The King is Dead, Long Live the King! The Court-Created American Concept of Immunity: The Negation of Equality and Accountability Under Law

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THE KING IS DEAD, LONG LIVE THE KING!
THE COURT-CREATED AMERICAN CONCEPT OF IMMUNITY: THE NEGATION OF EQUALITY AND ACCOUNTABILITY UNDER LAW

Rodolphe J.A. de Seife*

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The writing of this Article was periodically interrupted by circumstances beyond my control over a period of nearly twelve years. I assume, therefore, that my former student research assistants, Phillip A. Schuman, Regina Harris, Gregory Brown, John Kolb, and in particular, William D. Pulak and Jay Greening will be pleased to see that their work has not been overlooked and that the Article has finally come to fruition. The good-spirited cooperation of Ms. Judy Fredholm, Ms. Lisa Hoebing and Miss Connie Johnson has been very much appreciated. All errors and omissions are mine.
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The king, moreover, is not only incapable of doing wrong, but even of thinking wrong: he can never mean to do an improper thing: in him is no folly or weakness.

—William Blackstone

I. INTRODUCTION

The Federal Constitution is a contract between the people and the government it creates. The powers given to the government are specifically delegated: those not provided for in the document are retained by the people and the states. There is no provision for governmental immunity, as understood today, in the Constitution, for the very concept of immunity contradicts the notion of accountability: immunity from legitimate claims is not an "American" concept.

The drafters, signers, and ratifiers of the Federal Constitution ("Founding Fathers") did not intend to retain the English doctrine of

1. 1 WILLIAM BLACKSTONE, COMMENTARIES *239.
2. U.S. CONST. amend. X.
3. The Constitution provides that:
   They [the Senators and Representatives] shall in all Cases, except Treason, Felony and Breach of the Peace, be privileged from Arrest during their Attendance at the Session of their respective Houses, and in going to and returning from the same; and for any Speech or Debate in either House, they shall not be questioned in any other Place.
   U.S. CONST. art. I, § 6, cl. 1.
   This is the only place in the Constitution referring to privilege (or immunity), implying that any other acts by the legislators other than those enumerated in this clause are not covered by immunity. This is consistent with my contention spelled out in this Article.
sovereign immunity. To ground the court-created immunity on common law would have been a specious exercise, particularly when the English common law of pre-1776 clashed with the basic tenet upon which our Revolution was founded, namely "equality" under law.

Sovereign immunity as used in international law, including the several varieties thereof, e.g., diplomatic immunity, is not the subject matter of this Article. Herein I limit my discussion to domestic judicial, official and sovereign immunity. This includes an inquiry into the extension of judicial immunity to prosecutors and others involved in the "judicial process." In that context, executive privilege also deserves a footnote.

However, the main point of this Article is that, while both the sovereign immunity and the judicial immunity concepts are indeed grounded in the common law (therefore going back to the rules governing the relationship between the King of England and his subjects), it has no application to us as we are citizens of the United States, not subjects thereof, and surely not subjects of the United Kingdom.

Historically, it must be remembered that the King was both the

4. Diplomatic immunity is governed by rules of international comity and has a history going back thousands of years. Juliana J. Keaton, Does the Fifth Amendment Takings Clause Mandate Relief for Victims of Diplomatic Immunity Abuse?, 17 HASTINGS CONST. L.Q. 567, 570 (1990). Essentially it is the code of courtesies which is extended to accredited agents and representatives of a foreign government. This is done on the basis of reciprocity. Id. at 575-76. In modern times, diplomatic relations and immunity are governed by international treaties (e.g., The Vienna Convention on the Law of Treaties, U.N. Doc. A/Conf. 39/27 (1969)), and other bilateral or multilateral conventions including customs, traditions and rules of comity. Keaton, supra, at 577-80.

5. Executive privilege is based on the constitutional doctrine of separation of powers. Andrea L. Wolff, Comment, The Federal Advisory Committee Act and the Executive Privilege: Resolving the Separation of Powers Issue, 5 SETON HALL CONST. L.J. 1023, 1040-41 (1995). It exempts the executive, which encompasses more than the President, from the disclosure requirements applicable to the ordinary citizen or organization when exemption is necessary to carry out the responsibilities of the executive position in operation of its duties. Id. at 1040. While the term is normally used in regard to matters of national security and foreign policy, it also applies to "domestic decisional and policy making functions." Id. at 1042. The landmark case of United States v. Nixon, 418 U.S. 683 (1974) held that this immunity is not absolute under all circumstances. Wolff, supra, at 1045-46.

Unlike other forms of immunity, the purpose of executive privilege is to keep the other branches of government from infringing on the President's duties. See Wolff, supra, at 1063. In this regard, its justification rests primarily on political grounds rather than the traditional arguments put forth in support of immunity generally.

6. In His (Her) Majesty's government, the perspective is somewhat different. Semantics are indeed important; whereas the word citizen implies one who is part of a compact (Constitution), delegating certain powers to the government created by this document, the word subject implies a subservient relationship on the part of the individual to the government. See Swiss Nat'l Ins. Co. v. Miller, 267 U.S. 42 (1925).
sovereign (the State) and the fount of justice, i.e., the law. As a sovereign, the King, due to being anointed by God, enjoyed certain prerogatives such as the fact that his person was inviolable, i.e., not suable. However, while the King was immune, his agents were not. Regardless, the fact remains that the current theory of governmental immunity has evolved from the concept of the King’s personal immunity.

In his second role, as fount of justice, it would have been ridiculous for the King to command his own presence in his own tribunals. The King, in dispensing justice, was therefore immune from suit by the parties appearing before him, and thus, they had to accept his word and his determination as final. Since the King eventually had to act through judges to fulfill his judicial role which had become too burdensome, that particular type of royal immunity was ultimately held to inure to the judges who were considered to be merely an arm of the King.

Common law immunity has to be analyzed from this dual perspective in order to enable us to formulate an objective critical view of modern American immunity as created by our courts.

This Article discusses the roots of the concept of immunity in the United States and shows how the Supreme Court has, in fact, engaged in changing the very foundations on which our Constitution was crafted.

In simple terms, immunity means that one is above the reaches of the law and therefore need not account for his actions. This concept is contrary to the basic principle of the Constitution which is based on the proposition that the sovereign power is in the people. The Founders’ thinking was permeated by the notion of equality under the law. Since equality means accountability, immunity is inimical to this concept.

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8. Hargrove v. Town of Cocoa Beach, 96 So. 2d 130, 132 (Fla. 1957).
11. See generally James E. Pfander, Rethinking the Supreme Court’s Original Jurisdiction in State-Party Cases, 82 CAL. L. REV. 555, 559-97 (1994).
13. While there were other influences on the Founding Fathers’ thinking, the French influence, most notably Jean-Jacques Rousseau, Voltaire, Diderot and others, was undoubtedly the strongest, given the universal admiration of French thought by eighteenth century European and American political figures. Michael B. Reddy, The Droit De Suite: Why American Fine Artists Should Have the Right to a Resale Royalty, 15 LOY. L.A. ENT. L.J. 509, 539-40 (1995).
The Supreme Court rested its rationale on the “Common Law” of England in granting itself immunity nearly three decades after the ratification of the United States Constitution and eventually extended this dispensation from accountability to the whole judiciary and eventually to the other branches of the United States Government.\footnote{See, e.g., United States v. Lee, 106 U.S. 196 (1882). While this Article is primarily devoted to discussion of immunity at the federal level, its rationale applies equally well to the several states.}

The notion that sovereign immunity and judicial immunity are grounded in the common law may have been correct insofar as the English King’s immunity extending to his judges was concerned.\footnote{Laurier W. Beaupre, Note, Birth of a Third Immunity? President Bill Clinton Secures Temporary Immunity from Trial, 36 B.C. L. REV. 725, 729 (1995).} It is my contention that it is fallacious and arrogant to extend this concept to the United States where the people are the sovereign and have entered into a contract between themselves and the government they created. American political thought promotes that the agents of the government are “servants” of the people, yet recent developments seem to depart increasingly from this principle to rejoin the royal prerogatives which the American Revolution abolished to gain independence from the English King.\footnote{James A. Gardner, The Positivist Foundations of Originalism: An Account and Critique, 71 B.U. L. REV. 1, 7 (1991).} In fact, the United States Supreme Court has extended the shield of immunity to perjurers in court proceedings and to private contractors on the basis of a contractual provision in their government contract, putting them in the shoes of government officials.\footnote{See Becker v. Philco Corp., 234 F. Supp. 10 (E.D. Va. 1964), aff’d, 372 F.2d 771 (4th Cir.), cert. denied, 389 U.S. 979 (1967).}

This Article is dedicated to, among others, James Wilson,\footnote{James Wilson was born on September 14, 1742 at Carskerdo, near St. Andrews, Scotland, where he was raised. Before coming to the United States he attended several universities in Great Britain. In 1757 he attended the University of St. Andrews, only to leave within two years to attend the University of Glasgow. In 1763, having left Glasgow some time in the past, he entered the University of Edinburgh. By 1765, he had left this last university and had taken up accounting, which he quickly abandoned. 10 DICTIONARY OF AMERICAN BIOGRAPHY 326 (Dumas Malone ed., 1936). That same year he left England and came to America. Due to his prior education he was able to locate a position as a Latin tutor at the College of Philadelphia in 1766. During that same year, Wilson was granted an honorary M.A. from the college. Id. Wilson did not remain long in the academic sector, but almost at once began to study law. By November of 1767, he was admitted to the Philadelphia bar, though he did not begin to actually practice law for some time. After a failed start in the law practice, Wilson moved westward and formed his second practice on the frontier of Pennsylvania. The primary focus of his practice was land disputes. His was a very profitable practice, and he quickly raised enough money to buy a home, livestock and a slave. Id. at 327. During November of 1771 he married his first wife, Rachel Bird. It was probably this focus on land disputes that led Wilson to begin what may be seen as the} one of
source of his greatest gift and largest obstacle for later advancement. In 1773, he borrowed capital and began his enterprises in land speculation. Although his interest in speculation remained with him for the rest of his days, it provided him with a special insight into the workings and needs of landed economy. This insight proved to be very useful in the forming of the Constitution. Id.

The start of his political career began in 1774, when he was appointed as head of the First Committee of Correspondence at Carlisle, his town of residence. He was also elected to the First Provincial Conference at Philadelphia. His influence was large enough, at this time, to get him nominated to the First Continental Congress, but not elected. Id.

Wilson’s influence immediately grew from the publication of his manuscript entitled, CONSIDERATIONS ON THE NATURE AND EXTENT OF THE LEGISLATIVE AUTHORITY OF THE BRITISH PARLIAMENT, in 1774. Id. The principle espoused by this work was that the British Parliament did not have any authority over the colonies. Although this principle had only been put forward by a few people and was considered to present the extreme position of the American colonies, it was widely read in both America and England. The American psyche revealed its acceptance of Wilson’s position in the Declaration of Independence. Id.

From this point onward, Wilson grew in the political limelight. One interesting point in his political career occurred in 1775, when he introduced a resolution which would have held the Boston Port Act unconstitutional. Although the bill failed, it was important because it led to one of the first instances of birth of the American concept of judicial review. Id. This attempt to rule that an act of Parliament was unconstitutional was unheard of at this time, and would later find its permanent foothold in the American judicial system with Marshall’s decision in Marbury v. Madison. Id.

As a result of his rising influence, Wilson was elected as a delegate of Pennsylvania for the Second Continental Congress. Despite his argument about the lack of authority by the British Parliament, Wilson was indecisive about the question of independence from England. However, in 1776, he voted for independence, along with only two others of the seven Pennsylvanian delegates. Id.

With the outbreak of the war, Wilson was appointed to the position of chairman of the Standing Committee for Appeals, which was apparently his first judicial duty. During this time he advocated the creation of tax and revenue powers of the Congress, in order to strengthen the government. He also supported the theory of representation of a free population. Id.

Wilson was removed from Congress in October 1777 because of his extreme opposition to Pennsylvania’s democratic Constitution. This opposition was clearly in contrast to his apparent support of democratic principles, and it marked his gradual move from the political left to the conservative right. This change in politics was also reflected in his law practice and religion. His practice became one of corporate counsel and his religion altered from Presbyterian to Episcopalian. His changed positions also affected his economic relationships as he increased his profiteering schemes, which brought about a sharp decline of his popularity. One extreme incident of his worsening societal relations occurred in 1779. Food was scarce at this time, a fact which led to rioting. Wilson was attacked by a mob at his home, and although there were some casualties, Wilson was rescued by the arrival of local troops. The event was later termed the affair of “Fort Wilson” because of the barricade of his house. Id. at 328.

Despite this downturn, Wilson was reelected to the Congress and became one of the drafters of the Constitution. Wilson brought to the Constitution the philosophy that the people were the foundation of sovereignty, and that it was the people that formed the federal government, not the states. His influence can perhaps be no better seen than in noting the first words of the Constitution. Id. at 329.

It took three years to draft the Constitution and get it approved by the thirteen states, during which time Wilson left his law practice. His aspirations were to be awarded a high level position in the new federal government. In 1789 he wrote a letter to President Washington recommending himself for the position of Chief Justice of the new Supreme Court. Despite this effort, he was only appointed an Associate Justice. Id.
the great justices of the Supreme Court who has been overlooked for too long. Wilson’s passionate belief in the power of the people has lingered on, even though his ideas and writings have been largely ignored by his contemporaries in the governmental and judicial establishment who were willing, if not eager, to replace the British royalty with their own brand of elitist government. To some extent many American opportunists felt that the Revolution was their tool for domination of the people. Even today, some want to forget that in England, the Magna Carta was given under duress by the King to his barons, and meant “democracy” for only a few, i.e., the barons. 19 Several of the American revolutionaries were

During that year the College of Philadelphia began a law course, and invited Wilson to lecture. Wilson attempted to use this pulpit to lay the foundations for the American system of law, aspiring to establish himself as the leading legal theorist of the new nation, on a par with Blackstone in English law. In attempting this, Wilson’s legal theory focused in on the source of legal authority as coming from the people. This view was markedly in opposition to Blackstone’s view that legal authority derived from a sovereign superior. Id. at 329-30. Blackstone stood for the denial of the legal right of revolution. Blackstone also defined law as “the rule of a sovereign superior and, discovering the residence of sovereignty in the individual, substituted therefore ‘the consent of those whose obedience the law requires.’” Id. Wilson also disagreed with Blackstone on the legality of revolution, which he argued America had as a legal right. Wilson’s works, except for his first lecture, were never of any historical significance and influence until much later. Another drawback of Wilson was the time spent on his economic turn of mind. This lack of intensity of legal writing enabled other great minds to basically crowd him out of legal history. Id. at 330.

One of the last attempts to establish the legal foundation for judicial and legislative interpretation of the Federal Constitution came in the form of a commission to write a digest of Pennsylvania laws. Unfortunately, political pressure arose against having one person write such a work and his commission was repealed. Wilson continued the effort in private. Id.

The final years of his life became increasingly miserable. In 1786 his first wife died. He remarried in 1793 to a nineteen year-old woman; however, their first child died as an infant. Increasingly, his financial speculations also began to turn sour, culminating in 1797 with his move to Burlington, New Jersey, in order to avoid being arrested for his outstanding debt. Id. His activities also jeopardized his position on the Supreme Court, and there was talk that he should be impeached. Age, economic failure, and the inability to realize his dreams of earning recognition as a man of judicial importance and respect led to his mental breakdown. In the final days of his life he stayed with Justice Iredell, where he wrote “I have been hunted ... like a wild beast.” Id. He died shortly thereafter, in 1798, of a “violent nervous fever,” though there was speculation that he had actually committed suicide.

Wilson produced a number of written works, including lectures and essays. However, perhaps one reason for his lack of historic notoriety is the lack of correspondence, from which biographers and historians draw much of their information. Wilson only became a figure of noteworthy historical significance in the late nineteenth century. Eventually, in 1906, his remains were removed to be reinterred in the precincts of Christ Church in Philadelphia, where they were laid to rest with honor. President Theodore Roosevelt spoke at the dedication of Pennsylvania’s new capital, Harrisburg, that year about Wilson’s greatness and his contributions to the land. See also 1 JULIUS GOEBEL, JR., HISTORY OF THE SUPREME COURT OF THE UNITED STATES 731 (Paul A. Freund ed., 1971).

19. Lawrence Herman, The Unexplored Relationship Between the Privilege Against Compulsory Self-Incrimination and the Involuntary Confession Rule (Part I), 53 OHIO ST. L.J. 101,
admirers of the British social system and felt that they should rightfully replace the English royalty and its aristocracy with their own persons, and thus put themselves above the rest of the people in this country. That this philosophy is apparently being accepted in our times is an unfortunate trend, mainly tolerated nowadays in the guise of protection of national security or cloaked by vacuous statements of respect for the integrity of the judicial process. This euphemistic phraseology results in a situation where the government is put in a position above the people and in which too many individuals currently look to the “government” for marching orders when the “government” should be taking orders from the people. The cancer of immunity erodes the body of democracy and it eventually kills the spirit of democracy by creating a bureaucratic aristocracy which can oppress the people without accountability.

After supporting my theory of the specious, as well as pernicious, nature of the court-created concept of immunity, this Article explores a method by which the lack of governmental immunity need not bankrupt the government nor unduly interfere with the work of judges and government agencies. We can, if we really believe in the integrity of our democracy, reconcile the concept of justice with the objective of a society under law: even-handed compassionate justice and accountability.

II. THE CONCEPT OF IMMUNITY: ALIEN TO THE SPIRIT AND LETTER OF THE CONSTITUTION AND INIMICAL TO THE CONCEPT OF EQUALITY UNDER LAW

It is almost incredible that in this modern age of comparative sociological enlightenment, and in a republic, the medieval absolutism supposed to be implicit in the maxim, “the King can do no wrong,” should exempt the various branches of the government from liability for their torts, and that the entire burden of damage resulting from the wrongful acts of the government should be imposed upon the single individual who suffers the injury, rather than distributed among the entire community constituting the government, where it could be borne without
hardship upon any individual, and where it justly belongs.\textsuperscript{23}

\textbf{A. The Concept of Sovereign or Judicial Immunity: No Foundation in the Constitution}

1. History of Immunity Prior to the Revolution

There is no need to go to the earliest historic sources of royal immunity, which are the basis of the English common law upon which the court-created American notion of immunity is grounded. It is sufficient, for our purposes, to merely go back to the English medieval times, shortly after the Norman Conquest, 1066 A.D., when the Lord of Normandy, William "the Bastard," became Lord of England and "The Conqueror."\textsuperscript{24}

Sovereign immunity embodied the respect and inviolability that was granted to sovereigns and their ambassadors who traveled to other countries. The common law eventually carried this concept over to the treatment of the sovereign within his own country. As already noted, it was thus considered absurd for the King to issue himself a writ commanding his appearance in his court.\textsuperscript{25} However, it is important to note that this immunity did not extend to the King's servants.\textsuperscript{26}

English rulers, during the feudal times, were the lords of their respective lands, and they held court in order to settle disputes.\textsuperscript{27} The power to hold court though, originated with the lord, and he could issue a writ that commanded a person's appearance. As the source of power, there was no greater authority that could force the King into court. The King could not be sued in his courts; his power was seen as having come from God.\textsuperscript{28} As such, his power was above the law of man. The King

\begin{itemize}
\item \textsuperscript{23} Barker v. City of Santa Fe, 136 P.2d 480, 482 (N.M. 1943) (quoting R.T.K., Annotation, Rule of Municipal Immunity from Liability for Acts in Performance of Governmental Functions as Applicable in Case of Personal Injury or Death as Result of a Nuisance, 75 A.L.R. 1196 (1931)).
\item \textsuperscript{24} Merely a genealogical reference, not a reflection on his person. I BLACKSTONE, supra note 1, at *95, *124.
\item \textsuperscript{25} THEODORE R. GIUTTARI, THE AMERICAN LAW OF SOVEREIGN IMMUNITY 7 (1970). This absolute immunity concept was tempered by recourse to equity, i.e., appeal to the conscience of the King. See United States v. Lee, 106 U.S. 196, 206 (1882).
\item \textsuperscript{26} David E. Engdahl, Immunity and Accountability for Positive Governmental Wrongs, 44 U. COLO. L. REV. 1, 4 (1972).
\item \textsuperscript{27} \textit{Id.} at 2.
\end{itemize}
was also seen, in a very real sense, as the personification of the State.\textsuperscript{29}

The only way that the lord could be brought before his own court was by his voluntary submission to it.\textsuperscript{30} This immunity of the King from suit eroded over time with the signing of the Magna Carta, which established the premise that not only was the King able to do wrong, but that he was prone to do so.\textsuperscript{31} In addition to the rights granted by the Magna Carta, the royal subject was able to petition the King for redress of a wrong suffered by the King’s actions.

In the United States, there is no King and sovereignty ultimately lies with the people. The sovereignty of the people is expressed in the election of the nation’s “ruling” officials, namely the President and the members of Congress, with a new twist created by the Supreme Court: a bureaucracy which will not admit to being fallible and, in any event, assumes that it is not accountable for its mistakes.

