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ARTICLE: SOVEREIGN IMMUNITY AND THE RIGHT TO PETITION: TOWARD A FIRST AMENDMENT RIGHT TO PURSUE JUDICIAL CLAIMS AGAINST THE GOVERNMENT

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SUMMARY:
... Among the most remarkable and least understood provisions of the First Amendment, the Petition Clause guarantees the "right of the people ... to petition the Government for a redress of grievances." ... In this subpart, I provide a brief overview of "Crown" or "prerogative" practice in eighteenth century England and its relation to the doctrine of sovereign immunity and the right to petition. ... Second, the early linkage of the petition of right and the doctrine of sovereign immunity gave rise to the lasting and somewhat misleading idea that the Crown was suable only by its own consent. ... For Blackstone, then, the Crown's sovereign immunity remained theoretically intact but yielded as a practical matter to the subject's right to petition the courts of justice for redress of royal invasions of life, liberty, and property. ... In explaining this "necessary and fundamental principle," he first invoked the fiction of the evil minister, noting that government misconduct cannot be charged "personally on the king." ... This Engagements Clause offered modest assurance to creditors of the United States that the new government would not disavow its financial obligations - a strategy consistent with a politics of ratification that depended on the support of the creditor class. ... The law of forfeiture entitled the Crown to claim property owned by those who were adjudged to be traitors, felons, "idiots, lunatics, and infants." ...

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I. Introduction

Among the most remarkable and least understood provisions of the First Amendment, the Petition Clause guarantees the "right of the people ... to petition the Government for a redress of grievances." n1 In this Article, I propose that we interpret the Petition Clause as a guaranteed right to pursue judicial remedies for unlawful government conduct. n2 In particular, I contend that the clause's affirmation of government suability operates as a constitutional antidote to the familiar doctrine of sovereign immunity, which nowadays purports to prohibit the federal courts from entertaining claims against the United States government in the absence of a legislative waiver of immunity that meets a fairly demanding clear-statement requirement. n3 [*900]

My argument rests in roughly equal parts on the text and drafting history of the Petition Clause itself, and on the constitutional context in which the clause appeared. The text and drafting history make clear that the framers of the Petition Clause, including most notably James Madison, deliberately chose to broaden the clause to encompass submissions not only to the Congress of the United States but also to the executive and judicial branches of the federal government. n4 Such a three-branch petition clause was unique at the time it appeared; predecessor clauses in state constitutions entrenched a right to petition only the legislature. n5 On its face, such a broadened right to petition would seem to ensure the right of the people to seek redress from the federal courts as well as from the two political branches of government. [*901]

History and context confirm that the Petition Clause guarantees the right of individuals to pursue judicial remedies for government misconduct. By 1789, the right to petition had long been seen as a cornerstone of Anglo-American jurisprudence and in particular as a solution to the sovereign immunity of the Crown. In the same paragraph in which William Blackstone proclaimed the immunity of the Crown, he also sketched the procedure on the "petition of right," a relatively technical proceeding by which the subjects sought judicial remedies for government wrongdoing through the submission of petitions for redress. n6 Although nominally addressed to the King, such petitions of right (and a host of related proceedings that also began with the submission of petitions) invoked the exercise of judicial discretion and were adjudicated by the courts of justice on legal principles. For Blackstone, as for other British authorities, the right to petition solved the problem of sovereign immunity by assuring the subject access to a remedy for government wrongdoing. n7

My review of early American statutesprovides new evidence that the "petition of right" and the many related British remedies against the Crown that made up the right to petition found their way into the codes of the independent American states. Although many British colonies in North America relied on the legislative petition as an all-purpose [*902] mode of securing the disposition of disputes with the government, many also borrowed British judicial remedies for government wrongdoing. n8 The pace of borrowing picked up after Independence, particularly in the Commonwealth of Virginia. There, in 1785, Madison persuaded the legislature to reenact a provision drafted by his countryman, Thomas Jefferson, that authorized individuals to bring suit on any claim or demand against the Commonwealth by submitting a petition for the redress of grievances to an appropriate court. The Virginia statute, and others like it in New York and Pennsylvania, reflected distrust of legislative adjudication and growing support for an independent judiciary. n9

Similar factors influenced the recognition of the right to petition the judiciary at the federal level. The framers of the federal Constitution created an independent judiciary with jurisdiction over all cases arising under the Constitution, laws, and treaties of the United States. Evidence from the Philadelphia convention suggests that Article III specifically contemplates the suability of the federal government and its officers. n10 Two years later, the framers of the Petition Clause deliberately broadened its text to encompass petitions to the courts of the federal government. The resulting constitutional language resembles that of Virginia's version of the petition of right, and it was adopted by a committee that included Madison shortly after Madison had urged the House to adopt provisions that would secure individual access to the courts for an impartial determination of claims against the government. n11 As originally understood, in short, the Petition Clause appears to establish a constitutional right to pursue judicial claims against the government and its officers.

Such an understanding of the right to petition as a guarantee of government suability represents, to put the matter mildly, a departure from traditional accounts. Most scholars assume that the Constitution fails to address the issue of government suability, an assumption that helps to explain why the doctrine of sovereign immunity has gained so strong a hold in America. n12 Similarly, most accounts treat the Petition Clause as entrenching the right of individuals to participate in the political process free from retaliation or reprisal. n13 Although a few scholars have noted the clause's application to judicial petitions, n14 none have suggested that the clause bears any important relationship to the doctrine of sovereign immunity. As a consequence, my thesis [*903] will require a frank reappraisal of standard accounts of the right to petition and the doctrine of sovereign immunity.

That reappraisal proceeds in two parts. Part II offers a revisionist interpretation of the Petition Clause of the First Amendment that emphasizes its provision for the submission of petitions for redress to the federal courts. Part III offers a revisionist account of the doctrine of sovereign immunity.

II. The Petition Clause as a Guaranteed Right to Seek Judicial Redress

Lacking detailed and illuminating debates, n15 modern readers have relied upon text, structure, and especially history in giving meaning to the Petition Clause. The result has been an interpretation that emphasizes the historic role played by the right to petition in Revolutionary America. n16 As British subjects, the revolutionaries enjoyed a constitutional right, grounded in the English Bill of Rights, to consider their grievances and to petition the Crown for redress without fear of prosecution. n17 Such a right to petition enabled the revolutionaries to [*904] assemble, to criticize the Crown, and to embody their complaints in published petitions for redress - all with explicitly political goals in mind. As a lawful mode of protest, the right to petition gave rise to the freedoms of speech, press, and assembly that appear alongside the Petition Clause of the First Amendment. n18 Leading accounts of the clause thus emphasize its structural and historical connection to cognate First Amendment protections in treating the right to petition as one to participate fully in the political process, free from threats or reprisals. n19

Although such a political process conception captures an important element of the right to petition and enjoys a good deal of support both on and off the Supreme Court, n20 many scholars have criticized [*905] such a conception as incomplete. Noting that it antedated the development of rights of speech and press (which appeared for the first time in the First Amendment), some scholars have argued that the right to petition deserves separate and perhaps more sweeping protection. n21 Other scholars have noted that the right to petition, as a matter of history, entitled the petitioner not only to freedom from retaliation but also to some kind of considered government response or disposition. n22 Finally, some scholars have set out tentative arguments for a judicial conception of the right to petition, building on the fact that the Petition Clause encompasses petitions to all three branches of the federal "government" and thus establishes a right to petition the federal courts. n23 [*906]

This Part extends this judicial conception of the right to petition in suggesting that the Petition Clause guarantees the right of individuals to pursue judicial remedies for government misconduct. First, this Part looks to the British constitution, which recognized that the subject's right to petition the Crown overcame the doctrine of sovereign immunity by enabling the subject to pursue judicial claims in the courts of justice. Second, this Part explores the manner in which such British remedies made their way across the Atlantic and were incorporated into the American practice of government accountability. Third, this Part considers how the assumptions of government suability inform Article III of the Constitution. Finally, after developing this new understanding of the role of the right to petition in the history of government accountability, this Part turns to the text, structure, and drafting history of the Petition Clause itself.

A. The Right To Petition For Judicial Redress in Blackstone'sEngland

Although Blackstone acknowledged that the King could do no wrong, he also argued that the King was subject to the law. n24 Blackstone bridged the gap between these seemingly contradictory claims by distinguishing the ordinary course of the law from the kinds of extraordinary remedies against the government that were available through the submission of petitions for redress to the courts of justice. n25 He admitted that the common law courts lacked the power to redress injuries inflicted by the Crown (for the common law justices [*907] issued writs in the King's name and lacked the power to command the King). n26 Yet Blackstone insisted that alternative remedies were available through "peculiar forms of process, appropriated to the royal prerogative." n27 [*908]

In this subpart, I provide a brief overview of "Crown" n28 or "prerogative" n29 practice in eighteenth century England and its relation to the doctrine of sovereign immunity and the right to petition. First, I provide a summary of prerogative remedies and their two distinctive features: they were typically invoked by way of petition and were invariably controlled by the King's justices rather than the King himself. The rule of law, as opposed to royal whim, largely determined the availability of relief against the Crown. Second, I show that the British constitution was understood to guarantee the subject's right to invoke these rules of law by submitting petitions to the courts of justice. As Blackstone explained, the right to petition for redress of grievances encompassed a right to pursue judicial remedies for government wrongs. [*909]

1. Proceedings Against the Crown

a. The petition of right. Since at least the thirteenth century, requests for relief from government wrongdoing have been cast in the form of petitions for redress of grievances. n30 Beginning with the reign of Edward I, the English Crown encouraged subjects to seek relief unavailable at common law through the submission of petitions for redress. n31 Although some sought the grant of a royal favor as a matter of pure grace, many petitions grounded their claims in legal right. n32 Such "petitions of right" sought royal consent to the litigation of legal claims in the courts of justice, consent necessitated by the inability of the common law courts routinely to entertain suits or proceedings against the Crown. Assuming that the King supplied the proper endorsement ("let right be done to the parties"), n33 the petition

went to Chancery for an investigation. If seemingly well-founded, then the action proceeded to litigation in the proper court with the attorney general appearing for the Crown. n34 The endorsement authorized the court to hear the case, to decide it on legal principles, and to render a judgment against the Crown. n35

Early practice on the "petition of right," which came to be seen as an important element of the common law, n36 included a variety of features [*910] that would later characterize prerogative practice. First, early practice relied on the petition as the initial pleading in applications for relief from government wrongdoing. n37 Second, the early linkage of [*911] the petition of right and the doctrine of sovereign immunity gave rise to the lasting and somewhat misleading idea that the Crown was suable only by its own consent. n38 Third, early practice quickly established the rule that every petition was entitled to an official response. n39 Fourth, the relief available upon a petition of right - a self-executing [*912] judgment that bound the subordinate officers of the Crown - closely resembled other remedies available through prerogative practice. n40

Despite these many similarities, practice upon the petition of right in Blackstone's day differed quite dramatically from that in the early years. Most importantly, we find that the requirement of consent to suit had gradually disappeared. Either a fictional consent was substituted for the genuine consent of the King, or the authority to pass upon the petition was shifted from the Crown to the courts of justice. As the consent became routinized, the courts controlled access to remedies against the Crown through the exercise of judicial discretion. With this shift from royal to judicial control of prerogative litigation, the petition of right fell into desuetude until its statutory revivification under Queen Victoria. n41

b. Monstrans de droit and traverse of office. The transformation of the petition of right into other, more routinely available remedies against the Crown began at an early date. In the fourteenth century, Parliament created the alternative remedies of monstrans de droit and traverse of office to address the perceived unfairness associated with the requirement of a formal request to the Crown for leave to proceed. In simple terms, these new remedies expanded the rights of the subject to make affirmative claims upon property that was owned as a matter of record by the Crown. At common law, the Crown could enter, take possession, and sell an estate following the return of an "inquest of office" n42 that established title in the King. n43 [*913] Though it was available, relief by way of the petition of right came too late to prevent the sale of the land. n44 The remedies of monstrans and traverse enabled the subject to contest the Crown's ownership before any resale took place and did so by abandoning any requirement that the subject first obtain leave from the King to proceed. n45

Although they developed at a time when most disputes involved title to real property, n46 by Blackstone's time the remedies of monstrans and traverse were available in disputes over personal and intangible property as well. Any time the Crown sought to establish its title to property (as in a suit against a Crown debtor on a writ of extent) and chose to proceed by inquest of office, individuals were entitled to assert claims to the property by way of monstrans and traverse. This meant not only that the owner of the property could defend the Crown's claim of entitlement n47 but also that other interested parties (such as competing creditors or mortgagees) could set up their own title in litigation against the Crown. n48 As in other cases to which the [*914] monstrans and traverse applied, these "stranger" or third-party claims went forward on a petition without any requirement of the King's prior consent.

c. Injunctive relief. The broadened availability of relief by way of the monstrans and traverse helps to explain why the Court of Exchequer made injunctive relief available against the Crown in the well-known 1688 case of Pawlett v. Attorney General. n49 In Pawlett, the plaintiff filed suit on the equity side of Exchequer seeking to secure a mortgage interest in property that had been forfeited to the Crown following the owner's attainder for treason. Historically, plaintiffs who sought such relief were required to file a preliminary petition of right. But the court granted the requested relief against the King on general equitable principles without insisting on the King's prior consent; the court explained that the King, as the "fountain and head of justice and equity," was presumptively defective in neither. n50

The rule in Pawlett further fictionalizes the idea of royal consent. To be sure, the plaintiff in Pawlett initiated the action by filing an English bill or petition in equity. n51 Like other initial pleadings, petitions in equity sought relief in the form of a writ running in the name of the King (and attested to by justices who exercised the delegated judicial authority of the Crown). Yet everyone understood that the King himself did not pass on equitable petitions before the Courts of the Exchequer or of Chancery, just as the King himself no longer sat in King's Bench. n52 Parliament's successful attack on the Court of the Star Chamber some years earlier had effectively ended the exercise of royal or conciliar jurisdiction (at least as to disputes in England). n53 [*915] Pawlett understandably relies on the presumptive "equity" of the Crown, rather than on any royal consent, in its decision to grant injunctive relief in favor of the petitioner.

d. Scire facias. A similar evolution away from any requirement of genuine consent occurred in connection with that part of practice on the writ of scire facias that depended on the petition of right. Among other uses, petitioners employed writs of scire facias to initiate a proceeding to cancel the King's letters patent - a legal document that passed one of the official seals of state and ordinarily provided conclusive evidence of the lawfulness of the ownership interest (in land, an office, or a "patented" invention) that it described. n54 Corrective scire facias process was required any time letters patent were said to have issued in error; n55 only the Court of Chancery had the power to cancel the deed (by snipping off the seal). n56 Although the [*916] King's ministers could pursue such a writ as a matter of course, private suitors whose rights were prejudiced through the mistaken issuance of letters patent were traditionally required to seek leave to pursue the writ by petition of right to the Crown. n57 Over time, Chancery came to accept the fiat of the attorney general as a substitute for that of the King; leading treatises on scire facias practice indicate that the attorney general granted his fiat as a matter of course. n58 As with other prerogative proceedings, the Crown's consent grew into a fiction and the availability of relief to individual suitors came to depend on legal principles.

e. The case of the bankers. In 1701, the House of Lords approved a further change in the system of remediation that continued the trend away from any requirement of royal consent. In the famous Case of the Bankers, n59 individual creditors of the Crown sought to recover money due under the terms of a royal annuity set forth in letters patent. Everyone agreed that the plaintiffs "have a right; and [therefore], must have some remedy to come at it too." n60 The Justices divided, however, on the nature of the remedy. Lord Somers argued that the plaintiffs must first pursue a petition of right; Lord Holt argued that, while a petition of right would certainly suffice, the plaintiffs could also proceed by petition on the law side of Exchequer (as they had done) without first obtaining leave from the Crown. n61 The House of Lords ultimately agreed with Lord Holt and [*917] further broadened the English reliance on judges in the administration of remedies against the Crown.

2. Proceedings Against Officers of theCrown. In addition to an array of remedies against the Crown, English law provided the individual subject with remedies against the King's officers. As English law developed, the King himself was said to bear no personal legal responsibility for tortious invasions of the rights of his subjects. Instead, English law required individuals to bring their tort claims against the King's subordinate officers. In addition to claims for damages sounding in tort, individuals were entitled to bring petitions for what were called the "high prerogative writs": mandamus, prohibition, certiorari, habeas corpus, and quo warranto. In this section, I provide a brief overview of the prerogative writs and officer suits sounding in tort.

a. Prerogative writs. The power of King's Bench to issue the "high prerogative" writs of mandamus, habeas corpus, prohibition, certiorari, and quo warranto lay at the heart of Crown practice in Blackstone's England. n62 In issuing the writ of mandamus, King's Bench directed inferior courts and administrative officials to take nondiscretionary action clearly required of them by law. n63 Habeas corpus [*918] ad subjiciendum, the "Great Writ" of freedom, directed the jailer to bring the "body" of one of his inmates before the court for an adjudication of the sufficiency of his confinement. n64 Prohibition directed a lower court to refrain from exercising authority over a matter beyond its jurisdiction. n65 Certiorari effected the removal of a judicial record or cause (often an indictment) from a lower court for trial (or other disposition) in King's Bench. n66 Quo warranto tested the title of an [*919] individual to royal office and supplied the means of ousting those who held office unlawfully. n67

These writs shared many factors in common by the time they were first lumped together as "prerogative" writs by Lord Mansfield in 1759. n68 First, the writs were closely associated with the exercise of royal authority and with King's Bench, having long been used by the Crown in the administration of the state. n69 Second, prerogative writs were issued by the court, after reviewing the sufficiency of the petition and supporting affidavits; in contrast to such "extraordinary" writs, n70 most common law writs issued as a matter of course without any required showing of cause. n71 Third, the prerogative writs were seen as [*920] the "suppletory means of substantial justice" - the remedial mode to which the subject turned whenever remedies at law were unavailable. n72 Fourth, the writs sought an adjudication by way of summary proceedings; the writs were enforceable through contempt sanctions and were not subject to appeal. n73 The prerogative writs thus resembled the writ of scire facias in that they enabled the individual suitor to assert claims in the name of the King and seek extraordinary relief from government wrongdoing.

b. Tort claims against government officers. Although the early years of the seventeenth century were marked by a battle in which Privy Council denied the authority of the common law courts to entertain actions against officers of the government, n74 the issue was settled in favor of such suability following the Glorious Revolution. n75 The leading principles developed along the following lines: The King's officials and servants were held personally responsible for their own violations of the law and could not defend on the ground that they were just following orders. n76 That this idea of official responsibility extended to high government officials within the Crown's ministry was illustrated in the

famous case of Entick v. Carrington. n77 Official [*921] responsibility extended to officials outside the ministry as well. In Ashby v. White, n78 the House of Lords upheld an action in tort to challenge vote-counting in a parliamentary election. n79 But official responsibility did not necessarily encompass liability for the actions of one's subordinates. In Lane v. Cotton, n80 King's Bench refused to impose liability on the Postmaster for the negligent actions of a subordinate officer, thereby distinguishing such officials from sheriffs who did bear responsibility for the actions of their deputies. n81

3. Blackstone on Sovereignty and the Right to Petition for Redress. We have seen that the rule of law, rather than the whim of the prince, controlled the subject's right to relief against the Crown in Blackstone's England. How then can we make sense of Blackstone's affirmation of the Crown's immunity from suit (the king can do no wrong) at the same time he affirmed the existence of the many remedies that comprised the "prerogative" practice of the courts of justice? The answer lies in Blackstone's conception of the structure of government, the role of the courts as tribunals inferior to the Crown, and the inherent immunity of Parliament and the Crown from the "ordinary" course of law. Granting the Crown's immunity from the "ordinary" course of law, Blackstone nonetheless contended that the subject had an absolute right to pursue claims against the Crown by way of petition for "extraordinary" forms of relief. We need to consider his claim in some detail.

The first element of Blackstone's argument was structural. He defined two supreme powers of the government in England as the following: legislative power (vested in Parliament) and executive power (vested in the Crown). n82 Judicial power did not exist, at least as an [*922] independent power of government in the modern sense. Rather, the courts exercised the delegated judicial (executive) authority of the Crown. Immunity from the course of the law followed from the structure of government. Parliament was supreme, and the courts had no power to test the constitutionality or legality of acts of Parliament; n83 similarly, though the King might engage in action that resulted in injury to his subjects, n84 "no suit or action can be brought against the king, even in civil matters, because no court can have jurisdiction over him." n85 Ultimately, then, the King and Parliament were incapable of legal wrongs because "in such cases, the law feels itself incapable of furnishing any adequate remedy." n86 [*923]

Having established the Crown's immunity from the ordinary course of the law on structural grounds, Blackstone's second move was to distinguish the ordinary from the extraordinary course. With respect to claims against the King himself, Blackstone emphasized that the petition of right issued as a matter of "grace" rather than of right. n87 Reliance on the fictional consent entailed in the grant of the petition thereby enabled Blackstone to portray the petition of right as a matter of royal consent. A similar fiction came into play in connection with Blackstone's handling of the prerogative writs. Building on the idea that the courts wielded the King's own judicial power, Blackstone characterized all applications for prerogative writs as petitions to the Crown for redress. n88 In providing relief on such petitions, in other words, the courts were administering the prerogative of the king for the benefit of his subjects rather than entertaining suits or proceedings against the Crown. n89 Practice on the prerogative writs lent some color to the fiction; the writs issued upon petitions that invoked the Crown's judicial authority in King's Bench and ran in the name of the King himself, as a royal command to inferior officers of the government. n90 Yet the notion that courts were acting for the benefit of [*924] the King remained a fiction, n91 as Blackstone himself cheerfully admitted. n92

Blackstone's third move was to characterize the right to invoke these remedies for government misconduct as part of the subject's absolute right to petition the Crown for redress of grievances. n93 Subjects [*925] of England enjoyed certain absolute rights, in Blackstone's estimation, including the rights to life, limb, liberty, and property. These rights were protected both by the structure of the British constitution and by due process of law, and due process entailed an absolute right to invoke the ordinary course of law by seeking "redress of injuries" in the courts of justice. n94 When the ordinary course of law failed, as it did by definition in a claim against the Crown, the subject enjoyed a (similarly) absolute right to seek relief of a different character through a petition for redress of grievances:

If there should happen any uncommon injury, or infringement of the rights before-mentioned, which the ordinary course of law is too defective to reach, there still remains a fourth subordinate right, appertaining to every individual, namely, the right of petitioning the king, or either house of parliament, for the redress of grievances. n95

Blackstone said, in short, that "uncommon" injuries to the rights of life, limb, and property may evade the ordinary course of law; the Crown, after all, enjoyed immunity from suits and proceedings in the ordinary course. Yet the law still furnished a remedy through its provision for the submission of petitions to the King. [*926]

Not a bad piece of work for a good king's man like Blackstone. He carefully preserved the fiction of sovereign immunity by reaffirming the Crown's immunity from the ordinary course of the law and by treating Crown practice as a collection of extraordinary remedies available only upon petition. n96 Yet he recognized the existence of the subject's absolute right to seek judicial relief from government misconduct, both in his definition of the right to petition for redress of grievances and in his subsequent discussion of the petition of right and the prerogative writs. For Blackstone, then, the Crown's sovereign immunity remained theoretically intact but yielded as a practical matter to the subject's right to petition the courts of justice for redress of royal invasions of life, liberty, and property. n97

Listen again to Blackstone's carefully qualified restatement of the doctrine that the king can do no wrong. n98 In explaining this "necessary and fundamental principle," he first invoked the fiction of the evil minister, noting that government misconduct cannot be charged "personally on the king." Second, he noted that the "prerogative of the crown extends not to do any injury." Why no injury? Because "the law hath furnished the subject" with a "decent and respectful" mode of redress - an evident reference to the "humble" style of the petition for redress that commenced proceedings for prerogative remedies. But though he acknowledged the "humble" form of the petition, Blackstone was quite clear that the law controlled the subject's access to relief. It was the law that "presumes" royal willingness to offer redress and the law "that then issues as of course, in the king's own name, his orders to his judges to do justice to the party aggrieved." Blackstone said, in short, that the courts would not permit governmental wrongs to go unredressed - quite a different idea indeed from that conventionally associated with Blackstone's restatement of sovereign immunity.

B. Legislative and Judicial Petitioning in Post-RevolutionaryAmerica

The continuing hardihood of sovereign immunity owes much to the belief that American law failed to import British remedies against [*927] the Crown in the years following the Declaration of Independence. The least convincing version of this account, and the one to which the Supreme Court has unfortunately expressed some continuing devotion, treats sovereign immunity as one part of the common law that Americans more or less unthinkingly made their own. n99 A more plausible, but ultimately untested version, appears in an important article by Professor Louis Jaffe. n100 On Jaffe's account, Americans borrowed British remedies against the officers of their governments but failed to establish modes (like the petition of right) by which individuals could sue the government itself. Instead, Jaffe speculated that the all-purpose legislative petition, through which individuals sought relief through applications for the passage of an appropriation, supplied the prevailing mode for the adjustment of disputes between the individual and the government. n101 On this account, the practice of legislative petitioning [*928] ripened in time into a rule of government immunity from suit in the absence of legislative consent. n102

In this subpart, I consider the thesis that American law failed to incorporate British remedies for government wrongdoing and reach a somewhat surprising conclusion. On one hand, I agree that the colonies of British North America and the early American states did rely quite extensively on the legislative petition as an all-purpose mode of securing redress; indeed, early American constitutions invariably establish a right to petition the legislature for redress in keeping with the idea of legislative supremacy. n103 On the other hand, many states adopted statutes that incorporated British modes of judicial petitioning. [*929] In addition to officer suits and prerogative writs, both of which were widely available throughout the colonies and widely incorporated into the practice of the American states, a review of early American statutes reveals evidence of relatively widespread codification of remedies in the nature of monstrans, traverse, scire facias, and the petition of right. As we will see, such provisions for the judicial determination of claims against the government grew out of the same dissatisfaction with legislative dominance that gave rise to the creation of an independent judiciary in Article III of the Constitution.

1. The Rise of the Legislative Petition in Colonial America.

The right to petition the British government - the Crown and Parliament - played a significant role in the drive for American independence. n104 Yet the colonial conception of petitioning also encompassed the submission of grievances to local legislative assemblies. n105 By the [*930] early years of the eighteenth century, Americans had adopted the British model of the legislative petition as an all-purpose request for relief. n106 Substituting their own representatives for those in Parliament, Americans submitted a wide range of petitions to the lower houses of assembly that made up the popular branch of royal government in the colonies. Some petitions sought to influence the exercise of what we might today consider political judgment: petitioners expressed their views on such matters as religion and the established church, slavery, relations with Great Britain, debt, taxes, and the structure of government. n107 Other

petitions sought the adjudication of disputes; in many instances, the assemblies performed the essentially judicial role of resolving disputes presented through the submission of legislative petitions. n108 [*931]

The essentially adjudicative function that many lower (and upper) houses of assembly played in passing upon petitions can be clearly seen both in the nature of the relief sought by way of the petitions and in the procedures that developed for their disposition. n109 Throughout New England, for example, petitioners sought legislative review of judicial decisions and new trials or other relief from judgment in appropriate cases. n110 Some colonies entrusted their assemblies with jurisdiction over divorce petitions, much to the chagrin of Crown officials who were accustomed to the use of ecclesiastical courts. n111 Many colonies entertained petitions for relief from creditors and applications for naturalization. n112 Procedures for the submission of petitions confirm that the participants understood them to seek an adjudication of disputes. An early Connecticut statute, for example, required individual petitioners who sought relief of a judicial character to serve a copy of their petition on the opposing party and to refrain from submitting petitions to the assembly when other avenues of relief at law were available. n113 Plainly then, the assembly [*932] viewed itself as offering extraordinary judicial relief of the kind that has come to be known as "legislative equity." n114

The system of legislative equity applied not only to the adjudication of disputes between private parties but also to the determination of money claims against the governments of the colonies. Individuals who had provided goods or services to the government were expected to file their claims for reimbursement by submitting a petition to the lower house of assembly in the first few days of the session. Typically, such petitions sought payment for claims that had been incurred in the preceding year. The lower houses sent such petitions to committees for investigation and recommended disposition. If approved by the whole house, the claims were included in the year's appropriations bill along with other government expenses. n115 Legislative disposition of [*933] money claims was thus bound up with the lower houses' control of money bills. n116

To summarize, petitions for redress to the lower houses of assembly played an important role in the struggle between the popular and royal branches of colonial government. The governor and the courts of justice in the colonies were appointed by the Crown; n117 distrust of these royal officials (and dissatisfaction with the results of royal justice) led many individuals to seek redress from the assembly. Assemblies responded by working to defend their access to petitions in order to broaden their power vis-a-vis the Crown. n118 Part of the early [*934] American reluctance to establish courts of equity reflects a preference for the determination of claims for extraordinary relief by the popular branch of government. n119 Similarly, colonial reliance on the legislative petition in the determination of money claims against the government was a part of what has been aptly characterized as their "quest" for control over the machinery of the fisc. n120 Seen as the triumphant conclusion of this quest, the American Revolution set the stage for the legislative predominance that appears in the early American state constitutions.

2. The Constitutional Right to Petition in the American States.

After declaring their independence, Americans like Thomas Jefferson left Congress and returned home to write constitutions and new bodies of law suitable for their fledgling republican governments. n121 Many states included bills or declarations of rights in their written constitutions, and many of these bills of rights included affirmations of the right to petition. Pennsylvania went first, declaring in 1776 that "the people have a right to assemble together, to consult for their common good, to instruct their representatives, and to apply to the legislature for redress of grievances, by address, petition, or remonstrance." n122 Similar declarations appeared in the bills of rights adopted in Delaware, n123 Maryland, n124 North Carolina, n125 and Massachusetts; [*935] n126 state ratifying conventions would later propose similar language in suggesting the addition of a Bill of Rights to the Constitution. All such declarations speak of a right to petition only the legislature and fail to declare any right to petition the other branches of government.

The choice of the legislature as the identified recipient of "petitions" followed an established pattern in American state papers by defining the scope of the declared right to petition in terms that mirrored the prevailing conception of the structure of government and the locus of sovereignty. n127 The post-revolutionary petition clauses reflected not only the transfer of sovereignty from Parliament to the state legislatures but also the structural fact that the state constitutions tended to create extremely strong legislative branches and relatively [*936] weak and dependent executive and judicial branches. n128 Gordon Wood chronicled these structural aspects of the early American constitutions in his indispensable Creation of the American Republic. n129 As Wood explained, Americans in 1776 saw the executive branch as the primary source of arbitrary authority; they thus set out to strip that branch of all its prerogatives and to reduce it to a mechanical execution of the laws. Both the Virginia and Maryland constitutions specifically prohibited their governors from exercising any "power or prerogative by virtue of any Law, statute, or Custom, of England." n130

As a consequence, the assemblies often assumed the old prerogative powers over revenue, war and peace, treaty-making, commerce, and appointment. n131 In Pennsylvania, where radically democratic impulses found their highest constitutional embodiment, n132 the constitution did away with the governor altogether and substituted an executive council of twelve individuals who were elected by the people. n133 Even where single governors remained, as in Virginia, Maryland, and elsewhere, the constitutions called for the election of the governor by joint ballot of the assembly, subjected the governor to the threat of impeachment, and denied the governor any check or veto on legislation. n134

State constitutions often placed the judiciary in a position similarly dependent upon the legislature. As Wood explained, the constitutions typically sought to end the judges' dependence on the chief magistrate by eliminating gubernatorial control over appointment and removal from office. n135 But having insulated the judges from the governor, the constitutions made them relatively dependent upon the assemblies. Legislative bodies often controlled the appointment (and in some cases the removal) of judges as well as their salaries, fees, and jurisdiction. n136 Such dependence would later be seen as inconsistent with the doctrine of separation of powers and the necessary independence [*937] of the judiciary. But, as Wood explained, this new conception of judicial independence from the legislative branch "had to await theexperience of the years ahead." n137 Part of that experience, as the next section makes clear, included growing dissatisfaction with the model of legislative adjudication.

3. Government Accountability and the Rise of the Judicial Petition. Although early declarations of the constitutional right to petition in American constitutions focused on submissions to the legislature, evidence from the post-revolutionary era reveals that the courts played an important and growing role in securing government accountability. That role rested in large part on established common law rules that enabled individuals to bring suit against government officials in tort n138 and to seek relief through petitions for the prerogative [*938] or supervisory writs. We have already examined the growth of these proceedings in England n139 and most commentators agree that such suits and proceedings against government officials were incorporated into early American law. n140

The system of government accountability through officer suits suffered its principal shortcomings in suits sounding in contract, account, debt, and property - matters for which the law did not regard the individual official as responsible and for which some mode of seeking relief from the government as an entity was required. n141 [*939] Although many states relied upon the legislative petition as the mode of seeking such extraordinary relief, in keeping with Jaffe's hypothesis, early American statutes reveal striking evidence of reliance upon British-style judicial modes for asserting entity claims against the government.

As I show in the appendix, most of the states that directed the forfeiture of loyalist property during the Revolutionary War also authorized the judicial determination of claims to post-forfeiture assets held by the state through the adoption of proceedings such as the monstrans and traverse. Courts determined claims to the forfeited property of British loyalists in Virginia, New York, Pennsylvania, Georgia, Delaware, New Jersey, and New Hampshire; legislation in those states specifically protected the rights of third parties to assert judicial claims to property that had been forfeited into the hands of the government. New Jersey went further than Georgia and Delaware in making the favorable decision of its courts of common pleas a sufficient warrant for the payment of money to the creditors of forfeited estates. New Hampshire briefly followed a similar course. Even in the Carolinas, Maryland, and New England, where the tradition of legislative control remained largely intact throughout the period, courts were given some modest responsibility for overseeing claims against forfeited estates.

In addition to these widespread but rather specialized provisions relating to forfeited estates, at least three different states - New York, Pennsylvania, and Virginia - adopted statutes that more generally authorized individuals to carry their claims against the government into state court. Consider the remarkable language of Virginia's statute, which appeared in a provision that established a board of auditors to review individual claims against the public:

Where the auditors according to their discretion and judgment shall disallow or abate any article of demand against the commonwealth, and any person shall think himself aggrieved thereby, he shall be at liberty to petition the high court of chancery or the general court, according to the [*940] nature of his case, for redress, and such court shall proceed to do right thereon; and a like petition shall be allowed in all other cases to any other person who is entitled to demand against the commonwealth any right in law or equity. n142

The act not only allowed individuals to obtain judicial review of the determinations of the board of auditors, it also authorized any individual to pursue "any right" in law and equity against the Commonwealth. Strikingly, the act

conferred this right on individuals without any qualification and did so in mandatory terms ("shall proceed to do right") that appeared to have been drawn from English practice. n143 The statute thus brought Virginia law into line with British practice (where royal consent had long since become fictional). n144 [*941]

Like that of Virginia, statutes adopted in New York and Pennsylvania used the familiar British language of judicial petitioning to provide for the judicial determination of claims against the government. Enacted in 1781, the New York statute first established an auditor general to pass upon "any other [non-military] accounts due to and from this State." n145 Provisions for judicial review followed:

That if any person having an account with this State, and which shall be settled by the auditor general as aforesaid, shall deem himself or herself aggrieved by such settlement, it shall be lawful, for such person at his or her own expence, to apply, by way of petition, to the court of chancery for relief, and it shall be lawful for the chancellor, after the auditor general shall have been served with a copy of such petition, to take such order thereon, and direct such summary proceedings therein as he shall deem requisite and proper; and make such decree as shall be agreeable to equity and good conscience. n146

The New York provision thus empowered parties "aggrieved" by government denials of their claims to file "petitions" for relief in the court of chancery. Similar language appeared in Pennsylvania's provision for judicial determination of claims against the government. n147 Like [*942] the Virginia statute, moreover, the New York and Pennsylvania laws employed mandatory language that empowered the court to proceed without awaiting any endorsement or fiat. n148

If the model for these statutes was the British petition of right, then the theoretical justification for their adoption was the doctrine of separation of powers as refined by the Frenchman, Baron de Montesquieu. n149 The Virginia codification of the petition of right reflected the growing appeal of the doctrine of Montesquieu, growing dissatisfaction with the legislature's dominance of American government and growing support for the assignment of judicial matters to the courts. The two leading critics of legislative tyranny, Thomas Jefferson and James Madison, played central roles in the adoption of the Virginia statute. n150 Jefferson drafted the provision as part of his effort at law reform shortly after independence; n151 Madison shepherded the provision [*943] through the Virginia legislature as part of the so-called "Chancellor's Revisal" of 1785. n152 Contemporary accounts by knowledgeable participants explicitly defended the role of the judiciary under the statute by reference to the separation of powers. In Commonwealth v. Beaumarchais, n153 Edmund Pendleton, Chief Justice of the Virginia Court of Appeals, upheld the statute against a challenge that the courts could not play a role in determining contract claims against the government:

The Legislature are to form rules for the conduct of the citizens ... The province of the Judiciary [is] to decide all questions which may arise upon the construction of laws or contracts, as well between the government and individuals, as between citizen and citizen.... If a contract is entered into in behalf of the government pursuant to an existing law, and a contest shall arise about the meaning of the contract, it belongs to the Judiciary to decide what the contract was, and, if the Legislature shall decide the question, they invade the province of the Judiciary, contrary to the Constitution.... n154

Pendleton, who had worked with Jefferson on the provision in the 1770s, n155 offered a classic defense of the role of the courts in passing upon claims against the government. Legislatures, he said, make laws of general applicability; courts must decide disputes arising under those laws, even where they involve claims by the citizen against the government; legislative retention of an adjudicatory role would invade the province of the judiciary; and so, the provision for judicial determination finds explicit support in the constitution.

Just as it did in Virginia, the doctrine of the separation of powers influenced the decision of the Pennsylvania assembly to adopt provisions for the judicial determination of claims against that government. Pennsylvania enacted its provision for judicial determination in 1785, only one year after the publication of the report of the Council of [*944] Censors on the question whether the Pennsylvania Constitution of 1776 had been "preserved inviolate" in its operation. n156 Well known for its criticism of "legislative equity" in the resolution of disputes between private parties, n157 the Censors' Report also criticized the tradition of petitioning the legislature for redress of grievances as the vehicle by which these legislative excesses occurred. n158 To address the problem, the report specifically recommended that the legislature refrain from interfering with the usual course of legal proceedings. In addition, the report specifically recommended the creation of a judicial mode for the determination of claims against the government. As the report

explained: "All demands by or against the public, ought, in all instances, to be judged by the known and usual course of proceedings; [*945] ever preserving, in cases of doubt as to facts and law, the sacred right of trial by jury, and the proper tribunals." n159

The recommendation became law a year later with the enactment of a provision for trial de novo before the Supreme Court of Pennsylvania on claims brought by individuals who conceived themselves to be aggrieved by administrative denial of their claims against the government. The critique of legislative equity and legislative petitioning in Pennsylvania thus entailed a critique of legislative determination of claims against the government and led directly to the adoption of provisions for judicial determination. n160

In short, the same Americans who would later frame a Constitution for the nation had criticized the exclusively legislative conception of the right to petition that the states inherited from the colonial era. Part of this dissatisfaction stemmed from the perception that the legislatures violated the doctrine of separation of powers by exercising powers of a judicial nature in passing upon certain petitions for equitable relief. The separation-of-powers critique of "legislative equity" included a critique of the power of the legislature to pass upon petitions for redress of monetary claims against the government itself. The answer, according to three states, lay in the adoption of British practice on the petition of right. How similar concerns influenced the framing of the Constitution and the Bill of Rights provides the subject of the next subpart.

