty by name. Ironically, one state court that explicitly acknowledged popular sovereignty was one of the few courts that found sovereign immunity to be (theoretically) *compatible* with that conception of sovereignty, at least because it believed the real concerns of budgetary constraints were sufficient to justify immunity.

IV. Reconciling the Fates of Common Law and Constitutional Immunity – the Role of Federalism

In *Nathan v. Commonwealth of Virginia*, a 1781 case, the Court of Common Pleas for Philadelphia County heard a case where an individual tried to attach the property of the Commonwealth of Virginia in order to bring Virginia within the jurisdiction of the court.¹⁶⁴ Virginia appeared in court and argued that it was not subject to the jurisdiction of the courts of Pennsylvania because it was a separate sovereign, and no sovereign could be forced to appear in the court of another.¹⁶⁵ The court accepted this argument, and it accepted the argument that “jurisdiction implies superiority,”¹⁶⁶ which meant that jurisdiction would destroy the co-equal nature of sovereigns.¹⁶⁷ The court went further in discussing the sovereignty of the King of England. The court asserted that he was “independent of all, and subject to no one but God....No compulsory action can be brought against him, *even in his own courts.*”¹⁶⁸ Thus, the court was entirely willing to

¹⁶⁴ *Nathan v. Commonwealth of Virginia*, (Penn. Ct. Common Pleas, Phila. Co., Sept. 1781), reported in *M’Carty v. Nixon*, 1 U.S. (1 Dall.) 77 (Penn. Ct. Common Pleas, Phila. Co., 1784).

¹⁶⁵ *Id.*

¹⁶⁶ *Id.*

¹⁶⁷ *Id.*

¹⁶⁸ *Id.* (emphasis added).

apply traditional concepts of sovereign immunity to the states under the Articles of Confederation. The court seemed to be treating the state with the full respect due a sovereign, but the context of the case is critical – since the case was in Pennsylvania court, Virginia was a co-equal sovereign. Even if sovereignty resided in the people, it was still necessary for the American states to be treated as co-equals when dealing with other governments, and the shorthand for this type of treatment was that they should be treated like “sovereigns.” Even James Wilson, one of the most ardent critics of sovereign immunity, saw the need for America’s governments to be treated as equals when dealing with other governments.¹⁶⁹ This customary respect included not exercising jurisdiction over the other country, for in that context jurisdiction would imply coercive superiority.

In a federal system like that of the United States, jurisdiction can raise issues of the proper relationship between governments and citizens *and* between distinct governments. While the concept of popular sovereignty might pose problems for states seeking to exercise sovereign immunity vis à vis their citizens, it is less problematic in terms of justifying the rights of states to be free from interference and domination at the hands of other governments.

Since the passage of the Eleventh Amendment, the Supreme Court has consistently used the Constitution to protect states from suit. In doing so, one of its principal concerns has been the federalism problem raised by forcing states to answer lawsuits brought under federal law. This federalism concern is different from the typical sovereign immunity issue of whether a government should have to answer a private citizen in court – instead, the concern is whether the federal government (i.e. one “sovereign”) can force a state (another “sovereign”) to do so against its will. In other

¹⁶⁹ See Wilson, *Of the Law of Nations*, *supra* note 3, at 157.

words, this special protection of states might be thought of less in terms of whether the people or their government is sovereign, but whether a government chosen according to principles of popular sovereignty is still entitled to the respect of foreign governments, notwithstanding the fact that it cannot be considered the “sovereign” in domestic affairs.

The disparity in treatment between suits for money damages and for enjoining violations of law indicates this distinction. States are obviously not complete sovereigns, but are sovereign only in those matters over which they retain power.¹⁷⁰ The federal government is sovereign, but only over those limited areas where they have been given power.¹⁷¹ When the federal government forces states to comply with valid federal laws, it is acting within a sphere where it is sovereign and the state is not. However, when it interferes with the ability of states to collect and dispense with revenue, then arguably it is invading the traditional right of the states to control their finances.

Admittedly, the analogy to relations between foreign governments is imperfect. For one thing, the congressionally-created causes of action that the Court has struck down were passed pursuant to the powers granted to Congress (namely, its power over interstate and Indian commerce), and so those areas could be considered areas within the sovereign control of Congress. Moreover, forcing states to answer lawsuits for injunctive relief still impacts public finances, which would arguably invade the domestic sphere of the states.¹⁷² Nonetheless, there is at least some conceptual room for a distinction

¹⁷⁰ THE FEDERALIST No. 32, at 155 (Alexander Hamilton) (George W. Carey & James McClellan, eds., 2001).

¹⁷¹ THE FEDERALIST No. 41, at 241 (James Madison) (George W. Carey & James McClellan, eds., 2001).

¹⁷² Eric Berger, *The Collision of the Takings and State Sovereign Immunity Doctrines*, 63 WASH. & LEE L. REV. 493, 548 (2006).

between states acting as sovereign governments and states acting as bodies subordinate to federal law.¹⁷³

V. Conclusion

In a federalist nation with dual governments, defenders of popular sovereignty have argued that since sovereignty resides with the people, each government should honor its obligations to its citizens. These arguments were made by some of the founders during the ratification debates and in *Chisholm v. Georgia* on the issue of whether individuals should be able to sue states in federal court, and similar arguments were present in the many state court opinions of the mid- to late-20th century that abolished common law sovereign immunity in tort. These arguments have attacked two rationales offered to support sovereign immunity – the rationale that “sovereign” governments were entitled to the privileges afforded English monarchs, and the rationale that it was logically impossible to enforce a judgment against the government itself. In contrast, the

¹⁷³ Protection from intergovernmental interference should probably not be presumed to extend to suits arising directly under the Constitution, because the federal Constitution was ratified by the people of the several states, meaning it was a fundamental governing document for the states as well as the federal government. In other words, there is no intergovernmental encroachment when the federal Constitution (as opposed to Congress) places an obligation upon the states.