2. The Revolution and Its Aftermath: The Eleventh Amendment

The concept that all citizens are equally accountable under the law was expressed early in the Court’s history, in the landmark case of \textit{Marbury v. Madison}.\textsuperscript{32} In determining its jurisdiction over the actions of the Secretary of State to compel delivery of a judgeship appointment, the court reasoned: “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.”\textsuperscript{33}

The Court continued, expressing its responsibility in this regard, that: “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.”\textsuperscript{34}

One of the earliest and most frequently quoted verbalizations of the norm that all men are equal under the law is Dicey’s “Rule of Law”:

\begin{quote}
30. \textit{Engdahl}, supra note 26, at 2-3. \textit{Engdahl} correctly pointed out that even when the lord submitted to the ruling of his court, he was tried by men who were his appointees who would possibly have to answer to him for their decision. \textit{See id.} As pointed out above, the voluntary submission by the lord to his court was by way of his granting a petition in equity.
31. \textit{Id.} at 3.
32. 5 U.S. (1 Cranch) 137 (1803).
33. \textit{Id.} at 163.
34. \textit{Id.}
\end{quote}
In England the idea of legal equality, or of the universal subjection of all classes to one law administered by the ordinary courts, has been pushed to its utmost limit. With us every official, from the Prime Minister down to a constable or a collector of taxes, is under the same responsibility for every act done without legal justification as any other citizen.\(^{35}\)

The first recognition of sovereign immunity by the United States Supreme Court was in Justice Marshall’s opinion in *Cohens v. Virginia*\(^{36}\) issued in 1821. Marshall’s general proposition that it is not to be

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36. 19 U.S. (6 Wheat.) 264 (1821). The relevant portion of *Cohens* held that the government could not be sued without its consent. *Id.* at 380. More precisely, it held that the government could be sued if it had consented. Chief Justice Marshall made this statement in the context of comparing American immunity with that in England. After explaining how the English system was based on the maxim the “King could do no wrong,” the Chief Justice pointed out that the American system was different. See *id.* Without authority or analysis, he stated that consent by the government would open it up to suit (unlike England in which, presumably, the theory would not allow or at least not necessitate governmental consent). *Id.* Interestingly, Justice Marshall based his statements on an analysis of the Judiciary Act, rather than the Constitution. This exercise vividly demonstrates that Marshall did not consider the role that the King played in the common law of England at the time of the Declaration of Independence or a point thereafter; it seemed as though the issue was never raised. While it is possible this was due to some accepted understanding that governmental immunity was appropriate in some form, it was more likely the result of political beliefs and bad lawyering—especially given the divergent opinions in *Chisholm*. See *infra* notes 150-78 and accompanying text.

The *Cohens* Court went on to state that wrongful acts of agents did not enjoy the same protection as the state’s purse strings. The issue was again raised in *Lee*, albeit in a different set of circumstances. United States v. *Lee*, 106 U.S. 196, 198-99 (1882). *Cohens* involved an appeal from a state supreme court where the primary issue was whether the U.S. Supreme Court had the power to review a state’s high court. *Cohens*, 19 U.S. at 376. In this context, Virginia’s lawyers argued that the state enjoyed immunity from suit in the federal system. While the case was really one of jurisdiction, Marshall’s opinion, characteristically rich in dictum, detailed the above analysis.

In *Lee*, the issue was more squarely before the Court. The *Lee* Court reached the same conclusion on this issue as *Cohens*: namely, that while the government enjoyed immunity, wrongful acts of agents were actionable against the agents themselves. *Lee*, 106 U.S. at 196, 204 (1882). The issue in the *Langford* decision was altogether different. In *Langford*, the idea of immunity was both established and assumed. *Langford* v. United States, 101 U.S. 341 (1879). Because the government had “graciously” decided to waive their immunity in contract cases, the issue presented in *Langford* arose often: “What type of action is this?” *Id.* at 342. The plaintiff in that case claimed title to land which the government disputed was their own. He sued to have the government ejected. *Id.* at 342. As pointed out, this action sounded in tort, and the United States raised an immunity defense. The plaintiff made the “King can do no wrong” argument, asserting that the maxim necessitates a finding of implied contract rather than tort since the government was attempting to take his property without just compensation, thus violating the Fifth Amendment Takings Clause. *Id.* at 342-43. Here the Court held that Takings law was altogether different since in a takings action, the government concedes title in the opposing party. *Id.* at 343. The Court found title in the government and held that the takings analysis was inappropriate. *Id.* at 344. Although not on point with the earlier two cases, the
controverted "that a sovereign independent State is not suable, except by its own consent" is a conclusory statement pulled out of thin air. 37

While this may be true in international law relating to the intercourse among nations, this concept surely does not extend to suits by citizens in a democratic nation who seek redress from their own government's wrongful actions. 38

Hence, in one single declaratory and conclusory sentence, without analysis, Marshall prepared the ground for the pernicious un-American notion that sets the governing class (such as it is) above the rest of the citizens and thus fouled the grand American experiment with democratic (albeit republican) institutions. As the first modern democracy, it was ridiculous for us to borrow a concept from a monarchy we had just kicked out. One kind interpretation is that, possibly, Marshall confused the Supreme Court's role as guardian of the democratic institutions and processes created by the Revolution, with a law-making function which is not within the Court's primary purview under our political scheme. Again, it is the age-old arrogation of power by a human institution when it is not properly policed and held to its declared mandate: which explains my personal strong aversion to the notion of "implied powers" which the Supreme Court has so generously used over the years to change the nature of the government in the United States.

Since the presumptuous pronouncement in Cohens, the immunity doctrine has been accepted, without serious challenge, as an established and uncontroverted fact. This unconstitutional bootstrapping operation by Justice Marshall was readily adopted in cases following Cohens from 1843 through 186939 and has become an unchallenged assumption in modern American jurisprudence. 40

The state courts did not hesitate to follow suit. In Briggs v. Light-
Boat Upper Cedar Point,\(^{41}\) the Massachusetts Supreme Court spelled out the reasons for entertaining such a perverse notion as immunity:

[I]t would be inconsistent with the very idea of supreme executive power, and would endanger the performance of the public duties of the sovereign, to subject him to repeated suits . . . and to submit to the judicial tribunals the control and disposition of his public property, his instruments and means of carrying on the government . . . and the money in his treasury.\(^{42}\)

This pompous and quasi-regal language is quite ironic, if not absurd, when uttered by a populist democratic American court.

In contrast, there are early American cases which justly find the extension of immunity to government officials to be abhorrent. Thus, contrast the language in Briggs with that of the U.S. Supreme Court in United States v. Lee,\(^{43}\) in which the Court stated:

No man in this country is so high that he is above the law. No officer of the law may set that law at defiance with impunity. All the officers of the government, from the highest to the lowest, are creatures of the law, and are bound to obey it.\(^{44}\)

The language used in a later case is even more interesting when one considers the more recent pronouncements on immunity. The Supreme Court, in Hopkins v. Clemson Agricultural College,\(^ {45}\) stated:

But immunity from suit . . . cannot be availed of by public agents when sued for their own torts. The Eleventh Amendment was not intended to afford them freedom from liability in any case where, under color of their office, they have injured one of the State's citizens. To grant them such immunity would be to create a privileged class free from liability for wrongs inflicted or injuries threatened. Public agents must be liable to the law, unless they are to be put above the law.\(^ {46}\)

Moreover, the Court in Johnson v. Lankford\(^ {47}\) stated:

[T]he action is not one against the State. To answer it otherwise would be to assert . . . that whatever an officer does, even in contravention of

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41. 93 Mass. (11 Allen) 157 (1865).
42. Id. at 162-63.
43. 106 U.S. 196, 261 (1882).
44. Id. at 220.
45. 221 U.S. 636 (1911).
46. Id. at 642-43 (emphasis added).
47. 245 U.S. 541, 545 (1918).
the laws of the State, is state action, identifies him with it and makes the redress sought against him a claim against the State and therefore prohibited by the Eleventh Amendment.\textsuperscript{48}

Other than the references to the mythical "State" which presumably cannot be sued, contrast the Court and the above statement in \textit{Johnson} with the same Supreme Court which, some sixty-five years later, held a police officer immune from suit for his perjured testimony, which sent an innocent person to jail, on the strange notion that the police officer's testimony was part of the "judicial process."\textsuperscript{49} The umbrella of judicial immunity now covers the penumbra of activities vaguely related to this mystical judicial process that would call for a nugatory smile discussing such vagaries as part of what the layman thinks of "The Law," were it not so insensitive to the most elementary notions of Justice.

\textit{Old Colony Trust Co. v. City of Seattle}\textsuperscript{50} is one of the cases best

\textsuperscript{48} \textit{Id.} at 545.

\textsuperscript{49} \textit{Briscoe v. LaHue}, 460 U.S. 325, 335-36 (1983).

\textsuperscript{50} 271 U.S. 426 (1926). In that case, the Puget Sound Power & Light Company owned two operations, one a power and lighting system and the other a street railway system. The defendants contracted to purchase the railway system, and as part of the contract agreed to pay their pro-rata share of the state, county and municipal taxes. The plaintiff was the mortgagor of the power and lighting system. \textit{Id.} at 427.

When it came time to pay the property taxes, the defendants refused to pay the agreed-upon taxes, and instead demanded that the company pay all of the taxes. In furtherance of this demand, the county treasurer caused the sheriff to initiate foreclosure proceedings on the power and lighting system. \textit{Id.} at 428.

The plaintiff filed a bill to enjoin the foreclosure and sale by the sheriff. The bill did not name the State as a defendant. The defendants appeared and moved that the plaintiff's complaint be dismissed for want of subject matter jurisdiction and for want of equity, claiming that the federal court did not have subject matter jurisdiction because of the Eleventh Amendment. The district court denied the plaintiff's injunction request, and dismissed the action for want of jurisdiction. \textit{Id.} at 429.

Appeal was then taken to the Supreme Court where the question presented was whether the State is a necessary party to a suit brought against the State's agents to restrain those agents from wrongful acts threatened and attempted under the color of state law? \textit{Id.} at 430.

In deciding that the State is not a necessary party, and that its agents do not enjoy immunity from suit as provided by the Eleventh Amendment for the benefit of the State, the Supreme Court reversed the lower court's decision. \textit{Id.} at 431.

The Court reasoned that:

\textit{Immunity from suit is a high attribute of sovereignty — a prerogative of the State itself — which cannot be availed of by public agents when sued for their own torts. The Eleventh Amendment was not intended to afford them freedom from liability in any case where, under color of their office, they have injured one of the State's citizens.} \textit{Id.} at 431 (quoting Hopkins v. Clemson College, 221 U.S. 636, 642 (1911)).

As the Court pointed out, the bill (suit) was not against the State in either name or effect, but against the wrongful acts of the agents. Public agents cannot be granted immunity under the Eleventh Amendment, because "[t]o grant them [public agents] such immunity would be to create a privileged class free from liability from wrongs inflicted or injuries threatened. Public agents must
illustrating the application of the dichotomy between “state” and “employee.” The lower court determined that it lacked subject matter jurisdiction over an action brought by the plaintiff to enjoin the city of Seattle simply because state taxes were involved. In overturning the lower court’s dismissal for lack of jurisdiction, the Supreme Court pointed out that the State was not named as a defendant, and the underlying action was to enjoin the wrongful actions by agents of the State.\(^5\) It concluded that if the actual action was not against the State, but instead against the agents of the State, then the Eleventh Amendment was inapplicable. The Court’s language is indeed commendable but one wonders whether judges are not “agents” of the “Government,” distinguishing it from the “State.”

There is an early line of cases holding government officials liable for wrongdoing. They focus on that class of cases where an individual is sued in tort, and he asserts that he acted on the orders of the government. In these cases, the defendant is not sued because of his official capacity, it is his defense. Therefore, the defendant must assert that his authority to do the act was sufficient in law to protect it. This generally requires a statute giving him the authority to do the act that caused the injury.

In *Mitchell v. Harmony*,\(^5\) the defendant was an officer in the U.S. Military. The plaintiff was a trader who followed behind the army during the invasion of Mexico in the Mexican-American war. During the course of the expedition, the defendant seized plaintiff’s mules and carts, and put them to work in the military.\(^5\) However, at the time of the seizure, the military did not requisition the equipment. Instead, the goods were confiscated based on the defendant’s belief that the plaintiff was consorting with the enemy.\(^5\) Additionally, the defendant raised as a defense that the property was taken for public use and that he was following the orders of a superior.

The verdict was for the plaintiff, and the defendant appealed. The Court held that absent either some illegal conduct by the citizen, such as consorting with the enemy, or urgent necessity, an officer of the military may not convert private property to public use; and following orders did

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\(^5\) Id. (quoting *Hopkins*, 221 U.S. at 642.
\(^5\) Id.
\(^5\) 54 U.S. (13 How.) 115 (1851).
\(^5\) Id. at 130.
\(^5\) Id. at 133.
not give the defendant the authority to violate the Constitution. Bates v. Clark also involved military officers tortiously taking the property of an American citizen. The appellants were officers in the U.S. Military who, in the course of their duty, seized a quantity of whiskey from the plaintiff. After an action was brought against them, they pleaded that they had been acting in their official capacity, carrying out their duties under the 1834 Act to Regulate Trade and Intercourse with the Indian Tribes by confiscating the alcohol, which they alleged was located on Indian land. The Act gave them the power to confiscate any alcohol found on Indian lands. The area of land upon which the alcohol was found was Indian land within the strict reading of the Act.

The verdict was for the plaintiff, and the defendants appealed. In affirming, the Court held that although the land upon which the alcohol was found was technically Indian land, the definition of Indian land according to the Act had to be read with a degree of flexibility. The Court looked to the fact that since the time the Act was drafted in 1834 the United States had accumulated a great deal of land that was once Indian land. As Congress had intended that the definition be adaptable, the Court concluded that the alcohol was not actually on Indian land at the time it was seized.

While the Court refused to hold that the appellants had no immunity from suit, its factual finding is nonetheless illustrative of the widespread discontent with the immunity doctrine. Here the land in question was in fact Indian land. The Court manipulated this fact in order to avoid a situation in which the plaintiffs would have had no remedy for the wrong committed by the defendants.

Similar to Mitchell and Bates is Meigs v. M'Clung's Lessee, wherein the defendant, a military commander, acting pursuant to a treaty with an Indian nation, had mistakenly built a military post on land that was reserved for private use. The plaintiff sued to eject the military and recover the land. In that case, the United States had entered into a treaty with the Cherokee Nation by which the United States acquired certain

55. Id.
56. 95 U.S. 204 (1877). Although not directly mentioned in the case, it is interesting to note that the lack of a bad faith seizure was not even addressed. The officers were apparently acting in good faith; however, it did not save them from losing the case.
57. Id. at 205.
58. Id.
59. Id. at 208.
60. Id. at 209-10.
61. 13 U.S. (9 Cranch) 11 (1815).
lands that were above the Duck River. Three square miles were designated to be used for a military post, unless the lands were undesirable, in which case the government would take three square miles below the Duck River.\textsuperscript{62} The land above the river was undesirable; however, the army did not build a post below the river, but instead built the post in a different location above the river, claiming the land for the government. The plaintiffs sued to eject Meigs, who was the commander of the garrison.\textsuperscript{63} In holding against the military, the Court analyzed the language of the treaty: the government was in a location that was not set aside for the military post, which had been clearly set out in the treaty with all other land to go to private use. The defendant's taking of other, more suitable lands, was allowed by the treaty, but only if the lands were below the Duck River.\textsuperscript{64} Meigs did not take lands below the river, but instead settled on lands that were above the river and previously set aside for public use by the treaty.\textsuperscript{65} While the issue of immunity was again not directly addressed by the Court, the opinion demonstrates that the Court did not want the government or its officials to arbitrarily take lands. In contrast to the decision in \textit{Bates}, a very literal reading of the treaty preempted an unjust result here at the hands of the government.

In \textit{Wilcox v. Jackson},\textsuperscript{66} De la Fayette Wilcox was sued by John Jackson upon the demise of Murray M’Connel. Jackson sought recovery of a portion of Fort Dearborn, of which Wilcox was in possession as commanding officer of that post for the United States.\textsuperscript{67} The land on which Fort Dearborn sat was reserved by the Secretary of War for military use in 1824. In the years prior and subsequent, J.B. Beaubean had cultivated and possessed a portion of section ten, which also contained Fort Dearborn. Beaubean succeeded in gaining ownership to the land on which the military post stood. In 1835, the title was granted through the Illinois Registrar’s office, and the conveyance was approved by Congress.\textsuperscript{68}

In 1836, Beaubean sold his interest to Murray M’Connel, the lessor of the plaintiff. M’Connel purchased the land, with knowledge of the ownership dispute between Beaubean and the government. Prior to this

\textsuperscript{62} Id. at 16.
\textsuperscript{63} Id. at 11.
\textsuperscript{64} Id. at 17.
\textsuperscript{65} Id. at 18.
\textsuperscript{66} 38 U.S. (13 Pet.) 498 (1839).
\textsuperscript{67} Id. at 499.
\textsuperscript{68} Id. at 505.
sale to M’Connel, the General Land Office had declared the sale to Beaubean void, on the grounds of the prior military reservation. The government attempted to tender a check to Beaubean, but he refused to accept it.\textsuperscript{69}

The Supreme Court held that Beaubean’s title from the United States was imperfect and would not be recognized without a congressional patent, despite being transferred according to the Presidential Act. The Court reasoned that no matter what power is granted by the President, the power to convey U.S. lands is granted to Congress by the Constitution.\textsuperscript{70} Congress must issue a patent for title transfer in order to perfect title of U.S. land. Here, Congress did not issue a patent. Therefore, despite being in accord with requirements set forth under the presidential proclamation, title was not transferred from the U.S., as the title was imperfect.\textsuperscript{71}

The city of San Francisco, in Grisar v. McDowell,\textsuperscript{72} came into possession of a portion of land previously held by Mexico. Whatever Mexico owned had passed to San Francisco in 1851, as a result of an Act by Congress to settle Californian lands. In 1852, the claim of San Francisco to this portion of a Mexican pueblo was recognized by city ordinance. The self-proclaimed ownership rights of San Francisco were sold to a private party from whose interest the plaintiff claimed possessory rights. However, in 1850, prior to the Congressional Act, President Fillmore, by presidential order, reserved land containing the subject tracts for military purposes.\textsuperscript{73} Subsequently, Congress passed an act in 1866 that ratified the titles granted to possessors of land by the 1850 Act. This Act recognized the lands reserved for public use by the federal government as being excepted from confirmation of title.

The defendant, a military officer, took possession by military order. The Supreme Court held that the U.S. title was superior to that of the City at the time of the conveyance, since the President was granted power to except lands by Congress in the 1830 Preemption Act.\textsuperscript{74} President Fillmore excepted these lands in 1850. Prior to the 1852 Act granting title to San Francisco, the title held was imperfect. Mexico’s title was subject to Spanish control. Upon taking the lands from Mexico,

\textsuperscript{69} Id. at 506-07.
\textsuperscript{70} Id. at 516.
\textsuperscript{71} Id.
\textsuperscript{72} 73 U.S. (6 Wall.) 363 (1867).
\textsuperscript{73} Id. at 371.
\textsuperscript{74} Id. at 381.
which did not have perfected title, San Francisco’s title was only as valid as that of Mexico.

Where imperfect title passes into a private party’s hands from a foreign government as a result of conquest, it is up to the new government to determine the validity of title.\textsuperscript{75} Thus, when the title was sought properly by San Francisco in 1850, it was recognized as a valid claim even though it had not been ratified as required by Congress. Subsequently, Congress ratified those lands for which title was properly sought, except lands reserved by the federal government for public use. Therefore, the subject lands were excepted. At the time of the transfer, the title of San Francisco was only as good as that of Mexico, which was not recognized as a perfect title by the United States.

While each of these early decisions could have been decided on the basis of sovereign or official immunity, the Supreme Court did not recognize this concept. It was not until United States v. Lee,\textsuperscript{76} that the Court concluded that the government could not be sued against its will. Despite the recognition of the concept, the opinion gives no analysis of its origin. In that case the Supreme Court entertained a claim by the plaintiff Lee concerning ownership of the land upon which Arlington National Cemetery was located. Lee claimed that he was the rightful owner, with title having passed to him through his grandfather, George Washington Parke Custis. The suit to recover the title was brought against Fredrick Kaufman and Richard Strong, in whose names the title to the land was held. Kaufman and Strong were agents of the federal government. The United States declined to submit to jurisdiction, and suit was not brought against it.\textsuperscript{77} Lee filed his action against defendants Kaufman and Strong in the Virginia State court to recover 200 acres of land which made up the cemetery. Upon its filing, the action was removed to the federal district court. The United States was never named as a party, and although it did defend the action through its law offices, it declined to be a party to the suit.

The plaintiff was able to establish that he had clear title to the land through his grandfather’s will. However, the land had previously been sold to the U.S. government because of outstanding taxes due on the property. At the time of the sale, the defendants had refused to accept payment of the taxes from anyone but the titled owner of the

\textsuperscript{75} Id. at 378.

\textsuperscript{76} 106 U.S. 196 (1882).

\textsuperscript{77} Id. at 199.
land. After a jury trial, the court entered a judgment awarding the land to the plaintiff. The defendants, including the United States, appealed.

One of the primary questions that was addressed by the Supreme Court was whether the agents of the United States could be sued to recover land that was being held for the government. In essence, were the agents of the government liable for their actions if the actions were carried out for the government?

The Court reasoned that, although the United States could not be made a party to a suit without its consent, the plaintiff must be allowed to enforce his rights by bringing suit against the agents of the government. Otherwise, the plaintiff would not have a remedy. Furthermore, if the United States was damaged by this action, it could bring a subsequent action against the plaintiff, or any other necessary party, in order to enforce its rights. Res judicata would not preclude this action by the federal government since it was not a party to the original suit.

In holding that the agents of the United States could be sued for their wrongful acts, the Court engaged in a very interesting discourse on sovereign immunity.

Two issues were raised: the first being the suability of the parties and the second being a question of fact dealing with the specific situation of the case, which only bears marginally on the issue of immunity. The first issue presented was whether an action could be maintained against the defendants for the possession of land which they held for the United States, despite clear legal title in the plaintiff.

In holding in the affirmative and stating that the agents of the United States could be sued for their wrongful acts, the Court reasoned that while the government could not be sued without its consent, a claim could be maintained against an individual agent who acted illegally.