C. Government Accountability at the PhiladelphiaConvention

The Constitution signals the end of legislative equity and the rise of the judiciary; it divides the powers of the federal government into those that it characterizes as "legislative," "executive," and "judicial," and vests them in coordinate but independent branches. n161 This separation [*946] of the powers of government presupposes that independent federal courts were to perform the function of adjudication in the exercise of the judicial powers vested in them in Article III. n162 The Constitution drives home this separation-of-powers conclusion by explicitly denying Congress and the state legislatures the power to legislate retrospectively; the distrust of retrospectivity finds reflection in provisions that bar ex post facto laws, bills of attainder, and the impairment of contracts, n163 and that seemingly prohibit case-by-case legislative determination of petitions for debtor relief and naturalization. n164

Apart from their decision to separate the legislative from the executive and judicial powers, the framers acted on the theory that the courts had a special role to play in enforcing constitutional limits on government action. n165 Many scholars have traced the origins of this doctrine of judicial review, which depends on a higher-law conception of the Constitution itself and on an understanding that the judiciary must respect and enforce constitutional limits in litigation testing the boundaries of government authority. n166 As Professor Akhil Amar has [*947] shown, the analogy of the corporate charter informed and influenced the idea of limited government. n167 Like officers of a corporation, government officials were seen as the agents of the people of the United States acting pursuant to powers delegated in the charter. n168 Judges were to enforce these limits by denying effect to constitutionally unauthorized acts of government agents.

The Constitution thus rests upon an ideological foundation quite amenable to the development of a constitutional right to submit judicial petitions for redress of grievances. Thinking about the separation of powers and the structure of government had led away from the idea of legislative supremacy that had informed the early American state constitutions to a more balanced division of authority among the branches; courts had come to occupy a special place in the thinking of the framers about the enforcement of constitutional limits. Here were ideas that would support the creation of a constitutionally assured role for the federal courts in the adjudication of claims against the government and its officials. n169

Such ideas plainly made their way to the Philadelphia convention of 1787 and were incorporated into the final text of Article III. Their most vigorous advocate was Charles Pinckney, the young, brilliant, and somewhat unstable delegate from South Carolina. n170 Pinckney proposed, in the reconstructed version of the plan that bears his name, n171 a federal court with jurisdiction to "try Officers of the U.S. for all Crimes &c in their Offices" and to hear appeals from the state [*948] courts wherein questions shall arise "on the Regulations of the U.S. concerning trade and revenue or wherein U.S. shall be a party." n172 The language of these grants of jurisdiction closely resembled the scope of federal judicial power that Pinckney advocated in a lengthy pamphlet that contained remarks of the kind he may have made to the convention on the subject. n173 Pinckney's pamphlet urged the creation of a "Tribunal in the Union capable of taking cognizance of their officers who shall misbehave in any of their departments, or in their ministerial capacities out of the limits of the United States" and to try questions "arising on ... any of the regulations of Congress in pursuance of

their powers, or wherein they may be a party." n174 Such a tribunal ought to act under the authority of the Union "for securing whose independence and integrity some adequate provision must be made, not subject to the controul of the legislature." n175 Pinckney thus argued, on familiar separation of powers grounds, for a federal court with power to hear officer suits, litigation over federal laws, and suits by and against the United States as a party.

Pinckney's argument left its mark on the text of Article III. Article III, section 2 extends the judicial power of the United States to "all cases" in law and equity arising under the Constitution, laws, and treaties of the United States. This familiar, federal-question grant of jurisdiction encompasses virtually every conceivable suit and proceeding against federal government officials: petitions for writs of mandamus n176 and habeas corpus, n177 the actions of trespass n178 and ejectment [*949] n179 presented questions of federal law that fell within the jurisdictional grant. n180 Only in those instances in which neither the claimant nor the official relies on federal law would the action lie beyond federal judicial cognizance. n181

Article III also provides for the assertion of claims against the United States government as a party defendant. The relevant language of Article III declares that the judicial power shall extend to "controversies to which the United States shall be a Party." n182 On its face, the language focuses on the party status of the United States and encompasses suits brought by and against the government. n183 A brief review of the drafting history of the provision confirms this party-defendant interpretation. Pinckney proposed the predecessor to this provision on August 20, just prior to the convention's consideration of the Committee of Detail draft of the text of the judiciary article. n184 The context in which the proposal appeared makes it clear that Pinckney meant to confer on the United States the power to "sue and be sued" - a normal incident of corporate status then and now. n185 [*950]

Although the Convention adopted Pinckney's proposal by adding U.S.-party controversies to Article III, n186 the final text differs importantly from that he had proposed. Rather than a provision that mandated the assertion of jurisdiction over "all" U.S.-party controversies, as Pinckney had proposed, Article III omits any reference to the word "all" and seemingly allows Congress to determine the scope of this head of jurisdiction. In addition, the Convention explicitly considered and rejected a proposal that would have added U.S.-party matters to the Supreme Court's mandatory original jurisdiction. n187 Together, these drafting developments suggest that the framers expected Congress to retain some discretion over the suability of the United States as an entity.

We can best understand the retention of a measure of congressional discretion over government entity suability as a confirmation of congressional control over access to payments from the Treasury of the United States. The Constitution confers broad powers on Congress to control the disposition of the money, property and legal obligations of the federal government. n188 Chief among the government [*951] obligations were the debts that the United States had accumulated in the course of fighting the Revolutionary War. n189 The Constitution addresses these debts on two occasions, empowering Congress in Article I to collect taxes "to pay ... the Debts of the United States" and declaring in Article IV that debts and engagements entered into before the Constitution's adoption "shall be as valid against the United States under this Constitution, as under the Confederation." This Engagements Clause offered modest assurance to creditors of the United States that the new government would not disavow its financial obligations - a strategy consistent with a politics of ratification that depended on the support of the creditor class.

As finally adopted, the Engagements Clause simply declares continuity with the past by declaring those obligations as valid under the [*952] new regime as under the old one. n190 In the course of its consideration, however, the Convention considered and rejected provisions that would have more clearly mandated payment. The rejection of a mandatory payment regime occurred a scant two days before the convention flirted with (and abandoned) the proposal to mandate federal jurisdiction over U.S.-party cases. Until August 25, the working draft of the Engagements Clause had provided on motion by Gouverneur Morris that the "Legislature shall discharge the debts and fulfill the engagements of the United States." n191 On that date, George Mason of Virginia argued that the term "shall" was too strong; it might be impossible for Congress to comply and full compliance might result in a windfall to speculators. n192 His proposal to keep creditors "in the same plight" n193 resulted in an Engagements Clause embodying a status quo that emphasized legislative control over payment of the national debt. n194 This rejection of a mandatory payment (or assumption) regime must have been fresh in the minds of the delegates who voted on August 27 to refrain from mandating federal jurisdiction over U.S.-party matters. [*953]

Article III, in short, appears to pick up the common law's distinction between officer and entity suits - making the former a part of its mandatory ("all cases") federal-question jurisdictional grant and leaving the latter to the discretion of Congress. n195 While the provision thus appears to recognize some degree of congressional control over the suability of the United States, at least in entity claims sounding in debt or contract, it stops far short of placing the legality of

government conduct beyond the reach of the federal courts. To the contrary, the declaration that the federal courts shall have jurisdiction of "all cases" that implicate the constitution, laws, and treaties of the United States more than adequately assures the federal courts of the power to test the legality of government action. It thus lays the jurisdictional foundation for the constitutional right to petition for redress that appears in the First Amendment.

D. The Petition Clause: Lessons from the Text, Structure, andHistory

We can say a great deal in general about Madison's project to amend the Constitution by adding a Bill of Rights. We know, for example, that Madison had long doubted the wisdom of such a project, having dismissed state declarations of rights as mere "parchment barriers" and having expressed opposition to their addition to the federal Constitution. n196 We know as well that he had been persuaded to undertake the project in part because it was good politics n197 and in part [*954] because he had come to expect "independent tribunals of justice" to become guardians of the federal bill of rights, making of them "an impenetrable bulwark against every assumption of power by the legislative or executive." n198 Madison's pursuit of amendments thus reflects, at least in part, Jefferson's suggestion that a bill of rights would place a "legal check ... into the hands of the judiciary." n199

We can say somewhat less about the particulars. Like many other provisions in the bill of rights, the Petition Clause was not the subject of illuminating debate. In the House, debate on what became the First Amendment focused on proposals (both rejected) to eliminate the right of assembly and to add a right of instruction n200 but no one [*955] questioned or paused to explain the right to petition. n201 Neither the Senate debates nor the debates in the legislatures of the ratifying states were officially recorded. The correspondence of the participants in the process makes reference to the business of amendments, often in impatient terms, n202 but does not offer any detailed account of the meaning either of the Petition Clause or any other clause.

Notwithstanding the absence of detailed debates, n203 we do know that separation-of-powers thinking exercised an ongoing influence on the work of the first Congress generally n204 and on the text of the Petition Clause as it worked its way through the legislative process. If the final text suggests such an influence with its use of the evocative term "Government" to describe the recipient of petitions, the progression of drafts makes such an influence absolutely clear. We thus find, in short, a strong historical basis for reading the Petition Clause to encompass a right to petition all three branches of government. [*956]

1.

"To Petition the Government." Our story begins with the well-known text of the First Amendment: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." n205 Unlike all of its state predecessors, the Petition Clause speaks of the right to petition the "Government," not the legislature, for a redress of grievances. The salient fact of the new federal Constitution was its provision for a "government" with three "powers" - legislative, executive, and judicial. On its face, then, the Petition Clause would appear to secure the right of individuals to present claims for redress of grievances to all three branches of the newly constituted "Government." n206

Read in light of the progression of petition clauses from Blackstone's day through American independence and into the early years of the Republic, the reference to "Government" in the First Amendment conveys an even clearer three-branch message. Petition clauses traditionally reflected the structure of government and the locus of sovereignty: Blackstone's right to petition Parliament and the King reflected his conception of the two-branch structure of government; n207 American revolutionaries fashioned petition clauses that initially upheld and later denied a role for Parliament; n208 independent American States drafted petition clauses that underscored the supremacy of the legislature. n209 The Constitution consciously abandoned legislative dominance in favor of a more even division of government authority among three independent, coequal branches. Characteristically, the Petition Clause reflects this more even distribution of power by entrenching a right to petition all three branches.

The constitutional context supplies further evidence that the Petition Clause uses the word "Government" to carry a three-branch meaning. The Constitution speaks frequently of the United States; but rarely of the "government." The latter term appears but thrice in the whole instrument as originally framed, n210 most importantly in Article I, Section 8's grant of power to Congress: "To make all Laws which shall be necessary and proper for carrying into Execution the

[*957] foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof." n211

The familiar language of the Necessary and Proper Clause literally authorizes Congress to create a "government" of laws, by passing laws to effectuate its own "powers" and the "powers" otherwise vested by the Constitution in the "Government of the United States." Such a reference to the "powers" of the "Government," in turn, reminds us that the first three Articles of the Constitution vest "power" in three distinct branches of government. Article I vests "legislative Powers" in Congress; Article II vests the "executive Power" in a President; and Article III vests "the judicial Power" in the federal judiciary. If Article I, Section 8 describes a "government" of "powers vested" in three distinct branches, then the Petition Clause promises the individual a right to invoke the "powers" of government by way of a petition for redress of grievances. By its terms, then, the clause affirms the right to invoke the "judicial Power" of the government by petition for redress.

The drafting history of the Petition Clause confirms that, in choosing the word "Government," the drafters consciously rejected the state model of legislative petitioning. n212 In chronological order, the three most important drafts were that of Madison, who introduced amendments on June 8, 1789, and served on the House Select Committee to which they were referred; that of Roger Sherman who, as a member of the House Select Committee, developed his own draft on July 21, 1789; and that of the House Select Committee, presumably the final product of a debate over the merits of the Madison and Sherman drafts, on July 28, 1789. n213 The provisions follow:

(Madison) The people shall not be restrained from peaceably assembling and consulting for their common good; nor from applying to the Legislature by petitions, or remonstrances, for redress of their grievances. n214 [*958]

(Sherman) The people have certain natural rights which are retained by them when they enter into society. Such are the rights ... of applying to Government by petition or remonstrance for redress of grievances. n215

(Select Committee) The freedom of speech, and of the press, and the right of the people peaceably to assemble and consult for their common good, and to apply to the government for redress of grievances, shall not be infringed. n216

Madison opens the bidding with a traditional petition clause, one that empowers the people to apply to the Legislature but makes no mention of the other branches of the government. Madison's legislative conception of the right finds confirmation in his reference to the use of "remonstrance" - a term frequently used to describe an address to a legislative body. n217

Sherman's draft makes some progress. He provides for the people to "apply[ ] to Government" instead of to the "legislature" and may deserve some credit for importing that more sweeping term into the clause's final text. But Sherman's draft remains tentative and contains a variety of problems. For one thing, Sherman's natural-rights phraseology smacks of the hortatory "oughts" that Madison had criticized in state constitutions. n218 Such phraseology also appears to have influenced Sherman's reference to the right of applying "to Government." Government on this phrasing, without the definite article, has an abstract quality and does not evoke the concrete government of the United States. Finally, Sherman's draft retained Madison's term "remonstrance" - despite the fact that it makes less sense as a description of the process of applying to the executive and judicial branches of government.

The Select Committee solved all these problems. The strong language of that draft, "shall not be infringed," has the mandatory ring necessary to secure effective judicial enforcement; Sherman's natural rights language disappears and with it the abstract reference to "Government." Instead, the Select Committee speaks of applying to "the government" - the federal government that the first Congress was then busily legislating into existence. Finally, the specialized term of legislative art, "remonstrance," disappears from the Select Committee draft in keeping with the idea that the right of the people had been broadened to that of applying for redress to all three branches of the government. We now have a guaranteed right to apply to the government [*959] for redress of grievances that bears some resemblance to the final text of the Petition Clause.

It seems obvious that separation of powers concerns like those that led to the attack on legislative petitioning in New York, Virginia, and Pennsylvania influenced the decision of the House Select Committee to abandon legislative petitioning in favor of a right to petition all three branches. Madison, after all, had drafted a Separation of Powers Clause for inclusion in the Bill of Rights. Although the Senate ultimately deleted the clause, the House Select Committee included a version of the clause with its proposed amendments that borrowed elements of drafts by Madison and Sherman. n219 The fact that the Select Committee dealt explicitly with separation of powers helps to make clear

that the ubiquitous doctrine of the "celebrated" Montesquieu influenced the decision of the Committee to broaden the Petition Clause to include applications to all three branches of the federal government. [*960]

2. Judicial "Redress of Grievances." In providing for a judicial role in hearing petitions "for a redress of grievances," the Petition Clause closely tracks the language of the British right to petition Parliament and the Crown for redress of grievances. As we have seen, Blackstone understood the right to petition as an individual right to apply to the King (and his courts of justice) for extraordinary relief from government misconduct that lay beyond the reach of the ordinary course of law. n220 Early American practice perceived the right to petition in similar terms except that applications for extraordinary relief went to the legislative rather than to the executive and judicial branches. Critics of these legislative petitions consciously modeled alternative state laws on the British model of judicial petitioning; when Jefferson and Madison sought to authorize judicial determination of claims against the government, they followed the British formula by authorizing individuals to submit "petitions" to the courts for "redress" of their "grievances." n221 A similar formula appeared in the New York statute. n222 In short, by establishing a constitutional right to petition the government for a redress of grievances, the drafters of the First Amendment followed this pattern of judicial petitioning by adopting language that appears to authorize individuals to pursue a judicial determination of claims against the government. n223

Such a judicial conception of the Petition Clause finds support in the timing and content of debates in the first Congress that evidence broad agreement in the House with Madison's view that courts should adjudicate claims against the government. Among the many important provisions it enacted, the first Congress spent a great deal of time on the structure of what was then by far the most important department of the Executive - the Treasury Department. Early drafts of the bill for the establishment of the Treasury placed the power to pass upon accounts and other money claims against the federal government in the hands of a Comptroller. On June 29, 1789, Madison rose on the floor of the House to question the propriety of this assignment of powers to the Comptroller. n224 [*961]

Madison made two arguments. First, he contended that the Comptroller, in passing upon claims against the government, ought to be responsible to each of the three branches of government. Claims determination had an obvious fiscal impact, and it also obliged the Comptroller to exercise powers of a "judiciary quality as well as executive." In light of the varied quality of the work, Madison expressed some concern about the proper tenure in office for such an officer of the government. After a lengthy debate that focused on separation of powers issues, the House had generally agreed that all executive officers were to hold their positions at the pleasure of the President. Madison, in effect, was proposing to reopen the Decision of 1789 to make the Comptroller more dependent on Congress for tenure in office. n225

Madison next considered what kind of mechanism would best answer the need for an impartial judicial determination of claims such as those the Comptroller was to hear against the government. As usual, Madison looked to familiar precedents to supply the answer:

But making him thus thoroughly dependent, would make it necessary to secure his impartiality, with respect to the individual [claimant]. This might be effected by giving any person, who conceived himself aggrieved, a right to petition the Supreme Court for redress, and they should be empowered to do right therein; this will enable the individual to carry his claim before an independent tribunal.

A provision of this kind exists in two of the United States at this time, and is found to answer a very good purpose. He mentioned this, that gentlemen might not think it altogether novel. n226

Madison thus adverted to the judicial petition-of-right machinery in Virginia and elsewhere in the course of his discussion of how to solve the separation of powers problem presented by a proposal to invest the Comptroller with what Madison regarded as powers of a judiciary nature. His choice of language, with its reference to petitions for redress by those aggrieved by the denial of claims against the government, closely follows the text of the Virginia statute that Jefferson had drafted and he had introduced only four years earlier.

Madison's proposal on the issue of the Comptroller's tenure attracted much opposition. n227 But his claim as to the need for an judicial determination of the individual's claim against the government appears to have occasioned far less controversy. The only member to address the issue, Rep. Stone of Maryland, made the following argument:

He also thought it unnecessary to consider the Comptroller as a judge, and give, by an express clause in the bill, a right to the complainant to [*962] appeal from his decision. He considered this as the right of every man, upon the principles of the common law, therefore securing it by statute would be a work of supererogation. n228

Stone did not question Madison's claim that the decision of claims against the government had a judicial quality. Rather, Stone argued that the individual enjoyed a right at common law to seek a judicial determination of money claims against the government, a right that required no statutory implementation. Stone thus appears to have invoked British practice on the petition of right, which had by then evolved to permit individuals to assert money claims against the government without a preliminary application for royal consent, as the common law source of the judicial determination that Madison sought to secure by statute. n229

Madison's comment and Stone's reply thus raised the issue of judicial petitioning and its relation to the separation of powers on the floor of the House just prior to the creation of a right to petition the judiciary. Although Madison withdrew his proposal respecting the Comptroller on the last day of June, n230 he would participate in July with the House Select Committee in refining the text of the amendments that were to become the Bill of Rights. As we have already seen, the Select Committee changes of July 28, 1789, bore the stamp of separation-of-powers thinking and, for the first time in American constitutionalism, established a right to petition not just the legislature but also the judicial department of the "government" for a redress of grievances. We lack records of the work of the Select Committee that would enable us to reconstruct the tenor of the debate but we can say that, in seeking amendments to the Constitution, Madison meant to secure to the people a whole cluster of judicially enforceable rights that many members of Congress regarded either as amply secured by the common law or as too obvious to require restatement. n231 Such a right, according to Rep. Stone, was that of "every man, upon principles of common law" to seek a judicial determination of claims against the government.

III. The Right to Petition and the Law of Sovereign Immunity

The text and history suggest that the right of the individual to petition for redress should, in principle, guarantee access to the federal courts for a determination of the legality of government conduct. [*963] Yet the history of government accountability in England as in the United States also suggests that this right to seek judicial redress may be disguised by a doctrine of sovereign immunity that appears to place the government beyond the reach of the law. Blackstone explained the English system of government accountability in terms of such "fictions and circuities," comparing Crown practice to an old Gothic castle erected in the days of chivalry but actually fitted up for the modern inhabitant. n232 The American system also looks positively feudal, n233 with its acquiescence in the ancient doctrine of sovereign immunity for no reason other than its doctrinal longevity. In this Part, I suggest that we can now dismantle the doctrine of immunity and build up in its place a structure of petitioning more in keeping with our institutions and better fitted up for modern Americans.

A. The "Fictions and Circuities" of SovereignImmunity

Two factors appear to support the idea that sovereign immunity exists as an independent bar to government responsibility. First, the Supreme Court has amassed an impressive collection of immunity rhetoric that appears to place the government beyond the reach of judicial redress except in cases where Congress has supplied the requisite consent. In its broadest formulation, sovereign immunity purports to bar all unconsented suits against the government itself or its officers, agencies, or instrumentalities; indeed, the formulation in Dugan v. Rank n234 treats the suit as one against the government whenever a judgment in favor of the plaintiff "would expend itself on the public treasury or domain, or interfere with public administration, or if the effect would be to restrain the Government from acting, or to compel it to act." n235 This barrier to suit has been thought to apply to all [*964] claims against the government, including those based upon the Constitution, laws and treaties of the United States; traditional formulations treat sovereign immunity as a doctrine of "constitutional dimension, defeating even suits for enforcement of constitutional rights" in the absence of legislative consent. n236 Coupled with the requirement that waivers of immunity appear in statutory texts that speak with "unequivocal" clarity, n237 the doctrine of sovereign immunity appears to offer a most impressive barrier to the vindication of individual rights against the government.

Second, many suits and proceedings against the government of the United States proceed under specific statutory provisions that authorize litigation with the government or its agents - a practical reality that tends to confirm the

centrality of legislative consent. The three most important such statutes, the Tucker Act, n238 the Federal Tort Claims Act, n239 and the catch-all provision for the review of agency [*965] action that appears in the Administrative Procedure Act, n240 all appear to operate as waivers of the government's sovereign immunity. The Tucker Act authorizes the award of damages against the federal government in non-tort claims based upon the Constitution and laws of the United States; the FTCA makes the government responsible for the torts of its agents; and the APA establishes a statutory predicate for a general right to test the legality of agency action through suits seeking injunctive and declaratory relief. This array of statutes, coupled with many other specialized provisions for suit against the government, n241 contributes to the perception that government accountability depends entirely on statutory grace. [*966]

Yet the notion that the government's suability depends on legislative consent represents a grave misrepresentation of the rise of government accountability at common law. Faced with limited jurisdiction over claims against the government itself, n242 the Marshall Court relied extensively upon officer suits to secure government accountability. [*967] Such suits became the norm in a variety of discrete doctrinal areas: the action of ejectment enabled individuals to test the government's title to property by suit brought against its officials; n243 the action to enjoin a trespassory taking enabled the Bank of the United States to challenge the collection of a confiscatory tax by Ohio officials; n244 suits brought against collectors of external and internal revenue enabled individual taxpayers to litigate the propriety of exactions by the officialdom. Many of these suits rested on the fiction that assets were subject to judicial disposition so long as they remained in the hands of officials and did not enter the treasury of the government. n245

In all such cases, the Court plainly understood that it was using suits against officials to test the legality of government action. Process in officer actions, as Chief Justice Marshall admitted in Osborn v. Bank of United States, n246 runs "substantially, though not in form, against the State." n247 Yet the fact that the officer suits admittedly implicated "the direct interest of the State" did not transform such proceedings into actions against the government for purposes of triggering the prohibition on the exercise of entity jurisdiction. Rather, the Court decided the issue of its own jurisdiction by reference [*968] to the party defendant named on the face of the record. n248 This party-of-record rule enabled the Court to overcome the absence of entity jurisdiction by treating government officers as defendants in all cases where the common law supplied a remedy for the official action drawn into issue. n249

These common-law rights of action against government officers provided the predicate for two of this century's most important accountability rulings: Ex parte Young n250 and Bivens v. Six Unknown Named Agents. n251 In Ex parte Young, the Court upheld the power of a federal district court to enjoin the state prosecutor from enforcing state laws determined to have imposed confiscatory rates in violation of substantive due process. n252 The Court made similar injunctive remedies available to individuals who faced comparable threats from federal officials. n253 This established body of doctrine n254 offered decisive support for the recognition in Bivens that individuals who suffer invasions of their constitutional rights may sue the responsible federal officers for tort damages. n255 For as Justice Harlan recognized in his influential concurring opinion, the Ex parte Young doctrine assumes [*969] the existence of a federal right of action to enforce the Constitution. n256 Bivens simply makes an alternative form of relief available to individuals for whom it's "damages or nothing." Both cases went forward in federal court on the basis of the bare jurisdictional grant now codified in section 1331 of the Judicial Code.

Apart from the common law liability of the government officer, the Court has relied extensively upon prerogative writs as a source of authority with which to review the legality of government action. After striking down its own statutory grant of authority in Marbury v. Madison, n257 and initially refusing to permit other courts to entertain such actions, n258 the Court empowered lower courts for the District of Columbia to issue writs of mandamus to federal officers and thereby restored that much-needed remedy to the arsenal of the federal courts. n259 Mandatory injunctions came to play a role somewhat similar to that of mandamus in federal courts outside the District of Columbia. n260 Habeas corpus gave the federal courts power to review criminal process and the administration of immigration policy. n261 [*970] Even the original writ of scire facias, the venerable English remedy for the cancellation of letters patent, provided authority for judicial review of patented inventions before being swallowed up in patent practice by the all-purpose bill in equity. n262 Together, these remedies made up the core of what came to be known as "nonstatutory" review of administrative action, a body of law that has now itself largely been codified. n263

These remedies suggest that the description in Dugan v. Rank vastly overstates the breadth of sovereign immunity. Officer suits and nonstatutory review enabled individuals to bring suits against government officers in a variety of situations, including those that seek to test the government's title to real property n264 and those that seek to recover monies collected in payment of taxes and headed for the treasury. n265 Similarly, federal courts have exercised mandamus jurisdiction to compel government officials to take action required of them by law, even where the action in

question was to issue a patent for federal lands or to draw funds from the Treasury. n266 Finally, federal courts have long granted injunctions, prohibiting action violative of federal law and mandating that government officials take action required in order to respect the rights of the individual. n267 In all of these instances, the relief sought would appear to compel or prohibit government action, or to touch the public treasury or domain in ways that trigger the application of the sweeping rule of immunity set forth above. In all such instances, the relevant statutes would fail to pass muster under the modern "clear statement" test. Yet in all such instances, [*971] the Court has nonetheless permitted the actions to proceed against the official without regard to sovereign immunity.

Like those that do so in the context of suits against government officials, decisions that address the issue of sovereign immunity in the context of suits against the government itself treat the doctrine as something other than an absolute ban on unconsented suits against the government. Two cases in particular appear to suggest that governments themselves must occasionally pay damages to remedy breaches of their constitutional obligations. In First English Evangelical Church v. City of Los Angeles, n268 the Court held that the Just Compensation Clause of the Fifth Amendment demands a monetary remedy for governmental takings of property. n269 Similarly, in McKesson Corp. v. Division of Alcoholic Beverages & Tobacco, n270 the Court held that the Due Process Clause requires state governments to afford taxpayers an adequate opportunity to test the legality of a tax assessment. n271 States that deny taxpayers an opportunity to litigate the legality of the tax in an action to enjoin its collection must give them a post-deprivation opportunity to recover monies paid pursuant to an unconstitutional tax. n272 As a result, the McKesson Court ruled that Florida could not withdraw an available monetary remedy late in the course of a proceeding for a tax refund. n273 [*972]

First English and McKesson suggest that in cases where the Constitution requires the government, as an entity, to make victims of certain kinds of constitutional violations whole, remedial obligations apply whether or not the government has adopted an effective waiver of sovereign immunity. In First English, for example, the Court rejected the suggestion of the government of the United States, as amicus, that the recognition of any liability under the Just Compensation Clause ought to await the enactment of an appropriately specific waiver of sovereign immunity by the legislature. n274 Similarly, in McKesson the Court turned back Florida's claim that the doctrine of sovereign immunity embodied in the Eleventh Amendment prohibited federal courts from ordering the State as such to make retrospective monetary relief available to the claimant. n275 Finally, in Reich v. Collins, the Court noted that the McKesson remedial obligation applies notwithstanding "the sovereign immunity States traditionally enjoy in [*973] their own courts." n276 As a matter of principle, then, the cases suggest that the doctrine of sovereign immunity does not operate as an impenetrable barrier to suits against government bodies for monetary damages.

B. A Functional Analysis of SovereignImmunity

What then accounts for the widespread invocation of sovereign immunity as a bar to suits against the federal government? The cases fall into four related categories. In one category of dismissals, federal courts use the doctrine of sovereign immunity, much like that of equitable restraint, to withhold equitable relief where the plaintiff may obtain adequate remedies at law. In a second category, federal courts use the doctrine much like that of primary jurisdiction to shift litigation into a preferred forum. n277 In the third category, sovereign immunity simply reflects a judgment that the relevant law fails to create a right of action against the individual or entity sued. In the fourth category, the Court deploys sovereign immunity to justify a narrow interpretation of statutes said to have created a monetary liability running against the United States. The cases suggest, in short, that sovereign immunity offers a flexible tool by which the Court can choose among an array of available relief but plays no independent role in barring a remedy otherwise available as a matter of federal law.

1. Equitable Restraint. Judicial decisions that invoke sovereign immunity to restrict the scope of available common-law remedies often do so on the ground that other, more finely calibrated remedial statutes have displaced the common-law machinery. In Larson v. Foreign & Domestic Commerce Corp., n278 the Court refused to permit the plaintiff corporation to pursue its claim to a disputed shipment of coal by seeking to enjoin a federal official from transferring the property to a third party. The Court's decision has been much-criticized for extending the doctrine of sovereign immunity to bar an officer suit that [*974] had been traditionally used as a vehicle to precipitate a test of title to government property. n279 Though apparently based on immunity, Larson obviously owes much to the perception that the corporation could claim compensation for any taking of its property or breach of its contract rights in a suit against the government under the Tucker Act. Although the Court was careful to preserve the Ex parte Young n280 remedy for alleged violations of constitutional and federal statutory rights, n281 the Court viewed the existence of an adequate

post-hoc remedy as obviating any need for preliminary relief to precipitate a test of rights grounded in common law. n282

Sovereign immunity as deployed in the Larson line of cases operates as a tool of equitable discretion, not as a threshold barrier to litigation that applies irrespective of the availability of other remedies. It follows that courts in a Larson situation enjoy jurisdiction to determine whether the action falls within the Larson rule as an application for injunctive relief in circumstances where damages would suffice, or whether it comes within the Larson exception for official action in violation of the Constitution or in excess of authority. That, indeed, was the explicit lesson of a Larson precursor, Land v. Dollar, n283 where [*975] the Court held that the "District Court has jurisdiction to determine its jurisdiction by proceeding to a decision on the merits" n284 and thus treated the issue of immunity as dependent on whether title was in the plaintiff or the government. n285 Subsequent decisions treated the availability of alternative remedies against the government as a crucial factor in the determination of the immunity issue. n286

Larson and its progeny n287 have yielded a rich harvest of legislation as the Congress has sought to place individual rights against the government on the firmer, statutory basis that the decisions require. Section 702 of the Administrative Procedure Act now authorizes the federal courts to entertain applications for injunctive relief against government action by bringing suit against the relevant government agency or official. n288 The Quiet Title Act authorizes individuals to [*976] bring suit to test the title of the federal government to real property, n289 thereby restoring the ejectment proceeding that had been overthrown on the authority of Larson. n290 Subsequent decisions have made clear that these statutes displace the common law remedies by creating a mode, deemed preemptively exclusive, by which individuals and states may pursue their real property claims against the federal government. n291

The Larson line demonstrates a striking degree of interdependence between the statutes that regulate much of the modern law of government suability and the background assumptions on which they were based. n292 To be sure, modern statutes almost invariably provide the measure of the government's liability, as the post-Larson enactment [*977] of an exclusive Quiet Title remedy nicely illustrates. Yet the increasing reliance on statutes does not imply that Congress may curtail all government suability through statutory repeals. As we have seen, many of the statutes build upon (rather than reject) common law assumptions and many respond to Supreme Court decisions in attempting to develop workable rules of suability for a post-Erie world. n293 The complex interplay of statutes, judicial decisions, and common law assumptions negates any claim that liability depends entirely on legislative grace. n294 A decision to repeal the Quiet Title Act [*978] and the Tucker Act would deprive litigants of any statutory right to test title to property held by government officers and might well persuade the Court to revitalize the action in United States v. Lee.

2. Primary Jurisdiction. Under the current array of accountability legislation, claims against the United States, other than those brought pursuant to the FTCA, usually go forward before the Claims Court. When these claims are brought before them by mistake, federal judges often shunt non-tort entity claimsto the Claims Court by dismissing on the basis of sovereign immunity. Such dispositions make less sense as a threshold bar to recovery than as a directive to pursue the claim before the proper court, n295 as a recent decision by the Court of Appeals for the Federal Circuit reveals. In Quality Tooling, Inc. v. United States, n296 the Federal Circuit faced the question whether a bankruptcy court in Alabama could assert jurisdiction over the trustee's breach of contract action against the United States. Although it acknowledged that sovereign immunity had been waived with respect to contract claims, the government argued that these waivers of immunity were court-specific, that they authorized litigation on contract claims only before the Court of Federal Claims and not before the bankruptcy court. The Federal Circuit rejected this court-specific argument, concluding that the issue of forum choice was a matter within the discretion of the district court. n297

3. Failure to State a Claim. In another common category of decisions nominally resting on sovereign immunity, federal courts determine that the Constitution does not create a right of action in damages against the government itself for the conduct in question. As [*979] we have seen, the Court has occasionally interpreted the Constitution to require the government itself to pay monetary compensation for constitutional violations. n298 In most instances, however, victims of allegedly unconstitutional government conduct must seek damages in actions brought against government officials under Bivens n299 or against the government itself under the FTCA. Federal courts often dismiss on sovereign immunity grounds when they agree with the government that the plaintiff seeks an award of damages under a constitutional provision that creates a right of action against individual officers and not against the government. n300 Often mistakenly couched in terms of immunity, such dismissals operate much like those for failure to state a claim upon which relief may be granted. n301

4. Federal Statutory Claims for Monetary Relief. A similar form of dismissal occurs in a fourth broad category, dispositions that invoke sovereign immunity as a canon of construction in the course of interpreting the extent of

government liability for the violation of rights under a federal statute. Complex statutes in such diverse fields as bankruptcy and environmental regulation expressly create rights of action for those injured by violations of the law and confer jurisdiction on federal district courts to entertain such proceedings. Litigation to enforce rights under such statutes often presents the question whether plaintiffs may pursue claims for damages (or other monetary relief) against the federal government. n302 Under the Supreme Court's decision in Nordic Village, sovereign immunity establishes a relatively strong presumption of government nonliability that Congress can overcome only by including a "unequivocal expression" in the text of [*980] a statute. n303 Relatively few enactments have passed muster under this demanding standard.

Others have criticized this clear statement doctrine, both for its mistaken enunciation of too stringent a general principle of statutory construction and as a mistaken interpretation of specific statutory schemes. Despite these admitted shortcomings, we should assess the presumption in light of the framework for government accountability. That framework assumes that tort claims will proceed against the United States in district courts, that other entity claims will proceed against the United States in the Claims Court, and that other claims against officers and agencies of the federal government will proceed in actions seeking injunctive and declaratory relief. The Court's presumption tends to make claims for damages under specific statutory schemes more difficult to assert but does not threaten the array of existing remedies or threaten the plaintiff with a complete denial of relief.

To summarize, sovereign immunity rarely operates as an absolute bar to the assertion of unconsented claims against the government. Even where the individual seeks money damages against government entities, we have seen that claims based on the Constitution itself may go forward against the government without consent. We have also seen that most dispositions that rest on sovereign immunity actually reflect something other than simple nonsuability of the government. In general, the doctrine operates as a tool with which the Court coordinates the array of existing remedies for government misconduct. Having shown in this subpart that sovereign immunity offers no important practical barrier to government accountability, I argue in the next subpart for its replacement by a right to petition.

C. Toward a Constitutional Right To Petition theGovernment

We have now come full circle. The Petition Clause affirms the right of the individual to seek redress from government wrongdoing in court, a right historically calculated to overcome any threshold governmental immunity from suit in the ordinary course of law. In keeping with the apparent thrust of the Petition Clause, our law of government accountability has built up a body of law originally grounded in common law proceedings and prerogative writs of the kind traditionally encompassed within a right to petition the courts of justice. Although our law of accountability now depends largely on statutes and nominally incorporates a doctrine of sovereign immunity, we have seen that the doctrine presents no independent barrier to applications for such redress - conventional wisdom to the contrary notwithstanding. We need only recognize that fact and we can draw [*981] the circle to a close. We should abandon the doctrine of sovereign immunity and adopt a right to petition in its stead.

The decision to abandon sovereign immunity would do no violence to any feature of our constitutional structure. Although some scholars have argued that the Constitution itself compels the recognition of the doctrine, its constitutional origins remain quite obscure. Obviously the text of the Constitution says nothing about the government's immunity from suit; it simply gives Congress a (largely undefined) measure of discretion over entity suits against the government under Article III and requires an appropriation bill to support the payment of funds from the Treasury. Absent any textual predicate, arguments about the constitutional foundations of sovereign immunity proceed from structural premises or from assumptions about the implicit incorporation of common-law immunity doctrines. But these arguments look surprisingly thin. Professor Hill, for example, argues that sovereign immunity operates as a doctrine of "constitutional dimension" and thus may potentially bar unconsented suits to enforce constitutional rights. n304 The source of this constitutional "dimension" remains unclear, however; Professor Hill simply cites a rather vague reference to extra-constitutional "postulates" that limit and control - an apparent description of the presumed immunity in the common law. n305

Professor Krent makes a more explicitly structural argument, contending that separation of powers concerns explain why "the doctrine of immunity is rooted in the Constitution." n306 On Professor Krent's account, a decision to vest the waiver of immunity decision in Congress makes sense because it protects majoritarian policymaking from the interference of the unelected judges of the Third Branch. On the whole, Professor Krent defends the body of law that has emerged as "normatively plausible" and views judicial intervention as appropriately limited to instances where the political process does not place an effective check on congressional expropriation. n307 Although Professor Krent

offers valuable insights into the working of our system of accountability, [*982] he acknowledges that his work assumes the existence of sovereign immunity and simply seeks to describe its function in the protection of majority policymaking. n308 At the end of the day, his defense of sovereign immunity boils down to a claim that Congress should make the laws within constitutional limits. Although no one would quibble with that account, we do not need a doctrine of sovereign immunity to defer to congressional lawmaking.

Most scholars refrain from assigning constitutional stature to the doctrine of sovereign immunity. n309 Although Professor Hart admitted that a plaintiff may have to take what Congress gives him, he immediately qualified his concession to sovereign immunity by adding "although I have my doubts." n310 Similarly, Professor Jaffe sees the rise of sovereign immunity not as the vindication of constitutional principle but as an unfortunate feature of the law of government accountability that appeared to have arisen from the "magnificently ironic" failure of American law to incorporate entity suability assumptions of the kind that had long been a feature of British law. Most recently, Professors Fallon and Meltzer argue that descriptively accurate accounts of governmental accountability must take account of the blunt force of sovereign immunity, n311 but they stop well short of portraying the doctrine as one of constitutional dimension. The Constitution, in short, presents no barrier to the abandonment of the doctrine of sovereign immunity.