Under this rubric, the misfit is *Hans v. Louisiana*, which held that an individual could not sue the state in federal court based upon an obligation found in the federal Constitution (the “Contracts Clause,” U.S. CONST. art. I, § 10). Such an obligation was one agreed to by the people of the states upon ratification and thus was not imposed upon the state by another government. Sometimes, however, the legal reasoning of a case fails to tell the entire story. One historian has argued that *Hans* is best understood in the context of the post-Reconstruction era. Under this theory, Congress went to extraordinary lengths during Reconstruction to re-make southern society, and the expansion of the jurisdiction of federal courts was part of this effort. JOHN V. ORTH, *THE JUDICIAL POWER OF THE UNITED STATES: THE ELEVENTH AMENDMENT IN AMERICAN HISTORY* 50-51 (1987). Another part was enormous debts shouldered by southern state governments controlled by Reconstructionists. *Id.* at 53. In the 1876 election, Republicans pledged to end Reconstruction if southern states would support Rutherford B. Hayes for President. *Id.* at 54-55. Part of that pledge included a pullback of federal troops from the region – troops that would have been necessary to enforce court decrees mandating the repayment of debts incurred by Reconstructionist governments. *Id.* at 58. Thus, Orth argues, *Hans* really *was* about the federal government imposing upon a state government, and the result in *Hans* was practically necessary given the impossibility of enforcing a judgment against the state.

current Supreme Court has refused to force states into court to make good on external obligations imposed by the federal government. These divergent results might be best understood by characterizing the sovereignty protected by the Supreme Court as the freedom from interference by foreign governments, rather than freedom from making good on the harms done to citizens. Such an accommodation acknowledges the problems posed by sovereign immunity to a government based upon popular sovereignty, but recognizes that even when the people are sovereign, governments must be able to interact with one another in a functional manner.

VI. Postscript – When Should Realistic Fears About the Impact of Judgments Override Principles of Accountability to the People?

In a number of disputes over the propriety of sovereign immunity in America, courts and commentators have engaged in a debate that has been largely at the theoretical level of whether sovereign immunity is consistent with American ideals of popular sovereignty. This type of debate can leave analysts speculating about whether more practical motives are at work behind the high-minded debate. At least in the context of the ratification debates, several scholars have concluded that such underlying motives were likely significant. However, not every debate participant has ignored practical reality. The Kansas Supreme Court and Brutus were both open about the fact that unfettered liability might spell disaster for states, even if immunity were inconsistent with the liberal ideal of popular sovereignty. Is this argument a legitimate one to make in support of a doctrine contrary to the ideals of American democracy?

During the ratification debates, and in *Chisholm*, Wilson certainly believed not. First, he argued that fiscal concerns were subordinate to the weightier issue of whether the state was of good moral character.¹⁷⁴ In so doing, he implied that moral character has no price tag – there is no cost to the state dear enough to justify the betrayal of a natural duty.¹⁷⁵ Wilson acknowledged that the state sometimes had to take actions that unavoidably harmed others,¹⁷⁶ but he spoke of refusing to honor debts as “tyranny”¹⁷⁷ – perhaps indicating a fear on his part that debt repudiation might occur as a result of less than lofty motives.

His position, however, may have been extreme in this regard. It is one thing to exalt the principle of government accountability, but it is yet another to sacrifice an entire government to that principle. If governments had failed, that could mean the end of popular sovereignty as a viable concept as well. Perhaps by saving the governments, the fiction of sovereign immunity was able to save popular sovereignty. It is impossible to know, of course, whether states would have indeed shut down if they had been commanded to pay war debts by the courts. The prospect of states being hamstrung by their debts, though, was evidently a significant fear for many framers. When dealing with the matter of the solvency of the government, perhaps principle rightly gave way to practicality.

This line of reasoning has two problems. The first problem, visible as a result of historical hindsight, is that the doctrine justified by exigent circumstances lasted long after the exigencies had vanished. By the 20th century, states had grown to such an

¹⁷⁴ James Wilson, *Of Citizens and Aliens*, 2 THE WORKS OF JAMES WILSON 578 (Robert Green McCloskey ed., 1967).

¹⁷⁵ *Id.*

¹⁷⁶ James Wilson, *Of the Law of Nations*, *supra* note 3, at 160.

¹⁷⁷ James Wilson, *Of Citizens and Aliens*, *supra* note 174, at 578.

extent, and had access to sufficient insurance, that absolute immunity from suit was no longer necessary to protect them from insolvency. The judiciary was still very timid in abolishing common law sovereign immunity, although when it finally did so it used bold language.

The second problem is one of principle. Once a government invokes doctrines inimical to its founding principles in order to justify its own survival, its legitimacy is certainly jeopardized. It is one thing for a legislature to constrain suits against the state, for legislative action may be presumed sanctioned by the people; it is quite another for the judiciary to create such a constraint. Governments should not lightly subvert the principles upon which they are founded, and invoking the right of the sovereign to prevent individuals from recovering for their injuries certainly seems inconsistent with the idea that the only legitimate source of power is the people themselves.

Furthermore, if governments are to be shielded from suit, it seems more consistent with popular sovereignty for the people themselves, or at least their representatives, to sanction such protection. At least statutory sovereign immunity has the implicit approval of the people, and can be seen more easily as a legitimate accommodation to the practical realities of self-governance, rather than a government being insulated from the consequences of its actions.