The defendants, along with the United States, argued on appeal that although the jury found that the plaintiff had title to the land, his suit could not be maintained against them because they were holding the land as agents of the United States government. The defendants further argued that because the government could not be sued without its consent, a suit could not be maintained against an individual without such consent if the judgment would affect the property rights of the government. While the Court agreed to the first part of this proposition, it expressly refuted the

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78. Id. at 201.
79. Id. at 204.
80. Id. at 199.
81. Id. at 204.
The Court began its opinion with a general discussion of the immunity rights of the King in England. The King could only be sued in his own courts by his permission. One reason presented for this position was that it would be ridiculous to have the King issue a writ against himself. Also, if the King were to present himself, it would embarrass and degrade the government.

In this country, the Court pointed out, there is no royal head of the nation or of any state. Additionally, Congress has authorized the government to be sued, though solely for contract issues. This authorization of suit illustrates that the government would not be degraded by having to appear in court because it already does so with the consent of Congress.

The Court stated that the doctrine of immunity for the United States government is "established," although the Court failed to spell out reasons, noting that it has never been pointed out or discussed. Still, it accepted the doctrine on its face. The Court, however, stated that where the United States is not a defendant or a necessary party, the enforcement of a plaintiff's right shall not be interfered with by the Court.

The Court found the idea of leaving the plaintiff without a remedy repugnant. Unfortunately, it felt strapped by the previous jurisprudence which had recognized governmental immunity. While the opinion follows Cohen's by ensuring that individuals who are harmed by the government will have some sort of redress, it, in fact, reinforces the notion that injured persons may not be compensated by the government unless it consents to be sued.

There is a difference, albeit apparently too subtle for the Court to discern, between the English subjects and the people (citizens) of the United States. One result of being a citizen of the United States is that each individual is a part of the government, and when that person has

82. Id. at 204.
83. Id. at 206.
84. Id. at 206-07. The Court implicitly espouses the doctrine of governmental immunity. My position is that Congress has not done anything other than acknowledge the lack of immunity of the government both in tort and in contract.
85. This is an argument a contrario which assumes that the state has immunity and "graciously" consents to be sued!
86. Id. at 207 ("while acceding to the general proposition that in no court can the United States be sued directly by original process as a defendant").
87. Id. at 208.
established his property rights in a court of competent jurisdiction, "there is no reason why deference to any person, natural or artificial, not even the United States, should prevent him from using the means which the law gives him for the protection and enforcement of that right."88

The Court drew an analogy to an earlier case, United States v. Peters,89 which was an admiralty proceeding to recover from the Treasurer of Pennsylvania the proceeds of the sale of a vessel that had been condemned as a prize of war. The Court, per Chief Justice Marshall, held that although a citizen could not bring suit against a state if the property was in fact owned by the state, the mere suggestion of title in the state was not adequate to terminate the proceedings.

These facts were similar to Lee where the defendants had possession of the property. One difference was that the defendants were only holding the land for the United States. In Peters, the defendant had actual control and possession of the proceeds until a better right was established.90

The Court in Lee did not acknowledge this distinction. The defendant's sole defense was the existence of absolute immunity from judicial scrutiny of every individual who asserts authority from the executive branch of the government. The Court, stating that this is not correct, noted that granting immunity to agents of the government would leave aggrieved persons without remedy.91 It did not recognize, however, that the very immunity which was "established" in the government itself led to the same result. Such a result relegates individual plaintiffs to a position subservient to the government. Without the "generous" act of waiving its immunity in many instances, the concept would allow the United States to take any action against its citizens without any fear of redress.

No man is above the law, and all government officers are bound by the law and must obey it. This is because the people make up the law, and they are the supreme force in this country.92 The argument that the government will be undermined without this immunity is also found to be clearly inadequate because the government has survived during the

88. Id. at 209.
89. 9 U.S. (15 Cranch) 115 (1809).
90. Id. at 140.
91. Lee, 106 U.S. at 220. "Not only no such power is given, but it is absolutely prohibited, both to the executive and the legislative, to deprive any one of life, liberty, or property without due process of law, or to take private property without just compensation." Id.
92. Id.
course of the century, and has grown and prospered. The last point that the court made was that if the title to property is altered in a way that is detrimental to the government, because it was not a defendant, it may always return to a court as a plaintiff.

The other class of cases makes a distinction between the state and the state's governmental bodies. If one sues the state, immunity kicks in; if one sues the state's officials, it does not.3 This is a rather muddled and inconsistent state of affairs.

In Langford v. United States,4 the plaintiff claimed title to certain lands and buildings that were seized by officers of the United States. The United States asserted that it always had title, and therefore the right to possession. Langford claimed that the United States officers were in possession illegally. Suit was brought in the Court of Claims, which had jurisdiction over matters only involving ex contractu, not ex delicto, claims against the United States. The claim was dismissed, since the action was one in ejectment. The plaintiff sought possession, claiming title. Therefore, the United States was alleged to be trespassing. Such an action sounded in tort, or ex delicto.5

On appeal, the plaintiff created a unique argument. The plaintiff asserted that the English maxim, "the King can do no wrong" applied to the United States government; thus, the United States cannot commit torts. Therefore, the taking of plaintiff's lands created an implied contract, whereby the United States must provide just compensation, in accordance with the Constitution.6 The Court rebuffed the plaintiff's argument because the English maxim "the King can do no wrong" simply has no place in our government, and is contrary to the Constitution. The closest thing to a king in our government is the President, who can be impeached or even imprisoned for crimes.7 It is true that the United States must pay for lands taken for public use under formal proceedings in accordance with the Constitution. However, that constitutional provision is not applicable to the overzealous, unauthorized acts of government officials constituting common law torts.8

The Court reasoned that when the United States disputes the title of

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3. See Old Colony Trust Co. v. City of Seattle, 271 U.S. 426, 431 (1926) (holding that to grant public officials immunities would run counter to the spirit of the Eleventh Amendment and effectively create a privileged class).
4. 101 U.S. 341 (1879).
5. Id. at 346.
6. Id. at 342-43.
7. Id. at 343. See U.S. CONST. art. II, § 4.
land, a preliminary determination of ownership must be made before a takings analysis begins. Here the Court made a factual finding that the land was in fact owned by the government. Therefore, the Court never reached the issue of whether a taking could be an implied contract. Regrettably, the dictum in the case which takes issue with the plaintiff’s “the King can do no wrong” argument has not been adopted by a court dealing squarely with the immunity issue.

The Texas legislature, in *Texas v. White*, enacted laws regarding the dispensing and redeeming of certain bonds, which required the signature of the governor for redemption. The legislature later repealed the requirement of the governor’s signature and authorized the redemption of a portion of the bonds to fund a military in order to go to war against the United States. Some of the bonds were traded to the defendants for cotton and medicine in 1865. These bonds were not signed by the governor. The goods shipped in consideration for the bonds were destroyed in transit.

Suit was brought by Texas in the Supreme Court under original jurisdiction for recovery of the bonds. The defendants, White and Chiles, answered the complaint by alleging, *inter alia*, lack of authority of the plaintiff to bring suit in the name of Texas.

The Supreme Court held that the provisional government of Texas had authorized the plaintiff’s solicitors to bring suit, as evidenced by a letter from the provisional governor, ratified by the state legislature and later adopted by the newly elected governor. Once a legitimate government that recognized the statehood of Texas and the authority of the United States government came into power, that government had the power to authorize suits on behalf of the State of Texas.

In *Thorington v. Smith*, during the Confederate uprising, the organized opposition to the United States was so great, that a *de facto* government existed which had the support of a majority of the jurisdiction’s residents. A militia was in place, and a separate economy was established. The Confederacy established its own currency which was not based on gold or silver, but on notes payable after the anticipat-

99. Id. at 344.
100. 74 U.S. (7 Wall.) 700 (1868).
101. Id. at 718.
102. Id. at 719.
103. Id. at 731.
104. 75 U.S. (8 Wall.) 1 (1868).
Thorington sold some Alabama property to Smith and Hartley during the late stages of the Confederate rebellion, for $45,000. A payment of $35,000 for the property was made in Confederate notes, payable two years after the Confederacy signed a treaty with the United States. The balance was signed for and held in mortgage. After the war, the $10,000 note remained outstanding and Thorington sued for payment. However, Thorington wanted United States dollars, since the Confederate notes were worthless.

The Supreme Court held that a de facto government's currency is treated like that of a foreign nation, and can be exchanged into United States dollars. A de facto government differs from a treasonous uprising. Citizens acting contrary to the laws of the de facto government face punishment for acting inconsistently with the de facto government's laws. Upon overcoming the de facto government, the de jure, or proper, government cannot punish the people who merely fell into submission of the illegitimate government. At the time of this contract, United States currency was not recognized in the Confederate States. No citizen could trade in United States currency. Therefore, Confederate dollars were the intended currency under the contract.

In Williams v. Bruffy, during the confederate uprising, the Confederate States of America wrote into law a requirement that all citizens of the Confederacy turn over all property belonging to citizens of alien states. Failure to do so constituted a high misdemeanor. The plaintiff, a Pennsylvania citizen, had a contract to sell to the defendant, a Virginia citizen, certain goods. Unlike Virginia, Pennsylvania was not a Confederate state. The defendant turned the plaintiff's property over to the Confederacy. After the conflict was over, the plaintiff sought the monies owed under the contract from the defendant's estate.

The United States Supreme Court held that it had jurisdiction over any decision by the highest court of any state. The Court also has jurisdiction over federal questions regarding the constitutionality of state legislation. The defendant asserted that the Confederate laws should not be subject to review by the United States, as the Confederacy should

105. Id. at 1-2.
106. Id. at 3.
107. Id. at 11-12.
108. 96 U.S. 176 (1877).
109. Id. at 178.
have the status of a foreign nation.\textsuperscript{110}

However, the Court held that Confederate laws were nothing more than illegal legislation, imposed by a military power. The Confederacy never established itself as a foreign government, in that it never succeeded in its withdrawal from the Union by act of war, and the United States never recognized the Confederacy in any form as a foreign state.\textsuperscript{111} Furthermore, the law, as written, takes property from citizens of other states, while leaving intact the property of the citizens within the state. As such, it is repugnant to the Equal Protection Clause of the Constitution adopted after the Civil War. Those citizens in the states rebelling through the Confederacy cannot act contrary to the Constitution; in doing so their laws are invalid. The Supreme Court will always have jurisdiction over state courts when federal questions are at issue.\textsuperscript{112}

The \textit{Thorington} case does not conflict with \textit{Williams}, as the citizen there also had to conform to the Confederate law or face punishment. \textit{Thorington} did not recognize the Confederacy as a foreign entity, but merely recognized the military presence of the illegitimate government and the establishment of a separate system of currency.

In \textit{Horn v. Lockhart},\textsuperscript{113} Horn left a substantial estate. He was survived by his wife, son, and several daughters. The son, Horn, Jr., sought and proved a document as the will of Horn, Sr. Horn, Jr. sold the estate and distributed some of the proceeds which were accepted by the siblings and the mother. The remainder of the proceeds were invested by the son in Confederate notes. When the war ended the notes became worthless. The daughters, living in Texas, subsequently sued Horn, Jr. for misappropriation of funds.\textsuperscript{114}

The Court held that an executor who acts contrary to the laws of the United States, by investing in a rebellion, will be held liable for misappropriating funds, since the investment transaction is illegal and therefore void. Legitimate business transactions occurring during the Confederate uprising which were not in aid of the rebellion are to be honored and validated by all states and their citizens. However, any acts or transactions in aid of the Confederacy are void. While the probate court did approve the investment, that action was also voided since it was

\begin{itemize}
\item \textsuperscript{110} \textit{Id.} at 184.
\item \textsuperscript{111} \textit{Id.} at 185.
\item \textsuperscript{112} \textit{Id.} at 182.
\item \textsuperscript{113} 84 U.S. (17 Wall.) 570 (1873).
\item \textsuperscript{114} \textit{Id.} at 571-73.
\end{itemize}
in the aid of the rebellious government.\textsuperscript{115}

In \textit{Keith v. Clark},\textsuperscript{116} the Bank of Tennessee was established by that state, \textit{inter alia}, for the purpose of levying and collecting taxes. Its charter authorized the receipt of notes to be taken for the payment of state taxes. Tennessee was a member of the Confederacy. Subsequent to the charter, the Civil War ended. The United States, in adopting the Fourteenth Amendment, refused to honor the debts incurred by Confederate States. Therefore, any debts incurred in aid of the rebellion were considered void by the United States. The Tennessee legislature in 1865 enacted a law that prohibited the Tennessee bank from accepting any notes created after 1861. Yet, the plaintiff attempted to pay his taxes with notes created after 1861 which the bank refused to accept. The plaintiff brought suit against the Bank of Tennessee for the money owed on the notes.\textsuperscript{117}

The Supreme Court held that a bank, under state law, may not refuse to accept notes made after a certain date even if the provisions of its charter are to the contrary. The burden of proof lies with the defendant to show that the specific notes were made in aid of the Confederacy. The Fourteenth Amendment permits contracts created in the conduct of ordinary business to be recognized. These notes are presumed valid unless the defendant proves they were created in aid of the rebellion.\textsuperscript{118}

In \textit{Davis v. Gray},\textsuperscript{119} the Court held that suing a state officer in his official capacity does not automatically make the state a party. The state will only become a party when the pleadings are written to implicate expressly the state itself. The Court upheld a lower court decision which granted an injunction against the Commissioner of the General Land Office for the State of Texas, in favor of the complainant Gray, a trustee for a railroad company which held land in Texas.\textsuperscript{120}

The State, by its officer, Kuechler, acting under the new Texas Constitution enacted after the Confederate War under the authority of Governor Davis, attempted to take back lands previously granted to the company. In holding that the new constitution was void \textit{ab initio} as unlawful and violative of the United States Constitution, the Court ruled

\textsuperscript{115} \textit{Id.} at 581.
\textsuperscript{116} 97 U.S. 454 (1878).
\textsuperscript{117} \textit{Id.} at 455-56.
\textsuperscript{118} \textit{Id.} at 465-66.
\textsuperscript{119} 83 U.S. (16 Wall.) 203 (1872).
\textsuperscript{120} \textit{Id.} at 233.
that a state, by its officers, cannot violate the obligations of a contract. Since the corporation could not perform its obligations under the contract and the reason for nonperformance was due to the State’s Confederate participation in the Civil War, the corporation was entitled to a reasonable time in which it could perform its duties under the contract. Since the Texas Constitution allowed for the violation of the contract between the plaintiff and the State, the new constitution violated that clause of the United States Constitution which forbids states from enacting laws which impair the obligations of contracts. The Court unequivocally denied any right of the State to assert immunity:

When a state becomes a party to a contract, as in the case before us, the same rules of law are applied to her as to private persons under like circumstances. When she or her representatives are properly brought into the forum of litigation, neither she nor they can assert any right or immunity as incident to her political sovereignty.

Thus, individuals may sue officials in equity to ensure that contracts are performed, thereby circumventing the immunity doctrine. Here again, we see the Court creating an exception to limit the unjust results created by its application of the English immunity doctrine to the United States in the first place.

B. Ratification Debates: Wilson, Randolph, Nicholas, Pendleton, Henry, and Davie

The comments made during the ratification debates among the delegates of the several states in favor of the adoption of the U.S. Constitution are illustrative of the Founders’ views on sovereign immunity. Those comments addressing the Judiciary Article, specifically the clause confirming Supreme Court jurisdiction of cases between a state and a citizen of another state, confirm the original intent to create a system of equality under law.

Justice Wilson’s remarks to the Pennsylvania Convention evidence an understanding contrary to any incorporation of the notion of sovereign immunity which is the core argument of this article. “Impartiality . . . is the leading feature’ of the Constitution,” Wilson stated, asserting that “when a citizen has a controversy with another state, ‘there ought to be

121. Id. at 229.
122. Id. at 232 (citation omitted).
a tribunal where both parties may stand on a *just and equal* footing.”

During the Virginia ratification debate, the issue of state suability was first discussed when Edmund Randolph professed admiration for those parts of the Constitution which forced Virginia “to pay her debts.” This concern over state liability for outstanding debts elicited remarks from Patrick Henry and George Nicholas which strengthen the belief that the Constitution’s Judiciary Article permitted states to be sued by citizens. In addition, the Virginia Convention’s chairman, Edmund Pendleton, defended the Judiciary Article (and denounced sovereign immunity) by proclaiming that the states could sue in “‘cases of general and not local concern,” and that “‘the necessity and propriety of a federal jurisdiction, in all such cases, must strike every gentleman.”

In the North Carolina Convention’s debate, only one delegate, William R. Davie, commented on the question whether the states would be amenable to suit. Davie declared that the clause extending jurisdiction over cases between a state and citizens of another state was “‘necessary to secure impartiality in decisions, and preserve tranquillity among the states.”

Unfortunately for the ideals on which this country was founded, political opportunism and parochialism started with the Revolution! Local

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124. Id. at 33.
125. Patrick Henry claimed that states should be amenable to suit in federal court. George Nicholas concurred but added that he did not think Congress could be sued. Id.
126. Id.
127. Davie was a Federalist from North Carolina who participated in the Constitutional Convention. THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION (Jonathan Elliot ed., 1836). The following is a list of Davie’s ideas:
   (1) He agreed with James Wilson that the convention proposal was worthless until ratified by the people. Id. at 16-17.
   (2) He believed that U.S. citizens were bound by international treaties and that federal courts had jurisdiction to hear cases in which citizens breached these treaties. To him, all treaties were self-executing. Id. at 18.
   (3) He agreed with Justice Iredell’s dissent in *Chisholm* that common law of England became law of United States unless superseded by Congress. That dissent, and Davie, do not however subscribe to the fact that the Constitution granted any kind of immunity. Id.
   (4) Davie saw the federal judiciary as the only way to enforce debts against states short of a federal army. This furthers the belief that Davie believed that states did not enjoy immunity. Id. at 19.
   (5) He strongly advocated separation of powers including granting Senate power of impeachment over Executive. Id. at 20-21.
128. JACOBS, supra note 123, at 38.
and personal interests dictated many other fundamental concepts which were to be imbedded in our early state constitutional language, for how else could one explain that the states have a different concept of equal justice under law and democracy than the federal government?

C. Wilson, Randolph, and Ellsworth: Rejecting the Concept of Sovereign Immunity

James Wilson denounced the application of the sovereign immunity doctrine to the United States in his opinion in the case of *Chisholm v. Georgia.* Wilson also indicated that the state would be suable under the United States Constitution in his comments to Pennsylvania’s ratifying Convention. He was instrumental in drafting the Pennsylvania State Constitution which provided, in part:

That all courts shall be open, and every man, for an injury done him in his lands, goods, person, or reputation, shall have remedy by the due course of law, and right and justice administered without sale, denial, or delay. Suits may be brought against the commonwealth in such manner, in such courts, and in such cases as the legislature may by law direct.131

Edmund Randolph, in addition to arguing against sovereign immunity in the Virginia ratification debates, also appeared as counsel for plaintiff in citizens’ suits against the states.132

Oliver Ellsworth, a third member of the Committee of Detail which drafted the Judicial Clause of the Constitution, later went on to play a major role in the drafting of the Judiciary Act of 1789. Section 13 of the Act supports state suability by a citizen much like the Judiciary Clause of the Constitution.133

Section 13, as drafted in committee by Ellsworth, delegated to the Supreme Court jurisdiction “of all controversies of a civil nature, where any of the United States or a foreign state is a party.”134 This legislation drafted by Ellsworth does not differentiate between a state as a plaintiff or as a defendant, and is significantly more supportive of state

129. 2 U.S. (2 Dall.) 419 (1793).
130. JACOBS, supra note 123, at 25.
131. PA. CONST. of 1790, art. IX, § 11; see also JACOBS, supra note 123, at 25 (noting that Wilson persuaded the Pennsylvania state constitutional convention to include a “waiver of the state’s immunity from suit in its own courts”).
132. See, e.g., Vanstophorst v. Maryland, 2 U.S (2 Dall.) 401 (1791).
133. An Act to establish the Judicial Courts of the United States, ch. 20, § 13, 1 Stat. 73 (1789).
134. Id.
suability than the wording of the final Act, as amended by the Senate, which further qualified a court’s jurisdiction to

all controversies of a civil nature, where a state is a party, except between a state and its 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.\textsuperscript{135}

\subsection*{D. Lower Courts’ Rejection of Sovereign Immunity Before Ratification of the Eleventh Amendment}

Seven suits were instituted against the states by citizens and foreigners prior to ratification of the Eleventh Amendment. In the first case, \textit{Vanstophorst v. Maryland},\textsuperscript{136} the defendant evidently settled with the plaintiff after the court ordered the state to enter a plea or suffer a default judgment.\textsuperscript{137}

In \textit{Oswald v. New York},\textsuperscript{138} the State of New York was sued by way of a summons for wages unpaid to a Pennsylvania plaintiff. New York, as a result of Alexander Hamilton’s assurances at the state ratifying convention, believed that sovereign immunity applied;\textsuperscript{139} that Arswalt had erroneously assumed that sovereign immunity did not apply; and that the Constitution did not allow for states to be sued by citizens. As a result, New York refused to appear before the Court. A jury was impaneled and, while the award was granted to Oswald, there is no record that the judgment was ever satisfied.\textsuperscript{140} The Court’s actions, however, clearly rebut an interpretation of a constitutionally founded notion of sovereign immunity.