Lacking constitutional stature, sovereign immunity survives on combined strength of repeated reaffirmation and the perception that our own eighteenth century Constitution contains no affirmative remedial assurance. To be sure, the Constitution's Due Process Clauses, which typically act as a check on the enforcement by government of individual obligations, occasionally demand an affirmative remedy; n312 the Suspension Clause seemingly guarantees the availability of the [*983] writ of habeas corpus to those in confinement; n313 and the Just Compensation Clause n314 confers an affirmative right to compensation for a taking of private property for public use. n315 Although it acknowledges these special remedial provisions, the weight of scholarly opinion holds that the Constitution establishes no general right to pursue affirmative claims against the government. n316

As we have seen, however, the presumed absence of any constitutional affirmation of government suability rests upon an unduly restrictive interpretation of the Petition Clause and on the assumption that most claims against the governments of the early American States went forward by way of legislative petition. n317 We see, in short, a subtle connection between the mistaken assumption that legislative petitioning worked to the exclusion of judicial remedies for government misconduct and the assumption that the Petition Clause guarantees only a right to invoke the political processes of government. n318 Once we recognize that modes of seeking redress through judicial petitions had become a relatively commonplace feature of American law following independence, it becomes clearer that the Petition Clause secures the right of individuals to pursue such remedies in the newly established federal courts. We should make that assurance explicit by exchanging our doctrine of sovereign immunity for a right to petition. [*984]

Such a conception of the Petition Clause closely follows the right to petition as originally understood. As we have seen, the petition began as an all-purpose request for extraordinary relief of the kind that the common law courts were incapable of providing. From feudal England to Blackstone's day, the right to petition served to overcome the Crown's immunity from suit and provided the subject with an essentially judicial mode of pursuing relief. n319 The petitioner's traditional immunity from prosecution for statements made in petitions and the government's traditional obligation to respond - cornerstones of the right to petition as historically understood - both grow out of the petition's origins as a judicial mode of proceeding. n320 While these features of the right to petition seem rather anachronistic today, as applied to petitions addressed to either the legislative or executive branches of government, n321 they still make sense as applied to petitions to the judicial branch. Judicial petitioners still enjoy a virtually absolute immunity from liability for statements made in judicial proceedings and courts still owe suitors a virtually unflagging obligation of considered disposition. n322 A judicial-process interpretation of the right to petition makes better sense in light of these historic features of petitioning than the dominant political process accounts of other scholars.

Understood as a right to invoke judicial processes in suits and proceedings against the government, the right to petition not only conforms to the historical understanding but also fits surprisingly well within a modern framework of government accountability law. As we have seen, the petition of right provided a mechanism for the issuance of a judicial decree declaring the relative rights of the plaintiff and the government. In cases involving disputes over title to land, a self-executing judicial decree established "record" ownership that would ordinarily conclude the dispute. Equity, or some other form of enforcement, could compel officers of the Crown to respect the record. [*985] n323 In keeping with this traditional judicial role, federal government accountability law has long upheld the authority of courts to resolve disputes over title to land. n324 Although the common law mode of securing such a judicial determination has now given way to the Quiet Title Act, n325 the right of individuals to secure a test of ownership rights in litigation

with the federal government remains intact. The Petition Clause thus provides an anchor for the right of individuals to interplead with the government on issues of property ownership much in keeping with our tradition of accountability.

In respect of suits for money payable by the Treasury, recognition of a right to petition can also be seen as consistent with our accountability traditions. Recall that petitions of right did not result in self-executing judgments payable by the Parliament in England or the assembly in Virginia. Rather, legislative control of the fisc entailed legislative control of the decision whether to appropriate funds to pay money judgments rendered against the government. n326 Judicial reluctance to challenge legislative control over the fisc directly helps to explain a good deal of our received tradition and our widespread reliance upon the officer suit as a tool of government accountability. Thus, the Court has shown great reluctance to recognize rights of action against the government itself as a mode of enforcing substantive constitutional guarantees. n327 Yet in the relatively few instances in which the Court has interpreted the Constitution as compelling the government itself to make monetary remedies available to individual suitors, the Court has refused to regard the doctrine of sovereign immunity as an independent bar to litigation. n328 The recognition of a right to petition can accommodate both the traditional willingness of the Court to defer to congressional primacy in fiscal matters and the [*986] willingness of the Court to ignore sovereign immunity in circumstances where the Constitution demands a remedy against the government.

Finally, the right to petition can give effective voice to the fundamental idea that individuals enjoy a right to pursue, if not claims against the government itself in every case, then at least claims for injunctive relief or damages in suits against responsible government officials. At the core of the right to petition lie the prerogative writs of mandamus, habeas corpus, prohibition, and certiorari - writs that comprised Crown practice in England and that came to provide the vehicle by which individuals secured an adjudication of their rights against the government of the United States. n329 The prerogative writs have remained remarkably stable over time, providing an extraordinary mode of securing redress of grievances in circumstances where ordinary remedies at law will not suffice. Although the core elements of this right to seek extraordinary remedies have been codified in provisions of the Administrative Procedure Act that authorize suits against either the United States or its agencies or officers for injunctive and declaratory relief, n330 the right traces its origins to the Marshall Court's reliance upon prerogative writs and officer suits, and to the landmark decisions in Bivens and Ex parte Young. n331

Such a change would return our law of government accountability to the foundations laid when the Petition Clause was ratified. On abandoning the doctrine of sovereign immunity, we would return to the assumption of the framers that issues of government suability were to be resolved in jurisdictional terms. n332 A federal court with jurisdiction would thus enjoy the power to entertain suits and proceedings against the government and its officers. How far such an action would proceed in any particular case would depend on a variety of familiar factors, including the questions whether the law created any right of action against the government, whether the claims would be better resolved in an alternative forum, whether the relief sought [*987] was appropriate to the claim asserted, and whether to make such relief available in the sound exercise of equitable discretion. n333

By preserving the usual array of defenses, such a properly tailored right to petition would work no revolution in the law of government accountability. In particular, the recognition of a right to petition would not eliminate the power of the federal courts to withhold equitable relief in circumstances where any one of a number of considerations pushed in that direction. As a matter of history, petitions for prerogative writs were administered by King's Bench - a court of the common law - but were seen as applications for extraordinary relief that necessarily entailed the exercise of equitable discretion. Such discretion has long informed the federal courts' flexible use of relief in the nature of mandamus today. As Justice Stone explained in words that remain as apt today as in 1933, the court "in its discretion, may refuse mandamus to compel the doing of an idle act, ... or to give a remedy which would work a public injury or embarrassment, ... just as in its sound discretion a court of equity may refuse to enforce or protect legal rights, the exercise of which may be prejudicial to the public interest." n334 The availability of alternative relief in an alternative forum has always been seen as a factor counselling against a decision to grant such extraordinary relief. n335

Equitable discretion would not only survive the recognition of a right to petition but would come into play in a different and more useful framework. Rather than a mode of analysis that informed a threshold question of sovereign immunity, equitable discretion in a petitioning framework would inform the court's exercise of remedial discretion. n336 Faced with claims such as those in Larson, therefore, [*988] the Court might forthrightly address itself to the factors that ought to influence its decision whether to grant specific relief. Such an approach would make it clear that the Court's decision to dismiss rested on the existence of remedial alternatives, rather than the blunt instrument of sovereign immunity.

The adoption of a right to petition might produce more nuanced rules to govern other issues that arise in course of litigation with the government. n337 The superstrong presumption against government suability in Nordic Village doubtless reflects the Court's reluctance to recognize treasury liability and should be conceived as a doctrine of statutory construction applicable to the question whether any particular statute creates a right of action in damages. Yet the Nordic Village decision speaks of its test as one that governs the waiver of sovereign [*989] immunity; it thus presents the prospect that a similarly "superstrong" presumption will apply to other questions presented in the course of litigation over government accountability. Such an extension of Nordic Village beyond the issue of new liability in damages makes little sense, however. For example, where the law clearly entitles an individual to sue the government for damages, a less demanding standard might well govern the interpretation of statutes that determine in what forum the claim should proceed. Recognizing a right to petition can help to cabin the Nordic Village rule and preserve the possibility of a more textured analysis of other questions.

Such a right to petition would also leave much of the remainder of the law of government accountability intact. Federal district courts should still ordinarily refrain from hearing suits for damages against the government itself based on contract and constitutional theories; the Claims Court remains the preferred forum for such litigation. Suits for constitutional torts would still go forward in federal district courts and would continue to name federal officials as defendants. Attempts to broaden the scope of such actions to include other defendants (such as the United States itself or its agencies) would succeed or fail on the merits and not on the unthinking basis of sovereign immunity. As the Court's recent decision in FDIC v. Meyer makes clear, the absence of sovereign immunity as a catch-all barrier to suit does not necessarily occasion broader government liability. n338 But it may improve the quality of decisionmaking by encouraging courts to undertake a more thoughtful analysis of the issues of government accountability.

IV. Conclusion

Sovereign immunity remains a part of our law of government accountability partly as a result of sheer inertia and partly as a consequence of too narrow a conception of the Petition Clause of the First Amendment. As we have seen, most accounts characterize the Petition Clause as guaranteeing the right of individuals to pursue a political decision through the submission of petitions to the legislative and executive branches of government. Such a conception dominates the decisional law of the Supreme Court and much of the scholarly writing on the subject. Such a conception, moreover, helps to confirm the logic of sovereign immunity. For as Professor Jaffe noted, the assumption that most claims for redress of government wrongdoing went forward by way of petition to legislative assemblies has been thought to explain how the newly independent American states failed to incorporate [*990] British remedies against the Crown into their evolving law of government accountability.

This Article calls for reconsideration of our established assumptions about the nature of early American accountability law, and the relationship between the Petition Clause and the doctrine of sovereign immunity. Once we recognize that Madison and the other framers of the Constitution and the Bill of Rights had actively worked at the state level to codify such British remedies against the government as the petition of right, the monstrans, the traverse, and the prerogative writs, we can begin to understand the Petition Clause as an affirmation of the Blackstonian right to seek judicial redress from government wrongdoing. Precisely such a judicial conception of the clause emerges from its textual reference to petitioning the "government," from its structural connection to the doctrine of the separation of powers, and from its historical link to the tradition of judicial petitioning that the Americans had brought with them from England. Representative Stone pointed to that tradition, in denying the necessity of a provision to codify practice upon the petition of right in June 1789; Madison and others subsequently wrote that tradition into the Bill of Rights.

Understood as applying to judicial petitions, the Petition Clause establishes a constitutional right to pursue judicial claims for government wrongdoing that seemingly displaces the judge-made doctrine of sovereign immunity. Granted, the Petition Clause has not played a significant role in the development of our current body of government accountability law. But the common-law traditions of accountability that underlie the Petition Clause were incorporated in the early American practice in the form of widespread reliance upon officer suits and prerogative writs. Such remedies have given rise to an impressive body of law that includes a presumptive right to judicial review of claims against the government, its agencies, and its officers. Sovereign immunity has no place in such a body of law, except as a reminder of the judicial reluctance to recognize claims for money damages against the government and as a method of coordinating the rich array of available remedies. We should exchange that doctrine - one with no textual predicate - for a right to petition rooted in the Petition Clause. [*991]

Appendix

The Role of the Courts in Handling Claims Arising from the Forfeiture of Loyalist Property During the Revolutionary War

Congress recommended the confiscation of the property of British loyalists n339 late in 1777, no doubt partly to punish traitors, partly to encourage doubtful patriots and partly to furnish state treasuries with the hard currency that could be obtained through the sale of loyalist property. n340 Many states responded with confiscation statutes of various kinds: some relied upon the failure of the loyalists to take an oath of allegiance as the triggering event of forfeiture; others followed the British practice of "attainting" those determined by the legislature to have been guilty of treason. Whatever the method, confiscations of loyalist property raised a variety of questions similar to those that arose in Great Britain in connection with prerogative practice on escheats and forfeitures. As we shall see, many states followed the British practice of investing the courts with control over the disposition of claims; in many instances the states adopted some version of the British procedures of monstrans and traverse.

The English Exchequer Tradition

The law of escheat entitled a superior landlord, who in practice was often the King, to claim the land of a tenant who made the mistake of dying without heirs. n341 The law of forfeiture entitled the Crown to claim property owned by those who were adjudged to be traitors, felons, "idiots, lunatics, and infants." n342 To perfect the [*992] Crown's right to forfeited or escheated property, the court of the Exchequer presided over the "inquisitions" or "inquests of office" that were held to determine whether the facts supported the Crown's claim to the property. n343

In the typical inquest of office, officers of the Crown such as the sheriff or escheator initiated an action by informing Chancery that the Crown was entitled to claim specific property. n344 If the information was accepted, Chancery issued a formal grant of authority to certain commissioners who would preside over the inquest, along with a local officer or sheriff and some number of jurors. n345 Together, the jurors would determine whether the Crown's claim appeared to have merit, by travelling to the vicinage, asking questions, and otherwise taking evidence. If the jurors agreed with the claim of Crown entitlement, an office was said to be found for the Crown and that fact was returned or communicated to the Exchequer. Essentially, the finding of the office established the Crown's entitlement as a matter of record, good unless someone came into Exchequer to contest the Crown's claim. n346 [*993]

At one time, the petition of right (with its request for an endorsement by the Crown) offered the sole mechanism by which the subject could contest the finding of an office and the vesting of title in the Crown. The absence of any speedier remedy could cause great injustice when the Crown took possession (as it was entitled to do at common law) immediately upon the finding of an office, particularly in cases where the Crown conveyed or granted the property to another in the meantime. n347 Parliament solved this problem in the Fourteenth Century by installing a lapse of time between the finding of an office and the seizure of property. n348 During the one-month period, any individual who claimed the property could enter an appearance and, by pursuing either a monstrans de droit or traverse of office, assert rights against the Crown. n349 In any case, successful claimants obtained a self-executing judgment "amoving" or removing the Crown's hands from the property (amoveas manus).

Although the system of remediation developed at a time when most claims involved title to land, n350 the Exchequer adapted it to the money economy. To begin with, many of the issues involved in claims asserted by way of petition and monstrans involved entitlement to a stream of money. n351 To state the most obvious example, disputes over land presented not only the question of ownership but also that of the right to rents or profits during the period of litigation. n352 In addition, the most common action to recover Crown debts - the writ of extent - issued only after an inquest of office much like that involved in [*994] cases of escheat and forfeiture. n353 Crown debtors who faced actions in Exchequer on writs of extent thus enjoyed the same opportunity to assert claims of right against the Crown as other targets of inquisitions of office. n354

Perhaps most significantly, the monstrans and traverse were available to all subjects who claimed an interest in the property, not just to those who sought to resist the Crown's proceedings against them. n355 Thus, the right to contest an escheat of land extended to the owner and his successors and to those outside the line of feudal succession, including mortgagors. n356 Similarly, the right to contest an extent applied both to the Crown debtor and to the debtor's creditors. Following an office found in support of an extent to collect a debt owing to the Crown, therefore, the Crown debtor could appear and contest the debt or simply pay it off. n357 Alternatively, those creditors who claimed an interest in the assets of the Crown debtor, either as assignees of debtor's assets for value before the Crown process began or as mortgagors of the property claimed by the Crown, could appear and assert rights against the Crown. n358

The Exchequer Tradition in the British Colonies of North America

Although the evidence remains incomplete, what few accounts we have suggest that colonial officials followed Exchequer practice as best they could in matters of prerogative revenue. For example, the forfeiture proceedings that grew out of the Salem witch trials at the close of the seventeenth century appear to have tracked Exchequer practice in most particulars. n359 Similarly, a variety of eighteenth century statutes suggest that the colonies attempted to duplicate Exchequer practice in matters of escheat. n360 Finally, the process by which [*995] claimants petitioned in Virginia to take up land under lapsed grants bears an obvious resemblance to scire facias practice in Great Britain. n361

The clearest evidence of the incorporation of Exchequer practice appears in Goebel and Naughton's analysis of law enforcement in colonial New York. n362 Based on their review of docket entries, minute records, and the notes of a colonial attorney general, Goebel and Naughton show how New York's evolving practice on recognizances drew upon practice in the Court of Exchequer. They report that efforts by the attorney general in 1760 to regularize the management of Crown revenue on forfeited recognizances in New York was really an attempt to import regular "estreat" practice into the Province. n363 Equally important, they indicate that colonial lawyers, in the course of defending suits to enforce bonds estreated into the Supreme Court under the newly reinvigorated collection practices, invoked the traditional remission powers of the Court of Exchequer as a precedent for relief in the absence of any "wilful contempt." n364 The adoption of estreat procedure in New York thus carried along with it the subject's traditional right to seek judicial relief against the Crown in Exchequer.

Goebel and Naughton also demonstrate that, to the extent they operated at all in colonial New York, escheats and forfeitures followed the rules of Exchequer practice. The authors first report on a series of forfeitures that grew out of the Leisler rebellion. While they note the similarity to Exchequer practice, they conclude that the escheat of lands appears to have ended in New York at the turn of the eighteenth century. n365 They report a similar end to attempts to forfeit personal property. n366 They attribute the sparsity of such claims to the fact that most criminal defendants, in cases subject to escheat and forfeiture, had few assets worth pursuing. n367 Such an account may explain why American legislatures adopted statutes that not only effected the forfeiture of the property of British loyalists during the Revolutionary War but also regulated practice on escheats and forfeitures. If, as Goebel and Naughton reckon, the practice had fallen into [*996] desuetude by the late colonial period, then the adoption of forfeiture practice rules was not redundant of state laws that incorporated English common and statutory law in use in the province before the Revolution.

The Post-Revolutionary Codifications

Virginia

Of the many states that instituted provisions for the escheat and forfeiture of property owned by the British, Virginia's detailed collection of rules borrowed perhaps the most directly from the English Exchequer tradition. To begin with, Virginia passed a law in May 1779 defining citizenship by reference to residence and willingness to take an oath of fidelity to the Commonwealth. n368 Those who did not qualify as citizens were deemed aliens, a declaration that subjected the property of many British subjects to escheat or forfeiture. n369 A second law went further by declaring subjects of Great Britain "aliens and enemies;" n370 the act explicitly declared the real and personal property of such alien enemies to be "vested in the commonwealth." n371 Following the practice of Great Britain, the act went on to specify that the property subject to escheat and forfeiture was to be determined by offices found and returned to the general court. n372 The act specifically provided a one-month holding period, during which time individuals might assert claims of title to the property. n373

The two statutes thus sought to transfer property in the hands of British subjects to the Treasury of the Commonwealth and to protect the right of individuals to an adjudication of their claims. But they operated in slightly different ways. The act addressed to "alien enemies" actually "vested" the property in question in the Commonwealth; all that was necessary was an "office of instruction" to determine what property the alien enemy owned at the time of the [*997] passage of the act. n374 The act defining citizens and aliens, in contrast, did not accomplish any such "vesting;" it simply made the property of the aliens subject to forfeiture upon an "office of entitling." n375 But while it effects no immediate vesting of property, the act defining British subjects as aliens applies to property held as of its effective date and to any such property the alien might thereafter acquire. n376

Virginia also enacted rules of procedure to govern matters of escheat and forfeiture that explicitly authorized individuals to contest the finding of an office by way of monstrans, traverse, and petition of right. Enacted in May 1779, the provisions appear in "An act concerning escheators" that was closely modeled upon the English precedents. n377 The act began by calling for the appointment of one escheator in each county, who "shall sit in convenient and open places, and shall take his inquests of fit persons, who shall be returned and empanelled by the sheriff." n378 The act then required the jury to take evidence and render a decision by indenture returned to the general court.

Provisions for monstrans and traverse followed immediately after the provision for returns of the inquest to the general court:

And if [the office] be found for the commonwealth, and there be any man that will make claim to the lands, he shall there be heard without delay on a traverse to the office, monstrans de droit, or petition of right; and the said lands or tenements shall be committed to him if he shew good evidence of his right and title. n379

The act thus authorized individuals to contest inquests of office before the general court, much the same way individuals proceeded before the Court of Exchequer in England. It also followed English practice in requiring escheators to hold the lands for a period before selling them, during which time claimants might assert title to the land. n380 [*998]

A subsequent statute provides relatively clear evidence that British loyalists made wide-ranging use of these provisions by filing claims to contest the validity of inquests of office. Passed in October 1779, the act recited in its preamble that "doubts have arisen respecting the construction of the act" relating to escheats and forfeitures from the previous May. n381 These doubts no doubt arose in the course of litigation pursuant to the act. At common law, aliens were entitled to traverse a finding of office and thereby litigate the issue of their alienage. n382 British subjects must have made such claims under the May enactment because the October clarification specifies that British subjects must withdraw their traverses and file monstrans de droits instead. n383 The October clarification also declared a thirty-day holding period applicable to inquests, apparently reflecting judicial uncertainty as to whether to apply the one-month holding period in the act relating to alien enemies or the more lenient twelve-month provision in the act governing escheators. n384 Finally, the October act specifically denied British subjects their right at common law to litigate procedural irregularities in the inquest. n385

Although these amendments made it more difficult for British subjects to contest escheatsand forfeitures, the act displayed great solicitude for the rights of Virginia citizens. Section three of the act authorized the Court of Chancery to issue injunctions to stay inquests (a common-law proceeding) in favor of those with mortgages and other equitable interests in the land. n386 Section four sought to preserve the rights of those who, though not then residents of the Commonwealth, might return to take up citizenship after the war. The section provided that such individuals that return and qualify for citizenship may claim either the property itself or, if the property had been sold, "the money arising from the sale with the same force he or she might have [*999] done to the thing itself." n387 The provision allowed courts to adjudicate an individual's money claim against the Commonwealth and its Treasury. n388

New York

New York adopted provisions, somewhat analogous to those of monstrans and traverse, to protect the rights of third parties to litigate their claims in disputes growing out of the forfeiture of loyalist estates. New York's commitment to such protection appears most clearly in a [*1000] statute calling for the "speedy sale of the confiscated and forfeited estates." n389 The act began by specifying that the commissioners of forfeited estates shall have authority to issue deeds and conveyances to those who purchase forfeited estates, which deeds shall operate as warranties of good title by the state. n390 Such a warranty provision contemplated the possibility that a true owner (perhaps one not properly subject to attainder for treason) might recover the lands in a subsequent action of ejectment. n391 The act protected against the prospect of such subsequent eviction by requiring the true owner to reimburse the purchaser for the appraised value of any improvements on the land. n392

Apart from this recognition of the rights of owners to recover wrongly forfeited estates, the act protected those who had perfected mortgages on forfeited estates before the attainders for disloyalty became effective. n393 It did so by authorizing the chancellor to resolve disputes between the commissioners of forfeited estates and any claimants under such a mortgage. Following the now-familiar pattern, the act provided for a petition to the chancellor by either the commissioner or the claimant and directs the chancellor "to proceed in a summary way, to enquire into the matters of such claim, and after hearing the parties to make a final decision thereupon." n394

Finally, the act offered judicial protection to the creditors of those attainted for treason. It did so by vesting a variety of courts, including chancery, the supreme court, the mayors court and the court of common pleas, with jurisdiction to entertain petitions from persons with "any claim or demand ... against any estate forfeited as aforesaid." n395 The act authorized such courts or judges to "examine, hear and according to equity and good conscience, to determine" any such claims. n396 The act then provided for the treasurer to issue certificates to successful petitioners; like other treasury certificates, these were to earn interest and were to be accepted for the purchase of forfeited estates and unappropriated lands and for the payment of taxes. n397 [*1001]

Pennsylvania

Pennsylvania also entrusted its courts with the determination of the claims of third parties against the forfeited estates of British loyalists. Chapter 773 of the Pennsylvania laws, enacted on March 6, 1778, n398 first declared forfeited to the state the real and personal estates of those attainted for treason. n399 The act then specifically authorized all persons claiming an interest in such estates to "enter their respective claims and demands before the Justices of the Supreme Court." n400 The act directed the Court to "proceed in a summary way .. to hear and determine all such claims" and declares the Court's decree to be "final and binding." n401 After directing the state's attorney-general to defend the interests of the state in such litigation, n402 the act provides for the payment of sums of money from the treasury. In particular, the act called upon the treasurer to pay the amounts set forth in decrees of the Supreme Court out of the rents and profits of the estate on which the demand was made. n403

Although it clarified forfeiture procedures in some respects, subsequent legislation preserved the essential role of the courts in passing upon third party claims. n404 The subsequent act directed the speedy sale of forfeited estates but it preserved the right of claimants to assert claims before the Supreme Court. n405 The act also offered such claimants a right to trial by jury, instead of the summary proceedings that had been specified in the earlier act. n406 Finally, the act made clear that purchasers of forfeited estates would obtain good title, even in cases where the attainder was later reversed by legislative act. Those claiming under a reversed attainder were directed to "apply to the [*1002] legislature to be indemnified, out of the public treasury, to the amount of the purchase money of the estate." n407

Georgia

Like Virginia, Georgia made specific provision for the judicial determination of claims arising from disputes over the confiscation of the estates of British loyalists. Georgia's confiscation act, enacted on March 1, 1778, provided for a board of commissioners to oversee the confiscation and sale of the estates of those attainted for treason. n408 It then provided specifically for the assertion of claims by those who "claim any estate, right title, or interest" in the confiscated property or who claim as creditors of those attainted. n409 The statute provided for the board of commissioners to hear such claims initially, and to allow those that appear to be well grounded. n410 The act then provided that "all, any, and every such claimant or claimants, who shall or may be discontented with the determination of any of the boards respectively, shall have the right of appealing from the same to any of the superior courts of this State within the respective counties." n411

The same pattern was followed in the Confiscation Act of May 4, 1782. n412 After naming those whose estates were subject to forfeiture, the statute provided that individuals who have claims against the forfeited estates may pursue them before the board of commissioners. n413 Alternatively, the act provided that claimants may pursue an action at law before the superior court. n414 Such actions were to be tried by jury, unless the amount in controversy was less than fifteen pounds. If successful, such actions entitled the claimant to a certificate in the amount of the verdict, issued by the governor, and payable (with interest) in twelve months time. n415

Later legislation suggests that such claims were asserted in abundance. A supplemental act, effective as of July 29, 1783, recited that [*1003] "suits are daily brought for recovery of such demands under the said act of confiscation." n416 The general assembly attempted to deal with the avalanche of suits by curtailing the rights of a limited group of claimants to sue in superior court. The 1783 enactment thus abated the right of creditors to pursue money claims in court against confiscated estates, but it preserved the right of individuals to a judicial determination of their claims to ownership of property involved in forfeiture proceedings. n417

Though significant, this limited abatement lasted for less than two years. An act of February 22, 1785, declared that "many persons have just demands against the estates of those [attainted], which on principles of justice ought to be paid or some way provided for." n418 Accordingly, the act provided individual claimants a period of nine months during which to submit their claims against confiscated estates to the auditor, and it directs the auditor, to resolve such claims in accordance with the standards that would control in a "court of law." n419 It then provided that any person

"dissatisfied with the determination of the auditor ... may appeal to the superior court of the county." n420 The act directed the auditor to issue certificates to any successful claimants in accordance with the verdict of the court. n421 [*1004]

Delaware

Like Virginia, Delaware used loyalty oaths to distinguish patriots from British loyalists whose property was subject to escheat and forfeiture. First enacted in June 1778, the Delaware act of "free pardon and oblivion" provided British loyalists until August to take an oath of allegiance to the state. n422 The property of those who failed to take the required oath was "declared to be absolutely forfeited to this state, subject nevertheless to the payment of the said offenders just debts." n423 The act calls for the appointment of commissioners and directs them to administer and sell forfeited estates and to transmit the proceeds to the General Assembly. n424

Although it called for fair treatment of the creditors, wives, and children of British loyalists, the Delaware act made no provision for the determination of any disputes growing out of the sale of escheated estates. To cure that problem, Delaware passed a supplemental act in June 1779 that vested the county courts of common pleas with authority to resolve claims arising from the forfeited estates. n425 The act directed the justices of the courts of common pleas in each county to empanel juries to resolve claims to real property n426 and to try claims of the estates' creditors themselves, "agreeable to the very right of the case." n427 The act established a three-month limitation period, running from the date of the sale of the estates, for the assertion of such claims n428 and declared the judicial determination to be "final and conclusive without any further appeal." n429

New Jersey

Although New Jersey maintained legislative control over the settlement of public accounts, its provisions for the forfeiture of the estates of British loyalists closely follow the rules of Exchequer practice and make explicit provision for the adjudication of claims. n430 New [*1005] Jersey began in 1777 by appointing commissioners to sequester the personalty of those British subjects who failed to swear oaths of allegiance to the United States. n431 One year later, New Jersey directed the forfeiture of the personal estate and the sequestration of the real estates of British loyalists. n432 The act directed the commissioners to take an inquisition by convening twenty-four "reputable freeholders" to sit as a jury to determine whether those accused of British loyalty in question did, indeed, violate the duty of allegiance to the state. n433 It then called for the return of the inquest to the court of common pleas for the county and specifically contemplates the litigation of a "traverse" of the inquisition. In particular, the act allowed "the Person against whom such Inquisition hath been found, or any Person on his Behalf, or who shall think himself interested in the Premises [to] appear and traverse the said Inquisition" before the court of common pleas. n434 The act thus adopted Exchequer practice in relying upon the inquest of office and in allowing both the suspected loyalist and others to contest the claim of British allegiance.

Subsequent legislation in New Jersey continued to reflect the imprint of Exchequer practice and a commitment to judicial determination of claims to forfeited estates. In December 1778, New Jersey took steps to effect the forfeiture of the real and personal estate of British loyalists. n435 Again, the act proceeded by directing an inquisition to determine the individual's British allegiance and declares forfeited any property owned by individuals against whom inquests were found and finally determined. n436 By incorporating the relevant provisions of earlier legislation, the December statute made clear that it continued to contemplate the return of inquests to the court of common pleas and the submission of traverses by those interested in litigating the issue of loyalty. n437 [*1006]

The December legislation also made a relatively detailed provision for the assertion of claims by the creditors of British loyalists. Section sixteen noted that "divers Persons may have just and equitable Demands against" the forfeited estates and declares it "highly reasonable that such Demands should be adjusted and paid." n438 It therefore directed the claimants to submit their demands for adjudication by the courts of common pleas in the various counties. The act directed the courts, upon receipt of the claims, to "examine[ ] and settle[ ]" them and forward them to the treasurer. n439 Importantly, the act directed the treasurer "to pay each Person ... the Sum adjudged to be due" and does not call for any legislative review of the propriety of the judicial settlement. n440

South Carolina

In contrast to other state assemblies which authorized the courts to determine such claims, the general assembly of the state of South Carolina preserved its dominant role in the determination of claims against the state. Reflecting the instinct towards legislative dominance, South Carolina's laws offer an example of how those with little sympathy for a

judicial role were to structure a system of claims determination. In consequence, South Carolina's laws serve to underscore the significance of the adoption of judicial claims determination by other newly independent states.

Traditionally, determination of money claims against the state of South Carolina had been subject to detailed regulation by the lower house of the assembly. In 1778, South Carolina passed a law authorizing the appointment of a new "receiver, auditor and accomptant-general" for the state but took pains to preserve the assembly's control of money matters. n441 For one, the statute provided for the election of the auditor by vote of the assembly. n442 For another, the statute directed the auditor to "lay the whole" of his accounts before the assembly "for their approbation, that orders on the treasury may issue for payment." [*1007] n443 The act thus provided for ultimate legislative control of the approval of claims against the state and, significantly, makes no mention of any judicial role.

The statutes governing the disposition of claims to forfeited estates reflected some relaxation in the legislature's control. After providing for the forfeiture of the real and personal estates of British loyalists, n444 the South Carolina act allowed nearly a year for creditors to make demands on the commissioners who were appointed to manage the estates in question. n445 The act directed the commissioners to consider the claims of creditors and to report on them to the assembly "to the end, that the legislature may direct with respect to such creditors what to justice shall appertain." n446 In a curious twist on legislative supremacy, however, the act then specified that claimants dissatisfied with the assembly's determination were to have "an action against the said commissioners." n447

As time went on, the assembly grew dissatisfied with the judicial determination of such claims. Legislation adopted in March 1784 in effect prohibited creditors from pursuing claims against confiscated estates without first obtaining leave from the assembly. n448 Drafted so as to bar suits by creditors where the estates had been sold, n449 the act reflected the assembly's concern for protecting money that the commissioners had transferred to the treasury from disposition by the courts. By also requiring legislative approval of suits against other persons in possession of the forfeited property, n450 the act attempted to protect those who purchased the estates from suits by creditors. As a [*1008] consequence, those making claims against forfeited estates were driven back to legislative petition. n451

North Carolina

North Carolina also maintained its tradition of legislative determination of public claims. The legislature maintained its own procedures for settling public claims until April 1780, when it established a board of auditors. n452 The auditors were directed to review the accounts of those entrusted with public funds and to provide the attorney-general of the state with a list of debtors to sue. The auditors were also authorized "to settle and adjust all Accounts and Claims which heretofore were wont to be settled and adjusted by the General Assembly." n453 Yet this power to pass on public claims was subject to an important limitation: the auditors were directed to lay such settled accounts and claims "before the General Assembly to be by them approved or rejected." n454 Thus, the legislature retained its control over the disposition of public claims. n455

The General Assembly was willing to part with control over certain of the claims to the confiscated property of British loyalists. Like some other states, North Carolina's assembly directed the county court in each county to appoint three commissioners to manage the collection and sale of forfeited property. n456 The assembly directed the court to suspend such sales in cases where loyal citizens of the United States claimed title to any forfeited property, thereby securing the right of citizens to a final determination of the matter by the superior [*1009] court of the district, sitting with a jury. n457 Although this provision allowed the superior court to adjudicate the demands of those claiming ownership of the forfeited property before it was actually sold, no similar provision was made for judicial determination of the claims of creditors of such estates. Instead, creditors were told that they would, "upon due Proof made before the General Assembly, be entitled to receive their several Demands." n458 The General Assembly thus retained its control over money lodged in the state's treasury. n459

Massachusetts

Like South Carolina, Massachusetts had an exceedingly strong tradition of legislative control of the determination of money claims against the state. That tradition was reflected in the state's handling of the claims of creditors of the forfeited estates of British loyalists. Although Massachusetts directed the courts of common pleas to determine whether any particular individual's estate was subject to forfeiture, n460 it made no provision initially for the determination of the claims of creditors. Later legislation cured this omission by directing so-called "commissioners of claims," appointed by the probate judges for each county, to pass upon any claims by creditors of forfeited estates. n461 The act directed the judge to appoint a representative of the state to dispute any doubtful claims and calls for the commissioners to allow those that they find to be "supported" and to report that fact to the judge. n462 The act did not appear to allow

the judge any discretion in approving the commissioners' report but simply directed that the claims "shall be allowed accordingly." n463 It thus appeared to vest final authority over the determination of creditors' claims in the hands of the commissioners, rather than in the probate judge. [*1010]

New Hampshire

New Hampshire displayed what can best be described as a grudging acceptance of the role of courts in the determination of claims involving forfeited estates. The first legislation on the subject simply set forth a list of British loyalists and declared their estates to be forfeited to the state "for the use thereof." n464 It failed, as later legislation noted, to make provision for "ascertaining the Estates of said Persons: & for Settling the just Debts and Credits of Said persons." n465 Accordingly, the general court (assembly) of the state authorized the several judges of probate to oversee the sale of forfeited estates and to return the proceeds to the state's treasurer. n466 Following the Massachusetts model, it also directed the judges of probate to appoint commissioners to entertain claims by creditors of those British loyalists whose estates were deemed forfeited. n467 Unlike the Massachusetts model, however, the commissioners had no power to resolve such claims; they were directed to present them to the treasurer so "that the General Court may adjust the Same and order payment." n468

Later legislation broadened the role of the courts to include the power to determine which estates were subject to forfeiture, what property such estates encompassed, and whether claims of creditors were to be allowed. n469 The act began by defining British loyalists as aliens and then subjects their property to escheat and forfeiture. n470 The act authorized the superior court and the several inferior courts of sessions to adjudicate claims of forfeiture upon grand jury presentments. Trials were to proceed by jury, "agreably [sic] to the laws of this State" and, if had in an inferior court, were subject to appeal. n471 In a significant departure from earlier practice, claims of creditors were to be determined not by the general court but by the probate judge of the county; the act specifically authorized the state's treasurer to pay such claims upon receipt of an attested copy of the judge's determination. n472 [*1011]

Rhode Island

Although its general assembly continued to approve accounts and pass upon public claims throughout the years immediately following independence, n473 Rhode Island made a modest provision for the determination of the claims of creditors of forfeited estates. The act for the confiscation of estates proceeded by defining British loyalists as aliens and then by making provision for a judicial determination of the forfeiture of their estates. n474 Like New Hampshire, Rhode Island vested its superior court with jurisdiction over forfeiture proceedings and directed its attorney general to institute such proceedings. n475 The act did little, however, to secure the rights of the creditors of such estates. It simply declared that all just debts, owed by the estates to any subject of the United States, were to be paid out of the respective estates. n476 Presumably, creditors were to assert their claims either before the superior courts during the pendency of the forfeiture proceedings or in the form of legislative petition.

Connecticut

Like other states in New England, Connecticut maintained legislative control of public claims against the state n477 and gave commissioners, under the control of probate judges, the responsibility to determine claims of creditors of forfeited estates. n478 The act providing for the sale of confiscated estates thus directed the probate judges to administer and dispose of the estates. n479 The act provided, however, that the sale should await the determination of the claims of creditors by the commissioners of claims for the county. n480 The act also provided that purchasers of the estates take them subject to any mortgages in place at the time of forfeiture. n481 [*1012]

Maryland

Maryland also maintained legislative control of most claims against the state in the period following independence. Public creditors were directed to lay their accounts before the auditor, for liquidation and transmission to the governor and council. n482 If those officials agreed to the payment, they were authorized but not commanded to order the treasurer to pay the amount due. n483 The treasurer, in turn, was directed to issue a certificate for the sum expressed in any such order, bearing interest at the rate of six percent. n484

Legislative control also characterized Maryland's provision for the forfeiture of the estates of British loyalists. To be sure, the act effecting the forfeiture declares that creditors shall be indemnified out of the British property seized in consequence of the act. n485 But the act went on to declare that the indemnification "shall be settled by the general assembly." n486 Subsequent legislation directed commissioners of forfeited estates to certify to the treasurer any demands against the estates as the "commissioners may deem just." n487 Later, the legislature provided for the

assertion of judicial actions to recover forfeited property and established a one-year limitation period for such claims. n488 The act appeared to provide only for actions of ejectment to test title to real property and of replevin to recover specific personal property; it made no provision for the payment of judicially determined money claims on account or otherwise.

Conclusion

It would be rash to assert that these state governments were judicially accountable for all invasions of property rights. n489 Yet the British [*1013] ideology of assured remediation had left its mark on the Americans. At one time or another, Virginia, New York, Pennsylvania, and New Jersey appear to have treated the judicial decree as a sufficient warrant for the payment of money from the treasury.

British tradition left marks on the records of many other states. Courts determined claims to the forfeited property of British loyalists in Georgia, Delaware, New Jersey, and New Hampshire; legislation in those states specifically protected the rights of third parties to assert judicial claims to property that had been forfeited into the hands of the government. New Jersey went further than Georgia and Delaware in making the favorable decision of its courts of common pleas a sufficient warrant for the payment of money to the creditors of forfeited estates. New Hampshire briefly followed a similar course. Even in the Carolinas and in New England, where the tradition of legislative control remained largely intact throughout the period, courts were given some modest responsibility for overseeing claims against forfeited estates.

Such evidence has important implications for our understanding of then-current attitudes toward the roles of the legislatures and the courts in claims determination. To be sure, one can view the legislative creation of judicial modes of claims determination as consistent with the claim of legislative dominance; what the legislature gives, the legislature may take away. On such a reading, the statutes from the Revolutionary era confirm a contemporary acceptance of sovereign immunity by underscoring the dependence of the judicial modes on legislative consent to suits against the government. The experiences in Georgia and South Carolina, which first established and then abandoned judicial modes for the determination of claims against the state, underscore this concept of judicial dependence on legislative consent.