\textit{Chisholm v. Georgia}\textsuperscript{141} resulted in a default judgment against the State of Georgia which refused to appear. The case was dismissed after the state settled with the plaintiff.\textsuperscript{142}

Massachusetts was compelled by the Court to defend a suit to recover land confiscated under the State’s absentee landlord laws in

\begin{itemize}
\item Id.
\item 2 U.S. (2 Dall.) 401 (1791).
\item JACOBS, \textit{supra} note 123, at 44.
\item 2 U.S. (2 Dall.) 401 (1791).
\item Hamilton, the great admirer of the British system, is one of the spiritual fathers of sovereign immunity which has expanded in this age of ours.
\item JACOBS, \textit{supra} note 123, at 45-46.
\item 2 U.S. (2 Dall.) 419 (1793).
\item JACOBS, \textit{supra} note 123, at 55.
\end{itemize}
Vassal v. Massachusetts. Massachusetts succeeded in delaying the case, until it was dismissed following ratification of the Eleventh Amendment in 1797. It is worthy to note that dubious political maneuvers like filibusters and gerrymandering had their origins in the founding days of this country and are alive and healthy today.

The Court again compelled appearance by a state in the unreported case of Cutting v. South Carolina. However, this case was also dismissed after the Eleventh Amendment was passed.

In Huger v. South Carolina, the Court served a subpoena upon the Attorney General of South Carolina, but the case was halted upon the passage of the Eleventh Amendment.

These cases confirm that the Constitution, as interpreted by the original Supreme Court, did not provide for any state sovereign immunity.

III. THE SUPREME COURT'S EXPRESS REJECTION OF SOVEREIGN IMMUNITY IN CHISHOLM V. GEORGIA

Chisholm is a significant case in that it appears to be the earliest Supreme Court ruling in the field of sovereign immunity, decided at a time when the intent of the Framers was familiar to the Court.

This case involved an action for assumpsit brought against the State of Georgia by a resident of South Carolina. When served notice of the suit filed in the Supreme Court, Georgia declined to answer, evidently claiming sovereign immunity. The Attorney General of the United States moved for judgment against Georgia unless it made a timely appearance.

Upon this motion, arguments were heard concerning whether the Court had jurisdiction over the case. It was held by a 4-1 majority that the Court did indeed have jurisdiction.

144. JACOBS, supra note 123, at 62.
145. Id. at 63.
146. Minutes of the Supreme Court, August 1796 in 1 DOCUMENTARY HISTORY, supra note 143, at 429.
147. JACOBS, supra note 123, at 63.
148. 3 U.S. (3 Dall.) 339 (1797).
149. JACOBS, supra note 123, at 63-64.
150. 2 U.S. (2 Dall.) 419 (1793).
151. Id. at 419.
The issue presented in *Chisholm* resulted in arguments primarily concerning state sovereign immunity, dwelling on the difference between state and federal powers. Each of the five Justices filed separate opinions, of which two extended the discussion to the question of the federal government’s sovereign immunity.

### A. The Wilson Opinion

The third reported opinion, and, in my opinion, the most important, was that of Justice Wilson which is significant because it contains three distinct viewpoints on the American notion of sovereign immunity. This opinion is also noteworthy because it was written by a Justice who was himself one of the Framers of the Constitution.\(^{152}\)

Justice Wilson construed the question of the case to be whether the State of Georgia is amenable to the jurisdiction of the Supreme Court. Wilson chose to analyze the question by examining the principles of general jurisprudence, by comparing the laws and practices of other states and kingdoms in world history, and by examining the United States Constitution for a grant of sovereign immunity to the states.

Justice Wilson opened his treatment of the general jurisprudential analysis of the concept of sovereignty by expressing his disapproval of the perverted use of the terms “state” and “sovereign” in politics and jurisprudence. Wilson objected to the practice in politics of placing the state above the people, and then considering the ministers of the state to be the sovereigns of the state. This construction, asserts Wilson, is against the natural order of things, where the state is considered subordinate to the people.\(^{153}\)

Justice Wilson defined a state as “an artificial person,” and as “a complete body of free persons united together for their common benefit ... and to do justice to others.”\(^{154}\) Wilson proposed that the state is conceptually amenable to suit by reason of the following syllogism: (1) an individual free person is bound by human laws because he chooses to bind himself, and by the same principle is amenable to the courts which are formed and authorized by those laws; (2) a state is an artificial person, comprised of an aggregate of free persons; therefore, (3) a state is bound by the laws to which its free persons have bound

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152. *See* *Ames v. Kansas ex rel. Johnston*, 111 U.S. 449, 465 (1884) (stating “Mr. Justice Wilson, who had been a member of the convention that framed the Constitution”).


154. *Id.*
themselves, and similarly is answerable in the courts.\textsuperscript{155}

Justice Wilson's jurisprudential analysis continued with the assertion that the term "sovereign" has no application in the United States. He observed that in one sense, the term "sovereign" has its correlative term "subject," and that "[u]nder [the] Constitution there are citizens, but no subjects."\textsuperscript{156}

In another sense, Justice Wilson felt that the term "sovereign" implied an insulation of a state from foreign subjects. In this sense, however, Wilson pointed out that as to purposes of the Union (such as the case \textit{sub judice}), the citizens of Georgia did not surrender this sovereign power to the state, but retained their sovereignty in the greater assembly of the United States.

Justice Wilson concluded with a comparison of the principles underlining the concept of sovereignty. The basic premise of sovereignty, Wilson asserted, is that "all human law must be prescribed by a \textit{Superior}.") He continued:

Suffice it, at present to say, that another principle, very different in its nature and operations, forms, in my judgment, the basis of sound and genuine jurisprudence; laws derived from the pure source of equality and justice must be founded on the \textit{CONSENT} of those, whose obedience they require. The \textit{Sovereign}, when traced to his source, must be found in the man.\textsuperscript{157}

With these words, Justice Wilson concluded that there is nothing within the general principles of jurisprudence which permit the State of Georgia an exemption from the jurisdiction of the Court.

Justice Wilson's second perspective of the sovereignty issue involved a comparison of the claim by Georgia with the laws and practice of different states and kingdoms throughout the world. In his treatment, Wilson listed several examples of governments where sovereignty was nonexistent or where the sovereign was suable by its subjects. Those examples included the ancient Greeks, where "whole nations defended their rights before crowded tribunals,"\textsuperscript{158} the Spanish State in the days of Columbus' son Don Diego, where a suit to recover the benefits of Columbus' contract with King Ferdinand was decided

\textsuperscript{155} \textit{Id.} at 455-59.

\textsuperscript{156} \textit{Id.} at 456.

\textsuperscript{157} \textit{Id.} at 459.

\textsuperscript{158} \textit{Id.}
against the monarch, and the reign of Frederick of Prussia, who was quoted as once saying: "Judges ought to know, that the poorest peasant is a man as well as the King himself: all men ought to obtain justice; since in the estimation of justice, all men are equal; whether the Prince complain of a peasant, or a peasant complain of the Prince." Wilson concluded his review of the laws and practices of other states and kingdoms by finding nothing against the jurisdiction of the Court over the State of Georgia in the instant case.

Justice Wilson’s third and final point in his analysis of the sovereignty issue entailed an examination of the Constitution. In approaching this analysis, Wilson bifurcated the issue into two questions: (1) whether the Constitution could vest jurisdiction over Georgia in the Court; and (2) whether the Constitution had in fact vested such jurisdiction.

Before reaching the first of these two questions, Justice Wilson digressed again to how the practice of politics had inverted the natural and proper order of power in subordinating the people to the state, and how despotic governments have vested sovereignty in the ministers of the state. Wilson criticized Blackstone and his followers for their failure to mention the people as being the source of any form of power in their descriptions of the sources of authority in British government.

Upon the premise that the people are the source of authority and sovereignty in the United States, Justice Wilson found that the question of whether the Constitution could bind jurisdiction on Georgia "must unavoidably receive an affirmative answer." In answering the second question of whether the Constitution had in fact bound Georgia to the Court’s judicial power, Justice Wilson argued that if the people had intended themselves to be bound to the national legislative power vested in the Constitution, then the same intention applied to the national judicial power. Wilson pointed out that

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159. Id.
160. Id. at 460. This phrase was contained in a judgment rendered by the King of Prussia on December 11, 1779, against three justice counsellors, in favor of a miller, Arnold. J.P. BRISOT DE WARVILLE, THEORIE DES LOIX CRIMINELLES 393 (1781).
161. Chisholm, 2 U.S. (2 Dall.) at 461.
162. Id. at 462. The blind devotion of the American legal establishment to Blackstone’s Commentaries explains the slavish adoption of the British view of the relationship between the "people" and the "sovereign." Id. at 462-63.
163. Justice Wilson points, with great emphasis, to the opening words of the preamble to the Constitution: "The people of the United States" are the first personages introduced. Id. at 463.
164. Id.
the people had withheld a grant of national legislative power when forming the Articles of Confederation. To remedy the defects of the Articles, the people adopted the present Constitution, which expressly affects the states. Wilson referred to the provisions of Article I, Section 10 which render some state laws "subject to the revision and control of the Congress" as being dispositive of the intent of the people to bind themselves to the national legislative power.\footnote{165}

Since the people intended to bind the states to the legislative power vested in the Constitution, and since the judicial authority is necessary to the application of the legislative authority, Justice Wilson concluded that the people of the United States did in fact vest the Court with the jurisdiction over the State of Georgia in the instant case. The Justice concluded his opinion by repeating Justice Blair's constitutional construction syllogism, and further enunciated the principle that "[c]auses, 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 \textit{is}, as she is painted, blind."\footnote{166}

\section*{B. The Blair, Cushing, and Jay Opinions}

The second of the five opinions presented is that of Justice Blair, whose brief opinion constructs a simple analysis. Blair found that the Constitution expressly allows the Court jurisdiction in cases between a state and citizens of another state. Blair also noted that the Constitution grants jurisdiction over cases between two states, which, since one of those states must be a defendant, necessarily means that a state could be sued as a defendant. Therefore, the Constitution gives the Court jurisdiction over cases between a state, as a defendant, and a citizen of another state. Justice Blair applied this conclusion to the case at hand, and held that the states, in adopting the Constitution, yielded their sovereign immunity in these cases, and that therefore the Court had jurisdiction to entertain this claim.\footnote{167}

Similarly, Justice Cushing also held that the Court had jurisdiction over the case. Cushing's main argument was the same as Justice Blair's, and was repeated by Justice Wilson as well. The argument is founded upon the wording of the general grant of jurisdiction contained in Article
III, Section 2. He supplemented this constitutional grant of jurisdiction with his own views of government accountability:

The rights of individuals and the justice due to them, are as dear and precious as those of the States. Indeed the latter are founded upon the former; and the great end and object of them [the States] must be to secure and support the rights of individuals, or else vain is Government.

Justice Cushing made a fleeting digression into the issue of federal sovereign immunity, conceding that logically, if a state can be sued by the citizens of another state, that it must follow that the United States may be sued by any of its citizens. Cushing refused to draw this conclusion, however, partly because it was not necessary to the decision of the instant case, and partly due to other reservations which he mentioned briefly.

Among these reservations, Cushing pointed out a subtle distinction in the wording of the Constitution relative to the two issues. He noted that jurisdiction concerning the United States is vested in “controversies to which the UNITED STATES shall be a party,” and not to controversies between the United States and any of their citizens, whereas when speaking of the states, the Constitution uses more precise wording to vest jurisdiction in cases “between a State and citizens of another State.”

The second of Cushing’s reservations points out that the reason for the Court’s jurisdiction over states and individuals was to act as “a common umpire.” This purpose is not advanced by suits against the United States. Notwithstanding his reluctance to extend jurisdiction to suits against the United States, Justice Cushing held that the Court did have jurisdiction over Georgia.

168. Id. at 466–67. This section of the Constitution provides:

The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; —to all Cases affecting Ambassadors, other public Ministers and Consuls; —to all Cases of admiralty and maritime Jurisdiction; —to Controversies between two or more States; —between a State and Citizens of another State; —between Citizens of different States; —between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

U.S. Const. art. III, § 2.

169. Chisholm, 2 U.S. (2 Dall.) at 468.

170. Id. at 469.

171. Id.
The fourth opinion reported in the *Chisholm* case was that of Chief Justice Jay, who concurred with the majority that jurisdiction was vested in the Court to try the case. In deciding the sovereignty issue, the Chief Justice found three issues to be of importance: (1) whether Georgia is a truly sovereign state; (2) whether suability is incompatible with such sovereignty; and (3) whether the Constitution (to which Georgia is a party) authorizes such an action.\(^{172}\)

In addressing the first question, Chief Justice Jay distinguished the United States from Great Britain and other European sovereignties of feudal origin, as being a country where the people act as sovereigns. Like Justice Wilson, Chief Justice Jay referred to the preamble of the Constitution, "We the People," to support his finding of sovereign authority vested in the people.\(^{173}\) The Chief Justice also found, as did Justice Wilson, that, whereas the people of the United States were once subjects to the sovereign in England, after the Revolution they all became sovereigns without subjects. Therefore, the State of Georgia could only be a sovereign in the sense that its people were sovereigns.

The second question, whether suability is compatible with state sovereignty, is answered by Chief Justice Jay in the following manner: (1) since all citizens are equal to each other, each citizen can sue another citizen; (2) in certain cases, such as suits against multiple defendants, cities or corporations, a citizen may sue any number of other citizens; (3) it follows, then, that if a citizen can sue the city of Philadelphia, a group of forty-odd thousand citizens (at the time), that there should be no objection to a citizen suing the State of Delaware, a group of fifty-odd thousand citizens.\(^{174}\)

The only objection to the argument presented by Chief Justice Jay's analysis, in his mind, was by those who would regard the right of a lesser number of citizens who were party to a suit as an inferior right. The Chief Justice found this objection to be unreasonable because it did not work equally in both directions: "That rule is said to be a bad one, which does not work both ways; the citizens of *Georgia* are content with a right of suing citizens of other states; but are not content that citizens of other states should have a right to sue them."\(^{175}\) Chief Justice Jay further rebutted this objection by stating that "[s]uch objections would not correspond with the equal rights we claim; with the equality we

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172. *Id.* at 470.
173. *Id.* at 471.
174. *Id.* at 472-73.
175. *Id.* at 473.
profess to admire and maintain, and with that popular sovereignty in which every citizen partakes."\textsuperscript{176} From this rationale, the Chief Justice found that suability was compatible with the State's sovereignty, which is founded in the equal sovereignty of the individual citizen.

Chief Justice Jay's third question, whether the Constitution authorizes the present action against Georgia, was answered in the affirmative using arguments similar to the constitutional construction of Justice Blair's opinion, and that advanced by Justice Cushing based on the purposes of the Union as expressed in the Preamble.\textsuperscript{177}

In dicta, which has been touted to be the first Supreme Court words on the subject of federal sovereign immunity,\textsuperscript{178} Chief Justice Jay suggested that the United States would be suable by a citizen just as Georgia would be. However, just as Justice Cushing, the Chief Justice found some reservations to the notion, and restricted his holding to the state sovereignty question.

It would appear that the Chief Justice's reluctance to extend the Court's jurisdiction to suits against the United States was based on an absence of executive muscle to back up the judicial power. As Chief Justice Jay explained, the Court's judgment in a suit against a state can be executed by the federal executive, however in a similar judgment against the United States, "there is no power which the Courts can call to their aid."\textsuperscript{179}

In leaving the federal sovereign immunity question open, Chief Justice Jay expressed his views on the ideal application of sovereignty in the new nation: "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."\textsuperscript{180}

\textsuperscript{176} Id.
\textsuperscript{177} Id. at 474-75. In addition to the purpose of the constitutional judicial authority as a "common umpire" between the states, as Justice Cushing suggested, Chief Justice Jay found that several of the other goals of the Constitution, i.e. forming a more perfect union, establishing justice, and ensuring domestic tranquillity are constitutional justifications for the Court's jurisdiction over the present case. Id. at 469, 474.

\textsuperscript{178} Coleman R. Mullins, Note, Holding the Government Liable for Its Torts: Payton v. United States, 13 U. TOL. L. REV. 463, 466 (1982). This conclusion should be viewed critically, however, since Justice Cushing also wrote dicta addressing federal sovereign immunity in Chisholm. See Chisholm, 2 U.S. (2 Dall.) at 478.

\textsuperscript{179} Chisholm, 2 U.S. (2 Dall.) at 478.

\textsuperscript{180} Id.
C. The Eleventh Amendment: Defining States' Sovereignty Against Sister States

The argument for state sovereign immunity as being grounded in the Eleventh Amendment is not well taken and judicial immunity being grounded in the common law of England falls flat when extended to the American judiciary.

If we add the numbers of individuals who, thanks to the grand perspective of the Supreme Court while engaging in its own constitutional legislating activities, are above the law, their magnitude becomes impressive: the "government" and its agents, and the judiciary and all those involved in its "process" are protected by some degree of immunity. Whether the immunity is qualified or not is immaterial due to the mere fact that any immunity runs counter to the basic political philosophy upon which this country was founded. We reach the conclusion that probably anywhere between six to eight million people in this country enjoy some sort of immunity, including the absolute immunity granted to prosecutors (not counting that immunity granted by them to criminals in order to get easy convictions) and those who, because of a government contract, are given by judicial "extension" the benefit of sovereign immunity.181

We face a very curious situation for a country allegedly committed to the Rule of Law: conservatively speaking, some five percent of the American population end up being above the law in one way or another.182 This should be of great concern to all of us and should no longer be ignored or overlooked because of the imperative of "national security" or some similar euphemism covering governmental arrogance. We must face this problem squarely if we want to lend credibility to the rhetoric about our commitment to the principle of equality under law.

If it now is the "will of the people" that some of them be given immunity because of their position or their status in our society, then this change should come from the people, either by way of constitutional amendment or, the one thing apparently feared by most politicians these days, a convening of a constitutional convention. Why this thought is so scary is difficult to understand when one of the most revered Founding Fathers, Thomas Jefferson, stated that there should be a constitutional

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convention every nineteen years.\footnote{183. John R. Vile, Rewriting the United States Constitution: An Examination of Proposals from the Reconstruction to the Present 3-4 (1991); see also The Writings of Thomas Jefferson 43 (Paul L. Ford ed., 1899) ("Let us provide in our constitution for its revision at stated periods.").}

It is understandable that situations change, and rights that were never thought of before come to fruition. Thus, when we talk about individual right of privacy which can only flow from the constitutional guarantee of the right of the people to be immune in their own homes, which is a given, this judicial construction does not diminish the right of the people as does a finding of immunity. Even though some might argue that the issue of right to privacy should expressly be made part of the Constitution by an appropriate constitutional amendment,\footnote{184. See David Flaherty, On the Utility of Constitutional Rights to Privacy and Data Protection, 41 Case W. Res. L. Rev. 831 (1991) (asserting that although the Constitution was never amended to include the right to privacy, many thought it would give such a right).} I do not necessarily share this strict constructionist view. Contemporary social conditions are very different from those existing when the United States of America was primarily an agrarian society. Shifts in the role of responsibilities and rights concurrent with a shift in emphasis on the role of government have occurred since 1776, and it is questionable whether the determination on how to change the Constitution to adapt its terms to the current times should be left to the discretion of nine non-elected individuals.

It may be somewhat simplistic to say that the job of the Supreme Court is limited to interpreting the law. Interpreting the law is meant to be no more than that the plain meaning rule should prevail. The idea that the Supreme Court can change the intent of legislators through the device of historical precedent or delving into the legislative history of a law or resorting to the "implied powers" device is, putting it charitably, imperfect. Therefore, legislators have to learn how to write laws in clear enough language so as to make them applicable with a minimum of misunderstanding and need for court "interpretation."

One example of the flights of fancy in which the Supreme Court engages when interpreting statutory language follows. Thus, the lawmakers talk about "persons," and the Supreme Court rightly noted that "corporations" are "persons."\footnote{185. Monell v. New York City Dep't of Social Servs., 436 U.S. 658 (1978).} This, by no stretch of imagination, means that the laws and the privileges of live citizens necessarily devolve to corporations. Corporations are fictional persons: "they have no soul,"
as Sir Edward Coke said, and the Supreme Court, unless it likens itself to a deity, cannot give a soul to corporations. Therefore, many of the attributes flowing from constitutional protections given by a simplistic Supreme Court to corporations over the years make very little sense and run counter to the rules applied to corporations in most sophisticated and developed nations.

Of the many reasons given by judges, justices and scholars for the authorship and ratification of the Eleventh Amendment, the most convincing historical explanation characterized it as the result of the first in a protracted series of confrontations between the states and the federal judiciary over the nature of the federal union and the position of the states in the constitutional order. Other cited purposes of the amendment, such as the self-interest of the states, or an affirmation of the original intent of the constitutional framers has, over time, confused this declaration of state sovereignty with a purpose of sovereign immunity.

The theory that the Eleventh Amendment was enacted to overturn the Supreme Court's interpretation of the Article III federal judicial power in Chisholm and replace it with the Constitution's "true intent" has been advanced by such eminent constitutional scholars as Thorpe, Orth, and Tribe. Only Thorpe provides any historical basis for such a conclusion.

Thorpe supports his proposition that the Eleventh Amendment was passed in order to reflect the true intent of the constitutional Framers by referring to the constitutional ratification debate records and to Justice Iredell’s dissenting opinion in Chisholm. In establishing the Framer’s intent in constructing the federal judicial authority, Thorpe relies on the comments of Alexander Hamilton during the New York ratification proceedings which assured the state delegates that the states would not

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187. G. M. Leasing Corp. v. United States, 429 U.S. 338, 353 (1977) (holding that corporations are protected by the Fourth Amendment); Santa Clara County v. Southern P.R.R., 118 U.S. 394, 409 (1886) (asserting that the Fourteenth Amendment applies to corporations).
188. See Great Northern Life Ins. Co. v. Read, 322 U.S. 47, 51 (1944) (stating that as a sovereign, the state is interested in "be[ing] free from judicial compulsion in the carrying out of its policies within the limits of the Constitution").
189. Hans v. Louisiana, 134 U.S. 1, 13-14 (1890).
be suable in a federal court.\textsuperscript{193}

Professor Jacobs' seminal book on state sovereignty and the Eleventh Amendment independently confirms my views on the foundation of our Constitution acquired in my student days in the French education system: equality under law. This concept rests on the French philosophers who greatly influenced the thinking of the Founding Fathers.\textsuperscript{194} In his exhaustive analysis of the Eleventh Amendment underpinnings, Jacobs rebuts Thorpe's assertion that Hamilton's comments are representative of the Framers' understanding of the Article III provision which allowed federal jurisdiction of cases between a state and citizens of another state. Jacobs points to ratification debate quotes of James Wilson in Pennsylvania, Edmund Randolph, George Nicholas, Edmund Pendleton and Patrick Henry of Virginia and William R. Davie of North Carolina which recognized state suability in federal court. In an analysis of the debates, Jacobs concludes that there was no uniform understanding concerning the meaning of the judicial clause, but that the many Anti-Federalists who commented on the clause believed that the states would be suable. Jacobs bolsters his rebuttal of absolute state sovereignty as being part of the original constitutional intent by showing that three of the five members of the Constitutional Committee of Detail which drafted the judicial clause—James Wilson, Edmund Randolph and Oliver Ellsworth—later made statements indicating that the states were suable under the Constitution.\textsuperscript{195}

Thorpe's alternate proof of constitutional intent was Justice Iredell's dissent in \textit{Chisholm}, which asserted that the English concept of sovereign immunity had been assimilated into American law along with other common law doctrines. In addition to the obvious rebuttal provided by the \textit{Chisholm} majority opinions, Jacobs reveals several American lower court cases decided before \textit{Chisholm} where states were compelled to defend suits by individuals.\textsuperscript{196}

Professor Tribe's explanation of the Eleventh Amendment's purpose is twofold: like Thorpe, he asserts the constitutional Framers' true intent. However, Tribe adds the motive of state self-interest, and argues that the states passed the Amendment out of the fear of ruinous suits on

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{193} "It is inherent in the nature of sovereignty not to be amenable to the suit of an individual without its consent." \textsc{The Federalist} No. 81, at 487 (Alexander Hamilton) (Mentor ed., 1961).
\item \textsuperscript{194} \textit{See Jacobs, supra} note 123.
\item \textsuperscript{195} \textit{Id.} at 27-40.
\item \textsuperscript{196} \textit{Id.} at 43-46.
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Revolutionary War debts. Jacobs explores this contention in depth, listing several suits in which individuals sought or won awards against state debts or land confiscations. Jacobs, after detailing the significant potential for state liability, discounts the self-interest motive by explaining that of the 26 million dollar total state indebtedness, the Federal Treasury had assumed approximately 16 million dollars. Although this reduced state debt liability weakens the self-interest motive, Jacobs' abrupt dismissal of the argument is not totally persuasive.

Another endorsement of the self-interest rationale came from Chief Justice John Marshall in *Cohens v. Virginia*. In resolving an issue of federal jurisdiction over state court decisions involving federal law, Marshall asserted that the Eleventh Amendment was adopted to inhibit creditors from prosecuting claims against state debts. Marshall's statement was made to dispel the notion that the amendment was enacted to maintain the sovereignty of the state from process in federal courts, which was contrary to Marshall's agenda in *Cohens*. Marshall's dicta drew criticism from influential voices such as Thomas Jefferson and James Madison.

Having dissected and discarded the theories of original constitutional intent and state self-interest, Jacobs proceeds to persuasively present his own view of the purpose of the passage of the Eleventh Amendment. He asserts that the amendment was the states' reaction to the blatantly nationalist politics expressed by the *Chisholm* majority.

Jacobs begins his argument by focusing on the unanimity of the amendment's support throughout the congressional and state ratification proceedings, a phenomenon which did not accord with the lack of agreement as to the original intent of the judicial clause or the different financial positions of the various states. Jacobs concedes that, while the amendment was expressly popular with the states' rights people, it is more difficult to explain the nationalists' acceptance of the bill. To this question Jacobs uncharacteristically speculates that the nationalists acted out of political expediency and/or in the awareness that the amendment concessions to state sovereignty were more formal than substantial.

197. TRIBE, supra note 192, § 3-25.
198. JACOBS, supra note 123, at 69-70.
199. 19 U.S. (6 Wheat.) 264 (1821).
200. See JACOBS, supra note 123.
201. See JACOBS, supra note 123, at 67-69.
202. JACOBS, supra note 123, at 71-72.
Jacobs’ view of the Eleventh Amendment’s purpose as a statement of state sovereignty in the Union is reinforced by the major cases which have subsequently shaped the amendment’s constitutional doctrine. Although the Court’s uncritical acceptance of Marshall’s dicta in Cohens has resulted, over time, in a common wisdom and tradition of the amendment’s purpose as protecting the states from compulsory payment of debts ordered by the Federal Judiciary, the central theme of the cases has been to define the boundaries of permissible federal intrusion into state governmental activities. Despite Justice Bradley’s interjection of the tangentially related sovereign immunity concept into the Eleventh Amendment doctrine in Hans v. Louisiana, the cases have primarily dealt with the issue of state sovereignty within the federal constitutional system.

Having severed the problem of state sovereignty, with which the Eleventh Amendment is concerned, from the concept of sovereign immunity, Jacobs concludes that sovereign immunity has no constitutional ties with the Eleventh Amendment. Jacobs questions the compatibility of the monarchial sovereign immunity doctrine, which had been reduced to formal conception in England, with the political principles and governmental institutions which took shape in post-Revolutionary America.

Jacobs searched through the alternate rationales for sovereign immunity, including the public policy of protecting government treasuries and the government’s ability to function without judicial interference. He found no proof of danger from suits by citizens which would justify the doctrine’s transgression of the Rule of Law. Finally, Jacobs found Justice Holmes’ maxim in Kawananakoa v. Polyblank that “there can be no legal right as against the authority that makes the law on which the right depends,” as an expression of circular logic, and postulating a more authoritarian theory than the concept of kingship against which America’s Founders revolted.

Professor Jacobs concludes by reiterating that the Eleventh Amendment was the outcome of the first of many confrontations required to determine the nature of the federal union and the positions of the states and federal judiciary within the new constitutional order. Jacobs

203. 134 U.S. 1, 13 (1890).
204. JACOBS, supra note 123.
205. 205 U.S. 349 (1907).
206. Id. at 353.
207. JACOBS, supra note 123, at 154-55.
asserts that the concept of sovereign immunity has neither logical nor entirely justifiable legal or policy rationale. He further states that the doctrine, having essentially judicial roots, should be withdrawn by judicial decision, or alternatively, that the Fourteenth Amendment's Due Process Clause be invoked by the courts to provide effective redress for wrongs attributable to states.\footnote{208}

On the other hand, another respected scholar thinks that sovereign immunity springs from the Tenth Amendment. Professor Massey, in a well-researched article,\footnote{209} points out that the Tenth Amendment provides that "[t]he 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,"\footnote{210} while the Eleventh Amendment reads: "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."\footnote{211}

Massey's argument is that the immunity for state government is derived through state sovereignty. The existence of state sovereignty is found in the Tenth Amendment because it is through this amendment that the "frontier" between federal rights and state rights is determined. Whatever rights are not given to the federal government under the Constitution are retained by the state or the people. The rights of the federal government are determined by the actions of Congress through its delegated powers. If the power has not been given to the federal government, then that power is for the state to exercise, provided that its citizens gave it this power.

It is only through state sovereignty that a state may be immune from suit, but the state may only gain this immunity if the people of the state convey that right through the state constitution. If the right is not conveyed by the people, then it is reserved by the people. However, in defining the "frontier" between the federal rights and state sovereignty, the people may act to remove any immunity of a state.\footnote{212}

The Eleventh Amendment is narrowly tailored to limit the original jurisdiction of the federal courts. Therefore, what is simply a matter of

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\footnote{208} JACOBS, supra note 123, at 164. 
\footnote{210} U.S. CONST. amend. X. 
\footnote{211} U.S. CONST. amend. XI. 
\footnote{212} Massey, supra note 209, at 143-44. 

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determining jurisdictional subject matter should not be seen as creating state immunity. Under the plain meaning of the amendment, a state may still be able to be sued under a variety of circumstances: by a foreign government (this interpretation was removed by *Principality of Monaco v. Mississippi* in 1934), by other states, by its own citizens, and in suits that were not grounded in law or equity, such as admiralty.

According to Massey, there are currently two views on the meaning of the Eleventh Amendment. The first view is that the amendment codified the original understanding of the Framers: that states were immune from suit. The second view is that the Amendment was enacted only to limit one avenue of federal jurisdiction, namely diversity of citizenship. Massey finds both of these arguments historically incorrect and conceptually flawed.

The Eleventh Amendment was enacted as a reaction to the decision in *Chisholm*. According to Massey, this case necessitates a brief look at the then political climate. The Revolutionary War had been recently concluded with the Peace Treaty of 1783. Under this treaty, the United States was not to take actions that would deny British creditors the full value of all their debts in sterling currency. Unfortunately, many states took a number of actions to undermine this provision. It was critical that the fledgling federal government maintain the integrity of this treaty because a failure to do so would indicate to the rest of the world that the United States was unable to enforce international treaties.

Into this political framework came Alexander Chisholm, who was the executor of Robert Farquhar's estate, which was owed money from Georgia for military goods purchased by the state during the war. Chisholm initially sued Georgia in the Georgian federal court. However, Justice Iredell dismissed this complaint after Georgia appeared and asserted its immunity defense. Chisholm then filed his suit as an original action in the Supreme Court, and when Georgia failed to appear, moved for a default judgment. Georgia once again claimed sovereign immunity.

I agree with Professor Massey that the Supreme Court's decision

213. 292 U.S. 313 (1934).
214. Massey, *supra* note 209, at 61-62. This view apparently is only held by a plurality of the Supreme Court. *Id.*
218. *Id.* at 100.
should be read as determining solely that the Court had jurisdiction, and
the question of whether Georgia was immune from suit as a result of
state sovereignty was reserved for a later day which never came. Appearantly as a result of the *Chisholm* decision, hearings on what later
became the Eleventh Amendment began immediately.\(^{219}\)

The first proposal for the Eleventh Amendment suggests that
Congress did not intend for it to provide the states with a blanket
immunity from suit. Representative Sedgwick entered the first proposal
on February 19, 1793, the day after the *Chisholm* decision:

> [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.\(^{220}\)

The fact that Congress turned down this proposal is historical
evidence that the original understanding was not state immunity. As
Massey points out, if Congress had desired to extend absolute immunity
to the states, this first proposal was the vehicle.\(^{221}\) The fact that it was
rejected indicates that Congress did not intend to provide the states with
absolute immunity.

In addition to this first proposal, a subsequent text\(^{222}\) went com-
pletely in the opposite direction by only limiting the jurisdiction of the
Court in diversity cases, but leaving federal question jurisdiction unhindered. This proposal was also turned down, probably because it
would not have offered the states the protection they desired. British
creditors could have easily established subject-matter jurisdiction for the
Court through the 1783 Peace Treaty.

The text of the Amendment was a political compromise, which
provided the states with their desired protection, and cooled the heads of
the republican politicians who were calling for a constitutional conven-
tion to assert more extreme states' rights positions.\(^{223}\) In sum, it is clear
that the Amendment was not intended to provide the states with absolute
immunity: both the rejected proposal and actual language of the Eleventh
Amendment so indicate.

\(^{219}\) Id. at 103.
\(^{220}\) 1 CHARLES WARREN, THE SUPREME COURT IN UNITED STATES HISTORY 101 (1922).
\(^{221}\) Massey, *supra* note 209, at 112.
\(^{222}\) Id. at 112 n.266 (citing 3 ANNALS OF CONG. 651-52 (1793)).
\(^{223}\) Massey, *supra* note 209, at 113.
One revisionist interpretation is that the Amendment was not intended to limit the Court's jurisdiction to hear federal questions. However, Massey points to some evidence to support the position that the Amendment was devised to so limit the Court's jurisdiction. Senator Gallatin proposed an amendment that would have allowed suits against the states by foreigners and citizens of other states, but only to the extent that their claims arose under a federal treaty. This was overwhelmingly rejected because, according to Massey, it would have allowed the exact type of action that the states wanted to end, namely British creditors suing to recover their property. It is unlikely that the three largest proponents of the amendment, Virginia, Massachusetts and Georgia, would have allowed this loophole to survive.224

Massey then argues that the state immunity from suit is to be found in the Tenth Amendment. However, since Garcia v. San Antonio Metropolitan Transit Authority,225 the common view has been that the Tenth Amendment has been relegated to the "nether world of non-justiciability."226 In essence, it is argued that Garcia has reduced the frontier between state and federal power to an obsolete point. Professor Massey argues that the Tenth Amendment is not a non-justiciable point, though, and in support of this position points to several ongoing principles that demonstrate the continued existence of the Tenth Amendment: adequate and independent state grounds,227 the Erie doctrine,228 the Abstention doctrine,229 the requirement of Exhaustion of State Remedies,230 the Compact Clause231 and the effects of the Anti-Injunction Act.232

The dilemma is that if the Tenth Amendment is seemingly devoid of power, where else but in the Eleventh Amendment could the states find the immunity they desired? According to Massey, interpretations of the early case law indicated that the Eleventh Amendment did not create state immunity. Massey's article focuses on several areas of the law to

224. Id. at 114-15.
231. U.S. CONST. art. I, § 10, cl. 3.
illustrate his position: admiralty cases, section 25 of the Judiciary Act (the foundation for the Courts’ appellate jurisdiction), suits by other states, and the bank cases. In each of these areas, the Court determined, prior to the Civil War, that the Eleventh Amendment did not confer immunity to the states, but instead only acted as a limitation on the jurisdiction of the Court.

Following the Civil War however, the attitude of the Court changed. It faced a serious dilemma of having the states repudiate the bond obligations that they had created during the war. The federal government however, lacked both the will and the power to enforce any judicial decision that the states could not repudiate their contracts. The Court thus was forced to either allow the states to forego the Contract Clause or establish a precedent of state non-compliance with judicial decisions. The solution, according to Massey, was to read into the Constitution state immunity from suit.233

In the case of Louisiana v. Jumel,234 bondholders attempted to force the Treasurer of Louisiana to pay the full value of the bonds. The Court, going against prior decisions finding that actions against the agents of the state are not state actions, determined that this action was against Louisiana. The Court admitted that it was forced to do this because:

The remedy sought . . . would require the court to assume all the executive authority of the State . . . and to supervise the conduct of all persons charged with any official duty in respect to the levy, collection, and disbursement of the tax in question until the bonds . . . were paid in full. . . . It needs no argument to show that the political power cannot be thus ousted of its jurisdiction and the judiciary set in its place.235

The Court also limited the rights of other states to sue on behalf of their citizens. In New Hampshire v. Louisiana,236 New Hampshire had enacted legislation that allowed citizens to assign their claim to the state for purposes of the suit. The Court struck down this legislation by finding that the Eleventh Amendment barred suits between states when the complaining state was acting as agent for its citizens.

As Massey points out, in both of these cases, the Court did not look
to the Tenth Amendment to find its authority, although this is the logical source for limiting the ability of Article III to overrule state sovereignty. This issue becomes more clouded by the *Hans v. Louisiana* decision, in which the trial judge concluded that "a state can no more be sued contrary to its continuing assent than can the dead." The Supreme Court upheld this rationale, despite its earlier reasoning that it was the inability of the Court to enforce its decision upon the states that had guided its decision. As Massey points out, "[s]tripped of euphemism, Louisiana possessed sovereign immunity because the federal judiciary was unable, and the President and Congress unwilling, to enforce decrees adverse to Louisiana." Perhaps this is exactly what sovereign immunity entails: the powerlessness of one party to affect another. Yet, simply because this situation arose once in this nation's history, allowing Louisiana to thumb its nose at the rest of the nation, it should not be used as evidence to support the continuation of that "policy."

IV. THE CONCEPT OF SOVEREIGN IMMUNITY: NO PLACE IN THE AMERICAN FORM OF GOVERNMENT.

One of the tenets of American political philosophy is that the people are the "sovereigns," not those who are elected to office. It is the mass of these sovereigns which creates the functional government, and each person is equal in his rights and interest. If even one person is placed above the rest, this order begins to fail and will disintegrate. That is the sole purpose of immunity, placing one person above all others. The granting of immunity operates to effectively diminish the sovereignty of everyone. In order to protect society, we must maintain the accountability of all people, especially those select few that we place in positions of power.

The concept of sovereign immunity arose as a logical deduction from the English monarchial system of government, where the people were not equal, and the rights and interests of some were placed above others. Under the English system, the King was God-anointed, and considered to be the source of the law. As this was the case, one could

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237. 134 U.S. 1 (1890).
239. Massey, supra note 209, at 139.
at least rationalize the concept that the King was immune from his own law. However, the King’s servants were not immune and were subject to suit. Under our peculiar system, as fashioned by the Supreme Court, the servants are immune as well as the state. It is an interesting point that the English government has abandoned this undemocratic doctrine.242

There are several modern countries that do not even understand what is meant by sovereign immunity. When I discussed this subject with Professor Schmidt of the University of Oslo’s Law faculty, he had problems understanding what we meant by immunity since, to quote him, “in Norway, if the King parks his car illegally, the King is subject to a fine and must pay his fine like all the other citizens.”243 The concept of sovereign immunity has also been discarded by the French Civil Law system where all claims against the government are handled by an administrative court system. The most influential and eloquent voice to abandon the notion of sovereign immunity in France was the late Léon Blum: this may well have been one of his finest contributions to French political life.244

242. Engdahl, supra note 26, at 3-4.
243. Interview with Dr. Schmidt, University of Oslo, in Oslo, Norway (May 1987, confirmed by letter dated July 21, 1987).
244. Léon Blum was born in Paris on April 8, 1872. He was one of the most influential French Socialist leaders and became Premier of France. A brilliant writer of essays, poetry, and literary criticism, he was also one of the outstanding legal minds of his generation. As Commissaire du Gouvernement on the Conseil d’État (Council of State) he had an important impact on French judicial thinking. In the 1890s, he became actively involved in politics as a socialist. After the assassination of Jean Jaurès in 1914, he gradually assumed the Socialist party leadership, becoming the party’s spokesman in Parliament after 1919 and editor of Le Populaire. Blum died on March 30, 1950, after he was saved from a concentration camp by the U.S. Forces at the end of World War II. See JOEL COLTON & LEON BLUM, HUMANIST IN POLITICS (1966).

Blum’s impact on the theory of state liability for harm caused by an official was dramatic. His most convincing argument was raised in his brief as Commissaire du Gouvernement in the 1918 Lemonnier case:

Until relatively recently a citizen injured by the improper functioning of a public service did not have any way of obtaining relief for the loss that he suffered. If he wished to sue personally the official who ordered or committed the illegal or faulty act, he was faced by an objection based on article 75 of the Constitution of 22 frimaire, An VIII. And, even if the Council of State authorized a suit before the regular courts, the plaintiff would probably encounter there a declaration of incompetence based on the principle of separation of powers. If he wished to sue the State as responsible, not as an employer for his employee under article 1384 of the Civil Code, but as a legal person obligated through its own acts (its personality encompassing that of its agents taken collectively), the Council of State would bar recovery by a ground analogous, juridically speaking, to force majeure. It was clearly established in legal writing and in the case law that the State and other persons of public law were not liable, except in certain special cases, such as damage resulting from the carrying out of public works, to citizens. . . . This was the
state of the law when a decree... of September 19, 1870 abrogated article 75 of the Constitution of the Year VIII. We can say today that the policies and controversies of the period have a purely historical interest, that the intention of the authors of this decree, an intention that is rendered clear by the discussions relative to article 75 of the Constitution of the Year VIII, was to confer on the civil courts a general jurisdiction in all actions for damages caused by a wrongful act committed in connection with the exercise of a public function. This jurisdiction of the ordinary law seemed the surest safeguard of individual liberties. It was desired that, as for example in England, in the event of an arbitrary arrest, an illegal seizure, a manifest irregularity of any kind, the officer who had given or executed the order should be subject to personal liability. The fear of a personal liability is assuredly, for the public official, a much more powerful restraint than the possibility that an action may be brought against the administration of which he forms a part. ... We can, therefore, truly say that the classic case law of the Tribunal des conflits, begun by the Pelletier case... and continued in a whole series of subsequent decision, is untrue to the spirit of the Decree of 1870. ... The Tribunal des conflits played, everything considered, in the classic debate a role analogous to that of the Supreme Court of the United States. It allowed only the aspect of the decree of 1870 to survive that was not contrary to a principle of public law considered to be of higher authority, the principle of separation of powers. It recognized the competence of the regular courts only to the extent that the measure of the investigation of the fault imputed to an official did not involve a critical examination of the normal and legal conditions of the service. This case law removed the privilege that the official, sued for an act foreign to his functions and under conditions in which anyone else might have been sued, had long enjoyed. But it did not satisfy the demand that a citizen, injured by a serious administrative fault, should have an action and be able to obtain relief. ... Accordingly, it was in reality this case law [of the Tribunal des conflits] that caused you to abandon gradually your own case law and slowly led you to recognize ... the liability, in principle, not only of the State but of all public-law entities for the fault of the public service. ... The actual state of the law now is, accordingly, that in principle the agent is not liable while the service is. And, in consequence, the responsibility of the State or of other public-law entities is not that of article 1384 of the Civil Code. Public-law entities are not liable as a master or as an employer. The liability of the master is a liability of guaranty, a secondary liability, which necessarily assumes the primary liability of the servant, the author of the damage. But, precisely, the combined case law of the Tribunal des conflits and of the Council of State excludes, in principle, the liability of the agent for a faute de service. The State is not secondarily liable, as the employer of the agent, but principally, as the director of the service. ... But—and we touch here on the capital point—if the exceptional jurisdiction of the civil judge can only be exercised when the fault of the agent is not in any respect of a faute de service, the converse is not true, and cannot be true, with respect to the normal jurisdiction of the administrative judge. The administrative judge will be competent if there is a faute de service, and even if this faute de service is mingled with, is colored to some extent by, an error or an individual fault of one of the agents of the service. ... The civil judge has jurisdiction only if the fault of the agent detaches itself completely from the service. The administrative judge has jurisdiction unless the service is completely detached from the presumed fault of the agent. A fault that the civil courts may consider personal to an agent and as making him liable can, therefore, coexist with an administrative fault, which the administrative court will consider a faute de service, making the administration liable. ...
The source of political power in the United States is the people, not a monarch. No one person is God-anointed, or can otherwise be seen as the source of the law. The law comes from the people as an entity. However, these same people from whom the law flows, have neither immunity as a group nor individually. Therefore, the government does not have any immunity which it can legitimately assert.