Yet the statutes also demonstrate that the American assemblies, so dominant in the years before the Federal Constitution, were beginning to transfer a portion of their control over the fisc to the state judges. Seen as implementing the remedial guarantees of state constitutions, the statutes offer important evidence that the early Americans made some progress in translating the rhetoric of remediation into concrete machinery for the judicial determination of claims - progress, as Goebel puts it, in supplying writs to enforce rights. n490 Evidence [*1014] both internal and external to the statutes, moreover, suggests that wide use was made of the provisions for judicial determination. n491 Seen as laying the foundation for the creation of a federal constitutional right to petition for redress of grievances, the statutes reflect a growing recognition of the problems presented by traditional reliance upon the legislature for the adjudication of public claims and of the necessity for a transfer of responsibility for such claims to the judicial branches of government.

FOOTNOTES:

n1. U.S. Const., amend. I. For the full text of the First Amendment, see text accompanying note 205 infra.

n2. Leading accounts of the history of the Petition Clause include Eric Schnapper, "Libelous" Petitions for Redress of Grievances - Bad Historiography Makes Worse Law, *74 Iowa L. Rev. 303 (1989);* Norman B. Smith, "Shall Make No Law Abridging ... ": An Analysis of the Neglected, But Nearly Absolute, Right of Petition, *54 U. Cin. L. Rev. 1153 (1986);* Julie M. Spanbauer, The First Amendment Right To Petition Government for a Redress of Grievances: Cut From a Different Cloth, *21 Hastings Const. L.Q. 15 (1993);* Stephen A. Higginson, Note, A Short History of the Right To Petition Government for the Redress of Grievances, *96 Yale L.J. 142 (1986);* Note, A Petition Clause Analysis of Suits Against the Government: Implications for Rule 11 Sanctions, 106 Harv. L. Rev. 1111 (1993); Don L. Smith, The Right To Petition For Redress of Grievances: Constitutional Development and Interpretations (unpublished Ph.D. thesis on file with author). For a more contemporary take on the meaning of the Petition Clause, see Anita Hodgkiss, Note, Petitioning and the Empowerment Theory of Practice, *96 Yale L.J. 569 (1987)* (emphasizing the role of petitioning in the empowerment of citizens).

n3. Decisions of the Supreme Court require waivers of sovereign immunity to appear with unequivocal clarity on the face of a statutory text. See *Lane v. Pena, 116 S. Ct. 2092 (1996); United States v. Nordic Village, 503 U.S. 30, 37*

(1992) ("The unequivocal expression of elimination of sovereign immunity that we insist upon is an expression in statutory text."). Moreover, the Court reads ambiguous language in favor of the sovereign. See *United States v. Williams, 115 S. Ct. 1611, 1616 (1995); Library of Congress v. Shaw, 478 U.S. 310, 318 (1986).* Such a demanding standard for the waiver of immunity has been aptly termed a "superstrong presumption" of nonsuability. See William N. Eskridge, Jr. & Philip P. Frickey, Quasi-Constitutional Law: Clear Statement Rules as Constitutional Lawmaking, *45 Vand. L. Rev. 593, 597, 639 n.216 (1992)* (describing Nordic Village as creating a new superstrong presumption against government suability).

In taking up the question of federal sovereign immunity, this Article will largely but not completely ignore the related question of State suability under the Eleventh Amendment. That issue has been the subject of many divisive Supreme Court decisions, the most recentof which will surely occasion wide commentary. See *Seminole Tribe v. Florida, 116 S. Ct. 1114 (1996)* (reaffirming the Eleventh Amendment ban on federal-question claims against the States in federal district courts; overruling prior decisions that authorized abrogation of such immunity pursuant to the exercise of Article I powers of Congress; precluding reliance on officer suit as a substitute for entity suit). For criticisms of the Court's Eleventh Amendment jurisprudence, see Akhil R. Amar, Of Sovereignty and Federalism, *96 Yale L.J. 1425 (1987);* William A. Fletcher, A Historical Interpretation of the Eleventh Amendment: A Narrow Construction of an Affirmative Grant of Jurisdiction Rather than a Prohibition Against Jurisdiction, *35 Stan. L. Rev. 1033 (1983);* Vicki C. Jackson, The Supreme Court, The Eleventh Amendment, and State Sovereign Immunity, *98 Yale L.J. 1 (1988).* My own work questions the Court's path as well. See James E. Pfander, Rethinking the Supreme Court's Original Jurisdiction in State-Party Cases, *82 Cal. L. Rev. 555 (1994)* (asserting that Original Jurisdiction Clause contemplates the suability of the States on the Court's original docket in all cases arising under the Constitution, laws, and treaties of the United States and thereby secures a forum for the enforcement of federal rights against the States).

Comparatively speaking, far less has been written about federal sovereign immunity in recent years. Important treatments of the issue appear in David E. Engdahl, Immunity and Accountability for Positive Government Wrongs, *44 U. Colo. L. Rev. 1 (1972);* Louis E. Jaffe, Suits Against Governments and Officers: Sovereign Immunity, *77 Harv. L. Rev. 1 (1963).* See generally Richard H. Fallon, Daniel J. Meltzer & David L. Shapiro, Hart & Wechsler's The Federal Courts and the Federal System 994-1041 (4th ed. 1996) [hereinafter Hart & Wechsler] (summarizing sovereign immunity doctrine).

n4. See infra text accompanying notes 205-09.

n5. See infra text accompanying notes 122-26.

n6. Sir William Blackstone described the doctrine as follows:

That the king can do no wrong, is a necessary and fundamental principle of the English constitution: meaning only, ... that in the first place, whatever may be amiss in the conduct of public affairs is not chargeable personally on the king ... ; and, secondly, that the prerogative of the crown extends not to do any injury .... Whenever therefore it happens, that, by misinformation or inadvertence, the crown hath been induced to invade the private rights of any of its subjects, though no action will lie against the sovereign, ... yet the law hath furnished the subject with a decent and respectful mode of removing that invasion, by informing the king of the true state of the matter in dispute: and, as it presumes that to know of an injury and to redress it are inseparable in the royal breast, it then issues as of course, in the king's own name, his orders to his judges to do justice to the party aggrieved.

3 William Blackstone, Commentaries on the Laws of England *254-55 (St. George Tucker ed. 1803) [hereinafter cited as Blackstone if to material in the original Commentaries, and as Tucker's Blackstone if to material in St. George Tucker's notes or appendices]. Blackstone here paraphrases practice upon the petition of right, through which the subject applied to the Crown by petition for permission to litigate his claim against the government. For more on the petition of right, see infra text accompanying notes 30-41. For interpretations of this passage in Blackstone similar to that offered in the text, see Clyde E. Jacobs, The Eleventh Amendment and Sovereign Immunity 7-8 (1972).

In beginning with the famous Commentaries, I choose a source that was both familiar to and influential with the framers of American constitutions. On the importance of Blackstone to the early Americans, see Julius S. Waterman, Thomas Jefferson and Blackstone's Commentaries in Essays in the History of Early American Law 451-57 (David H. Flaherty ed. 1969) (noting Blackstone's influence on the law as applied in the courts and as learned by apprentice lawyers). On Blackstone's relevance to the framers, see Forrest McDonald, Novus Ordo Seclorum xii (1985) (stating

that although modern scholarship may have proven him to have been mistaken on certain issues, Blackstone remains an important source for understanding American conceptions of English law).

n7. See infra text accompanying notes 87-95.

n8. See Appendix.

n9. See infra text accompanying notes 142-48.

n10. See infra text accompanying notes 161-95.

n11. See infra text accompanying notes 224-31.

n12. See infra note 316.

n13. See infra notes 19-20.

n14. See infra note 23.

n15. On the thinness of the record of the Bill of Rights, see Daniel Farber & Suzanna Sherry, A History of the American Constitution 241, 243 (1990) (noting the absence of any official record of the debates in the Senate until 1794; describing the history of state ratification votes as "virtually nonexistent"); Bernard Schwartz, II The Bill of Rights: A Documentary History 1171 (1971) (no record of the State ratification debates exists aside from a tally of the votes). See also James H. Hutson, The Creation of the Constitution: The Integrity of the Documentary Record, *65 Tex. L. Rev. 1 (1986)* (same).

n16. For accounts emphasizing the importance of the right to petition to the patriots of the American Revolution, see Spanbauer, supra note 2, at 32-33 (noting that resolves of the First Continental Congress declare that the colonists enjoy a "right peaceably to assemble, consider of their grievances, and petition the king; and that all prosecutions, prohibitory proclamations and commitments for the same are illegal"); Smith, supra note 2, at 1173-74 (noting the declarations of rights to petition in the resolves of the Stamp Act Congress of 1765 and the Continental Congress of 1774). See also Garry Wills, Inventing America: Jefferson's Declaration of Independence 54-55 (1978) (describing the role of the right to petition in the run-up to the Revolution). As the declarations suggest, the patriots understood their right to petition as protection from reprisals by the Crown. Interestingly, the Americans were careful to refrain from publishing their petitions in the newspapers until after they were submitted to the Crown - apparently in recognition that the immunity from reprisal attached to the petition as a legal submission and not as a political document. See A Decent Respect to the Opinions of Mankind: Congressional State Papers, 1774-1776, at 126 (James H. Hutson ed., 1975) [hereinafter Decent Respect] (Thomas Jefferson reports that, as it had done with the earlier Petition to the King, Congress refrained from publishing the Olive Branch Petition of 1775 because "a public communication, before it has been presented, may be improper"). English law provided some basis for the caution displayed by the revolutionaries. *In Rex v. Salisbury, 91 Eng. Rep. 1124 (K.B. 1699),* King's Bench declared that the immunity from seditious libel for assertions made in petitions did not extend to anyone who published the contents of the petition to the world at large. See Spanbauer, supra note 2, at 38, 53.

n17. For accounts of the Glorious Revolution and the English Bill of Rights, see generally C. Hill, The Century of Revolution, 1603-1714, at 198-99, 237-39 (1982); G. Trevelayan, The English Revolution, 1688-89, at 87-94 (1938), quoted in Schnapper, supra note 2, at 312-13). For the text of the relevant provision of the English Bill of Rights, see Edward Dumbauld, The Bill of Rights and What it Means Today 168 (1957) ("That it is the right of the subjects to petition the King, and all comittments [sic] and prosecutions for such petitioning are illegal.").

n18. For accounts of the significance of the right to petition in giving rise to other expressive rights in the First Amendment, see Spanbauer, supra note 2, at 16-17 (right to petition superior to, and distinct from, the other expressive rights in the First Amendment); Smith, supra note 2, at 1165-67 (same).

n19. Such a political process conception of the right to petition informs leading accounts of the Petition Clause, which link the right to petition to such other First Amendment rights as freedom of press, speech, and assembly. In *McDonald v. Smith, 472 U.S. 479 (1985),* the Court refused to craft a separate immunity doctrine to govern statements that appear in letters to the President of the United States. The defendant in the action urged that, as petitions to the executive branch of the government, the letters enjoyed an absolute immunity from suit. The Court rejected the claim of absolute immunity, applying instead the qualified immunity that it had developed as part of its free speech jurisprudence in *New York Times v. Sullivan, 376 U.S. 254, 279-80 (1964)* (holding that public figures must show that the defendant

published the statement with actual knowledge of its falsity or with reckless disregard of its truth or falsity). McDonald thus permits public figures to base defamation actions on statements that appear in petitions to the government so long as the statements meet Sullivan's actual malice standard.

Both the majority and concurring opinions drew explicit links between the rights of free speech, assembly, and petition. In the course of defending his refusal to craft a separate rule for petitions, Chief Justice Burger noted that the "Petition Clause ... was inspired by the same ideals of liberty and democracy that gave us the freedoms to speak, publish, and assemble." *McDonald, 472 U.S. at 485.* Justice Brennan sounded the same theme in his concurring opinion, noting "the essential unity of the First Amendment's guarantees" and citing approvingly a description of the speech, press, assembly and petition guarantees as "inseparable ... cognate rights ..., united in the First Article's assurance." *Id. at 485, 489-90* (Brennan, J., concurring) (quoting *Thomas v. Collins, 323 U.S. 516, 530 (1945)).*

n20. One group of scholars agrees with a political-process account of the Petition Clause but emphasizes less the petitioners' immunity from reprisal than their right to participate in political decisionmaking. Professor Akhil Amar, for example, portrays the right to petition as the right of the people, collectively, to pursue political ends through group action. See Akhil R. Amar, The Bill of Rights as a Constitution, *100 Yale L.J. 1131 (1991).* Thus, although Amar acknowledges the right of individuals to petition the government, he emphasizes the populist political nature of most petitioning activity and its linkage to the right of assembly. *Id. at 1152* (describing right to petition and its "companion" right to assemble). Professor Emily Calhoun articulates a similarly collective conception of the right to petition as securing the right of the people to a voice in the political process. See Emily Calhoun, Initiative Petition Reforms and the First Amendment, *66 U. Colo. L. Rev. 129 (1995);* Emily Calhoun, Voice in Government: The People, 8 Notre Dame J.L. Ethics & Pub. Pol'y 427 (1994). Such political process accounts dovetail nicely with the perceptions of petitioning that emerge from the most visible emblem of the right to petition today: the modern petition drive. Seen from the vantage point of the petition drive, the right to petition does appear to share much in common with rights of speech, press, and especially, assembly.

n21. Many scholars have criticized the McDonald Court's refusal to accord absolute immunity to statements made in petitions for redress of grievances. See Smith, supra note 2, at 1183-88; Spanbauer, supra note 2, at 52-58. Eric Schnapper offers the most persuasive such criticism of McDonald. Schnapper traces the Petition Clause to the Case of the Seven Bishops, in which government lawyers alleged that, by challenging the legality of royal dispensation in a petition to the Crown, the bishops committed the crime of seditious libel. See Schnapper, supra note 2, at 313-329. The jury's acquittal of the bishops rested on the notion that petitioners enjoyed an absolute immunity from reprisals, an immunity later restated in the English Bill of Rights of 1689, incorporated into the tradition of political petitioning in Revolutionary America, and later included in the First Amendment. Accordingly, Schnapper argues that history supports a more nearly absolute immunity from defamation suits and other forms of retaliation than that recognized in McDonald.

n22. As a matter of history, most scholars agree that the right to petition includes a right to some sort of considered response. See Hodgkiss, supra note 2, at 576 (petitioners entitled to a response); Spanbauer, supra note 2, at 51 (same); cf. Higginson, supra note 2, at 165-66 (arguing that petitioners were historically entitled to a response and tracing how abolitionists used this entitlement to burden Congress with a flood of antislavery petitions). Yet the Court has repeatedly refused to recognize a mandatory duty of government response on the ground that such a duty would burden government officials and interfere with representative government. See *Minnesota Bd. for Community Colleges v. Knight, 465 U.S. 271 (1984)* ("Nothing in the First Amendment ... suggests that the rights to speak, associate, and petition require government policymakers to listen or respond to individual communications on public issues."); *Smith v. Arkansas State Highway Employees, Local 1315, 441 U.S. 463 (1979)* (Commission's refusal to respond to employee grievances did not violate the First Amendment); *Bi-Metallic Investment Co. v. State Bd. of Equalization, 239 U.S. 441 (1915)* (same).

n23. For scholarship that recognizes the application of the Petition Clause to judicial submissions, see Spanbauer, supra note 2, at 43-49 (arguing that Petition Clause guarantees individual right of access to court and prohibits governments from limiting access through filing fees and the like); id. at 58-63 (asserting that Petition Clause limits sanctions to those imposed for litigation undertaken in subjective bad faith); Note, A Petition Clause Analysis of Suits Against the Government: Implications for Rule 11 Sanctions, 106 Harv. L. Rev. 1111, 1122-28 (1993) (suggesting that the imposition of Rule 11 sanctions in suits brought against the government implicates the core values of the Petition Clause).

Under the Noerr-Pennington doctrine, petitions to government officials enjoy some immunity from scrutiny under the antitrust laws. For an overview of the doctrine, which takes its name from the leading decisions of the Supreme Court, *Eastern R.R. Presidents Conf. v. Noerr Motor Freight, Inc., 365 U.S. 127 (1961)* and *United Mine Workers v. Pennington, 381 U.S. 657 (1965),* see Daniel R. Fischel, Antitrust Liability for Attempts to Influence Government Action: The Basis and Limits of the Noerr-Pennington Doctrine, *45 U. Chi. L. Rev. 80 (1977).* For a criticism of the doctrine's failure to conform to the original understanding of the Petition Clause, see Spanbauer, supra note 2, at 63-68. Noerr-Pennington lies beyond the scope of this Article.

n24. See supra note 6.

n25. For Blackstone's statement of the distinction between the ordinary course and extraordinary remedies, see infra text accompanying note 95. In highlighting the distinction, Blackstone picked up a recurring theme in English law over the centuries. See Matthew Hale, The Prerogatives of the King 192-93 (D.E.C. Yale ed., 1976 Selden) (distinguishing circa 1660 between "ordinary process ... by writ issuing out of the chancery or those mesne processes that issue out of the courts ... [and] extraordinary process, such as are fitted for extraordinary cases [such as writs of scire facias, injunction, and certiorari]"); F.W. Maitland, Equity: A Course of Lectures 3 (A.H. Chaytor & W.J. Whittaker eds., 2d ed. 1936) (distinguishing between "writs of course (brevia de cursu) ... [and] petitions to the king and his council praying some remedy"); S.A. deSmith, The Prerogative Writs: Historical Origins, in Judicial Review of Administrative Action 584, 586 (John Evans ed., 4th ed., 1980) (tracing the origins of the phrase "writs of course" (brevia de cursu) to the Register of Writs in 1227 and distinguishing them from "writs of grace" (brevia magistralis), which were not available for the asking but issued only upon a showing of cause to the court).

n26. Writs ran in the name of the King but were issued upon the authority of the judges of the court that bore responsibility for their issuance in accordance with the rule of law. Consider the writ of mandamus, a writ of King's Bench that ran in the name of the King, was signed by the judges of the court and directed some inferior court or government body to take specified action required by law:

George, &c. To the mayor, jurats, and commonalty of our town and Port of S...., greeting: Whereas [petitioner was elected a jurat and wrongly removed from office] we therefore being willing thatdue and speedy justice should be done in this behalf, ... do command and firmly enjoin you, that immediately after the receipt of this our writ, you do without delay restore [petitioner to office] or that you shew us cause to the contrary thereof, ... and how you have executed this our writ make known to us [on a date certain]. Witness, E. Lord E., at Westminster, the twenty-ninth day of April in the fifty-seventh year of our reign [1813].

By the Court.

2 Richard Gude, The Practice of the Crown Side of the Court of King's Bench 545-46 (Rothman reprint ed., 1991) (originally published in 1828). A similar form of mandamus appears to have been used by the courts in the colonies of North America. See 1 The Documentary History of the Supreme Court of the United States, 1789-1800 (M. Marcus & J. Perry eds., 1985) [hereinafter DHSC] (mandamus from the Pennsylvania Supreme Court issued in the name of "George the II" in 1747 commanding justices of an inferior court to proceed to judgment in a case before them; bearing witness of the Chief Justice of "our said Sup. Court").

Although the King's justices had the power to issue commands or writs in his name, they did not have the power to command the King himself. Simple hierarchy can bear the burden of explaining a measure of the Crown's immunity: inferior courts could not issue orders to their superiors. But for Blackstone, of course, the inability of the common-law courts to entertain proceedings against the Crown implicated the mystical idea of royal prerogative and sovereign immunity.

A similar form of writ was adopted by the Supreme Court of the United States, in that it bore the teste or witness of the justices of the Court. Rather than running in the name of the king, however, the writs of the Supreme Court ran in the name of the "President of the United States." Id. at 566 (reproducing model writ of error, circa 1791-92, running from "The President of the United States"; directing "the judges of the Circuit Court of the United States for the district of New Hampshire" to send a record to the Supreme Court; bearing witness of Chief Justice John Jay); 5 The Papers of John Marshall: Selected Law Cases, 1784-1800, at 253-54 (C. Hobson ed., 1987) (writ of error running in the name of the "President of the United States"; directing the Circuit Court for the District of Virginia to send the record and process in the case of Fairfax v. Hunter to the Supreme Court; allowed by Justice Iredell).

In choosing to issue writs in the name of the President, the Court made a controversial decision. The style of writs had been a disputed issue in the First Congress with at least some strong sentiment expressed in opposition to the adoption of the royal style. See John C. Miller, The Federalist Era: 1789-1801, at 30-31 (1960) (noting disagreement between the Senate, which proposed writs to run in the name of the president, and the House, which opposed such "aping" of the British government; impasse between the two chambers left the issue to the Court for resolution). Cf. infra note 185 (reproducing Pinckney's proposal to the Philadelphia convention that writs and letters patent issue in the name of the United States).

n27. 3 *Blackstone, supra* note 6, at *254.

n28. We can perhaps best define Crown practice as that portion of the practice before King's Bench that went forward in the name of the King. Thus, Crown practice included such criminal proceedings as indictments and informations, all of which were prosecuted by the Attorney-General in the name of the King. See 1 Gude, supra note 26, at 5, 65-134 (distinguishing the criminal or Crown side of King's Bench from the civil or Pleas Side; describing practice upon indictments and informations in criminal proceedings). Crown practice also included the so-called prerogative writs, i.e., the writs of certiorari, mandamus, prohibition, quo warranto, and habeas corpus by which King's Bench exercised a general superintendence over inferior courts and officers. See 1 William Holdsworth, A History of English Law 226-31 (A.L. Goodhart & H.G. Hanbury eds., 1903). In all these prerogative proceedings, individuals were permitted to seek leave to pursue claims but the claims themselves were styled in the name of the Crown. See 1 Gude, supra note 26, at 181 (application to the court must be founded upon affidavits and entitled "'In the King's Bench'"); id. at 1, 2 ("In all proceedings in this Court arising by motion, or otherwise, it is necessary to intitle the affidavits 'In the K.B.'"; "when both parties have appeared in Court by counsel, the affidavits must be intitled, 'In the K.B. The King against A.B.'").

Although it may at first seem odd, a page of history can help to explain why we find prerogative writs, which we think of as civil remedies for government wrongdoing, lumped together with criminal proceedings on the Crown side of King's Bench. Early criminal proceedings sought to punish wrongs that involved a breach of the King's peace; civil actions were those relating to property. See S.F.C. Milsom, Historical Foundations of the Common Law 285 (2d ed. 1981). Many criminal proceedings could be brought either by the attorney-general himself or by an interested individual. Eventually, informer and relator proceedings became common in which individuals instituted actions in the King's name to recover penalties or adjudicate claims against wrongdoers. By the eighteenth century, these proceedings were understood as civil proceedings in that they did not threaten defendants with criminal punishment but remained on the Crown side of King's Bench. See 1 Gude, supra note 26, at 165 (proceedings qui tam are conducted on the Crown side, though they are in the nature of civil actions); 3 *Blackstone, supra* note 6, at *263 (quo warranto properly a criminal method of prosecution "but hath long been applied to the mere purposes of trying the civil right").

n29. For a thorough overview of the King's prerogative and the subject's remedies against the Crown, see Joseph Chitty, Jr., A Treatise on the Law of the Prerogatives of the Crown (1820). Chitty's work usefully describes both the sources of the King's revenue and the manner in which the parties litigated disputes over its collection. In addition, although Chitty's treatise appeared well after American independence, it offers an account of the prerogative that corresponds in good measure to the understandings of the previous century. Cf. 9 Holdsworth, supra note 28, at 39-45 (setting forth the history of the petition of right with a view towards describing the scope of the remedy under the Petition of Right Act of 1860).

n30. For a careful history of the rise and early use of the petition of right, see Ludwik Erhlich, Proceedings Against the Crown (1216-1377), in 6 Oxford Studies in Social and Legal History (P. Vinogradoff ed., 1921).

n31. On the origins of the petition of right, see id. at 86-90 (agreeing with the traditional view that Edward I introduced petitions to the law of England).

n32. Whether, as Blackstone says, the Chancellor was to administer justice on the endorsed petition "as a matter of grace," 1 *Blackstone, supra* note 6 , at *243, or as a matter of right, has been a subject of lively debate. Dr. Erhlich explains that during the time of King Edward I, one "can distinguish petitions of grace, and petitions asking, not for grace, but for justice, for right; in this latter group, there might be disputes relating to private parties only; or the king might be interested in the result." Erhlich, supra note 30, at 96. Yet as Erhlich goes on to observe, the King could legally refuse a petition; if he did so, there was no redress because no writs ran against the King. Id. at 26, 188. However one resolves the debate, it remains a fact that virtually all petitions of right were disposed of on legal grounds. Id. at 188. Indeed, the characteristic feature of the petition of right was its claim that the law, as opposed to some request for royal favor, entitled the plaintiff to the relief requested. See 9 Holdsworth, supra note 28, at 14-15.

n33. In Latin, fiat iustitia; in French, soit fait droit. Erhlich, supra note 30, at 97-98. See also Chitty, supra note 29, at 346 (soit droit fait al partie). On the origins of the name "petition of right," see 9 Holdsworth, supra note 28, at 15 (petition of right takes its name from the right the subject has against the King).

n34. See Chitty, supra note 29, at 346-52 (describing procedure upon a petition of right).

n35. In noting that the petition of right had early assumed the character of a "definite legal remedy" against the Crown, Holdsworth emphasizes the fact that, at the completion of the litigation, Exchequer would render judgments amoveas manus (to remove the King's hands) if the plaintiff succeeded and nil capiat if the plaintiff lost. 9 Holdsworth, supra note 28, at 16, 17.

n36. Everyone agrees that the petition of right developed as a common law remedy against the Crown. See Chitty, supra note 29, at 352 (contrasting common law origins of the petition with the statutory origins of monstrans and traverse); 9 Holdsworth, supra note 28, at 25 (same). At least one observer claims to have found support for the common law origins of the monstrans and thus takes the view that the statutes enacted in the fourteenth century reenacted the monstrans into law. See Erhlich, supra note 30, at 74-75 (monstrans lay at common law, was abolished, and restored by statute).

n37. As Maitland explains, early petitions were referred to the Chancellor and eventually accounted for two separate aspects of the Chancellor's jurisdiction. See Maitland, supra note 25, at 3-4. On the common law or Latin side of the Court of Chancery were petitions of right seeking justice against the Crown. Id. at 4. Like other common law proceedings, these were enrolled in Latin and went to trial, if necessary, before a jury administered by King's Bench. See also A.D. Hargreaves, Equity and the Latin Side of Chancery, *68 Law Q. Rev. 481 (1952).* On the equity or English side of Chancery were English bills or petitions, which sought relief in disputes among private parties and did not touch the interests of the Crown. This aspect of the Court of Chancery eventually developed into what we now know as equity jurisdiction. Maitland, supra note 25, at 5. The Chancellor thus bore responsibility for relief against the Crown itself and against other individuals, where the courts of common law were incompetent. For an early statement of the division between the law and equity side of Chancery, see Lord Nottingham's "Manual of Chancery Practice" 78 (D.E.C. Yale ed., 1965) (quoting Lord Keeper's speech from 1621 that distinguished between the "two powers" of Chancery: one, "the power of jurisdiction which the Chancellor by patents and writs doth disperse to all other courts, ... and holdeth plea of latin pleas which are not to vary from the principles of Common Law"; the second, "a power of jurisdiction according to Equity and Conscience").

Despite this functional division, the formal quality of the petition for redress remained very much the same. Erhlich reports that early petitions use the Latin terms to petition or to supplicate to convey the idea of a humble prayer for relief. See Erhlich, supra note 30, at 85. The same language of humble supplication continued to characterize petitions of all kinds throughout Anglo-American law practice, as the examples below illustrate:

(1) To the kyng our soverayn lord

Lamentably compleyneng shewith unto your highnes your true and feithfull Subject Thomas Adene ... [suffered an assault at the hands of named respondents]. In tender consideracion wherof that it may please your Majestie [to subpoena the respondents to appear and answer the claim], and your Subiect shall daily pray to God for the prosperouse contynuaunce of your most royall astate.

Henry Heydon [utter-barrister]

J.A. Guy, The Court of Star Chamber 25-26 (1985) (petition for equitable relief, circa early sixteenth century, submitted to the Court of Star Chamber).

(2) In consideracion wherof ... yt may therfore pleas your mastershippes [to command the respondent's appearance] and vpon examinacion of the hole matter to take suche order & dirreccion therin as shall appertayne to lawe equytie & consciens And your said poore orator shall pray to god for your mastershippes wurshipfull estate longe to contynue.

Walter C. Richardson, History of the Court of Augmentations: 1536-1554, at 409 (1961) (setting forth "typical" prayer for land wrongfully disseised, circa the middle of the sixteenth century, as part of a petition to the English Court of Augmentations).

(3) Humbly complaining sheweth unto your Honorable L. H.E. of B in the County of Yorke, esquire: That whereas [petitioner owns lands of which the respondents have wrongly taken possession and on which they have committed waste] .... it may please your good L to grant unto your said Orator, his Majesties most gracious Writ of Subpoena [directing respondents to appear] in his Ma. high Court of Chancery, then and there to answer to the premisses &c.

9 Holdsworth, supra note 28, at 380-81 (exemplar of bill in equity, circa the end of the sixteenth century, to the high Court of Chancery).

(4) To the Honourable the Judges of the High Court of Chancery Humbly complaining shew unto your Honours your Orator James Leith [holds equitable title to land but faces litigation at law that threatens his peaceful possession]. All which is contrary to equity. In tender consideration whereof and to the end that your Orator may be quieted in the possession of and Title to the same Land. May it please your Honours &c. And your Orator shall pray &c.

J. Marshall for Comp.

5 The Papers of John Marshall, supra note 26, at 64-65 (setting forth bill in equity submitted by John Marshall to initiate proceeding in November 1786).

(5) To the Honorable the Chief Justice and the associate Judges of the United States David Hunter petitions & shews to your honors....

That [error occurred in the course of litigation over title to land in the matter of Denny Fairfax and David Hunter before the United States Circuit Court for the District of Virginia]. Your petitioner therefore praysthat a Writ of Error may issue from this Honorable Court to bring the Record of the proceedings aforesaid before your Honors: that the said proceedings may be review'd by your Honors - the judgment of the Circuit Court thereupon be reversed & annulled, or such other Judgment rendered thereupon as to your Honors shall seem right. And Your Petr. will pray &c.

Alex Campbell [counsel for Hunter]

Id. at 250 (setting forth petition for writ of error seeking Supreme Court review of lower federal court decision in the famous Fairfax-Hunter litigation, ca. November 22, 1795). See also Chitty's Forms of Civil Proceedings in the King's Bench Division 749 (T. Chitty, E. Chapman & P. Clark eds., 1912) (setting forth model petition of right for use under the statutory form of that ancient proceeding).

These exemplars of the petition illustrate the ongoing influence of the form book in the work of the practicing lawyer. While one might well have approached the Court of Star Chamber with a measure of trepidation and genuine humility, as in item (1) above, litigants had no occasion to pursue their right to equitable remedies before Chancery, as in items (3) and (4), with similar trepidation. Maitland reports that equity had become a fixed system of case law by 1675, with "precedents reported and respected." F.W. Maitland, The Constitutional History of England 312 (1955); cf. William J. Jones, The Elizabethan Court of Chancery 456 (1967) (noting that during Elizabethan England, we begin to "think seriously of Chancery as providing and interpreting a distinct body of case law rather than as being primarily a court of remedial and advantageous procedures"). Modern readers, therefore, should not interpret the submission of a "humble" petition, styled along traditional lines, as an indication that the tribunal in question enjoyed absolute authority over the claim and could grant or withhold relief without regard to the rule of law. Rather, petitions were "humble" by virtue of their historic form and sought (like other legal proceedings) to enforce a legal right. To be sure, the tribunal in question might enjoy a degree of judicial discretion in passing upon any particular petition. But petitioners nonetheless enjoyed a right to certain kinds of equitable remedies if they disclosed facts that triggered the availability of such remedies. See Jones, supra, at 457 (describing requests for discovery to the Elizabethan Court of Chancery as "almost obligatory"); see also infra note 58 (although nominally addressed to discretion, petitions for writs of scire facias were allowed as a matter of course). For that reason, we should not be misled into believing that all petitioners, by definition, lacked rights that the law was bound to respect.

n38. Lasting inasmuch as the idea that the King can do no wrong remains a part of Blackstone's account of the prerogative; misleading in that the Crown's personal fiat was no longer necessary as a mode of permitting litigation to go forward against either the Crown or its officers.

n39. See Erhlich, supra note 30, at 95 (noting that the new and characteristic feature of practice was the requirement that an answer be given to every petition; emphasizing that this requirement of a considered response reflected the fact that the petition of right was a submission to a court).

n40. For breach of the prerogative writs, mandamus, certiorari, quo warranto, habeas corpus, and prohibition, King's Bench issued an attachment directing the arrest of the official respondents. See 1 Gude, supra note 26, at 280 (attachment for contempt for violation of writ of habeas corpus); Thomas Tapping, The Law and Practice of the High Prerogative Writ of Mandamus 421-22 (1848) ("Any contempt of court is punishable by attachment, and the neglect of a mandamus has been ... declared to be such a contempt.").

n41. On the circumstances leading to the revival of the petition of right through the passage of the Petition of Right Act in 1860, see 9 Holdsworth, supra note 28, at 39-41.

n42. English observers regarded the requirement of an inquest, with its reliance on the jury of the vicinage, as an important procedural protection against unlawful takings of property by the Crown. See *Blackstone, supra* note 6, at *259 ("part of the liberties of England, and greatly for the safety of the subject"); Chitty, supra note 29, at 247 ("admirably constructed barrier between the Crown and the subject").

n43. In the typical inquest of office, such officers of the Crown as the sheriff or escheator initiated an action by informing Chancery that the Crown was entitled to claim specific property. If the information was accepted, Chancery issued a formal grant of authority to certain commissioners who would preside over the inquest, along with a local officer or sheriff and some number of jurors. For a description of the process of an inquisition of office, see 3 *Blackstone, supra* note 6, at *258; Chitty, supra note 29, at 246-47, 266-67. Together, the jurors would determine whether the Crown's claim appeared to have merit by travelling to the vicinage, asking questions, and otherwise taking evidence. If the jurors agreed with the claim of Crown entitlement, an office was said to be found for the Crown and that fact was returned or communicated to Exchequer. Essentially, the finding of the office established the Crown's entitlement as a matter of record, good unless someone came into Exchequer to contest the Crown's claim. For this reason, inquests seeking to establish the Crown's entitlement were known as "offices of entitlement" and were distinguished from "offices of instruction." See Chitty, supra note 29, at 247-50 (where the basis for the escheat or forfeiture was already a matter of record, Exchequer convenes an "office of instruction" to determine the extent of the estate subject to forfeiture).

n44. The absence of any speedier remedy could cause great injustice when the Crown took possession (as it was entitled to do at common law) immediately upon the finding of an office, particularly in cases where the Crown conveyed or granted the property to another in the meantime. In the face of such grants over to another, the subject was required to pursue both the petition of right and to obtain a writ of scire facias to contest the grant. See 3 *Blackstone, supra* note 6, at *260-61; Chitty, supra note 29, at 330-31.

n45. Parliament simply installed a lapse of time between the finding of an office and the seizure of property. See 9 Holdsworth, supra note 28, at 25-26 (describing significant Parliamentary reforms to petition practice in 1360 and 1362). During the one-month period, any individual who claimed the property could enter an appearance and, by pursuing either a monstrans de droit or traverse of office, assert rights against the Crown. In general, those who could confess and avoid the Crown's title by asserting a superior title would rely upon the monstrans; those who attacked the Crown's title used the traverse. For the details, see Chitty, supra note 29, at 353-54; 9 Holdsworth, supra note 28, at 25-26.

n46. See 9 Holdsworth, supra note 28, at 21.

n47. Chitty explains the importance of both the writ of extent (as a tool to collect Crown debts) and the requirement of an inquisition of office to determine, as a matter of record, the nature of the debts owed to the Crown. See Chitty, supra note 29, at 265-71. Crown debtors who faced actions in Exchequer on writs of extent thus enjoyed the same opportunity to assert claims of right against the Crown as other targets of inquisitions of office. Id. at 356-73 (describing the use of the traverse to resist the writ of extent).

n48. The right to contest an escheat of land extended to the owner and his successors and to those outside the line of feudal succession, including mortgagors. See id. at 360-61 (noting that the party against whom the extent issues may appear for the purpose of denying the debt and that others may appear as well, including a mortgagee, and a creditor not of record). Similarly, the right to contest an extent applied both to the Crown debtor and to the debtor's creditors. Following an office found in support of an extent to collect a debt owing to the Crown, therefore, the Crown debtor could appear and contest the debt or simply pay it off. See id. at 364-65 (describing the party's motion to pay the debt).

Alternatively, those creditors who claimed an interest in the assets of the Crown debtor, either as assignees of debtor's assets for value before the Crown process began or as mortgagors of the property claimed by the Crown, could appear and assert rights against the Crown. See id. at 363-64 (describing the appearance of assignees of a bankrupt to resist Crown claims on the bankrupt's assets).

n49. *Hardres 465, 145 Eng. Rep. 550 (1668).*

n50. For accounts of Pawlett, emphasizing its importance in the development of remedies for government wrongdoing, see *Jaffe, supra* note 3, at 6.

n51. Of course, the English bill or petition began as a petition to the King in council invoking the "reserve of justice in the king." Maitland, supra note 25, at 3. But by the time of Pawlett, the English bill on the equity side of Chancery had long since separated itself from the petition of right on the law or Latin side. The notable feature of Pawlett thus lay in the Chancery's extension of its ordinary process in equity to deal with what had previously been thought of as the extraordinary business of impleading the Crown.

n52. By the early years of the seventeenth century, Lord Coke had famously denied that King James could offer an opinion as a justice of King's Bench. For an account, see Maitland, supra note 37, at 268-69 (Coke pronounces the king deficient in the "artificial reason and judgment of law, ... which requires long study and experience" and therefore incapable of deciding questions of jurisdictional competence as between the common law and ecclesiastical courts).

n53. For accounts of the conflict between Parliament and the common lawyers on the one hand and the royalist defenders of conciliar justice in Star Chamber on the other, ending in the abolition of Star Chamber in 1640, see 1 Holdsworth, supra note 28, at 285-98; T.F.T. Plucknett, A Concise History of the Common Law 171-78 (2d ed. 1936). Following the abolition of Star Chamber, the privy council lost the great bulk of its judicial power. Id. at 292. All that remained was its jurisdiction on appeal from courts outside England, including those of the colonies of British North America. For an account, see Joseph Henry Smith, Appeals to the Privy Council from the American Plantations (1950).

n54. Letters patent have been defined as open letters, so called because "they are not sealed up but exposed to open view, with the great seal pendent at the bottom." Thomas Campbell Foster, A Treatise on the Writ of Scire Facias 237 (1851). As such, letters patent acted as deeds of the Crown, enjoyed the dignity of a matter of record, and were entered onto the parchment rolls. Id. at 237-38. A variety of ownership interests might be reflected in the issuance of letters patent, including offices (which in eighteenth century England were often seen as a species of property) and "patented" inventions. Id. at 236 (patents may grant "some franchise, honor, or liberty by the Crown to a subject, as of corporate rights, a manor, a fair, a market, a separate Quarter Sessions, a rectory, a ferry, a toll, an office ... or some privilege to an inventor or importer of some new and useful invention, art, or manufacture"). The task of administering letters patent fell to the law side of Chancery, acting through the Petty Bag Office. Id. at 237.