The structure of our government was created with a great deal of care, and the Framers labored to find a precise balance between power and accountability in order to assure its continuation. Accountability of those in power to the people was the driving concept to insure that the people would remain the true sovereigns. Sovereign immunity is incompatible with this because it creates a class of people that are not accountable, therefore not treated equally under the law. When one person is no longer accountable, that person has been raised above all others, who are in turn diminished.

A. Incompatibility of Sovereign Immunity with American Jurisprudential Principles of Accountability, Equality Under the Law, and Justice for All

Chief Justice Marshall put it best when he wrote in *Marbury v. Madison* that: "[t]he 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." Perhaps no truer words have been written to date about the basic tenets of our political system, and yet, it seems that over time Marshall abandoned these lofty ideas, opting instead for a system in which the few are placed above the many. If this country is to be seen as a government of laws, we must return to the notion of accountability for everyone pursuant to the Rule of Law.

Justice Marshall also rightly pointed out that it is the primary duty
of the government to insure that each and every citizen is offered the protection of the law. Being a government of men is being a government that seeks to protect itself first, and the people second.

It should never be forgotten that the power of the government flows from the people. The source of governmental power is the people, not the elected official, regardless whether they are local council members, city mayors, state and federal representatives, senators, or the President of the United States. To ensure that the power rested with the people, the Framers were careful to create a system of checks and balances in devising our form of government. This is merely another way of stating that those who are in power must be accountable for their actions, just as every other person is accountable.

The very concept of immunity, whether it is sovereign immunity or the self-created judicial immunity that seems to be extending its reach further and further each day, is repugnant to the ideal of accountability. Immunity is contradictory to the American ideal, for one is not accountable if one does not have to answer for one's wrongdoing.

The Supreme Court was directly faced with the problems created by sovereign immunity in the case of United States v. Lee. As we have seen, in Lee, the plaintiff was faced with the situation of having to sue government officials in an action of ejectment in order to regain his land. The land had been taken by the United States government and was being held by the defendants as agents of the government. The plaintiff alleged that the land had been taken by the government because its agents had refused to allow for the payment of the taxes that were due by anyone other that the owner. Although suit was brought against the defendants to recover the land, the government refused to submit to the jurisdiction of the Court. Furthermore, the government claimed that since the land was actually being used by it, although held by defendants, the Court lacked the ability to assert jurisdiction over the entire matter. It is a strange notion indeed, that a citizen would be barred from asserting personal rights in property simply because the government has decided that it owns the property. Yet, in effect, this is what the government's immunity claim amounted to: a blatant attempt to deny a citizen the protection of the laws.

The lower court held for the plaintiff. In affirming this decision, the

249. Id. at 198. It is interesting to note that the land that he was attempting to regain is now the Arlington National Cemetery. Id.
250. Id. at 198.
Supreme Court stated that it is proper to bring a suit against the agents of the government. "No man in this country is so high that he is above the law. No officer of the law may set that law at defiance with impunity." 251 This approach creates a strange schism in the law. A plaintiff who has suffered a wrong may bring an action against the agent of the United States, but the government as an abstract entity is somehow above the law. An unanswered question in all this is which government officials are not agents of the government?

The Court’s refusal to extend immunity from suit to the government’s agents was supported by the position that the government could return to court and seek relief if a decision was not favorable to it. Since the government was not a party to the original suit, it was not estopped from asserting its position in a subsequent action.

The importance of the Lee decision is that it presents a method for resolving disputes that a citizen may have against the government, without compromising the government’s desired immunity. In effect though, the government is forced to either consent to suit initially or to return to court once an adverse decision has been rendered.

At this point, a reference to Dicey’s “Rule of Law” 252 seems appropriate. The Rule of Law rests on the premise that no person should be punished or oppressed individually by the government, absent a breach of the law. It would seem, according to Dicey, that this stands in contrast to the systems of government which grant wide, arbitrary, or discretionary powers to government officials.

Dicey’s interpretation of the Rule of Law divides it into three distinct concepts:

(1) regular law is supreme, even to the arbitrary exercise of power, such that no man should be punished, absent a breach of the law; 253

(2) no man is above the law, such that governing officials ought to be subject to the same duties of obedience that other citizens are subject to, and subject to the jurisdiction of the ordinary courts of the land; and 254

(3) the general constitutional principles of the rights of private

251. Id. at 220.
253. Lee, 106 U.S. at 188.
254. Id. at 193.
persons are to be developed by judicial decisions.\textsuperscript{255}

Dicey believed that constitutions are not the source of our rights as people, but rather an expounding and a consequence of the rights of individuals, built out of a course of judicial decisions. Thus, just as rules of law transcend government, the constitutions ought to be interpreted or “defined and enforced by the Courts.”\textsuperscript{256}

The supremacy of the courts under the crown initially was undisputed: “\textit{tout fuit in luy et vient de lui al commencement.”}

\textbf{B. Creation and Expansion of Sovereign Immunity: Inconsistent and Irreconcilable Results}

The application of sovereign immunity has led to inconsistent and irreconcilable case law which has caused the various courts to swing back and forth between its application and rejection. For example, in \textit{Muskopf v. Corning Hospital District},\textsuperscript{257} the Supreme Court of California reviewed its prior decision that the state and its agents were immune from liability in tort.\textsuperscript{258} In concluding that the rule of immunity was “mistaken and unjust,” the court discarded it, holding that government officials are liable for negligent acts, but not for acts that are within the discretion of their office. One justification for this result is grounded in the theory that if officials were not immune for their discretionary acts, then numerous suits could possibly be brought against them for injuries caused to others, which would constitute an undue burden in their ability to perform their task.\textsuperscript{259}

This theory is illogical because it leaves unanswered the question of how the harm done to a citizen by an official’s negligent acts differs from acts done intentionally, albeit within the official’s discretion. It would seem that a more fitting solution is to limit immunity for the intentional wrongs, that way discouraging actions that are likely to harm others and making the official more accountable.

Compare this to the ruling of \textit{Becker v. Philco Corp.},\textsuperscript{260} where the

\begin{itemize}
\item \textsuperscript{255} Id. at 195.
\item \textsuperscript{256} Epstein, supra note 252, at 151.
\item \textsuperscript{257} 359 P.2d 457 (Cal. 1961).
\item \textsuperscript{258} Id. at 458. The court had previously decided in Talley v. Northern San Diego Hosp. Dist., 257 P.2d 22 (Cal. 1953) that the state was immune from tort liability, as were state agents in the performance of a state function.
\item \textsuperscript{259} Muskopf, 359 P.2d at 462.
\end{itemize}
pivotal question was whether the defendant corporation was entitled to an absolute immunity in a state tort action simply as a consequence of its contractual arrangement with the Department of Defense.

The defendant was a defense contractor that worked with the Department of Defense. Under the terms of the contract, the defendant was obligated to maintain a system of security that would protect against the loss or compromise of confidential information. The defendant was also under an obligation to report any possible losses or compromises to the Department of Defense.

The plaintiffs were former employees of defendant. There had been a suspicion that information had been compromised by their actions. An investigation began, and the findings were reduced to writing. Plaintiffs were then notified of the report and given an opportunity to be heard and to present their statements. Once this was done, the report was sent to the Department of Defense.

After further investigation by the Department, the security clearance of the plaintiffs was revoked. This revocation caused the plaintiffs to lose their jobs with defendant. The plaintiffs alleged that all information in the report was completely erroneous, malicious, slanderous and libelous: this was so stipulated for the purpose of the appeal.

The court decided that Philco, because of its contract with the Department of Defense, possessed the attributes of a federal agency and was entitled to absolute immunity. The plaintiff in Becker had sued the defendant in a libel action. In deciding that the corporation did enjoy such immunity, the court expanded the protection of immunity from a tort action to a private defense contractor, in effect throwing out the window the notion that a citizen can obtain justice.

The Becker court, in a poorly reasoned decision, relied heavily on the plurality opinion in Barr v. Matteo, which granted federal officers absolute immunity from state tort claims. A series of Supreme Court decisions in the 1970s took considerable strides toward overruling Barr and reducing this grant of absolute immunity to only a qualified immunity. More recent cases, however, have reversed this trend of

261. While the case was brought in federal court it had applied Virginia law as to the libel.
262. Id. at 773.
263. Id. at 772.
264. Id. at 773.
265. See id. at 772. Notably, there were lengthy dissents to the denial of certiorari.
266. 360 U.S. 564 (1959).
restricting officer immunities,\(^{268}\) so that it is difficult to determine whether \textit{Becker} would be decided the same way today. It is very likely that Philco’s immunity today would be considered qualified immunity, in light of the holdings of \textit{Butz} and \textit{Harlow}. Justice Blackmun aptly summarized the modern trend regarding the accountability of federal officers, stating: “[T]he judicial pendulum, which swung from retrenchment in the years after Reconstruction to a renewal of federal responsibility . . . during the last two generations, may have begun to swing once more toward retrenchment.”\(^{269}\)

\section*{C. Sovereign Immunity Is Outdated in a Modern Democratic Society}

As in so many other areas of American law, the concept of sovereign immunity was adopted from the English system without much thought given to its logical consequences. Throughout this Article, I argue that immunity is inimical to democracy inasmuch as the government is held above the people. However, if we assume that immunity was not adopted as a matter of course and only accepted after forethought, it may be beneficial to consider the circumstances surrounding the context in which it was adopted.

Two historical phenomena would have led the Court to vest immunity in the government. First, the early American states were not nearly as united as they are today. Remember that there was no national highway system, no motorized vehicles, no electronic communication, and much distrust of a large central government. Moreover, the people in each state had more pronounced differences than they do today. In many ways, the states were more like countries and the Constitution more like a compact.

These facts fostered a strong federalist mentality which led to not only the enactment of the Eleventh Amendment but also to a strong feeling of isolationism between the states. In short, states did not want outsiders to have any power over them. Immunity was one way to limit that power.

Secondly, and probably more importantly, both the federal and the


various state governments were in the infancy stages of development. Additionally, their governments played a smaller role in the lives of people. The Founders were concerned about the effect that liability would have on continued governmental viability. Moreover, because the federal government was limited in scope compared to the bureaucratic machine of the latter twentieth century, the need for redress against governmental wrong seemed less obvious. In addition, one must look at the political composition of the Supreme Court at that time. In this type of environment, the reasons for the carryover of the notion of immunity from England is at least understandable.

Today, however, the federal government is our nation’s largest employer and holds an annual budget of $1.5 trillion. Furthermore, whatever need for state sovereignty has been drastically reduced; there is little doubt today that America is truly one nation as opposed to thirteen or fifty. These changes should lead us to consider seriously whether the cloak of immunity is appropriate to a democratic, unitary and thriving America: a democracy based on the concepts of equality and accountability under the law.

V. BALANCING GOVERNMENT LIABILITY AND INDIVIDUAL RIGHTS

The proper analytical framework for determining the liability of the government as a defendant is a balancing of individual and state interests, which need rarely, if ever, result in an absolute governmental immunity under such extraordinary circumstances as total war, an atomic disaster, or some cataclysmic natural disaster of overwhelming proportions so as to create exceptions to this rule of governmental liability.

A. Unlawful or Tortious Government Action: Individuals’ Right to Redress and the Public’s Need to Deter Such Acts in the Future

In Gregoire v. Biddle, Armand Gregoire was arrested on Ellis Island and accused of being a German. An Enemy Alien Hearing Board ruled that Gregoire was a Frenchman, but he remained imprisoned nonetheless. After being held for more than four years, a federal judge ruled that he was French. The Second Circuit affirmed, and Gregoire was finally released. Biddle and other unnamed defendants were the officers

270. According to the Tax Foundation of Washington, D.C., the average federal tax is 22.4% and state tax is 11.8%, i.e., 34.2% of the taxpayers’ income. These figures are based on statistics of the U.S. Department of Commerce’s Bureau of Economic Analysis and the Bureau of the Census.
and officials responsible for the arrest and prosecution of Gregoire. Gregoire filed suit for false arrest without color or authority of law and claimed civil damages.\textsuperscript{272}

The Court held that prosecutorial officials of the United States government are absolutely immune from civil liability for their prosecutorial acts even when committed with ill-will. A prosecutor presenting evidence in court is acting as an advocate for the state and absolute immunity applies to a prosecutor's presentation of evidence even if the prosecutor presents false evidence or withholds exculpatory evidence.\textsuperscript{273}

According to Judge Hand, the balance tips in favor of absolute immunity, as that is "the path laid down in the books."\textsuperscript{274} It is thus better, according to Hand, to leave unredressed the wrongs of dishonest officers than to subject duty-bound officials to the fear of retaliatory suits. Of course Judge Hand makes the unfounded assumption that the benefits of both procedures cannot be attained in a single system. In other words, a system which declined immunity to prosecutors would necessarily prompt an inundation of meritless suits and discourage these officials from pursuing their duties. This result does not necessarily follow after a proper reform of the judiciary's control of the cases brought before its courts. It is, after all, possible to create a system in which lawyers and litigants are properly discouraged from bringing frivolous lawsuits, where claims are handled in an efficient and fair manner, and prosecutors, among others, are held accountable for their tortuous conduct. An example of such a system is proposed later in this Article.

In \textit{White v. Frank},\textsuperscript{275} White was arrested and convicted, in a prior criminal trial, for possession and distribution of cocaine. In this case he sued Frank, one of the arresting officers, who was himself arrested for theft and for tampering with evidence. Frank admitted perjuring himself in the prosecution of the plaintiff, when testifying at a pretrial hearing

\begin{footnotesize}
\begin{enumerate}
\item Id. at 579.
\item Id. at 580. To complicate matters further, a prosecutor does not have absolute immunity for advising police officers, because there is no common law or historical support for such immunity and because the act of advising police officers is not part of the prosecutor's functions. \textit{Burns v. Reed}, 500 U.S. 478 (1991) (holding the prosecutor absolutely immune for presenting evidence to support application for search warrant even if evidence was misleading; prosecutor not absolutely immune for advising police officers that they could interrogate suspect under hypnosis and that they had probable cause to make arrest).
\item Gregoire, 177 F.2d at 581. The listing of individuals who are immune to lawsuit is impressive and, possibly frightening. \textit{Id.} at 580-81.
\item 855 F.2d 956 (2d Cir. 1988).
\end{enumerate}
\end{footnotesize}
and before the grand jury. The plaintiff, a black man, brought suit for wrongful arrest, malicious prosecution, and false imprisonment. He also brought a Section 1983 claim on the basis of race, against the state officers.276

In a surprisingly shallow, convoluted and slanted decision, the Second Circuit Court of Appeals held that state police officers have absolute immunity for wilful perjury during pretrial motions to suppress, but that state police officers only have qualified immunity for wilful perjury during testimony before a grand jury. Because Section 1983 was not intended to change the common law of torts, common law privileges were to remain unchanged. This decision followed the common law witness rule that witnesses could not be sued for their testimony, on the principle that only complete freedom to express one's story would lead to a full disclosure of the facts.277 The lower court had reasoned that without absolute immunity, trial witnesses may be inhibited in two ways: First, witnesses might not want to testify, for fear of subsequent litigation. Second, any testimony given might be slanted for fear of retaliatory lawsuits. Given the protections afforded by the adversarial nature of the pretrial motion to suppress, the interests of finding the truth are better promoted by a finding of absolute immunity for witnesses in adversarial pretrial proceedings. Thus, prosecuting witnesses should be afforded absolute immunity in an adversarial proceeding.278

However, false testimony before a grand jury is more likely to go undetected. Few of the safeguards inherent in the trial process are present in the grand jury proceeding. There is no impartial officer, and the proceeding is essentially ex parte. There is no opportunity to cross-examine the witnesses. Thus, qualified immunity strikes the proper balance between encouraging the truth and protecting the rights of the accused. Additionally, the common law did not afford absolute immunity for probable cause hearings. Since the grand jury proceeding is a presentation and weighing of evidence similar to a probable cause hearing, there should be the same immunity available. Section 1983 did not enlarge common law immunity. Therefore, witnesses testifying before a grand jury should have only qualified immunity.

The basis for the imposition of a qualified immunity here was the

276. Id. at 957.
277. Id. at 960 n.3.
Supreme Court’s decision in *Malley v. Briggs*. In *Malley*, the Court found that a police officer was only entitled to qualified immunity when testifying falsely at a pretrial warrant application. The apparent rationale for this was that this application was not an adversarial proceeding, and the judicial system would best be served by a qualified immunity because it would encourage the officers to present correct testimony.

Pursuant to a wire tap authorization, police were monitoring the calls on the home telephone of Driscoll, an acquaintance of the respondent’s daughter. During one phone call, slang terms were interpreted as referring to the use of marijuana at a party which the police determined to be at Briggs’ home. Briggs and his wife, prominent members within the community, were arrested based on the phone call and the subsequent determination that the party referred to an event at Briggs’ home. However, the grand jury would not indict on this limited evidence. Briggs brought an action against the state police officers for violation of his Fourth Amendment rights, under Section 1983. Malley was the officer who brought a complaint and affidavit to obtain a warrant to tap Driscoll’s phone.

The Supreme Court held that a police officer is entitled to qualified immunity from Section 1983 damages when a complaint is submitted based on an objectively reasonable belief that facts in the complaint are sufficient to establish probable cause. Common law tort principles guide the availability of immunity to Section 1983 claims, and qualified immunity was the common law norm afforded to executive officers. It is up to the officer to show that a public policy requires a greater scope of immunity than is allowed at common law, if one is sought.

Malley asserted that the warrant application is the equivalent of a complaining witness; thus he should be afforded absolute immunity, as were witnesses at common law. However, the Court held that complaining witnesses were not to be afforded absolute immunity; if the complaint was made with malice or without probable cause, the complainant would be liable for malicious prosecution. Thus the common law affords no support for the application of absolute immunity.

Similar to the agent liability established in *Cohens*, qualified immunity is a doctrine which has its genesis in the fact that these courts

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279. 475 U.S. 335 (1986).
280. *Id.* at 342-44.
281. *Id.* at 338.
282. *Id.* at 340.
283. *Id.* at 341.
are obviously disturbed by the results of granting immunity to any individual organization. Since the immunity doctrine in the United States has a history going back to the beginning of our nation, a judge’s only option was to create exceptions to a rule perceived as unjust. These exceptions and the patchwork body of immunity law that has been created since *Cohens* should be reason enough to reconsider and challenge the early ill-founded assumptions of the Supreme Court creating the immunity in the first place.

**B. Maintaining the Integrity of Government Financial Stability, State Sovereignty, and Governmental Effectiveness**

In *Gregoire v. Biddle*[^284^], Judge Hand stated that the court must commit to either of two positions: (1) allow suits against prosecuting officials and risk inundation of meritless, vindictive suits which entangle the legal system and discourage prosecutors from vigorously pursuing their duties; or (2) grant prosecutors absolute immunity and risk abuse of the immunity by careless or intentional misconduct by prosecutorial usurpation of power.[^285^] While these two positions signify the competing tensions of this problem, Judge Hand assumes that they are mutually exclusive. As will later be shown, this is not necessarily the case.

In *Barr v. Matteo*,[^286^] another much discussed case on immunity, the Court again opted for broad immunity. Matteo and Madigan were lower level directors within a government agency. They had initiated a plan to change the method of using agency funds in order to avoid restrictions set forth by Congress. They outlined their plan and sent it to the agency director’s secretary, who signed it and forwarded it to Congress. Congress was infuriated by the agency plan, and demanded explanation from the agency secretary. Barr was the incoming agency director. In order to distance himself from the plan, he publicly reprimanded the respondents via a disparaging letter and called for their immediate suspension as his first act in office. Respondents sued for libel and slander. The Supreme Court held that a nonelected, appointed agency director is absolutely immune from civil liability for libelous statements made regarding lower level agency employees.[^287^]

Privileges are a judicial creation. The Supreme Court has already

[^285^]: *Id.* at 580-81.
[^287^]: *Id.* at 574.
held that judges are absolutely immune to civil suit for actions taken in exercising their official judicial functions. This immunity later was extended to executive officials, such as the Postmaster General and to those exercising duties related to the judicial process.

It is thought that government officials ought to be free to exercise their duties unfettered by the fear of damage suits in respect to their acts done in the course of duty. Time spent defending suits could be better spent on government functions. Privilege is not a badge for exalted officials, but an expression of policy designed to aid effective government. The Court stated that functions performed by lesser officials are not less important simply because the officials are of lesser rank.

Justice Brennan, in dissent, argued that qualified immunity is all one should be afforded. According to Brennan, it is not true, as Learned Hand offers, that it is better to allow actual malice than punish for an honest mistake. We have in our judicial system avenues to simplify and reduce costs of meritless claims, such as summary judgment. It is better to afford protections for honest mistakes and hold those accountable for malicious wrongs.