In the United States, letters patent issued to recipients of grants of land, see *Polk's Lessee v. Wendal, 13 U.S. (9 Cranch) 87 (1815)* (reviewing lower court's disposition of claims arising from land patents issued by the land office of North Carolina) and to those who sought to "patent" an invention. See *Grant v. Raymond, 31 U.S. (6 Pet.) 218 (1832)* (upholding power of secretary of state, as keeper of the Seal of the United States, to cancel and reissue mistaken letters patent for inventions). In addition, commissions issued to those appointed as justices of the Supreme Court of the United States took the form of letters patent and were so described in the proceedings of the Court. See 1 DHSC, supra note 26, at 10 (reproducing Washington's commission of John Jay, Chief Justice of the Supreme Court; commission recites that "I have caused these letters to be made patent, and the Seal of the United States to be hereunto affixed"); id. at 173 (fine minutes from the February 1790 term recite that "Letters patent to the Honble John Jay ... [and three other justices] are openly read, and published in Court").

n55. On the use of the writ of scire facias to cancel letters patent, see 3 *Blackstone, supra* note 6, at *47-48, *260-61; Chitty, supra note 29, at 330-31. These authorities agree that scire facias would issue to repeal letters patent when they had been obtained by fraud or false suggestion and when they violated the prior rights of third parties. See Chitty, supra note 29, at 330.

n56. On the special role of the law side of Chancery in dealing with scire facias to cancel letters patent, see Chitty, supra note 29, at 331 (scire facias prosecuted in the Petty Bag office of Chancery, which keeps records of patents); Foster, supra note 54, at 247-48. See also 10 Earl of Halsbury, Laws of England 35 (H. Sutton & G. Robertson eds., 1909) (letters patent canceled in Chancery by cutting of the seal and vacating the record). In recognition of its significance in protecting the property of the subject from royal invasion, Lord Coke claimed that the power of

"cancelling" letters patent granted contrary to law was the "highest point" of the Chancellor's jurisdiction. See 3 *Blackstone, supra* note 6, at *47 (quoting Coke's Fourth Institute).

n57. See Chitty, supra note 29, at 331 (noting that individual may seek leave from attorney-general to pursue the writ of scire facias); Foster, supra note 54, at 246 ("subject ... may of right petition the Queen for leave to use her name in a writ of scire facias for its repeal"); II William Tidd, The Practice of the Court of King's Bench 1093 (1840) (process to obtain scire facias to repeal letters patent begins with petition to Crown with a view toward obtaining the fiat of the attorney-general).

n58. See Foster, supra note 54, at 249 (writ issues upon fiat of the attorney general, which "fiat is obtained as a matter of course").

n59. 14 T. B. Howell, A Complete Collection of State Trials 1 (T.C. Hansard ed., 1816).

n60. Representative was the comment of Lord Chief Justice Holt, who explained that "we are all agreed that they have a right; and if so, then they must have some remedy to come at it too." Id. at 34; cf. id. at 104 (Lord Somers admits the force of the argument that every right deserves a remedy but observes that he would permit the subject to seek a remedy through other methods, such as by the petition of right). For other exemplars of the right-remedy linkage in English law of the period, see *Ashby v. White, 6 Mod. 45, 87 Eng. Rep. 808 (Q.B. 1702)*, rev'd, 1 Brown P.C. 45, *1 Eng. Rep. 417 (H.L. 1703)* (Holt, C.J., dissenting) ("right and remedy are reciprocal").

n61. In the Exchequer Chamber, Lord Somers argued that the plaintiffs must pursue their claims by petition of right, addressed to the King, rather than by a petition addressed to the court. In brief, his argument rested on the familiar notion that the money in the receipt of the Exchequer lay beyond the reach of judges. In addition, he argued that the judges lacked power to issue judgments binding their superior officers at Treasury. Finally, he claimed that the expenditure of funds was a matter of policy to be handled by politicians, not by judges. 14 Howell's, supra note 59, at 39-105.

Lord Somers's argument carried the day in Exchequer Chamber, id. at 105, and with many subsequent observers, including Justice James Iredell. But the House of Lords reversed Somers, and reinstated the judgment in favor of the plaintiff's right to proceed by petition to the court. Id. at 110-11. Creditors were thus given a fairly simple method by which to pursue claims against the Crown - a method that explains in part why the petition of right fell into desuetude in the eighteenth century. See 9 Holdsworth, supra note 28, at 35.

Despite the debate over the proper remedial course, all the Justices of Exchequer Chamber agreed that a petition of right would lie. Later, that agreement played a central role in the High Court's recognition of the subject's right to use the petition of right to pursue breach of contract claims against the Crown. See 9 Holdsworth, supra note 28, at 36-39, 41.

n62. In defining the universe of prerogative writs, I have followed Holdsworth in including mandamus, prohibition, quo warranto, habeas corpus, and certiorari. See 1 Holdsworth, supra note 28, at 93-95; cf. deSmith, supra note 25, at 584 (omitting quo warranto, no doubt because it had fallen into desuetude by the twentieth century). Other writs that bear some resemblance to prerogative writs and often appear alongside them in discussions of the practice of judicial superintendence include the writ of error and the writ of scire facias. deSmith, supra note 25, at 585, 594-95 (explaining that the writs of scire facias and error were too prosaic to find a place on the list of prerogative writs).

n63. Most scholars trace the origins of the writ of mandamus to the early seventeenth century, when Lord Coke and King's Bench began to use the writ to supervise the machinery of local government administration. See Jaffe & Henderson, Judicial Review and the Rule of Law: Historical Origins, *72 L.Q. Rev. 345 (1956);* deSmith, supra note 25, at 591. King's Bench appears to have acceded to this authority by virtue of its close historical relationship to the King and Council. See 1 Holdsworth, supra note 28, at 92 (linking thegrowth of King's Bench superintendence function through the use of prerogative writs to 1640, when conciliar jurisdiction ended in England); deSmith, supra note 25, at 592. As it came to develop, mandamus gave King's Bench a general superintendence over lower courts and administrative officials, including local government corporations. See id. at 591-92.

At least five important features came to characterize practice on the writ of mandamus. First, the writ was available to individual suitors only upon motion or petition for leave of King's Bench to pursue such claims. See Tapping, supra note 40, at 5. Second, individuals captioned their applications "In the King's Bench" and the action proceeded in the name of the King, with the parties appearing thereafter. See 1 Gude, supra note 26, at 181. Third, the writ was considered a form of extraordinary relief of the kind normally associated with Chancery; King's Bench exercised

equitable discretion and denied relief where the petitioner had adequate remedies at law or had failed to make demand upon the respondent. See id. at 10 (characterizing writ of mandamus as "extraordinary" remedy; noting its availability only where no specific legal remedy exists). Fourth, and related, the writ would not issue to enforce the exercise of a discretionary power. See id. at 13-14. Finally, King's Bench enforced the writ through the exercise of the contempt power. See id. at 6.

n64. Good accounts of its history suggest that the form of the Great Writ took shape during the constitutional struggles of the seventeenth century. The Petition of Right, Parliament's challenge to the Crown's authority in 1628, sought to establish the principle that habeas was available to secure the release of the subject held solely by virtue of the King's warrant, rather than through due process of law. Further refinements in habeas practice came with the passage of the Habeas Corpus Act of 1679. See generally 1 Holdsworth, supra note 28, at 95-100; R.J. Sharpe, The Law of Habeas Corpus (1976); deSmith, supra note 25, at 596. By the eighteenth century, habeas corpus had come to be seen as the principal protection of the liberty of the individual. See 3 *Blackstone, supra* note 6, at *131 ("The great and efficacious writ, in all manner of illegal confinement, is that of habeas corpus ad subjiciendum."). The writ served at least three separate purposes. First, it enabled a prisoner to be bailed - released from prison pending trial through the posting of a bond or recognizance. Second, it allowed a prisoner to compel the authorities to proceed to trial without further delay. Third, it enabled the courts to test the sufficiency of the reasons for the prisoner's confinement. See Sharpe, supra, at 20-60.

n65. See generally deSmith, supra note 25, at 590-91 (prohibition among the oldest writs known to law; originally developed to limit the jurisdiction of the ecclesiastical courts; later used as a weapon by the common law courts in their jurisdictional struggles with Chancery and Admiralty); 1 Holdsworth, supra note 28, at 93-94 (same). Prohibition was well established by Blackstone's day. See 3 *Blackstone, supra* note 6, at *112 ("Prohibition is a writ issuing properly only out of the court of king's bench, being the king's prerogative writ; but, for the furtherance of justice, it may now also be had in some cases out of the court of chancery, common pleas, or exchequer; directed to the judge and parties of a suit in any inferior court, commanding them tocease from the prosecution thereof, upon a suggestion that either the cause originally, or some collateral matter arising therein, does not belong to that jurisdiction, but to the cognizance of some other court.").

n66. See generally deSmith, supra note 25, at 587-90 (certiorari was essentially a royal demand for information; its later significance lies in its use by King's Bench to supervise the growing work of the inferior courts during the last half of the Seventeenth Century); 1 Holdsworth, supra note 28, at 93. Cf. 4 *Blackstone, supra* note 6, at *265 (into King's Bench "indictments from all inferior courts may be removed by writ of certiorari").

n67. See generally 3 *Blackstone, supra* note 6, at *263-64 (information in the nature of a writ of quo warranto filed in King's Bench; allows resolution of disputes between parties over right to franchise or corporate office); 1 Holdsworth, supra note 28, at 95 (writ for the king against persons who claimed or usurped any office, franchise, liberty, or privilege belonging to the crown; replaced by the information in the nature of quo warranto).

n68. On the origins of the "prerogative" writs, see deSmith, supra note 25, at 594 (explaining the roles that Mansfield and Blackstone played in inventing and popularizing, respectively, the use of the term prerogative writs to describe mandamus, habeas, certiorari, prohibition, and quo warranto).

n69. All writs ran in the name of the King and thus operated as orders to inferior officials in the King's name; prerogative writs retained a closer identity with the authority of the King than did other common law writs. Id. at 586-87 (distinguishing writs of course, which Chancery sold to any willing purchaser, from writs of grace; noting the "special sense" in which the prerogative writs were seen as the King's own writs). See also 1 Holdsworth, supra note 28, at 92 (suggesting that the jurisdiction of King's Bench to issue prerogative writs received a considerable extension upon the demise of conciliar jurisdiction in the Seventeenth Century).

n70. Much has been written about the extraordinary nature of the prerogative writs and the extent to which they issue as a matter of right, on a proper showing of cause, or as a matter of discretion. See, e.g., deSmith, supra note 25, at 587 (noting the discretionary use of mandamus and certiorari but describing both habeas corpus and prohibition as writs of right that issued upon a showing of illegality). We can see this ambivalence in early statements of Lord Mansfield. Compare Rex v. Barker, Burr. 1267 (characterizing mandamus as prerogative writ "to the aid of which the subject is entitled, upon a proper case previously shown, to the satisfaction of the court") with Rex v. Askew, Burr. 2186 (although party with no other specific remedy may seek a mandamus, "it is not a writ that is to issue of course, or to be granted merely for asking").

n71. Unlike many common-law proceedings, which began through the issuance as a matter of course of an original writ, proceedings on the prerogative writs began by motion or petition, with supporting affidavits to show cause for the issuance of the writ. See Lord Nottingham's "Manual of Chancery Practice," supra note 37, at 169 (memorandum from Lord Chief Justice North, circa 1675, lists among the proceedings that may begin in King's Bench without an original writ "any case removed by writ of Error, Habeas Corpus, or Certiorari, any Prohibition, Mandamus, or other mandatory writs were suable there"); 3 *Blackstone, supra* note 6, at *132 ("It is necessary to apply for [habeas] by motion to the court, as in the case of all other prerogative writs (certiorari, prohibition, mandamus, etc.) which do not issue as of mere course, without shewing some probable case why the extraordinary power of the crown is called in to the party's assistance."). The use of affidavits to show cause made the form of the motion or petition far less important; the litigation over an application for a prerogative writ centered on the return to the rule to show cause and its sufficiency. See 3 *Blackstone, supra* note 6, at *110-11 (mandamus for private parties "grounded on a suggestion, by the oath of the party injured, of his own right, and the denial of justice below: whereupon, in order more fully to satisfy the court that there is a probable ground for interposition, a rule is made ... directing the party complained of to shew cause why a writ of mandamus should not issue: and if he shews no sufficient cause, the writ itself is issued"); 1 Gude, supra note 26, at 180 ("Where it is a matter of a private nature, it is in the discretion of the Court either to grant the writ, or refuse the motion for the writ"; the "application to the Court must be founded upon the affidavit of the party injured."); Tapping, supra note 40, at 295-96 ("rule of Court for a mandamus can only be obtained on motion" with supporting affidavits). As a consequence, early treatise writers treat the motion and petition as formally indistinguishable modes of application for the issuance of the writs. See Tidd, supra note 57, at 478 (treating motion, application, and petition as synonyms and defining them as "any request to Court for relief"); cf. James L. High, A Treatise on Extraordinary Legal Remedies 475 (1896) (usual practice in United States "is to present to the court a formal application, variously termed a petition, relation or complaint, setting forth in detail the grounds upon which the claim for relief is based").

n72. Tapping, supra note 40, at 9 (mandamus issues as "the suppletory means of substantial justice in every case where there is no other specific legal remedy for a legal right, andwill provide as effectually as it can that all official duties are fulfilled"). See also 1 Gude, supra note 26, at 180 (mandamus issues in "all cases where there is no specific, legal or adequate remedy"). As a consequence, King's Bench denied relief in the nature of mandamus where remedies at law were adequate. See Tapping, supra, at 18-19.

n73. On the enforcement of the prerogative writs through contempt, see supra notes 40, 63.

n74. For accounts, see 4 Holdsworth, supra note 28, at 70-88; *Jaffe, supra* note 3, at 9-13.

n75. See 6 Holdsworth, supra note 28, at 266-68; *Jaffe, supra* note 3, at 13-16.

n76. See 6 Holdsworth, supra note 28, at 267 (indicating that the issue of personal responsibility had been settled by the impeachment of Danby in the late Stuart period).

n77. 2 Wils. 275, *95 Eng. Rep. 807 (K.B. 1765).* For accounts of Entick and its significance to the framers of our Constitution, see Akhil Amar, supra note 20, at 1173-75.

n78. 14 Howell's State Trials 695 (H.L. 1704).

n79. For accounts, see 6 Holdsworth, supra note 28, at 271-72; *Jaffe, supra* note 3, at 14-15.

n80. *1 Raym. Ld. 646, 91 Eng. Rep. 1332 (K.B. 1701).*

n81. On the significance of *Lane v. Cotton, 1 Raym. Ld. 91* Eng. Rep. 1332 (K.B. 1701), see 6 Holdsworth, supra note 28, at 267-68; *Jaffe, supra* note 3, at 14-15.

n82. According to Blackstone, the supreme power of the government in England was divided into only two (not three) branches: "the one legislative, to wit, the parliament, consisting of king, lords and commons; the other executive, consisting of the king alone." 3 *Blackstone, supra* note 6, at *147. This formulation of the division of government power conformed to prevalent understandings of the doctrine of the separation of powers and that of judicial inferiority. For Blackstone, as for Locke and Hume, the separation of powers meant the separation of the legislative from the executive power. Id. at *146. On this account, the judicial power was seen as an element of the executive power and thus as part of the administration of the government. Judges, though entitled to life tenure during good behavior by virtue of the Act of Settlement, exercised the delegated judicial power of the Crown and were thus seen as subordinate to the Crown. Blackstone thus distinguishes the "supreme" magistrates (Parliament and the Crown) from "subordinate" magistrates, who "derive all their authority from the supreme magistrate, account[ ] to him for their conduct, and act[ ] in an inferior

secondary sphere." Id. Later, Blackstone defined the nature of the inferiority of the courts to the Crown. Blackstone notes that "all courts of justice, which are the medium by which [the Crown] administers the laws, are derived from the power of the crown.... In all these courts the king is supposed in contemplation of law to be always present; but as that is in fact impossible, he is there represented by his judges, whose power is only an emanation of the royal prerogative." Id. at *23-24.

n83. Blackstone identified Parliament as the locus of "supreme and absolute authority":

It hath sovereign and uncontrollable authority in the making, confirming, enlarging, restraining, abrogating, repealing, reviving and expounding of laws, ... this being the place where that absolute and despotic power, which must, in all governments, reside somewhere, is entrusted by the constitution of these kingdoms. All mischiefs and grievances, operations and remedies, that transcend the ordinary course of the laws, are within the reach of this extraordinary tribunal.

3 *Blackstone, supra* note 6, at *160-61. Blackstone saw Parliament as superior to the Crown and to the courts of justice. For just as Parliament could regulate succession to the Crown and restrict the royal prerogative, it could enact legislation free from any judicial control. Id. at *161. The "subordinate" courts of justice were not only debarred from considering matters of Parliamentary privilege, id. at *163, they were precluded from declaring an Act of Parliament void on grounds of repugnancy to reason or to the law of nature. Id. at *91 (acknowledging that courts may narrowly construe Acts of Parliament to avoid unforeseen difficulties but denying that acts contrary to reason or natural law are void; if judges were at liberty to reject an unreasonable statute, "that were to set the judicial power above that of the legislature, which would be subversive of all government"). As a consequence, appeals to Parliament were the last resort for any person with a claim upon the State. Blackstone articulated this idea of Parliament's remedial authority as follows:

This being the highest and greatest court, over which none other can have jurisdiction in the kingdom, if by any means a misgovernment should any way fall upon it, the subjects of this kingdom are left without all manner of remedy.

Id. at *161.

n84. Blackstone recognized that a variety of legal restrictions had been placed on the Crown's prerogative over time - restrictions that he esteemed as bulwarks of civil liberty. Although he admitted that the Crown was capable of taking action that invaded the rights of *Englishmen, 3 Blackstone, supra* note 6, at *242 (admitting possibility of a "tyrannical and arbitrary" reign), Blackstone argued that the ordinary course of law could not reach certain of these invasions. As a consequence, when the Crown took action resulting in private injuries, the law required the subject to submit a "petition of right" to the Crown in the Court of Chancery seeking justice as a matter of grace. As to public oppressions, the remedies lay in Parliamentary checks (as through impeachment of the responsible ministers), id. at *244, and through such remedies as the emergency might require. Blackstone, in short, did not deny the possibility that the sovereign authority might invade the rights of the subject.

n85. Id. at *242.

n86. Id. at *244-45.

n87. After he defined the Crown's immunity from ordinary suits for redress, Blackstone quickly added that "the law has provided a remedy" for instances in which the Crown invades the rights of individuals. The remedy consists of the petition of right, through which persons with just demands upon the Crown may "petition him in his court of chancery, where his chancellor will administer right as a matter of grace, though not upon compulsion." 3 *Blackstone, supra* note 6, at *243; cf. supra note 29 (others dispute Blackstone's emphasis on grace).

n88. In a later chapter on injuries "proceeding from, or affecting, the Crown," Blackstone discussed the petition of right along with such other elements of Crown practice as the prerogative writs of mandamus, scire facias, and quo warranto. 3 *Blackstone, supra* note 6, at *254-69.

n89. As deSmith explains, Blackstone was a "good King's man" and understandably sought to associate the beneficent effects of such extraordinary remedies with the munificence of the Crown. deSmith, supra note 25, at 593. Blackstone accordingly included these remedies under his description of methods of "redressing injuries that the crown may receive from the subject." 3 *Blackstone, supra* note 6, at *257-65 (summarizing the rules governing scire facias,

quo warranto, and mandamus as instances in which the Crown obtained relief against its subjects rather than as suits brought by subjects against inferior government officials); id. at *131 (explaining habeas as a writ issuing throughout the realm on the ground that the "king is at all times entitled to have an account, why the liberty of any of his subjects is restrained").

n90. Several features clearly served Blackstone's purpose in characterizing practice upon the prerogative writs as submission of petitions for redress to the Crown. First, all applications for prerogative writs began with the submission of a petition or application with supporting affidavits, which sought to establish cause for the issuance of relief. See supra note 63. Second, all such applications were styled "In the King's Bench" - and could thus be characterized as applications to the king himself. See supra notes 28, 63. Third, the writs if any that emerged from King's Bench ran in the name of the king and therefore operated in form as commands from the Crown. See supra note 26.

n91. Two fictional elements of Blackstone's account deserve mention. First, it will hardly do to claim that the King invariably nursed a tender concern for the liberty of the subject; unjustified executive detention had led to the crisis of the early seventeenth century and to the broadening of the writ of habeas corpus. See Sharpe, supra note 64, at 8-15. In suggesting that the Crown authorized habeas out of concern for his subjects, then, Blackstone was following the established tradition of immunizing the King himself from blame and casting blame instead on the fictional "evil" minister. Cf. 1 *Blackstone, supra* note 6, at *237 (King cannot misuse his powers "without the advice of evil counsellors, and the assistance of wicked ministers [all of whom] may be examined and punished"). Second, the courts had long since established independence from the Crown; the Act of Settlement of 1701 established, among other things, that judges were to serve during good behavior and not at the pleasure of the king. See Colin Rhys Lovell, English Constitutional and Legal History: A Survey 412-13 (1962) (tracing judicial tenure during good behavior to the Act of Settlement of 1701).

n92. To be sure, Blackstone's account of the right to petition struggles to preserve the fiction that the subordinate courts were not to entertain proceedings against the Crown. Blackstone himself acknowledged the fiction in a marvelous literary passage at the close of his section on remedies against the Crown. See 3 *Blackstone, supra* note 6, at *268 ("The only difficulty that attends [modern remedies] arises from their fictions and circuities: but, when once we have discovered the proper clew, that labyrinth is easily pervaded. Our system of remedial law resembles an old Gothic castle, erected in the days of chivalry, but fitted up for a modern inhabitant."). Blackstone thus tends to emphasize the often-fictional exercise of executive discretion or royal "grace" and thus to obscure the role of law in securing relief against the Crown.

n93. Others shared Blackstone's view that the right to "petition" for redress of grievances entailed a right to invoke, not royal or Parliamentary grace, but the exercise of judicial power. If we examine English law dictionaries of the eighteenth century, we find definitions of the term petition that emphasize the use of the petition of right as a mode of securing relief in litigation with the Crown. See 2 T. Cunningham, A New and Complete Law Dictionary (2d ed. 1771) ("Petition, (Petitio) Hath a general signification for all kinds of supplication made by an inferior to a superior, and especially to one having jurisdiction.... And it is used for that remedy which the subject hath to help a wrong done by the King, who hath a prerogative not to be sued by writ: In which sense it is either general, that the King do him right and reason, whereupon follows a general indorsement upon the same, Let the right be done the party: or it is special, when the conclusion and indorsement are special, for this or that to be done, &c."); 3 Thomas Edlyne Tomlins, The Law-Dictionary 105 (4th ed. 1836) (defining petition as a "supplication made by an inferior to a superior, and especially to one having jurisdiction.... It is used for that remedy which the subject hath to help a wrong done by the king, who hath a prerogative not to be sued by writ; in which sense it is either general, that the king do him right, whereupon follows a general indorsement upon the same, 'Let right be done the party;' or it is special, when the conclusion and indorsement are special, for this or that to be done, &c."). These definitions obviously bear a good deal of resemblance (and incidentally cast doubt on the vitality of the copyright protections of the day). Their significance lies in their use of the petition of right - a judicial proceeding - to illustrate the generic term "petition"; readers doubtless understood that petitions sought relief of a judicial nature.

Similar, and more detailed, accounts appear in the leading abridgments or treatises of the day - those of Viner, Bacon, and Comyns. See 4 John Comyns, A Digest of the Laws of England 457 (1785) ("The King cannot be sued by Writ, for he cannot command himself. And therefore, where the King is seised by Matter of Record, or by Matter of Fact found by Office upon Record, he who has Right shall be, by the Common Law, put to his Petition of Right, in the Nature of a Real Action, to be restored to his Inheritance, or Freehold."); VII Henry Gwillim, An Appendix to Bacon's New Abridgment of the Law 379 ("The King cannot be sued by his subjects by writ, for he cannot issue a command to himself; though it is said in some books, that before the time of Edw. I, the king might be sued as a common person ....

The common law methods of obtaining redress or restitution from the crown of either real or personal property, are, I. By petition de droit, or petition of right. II. By monstrans de droit, manifestation or plea of right; both of which may be preferred or prosecuted either in the Chancery or Exchequer."); 16 Charles Viner, A General Abridgment of Law and Equity 540 (2d ed. 1793) ("Petition of right is in nature of his real action, which he cannot have against the King, because the King by his writ cannot command himself").

By the same token, law dictionaries define "redress of injuries" in terms that emphasize the role of courts of justice. See 3 Tomlins, supra, at 316 (entry for "redress of injuries" reads as follows: "The more effectually to accomplish the redress of injuries, courts of justice are instituted in every civilized society, in order to protect the weak from the insults of the stronger; by compounding and enforcing those laws, by which rights are defined, and wrongs prohibited: this remedy is therefore principally to be sought by application to these courts of justice: that is, by civil suit or action"). Blackstone and his contemporaries thus understood the right to petition for redress as a right to invoke the authority of the royal courts of justice in accordance with the established forms and modes of proceeding.

n94. 3 *Blackstone, supra* note 6, at *141. See also Chitty, supra note 26, at 341 (indicating that in every case "in which the subject hath a right against the Crown, and yet no monstrans de droit or traverse of office lies, a petition of right is the birth-right of the subject").

n95. 3 *Blackstone, supra* note 6, at *143. To be sure, the reference here to the two houses of Parliament indicates that the right to petition encompassed both political and judicial submissions. Petitions to the King, moreover, doubtless included a variety of "of grace" submissions, such as applications for reprieves and pardons, all of which went forward by way of petition to the King. Yet the existence of a right to petition the legislative and executive branches for nonjudicial relief does not foreclose a judicial interpretation of the right to petition.

n96. Oddly, Blackstone's fictions have fooled a good many subsequent scholars (and the Supreme Court of the United States) into thinking that the Crown's immunity from suit was real, immutable, and applicable to republican institutions in America.

n97. By thus limiting the scope of the subject's right to judicial redress against the Crown to invasions of life, liberty, and property, Blackstone picked up a distinction between public oppressions (royal tyranny) and the invasion of private rights. He admitted instances of royal tyranny in the past and simply denied that the courts had any role to play in redressing them. See supra note 84. Today, we can see a similar distinction. Petitions to the legislative branches of government do not seek to enforce existing rights so much as to create new ones, whereas suits and proceedings before the federal courts seek relief of a judicial character.

n98. See supra note 6.

n99. We find this common-law conception of sovereign immunity reflected in leading decisions of the Supreme Court, most recently in the Court's retrograde decision in *Seminole Tribe v. Florida, 116 S. Ct. 1114 (1996).* In Seminole Tribe, the Court essentially admitted the absence of any principle of sovereign immunity on the face of the Constitution. Yet the Court found, on the basis of a highly questionable reconstruction of the ratification debates, that the states were to enjoy an implicit or common-law immunity from suit in federal court. This implicit or common-law immunity was said to have been improperly ignored in *Chisholm v. Georgia, 2 U.S. (2 Dall.) 419 (1793),* and reinvigorated with the ratification of the *Eleventh Amendment. Seminole Tribe, 116 S. Ct. at 1130-31.* On this account, the text of the Eleventh Amendment counts for little; rather, the amendment restores the pre-constitutional understanding and the implicit notion of state immunity. *Id. at 1122, 1129.*

We can reject this account out of hand. For one thing, remedies against the Crown were understood by Blackstone and others to have been a feature of practice on the Latin or law side of Chancery, reflecting the common-law origins of the petition of right. See supra notes 36-37. Unthinking incorporation of sovereign immunity as a common-law precept would presumably occasion the unthinking incorporation of the appropriate common-law remedies as well. In any case, as Justice Souter argues in his dissenting opinion in Seminole Tribe, the American incorporation of common-law principles was anything but unthinking. *116 S. Ct. at 1145* (Souter, J., dissenting).

n100. See *Jaffe, supra* note 3, at 2 (describing as a "magnificent irony" the process by which English doctrine favorable to the rights of the subject lost one-half its efficacy in translation into American state and federal systems).

n101. Jaffe says that with "the expulsion of the Crown, the citizens of the new Republic lost half of the rights against government which as Englishmen they had previously enjoyed." Id. at 19. In the accompanying footnote, Jaffe explains that the "rhetorical flourish" in the quoted text does not rest on records of litigation by American colonials but

rather on the assumption that Americans enjoyed the right to invoke established English procedures before the Revolution and lost the important English remedies of petition of right, monstrans de droit, and traverse of office because such remedies were never introduced into this country's common law. Id. at 19 n.56. Instead, Jaffe asserts that "claims upon the government in the American colonies and states were commonly made by petition to the legislature." Id.

Jaffe's hypothesis has remained untested. To the extent that other scholars have examined the history of government accountability from the era of the framing, they have tended to focus on the text of early state constitutions and have failed to consider the actual practice of the states in determining claims against the government. See Akhil R. Amar, Of Sovereignty and Federalism, *96 Yale L.J. 1425 (1987);* John J. Gibbons, The Eleventh Amendment and State Sovereign Immunity: A Reinterpretation, *83 Colum. L. Rev. 1889 (1983).* Both scholars emphasize that early state constitutions promised individuals a judicial remedy for every wrong they suffered. See *id. at 1898 n.44* (citing provisions in Delaware, Maryland, and Massachusetts). Later provisions explicitly contemplated suits against the government itself. See *id. at 1898 n.4* (citing provisions of Pennsylvania and Tennessee Constitutions in emphasizing the importance of remediation to framers of state constitutions). For the text of the Pennsylvania provision, see 8 Sources and Documents of United States Constitutions 304 (William F. Swindler ed., 1979) ("Suits may be brought against the commonwealth in such manner, in such courts, and in such cases as the legislature may by law direct"). On the origins, see Jacobs, supra note 6, at 25 (describing James Wilson as a leading member of the Pennsylvania constitutional convention, who "persuaded that body to write into its document a waiver of the state's immunity from suit in its own courts"); cf. infra note 147 (explaining origins of the Pennsylvania law, circa 1785, that authorized suits against the Commonwealth and preceded the adoption of the constitutional provision).

One scholar who has looked at actual case reports, Professor Shimomura, found some support for Jaffe's thesis in a modest collection of Pennsylvania decisions; unfortunately, his conclusions rest on an extremely limited collection of reports and on a mistaken analysis of their significance. See Floyd D. Shimomura, The History of Claims Against the United States: The Evolution from a Legislative Toward a Judicial Model of Payment, *45 La. L. Rev. 625, 633 (1985).* On the problems with Shimomura's reading of the early decisions, see infra note 141.

n102. Leading decisions on the question of the suability of the United States take for granted that suits against the government require the consent of the legislature, just as remedial practice in Great Britain on the petition of right required royal consent. To be sure, the majority opinion in *United States v. Lee, 106 U.S. 196 (1882),* recognized an important exception to the rule of federal immunity by allowing officer suits as a partial substitute for suits against the government, eo nomine. New life has been breathed into Justice Gray's dissenting opinion in Lee, however, by later decisions that forbid the use of officer suits to test the title to property in the possession of the United States. See infra note 286. Gray's dissent draws a connection, much like Jaffe's, between the historical assertion that British remedies were never introduced into this country's common law and the related assertion that claims upon the governments of the American states were traditionally made by petition to the legislature. See *106 U.S. at 238-39* (Gray, J., dissenting). A leading casebook cites Lee for the proposition that "the English practice of royal consent was transformed in this country into the notion that the government is immune from suit absent consent of the legislature." Paul M. Bator et al., Hart and Wechsler's The Federal Courts and the Federal System 1110 (3d ed. 1988).

n103. As a matter of history, American legislatures have played an important (and much criticized) role in determining money claims against the government. Congress withheld an effective consent to judicial determination of contract and constitutional claims until after the Civil War and did not subject the government to judicially determined liability in tort until 1946. Before these statutes created a judicial role, individuals submitted claims to Congress by way of legislative petition. See generally Shimomura, supra note 101; William M. Wiecek, The Origin of the United States Court of Claims, *20 Admin. L. Rev. 387 (1968).*

Widespread reliance on legislative petitions for relief from government injuries has tended to encourage an understanding of the Petition Clause as a guarantee of access to a process of political, rather than judicial, decisionmaking. See, e.g., Wilson Cowen et al., The United States Court of Claims: A History, 216 Ct. Claims Rep. 1, 4 (1978) (linking right to petition under the First Amendment to the submission of legislative petitions); Wiecek, supra, at 389 (characterizing the Petition Clause of the First Amendment as guaranteeing the right of individuals to petition Congress for the payment of money claims against the government). Professor Jaffe's account, with its emphasis on the legislative petition, forges a subtle connection between the American acceptance of the doctrine of sovereign immunity and a legislative or political conception of the First Amendment right to petition the government for redress.

n104. See supra note 16.

n105. Royal colonies operated under the supervision of executive officers of the Crown acting through a variety of boards or commissions. Primary responsibility in England for the management of the colonies lay with the Board of Trade, a group of high government officials that was established at the tail end of the Seventeenth Century to coordinate Crown policy towards the Plantations. See 1 Herbert L. Osgood, The American Colonies in the Eighteenth Century 133-45 (1924). Judicial appeals from the courts of the colonies went to the Privy Council, a declining executive department with only this remaining vestige of judicial authority, rather than to the appellate courts in England. See Lovell, supra note 91, at 316-17 (describing Privy Council's loss of judicial authority in the middle of the seventeenth century). On the role of the Privy Council as a court in proceedings coming from the colonies, see Smith, supra note 53. The Treasury oversaw the work of customs officials who collected duties in the colonies and were expected to account at the Exchequer. See 1 George Louis Beer, The Old Colonial System: 1660-1754, at 272-84 (1933); Osgood, supra, at 18-22. The Admiralty supervised the royal navy and authorized the creation of colonial courts of admiralty, and the Secretary of State corresponded frequently with colonial governors and pushed official paper through the drawn-out process that led to the application of the various seals. See Leonard F. Labaree, Royal Government in America: A Study of the British Colonial System Before 1783, at 27-28 (1930); Osgood, supra, at 16, 28-30. An admirable one-volume overview of the colonies' administrative apparatus as seen from the British perspective appears in A. Berriedale Keith, Constitutional History of the First British Empire (1930).

On the origins of colonial assemblies and their role in the movement toward American independence, see 3 George Bancroft, History of the United States 1-108, 383-98 (1860); Labaree, supra, at 172-217. For a study of the lower houses of assembly in the South and their progressive demand for a greater share of governmental authority, especially over money matters, see Jack P. Greene, The Quest for Power: The Lower Houses of Assembly in the Southern Royal Colonies, 1689-1776 (1963). For an introduction to the southern assemblies and the common themes in their growing influence in government affairs, see id. at 3-18.

n106. For a discussion of the judicial powers of the High Court of Parliament and the House of Lords and their roles in the disposition of petitions, see 1 Holdsworth, supra note 28, at 170-73; Charles Howard McIlwain, The High Court of Parliament and its Supremacy 109-256 (1910). For a history of private legislation in Parliament, tracing the origins of the private bill to the submission of individualized petitions, see Frederick Clifford, A History of Private Bill Legislation 267-316 (1885) (power of Parliament arises from its role in disposing of petitions for redress; due to the burden of handling petitions, many were early referred to the common law tribunals for disposition; parliamentary authority was thus limited to matters of an equitable nature and to private relief). On the use of parliamentary precedents in the development of the powers of the colonial assemblies, see Mary P. Clarke, Parliamentary Privilege in the American Colonies 14-60 (1943) (early colonial assemblies consciously modeled their actions on those of the House of Commons); Ralph V. Harlow, The History of Legislative Methods in the Period Before 1825, at 1-23 (1917) (emphasizing influence of the British example in the rise of the committee system among American assemblies); see also Raymond C. Bailey, Popular Influence on Public Policy: Petitioning in Eighteenth-Century Virginia 9-19 (influence of the British House of Commons).

n107. In some matters of public interest to a wide range of individuals, upwards of a thousand signatures would appear on petitions. See Bailey, supra note 106, at 26-27 (describing the method by which signatures were sought on such petitions). Such public petitions were obviously regarded both by the petitioners and the assemblies as a useful reflection of public opinion. For example, the Pennsylvania Council of Censors decided in 1784 to refrain from calling a new constitutional convention because thousands of individuals signed a remonstrance against any such proceeding. See infra note 156.

n108. It was perfectly permissible to petition on a strictly individual claim, such as one for a government pension, for government payment of a public claim, or for legislative relief from the misconduct of a neighbor. Bailey, supra note 106, at 27. In addition, to the extent petitions sought an adjudication, such as the grant or denial of new trials or other equitable relief from judicial decisions, individual petitions were the norm. See Judicial Action by the Provincial Legislature of Massachusetts, *15 Harv. L. Rev. 208 (1902)* [hereinafter Judicial Action] (reproducing 16 instances from the period 1708-1720 in which the Massachusetts Bay legislative body resolved disputes of a judicial nature in response to the petitions of individual claimants).

n109. Traditions of legislative prerogative empowered committees of the assembly to utilize many of the investigative tools we now associate with judicial dispute resolution. Such powers included that to subpoena witnesses and documents, to take testimony, and to punish the recalcitrant through contempt sanctions. See Clarke, supra note 106, at 205-08 (describing powers of contempt); Harlow, supra note 106, at 111 (describing the power of standing committees to force the attendance of witnesses in connection with the investigation of petitions).

n110. See Erwin C. Surrency, The Courts in the American Colonies, *11 Am. J. Legal Hist. 253, 268-69 (1967);* see also Leonard S. Goodman, Mandamus in the Colonies, *1 Am. J. Legal Hist. 308, 322-24 (1957)* (describing the efforts of the Massachusetts assembly, known as the "General Court," to retain judicial power of last resort in the late seventeenth and early eighteenth centuries).

The provincial legislature of Massachusetts Bay entertained a variety of petitions for relief in equity, including petitions seeking relief from the forfeiture of bonds, stay of execution, and relief from a default judgment. See Judicial Action, supra note 108, at 209, 210, 216 (setting forth grants of applications for relief from forfeiture of a penal bond, stay of execution and relief from default judgment).

n111. See William H. Lloyd, The Early Courts of Pennsylvania 100-02 (1910) (noting that the Pennsylvania assembly granted divorces through the passage of private legislation; that Parliament banned such divorce legislation in 1773; that an act of 1785 conferred divorce jurisdiction on the Supreme Court; and that divorces through the passage of legislation continued until banned by constitutional provision in 1874); see also Clarke, supra note 106, at 43-44 (noting submission of divorce petitions in Connecticut, Massachusetts, New Hampshire, and New Jersey).

n112. See 1 William Winslow Crosskey, Politics and the Constitution in the History of the United States 487-93 (1953) (describing the use of petitions for private acts of naturalization in New Hampshire, Massachusetts, Rhode Island, New York, and New Jersey and the use of petitions for private acts of bankruptcy in Connecticut, New York, Maryland, and Pennsylvania).

n113. See An Act Concerning Petitions and Prayers, or Memorials to the General Assembly, in Acts and Laws of the State of Connecticut, in America 191-92 (Hudson & Goodwin eds., 1796) (enacting that "no Petition, Prayer, or Memorial made or preferred by any Person or Persons whatsoever to the General Assembly, shall be heard or considered by said Assembly, where any other Person or Persons is, or are concerned in the Estate, Matter, Thing or Things in Controversy, and have Right to be heard in the same, unless he or they so concerned have been summoned or notified thereof"; further enacting "that no Petition shall be preferred to the General Assembly, but in such Case or Cases where no other Court is by Law competent to grant Relief").

Central to the right to petition was the rule that required the considered disposition of every petition. Professor Bailey has explained how the Virginia House of Burgesses took steps to "encourage[ ] citizens to present their requests and grievances with petitions by guaranteeing that all would be considered." Bailey, supra note 106, at 6. Subsequent sections of the book explain that the Burgesses attempted to make good on this promise by defending their access to citizen petitions from attempts by governors and local justices of the peace to screen some matters from their consideration. Id. at 36-41. While Bailey acknowledges that the house exercised discretion in passing upon the petitions, he also describes as "axiomatic" the view that all legitimate petitions required "official consideration and response." Id. at 36; see also Harlow, supra note 106, at 15-16 ("In every case the committee had to make investigations concerning the truth of the facts alleged, and then decide whether or not the case was important enough to warrant legislative action. Frequently witnesses had to be summoned, and the committee was sometimes kept busy with the taking of evidence from one end of the session to the other. Every case, no matter how trivial it seemed, was given a fair hearing.").This requirement of considered disposition bears an obvious resemblance to that which courts owe to litigants and illustrates again the close parallel between legislative determination of petitions and judicial determination of claims.