The Court found absolute immunity for the petitioner, Barr. The Court further stated that the act of publishing the material was well within the officer’s discretion and must be protected if government is to function properly. Thus, the Court considered relevant whether the acts were within the scope of the official’s discretion.

The Court also obliterated any distinction between discretionary and mandatory acts. Previously, immunity derived from government-mandated acts, where the compelling nature of the duty tied the hands of government officials. Thus, the act could not be outside the scope of duty. Therefore, the official could not be liable for acts he was compelled to do. But the court reasoned there should be no distinction; the Court found an amorphous duty which “encompasses the sound exercise of discretionary authority,” to which the same underlying principles supporting absolute immunity for mandatory acts apply.

The opinion attempts to discount a qualified privilege by holding

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292. *Id.* at 589.
293. *Id.* at 575.
294. *Id.*
that if the officer was to be subjected to scrutiny if acting outside his official authority, then the privilege would be meaningless because the officer would be subject to trial on the basis of conclusions of a pleader or the jury’s speculation. This logic ignores the function of the judiciary in its assessment of a case’s merits as a matter of law, prior to trial. Additionally, the argument has no merit given the advent of Rule 11 and such procedures presently utilized in all slander cases, such as specific pleading requirements, motions in limine, and higher degrees of proof, such as a clear and convincing evidentiary standard. Ultimately, the Court’s position is that it is better to let certain wrongs go unredressed, for the “greater good.”

Chief Justice Warren and Justice Douglas in their dissent, noted that the principal opinion claimed to have conducted a balancing of evils akin to Learned Hand’s Gregoire opinion. The dissent reasoned, however, that the ultimate decision is not one of balance. The standard set forth is so unduly vague that it cannot be applied and will therefore serve no purpose. On the other end of the scale, the individual rights of the defamed respondent have been annihilated.

Absolute privilege used to be an affirmative defense. One must have established the elements in order to invoke the immunity. The principal opinion could not say that the act was not within the official’s discretion. Yet Congress does not delineate the power to issue press releases. Thus, an official cannot know whether she can issue a press release until a court determines if such a release is within her discretion.

In addition, the principal opinion does not hold that publication was within Barr’s discretion; it merely states that the Court cannot say that publication was an abuse of discretion. This creates a presumption that a plaintiff must rebut, contrary to the affirmative nature of the defense.

Executive immunity has historical roots in the military. In Sutton v. Johnstone, a suit brought in the Court of the Exchequer was dismissed, as it was between military officers. The court stated that the heat of battles and situations in which military men are involved are extraordinary. Therefore, vindication should come through acquittal if the suit is ill-founded.

But what condition will a commander be in, if, upon the exercising of

295. Id. at 576.
296. Id. at 578.
his authority, he is liable to be tried by a common law judicature?

... The person unjustly accused is not without his remedy. He has the properest among military men. Reparation is done to him by an acquittal. And he who accused him unjustly is blasted for ever, and dismissed the service.298

The principal opinion omits another important interest. Just as the government might desire the freedom to inform the public of government actions without fear of suit, so the public needs the freedom to criticize its government without fear of slanderous retorts by officials, immune from liability. It will take a brave citizen to criticize the government, knowing reprisals may come uninhibited by judicial redress. This is a much more serious danger than the possibility that an official may have to defend the occasional suit.

As such, the principal opinion weakened another great public interest: honest and open discussion and criticism of our government. Had Congress intended to afford absolute immunity to officials, it could have done so, but it has chosen not to.

In Briscoe v. LaHue,299 two suits were combined for appeal. In the first, Briscoe was convicted of burglary, based on partial fingerprints which LaHue had testified were the petitioner’s. However, the facts later revealed that the fingerprint evidence was not conclusive: over five hundred people in the area could have had the same fingerprint pattern as the evidence presented.300

The second case involved Vickers and Ballard, who were convicted of sexual assault. Officer Hunley testified that the two defendants’ stories were so similar, that they must have been created and memorized by the accused prior to being arrested.301

Both cases were presented under the rubric of Section 1983, alleging due process violations by state officers’ perjury as trial witnesses. The Court considered whether Section 1983 creates a damages remedy against police officers for their testimony as witnesses in a trial proceeding.302

The function of the court, rather than the status of the defendant who was a witness in a judicial proceeding, is the focus for determining

298. Id. at 1246.
300. Id. at 327 n.2.
301. Id. at 327.
302. Id. at 335.
immunity. It is the underlying policy of getting to the truth that mandates immunity for witnesses.

Thus, that the police officer has an interest in gaining conviction may be relevant to the plaintiff's interests. However, the policies of advancing the functions of the judicial proceeding outweigh consideration of individual interests. "'[T]he claims of the individual must yield to the dictates of public policy, which requires that the paths which lead to the ascertainment of truth should be left as free and unobstructed as possible.'"\(^{303}\)

All testimony of private party witnesses in open court is beyond the application of Section 1983. Section 1983 does not enlarge or reduce the common law of torts. Judicial officers, prosecutors and lay witnesses were absolutely immune at common law. The Court did not distinguish between a private witness and a police officer when considering whether the latter should be given immunity for trial testimony. Either a police officer is a private party, beyond the scope of Section 1983, as a trial witness, or the police officer is a judicial officer, given the same immunity as other judicial officers, i.e., the judge and prosecutor. Section 1983 does not carve out an exception for allowing a damages suit against police officers testifying in open court.\(^{304}\)

The dissent claimed that the majority misread the statute. The statute states on its face "every person," under which a police officer undoubtedly fits.\(^{305}\) Absolute immunity vitiates every purpose Congress intended by the statute, if "every person" is to be construed as not meaning every person. Congress intended to create a damages cause of action when a person's federal rights have been violated under color of law. The history of the statute shows it was intended to broaden remedial goals, not restrict them.

Contrary to the majority opinion, the dissent asserted that this statute was intended to create remedies, not codify the common law. Different considerations should apply when federal rights are at stake. Using principles governing private parties is inappropriate where state officials violate federal rights. Such an extension of absolute immunity ought only to be granted under the most convincing showing of necessity.\(^{306}\)

Finally the dissenting opinion argued that the credibility of a police officer at trial, cloaked with the authority of the state, does put the police

\(^{303}\) Id. at 332-33 (quoting Calkins v. Sumner, 13 Wis. 215, 220 (1860)).

\(^{304}\) Id. at 336.


\(^{306}\) Id. at 350.
officer in a different category than the ordinary private party. Additionally, due to the relationship between police officer and prosecutor, the threat of perjury prosecution is virtually nonexistent for a police officer, as distinguished from an ordinary citizen.

Moreover, the risk and cost associated with retaliatory suit for testimony is greater for the private citizen. The officer normally has an interest in gaining a conviction. Therefore, the notion that he might shade his testimony in favor of the defendant is largely spurious. Likewise, the state officer will likely have counsel provided for his defense from a frivolous suit when testimony occurred in the line of duty. Thus the burden on a police officer is not so great as to require absolute immunity, or any immunity for that matter, once proper enforcement properly chastises the filing of a spurious claim.  

C. Providing More Equitable Results Under the Current Court-Created Immunity: Considering Individual and Governmental Interests, and Granting Qualified Immunity

Why should there be even a “qualified” immunity? Defining the term and applying it to the multitude of scenarios, e.g. “good faith,” “accident,” “willful,” is an exercise in futility since all remain accountable. What valid argument is there that a judge who willfully wrongs a party should not have to pay?

In White v. Frank, the court danced around the immunity concept to such a degree as to make the opinion farcical. The distinction drawn upon the type of activity by a state police officer to decide whether the action was absolutely immune or only qualified, might have been written for a comedy show. In Pulliam v. Allen, the Court limited a judge’s absolute immunity to a qualified immunity when the claim alleged a constitutional violation and prospective relief. In Pulliam, Richmond Allen was arrested for using abusive and insulting language, a nonjailable misdemeanor. Because he was unable to post bond, he was put in jail for fourteen days. Allen was convicted, but the conviction was later reversed. Jesse Nicholson was also incarcerated for failure to post bond. He was arrested for public intoxication and jailed four times in two months, for two to six days at a time.

307. Id. at 367-68.
310. Id. at 525-26.
apartment without a warrant or probable cause. They arrested Bivens, handcuffed him in front of his wife and children, and searched the entire apartment. The plaintiff was then booked, interrogated, and strip-searched. Bivens brought suit alleging violations of his constitutional rights under the Fourth Amendment.

The Supreme Court held that a claim of damages arising out of a violation of Fourth Amendment rights may be brought against federal agents acting under color of law. The Court reasoned that the violation of constitutional rights in this case is not the same as a common law claim for invasion of privacy.317

The Fourth Amendment was adopted for the protection of private individuals from the invasions of government; state or federal. It does not matter what the claim is, if private citizens had committed the act. The Fourth Amendment contains independent limitations upon the exercise of federal power. Where legal rights are invaded and a federal statute granted the right to sue, the courts may make use of all available remedies to right the wrong.318

Justice Burger dissented, stating that Congress ought to adopt an administrative remedy that affords compensation and restitution for persons whose Fourth Amendment rights have been violated. He argued that a new statute should contain: (1) a waiver of sovereign immunity as to illegal acts of law enforcement officials committed in the performance of assigned duties; (2) damages against those violating the Fourth Amendment rights; (3) quasi-judicial tribunal to hear all claims under the statute; (4) the statute ought to be in lieu of the exclusion of evidence in criminal proceedings obtained in violation of the Fourth Amendment; and (5) a provision eliminating the exclusionary rule; no evidence ought to be excluded, even if unlawfully obtained, if otherwise admissible.319

In Scheuer v. Rhodes,320 the petitioners were personal representatives of the estates of students who were killed at Kent State University. They brought a Section 1983 claim against the Governor, the Leader of the Ohio National Guard, various officers and enlisted members of the Guard, and the University President for intentionally, and recklessly causing an unnecessary guard deployment on the campus and ordering the Guard members to perform allegedly illegal acts resulting in the students' deaths. The district court dismissed the case because the

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317. Id. at 394.
318. Id. at 396.
319. Id. at 422-23.
Allen brought suit against the state magistrate under Section 1983 of the Civil Rights Act, for violation of his constitutional rights. Nicholson intervened as a party plaintiff. The district court found for the plaintiff and enjoined the magistrate from jailing the accused for failing to post bond when the offense was nonjailable. The Court then assessed plaintiff's fees and costs against Magistrate Pulliam.311

The Supreme Court held that judicial immunity is not a bar to the awarding of attorney fees pursuant to Section 1983 against a judicial officer acting in his judicial capacity. The legislative intent of Section 1983 is clear: attorney fees are proper when relief is granted against officials who are immune from damages awards.312

The Court went on to state that judicial immunity is a common law principle. Allowing injunctive relief against judicial officers did not have a chilling effect on the administration of justice in the days of Lord Coke, nor should it today. None of the seminal common law opinions granted immunity from injunctive relief, nor has this Court or seven of the circuit courts done so. Additionally, the limitations of injunctive relief, irreparable harm and inadequate remedy at law severely curtail the threat of harassment of the judiciary. Therefore, judicial immunity is not a bar to prospective injunctive relief against a judicial officer acting in her judicial capacity.313

As to whether attorney's fees were proper, the Court stated that it is for the legislature to decide, in light of Sections 1983 and 1988. The legislature chose not to exempt the judiciary from Section 1988. There is a presumption that the statute is based on common law immunities, and that the legislature was aware of the common law. In fact, the legislative history indicates that Section 1988 grants the right of attorney's fees where a proper claim against any official was made when the defense was immunity from money damages. The Court stated that Congress's intent could hardly be more plain.314

Another example of prohibited conduct would be Malley v. Briggs,315 which safeguards against unconstitutional conduct absent a valid warrant application. In Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics,316 six federal agents entered into Bivens'
individuals were being sued in their official capacity and therefore the actions were barred by the Eleventh Amendment. The court of appeals affirmed and stated the alternative ground that executive immunity was absolute and barred the action. A unanimous Supreme Court, per ChiefJustice Burger, reversed stating: (1) the Eleventh Amendment does not bar an action against a state official charged with depriving a person of a federal right under color of state law; and (2) the immunity of officers of the executive branch of a state government is not absolute but qualified.\textsuperscript{321}

In \textit{Butz v. Economou},\textsuperscript{322} Economou was the president of an organization conducting business under the auspices of the Department of Agriculture. He criticized the agency in an attempt to initiate reforms of the Commodities Exchange Authority. The Department subsequently brought administrative charges against Economou’s company. Economou brought suit, alleging that the agency continued a campaign of disparagement against him.

The Supreme Court held that executive officials are only entitled to qualified immunity for acts done in the line of official agency duty. But where the functions are sufficiently characteristic of judiciary and prosecutorial roles, absolute judicial immunity will be available. The Court stated, “a federal official may not with impunity ignore the limitations which the controlling law has placed on his powers.”\textsuperscript{323}

Any state or federal official who acts outside his authority will be held liable. His acts are not authorized by controlling law. The burden is on the official to show his acts are within the granted authority, in order to have the immunity. The Constitution imposes restraints on federal executive officials, just as it does on state executive officials. Absent legislative initiative, there is no rational basis on which to grant greater immunity to federal executive officials.\textsuperscript{324} The Court appeared to return to immunity as an affirmative defense in \textit{Butz}.

No man in this country is so high that he is above the law. No officer of the law may set that law at defiance with impunity. All the officers of the government, from the highest to the lowest, are creatures of the law, and are bound to obey it.\textsuperscript{325}

\begin{footnotes}
\item[321] \textit{Id.} at 248.
\item[323] \textit{Id.} at 489.
\item[324] \textit{Id.} at 506.
\item[325] \textit{Id.} (quoting United States v. Lee, 106 U.S. 196, 220 (1882)).
\end{footnotes}
Much of the current discussion relating to judicial immunity sometimes extends to non-judicial government agents on the basis that their acts have led to a crazy quilt patch of decisions bringing to the resolution of the immunity issue the same enlightenment as the Internal Revenue Service’s rules bring to the Internal Revenue Code.326

326. In Walden v. Wishengrad, 745 F.2d 149 (2d Cir. 1984), the court extended the reasoning of Briscoe v. LaHue, 460 U.S. 325 (1983) (finding that witnesses and other persons considered integral parts of the judicial process are entitled to absolute immunity), as did the court in Kurzawa v. Mueller, 732 F.2d 1456 (6th Cir. 1984), to attorneys representing the county in child custody cases and to psychiatrists and psychologists involved in examining children in paternity activities. That this could encourage such individuals to try out unproven social theories and lead to boundless damage to the individuals seems quite apparent according to recent media reports. The editors of CIVIL ACTIONS AGAINST STATE GOVERNMENT: ITS DIVISIONS, AGENCIES AND OFFICERS (Wesley H. Winborne et al. eds., Supp. 1992) have well summarized the current maze presented by recent judicial opinions in this area:

Absolute immunity attached to a prosecutor in an action alleging that the prosecutor failed to stop coercive tactics by the police and participated in their efforts to coerce a confession. Since the police had arrested the defendant, conducted a lineup, and obtained the confession before the prosecutor became involved, and since the prosecutor’s function in talking with the defendant was to review, approve, and issue charges the police were seeking, the prosecutor’s conduct was involved with the initiation of a prosecution and thus was protected by absolute immunity. Hunt v. Jaglowski, 926 F.2d 689 (7th Cir 1991), 2 reh den, en banc 1991 US App LEXIS 7556 (7th Cir 1991).

... [Another prosecutor allegedly presented misleading evidence] which resulted in the issuance of a warrant to search the plaintiff’s home. ... [T]hose actions clearly involved the prosecutor’s role as an advocate for the state. However, the prosecutor had only qualified immunity for providing legal advice to police officers that they could question the plaintiff under hypnosis and that they had probable cause to arrest the plaintiff, because that conduct did not involve the prosecutor’s role in judicial proceedings. Burns v. Reed, 111 S.Ct 1934, 114 LE2d 547 (1991).

The district court properly dismissed an action against a county sheriff under 42 USC §1983 alleging that the sheriff’s failure to press criminal charges against officers who assaulted the plaintiff deprived the plaintiff of his constitutional rights. Even if the sheriff had the authority to decide whether or not to pursue criminal charges, the decision to file or not to file charges is an integral part of the judicial process and is subject to absolute immunity. Oliver v. Collins, 904 F.2d 278 (5th Cir 1990).

A prosecutor is absolutely immune for conducting a pretrial press conference to announce an indictment when the only injury alleged to have been caused by the press conference is that it prejudiced the defendant’s chances to obtain bail or obtain a fair trial. A prosecutor is also absolutely immune for presenting the case to a grand jury and preparing expert testimony for trial. A prosecutor has only qualified immunity, however, for participating with the police in a physically coercive interrogation of a suspect before trial. Buckley v. Fitzsimmons, 919 F.2d 1230 (7th Cir 1990).

An attorney for the department of human services who filed an application for a child custody order was not entitled to absolute prosecutorial immunity even though she was functioning as a prosecutor, because she was acting without any color of authority and was attempting to supersede the prosecutorial discretion vested in the district attorney’s office under state law. Snell v. Tunnell, 920 F.2d 673 (10th Cir 1990) cert den
CONCEPT OF IMMUNITY


The alleged violation of state law by disclosing secret grand jury proceedings does not state a claim under §1983. The plaintiffs are required to show a violation of their civil rights by the disclosure rather than the violation of the state statute. Rose v Bartle, 871 F2d 331 (3d Cir 1989) cert den 115 LE2d 1007, 111 SCt 2839 (1991).

The actions of a prosecutor are not subject to absolute immunity when undertaken prior to the commencement of judicial proceedings. Actions in approving an illegal photo lineup and in assisting in the preparation of affidavits for search warrants, arrest warrants, and nontestimonial investigative examinations are subject only to qualified immunity. The activities are more closely related to that of the investigative officer in a police examination and provide none of the safety factors involved in a judicial proceeding. Absolute immunity is justified once criminal proceedings have been initiated, since the charged party is apt to be in a vindictive mood, whereas the investigative procedures are subject only to qualified immunity due to lack of judicial safeguards and lack of knowledge of the activities by the affected party. Higgs v Dist Ct for Douglas Cty, 713 P2d 840 (Co 1986). See also Joseph v Patterson, 795 F2d 549 (6th Cir 1986).

The decision not to prosecute as well as to prosecute is a quasi-judicial decision subject to absolute immunity. The decision is discretionary and not compelled by any particular statute or legislative mandate, and within the sole powers of the prosecutor. Wellman v State of West Virginia, 637 FSupp 135 (SDWV 1986).

A county is not susceptible to suit for malicious prosecution under §1983. The county enjoys the same prosecutorial immunity as the county attorney in criminal actions filed. The fact that sovereign immunity has been waived does not affect the prosecutorial immunity. Ronek v Gallatin Cty, 740 P2d 1115 (Mt 1987).

An allegation of failure to properly investigate the charges before deciding to prosecute and in deliberately slowing the timetable for prosecution are part of the “presentation of the state’s case.” As such, the absolute immunity cloak for a prosecutor applies to the §1983 claim. Stefaniak v State of Michigan, 564 FSupp 1194 (WD Mi 1983).

The immunity afforded prosecutors applies to a claim of attempted bribery to procure false testimony. The acts occurred during the prosecution of the case rather than during the investigation. Immunity of the prosecutors also applies to the county which has no direct involvement with the prosecutor. The county cannot establish a policy or practice for the prosecutor who is acting on behalf of the people of the state. Stokes v Chicago, 660 FSupp 1459 (ND Il 1987).

Members of a state medical board were protected by absolute immunity for their actions in revoking a physician’s licenses. The board members weighed evidence and made factual determinations like a judge, and the presence of procedural safeguards such as the adversarial process, the use of oral and documentary evidence, and judicial review, also made the board’s duties similar to those of a judge. Bettencourt v Board of Registration in Medicine, 504 FSupp 772 (1st Cir Mass 1990).

Expert witnesses testifying for the state in a criminal trial have absolute immunity in preparing their testimony even if the witnesses deliberately mislead the court or commit perjury or slander, as long as they do not hide any evidence. Buckley v Fitzsimmons, 919 F2d 1230 (7th Cir 1990).

The superintendent and a psychologist at a state mental facility were entitled to absolute quasi-judicial immunity for confining the plaintiff in the facility pursuant to the facially valid order of a state court judge, even if the order violated several state statutes. The order was facially valid because the state judge had the authority to order the plaintiff confined for mental evaluation and the staff of the facility had the authority to admit a patient for that purpose. However, since the order did not dictate any specific
While Congressional waiver begs the question of whether immunity is constitutional in the first place, the action nonetheless demonstrates that the federal government has the power to eliminate this unjust system without the burden of constitutional amendment. Both the Administrative Procedure Act\textsuperscript{327} and the Federal Torts Claim Act\textsuperscript{328} are statutes in which the government partially waived its immunity to suit. Section 1983 of the Civil Rights Act\textsuperscript{329} and the \textit{Bivens} decision are further examples of the federal government allowing suit against itself where a constitutional violation is alleged. These partial steps could be completed by a single act of Congress, thus ending the unjust results created by immunity.\textsuperscript{330}

\section*{D. Eliminating the Sovereign Immunity Concept: A Rational and Just System of Compensation Without Fettering Legitimate Government Activity}

Sovereign immunity is, at the very least, outdated in a modern society. Accountability and responsibility are the tenets of our government. The existence of immunity in any form, whether it is absolute or qualified, is simply a contradictory position.