Subsequent history affords a further illustration of the connection. John Calhoun persuaded the United States Senate to abandon the rule of response in connection with a flood of anti-slavery petitions. See Higginson, supra note 2, at 145-49. By the time Congress abandoned the requirement of a response, the legislature no longer handled many of the judicial functions through legislative petition - a fact that weakened the claim of petitioners to an absolute right of consideration.

n114. See *Plaut v. Spendthrift Farms, Inc., 514 U.S. 211, 221-22 (1995)* (describing the system of "legislative equity" that preceded the framing as one the framers rejected; striking down a recent congressional decision to reopen a judicial proceeding as a violation of the doctrine of separation of powers).

n115. See Harlow, supra note 106, at 16-18 (describing the role of committees in passing upon petitions for payment of money claims in colonial Virginia and North Carolina). See also Bailey, supra note 106, at 129-30 (describing the procedure for payment of public claims by petition in Virginia).

n116. On the role of petitions in the legislative determination of money claims, see *Greene, supra* note 105, at 53, 66-67 (describing the role of the legislative petition in the payment of money claims by the colonial assemblies of Virginia, North Carolina, and South Carolina).

n117. Acting under authority conferred by their commissions and within guidelines established by their instructions, royal governors were to exercise the executive power in the colonies. On the importance of the commission as the "constitution" of the royal colony, see Labaree, supra note 105, at 8-11; see also Evarts Boutell Greene, The Provincial Governor in the English Colonies of North America 226-60 (1966) (reprinting the commission and instructions to Governor Bernard of New Jersey circa 1758).

Governors often sought the advice of the council - a group of local landholders and royal officials named by the Crown who also sat as the upper house of the colonial assembly. For an overview of the threefold capacity of the council, governor's advisory panel, upper house of assembly, and highest court of appeals in the province, see Labaree, supra note 105, at 134-71. On the background and influence of the members of the colonial councils, see Jackson Turner Main, The Upper House in Revolutionary America: 1763-1788, at 3-96 (1967).

Judicial power resided in courts established by the governor and in judges appointed by him during pleasure. See Labaree, supra note 105, at 99-101; George A. Washburne, Imperial Control of the Administration of Justice in the Thirteen American Colonies, 1684-1776, at 20 (1923). Although the Crown typically chose the chief justice, Labaree, supra at 167, other judges were chosen by the governor, with the advice and consent of the council, and were subject to removal at the governor's pleasure, id. at 390-91. Colonists objected both to the service of judges at the Crown's pleasure, id., and to the governor's authority to erect courts as a matter of royal prerogative without the approval of the legislature, id. at 373-80.

The governor's commission as vice-admiral issued from the Lord High Admiral and gave the governor jurisdiction over all admiralty and maritime affairs in the province, with the power of appointing officers and carrying the jurisdiction into effect. See Labaree, supra note 105, at 25-27. The governor's admiralty jurisdiction encompassed such matters as the enforcement of contracts, the forfeitures of bonds, the punishment of pirates and felons, and enforcement proceedings for royal fish, treasure trove, admiralty droits, prizes, and revenue law. Id. at 26.

The governor's commission vested him with control over the colonial seal, and that control, in turn, conferred chancery powers on the governor. Id. at 379. Sometimes the governor exercised these powers himself; sometimes he appointed judges to sit as a court of chancery. See id. In Massachusetts, by contrast, there were no courts of equity, and most appeals to conscience were directed in the form of petitions to the legislative body known as the General Court. Control over the colonial seal also reflected the governor's role in the issuance of grants of land. Id. at 112-13. The governor's instructions typically spelled out the rules for such grants in some detail. Id.

n118. See Bailey, supra note 106, at 36-41 (recounting the Virginia assembly's efforts to defend its access to petitions for redress of grievances from the interference of the governor and local justices of the peace); Clarke, supra note 106, at 215-16 (explaining that the power of the assembly to entertain and redress grievances widened its jurisdiction vis-a-vis the Crown).

n119. See *Greene, supra* note 117, at 141-42 (noting the conflict between royal governors, as the head of the Court of Chancery, and the assemblies in New York and Pennsylvania); Goodman, supra note 110, at 324 (noting the strong desire of the general assembly to retain its superintending power over courts); Surrency, supra note 110, at 265-66, 271-74 (noting reluctance of the assemblies to accede to the creation of courts of equity; vesting of the powers of the Court of Chancery in the governor and council gave rise to disputes with the assemblies over the exercise of equitable authority).

n120. See *Greene, supra* note 105, at 25, 52-53, 66-68 (describing the process by which the lower houses of the assemblies of South Carolina, Virginia, and North Carolina considered legislative petitions for the payment of public claims in the course of developing money bills for the colony).

n121. More accurately, one might date the concern with constitution-making to the May 15, 1776 resolution in which Congress sought to suppress the assertion of civil authority under the Crown and called for the creation of governments "under the authority of the people." Gordon S. Wood, The Creation of the American Republic: 1776-1787, at 132 (1969); see also Willi Paul Adams, The First American Constitutions: Republican Ideology and the Making of the State Constitutions in the Revolutionary Era 59-62 (1980). On Jefferson's role in Virginia lawmaking after independence, see Dumas Malone, Jefferson the Virginian 247-85 (1948).

n122. 1 Schwartz, supra note 15, at 266.

n123. Id. at 277 ("That every man hath a right to petition the Legislature for the redress of grievances in a peaceable and orderly manner.").

n124. Id. at 281 ("That every man hath a right to petition the Legislature, for the redress of grievances, in a peaceable and orderly manner.").

n125. Id. at 287 ("That the people have a right to assemble together, to consult for their common good, to instruct their Representatives, and to apply to the Legislature, for redress of grievances.").

n126. Id. at 343 ("The people have a right ... to request of the legislative body, by the way of addresses, petitions, or remonstrances, redress of the wrongs done them, and of the grievances they suffer.").

n127. Revolutionary state papers, ranging from petitions and declarations of rights that emerged from the Stamp Act Congress of 1765 to those issued by the Continental Congresses of 1774-1775, all reveal a close connection between the colonists' conception of government structure and the scope of the right to petition. The pattern was set during the Stamp Act crisis - at a stage of revolutionary development when the Americans accepted some portion of Parliament's claimed power to regulate matters of trade and commerce that touched upon the affairs of the colonies. See Edmund S. Morgan & Helen M. Morgan, The Stamp Act Crisis: Prologue to Revolution 145-50 (1962) (explaining that the Stamp Act Congress admitted the regulatory authority of Parliament and rejected only the claimed power of Parliament to tax the colonies without the consent of their assemblies). The Stamp Act declaration of rights expressed this idea by acknowledging "due Subordination" to Parliament, weasel words drafted by John Dickinson to resolve a disagreement among the delegates over the precise nature of parliamentary authority. Id. at 146. The Stamp Act Congress also embodied this compromise in its statement of the right to petition as set forth in the accompanying declaration of rights. See The Stamp Act Congress 202 (C.A. Weslager ed., 1976) (declaring that "it is the Right of the British Subjects in these Colonies to Petition the King, or either House of Parliament"). In keeping with this conception of the scope of parliamentary authority, the Stamp Act Congress petitioned both the Crown and the House of Commons; the parliamentary petition acknowledged "all due Subordination" to Parliament. Id. at 210.

Later, as the Americans came to view themselves as owing allegiance to the Crown but not to Parliament, they shifted ground and defined a right to petition only to the Crown. For a discussion of the shift away from the recognition of any role for Parliament, see *Wood, supra* note 121, at 344-54; cf. Edward Dumbauld, The Declaration of Independence and What It Means Today 119-24 (1950) (explaining that the Americans' later conception of the structure of their government accepted a role for the King but no role for Parliament); see also *Malone, supra* note 116, at 181-90 (describing Jefferson's rejection of parliamentary authority in his Summary View of the Rights of British America). For the relevant texts, see Decent Respect, supra note 16, at 49, 55 (The Bill of Rights and a List of Grievances, dated October 1774, declares that the inhabitants of the colonies "have a right peaceably to assemble, consider of their grievances, and petition the King; and that all prosecutions, prohibitory proclamations, and commitments for the same, are illegal."); id. at 71, 125 (setting forth the text and background of the Petition to the King of 1774 and the Olive Branch Petition of 1775, both of which were addressed to the "King's Most Excellent Majesty"; no petitions to Parliament appear during this period). By excluding Parliament from their statement of their right to petition, the Americans confirmed their denial of the parliamentary claim of sovereign authority over the colonies.

n128. These structural choices reflected a variety of impulses including a perception that the lower houses of assembly had played a leading role in the drive toward independence and a lingering distaste for royal prerogative as embodied in the governor and his courts. See *Wood, supra* note 121, at 136-37 (distaste for prerogative); id. at 154-55 (role of the lower houses of assembly in attacks on prerogative).

n129. Id. at 132-43.

n130. Id. at 137.

n131. Id. at 162-63.

n132. Id. at 226-37 (describing Pennsylvania's radical experiment in democracy).

n133. Id. at 137-38.

n134. Id. at 139-42.

n135. Among the colonists' grievances against Great Britain was the complaint that their judges served during the pleasure of the Crown, rather than during good behavior as in England. See Dumbauld, supra note 127, at 112-15 (providing background to the complaint in the Declaration of Independence that George III made judges "dependent on his Will alone, for the Tenure of their Offices, and the Amount and Payment of their Salaries").

n136. See *Wood, supra* note 121, at 160-61.

n137. Id. at 161.

n138. Under the principles of agency law, the government owed no legal obligation to individuals injured by the tortious conduct of its officers and employees. See Edwin M. Borchard, Governmental Responsibility in Tort, VI, *36 Yale L.J. 1 (1926)* (tracing origins of the government's immunity from suit in tort); *Jaffe, supra* note 3, at 19 (characterizing the doctrine of government non-liability at common law a "serious deficiency"). Accordingly, suits for positive government wrongs went forward not against the government as an entity but rather against the officers themselves. See Engdahl, supra note 3, at 16-18 (summarizing the "extremely harsh" rules of liability that applied to government officials at common law); Ann Woolhander, Patterns of Official Immunity and Accountability, *37 Case W. Res. L. Rev. 396 (1987).*

The common-law rules of official liability secured a broad measure of government accountability without any requirement that individuals bring suit against the state. Apart from their right to litigate an invasion of property rights through suits against the responsible officer, individuals enjoyed a right to test the legality of most government exactions. If the government sought to collect taxes or customs through judicial process, individuals were entitled to litigate the legality of the exaction in the course of resisting the claim. See Chitty, supra note 29, at 356-73 (noting the right of individuals to traverse claims brought by the Crown). If the government proceeded extra-judicially, compelling payment through a threatened seizure of property, individuals could pay under a fictional protest and then sue the officer in an assumpsit action that put into issue the legality of the assessment. Justice Story explained the theory of such actions in his treatise on Agency in the following terms:

Where, however, money is obtained from third persons by public officers illegally, but under color of office, it may be recovered back again from them, if notice has been given by the party at the time to the officer, although the money has been paid over to the government; and, if it has not been paid over, but it remains in the officer's hands, it may be recovered back, even without notice.

Joseph Story, Commentaries on the Law of Agency 311-12 (1839). For cases confirming the viability of this right of action in assumpsit to recover money had and received by the public agent, see *Philadelphia v. Collector, 72 U.S. (5 Wall.) 720 (1876)* (assumpsit against collector of internal revenue); *Elliot v. Swartout, 35 U.S. (10 Pet.) 137 (1836)* (assumpsit lies against collector of customs for duties paid under protest); see also *Osborn v. Bank of the United States, 22 U.S. (9 Wheat.) 738, 843 (1824)* (describing right of action in dicta).

Assumpsit was not, of course, the only mode by which individuals might litigate their challenges to the legality of a tax. Faced with distraint of their goods at the hands of the collector, the individual might suffer the deprivation and then bring an action to recover back the goods in question, thereby testing the legality of the tax that underlay the seizure. See Woolhandler, supra note 138, at 431-32. These alternative remedies later became decisive in a contest over the constitutionality of a decision by Congress to displace the ordinary assumpsit mode. Congress effected that displacement through a statute that directed collectors of customs to pay all funds over to the Treasury immediately. The Supreme Court interpreted this provision, in *Cary v. Curtis, 44 U.S. (3 How.) 236, 250 (1845),* as placing funds in the hands of the collector beyond the reach of the federal courts and thus as barring reliance upon assumpsit. Justice Story argued in dissent both against this interpretation of the statute, which he regarded as one Congress had not intended, and against the constitutionality of the displacement of the assumpsit action. *Id. at 252, 257* (Story, J., dissenting). The majority answered Story's constitutional claim by emphasizing the availability of alternative remedies. *Id. at 250.* For an account of Congress's reaction to the Taney Court's decision in Cary, see Antonin Scalia, Sovereign Immunity and Nonstatutory Review of Federal Administrative Action: Some Thoughts from the Public-Lands Cases, *68 Mich. L. Rev. 867, 916 n.222 (1970)* ("Congress promptly remedied this unfortunate decision by [providing] that 'nothing contained [in the earlier statute] shall take away, or be construed to take away or impair,' the right of action against the collector.").

n139. See supra text accompanying notes 74-81.

n140. See Engdahl, supra note 3, at 5-21 (reviewing in detail the rules of agency that controlled officer liability in tort in the United States); *Jaffe, supra* note 3, at 21-29 (tracing the development of the officer suit in the United States). On the incorporation of the writ of mandamus into American practice, see Goodman, supra note 110, at 334 (following a running battle between the Massachusetts colonial assembly and the royal courts over the writ of mandamus, the state legislature confered mandamus power on the Supreme Judicial Court in an Act of 1782); id. at 1, 8, 14, 25-26, 33-34, 131-34, 139-41, 142-43 (describing the introduction of mandamus into the laws of New Hampshire, Connecticut, Maryland, New York, New Jersey, Pennsylvania, and Delaware).

On the availability of habeas corpus in the colonies and in the newly independent American states, see William C. Duker, A Constitutional History of Habeas Corpus 95-125 (1980); Oaks, Habeas Corpus in the States - 1776-1865, *32 U. Chi. L. Rev. 243 (1965).*

n141. Under the prevailing common-law theory of agency, officers of the government who presided over the government's failure to pay claims sounding in contract or account owed no personal obligation to the individual creditor. See Engdahl, supra note 3, at 15-16 (noting that a government official could neither sue nor be sued on the government contract or for its breach; the same rule governed actions on account); cf. Woolhandler, supra note 138, at 428 (noting use of officer suit in assumpsit to test legality of government exaction). Rather, the common law regarded the obligation to pay such claims as one owed by the government itself. Similarly, when the government owned property as a "matter of record," the common law regarded the property as part of the government's "treasure" and viewed itself as incompetent to provide relief to an individual claimant. Individual claimants were thus required to pursue some form of extraordinary remedy in seeking an adjudication of rights in contract, account, and property. See Chitty, supra note 29, at 341-42 (where Crown owns of record, common law requires subject to submit petition to pursue claim to property).

These rules of agency were well-established in post-revolutionary America and help to explain early decisions concerning the suability of state governments. As we shall see, Pennsylvania was among the states that adopted judicial modes for the determination of money claims against the State. Yet early decisions of the Pennsylvania courts reject two such claims. See *Black v. Respublica, 1 Yeates 139 (Pa. Sup. Ct. 1792)* (denying recovery for wrongful act of government officers); *Respublica v. Sparhawk, 1 Dall. 383 (Pa. Sup. Ct. 1788)* (denying relief to plaintiff who sued to recover damages for taking of property during war). Although the two decisions have been taken to stand broadly for the proposition that early courts respected the rule of sovereign immunity, see Shimomura, supra note 101, at 636, the decisions rest on the common law distinction between liability in tort and in contract. Both involved takings claims of the kind that sounded in tort, and thus both involved liability of the officers rather than of the government itself. Both, moreover, advert to this distinction. In Sparhawk, the court noted that the mode provided for suing the Commonwealth of Pennsylvania applied only to claims "for services performed, monies advanced, or articles furnished." *1 Dall. at 389.* In Black, the court specifically noted that takings in law "must be considered as a tortious act." See *1 Yeates at 142-43.* Neither claim, in law, gave rise to liability of the state as an entity.

n142. 9 William Waller Hening, The Statutes at Large: Being a Collection of the Laws of Virginia 536-40 (1821). The act, chapter 17 of the October 1778 session, also repeals a previous act from 1776. See id. at 540 (repealing act of October 1776) (reprinted in id. at 245-46). The penultimate section of the act authorizes individuals to pursue claims against the State. Id. at 540, 5. Virginia adopted the petition of right as part of "An act for establishing a board of Auditors for public accounts." The law, enacted in the October 1778 term, essentially vests the auditors with powers (previously exercised by the assembly's committeeon public claims) to consider in the first instance a wide variety of claims against the Commonwealth.

n143. The act, after all, speaks of the submission of a "petition" - language suggestive of English practice. Moreover, the act directs that the court "shall proceed to do right" on the petition, a formulation similar to the endorsement ("let right be done to the parties") that came to characterize practice upon petitions of right in England. See supra note 33. The leading student of early Virginia state law, St. George Tucker, describes the act as having codified the petition of right. See 3 Tucker's Blackstone, supra note 6, at 256 n.2 (referring to Virginia session laws, 1794, chapter 85, section 6, which recodified Jefferson's 1778 statute).

n144. In the leading judicial decision on the meaning of this provision, Chief Justice Edmund Pendleton specifically links the Virginia petition-of-right machinery to the practice in England:

I feel a pleasure ... in discovering, that the Legislature of my country had provided such a tribunal, by allowing an appeal ... to the Judiciary, independent in the tenure and emoluments of office, and bound to decide according to the

laws, on which the contract was founded; for, in that light I view the law giving the appeal, which establishes a general mode of bringing all claims against the public before that tribunal.... The situation of England, in regard to this point, has been mentioned. The petition of right was the mode adopted there for referring such claims to their Judiciary; and although ... it could not be proceeded upon, until the King had underwritten, Let justice be done; yet that has long since been dispensed with, and the petition is taken up as an ordinary proceeding. That petition, and the monstrans de droit, subjects all the claims of individuals against the Crown, or the public, to legal decision.

Commonwealth v. Beaumarchais, 7 Va. (3 Call) 122, 169-70 (1801). In this passage, Pendleton openly celebrates his "country's" adoption of "ordinary" English practice upon the petition of right, which he understood (pace Blackstone) no longer to require the petitioner to obtain royal consent.

The Virginia procedure also resembled English practice in retaining the requirement that a petitioner seek the passage of an appropriations bill to effect payment of a successful claim. British practice during the Eighteenth Century required Parliament to appropriate funds to pay judgments rendered upon petition. See 9 Holdsworth, supra note 28, at 33 (explaining that successful petitioners still faced the task of securing parliamentary appropriations to fund the judgment in their favor). The practice in Virginia was similar. See 1 Tucker's Blackstone, supra note 6, at 362-63 (noting the availability of the petition of right in Virginia and criticizes the holding that the treasurer may not pay a judgment until the assembly passes an appropriation to that end).

n145. An Act Directing a Mode for the Recovery of Debts Due to, and the Settlement of Accounts with, this State, March 30, 1781, reprinted in 1 Laws of the State of New York 374 (1886).

n146. Id. at 376.

n147. Pennsylvania conferred authority to settle accounts upon a Comptroller General. See Act of April 13, 1782, ch. 959, 2 Laws of the Commonwealth of Pennsylvania 19 (1810) [hereinafter Pennsylvania Laws] (authorizing Comptroller General to liquidate and settle "according to law and equity, all claims against the commonwealth, for services performed, monies advanced, or articles furnished" for the use of the commonwealth). The act gives the Comptroller General authority to call witnesses, issue subpoenas, administer oaths, and make findings of contempt. Id. at 22-23, 12. The act also required the President and Council (the Supreme Executive Council of the state) to approve any payments to claimants against the state by issuing a warrant to the treasurer. Id. at 20, 24, 2, 16 (providing for review of accounts by council and for issuance of warrants to treasurer to direct payment of any balance owed to individuals; prohibiting treasurer from paying any monies except upon warrant signed by the president of the council).

Legislation passed on February 18, 1785, authorized individual claimants to test the Comptroller General's resolution of their claims by appeal to the Supreme Court that was to result in a trial de novo before a jury. See Act of February 12, 1785, ch. 1122, in 3 Pennsylvania Laws, supra, at 9. The preamble recited that

upon experience, it hath been found that the summary powers [in earlier statutes] without any opportunity of re-hearing or re-examining the settlements, balances, or sums declared and pronounced to be due and payable ... have not in all cases proved satisfactory....

And whereas it will be agreeable to the constitution of this state, which hath declared, that "trial by jury shall be as heretofore," that persons conceiving themselves to be aggrieved by the proceedings of the said Comptroller-General should be allowed to have a trial of the facts by a jury, and questions of law arising thereupon determined in a court of record.

Id. at 9-10, 1, 2. Section 3 provides that "in every case [of settled accounts] it shall and may be lawful for such party, within one month after notice [of settlement], to appeal from such setttlement, or award ... to the Supreme Court, which appeal shall be allowed by the Supreme Executive Council, provided [the party appealing posts a bond]." Id. at 10, 3. By its terms, the statute creates a mandatory right of appeal and to the Pennsylvania Supreme Court and requires the executive council to allow the appeal, in keeping with the idea that executive consent has become routinely available in such proceedings.

n148. See supra note 147 (language of Pennsylvania statute provides that it shall be lawful to appeal and that the Supreme Executive Council shall give leave to appeal).

n149. Montesquieu's contribution to the doctrine lay in his insistence on a separate role for the judicial branch of government. See Montesquieu, Spirit of the Laws Bk. XI, ch. 6, at 151-52 (1748) (Neumann ed., 1966) ("All would be lost if the same man or the same body of leaders ... exercise these three powers: that of making laws, that of executing the public resolution, and that of judging criminal and civil cases."). John Locke had argued that the legislature ought to enact prospective laws of general application and to refrain from adjudication of disputes arising under such laws; Locke thereby opposed the passage of bills of attainder or ex post facto laws. For accounts of this "rule-of-law" version of the separation of powers, see W.B. Gwynn, The Meaning of Separation of Powers 74-75 (1965). Locke saw separation of powers as prerequisite to the rule of law, i.e., to government by prospective laws of general application. Like Blackstone, Locke viewed the courts as a part of the executive branch of government and thus argued for the separation of the legislative from the executive function. Id. at 87, 105 n.1. Locke used executive to encompass what would today be called executive and judicial; Blackstone's version of the separation of powers involved the "old two-fold classification of governmental power" and included the judiciary within executive authority. Id. Montesquieu's argument for a distinctive judicial role won the endorsement of Americans, who came to see courts as a check on both legislative and executive excess, see *Wood, supra* note 121, at 152, and who invariably characterized the doctrines of Montesquieu in glowing terms (the "great," the "illustrious," and so forth). See, e.g., The Federalist No. 47, at 324 (James Madison) (Jacob E. Cooke ed. 1961) (the "celebrated" Montesquieu); The Federalist No. 78, at 523 (Alexander Hamilton) (same).

n150. That Jefferson and Madison had come to view early State constitutions as conferring too much power on the State legislatures has been well documented. See, e.g., Thomas Jefferson, Notes on the State of Virginia 120 (W. Peden ed. 1955) ("All the powers of government, legislative, executive, and judicial, result to the legislative body ... precisely the definition of despotic government."); The Federalist No. 47, at 333 (James Madison) ("The legislative department is every where extending the sphere of its activity, and drawing all power into its impetuous vortex.").

n151. Jefferson left Congress in 1776 to return to Virginia to take part in a revision of the laws of the Commonwealth. See Editorial Note, 2 The Papers of Thomas Jefferson: 1777 to 1779, at 305, 306 (Julian Boyd ed. 1950) [hereinafter Jefferson's Papers]. Jefferson was made the chair of the committee on revision, which included Edmund Pendleton, George Wythe, George Mason, and Thomas Ludwell Lee. Id. at 314. Jefferson's purpose in working on the revision was to form a system of laws that would remove the vestiges of aristocracy and lay "a foundation for a government truly republican." Id. at 305.

The revisal, as reported by the committee to the General Assembly in 1779, was not adopted in whole on that date, however. Rather, bits and pieces of the revisal were adopted throughout the period before and after 1779, as exigencies arose. Id. at 306-07. In October 1785, with Jefferson in France, many of the provisions were brought forward again under the leadership of James Madison. Id. at 307.

The petition of right procedure appears in an act establishing a board of auditors, which first became law in October 1778. See supra text accompanying note 142. The editor of Jefferson's papers reports that Jefferson drafted the bill. See 2 Jefferson's Papers, supra, at 320 (indicating that Jefferson drew bill no. 11); id. at 370-74 (setting forth the text of bill no. 11, an act establishing a board of auditors, which includes the provision for petition of right to the court).

n152. On the Chancellor's revisal and Madison's role, see 2 Jefferson's Papers, supra note 151, at 321-22. Madison introduced bill nos. 11 and 24 of Jefferson's revisal on October 31, 1785 as part of the Chancellor's revisal and both were enacted in that session. Id. at 374, 412.

n153. *7 Va. (3 Call) 122 (1801).*

n154. *Id. at 143-45.*

n155. See supra note 151 (Pendleton served as a member of Jefferson's law revisal committee).

n156. See Proceedings Relative To Calling the Conventions of 1776 and 1790 ... Together with a View of the Proceedings of ... The Council of Censors 66, 83 (1825) [hereinafter Censors' Report] (setting forth an overview of the proceedings of both the first and second sessions of the Council of Censors, circa 1783-84). For background and a criticism of the effectiveness of the Council of Censors as a vehicle to remedy alleged violations of the constitution, see 1 Julius Goebel, History of the Supreme Court of the United States: Antecedents and Beginnings 102-03 (1971). (describing the work of the Council as riven by factious disputes between the pro- and anti-constitutional parties of the Commonwealth). An early call by the Council for a constitutional convention attracted remonstrances signed by 18,000 citizens and petitions in support signed by only 500. See Censors' Report, supra, at 123. As a consequence of this show

of public opinion, the Council refrained from calling a convention. See id. at 124 (noting that remonstrances against the convention influenced the decision "not a little").

n157. Among others, the report identified instances in which the legislature had made a judicial award of real property, had granted a stay of legal proceedings, and had ordered replevin of personal property. Id. at 92; see also id. at 95, 105 (instances of equitable remission by the legislature invade the executive function in pardons and remission); id. at 109 (describing case-by-case debtor-relief legislation as a species of ex post facto legislation and supporting rules of general applicability as an alternative). In criticizing the exercise of these equitable powers, the report argued that the assembly had violated the doctrine of separation of powers by "exercising powers inconsistent with the constitution." Id. at 90. The report's critique of legislative equity received widespread circulation just prior to the framing of the Constitution and helps to explain the framers' decision to assign all judicial power to an independent judiciary.

n158. The criticism of legislative equity was understood as a direct attack on a too-expansive reliance upon legislative petitions. In the course of its discussion, the report noted that these violations had occurred as a result of action taken upon petitions referred to the committee on grievances, pursuant to the constitutional power of the legislature to redress grievances. Id. at 90-92. The report ruefully notes that a change appears to have occurred in the meaning of the word "grievances." In England, Parliament exercised power to redress grievances as a check on royal prerogative. Id. at 92. A similar function had justified the Pennsylvania assembly in its efforts to redress grievances that resulted from the excesses of the proprietary form of government during the colonial era. Id. at 86. Yet such a checking function did not justify the legislature in interfering with the "cases of individuals" or the "usual processes of law." Id. Such interference ignored the maxim of the "illustrious Montesquieu" and the "great Locke" as to the necessary separation between the province of the legislature in enacting prospective laws and that of the judiciary in their execution. Id. at 85.

n159. Id. at 86.

n160. The considerations that gave rise to the passage of this legislation and the Commonwealth's subsequent adoption of the first state constitutional provision that explicitly called for suits against the government, see supra note 101, help to explain why Pennsylvania declined to ratify the Eleventh Amendment.

n161. The Constitution reveals its commitment to separation of powers not through any explicit restatement of that principle but by defining three separate powers of government - the legislative power, the executive power, and the judicial power - and vesting them in independent departments. See U.S. Const., art. I, 1 ("All legislative Powers herein granted shall be vested in a Congress of the United States"); U.S. Const. art. II, 1 ("The executive Power shall be vested in a President."); U.S. Const. art. III, 1 ("The judicial Power of the United States, shall be vested in one supreme Court and in such inferior Courts as the Congress may from time to time ordain and establish."). On the significance of the Vesting Clauses in defining the powers of government, see Steven G. Calabresi & Saikrishna B. Prakash, The President's Power To Execute the Laws, *104 Yale L.J. 541 (1995).* Useful summaries of the doctrine of separation of powers as it applied to the federal Constitution appear in Robert J. Pushaw, Jr., Justiciability and Separation of Powers: ANeo-Federalist Perspective, *81 Cornell L. Rev. 393 (1996)* and Paul Verkuil, Separation of Powers, the Rule of Law and the Ideal of Independence, *30 Wm. & Mary L. Rev. 301 (1989).* For early implementation, see Gerhard Casper, An Essay in Separation of Powers: Some Early Versions and Practices, *30 Wm. & Mary L. Rev. 211 (1989).*

n162. Others have told the story of the Philadelphia convention's unanimous decision to establish a national judiciary, with judges protected from political reprisals by life tenure during good behavior and by salary protections. See Hart & Wechsler, supra note 3, at 6-7. On the importance of these structural guarantees of judicial independence in equipping the federal courts to review acts of Congress and of state legislatures for compliance with the Constitution, see Akhil R. Amar, A Neo-Federalist View of Article III: Separating the Two Tiers of Federal Jurisdiction, *65 B.U. L. Rev. 205 (1985).*

n163. See U.S. Const. art. I, 9, 10 ("No Bill of Attainder or ex post facto Law shall be passed"; "No State shall ... pass any Bill of Attainder, ex post facto law, or Law impairing the Obligation of Contracts"); The Federalist No. 44, at 302 (James Madison) (Jacob. E. Cooke ed., 1961) (describing these limits on legislative power as a constitutional bulwark in favor of personal security and private rights).

n164. See U.S. Const. art. I, 8 (empowering Congress to "establish an uniform Rule of Naturalization, and uniform Laws on the subject of Bankruptcies throughout the United States"). For an argument that the requirement of uniformity was meant to preclude case-by-case determination of issues of debtor relief and naturalization of the kind that had been common in the state legislatures, see 1 Crosskey, supra note 112, at 492.

n165. The classic statement remains that of Alexander Hamilton:

The courts were designed to be an intermediate body between the people and the legislature, in order, among other things, to keep the latter within the limits assigned to their authority. The interpretation of the laws is the proper and peculiar province of the courts. A constitution is in fact, and must be, regarded by the judges as a fundamental law. It therefore belongs to them to ascertain its meaning as well as the meaning of any particular act proceeding from the legislative body.

The Federalist No. 78, at 525 (Alexander Hamilton).

n166. For accounts of the precursors of judicial review that may have influenced the framers, see 1 Goebel, supra note 156, at 125-42. On the significance of the evolving conception of the constitution as higher law, see Edward Corwin, The Doctrine of Judicial Review: Its Legal and Historical Basis 37-44 (1914) (describing the confluence of events during the period of constitutional reaction from 1780-87 that gave rise to the framers' acceptance of judicial review). For recognition by the framers that federal courts would enjoy the power to declare acts of Congress unconstitutional, see Raoul Berger, Congress v. The Supreme Court (1969).

n167. See Amar, supra note 3, at 1432.

n168. Id. at 1432-37 (emphasizing the growing conception of government officers as agents of the people).

n169. For an elegant restatement of the separation-of-powers critique of legislative determination of money claims against the government, consider this from St. George Tucker:

According to the theory of the American constitutions, the judiciary ought to be enabled to afford complete redress in all cases, where a man may have a just claim for compensation for any injury done him, or for any service which he may have rendered another, in expectation of a just recompense.

1 Tucker's Blackstone, supra note 6, app. 363. Tucker goes on to criticize both the constitutions of the United States and of the Commonwealth of Virginia for violating this theory by requiring individuals to secure an appropriation as a condition to the payment of money claims against the government. Id. at 364.

n170. For a sketch of Charles Pinckney, see *McDonald, supra* note 6, at 209 (describing Pinckney as "brilliant and somewhat unstable" and describing Farrand's reconstruction of the "Pinckney plan" as a "close approximation" of the plan, no authentic copy of which has survived); see also 3 Max Farrand, The Records of the Federal Convention of 1787, at 595 (1911) (reprinting "Pinckney Plan").

n171. On the reconstruction of Pinckney's plan, see 3 Farrand, supra note 170, at 595-604 (noting that the official record of the convention refers to the submission of the Pinckney plan to the Committee of the Whole House and to the Committee of Detail but also explaining that no authentic copy of the plan had survived).

n172. Id. at 608.

n173. See id. at 106-23 & n.1 (reprinting text of pamphlet that bears date of May 1787 but first appeared in print in October 1787; noting that the greater part of the document probably represents a speech, prepared in advance but never delivered in full).

n174. Id. at 117.

n175. Id. Pinckney thus linked the suability of the federal government to the doctrine of separation of powers. Professor Pushaw sees a similar linkage in the historic connection between the separation of powers, the importance of judicial independence, and the ancient maxim that no person should judge his or her own cause. See Pushaw, supra note 161, at 424 (concluding that the maxim supported the framers' claim that only the judiciary had the independence necessary to adjudicate claims involving acts of Congress and the executive branch of government).

n176. For the classic affirmation that mandamus to federal officers lies within the scope of the federal judicial power, see *Marbury v. Madison, 5 U.S. (1 Cranch) 137, 173-74 (1803)* (stating that the judicial power is "expressly extended to all cases arising under the laws of the United States; and consequently, in some form, may be exercised over the present case; because the right claimed is given by a law of the United States"). The jurisdictional question in

Marbury focused not on the power of the federal courts generally but on the power of the Supreme Court to entertain the petition as an original matter.

n177. On the power of the federal courts to hear petitions for writs of habeas corpus, see Duker, supra note 140.

n178. On the federal cognizability of trespass claims against federal officers, see *Little v. Bareme, 6 U.S. (2 Cranch) 170, 179 (1804)* (reviewing and affirming an award of damages against the captain of a vessel on the ground that the seizure had been based upon a misconstruction of federal law and thus constituted a trespass for which federal law supplied no immunity).

n179. See *Meigs v. McClung's Lessee, 13 U.S. (9 Cranch) 11 (1815)* (action of ejectment to test federal government's title to land on which a garrison had been built).

n180. In all federal officer suits, the court's jurisdiction attaches either to the federal nature of the right (as in Marbury) or to the federal claim of official immunity (as in Little). Even where the federal question does not form an ingredient of the original cause, as required for the exercise of original jurisdiction in *Osborn v. Bank of United States, 22 U.S. (9 Wheat.) 738 (1824),* the federal courts would remain open to adjudicate any dispositive issue of federal law on appeal from the state courts. See *Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304 (1816).*

n181. See, e.g., *Mesa v. California, 489 U.S. 121, 137 (1989)* (avoiding "grave constitutional problems" by interpreting the federal-officer removal statute to authorize removal of state created claims from state court only where the officer interposed a federal law defense).

n182. U.S. Const. art. III, 2.

n183. Such an interpretation of the provision has ultimately prevailed, although not without a few false starts. See *Glidden Co. v. Zdanok, 370 U.S. 530 (1962),* overruling *Williams v. United States, 289 U.S. 553 (1933)* (interpreting the U.S.-party provision as applicable only to cases where the United States appears as a party plaintiff or petitioner).

n184. For the work of the Committee of Detail and the text of its proposed jurisdictional grant, see Pfander, supra note 3, at 621.

n185. Pinckney's jurisdictional proposal appeared as the last of four related proposals he submitted on August 20:

[1] The U.S. shall be for ever considered as one Body corporate and politic in law, and entitled to all the rights, privileges, and immunities, which to Bodies corporate do or ought to appertain.

[2] The Legislature of the U.S. shall have the power of making the great Seal which shall be kept by the President of the U.S. or in his absence by the President of the Senate, to be used by them as the occasion may require. - It shall be called the great Seal of the U.S. and shall be affixed to all laws.

[3] All Commissions and writs shall run in the name of the U.S.

[4] The Jurisdiction of the supreme Court shall be extended to all controversies between the U.S. and an individual state, or the U.S. and the Citizens of an individual State.

2 Farrand, supra note 170, at 342. As item [1] makes clear, these provisions were designed to confer corporate status on the United States. Then as now, the incidents of such corporate status included the right to sue and be sued. Cf. 1 *Blackstone, supra* note 6, at *475 (defining incidents of corporate status as follows: "To have perpetual succession ... To sue or be sued, implead or be impleaded, grant or receive, by its corporate name and do all other acts as natural persons may ... To have a common seal."). Pinckney's jurisdictional language evidently meant to confer such "sue or be sued" authority on the United States.

Pinckney's decision to use jurisdictional language, rather than a traditional "sue or be sued" clause, does not alter this conclusion. For one thing, the language of the Committee of Detail draft had already adopted the "controversies" phrasing that Pinckney used in crafting his provision for suability. Pinckney may have rejected the "sue or be sued" from a purely stylistic perspective. Second, Pinckney may well have worried that a "sue or be sued" provision would be read to authorize the assertion of claims against the United States in state courts. Pinckney may have concluded that a sweeping grant of federal jurisdictional over "controversies" would accomplish the same goal as a "sue or be sued" provision without entailing a threat of suability in state court.

n186. See 2 Farrand, supra note 170, at 430 (noting convention's unanimous acceptance of proposal by Madison and Governor Morris to add "to which US shall be a party" after "controversies" in article 11).

n187. Compare 2 Farrand, supra note 170, at 424 (reporting adoption of amendment to Original Jurisdiction Clause to provide for the Supreme Court to exercise original jurisdiction in all cases in which the "United States or a State shall be a party") with id. (reporting return to earlier text of the Original Jurisdiction Clause with no reference to the United States as a party) and id. (reporting consideration and rejection of a provision declaring that "in cases in which the United States shall be a Party the jurisdiction shall be original or appellate as the Legislature may direct"). This array of proposals reflects the Convention's explicit consideration of mandatory jurisdiction over U.S.-party cases; the first proposal would have mandated original jurisdiction, the second would have mandated jurisdiction but left Congress discretion in making such jurisdiction original or appellate.

n188. We find these assignments of authority to Congress in three well-known provisions: U.S. Const. art. I, 8 (providing Congress with power to "lay and collect taxes, ... to pay the Debts ... of the United States"); U.S. Const. art. I, 9 (providing that "no Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law"); U.S. Const. art. IV, 3 (providing Congress with power to "make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States"). Together, these provisions assign primary control of government property to the first branch of the government.

Although the Appropriations Clause reflects congressional primacy in the control of the fisc, it also rejects the model of absolute legislative management of the disbursement of federal funds. By requiring an appropriation by "Law," the Clause rejected the practice of many states in appropriating funds by resolution of the lower house or by order of the Speaker. For examples of the rejected practice, see *Greene, supra* note 105, at 88-107 (describing manner in which lower houses in South Carolina, North Carolina, and Virginia controlled the expenditure of funds from the treasury and evaded the royal requirement of gubernatorial control; among other tactics, the lower houses sometimes insisted on expenditure of funds upon a simple resolution of the lower house, often enacted detailed and carefully itemized appropriations bills, and often appropriated funds for expenditure not through royal officers but by commissioners accountable to the lower house who managed the expenditure of public funds). The constitutional requirement of a law, moreover, incorporated the requirement of presentment to the President and opened up the possibility of a veto on spending.

n189. Lacking the power to tax, Congress had chosen to finance the Revolutionary War with a melange of borrowing tactics, supported by the promise that the states would levy taxes sufficient to supply the Continental treasury with funds to repay all national debts. See E. James Ferguson, The Power of the Purse: A History of American Public Finance 25-69 (1961). Eventually, it became clear that the accumulated burden of the public debt, coupled with the refusal of the states to pay their requisitions on time or to authorize Congress to collect an impost, required either a dissolution of the Union and the assumption of the federal debt by the states or a strengthening of the Union. Id. at 241-42. Ultimately, the people chose the latter course through the adoption of the Constitution.

The debt took various guises. According to calculations from the 1780s, the nation owed roughly $ 40 million to domestic creditors. See Forrest McDonald, Alexander Hamilton: A Biography 147-48 (1979). In addition to this domestic debt, the nation owed roughly $ 11.7 million in foreign debt and accumulated interest to France, Dutch banking interests, and Spain. Id. at 145, 168. Finally, the state governments had amassed their own public debts to the tune of some $ 25 million.

Some idea of the enormity of the national debt emerges from a consideration of the level of government expenditures in a typical peacetime year. During the last four years of the Articles of Confederation (1785-1788), Congress spent on average only around $ 380,000 a year on domestic operations. See Ferguson, supra, at 236-37 (setting forth domestic expenditure figures for the years 1785-88). The remainder of its budget in these years was devoted to payment of foreign debt. After the new federal government began operation in 1789, annual expenditures rose into the $ 4-5 million range in the first four years. See Paul Studenski & Herman E. Krooss, Financial History of the United States 54 (2d ed. 1963). With the cost of domestic administration still around $ 400,000, the major component of the increase in the federal budget was attributable to the cost of servicing the interest on the national debt.

n190. Continuity with the past meant that the issue of debt payment would remain within the control of Congress. On the politics of the public debt during the period of the Articles of Confederation, see Merrill Jensen, The New Nation: A History of the United States During the Confederation 391-98 (1981) (noting the division between those who supported full payment of the public debt, and agrarian interests who felt that full payment would provide a windfall to speculators). The same division arose in the First Congress under the new government. In 1790, Hamilton submitted his

famous report on public credit, urging federal assumption of all state debts and funding of the national debt through taxes and promises to pay interest on a continuing basis. Madison opposed the plan in part because it would provide a windfall to speculators and urged discrimination between the (deserving) original holders of the public debt and the (undeserving) speculators. See Miller, supra note 26, at 39-45. As Ferguson has shown, Madison acted in part to protect the interests of Virginia in the final accounting that would occur following federal assumption of state debts. See Ferguson, supra note 189, at 309-19. On the final resolution of the assumption issue, through a compromise that involved the selection of a Potomac site for the national capital, see id. at 319-20.

n191. 2 Farrand, supra note 170, at 377 (noting unanimous adoption of proposal by Morris to add language to then-article VII). Before Morris's proposal to mandate legislative fulfillment of government obligations on August 22, the delegates had generally agreed that some provision empowering Congress to pay the public debt was important to avoid any implication that the creation of a new government dissolved the obligations of the old. Id. The provision had made its first appearance on August 18, as a proposal to "secure the payment of the public debt." Id. at 322.

n192. Id. at 412.

n193. Id. (noting the adoption of Randolph's proposed version of the Engagements Clause following a debate in which Morris continued to argue for a mandatory payment-of-debts obligation).

n194. The division in interests between Morris of Pennsylvania (who pushed for mandatory language) and Mason and Randolph of Virginia (who urged continuity with the past) broke along sectional lines. Later debates in Congress over the funding of the national debt and the assumption of state debts broke down along similar lines.

n195. The discretion that Article III seemingly confers on Congress in U.S.-party controversies differs dramatically from the apparently mandatory declaration that the judicial power "shall extend to all Cases arising under the Constitution, laws and treaties of the United States." In *Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304 (1816)*, the leading judicial formulation of this mandatory conception of Article III's federal question jurisdiction, Justice Story noted the distinction between the "all cases" language of the first tier of jurisdiction and the more permissive phrasing of the jurisdictional grants over "controversies" in the second tier. Story thus suggested that Article III distinguished cases from controversies by mandating the federal judicial determination of the former and by leaving the latter to be assigned to the federal courts, or not, as Congress sees fit. Story supposed that the framers adopted this discretionary grant of power over U.S.-party controversies to avoid the implication of a "right to take cognizance of original suits brought against the United States as defendants in their own courts." *Martin, 14 U.S. at 336.*

n196. See Letter from James Madison to Thomas Jefferson (Oct. 17, 1788) in 1 The Republic of Letters: The Correspondence Between Thomas Jefferson and James Madison 564 (J.M. Smith ed. 1995) [hereinafter The Republic of Letters] ("Repeated violations of these parchment barriers [state declarations of rights] have been committed by overbearing majorities in every State. In Virginia I have seen the bill of rights violated in every instance where it has been opposed to a popular current.").

n197. Three elements of Madison's project can be considered to have had political overtones. First, Madison had faced a closely contested election for his seat in the House of Representatives and had promised his constituents to support amendments to the Constitution in his first session in Congress. See Dumbauld, supra note 17, at 33. Second, Madison understood the popularity of amendments and noted in his opening speech to Congress on the subject that many of the state conventions had suggested them in the course of their decision to ratify the Constitution. See XI Documentary History of the First Federal Congress: Debates in the House of Representatives 819 (C. Bickford et al. eds., 1992) [hereinafter Documentary History] (despite ratification, "there is a great number of our constituents who are dissatisfied with [the government and] who at present feel much inclined to join their support to the cause of federalism, if they were satisfied on this one point").

Perhaps most interestingly, Madison designed his collection of amendments to do the least possible harm to the national government he had worked so hard to create. Scholars have noted that many state ratifying conventions proposed not only the addition of a bill of rights to the Constitution but also a variety of structural amendments that would have lessened the power of the federal government. Madison carefully sifted through the proposed amendments, picking out those relating to individual rights and largely omitting any amendments of substance. See Dumbauld, supra note 17, at 23-24 (observing that the "rights" proposed by the Virginia ratifying convention, save one relating to conscientious objectors, found their way into the Bill of Rights while the proposed modifications to the "structure of the Constitution itself ... did not fare so well"). Madison said as much in his correspondence. See Letter to Thomas Jefferson (Dec. 8, 1788) in The Republic of Letters, supra note 196, at 580 (revisal of the Constitution should "be

carried no further than to supply additional guards for liberty, without abridging the sum of the power transferred by the States to the general Government or altering previous to trial the particular structure of the latter"). Madison thus hoped to preempt the Antifederalist opposition to the Constitution by appending a bill of rights that would omit the most important of the proposed structural changes - a strategy that many characterized as throwing a "tub to the whale." See Kenneth R. Bowling, "A Tub for the Whale": James Madison and Amendments to the Constitution, in Politics in the First Congress, 1789-1791, at 121, 147 (1990) ("The Bill of Rights was a carefully thought-out compromise designed to protect the Constitution from its enemies. ... By throwing out a tub to the Antifederal whale, Congress diverted opposition away from the new government.").

n198. See Documentary History, supra note 197, at 825 (quoting Madison's speech to the House on the occasion of his introducing proposed amendments on June 8, 1789).

n199. See Letter from Thomas Jefferson to James Madison (Mar. 15, 1789) in The Republic of Letters, supra note 196, at 587 ("In the arguments in favor of a declaration of rights [for the federal Constitution], you omit one which has great weight with me, the legal check which it puts into the hands of the judiciary. This is a body, which if rendered independent, and kept strictly to their own department merits great confidence."). Madison obviously came to accept this argument from his good friend and made it a part of his speech on the floor of the House in support of amendments. See supra note 198.

n200. See Creating the Bill of Rights: The Documentary Record from the First Federal Congress 30 nn. 10-11 (H. Veit et al. eds., 1991) (noting the rejection of proposed amendments that would have eliminated the right to assemble and added a right of instruction to the text of the House Select Committee report on amendments). For newspaper accounts of the debate on the issue of assembly, see id. at 159-61 (arguing in support of deletion that freedom of speech presupposed a right to assemble and that the declaration of such a trivial right was beneath the dignity of the House). For accounts of the debate on the right of instruction, see id. at 161-76 (addressing such subjects as the enforceability of instructions, the wisdom of them, whether enforceable or not, the nature of the deliberative process, and the obligation of members of the House of Representatives to represent the whole people, and not just the people of a particular state or district). See also 1 Annals Of Cong. 759-61 (Gales & Seaton eds., 1834). See generally David P. Currie, The Constitution in Congress: The First Congress and the Structure of Government, 1789-1791, *2 U. Chi. L. Sch. Roundtable 161 (1995)* (discussing the debate in the House over the right of instruction).

n201. The lack of detailed commentary suggests that, like many of the other provisions Madison proposed, the specific terms of the Petition Clause were uncontroversial. That is not to say that Madison's project was free of controversy. Federalists tended to regard the amendments as a waste of precious time; Antifederalists saw them as relatively insignificant guarantees of individual rights offered as a substitute for the more important structural limits on federal power that they advocated. For an account of this political division, see Bowling, supra note 197, at 140-46.

n202. See, e.g., Creating the Bill of Rights, supra note 200, at 283-84 (letter from Theodore Sedgwick, describing the House as engaged in the "unpromising subject of amendments"; letter from James Madison, noting the "wearisome" progress of amendments).

n203. The absence of debate reflects Madison's strategy of avoiding controversy. Madison chose his proposed amendments quite carefully, seeking from the bevy of state proposals only the most familiar items - those taken from state bills of rights and proposed amendments. Madison specifically refrained from proposing structural amendments, knowing that they would both weaken a central government that he still supported and fail to attain ratification in staunchly Federalist states. See supra note 197.

n204. For accounts of the great separation-of-powers debate in the House over the power of the President to remove officers of the State department, see Miller, supra note 26; Calabresi & Prakash, supra note 161; Currie, supra note 195, at 195-201. The debate resulted in what has come to be known as the "Decision of 1789," which held that the President enjoys - by virtue of constitutional authority under Article II and not by virtue of congressional grant - the authority to remove the heads of the departments. Following its decision with respect to the State department, the House applied the same removal formula to the officers of the other two departments, War and Treasury. See Currie, supra note 200, at 201-02.

n205. U.S. Const. amend. I.

n206. For similar arguments, see Spanbauer, supra note 2, at 43 n.196 (use of word "government" encompasses judicial branch); Note, A Petition Clause Analysis of Suits Against the Government: Implications for Rule 11 Sanctions, supra at 1118-21 (suits against government implicate core values of petition clause).

n207. See supra text accompanying notes 82-83.

n208. See supra text accompanying note 127.

n209. See supra text accompanying notes 122-26.

n210. It appears in a provision of Article I, 8 granting Congress exclusive legislative power over the District encompassing the "seat of the Government of the United States," and in the guarantee to the states of a "Republican form of Government."

n211. U.S. Const. art. I, 8.

n212. The ratifying conventions of three states proposed the addition of a petition clause to the Constitution. All of these proposals spoke of a right to petition the "legislature." See Dumbauld, supra note 17, at 19 (Maryland minority proposes that "every man hath a right to petition the legislature for the redress of grievances, in a peaceable and orderly manner"); Creating the Bill of Rights, supra note 201, at 18 (Virginia proposes that "every freeman has a right to petition or apply to the legislature for redress of grievances"); id. at 23 (New York proposes that "every Person has a right to Petition or apply to the Legislature for redress of Grievances").

n213. Creating the Bill of Rights, supra note 201, at 5-6 (Madison submits proposed amendments on July 8, 1789; Madison moves on July 21, 1789, for the appointment of a select committee; committee appointed, consisting of Vining, Madison, Baldwin, Sherman, Burke, Gilman, Clymer, Benson, Goodhue, Boudinot, and Gale; motion that committee not be bound by state recommendations approved; select committee presents written report on July 28, 1789).

n214. Id. at 12.

n215. Id. at 267.

n216. Id. at 30.

n217. See supra note 156 (Council of Censors report refers to remonstrances against proposal to call constitutional convention).

n218. For Madison's critique of "parchment barriers," see supra note 197. For an account of Sherman's draft that traces its natural law origins, see Philip A. Hamburger, Natural Rights, Natural Law, and American Constitutions, *102 Yale L.J. 907, 920 & n.39 (1993).*

n219. A similar progression appears in successive drafts of an amendment, later stricken by the Senate, that would have mandated a rigorous separation of powers. Consider the progression of the Separation Clause from the Madison version of June 8 to the Sherman version of July 21 to the Select Committee version of July 28:

(Madison) The powers delegated by this Constitution are appropriated to the department to which they are respectively distributed: so that the Legislative Department shall never exercise the powers vested in the Executive or Judicial, nor the Executive exercise the powers vested in the Legislative or Judicial, nor the Judicial exercise the powers vested in the Legislative or Executive Departments.

Creating the Bill of Rights, supra note 201, at 14.

(Sherman) The legislative, executive and judiciary powers vested by the Constitution in the respective branches of the government of the United States, shall be exercised according to the distribution of powers therein made, so that neither of said branches shall assume or exercise any of the powers peculiar to either of the other branches.

Id. at 268.

(Select Committee) The powers delegated by this Constitution to the government of the United States, shall be exercised as therein appropriated, so that the Legislative shall never exercise the powers vested in the Executive or Judicial; nor the Executive the powers vested in the Legislative or Judicial; nor the Judicial the powers vested in the Legislative or Executive.

Id. at 33.

Madison introduced the idea of mandatory separation in a text taken from the Virginia proposals and vaguely reminiscent of the Necessary and Proper Clause. Sherman's draft more closely resembled the Necessary and Proper Clause in its reference to "powers vested" in (rather than "delegated" to) the "Government" of the United States. The Select Committee appears to have resolved the debate largely in favor of Madison's draft but it did pick up Sherman's use of the term "government."

We see a suggestive parallel in the evolution of the Petition and Separation Clauses. Madison's draft of the Petition Clause referred to the "Legislature"; Sherman used "Government" in the abstract; the Committee used "Government" concretely. Madison's draft of the Separation Clause omitted any reference to "Government"; Sherman supplied the missing term and the Committee included a highly concrete reference to the "government of the United States" in its final draft. The Select Committee debate over the language of the Separation of Powers Clause could well have informed its use of the term "government" in the Petition Clause.

n220. See supra text accompanying notes 87-98.

n221. See supra text accompanying notes 140-44.

n222. See supra text accompanying notes 145-46.

n223. By the time of the House-Senate conference on the final text of the Bill of Rights, the House had come to regard the right to petition as something more than an adjunct to political process rights such as those to speak, publish, and assemble freely. On the Senate's version of the First Amendment, the rights to assemble and petition were linked together in language that guaranteed the right of the people "peaceably to assemble and petition for redress." The House balked at this linkage and insisted upon the insertion of the word "to" before petition. See 4 Documentary History, supra note 197, at 47. The insertion suggests that the House conferees had come to view the petition clause as creating rights independent of the right to assemble, a factor that supports a judicial process interpretation of the Petition Clause.

n224. See 1 Annals of Cong., supra note 200, at 635-36.

n225. See supra note 204.

n226. 1 Annals of Cong., supra note 200, at 636.

n227. For accounts of the reactions, see Calabresi & Prakash, supra note 161, at 201.

n228. 1 Annals of Cong., supra note 200, at 637.

n229. On the common law origins of the petition of right, see supra note 36.

n230. 1 Annals of Cong., supra note 200, at 639.

n231. See Farber & Sherry, supra note 15, at 231 ("Little is known about the workings of the [House] select committee that produced this draft. It may be assumed that Madison played a major role in the drafting process.").

N232. See supra note 92.

n233. For the positivist version of the doctrine of sovereign immunity, see *Kawananakoa v. Polyblank, 205 U.S. 349, 353 (1907)* (Holmes, J.) ("A sovereign is exempt from suit, not because of any formal conception or obsolete theory, but on the logical and practical ground that there can be no legal right as against the authority that makes the law on which the right depends."). Such a view conforms to the Holmesian conception of law as the command of the sovereign, rather than as a "brooding omnipresence in the sky." See also *Southern Pac. Co. v. Jensen, 244 U.S. 205, 222 (1917)* (Holmes, J., dissenting) ("The common law is not a brooding omnipresence in the sky but the articulate voice of some sovereign or quasi-sovereign.").

For an early critique of the "feudal" account of sovereign immunity, see *Chisholm v. Georgia, 2 U.S. (2 Dall.) 419,* (1793) (opinion of Jay, C.J.) (contrasting the "feudal" doctrine of sovereign immunity in England, with its emphasis on the relationship between the sovereign prince and his subjects, with the republican theory of the American constitutions, where the people act as sovereigns). For an account of the drafting and ratification of the Eleventh Amendment, which overruled Chisholm, see Fletcher, supra note 3, at 1045-63 (concluding that the Eleventh Amendment was designed "simply and narrowly" to overturn Chisholm).

n234. *372 U.S. 609 (1963).*

n235. *Id. at 620.* For criticisms of Dugan emphasizing the point that the Court has often interfered with public administration and stopped the government in its tracks in the course of adjudicating the legality of government action, see Kenneth Culp Davis, Sovereign Immunity Must Go, *22 Admin. L. Rev. 383, 401 (1972).*

n236. As Professor Alfred Hill explained, the problem of constitutional remedies becomes most acute when the "remedies are offensive or affirmative in character." Alfred Hill, Constitutional Remedies, *69 Colum. L. Rev. 1109, 1112 (1969).* In such a setting, the doctrine of sovereign immunity has been thought to operate as a matter of constitutional dimension, defeating even suits for enforcement of constitutional rights in the absence of legislative consent. *Id. at 1122.* As a result, Hill doubted whether one could meaningfully discuss the existence of remedies as a matter of constitutional right "when the power to grant affirmative remedies is one that depends upon legislative authorization." *Id. at 1112.*

n237. Decisions of the Supreme Court require waivers of sovereign immunity to appear with unequivocal clarity on the face of a statutory text. See *Lane v. Pena, 116 S. Ct. 2092 (1996); United States v. Nordic Village, 503 U.S. 30, 33-34 (1992)* ("The unequivocal expression of elimination of sovereign immunity that we insist upon is an expression in statutory text.").

n238. Act of March 3, 1887, 24 Stat. 505. The Tucker Act grew out of a legislative decision in 1855 to create a claims court to hear entity claims against the government of the United States. President Lincoln pressed for the creation of a workable claims system early in the Civil War. After a series of false starts, during which the Supreme Court refused to entertain an appeal from the claims court on the ground that its decisions lacked the requisite finality, Congress finally gave the court power to render final decisions. For an account, see Shimomura, supra note 101, at 655-66.

The modern version of the Tucker Act follows the pattern of the original enactment, extending the jurisdiction of the Claims Court to

all claims founded upon the Constitution of the United States or any law of Congress, except for pensions, or upon any regulation of an Executive Department, or upon any contract, expressed or implied, with the Government of the United States, or for damages, liquidated or unliquidated, in cases not sounding in tort, in respect of which claims the party would be entitled to redress ... if the United States were suable.

28 U.S.C. 1491 (1994).

n239. The Federal Tort Claims Act (FTCA) became law in 1946, establishing for the first time a general right to recover against the federal government in tort. For an overview of the FTCA, see Jayson, Handling Federal Tort Claims (1995). The relevant language authorizes federal government suability by conferring exclusive jurisdiction on the federal district courts to hear claims against the United States for money damages caused by

the negligent or wrongful act or omission of any employee of the government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

28 U.S.C. 1346(b) (1994). The statute establishes the liability of the United States for torts to the same extent as if the government were a private person and borrows the law of the state, including its choice of law rules, in fixing the scope of that liability.

n240. Section 10(b) of the Administrative Procedure Act provides,

An action in a court of the United States seeking relief other than money damages and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority shall not be dismissed nor relief therein be denied on the ground that it is against the United States or that the United States is an indispensable party. The United States may be named as a defendant in any such action, and a judgment or decree may be entered against the United States.

5 U.S.C. 702 (1994). On the origins and subsequent interpretation of the provision, see Hart & Wechsler, supra note 3, at 1036-39.

n241. Congress often subjects federal agencies and government proprietary corporations to provisions that enable them to "sue or be sued" in federal court. See John Thurston, Government Proprietary Corporations in the English-Speaking Countries 43-62 (1937). Although such "sue or be sued" provisions effect a waiver of sovereign immunity for government agencies in question, the Court has ruled that such provisions do not authorize tort claims against such agencies; rather, litigants must proceed under the FTCA. See *Loeffler v. Frank, 486 U.S. 549 (1988).* Sue-or-be-sued agencies can thus claim an immunity from suit on tort claims cognizable under the FTCA but they remain suable on all other claims. See *FDIC v. Meyer, 114 S. Ct. 996 (1994)* (sue-or-be-sued provision effected waiver of sovereign immunity with respect to claims against the FDIC).

Statutory provisions that create federal agencies often specifically confer jurisdiction on the federal courts to review final agency action. Consider, for example, the suggestive language of the provision for appellate court review of decisions by the National Labor Relations Board:

Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any circuit court of appeals of the United States ... by filing in such court a written petition praying that the order of the Board be modified or set aside.

29 U.S.C. 160(f) (1994). Similar provisions appear in a host of other agency statutes. Even where no such provision obtains, the APA creates presumptive judicial review for final agency action and confirms the availability of injunctive relief against government wrongdoing. See supra note 240.

The Judgment Fund now assures payment to judgment creditors of the United States, and obviates the necessity for special appropriations to pay contract, tort, and other claims against the government. See *31 U.S.C. 1304* (1994) (providing for payment of judgments rendered against the United States). The importance of the statute stems from the Appropriations Clause, see supra note 188, which has been construed to prohibit the drawing of funds from the Treasury to pay a judgment except upon the passage of a law. See *Reeside v. Walker, 52 U.S. (11 How.)272, 291 (1850).* In the past, Congress would pass specific appropriations to fund particular judgments. The Judgment Fund, enacted in 1956, initially established a cap of $ 100,000 on payable judgments; larger claims were payable only through special appropriations. Congress removed the cap in 1977. See Pub. L. No. 95-26, 91 Stat. 61, 96 (1977). The statute thus provides the necessary authorization or appropriation to pay any judgment against the government, but does not operate as an all-purpose waiver of sovereign immunity. See *Office of Personnel Management v. Richmond, 496 U.S. 414, 432 (1990)* (judgment fund allows payment only on the basis of "a judgment based on a substantive right to compensation based on the express terms of a specific statute").

n242. Section 13 of the Judiciary Act of 1789 conferred original (and exclusive) jurisdiction on the Supreme Court in "all controversies of a civil nature, where a state is a party" and picked up both the mandatory language in the Original Jurisdiction Clause of Article III and its conception of states as party defendants. See 13, ch. 20, 1 Stat. 80-81. In contrast, the Judiciary Act declined to extend jurisdiction over "all" U.S.-party controversies; section 9 and section 11 gave the district court and circuit courts, respectively, "cognizance" of "suits at common law where the United States sue" and "all suits at common law or in equity, where ... the United States are plaintiffs, or petitioners." See 9, 11, 1 Stat. 79. Juxtaposed in this way, the government-party provisions of the Act appear to have authorized suit against the states and to have withheld jurisdiction over suits against the United States.

The absence of any general grant of jurisdiction over claims against the United States led individuals with contract and debt claims to rely upon petitions to Congress as the vehicle for the assertion of money claims against the government. See Act of Sept. 29, 1789, ch. 26, 6 Stat. 1 (1846) (private bill allowing pay to officer in Revolutionary War). Early in the Federalist era, Congress established procedures for the submission of such petitions. See Shimomura, supra note 101, at 643 (House of Representatives first created a Committee of Claims in November 1794 with authority to consider all "petitions ... claims or demands on the United States" including those for money, pensions, and public lands"). Late in the Federalist era, Congress considered and narrowly rejected a provision that would have transferred responsibility over entity claims against the federal government to the federal courts. For an account of the proposed statute, which would have conferred jurisdiction on the Supreme Court to hear a variety of claims and demands upon the government, see Susan Bloch & M. Marcus, John Marshall's Selective Use of History in Marbury v. Madison, *1986 Wis. L. Rev. 301, 330.* Several decades passed before Congress succeeded in effecting the transfer of general responsibility for the litigation of such claims to the Court of Claims. During that time, Congress became increasingly burdened with the business of claims determination and came to doubt its own institutional capacity to process such claims fairly. See Shimomura, supra note 101, at 648-50.

In the meantime, the federal courts occasionally entertained suits and proceedings against the federal government pursuant to specific grants of jurisdiction. In United States v. *Clarke, 45* U.S. (8 Pet.) 436, 444-45 (1834), for example, the Court upheld the power of a federal tribunal to hear a dispute over title to land in Florida pursuant to an ambiguous Act of *Congress. In United States v. McLemore, 50 U.S. (4 How.) 286 (1846),* the Court refused to permit a federal trial court to assert jurisdiction over a bill in equity to enjoin collection of a judgment but signaled its willingness to approve the trial court's exercise of equitable powers to protect the individual in any action brought by the United States to execute on the judgment. In general, the Court framed its assessments of suability in jurisdictional terms, noting in Clarke that the party who institutes such an action "must bring his case within the authority of some act of Congress, or the court cannot exercise jurisdiction." *45 U.S. at 445.* Similarly, in *Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 411-12 (1821),* the Court noted the "universally received opinion" that the absence of jurisdiction under the Judiciary Act of 1789 barred suits against the United States.

The Marshall Court's use of jurisdictional language to describe the suability of the governments of the United States differs sharply from its use of the term "sovereign" immunity to describe the suability of foreign nation states. Compare Cohens v. Virginia, U.S. (6 Wheat.) 264, 411-12 (1821) (noting jurisdictional bar) with *The Schooner Exchange v. McFaddon, 11 U.S. (7 Cranch) 116 (1812)* (referring to the "immunity" of the foreign "sovereign," the Emperor of France, whose armed vessel had been libeled in an American admiralty court) and *L'Invincible, 14 U.S. (1 Wheat.) 238 (1816)* (duly commissioned privateers entitled to the same "immunities" accorded to the vessels owned by the foreign "sovereign"). Marshall's willingness to regard foreign but not domestic governments as entitled to "sovereign" immunity calls to mind the lesson that Justice James Wilson taught in the first government suability case. See *Chisholm v. Georgia, 2 U.S. (2 Dall.) 419, 454 (1793)* (the word "sovereign" does not appear in the Constitution; it cannot accurately apply to any republican government but only to the people of the government).

n243. See *Meigs v. McClung's Lessee, 13 U.S. (9 Cranch) 11 (1815).*

n244. See *Osborn v. Bank of the United States, 22 U.S. (9 Wheat.) 738 (1824)* (action may proceed against official of Ohio to enjoin tax collection; action concededly affects substantial rights of the State but state's immunity under the Eleventh Amendment does not attach so long as the state has not been made a party of record).

n245. See *Osborn, 22 U.S. at 750* (noting that the funds taken from the Bank had been kept separate from the other specie in the treasury of the State of Ohio); see also *Cary v. Curtis, 44 U.S. (3 How.) 236 (1845)* (prior cases allowing action against the Collector of Customs to recover money paid under threat of seizure depended upon preservation of a separate fund in the hands of the Collector; declaration by Congress that funds in the hands of the Collector were to be considered part of the Treasury transformed the action into one against the United States and barred the claim).

n246. *22 U.S. (9 Wheat.) 738 (1824).*

n247. Id. at 847-58.

n248. Id.

n249. On the importance of the party-of-record rule in facilitating litigation against the government through suits that name officials rather than governments directly, see Engdahl, supra note 3, at 20-21, 34-35 (noting the Court's refusal to equate the officer with the State under the party-of-record rule; emphasizing that officer suits worked only where the common law created a cause of action against the official).

n250. *209 U.S. 123 (1908).*

n251. *403 U.S. 388 (1971).*

n252. As the Court viewed the case, the corporate plaintiff could claim a right under the Fourteenth Amendment to freedom from such rates. See *Ex parte Young, 209 U.S. 123 (1908).* Moreover, the inadequacy of remedies at law made the issuance of injunctive relief appropriate. Jurisdiction posed no problem: the action arose under federal law inasmuch as it sought to enforce rights under the Constitution and the general arising-under grant of federal trial jurisdiction empowered the district court to proceed. Finally, the Court dismissed the Eleventh Amendment as having been rendered inapplicable by virtue of the fiction that the prosecutor's unconstitutional act stripped him of official authority and made his action that of a private wrongdoer. Although the Court's authority-stripping rationale bore some resemblance to previous decisions, such as the Osborn Court's reliance upon the party-of-record rule, its innovative feature lay in its recognition that the officer's violation of the Constitution itself, rather than the common law, triggered liability. See David P. Currie, Sovereign Immunity and Suits Against Government Officers, *1984 Sup. Ct. Rev. 149, 155-56.*

n253. See, e.g., *Stark v. Wickard, 321 U.S. 288, 290 (1944)* (action to enjoin executive branch official); *Shields v. Utah Idaho Central R.R., 305 U.S. 177, 183-84 (1938)* (action to enjoin federal law enforcement officer).

n254. For good accounts of the common law backdrop of Ex parte Young, see Woolhandler, supra note 138, at 448-49 (implied rights of action in law and equity had been recognized long before Ex parte Young). Cf. Currie, supra note 252, at 154-55 (agreeing that Court could assimilate recognition of action in Ex parte Young to earlier decisions but characterizing the earlier law as an unreasoned departure).

n255. See *Bivens v. Six Unnamed Known Agents, 403 U.S. 388 (1971).*

n256. See *id. at 404* (Harlan, J., concurring) (relying upon the "presumed availability of federal equitable relief" in support of the recognition that the Constitution implied a right of action for damages as well).

n257. *5 U.S. (1 Cranch) 137 (1803).* The Judiciary Act of 1789 specifically empowered the Supreme Court to grant writs of mandamus to officers of the United States in accordance with the "principles and usages of law." Chief Justice Marshall famously struck that statute down in Marbury, ruling that Article III of the Constitution defined the content of the Court's original jurisdiction and implicitly forbade Congress from making additions. For critical reviews of Marshall's reading, see Akhil R. Amar, Marbury, Section 13, and the Original Jurisdiction of the Supreme Court, *56 U. Chi. L. Rev. 443, 456 (1989)* (agreeing with the constitutional reading but questioning Marshall's claim that the statute conferred original jurisdiction on the Court); William Van Alstyne, A Critical Guide to Marbury v. Madison, *1969 Duke L.J. 1, 31* (collecting critiques of Marshall's constitutional interpretation).

n258. Subsequent decisions broadened the remedial gap opened by Marshall's decision in Marbury. See *McClung v. Silliman, 19 U.S. (6 Wheat.) 598, 604-05 (1821)* (state courts lack power under the Judiciary Act to entertain petition for writ of mandamus to a federal official); *McIntire v. Wood, 11 U.S. (7 Cranch) 504 (1813)* (federal circuit courts lack power to issue writ of mandamus to the register of the land office in Ohio; Congress had not conferred such power on such courts either in the Judiciary Act of 1789 or in any enactment following Marbury). This gap remained until the Supreme Court clothed the federal court for the District of Columbia with mandamus power in *Kendall v. United States, 37 U.S. (12 Pet.) 524, 650 (1838).*

n259. See *Kendall, 37 U.S. at 650* (as successors to state courts in Maryland that had enjoyed authority to issue writs of mandamus, the District of Columbia courts enjoyed that power as well). For accounts of Kendall, see Woolhandler, supra note 138, at 419-29. On the rise of the mandamus power as a check on administrative action in the early years of the Twentieth Century, see Louis Jaffe, The Right to Judicial Review, *71 Harv. L. Rev. 401, 423-30 (1958).*

n260. For accounts of the growth of the mandatory injunction and its relationship to the mandamus remedy developed by federal courts in the District of Columbia, see Kenneth Davis, Mandatory Relief from Administrative Action in the Federal Courts, *22 U. Chi. L. Rev. 585 (1955).*

n261. On the rise of habeas corpus as the mode for securing judicial review in the field of immigration, see Henry Hart, The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic, *66 Harv. L. Rev. 1362 (1953); Jaffe, supra* note 259, at 425.

n262. Eventually, the Federal Rules of Civil Procedure abolished practice on the "writs" of scire facias and mandamus and provided instead for applications for such relief by way of ordinary action or motion. See *Fed. R. Civ. P. 81(c).*

n263. On the distinction between statutory and nonstatutory review, see Hart & Wechsler, supra note 3, at 1091-97 (tracing nonstatutory review to its origins in the English prerogative writs and describing statutory review as largely a development of the twentieth century).

n264. For examples of earlier cases in which the officer suit was used as a vehicle to test title to government property, see *United States v. Lee, 106 U.S. 196 (1882)* (allowing ejectment to proceed against officers of federal government to test government title to the Lee estate in Arlingon, Virginia); *Meigs v. McClung's Lessee, 13 U.S. (9 Cranch) 11 (1815)* (ejectment against officers in possession of government garrison); see also *Land v. Dollar, 330 U.S. 731 (1947)* (officer suit allowed to test government title to stock pledged as collateral).

n265. See supra note 138.

n266. See *Lane v. Hoglund, 244 U.S. 174 (1917)* (mandamus to compel issuance of land patent); *Roberts v. United States, 176 U.S. 221 (1900)* (issuing mandamus to compel payment by treasurer as required by Act of Congress). Sovereign immunity does not bar such claims for relief. See supra note 253.

n267. See *Houston v. Ormes, 252 U.S. 469 (1920)* (allowing bill in equity to direct appointment of receiver to secure an equitable lien on funds in the hands of the government). On the issuance of mandatory injunctions, see *Panama Canal Co. v. Grace Line, Inc., 356 U.S. 309, 318 (1958)* (suggesting that mandamus principles control suits for mandatory injunctions that serve the same function).

n268. *482 U.S. 304 (1987).*

n269. Although First English involved a local government defendant, the Court rejected the argument of the United States that an inflexible requirement of monetary remediation for Just Compensation violations would interfere with the sovereign immunity of the United States. See infra note 274.

n270. *496 U.S. 18 (1990).*

n271. See also *Reich v. Collins, 115 S. Ct. 547 (1994)* (state may structure opportunities to litigate the legality of its taxes either as pre-enforcement suits to enjoin collection or post-deprivation suits for recovery; due process prohibits state from holding out a post-deprivation remedy and then reconfiguring the scheme midstream to deny the plaintiff a remedy; action remanded for the provision of meaningful retrospective relief).

n272. Although the state court enjoined collection of the tax in the future, it refused to order a refund. The Supreme Court reversed, holding that the due process clause demanded an adequate post-deprivation remedy and directing the state court to afford the litigant such a remedy. See *McKesson Corp. v. Division of Alcoholic Beverages, 496 U.S. 18 (1990).* The Court swept aside Florida's contention that the doctrine of sovereign immunity, which otherwise shields the state from suits for unconsented monetary relief, barred the taxpayer's application for a retrospective remedy. Id. (rejecting argument that Eleventh Amendment bars Supreme Court from reviewing and reversing state court decisions that refuse to impose a monetary liability on the state); cf. *id. at 27* (characterizing Florida as having waived its immunity from suit seeking a refund of taxes in State court); see also *Harper v. Virginia Dept. of Taxation, 509 U.S. 86 (1993)* (O'Connor, J., dissenting) (characterizing the Court's insistence upon a fully compensatory retrospective remedy as anomalous in light of established immunity doctrines).

n273. See *McKesson, 496 U.S. at 31* (Due Process Clause requires state to furnish "meaningful backward-looking relief"); see also *Reich v. Collins, 513 U.S. 106 (1994)* (same); *Harper v. Virginia Dept. of Taxation, 509 U.S. 86 (1993)* (same).

n274. See Richard Fallon, Jr. & Daniel J. Meltzer, New Law, Non-Retroactivity and Constitutional Remedies, *104 Harv. L. Rev. 1731, 1825-26 n.536 (1991)* (citing *First English Evangelical Church v. County of Los Angeles, 482 U.S. 304, 316 n.9 (1987)* for this proposition).

n275. See *McKesson, 496 U.S. at 18* (rejecting Florida's argument that the Eleventh Amendment prohibition on the exercise of judicial power applied not only to federal trial courts but also to the exercise of federal judicial power by the Supreme Court in acting on petitions for review of final state court decisions).

In rejecting Florida's Eleventh Amendment argument, the McKesson Court stood on doctrinal developments stretching back to the Marshall Court. See id. (tracing Court's power to entertain actions against the State on its appellate docket to *Cohens v. Virginia, 19 U.S. (6 Wheat.) 264 (1821).* Yet Cohens had stopped short of establishing the rule that the Court applied in McKesson. See Vicki C. Jackson, The Supreme Court, The Eleventh Amendment, and State Sovereign Immunity, *98 Yale L.J. 1, 23-32 (1988)* (although Cohensupholds the power of the Supreme Court to exercise review of state court decisions in state-party actions notwithstanding the Eleventh Amendment, it left open the question whether such review could occur where the petitioner had commenced the action in state court to obtain coercive relief against the State). The important doctrinal developments come later, when the Court extended the Cohens rule of reviewability to such actions against the state. *Id. at 30* (noting both the extension of Cohens and the resulting gap between the relatively broad Eleventh Amendment immunity that states enjoy in federal trial courts and their relatively free suability on the Court's appellate docket).