The real question that must be answered is not which form of immunity should exist, because immunity should not exist at all! Instead, the answer must be in the determination of how the courts will promote the right of citizens to bring a suit against the government, which will further the ideal of justice for all, and simultaneously prevent an undue burden from falling on the shoulders of government. Historically, there was no answer to this question, and so the feudal concept of sovereign immunity continued to be used. Now though, society and the courts are placement within the facility, the officials were not absolutely immune for placing the plaintiff in a maximum security ward, but had only qualified immunity. \textit{Turney v O'Toole}, 898 F2d 1470 (10th Cir 1990).

Child welfare workers who investigate claims of child abuse before a petition for juvenile proceedings is filed in court are entitled to only qualified, not absolute, immunity because such activities are not integral to the judicial process but are more closely analogous to police work. \textit{Snell v Tunnell}, 920 F2d 673 (10th Cir 1990) cert den \textit{Swepston v Snell}, 111 Sct 1622, 113 LE2d 719 (1991).

\textit{Id.} at 66-68.

more advanced. New methods that can be used to redress governmental wrongs are available to adequately manage suits against government officials.331

Supporters of the immunity doctrine often argue that elimination of sovereign immunity will bankrupt many local government bodies and therefore its continuance, while problematic, is more palatable than the destruction of school systems, park districts, and the like.332 Of course, the first part of this argument does have some merit. If the government and its agents were placed on the same level as an average citizen and were opened up to suit, they would be required to pay for the injuries for which they were responsible. Furthermore, if they caused enough of these injuries, their continued existence could be jeopardized.

As a preliminary matter, we, as a society, must decide whether this is really an undesired result. Do we want to cloak institutions and individuals who are responsible for injuries with protection from suit? Will this protection give them reason to improve their conduct? Even if we conclude that such a system would victimize innocent taxpayers in addition to those responsible for the government's conduct, the question remains: given the would-be plaintiff, injured at the hands of the government, and the taxpayers who funded that government, who should pay for the cost of the injury?

The choice could be made easier if our system would treat suits against the government differently than suits between private parties. Like the Claims Court, this public law system should limit the fact finder to a judge or hearing officer. This would not only add to the system's efficiency, but it would reduce the cost of litigation and eliminate the enormous, and often unjust, jury verdicts that are sometimes delivered in our legal system. In addition, the public law system should disallow punitive damages.333 Since the "owners" of the government are the innocent citizens who have limited opportunity to control the day to day operations of the body, punitive damages would not have the same effect they do on private companies. The punishment component of punitive damages would not be inflicted on those who could solve the problem.

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331. See discussion infra Part VI.
333. Punitive damages are an oxymoron since they smack of "criminal" penalties. If used at all, the proceeds should go to the People and should not constitute an unconscionable windfall for an individual litigant who should have been made whole by the awarding of compensatory damages, including attorneys fees.
Finally, the system must impose harsh penalties on both litigants and lawyers who bring suits without merit against public officials. The efficient operation of government must not be deterred by frivolous litigation.

Many countries currently recognize a distinction between public and private law; in fact, it is the norm. For many reasons, the problems of immunity among them, it is time for us in America to seriously consider the desirability of adopting that concept.

VI. SUITS FOR REDRESS OF GOVERNMENTAL WRONGS: BEST HANDLED BY AN ADMINISTRATIVE COURT SYSTEM

A system for administering redress to individuals for governmental wrongs must be expert, efficient, impartial, and must not add to the federal court system case load or allow excessive awards above what is needed for redress against the government.

Among the many possible systems for dispensing redress to individuals for unlawful government actions, a modern administrative court system best fills the requirements described above. It is time to consider adopting the notion of public versus private law claims.


336. An executive summary of this proposal published in 1987 stated that:
   There is a serious need for change in the field of administrative law, as little has been done in a constructive way to achieve a logical and cogent reform. Changes have largely been the result of patchwork reaction to pressure by various interest groups with short-term interests resulting in reform falling far short of creating a workable system.
   The proposal advanced here entails the removal of most of the current Administrative Law Judges to a new Administrative Court System. Under this scheme, the Administrative Law Judges would function in their judicial capacity by having original jurisdiction over all properly defined adjudicatory matters and appellate jurisdiction over agency actions upon appeal. This will resolve the conflicting role now played by Administrative Law Judges: acting as trial courts within agencies that function as appellate bodies.
   Under this proposal it is sufficient, at the agency level, to have a hearing before a hearing officer. After the agency’s decision, an aggrieved party should be able to file an appeal to the Administrative Court System. The administrative action will be reviewed by a court that has a great deal of expertise not often available in federal courts.
   The proposed Administrative Court System would consist first of Administrative District Courts, one for each federal judicial district, to which an appeal from administrative action would be brought as of right, and where agency enforcement actions could be initiated.
   Secondly, a Federal Circuit Court of Administrative Appeals would be created, one for
All suits by citizens against the government should be handled by administrative courts. This avoids the problem of "deep pockets" and returns government to its democratic roots by rejecting the "immunity" defense.

There is an undisputed need to completely overhaul the American administrative law system, as the present manner of adjudicating claims within the present administrative framework is wasteful and ineffective. The patchwork system developed over the past fifty years is corrupted by each federal judicial circuit, in which all appellate authority would be vested. This court would entertain appeals by petition for certiorari in rule and ratemaking cases and as of right in adjudicatory matters disposed of by the lower administrative court. This court would consider questions of law only.

Finally, at a third level, the Federal Supreme Court of Administrative Appeals would entertain appeals by way of certiorari. This court would determine, with finality, all issues arising from cases below.

The Federal Supreme Court of Administrative Appeals would sit en banc only to resolve conflicts within its own panels or to ensure uniformity between the rulings of the lower administrative law courts, and to rule on constitutional issues raised by the parties. With the exception of constitutional issues where an appeal to the Supreme Court of the United States would be available, all of the decisions of the Federal Supreme Court of Administrative Appeals would be final.

The proposed Administrative Court System would lead to a better formulation of agency standards and policies, since there would be more uniformity in the process when handled by judges whose expertise in administrative law gives them the necessary perspective to handle the cases in a manner consistent with their commitment to this specialized field. The Administrative Court System would also provide a means of avoiding "intellectual stagnation" which inevitably occurs when one's attention is focused on a single subject matter for any length of time: Judges sitting on the Administrative Court would be reviewing cases from several agencies.

The shift of final authority from the agency to an appeals review board would give agency heads more time to concentrate on non-adjudicatory matters. An Administrative Court System would completely remove the appeals process from agencies and house it in a single judicial organization operating within clear procedural guidelines and mandated to do justice.

The creation of an Administrative Court System will improve the administrative process and will also result in the redistribution of the current judicial workload by dramatically lightening the burden of federal courts, including that of the Supreme Court, without arbitrarily curtailing the rights of citizens to be heard by the highest tribunal of the land when warranted.

This proposal for a separate administrative law court system preserves the integrity of the administrative process as it was originally intended to function. It would re-establish the agency as the responsible source of decision-making and assign to the Administrative Law Judges their proper role as reviewers of agency action.

[This enlarges the proposal in my working paper to include all "public" law controversies.] In that I define "public law" as all claims against the government and its employees, including judges and prosecutors. All other cases and controversies involving private parties are within the jurisdiction of the regular court system.

Id.
self-interest and has digressed so far from its originally intended function that the system is incapable of consistently administering justice in an adjudicatory capacity.\(^3\)

In order to return the function of agencies back to rulemaking, ratemaking and compliance-oriented tasks, and reduce the tremendous burden presently on our federal court system, it is herein proposed that a separate federal administrative court system be implemented. These administrative courts would also dispose of citizens’ suits against the government in a more cost-efficient, expedient manner.

To remove the burdens of adjudicatory functions and appellate reviews from the agency heads would free the agency heads to concentrate on agency matters, rather than administering individual grievances. Additionally, the problem of prosecutorial and hearing functions being handled within a single entity and the accompanying due process dilemmas would be resolved.

The proposed method for adjudicating agency matters begins within the agency itself. Consistent with Mathews v. Eldridge,\(^3\) a grievance would be brought before an agency hearing officer, who would make findings of fact and would then recommend a decision to the agency. Based upon the whole record, the agency would accept or reject that recommendation. The agency decision would be final and appealable to the Federal Administrative Court System.

Note that there are no pure adversarial roles involved in the proposed hearing process. There is a fact-finding function that is comprised of both adversarial and inquisitory methodology. One comes before the agency with its case and a record is developed. No immediate, adverse position is therefore taken by the agency. Thus the need for oral argument or testimony may be greatly limited. A record may be developed based on the written word, perhaps as limited as the exchanging of correspondence.

The benefits of this proposal are many. The agency does not act as an appellate body, thus a grievance ripens for appeal rather quickly. Administrative agencies need not hear and reheat the same matter time and time again, only to reach the same conclusions before the matter can be dispensed with. Agencies may become less top-heavy, with less need for “appellate” agency officers. Additionally, intricate legal arguments

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beyond the purview of an inexperienced or narrowly focused Administrative Law Judge would be quickly brought before judges with a breadth of interagency experience.

This proposal may seem somewhat oversimplified. However, we in the academic arena, with a critical, theoretical perspective, tend to lose sight of the basic premise that simplicity can be rather effective. Many of the intricate decisions involving due process, separation of powers, and agency discretion would be eliminated by this proposed system of agency adjudication.

A. The Proposal: Creating an Administrative Court System Covering Both Agency Action and Governmental Tort or Contract Claims

Administrative Law Judges ("ALJs") would be removed from the agency to the first level of appellate review of agency decisions; the Federal District Administrative Court. The ALJs would not be singularly attached to individual agencies; but note that this is not a separate corps of ALJs, another patchwork remedy currently suggested, but an entirely separate system of appellate procedure for administrative review. There would be no de novo review at this stage, and additional levels of administrative review would be created above the ALJs.

The breadth of experience and knowledge of judiciary functions, manners in which different agencies work, and legislative intentions of the various agencies will improve the ability of ALJs to make sound judicial decisions. Presently, ALJs are unduly limited in their knowledge of the law and the inter-working of the various branches in the administrative agency context.

The distinction between rulemaking and adjudication becomes apparent under this proposed system; at the agency stage, rulemaking continues beyond the initial decision. This is as originally intended; legislative delegation of rulemaking power is properly made to the agency, while the legislative creation of a federal court system to adjudicate claims against the federal government's agencies is properly a product of Article III.

Under the proposed system, agencies attempting to enforce promulgated rules and regulations will be able to more effectively deal

339. A comprehensive discussion of various proposals to create an independent corps of administrative law judges, a very different concept from the one advocated in this Article, can be found in de Seife, *supra* note 337, at 237-57. Similar proposals are currently being considered by Congress and suffer from the same weaknesses as discussed in that article.
with violators on both micro- and macro-management levels. Individual-
ly, alleged violators will be cited by the agency. If this citation is
contested, enforcement shall be sought via the Federal Administrative
Court System. No more will agencies have to pretend to be fair and
impartial; given the medial role of the administrative judiciary, the
agency can now step fully into this prosecutorial, enforcement role.

In the broader, macro-management context, the inconsistencies of
one agency decision differing from another based on factual or policy
decisions will be a thing of the past. The federal administrative courts
will bear the burden of consistency, leaving the agency to enforce or to
avoid taking action as it chooses in its traditional role as prosecutor.
Additionally, over the course of a newly established stare decisis of the
administrative court system, interested parties will have an additional
source with which to anticipate agency ruling and/or guide their actions.
Rules, white papers and notices of the agency in addition to decisions of
a judiciary sitting independent of that agency will undoubtedly enhance
and improve the predictability of outcomes, thereby reducing litigation
or prosecution of matters governed by the agencies.

Claims against the government, i.e., tort claims of any kind,
involving the government or any of its agents, would be processed in
accordance with arbitration rules by now familiar to the bar.

B. The Proposed Hierarchical Structure of the Administrative
Law Court System

The proposal for a federal administrative judiciary entails three tiers.
As mentioned, the ALJs would sit as the first appellate court from
agency determinations. At this level, there would be a District Adminis-
trative Court for each present federal district. The number of judges in
each district would depend on the workload within that district. Appeal
to this court from the agency would be a matter of right, and agencies
would come to this court for enforcement action initiation.

The second level of the administrative judiciary would be a Federal
Circuit Court of Administrative Appeals in which all appellate authority
would be vested. There would be one circuit administrative court for
each present federal circuit, with at least three judges for each circuit.

The third tier of the proposed administrative judiciary would be the
Federal Supreme Court of Administrative Appeals, which would only
hear cases by writ of certiorari. The Supreme Court of Administrative
Appeals would be comprised of seven panels of three justices, similar to
the federal circuit system. This court would also hear appeals when
Circuit administrative courts are split on issues. Appeal from this court would be to the United States Supreme Court, but only on constitutional issues.

Only questions of law would be heard in the administrative appeals system. Where constitutional issues are dispositive or controlling to the case, rather than going through several appeals on all the issues, an ALJ, now being an Article III judge, can initially hear and decide all constitutional issues. Thus, interlocutory appeals can go up through the administrative judiciary, even to the U.S. Supreme Court by writ of certiorari, in order to effectuate efficiency. The issues will be resolved by the higher courts without relitigating issues capable of resolution at the ALJ level.

As to ratemaking, which is primarily legislative, agency discretion would not be invaded. While certiorari may be made available to the circuit administrative court for ratemaking cases, the circuit court would remand if the agency rate was rejected, as an adjudicatory matter. Where the rate is made as a rule, it would be beyond the province of the judiciary to overturn the agency, as that is a legislative matter.

C. Advantages of the Proposed Administrative Law Court System

The administrative process will be simplified for the agencies and interested parties. Multiple appeals within the agency will be avoided and the final decision will come down after much less dealing with the agency itself. This will allow agencies to be more productive and will eliminate much unnecessary legal and administrative work for industry and other interested parties.

The judicial role will become more traditional, yet by the nature of an administrative court system, we will maintain the expertise and specialized role necessary for the ALJ. Uniformity and continuity will coincide with specialized agency adjudication. This is the ultimate goal of any ALJ.

The ex parte problems of interagency adjudication will be eliminated. Controlled interests, agency policy compromise and multi-role playing among agency members will no longer adversely impact administrative justice beyond the initial agency action.

By placing all agency appeals under the rubric of a newly created federal judiciary, the needless recreation of an appellate system within every agency will be utterly unnecessary. This agency review scheme costs too much, is burdensome on the agencies, tends to create inconsistencies within government and does not further the agencies’ missions.
Implementation of this proposal will also greatly benefit our present federal judiciary: the circuits are being increasingly burdened with dockets full of administrative appeals. The creation of an administrative appellate judiciary will lighten the load for agencies and the federal bench as well. The lightened load of the court system would also remove one of the mainstays of support for the granting of immunity. This will certainly shift the balancing evils in favor of governmental accountability.

VII. Conclusion

After over four decades of tinkering with the administrative process we realize that, as we look at the ridiculously complicated and ponderous machinery resulting from ad hoc reforms promoted primarily by private adversarial interests, there has to be a better way of getting things done. The creation of an Administrative Law Court system is the appropriate way.

Agency fact finders would become part of an integrated agency system that makes sense. Labeled as "hearing officers" they would be employees of the agency for which they perform as its ears and eyes. ALJ's, on the other hand, as reviewers of agency action, and having an original adjudicatory role in all claims and enforcement activities involving an agency, would be members of the court system advocated herein.

This proposal for a separate Administrative Court System would preserve the integrity of the administrative process as it was originally intended to function. It would reestablish the agency as the responsible source of decision-making in consonance with the Congressional mandate and assign to the ALJs their proper role as reviewers of agency action.

The Administrative Law Court proposal warrants serious examination in that it could well offer the best solution to date for procedural delay and confusion now marring the administrative process. It would also ease the current backlogs in the federal courts.

This Article puts forward a proposal for the revamping of our present, bankrupt administrative law system based on the concept that a scheme cannot function properly if we have conflicting statutory constructions made less intelligible by different court decisions often rendered by judges not familiar with the peculiarities of the administrative process. Changes, in order to be successful, should be based on logic, grounded on sound historical concepts, and respond effectively to the various reasons which compel the move toward reform.
The adoption of a separate Administrative Court System should not entail the hiring of any more judicial personnel than is currently contemplated under various proposals.\(^4\) In fact, it is possible that this reform might result in a lesser number of personnel being required. The concrete projecting of the required personnel needs, in order to implement the proposed reform, can be postponed until acceptance of the principle of reform outlined herein.

The procedural rules of these administrative courts should, of necessity, be less formal than the ones governing the conduct of the civilian courts, thus opening up this delphic and, at times, fearsome governmental process to public access, permitting a better understanding of government action to those who are affected by it.

Today's administrative law system does not and cannot do the job it is assigned to do. Therefore, it is time to streamline the system so that it can work efficiently and not do violence to the constitutional underpinnings of the administrative process. We must let the agency go back to the task assigned by Congress, and pay more attention to the reviewing process, along with a suitably amended Administrative Procedure Act which would require directness and fairness in administrative procedures. A slavish adherence to the traditional adversary system and a rigid adherence to the separation of powers doctrine are not called for in this context.

The ALJs will finally have found their rightful niche in the American judicial system to everybody's advantage. No longer will they be the judiciary's orphans. The ALJs will be an integral part of the third branch of government, a well-deserved position that has been long overdue.

To sum up, it is time for the United States to live up to the ideals of the Founding Fathers and stop the retrograde course of putting government over the citizens. The main culprit for this decay of the democratic notions of governmental accountability to the people and equality under law is the Supreme Court. The Court has taken over the role of a Constitutional Convention and arrogated unto itself the right to change the Constitution under the guise of "interpretation."\(^3\) The federal government ought to admit that holding onto antiquated notions of sovereignty and immunity is contrary to the spirit of the Constitution and legislate immunity out of existence.

\(^4\) See de Seife, supra note 337, at 248-57.

\(^3\) See supra part IV.C.
Notwithstanding the inapplicability of immunity to a free democracy, one of the most repugnant notions of the current immunity doctrine is its unbridled expansion in America during the twentieth century. While it is undisputed that the origins of the immunity concept came from England, the widespread expansion of the doctrine in this country has certainly surpassed the limited role it played at common law. Originally, the King enjoyed a dual “sovereignty;” he was immune to suit for his executive and legislative functions because he was anointed as “The State” by God and he was immune in his judicial capacity since it was absurd for him to hail himself to court and he was the final arbiter in the matter at hand. Practical considerations soon forced the King to appoint others as judges who “wore his shoes” in solving disputes and sentencing criminals. In that role, these judges asserted that they enjoyed the same immunity as the King. However, other officials in the King’s government were in fact amenable to suit. This was not due to the concern of these bureaucrats for a just system of government, but was instead a logical result of the King’s source of power: they were not anointed by God and could not, therefore, enjoy the royal immunity. Expansion of immunity into these areas in American law is itself a new creation by the Supreme Court, a creation which proves that we can, in fact, break from the common law rather than accepting without thought inapplicable English doctrines.

Many courts have labeled governmental immunity as an inequitable continuation of a historical philosophy of government which is unjust to all concerned. Some have effectively described the sovereign immunity notion as putting public treasury ahead of justice, in effect sacrificing the individual for what probably is a fanciful notion of the impact the removal might have on the public treasury and the continuing effective work of the government.

The recent trend in the United States has been to at least limit, if not

342. See supra part II(A)(1).
343. See supra notes 6-7 and accompanying text.
344. See supra part II.A.1.
abolish sovereign immunity. With many courts abrogating that doctrine whether it was court-created or based on common law, it is time for the Supreme Court of the United States to adopt a similarly enlightened policy and for Congress to adopt a rational and fair system to compensate victims of governmental tort or overreaching.

Grievances between the government and its citizens should be taken care of by an Administrative Law Court System which, additionally, would take care of substantive law problems, thereby freeing the regular courts to take care of criminal and private civil litigation. Justice, if it is the objective of a civilized legal system, cannot be served by evading the Rule of Law and invoking an immunity from governmental tort which smacks of a regal past that the American Revolution was meant to discard.


**A.**

**Agency**

1. (a) Rulemaking in furtherance of Organic Statute - hearings.
   (b) Ratemaking.
   (c) Benefit Determination Claims (e.g. social security, medicare, etc.).

   Hearing Officer sifts claims as does any insurance claims adjuster.

2. Enforcement activities regarding rules and organic law within agency jurisdiction. The agency acts in a prosecutorial capacity.

   All actions are agency actions i.e. agency ascertains facts (the record) with or without benefit of hearing officer. Where the Hearing Officer makes recommendations to Board, these are merely in-house recommendations not a substantive part of the record. The Hearing Officer is an employee of the agency.

**Public Law Adjudication**

1. Any tort or contract claim by one individual or private party against the government or any government unit or any government agent acting in an official capacity or while on duty.

2. Any claim by the government against an individual or private party.

**Administrative Law Court**

1. Appellate review of agency action (i.e. rule and ratemaking as well as benefit determination claims) for consistency with Agency statutory mission; only legal issues are considered; no de novo review of facts.

   If record is incomplete, case is returned to agency for further development. (Appeal as of Right)

2. Original Jurisdiction: All administrative adjudicatory activities in which agency appears in an adversial capacity (including all FOIA litigation).

**Adjudication of Liability Claims**

1. Original Jurisdiction as to both tort and contract claims.

2. Non-jury determination of dispute; akin to binding consensual arbitration; or bench trial.

(Equity Rules)

**Federal Circuit Court of Administrative Appeals**

1. Appeal by petition for certiorari only as to rule and ratemaking cases, as well as benefit determination claims.

2. Appeal as of right all adjudications by the lower administrative court and when constitutional questions are raised.

**Federal Supreme Court of Administrative Appeals**

Petition for certiorari only, in all cases; except, as of right: (1) when conflicts between the federal issues arise, (2) when decisions are final, except for

**Supreme Court of the United States**

Petition for Certiorari

Constitutional Issues Only