The evolution of practice at the Court thus mirrors that which occurred in King's Bench. In the early years, suitors were required to obtain the consent of the Crown, by way of the attorney-general's fiat, in order to pursue writ-of-error review in a cause to which the Crown was a party. By Blackstone's day, the consent was presumed and not viewed as a

condition to the power of King's Bench to grant the writ of error. See 4 *Blackstone, supra* note 6, at *391-92 (writ of error issues on cause shown to the Attorney General as a matter of "common right" in cases of misdemeanor and of grace in capital cases); I Gude, supra note 26, at 263 ("Although the writ can only be obtained, even in cases of misdemeanor, on application to the Attorney General, with the certificate of counsel that in his opinion there is error, yet if sufficient probable ground is shewn, it is understood to be grantable of common right ... ; and the writ ought not to be denied; and if refused, the Court may direct the Attorney General to grant his fiat for it."). Practice in England required consent on the ground that the writ of error, though in practice a mode of securing appellate review, was understood as an original proceeding against the respondent, i.e., the Crown.

n276. *513 U.S. 106 (1994).*

n277. One treatise in the field of administrative law defines primary jurisdiction as a "concept used by courts to allocate initial decision making responsibility between agencies and courts where such overlaps [of jurisdiction] exist." Richard J. Pierce, Jr. et al., Administrative Law and Process 206 (1985). Dismissals in the field of government accountability often reflect the primacy of the Court of Claims in hearing entity claims, not sounding in tort, against the United States. See, e.g., *Preseault v. Interstate Commerce Comm'n, 494 U.S. 1 (1990)* (Court refuses to reach a takings issue under the Rails-to-Trails Act on the ground that the Tucker Act provides a damages remedy for any such taking and the claim should be presented to the Claims Court in the first instance; Tucker Act remedy available unless act of Congress manifests clear and unmistakable intent to withdraw it); cf. *Block v. North Dakota ex rel. Board of Univ. Lands, 461 U.S. 273 (1983)* (Quiet Title Act provides the exclusive mode by which claimants may sue to test the federal government's title to land; statutory remedy designed to supersede the common law remedy under the doctrine of United States v. Lee).

n278. *337 U.S. 682 (1949).*

n279. For criticisms of Larson, see Engdahl, supra note 3, at 38-40; *Jaffe, supra* note 3, at 29-37.

n280. See *Ex parte Young, 209 U.S. 123 (1908)* (action to enjoin state official from violating plaintiff's constitutional rights does not implicate the State's sovereign immunity from suit and can thus proceed in federal court). For applications of the Ex parte Young fiction to suits against federal government officials, see supra note 253. For similar no-immunity treatment of applications for other forms of specific relief against federal government officials, see *Houston v. Ormes, 252 U.S. 469, 472-74 (1920)* (sovereign immunity does not bar petition for writ of mandamus to federal officer); *Vishnevsky v. United States, 581 F.2d 1249, 1255-56 (7th Cir. 1978)* (mandamus may issue to compel officers to pay funds from the federal treasury).

n281. See *Larson v. Domestic & For. Com. Corp., 337 U.S. 682, 700-03 (1949)* (admitting that action could proceed against a government official if the official were seeking to enforce an unconstitutional enactment or "acting in excess of his authority or under an authority not validly conferred"; distinguishing United States v. Lee as a case involving an allegedly unconstitutional taking of property).

n282. The Court evidently deployed sovereign immunity out of concern for the disruption of ordinary government processes, explaining that the government cannot be "stopped in its tracks by any plaintiff who presents a disputed question of property or contract right." *Larson, 337 U.S. at 703.* After-the-fact remedies in the nature of an action for damages under the Tucker Act would not have the effect of stopping the government in its tracks and so would not come within the prohibitory language of Larson. See *id. at 688-89* (emphasizing that the plaintiff sought relief of an equitable nature, rather than an award of damages) (distinguishing United States v. Lee as a case where specific relief to try title was appropriate in view of the absence of any relief by way of an action for damages); see also *id. at 705* (Douglas, J., concurring) (characterizing Larson as a problem arising from the sale of government property, an obvious reference to the remedies under the Tucker Act for breach of government contracts). Larson thus bars only the suit for equitable relief and seemingly only where the plaintiff may pursue an action for damages under the Tucker Act. See *Jaffe, supra* note 3, at 37-38 (treating Larson as the first in a line of cases that treats the availability of a claim for damages under the Tucker Act as preclusive of equitable relief).

n283. *330 U.S. 731 (1947).*

n284. *Id. at 740.*

n285. In suggesting that it enjoys jurisdiction to determine its own jurisdiction, the Court in Land v. Dollar adopted a strategy similar to that later suggested in the famous dialogue of Henry Hart. See Hart, supra note 255, at 1387 ("If the court finds that what is being done is invalid, its duty is simply to declare the jurisdictional limitation invalid also, and

then proceed under the general grant of jurisdiction."); cf. Lawrence G. Sager, The Supreme Court, 1980 Term - Foreword: Constitutional Limitations on Congress' Authority to Regulate the Jurisdiction of the Federal Courts, *95 Harv. L. Rev. 17, 23-24 (1981)* (emphasizing the importance of Article III's self-executing grants of jurisdiction to the Supreme Court as sources of power to review the constitutionality of statutory restrictions on the federal courts).

n286. In *Malone v. Bowdoin, 369 U.S. 643 (1962),* the Court extended Larson to actions in ejectment brought to assert prior title to land held by officers of the federal government. Although the Court recognized that its prior decision in *United States v. Lee, 106 U.S. 196 (1882),* had squarely upheld such an action, it limited Lee to situations in which the complaint presents a claim of constitutional dimension. A simple dispute over title, not involving any taking on the part of the government, was said to fall within the Larson rule and to require the submission of the claim to an alternative tribunal.

Similarly, in *Dugan v. Rank, 372 U.S. 609 (1963),* the Court treats the availability of alternative remedies as the decisive factor in determining the applicability of sovereign immunity. The action began as one to enjoin officers of the United States Bureau of Reclamation from interfering with plaintiff's water rights through upstream water impoundment orders. Justice Clark not only upheld the government's plea of immunity but also reached the question whether Congress had authorized the seizure of water. Ultimately, the Court held that the seizures of water were authorized, that individuals who suffered losses as a result were remitted to their Tucker Act claims, and that, as so construed, the statute did not violate the Constitution. In effect, then, the Court held that the availability of damages rendered injunctive relief unnecessary.

n287. For subsequent applications of the rule of immunity in Larson, see *Dugan v. Rank, 372 U.S. 57 (1963)* (suit to enjoin federal officers from impounding water allegedly owned by downstream plaintiffs; Court specifically relies upon availability of damages remedy under the Tucker Act as triggering application of sovereign immunity to bar equitable relief); *Malone v. Bowdoin, 369 U.S. 643 (1962)* (ejectment action against forestry official, brought to try title to property held by the United States, barred by rationale of Larson; such actions may proceed on the theory of Lee only where plaintiff claims an unconstitutional taking; effectively forces plaintiff to try title in suit under Tucker Act).

n288. See supra note 240 (citing amendment to *5 U.S.C. 702).* The passage of this waiver of immunity came after several years of sustained criticism of Larson and its progeny by such leading administrative lawyers as Professor Kenneth Culp Davis. For a flavor of the criticism and Davis's role in securing American Bar Association support for a change in the law, see *Davis, supra* note 235; see also Roger Cramton, Nonstatutory Review of Federal Administrative Action: The Need for Statutory Reform of Sovereign Immunity, Subject Matter Jurisdiction, and Parties Defendant, *68 Mich. L. Rev. 389 (1970)* (describing proposed changes in Administrative Procedure Act to address issues of sovereign immunity in the wake of Larson and its progeny).

n289. See *28 U.S.C. 2409a* (1994) (authorizing suit against the United States to adjudicate title to real property in which the United States claims an interest).

n290. Although Larson itself applied to a dispute over coal, its lessons were extended to disputes over real property in *Malone v. Bowdoin, 369 U.S. 643 (1962)* (ejectment action against government officials to try title to real property barred by doctrine of sovereign immunity as restated in Larson). Justice Douglas dissented in Malone on the ground that the traditional ejectment action, prosecuted against government officials in the locality, offered a more convenient vehicle to secure a test of title than relatively remote litigation before the Claims Court in Washington, D.C. See *id. at 650-53* (Douglas, J., dissenting). Congress agreed and passed the Quiet Title Act in response.

n291. Cf. *Block v. North Dakota ex rel. Board of Univ. Lands, 461 U.S. 273 (1983)* (Quiet Title Act provides the exclusive mode by which claimants may sue to test the federal government's title to land; statutory remedy designed to supersede the common law remedy under the doctrine of United States v. Lee).

n292. Like the statute that restored the suability of customs officials, see supra note 138, many of the most important of the so-called "waivers" of sovereign immunity build upon and implicitly confirm the assumptions embedded in early American common law of government suability. The Tucker Act of 1887 sought to provide for the suability of the federal government in claims sounding in contract and those based on the Constitution, laws, and regulations of the United States. It did so simply by conferring subject matter jurisdiction on the Claims Court in the specified category of cases to the extent that the party would be entitled "to redress in a court of law, equity or admiralty if the United States were suable." See supra note 238. The statute, in short, assumes that individuals enjoyed a common law right to pursue claims against the United States as an entity and could do so in court on the authority of a simple

jurisdictional grant. It thus follows a pattern, established under the Marshall Court, of regarding the government's suability as an entity as a matter of simple jurisdiction. See supra note 242.

Statutes dealing with the government's tort liability also appear to confirm the common law's assumption that such claims were properly addressed to individual officers, rather than to the government itself. The Tucker Act excepted liability in tort from that encompassed within the jurisdictional grant in an evident effort to preserve the model of official liability for claims sounding in tort. Several decades later, when the Congress in 1946 agreed to assume responsibility for the torts of its officers, it found it necessary not only to provide the federal courts with jurisdiction to hear claims sounding in tort but also to create a right of action in tort against the government itself. See supra note 239. Such a statute plainly meant to address the failure of the common law to impose liability on the government for the torts of its officials.

n293. The disparity in Congress's drafting approach to contract and tort liability in the Tucker Act and the FTCA, see supra note 292, not only reconfirms the important distinction between jurisdiction and rights of action, but also highlights an important change in the conception of law that occurred in the years that separated the two waivers of immunity. Congress adopted the predecessors to the Tucker Act during the salad days of *Swift v. Tyson, 41 U.S. (16 Pet.) 1 (1842),* and Justice Story's claim that judges merely "find" the law. The Court overruled Swift in 1938, just eight years prior to the passage of the FTCA. See *Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938).* As Justice Holmes noted, Swift's conception of the law as a "brooding omnipresence" differed drastically from Erie's positivist insistence upon respect for state decisional law as the command of the sovereign authority. See supra note 233.

The rise of positivism that underlies Erie also influenced our law of government suability. The Congress that enacted the FTCA in 1946 was obliged not only to provide a forum for the adjudication of tort claims based on "law" but also to identify the source of the legal obligations (state or federal, statutory or common law) that were to be adjudicated. Rights against the government followed, not from general principles of the common law but from the command of the sovereign. That, essentially, was the point Justice Holmes made in explaining that sovereign immunity arises "on the logical and practical ground that there can be no legal right as against the authority that makes the law on which the right depends." See supra note 233. For Holmes, then, the power of the government to make the law (rather than its obligation to find it and apply it fairly) necessarily entailed the power to refrain from creating rights against the government in favor of individuals. Whatever the vitality of the Holmes conception as applied to federal statutory rights, it plainly applies with less force to situations in which the Constitution, rather than the government, creates the rights of the individuals in question.

n294. The decision in *Bivens v. Six Unknown Named Agents, 403 U.S. 388 (1971),* allowing suits for damages against federal government officials who violate the Fourth Amendment, offers an excellent example of the Court's effort to adapt the old remedial system to the new, post-Erie world. Before Erie, the Court could exercise some control over the right of individuals to bring suit against federal officers at common law and could therefore tailor the right of action and measure of damages to fit federal needs. In *Osborn v. Bank of the United States, 22 U.S. (9 Wheat.) 738 (1824),* for example, Chief Justice Marshall reshaped restrictions on the availability of injunctive relief and did so to secure the Bank's right of action against Ohio officers. *Id. at 838-46* (rejecting Ohio's claim that equity would not intervene to restrain a trespass except where the corporation held an exclusive charter; rejecting argument that injunction was unavailable where the taking of Bank property had already been effected). Erie posed a rather obvious threat to such control, famously foreswearing any body of general federal common law and raising questions about the extent to which the measure of federal official liability for constitutional torts might appear to depend on tort principles defined by state courts. The Court in Bivens solved the Erie problem rather neatly, declaring that the Fourth Amendment itself implies the right of action for damages and thereby reclaiming its own primacy in defining the scope of the federal remedy. In this respect, Bivens bears an obvious resemblance to *Ex parte Young, 209 U.S. 123 (1908),* and its analogs in cases involving unconstitutional action by federal officers. See supra note 253. Today, after Bivens, we have little difficulty locating the Constitution itself as the source of the right of action in Ex parte Young. See *Bivens, 403 U.S. at 400 & n.3* (Harlan, J., concurring).

n295. Generally, the Tucker Act provides jurisdiction over claims for money damages arising under the Constitution against the United States as an entity. See *United States v. Testan, 424 U.S. 392 (1976).* The Claims Court has no general equitable jurisdiction; as a consequence that court may not enter declaratory judgments against the United States. See *United States v. King, 395 U.S. 1 (1969).* Applications for equitable relief must, therefore, generally proceed against an officer or agency of the United States in a federal court of general jurisdiction. See, e.g., *Duke Power Co. v. EPA, 438 U.S. 59 (1978)* (general federal question jurisdiction will support application for injunctive and declaratory relief but will not support a claim for compensation from the government). Suits to challenge agency action

may proceed either under a specific provision for judicial review in the organic statute or under the general provisions of section 702 that Congress added to the Administrative Procedure Act in 1976. Section 702 generally respects the primacy of the Claims Court over money claims by specifically precluding district court cognizance of such claims. See *Bowen v. Massachusetts, 487 U.S. 879 (1988)* (allowing district court to fashion incidental retrospective relief pursuant to section 702).

n296. *47 F.3d 1569 (Fed. Cir. 1995).*

n297. See *Quality Tooling, Inc. v. United States, 47 F.3d 1569, 1576 (Fed. Cir. 1995)* ("The issue here is not whether the Government has waived its sovereign immunity, but whether that waiver extends to federal trial fora other than the Court of Federal Claims.").

n298. See supra text accompanying notes 268-276.

n299. The federal courts have permitted Bivens actions to proceed against federal officers for violations of rights secured to individuals by a series of constitutional provisions. In addition to claims under the Fourth Amendment authorized by Bivens itself, see *Carlson v. Green, 446 U.S. 14 (1980)* (recognizing right of action against federal officers for the imposition of cruel and unusual punishment); *Davis v. Passman, 442 U.S. 228 (1979)* (same, denial of equal protection).

n300. See, e.g., *Rivera v. United States, 924 F.2d 948 (9th Cir. 1991); Arnsberg v. United States, 757 F.2d 971 (9th Cir. 1985),* cert. denied, *475 U.S. 1010 (1986)* (same; Fourth Amendment); *Garcia v. United States, 666 F.2d 960 (11th Cir. 1982); United States v. Timmons, 672 U.S. 1373 (11th Cir. 1982)* (same; Due Process, Equal Protection); *Jaffe v. United States, 592 F.2d 7121 (3d Cir. 1979)* (no right of action in damages against the United States for a violation of the First Amendment); *Willis v. United States, 600 F. Supp. 1407 (N.D. Ill. 1985)* (same; Fourth Amendment).

n301. See, e.g., *Beneficial Consumer Discount Co. v. Poltonowicz, 47 F.3d 91 (3d Cir. 1995)* (Right to Privacy Act does not create a right of action in favor of a financial institution; therefore, sovereign immunity remains intact and calls for dismissal of the action on jurisdictional grounds).

n302. See, e.g., *In re Price, 42 F.3d 1068 (7th Cir. 1994)* (finding effective waiver of immunity in Bankruptcy Act provision that allows bankruptcy trustee to set up a counterclaim to government's tax liability claim).

n303. See supra note 237.

n304. See Hill, supra note 236, at 1112 (the doctrine of sovereign immunity operates as a matter of constitutional dimension, defeating even suits for enforcement of constitutional rights in the absence of legislative consent).

n305. Id. (citing *Principality of Monaco v. Mississippi, 292 U.S. 313, 322-23 (1934))* ("Manifestly we cannot rest with a mere literal application of the words .... Behind the words of the constitutional provisions are postulates which limit and control."); see also Currie, supra note 252, at 168 ("Sovereign immunity in [sic] an unattractive doctrine that does not belong in an enlightened constitution. Unfortunately, however, it is a part of ours.").

n306. Harold Krent, Reconceptualizing Sovereign Immunity, *45 Vand. L. Rev. 1529, 1535 (1992).* See also *Christenson v. Ward, 916 F.2d 1462 (10th Cir. 1990)* (describing sovereign immunity as a structural precept rather than a constitutional command); *Williamson v. Department of Agric., 815 F.2d 368 (5th Cir. 1987)* (same).

n307. Krent, supra note 306, at 1533.

n308. See id. at 1531 n.7 (acknowledging that thesystem of accountability in tort might benefit from a presumptive rule of suability but suggesting that a critique of the immunity rules would exceed the scope of his essentially descriptive project).

n309. See also *Arnsberg v. United States, 757 F.2d 971 (9th Cir. 1985),* cert. denied, *475 U.S. 1010 (1986)* (describing sovereign immunity as a non-constitutional doctrine that has the odd consequence of barring constitutional claims).

n310. See Hart, supra note 261, at 1372.

n311. See also Fallon & Meltzer, supra note 274, at 1781 (as a descriptive matter, sovereign immunity implies that at least some government invasions of individual rights have always gone unredressed).

n312. See U.S. Const. amend. V ("No person shall be ... deprived of life, liberty, or property, without due process of law."); U.S. Const. amend. XIV, 1 ("No state shall ... deprive any person of life, liberty, or property, without due process of law."). On the application of the Due Process Clauses to require the provision of a damages remedy for certain violations of constitutional right, see *McKesson Corp. v. Division of Alcoholic Beverages & Tobacco, 496 U.S. 18 (1990)* (holding that State must afford litigant an opportunity to obtain a refund of unconstitutionally collected state tax).

n313. See U.S. Const. art. I, 9, cl. 2 ("The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.").

n314. See U.S. Const. amend. V ("nor shall private property be taken for public use, without just compensation"); see also *First English Evangelical Lutheran Church v. County of Los Angeles, 482 U.S. 304, 316 n.9 (1987)* (requiring county to pay just compensation for a taking of private property).

n315. See Fallon & Meltzer, supra note 274, at 1731, 1779 & n.244 (1991) (noting absence of any constitutional discussion of remedies, aside from the Suspension Clause and the Just Compensation Clause).

n316. The denial of any affirmative right to pursue claims against the government of the United States rests in part on the perceived absence of any textual affirmation and in part on the (related) doctrine of sovereign immunity. As Professor Alfred Hill explained, the problem of constitutional remedies becomes most acute when the "remedies are offensive or affirmative in character." Hill, supra note 236, at 1112. Similarly, Professors Fallon and Meltzer note the distinction between the essentially uncontroversial obligation of an enforcement court to apply all relevant law and the more difficult question of the obligation of courts to award particular forms of affirmative relief. See Fallon & Meltzer, supra note 274, at 1779. As a result, Hill doubted whether one could meaningfully discuss the existence of remedies as a matter of constitutional right "when the power to grant affirmative remedies is one that depends upon legislative authorization." Hill, supra note 236, at 1112. Hill's concern helps to explain what Professor Henry Hart meant in his famous Dialogue when he acknowledged that "perhaps a plaintiff does have to take what Congress gives him," at least in some circumstances. Hart, supra note 261, at 1372 (emphasis in original).

n317. For an account of the presumed reliance on legislative petitions to the exclusion of judicial modes, see supra text accompanying notes 100-01.

n318. For accounts of the political process conception of the Petition Clause, see supra notes 19-20.

n319. See supra text accompanying notes 30-41 and 93-98.

n320. On the petitioner's immunity from suit, see supra note 21. On the right of the petition to some sort of considered response, see supra notes 22, 39, 113.

n321. See supra notes 19, 21-22, 113 (contrasting the traditional right of the petitioner to absolute immunity and a considered response with the refusal of the Supreme Court and Congress to recognize such absolute immunities or to impose enforceable duties of response upon the legislative and executive branches of government).

n322. On the contours of modern-day privileges for statements made in the course of judicial proceedings, see Prosser and Keeton On Torts, 114, at 817 (describing the absolute immunity that lawyers and parties to litigation enjoy from defamation proceedings targeting statements made in pleadings, affidavits, and in open court). On the "virtually unflagging" obligation of the federal courts to hear cases within their jurisdiction, see *Colorado River Water Conserv. Dist. v. United States, 424 U.S. 800, 817 (1976).* Of course, modern abstention doctrine undermines this obligation to some extent. See generally David L. Shapiro, Jurisdiction and Discretion, *60 N.Y.U. L. Rev. 543 (1985)* (summarizing abstention doctrines and defending the idea that courts may exercise some discretion in determining the scope of their jurisdiction).

n323. On the issuance of judgment, see supra note 35.

n324. See supra note 264.

n325. See supra text accompanying notes 281-85.

n326. On the retention of legislative control over appropriations to pay judgments rendered against the government, see supra note 144. To be sure, the recognition of a power in Congress to refuse to appropriate funds for payment of judgments raises important questions of finality. The Supreme Court has long resisted legislative and executive revision of judicial decrees, most recently in *Plaut v. Spendthrift Farms, Inc., 514 U.S. 211 (1995),* where it invalidated

legislation that was said to have improperly reopened a final judgment in a securities fraud case. Yet the prospect of legislative reopening entailed in the congressional power over appropriations seems extremely remote today, especially in view of the Judgment Fund. See supra note 241. The theoretical possibility of legislative revision through nonpayment of judgments simply does not create a finality problem. See *Glidden Co. v. Zdanok, 370 U.S. 530 (1962).*

n327. For example, the Court refused in *FDIC v. Meyer, 510 U.S. 471 (1994),* to allow individuals to enforce the First Amendment's free-speech protections in an action brought directly against an agency of the federal government. Similarly, the Court strongly presumes that Acts of Congress do not create monetary liability enforceable in suits against the government. See supra note 237. Both lines of decision reflect judicial reluctance to authorize suits for damages payable by the Treasury.

n328. See supra text accompanying notes 268-76.

n329. See supra text accompanying notes 62-81 and 138-40.

n330. See supra notes 240.

n331. See supra text accompanying notes 242-63.

n332. We can see the framers' equation of suability and jurisdiction in a variety of different sources. Begin with Article III itself, which addresses the suability of government bodies in terms of jurisdiction over controversies involving those parties. See infra text accompanying notes 182-85 (describing evolution of Article III's provision for the assertion of jurisdiction over controversies to which the United States shall be a party); Pfander, supra note 3, at 598 (grant of original jurisdiction over state-party cases operates as mandatory provision for suit against the states on the Supreme Court's original docket). Similar lessons emerge from the Judiciary Act of 1789, which defined suability in terms of jurisdiction, and from the early opinions of the Marshall Court, which treat issues of suability and jurisdiction as synonymous. See supra note 242.

n333. Recognition of a right to petition would not broaden the jurisdiction of the federal courts and would not create any new federal liability. Rather, the Petition Clause would provide a constitutional anchor for the fundamental idea that Congress may not infringe the right of the people to seek redress in court for their grievances. In creating such a formal regime of presumptive government suability, a right to petition would recognize a fundamental truth: that Congress rarely seeks to place issues of government accountability beyond the reach of the federal courts and should not be presumed to have done so.

n334. *United States ex rel. Greathouse v. Dern, 289 U.S. 352, 359-62 (1933).*

n335. See *United States ex rel. Girard Trust Co. v. Helvering, 301 U.S. 540 (1937).*

n336. In this respect, the right to petition would call for the abandonment of sovereign immunity as a threshold barrier and for consideration of the issues addressed through that doctrine in a framework of remedial discretion. For similar suggestions in related areas, see Hart & Wechsler, supra note 3, at 1023 (suggesting that we consider Larson not "as a question of immunity, but a question only of the propriety of the remedy sought as a matter of sound exercise of equitable discretion"); Fallon & Meltzer, supra note 274, at (arguing for the use of a remedial framework to address questions of retroactivity); *Jaffe, supra* note 3, at 39 (suggesting that federal courts retain discretion to entertain claims against federal officers, notwithstanding the seemingly sweeping denial of such authority in Larson and its progeny); cf. William A. Fletcher, The Structure of Standing, *98 Yale L.J. 221 (1988)* (arguing for abandonment of standing as a threshold barrier); Louis Henkin, Is There a "Political Question" Doctrine?, *85 Yale L.J. 597 (1976)* (arguing that the political question doctrine does not operate as a monolithic barrier to litigation but raises issues better handled in a framework of equitable remedies); Hill, supra note 236 (arguing in anticipation of Bivens against any threshold barrier to the recognition of a right of action in damages against federal officers).

n337. An invigorated right to petition may provide an appropriate foundation for the constitutional right of access to judicial review. Although the Court has never squarely held that such a right of access exists, it has recognized a vigorous presumption in favor of judicial review in cases such as *Webster v. Doe, 486 U.S. 592, 603 (1988)* and *Bowen v. Michigan Academy of Family Physicians, 476 U.S. 667 (1986).* Bowen explains the presumption as the product of a longstanding consensus among judges, scholars, and members of Congress. Webster applies the Bowen presumption against preclusion to constitutional claims; indeed, the Court suggested in Webster that its application of the presumption sought to avoid "the serious constitutional question" that would arise if a federal statute were construed to deny any judicial forum for a colorable constitutional claim. *Webster, 486 U.S. at 603.*

Most observers assume that the Due Process Clauses provide the constitutional source of the "serious question" avoided by the presumption favoring review, but the Petition Clause would also serve effectively in that capacity. We can trace the presumption favoring judicial review to the use by the federal courts of the prerogative writs of mandamus and habeas corpus and writs of injunction as sources of "nonstatutory" authority to review the legality of administrative action. These common law elements of government accountability, coupled with the right to pursue claims against the government itself, also define the core of the First Amendment right to petition. Due process, by contrast, regulates the forms the government must follow in the course of depriving an individual of life, liberty, or property. By regulating deprivations, the Due Process Clauses do not appear to give rise to a general right of access to the federal courts for the assertion of affirmative claims. Indeed, the failure of the Due Process Clauses to create affirmative rights has led to the emphasis in our law of government accountability on the assertion of constitutional defenses in the context of an enforcement proceeding. See Fallon & Meltzer, supra note 268, at 1776 (noting significance of the enforcement proceeding in our tradition of constitutional remedies); Hart, supra note 261, at 1372-73 (same).

The Court could manage such issues of remedial adequacy in the context of a constitutional right to petition. Under such a framework, we would conceptualize Larson not as a threshold immunity barrier to suits against government officials but as an application of standard remedial discretion within a framework of presumptive suability under the Petition Clause. On such a conception, the hypothesized repeal of an available remedial option would offer an entirely straightforward justification for proceeding to grant specific relief in a future, Larson-like proceeding. An analysis based upon the right to petition would thus preserve remedial adequacy without forcing the Court either to abandon its framework of equitable discretion or to wield the Due Process Clause in an attack on acts of Congress that narrow remedial choices.

n338. *FDIC v. Meyer, 510 U.S. 471 (1994)* (although FDIC sue-or-be-sued clause affects waiver of sovereign immunity, individual claimant cannot state legally cognizable claim against federal agency, rather than federal official, under Bivens).

n339. Historians estimate that something like one-third of Americans remained loyal to Great Britain during the conflict. Loyalists were subjected to "test" laws, requiring them to swear allegiance to the state as a condition of continued political participation, to laws limiting their freedom of speech, and to confiscation of their property. See *Jensen, supra* note 190, at 265; see also Claude H. Van Tyne, The Loyalists in the American Revolution apps. B, C (1902) (summarizing laws involving loyalists). Apart from these legal attacks, loyalists were subjected to a variety of extra-legal depradations. See Allan Nevins, The American States During and After the Revolution: 1775-1789, at 65-66 (1927) (describing mob violence directed at loyalists as verging on a civil war between whigs and tories).

n340. See Van Tyne, supra note 339, at 277-78 (tracing congressional resolution recommending passage of confiscation acts by the states to idea first proposed in Paine's Common Sense).

n341. Technically speaking, land escheats to the lord under the feudal system of land tenures when the tenant dies without heirs. See Chitty, supra note 29, at 213. While in theory any landlord with the requisite chain of title may claim escheated property, the King was in practice the most common beneficiary of escheats by the end of the eighteenth century. Id. at 226-27 (King is almost universally though not necessarily the lord of the seignory).

n342. Generally speaking, those attainted of high treason lost their real and personal property forever; in contrast, those attainted of petit treason or felony lost their personalty through forfeiture and their real property through escheat, after the King's "year, day and waste." See Chitty, supra note 29, at 216, 219; 4 *Blackstone, supra* note 6, at *381, 385. See also Julius Goebel Jr. & T. Raymond Naughton, Law Enforcement in Colonial New York: A Study in Criminal Procedure 710-11 (1944). Blackstone's list of the wide array of offenses that triggered such consequences occupied almost two hundred pages. See *Blackstone, supra* note 6, at *74-250. For a brief summary, see id. at 387 (high treason, misprision of treason, petit treason, felonies of all sorts, petit larceny, and standing mute). It's worth noting that the "attainder" occurred not upon the conviction but upon the entry of the judgment for the offense. See 4 Blackstone, id. at *380-81. The distinction's significance stems from the fact that forfeiture of realty dated from attainder but forfeiture of personalty dated from conviction. Id. at 387. Corruption of blood, a consequence of attainder which essentially deprived heirs of their rights to inherit the property of those attainted, was abolished in the United States. See 4 Tucker's Blackstone, supra note 6, at 389 n.15.

On forfeitures of the estates of "infants, lunatics, and idiots" as a source of Crown revenue, see 3 *Blackstone, supra* note 6, at *303-06.

n343. English observers regarded the requirement of an inquest, with its reliance on the jury of the vicinage, as an important procedural protection against unlawful takings of property by the Crown. See Chitty, supra note 29, at 247 ("admirably constructed barrier between Crown and subject"); see also 3 *Blackstone, supra* note 6, at *259 ("part of the liberties of England, and greatly for the safety of the subject"); Geoffrey Gilbert, An Historical View of the Court of Exchequer 132-33 (1738) (rule that King could not take except by matter of record found through an office "was a Part of the Liberty of England, that the King's Officers might not enter upon any other Man's Possession till the Jury had found the King's Title").

n344. See F.S. Thomas, The Ancient Exchequer of England 53 (1848) (describing the information in Chancery). The incentive for the initiation of such process lay in the rewards given to those who collected the King's revenue. Id. at 56-57 (describing sheriffs' tally of reward, allowing for expense of collection). Eventually, competition to claim such rewards led to excessive zeal in the initiation of escheats, see Gilbert, supra note 343, at 140 (describing competition between escheators and sheriffs).

n345. For a description of the process of an inquisition of office, see Chitty, supra note 29, at 246-47, 266-67; 3 *Blackstone, supra* note 6, at *258.

n346. For this reason, inquests seeking to establish the Crown's entitlement were known as "offices of entitlement." See Chitty, supra note 29, at 247. Such offices were not necessary in every case, however. In a variety of situations, the basis for the escheat or forfeiture was already a matter of record. For example, the passage of a bill of attainder or the entry of judgment on a verdict convicting an individual of high treason established the treason as a matter of record and eliminated the necessity for the finding of an office of entitlement. See id. at 248-50; 3 *Blackstone, supra* note 6, at *259. Nonetheless, Exchequer might well convene a so-called "office of instruction" in such situations, not to try the issue of forfeiture, but to determine the extent of the estate subject to forfeiture. Id. at 247. See also Gilbert, supra note 343, at 132-35.

n347. In the face of such grants over to another, the subject was required to pursue both the petition of right and to obtain a writ of scire facias to contest the grant. See Chitty, supra note 29, at 330-31; 4 *Blackstone, supra* note 6, at *260-61.

n348. See 9 Holdsworth, supra note 28, at 25-26 (describing significant reforms to petition practice in 1360 and 1362).

n349. In general, those who could confess and avoid the Crown's title by asserting a superior title would rely upon the monstrans; those who attacked the Crown's title used the traverse. For the details, see Chitty, supra note 29, at 353-54; 9 Holdsworth, supra note 28, at 25-26.

n350. See 9 Holdsworth, supra note 28, at 21.

n351. Chitty reports, for example, that the judgment on a petition may result in the payment of money from the Treasury and describes the procedure for such payment. See Chitty, supra note 29, at 348-49.

n352. As a typical example of such a monetized dispute, consider an inquisition to determine the Crown's right to forfeiture of the property of a felon. In invoking the Crown's entitlement to a "year, day, and waste," officials most commonly sought a stream of rental payments for the specified period. See Chitty, supra note 29, at 220-21 (felon forfeits profits of land).

n353. Chitty explains the importance of both the writ of extent (as a tool to collect Crown debts) and the requirement of an inquisition of office to determine, as a matter of record, the nature of the debts owed to the Crown. See Chitty, supra note 29, at 265-71.

n354. See Chitty, supra note 29, at 356-73 (describing the use of the traverse to resist the writ of extent).

n355. See id. at 356 ("Offices may be traversed by any subject claiming property seized by the Crown, whether the object be to recover land or not, and though the office be untrue; or the traverser have no record shewing his right."); id. at 365 (describing manner in which a "stranger" to the proceeding, who does not deny the debt but claims a property in the effects seized, contests the writ of extent).

n356. See id. at 360-61 (noting that the party against whom the extent issues may appear for the purpose of denying the debt and that others may appear as well, including a mortgagee and a creditor not of record).

n357. See id. at 364-65 (describing the party's motion to pay the debt).

n358. See id. at 363-64 (describing the appearance of assignees of a bankrupt to resist Crown claims on the bankrupt's assets).

n359. See David C. Brown, The Forfeitures at Salem, 1692, 50 Wm. & Mary Q. 87 (1993).

n360. See infra text accompanying notes 430-40 (describing imprint of Exchequer practice upon early statutes of New Jersey).

n361. See infra note 388.

n362. See Goebel & Naughton, supra note 342.

n363. See id. at 526-28 (describing adoption of Supreme Court rule that required regular "estreat" of all fines, penalties, and forfeitures due the Crown); id. at 528 (reporting on attempt of Attorney General to prosecute local judges for failure to obey order to estreat).

n364. Id. at 549-50 (describing argument by James Duane against the enforcement of a recognizance forfeited and estreated into the Supreme Court). See also id. at 550-52 (reporting that Supreme Court accepted the argument and granted applications for a quietus or discharge from the obligation).

n365. See id. at 710-14.

n366. Id. at 715-17.

n367. Id. at 716.

n368. See An act declaring who shall be deemed citizens of this commonwealth, May 1779, ch. 45, in 10 The Statutes at Large; Being a Collection of All the Laws of Virginia 129 (William Waller Hening ed., 1822) [hereinafter Hening]. A nice account of the implications of these various statutes in light of the common law appears in 3 Tucker's Blackstone, supra note 6, at app. C.

n369. On the application of rules of escheat and forfeiture to aliens, see 3 Tucker's Blackstone, supra note 6, at app. C. Tucker's claim that the act seeks to trigger escheats on the part of aliens finds support in a subsequent provision that subjects to forfeiture the Virginia property of anyone attainted by the laws of a member of the United States confederation. See Hening, supra note 368, at 30 (calling for the disposition of property in Virginia owned by those attainted in other states).

n370. Hening, supra note 368, at 66-71.

n371. Id. at 67.

n372. See id.

n373. Id. In this, the act followed English practice. Moreover, the act specifically excluded property held by British subjects with children residing within the state. Id. at 71.

n374. See 3 Tucker's Blackstone, supra note 6, at app. C., at 59.

n375. Id.

n376. Id. at 61-62 (distinguishing the act defining aliens from the act vesting property of alien enemies in the commonwealth on the basis that the latter operates only on property held prior to or on the effective date of the statute).

n377. See Hening, supra note 368, at 115.

n378. Id. at 115-16. This language tracks that of the statute enacted in England to regularize the proceedings in cases of escheat.

n379. See id.

n380. See id.

No lands or tenements seized into the hands of the commonwealth, upon such inquests taken before escheators, shall be in any wise granted, nor to farm let ... till the same inquests and verdicts be fully returned into the general court, nor within twelve months after the same return, but shall entirely and continually remain in the hands of the escheators, who

shall answer to the commonwealth the issues and profits yearly coming of the said lands and tenements, without doing waste or destruction. If no person within the twelve months before mentioned make claim to the lands or tenements so seized, or claim being so made, if it be found and discussed for the commonwealth, [the] escheator shall thereupon proceed to make sale of the land for the benefit of the commonwealth.

Id. at 115-16.

n381. Id. at 153.

n382. See 3 Tucker's Blackstone, supra note 6, app. C. at 59-60 (noting that the October 1779 act forces British subjects to contest inquests by monstrans, contrary to common law practice).

n383. See Hening, supra note 368, at 153 (obliging British subjects to withdraw their traverses and file monstrans de droits instead); id. (obliging all parties who would contest an inquest to show "probable reason why such British subject is not within" the alien enemy forfeiture act). Apart from requiring British subjects to file a monstrans, the act specifies that technical challenges to the procedures used in the inquest were not to arrest the proceeding.

n384. As noted above, the act that declares British subject "alien enemies" and vests their property in the Commonwealth provides a one-month holding period during which claims may be filed to contest the inquest. The act concerning escheators, in contrast, sets forth a twelve-month period.

n385. See Hening, supra note 368 at 153 ("No exception [as to the proceedings] shall at any time be admitted").

n386. See id. at 155. The grant of authority thus entitles Virginia's chancellor to offer relief similar to that approved in English Exchequer practice. See supra text accompanying notes 46-49 (describing Pawlett v. Attorney General).

n387. Id. at 156.

n388. Early in the eighteenth century, Virginia established procedures for litigation over the forfeiture of land grants that relied heavily on scire facias practice in England. Enacted in 1710, see An act for settling the Titles and Bounds of Lands, October Session 1710, ch. 13, in Hening, supra note 368, at 517, the Virginia land laws provided for the issuance of land grants or patents, issued under the seal of the province, to those taking up previously ungranted land. See id. 14-18, at 524-25 (confirming grants under old patents and requiring that secretary of state record all new patents). The Virginia laws further provided for the forfeiture of any grants of land where the owner failed to "seat and plant the same within three years" and to "pay the full quit-rents." See id. 20, at 526. The forfeiture proceedings, typically instituted by a person who wished to obtain title to the land in question under a new patent, began with a petition to the governor, describing the land and the cause of forfeiture. See id. 21, at 526. Copies of such petitions were served on the secretary of state and on the current grantee, who was obliged to appear before the general court and defend his title. See id. at 526-27. The statute specifically authorized the court to "adjudge" whether the lands had been forfeited and vested in the Crown or retained by the original grantee. Id. at 527. In case forfeiture was adjudged, the statute directed the court to certify that fact to the governor. Id. Such certificate, in turn, entitled the party initiating the forfeiture proceeding to a patent for the lands. Id.

The statute, which was later reenacted in 1748, see An Act for settling the Titles and Bounds of Lands, October Session 1748, ch. 1, in 5 Hening, supra note 368, at 41, contains a variety of elements that closely resemble scire facias practice in England. St. George Tucker notes the similarity in his edition of Blackstone, explaining that "petitions for lapsed lands, formerly in use in Virginia, ... bore a great resemblance to the writ of scire facias to repeal a patent." 4 Tucker's Blackstone, supra note 6, at 261 n.10. To begin with, the Virginia statute calls for the initiation of proceedings by petition to the Crown, here represented by the governor. Similarly, scire facias proceedings began with a petition of right to the King, the granting of which entitled the individual to a writ of scire facias to contest an earlier grant. Moreover, the Virginia statute vested the power to determine the issue of forfeiture in the general court, thus following scire facias practice, which contemplated the adjudication of claims respecting the validity of the Crown's grants before Chancery. Finally, the Virginia statute makes no provision for the governor to exercise any discretion in passing upon the petition in the first instance, thus duplicating the essentially mechanical endorsement that characterized Crown practice on petitions of right to repeal patents.

Although the general assembly eliminated quit-rents and the remedy of petition for lapsed lands shortly after Independence, subsequent land laws maintained some vestiges of earlier practice. See An act for establishing a Land office, May Session 1779, ch. 13, in 10 Hening, supra note 368, at 50. The Act of May 1779 provides for land claimants to clear title to the land they wish to claim by filing and litigating caveats. The act follows earlier practice by calling for

service of the claim or caveat upon any defendant in possession of the lands. See id. 3, in 9 Hening, supra note 368, at 58-59. Such service operates as the prelude to litigation over title before the general court and a final resolution of the conflicting claims. This streamlined proceeding maintained the role of the courts and eliminated the, by then vestigial, role of the petition to the governor.

n389. Laws of New York, 7th Sess., ch. 64 (May 12, 1784) in 1 Laws of the State of New York 736. New York had adopted a variety of earlier statutes dealing with forfeited estates in a piecemeal fashion but none of them addressed the rights of third parties in a comprehensive way.

n390. See id. 1, at 736-37.

n391. Id.

n392. Id. at 737.

n393. See id. 3, at 738.

n394. Id.

n395. Id. 38, at 753.

n396. Id.

n397. See id. 39, at 754-55.

n398. See Pennsylvania Laws, ch. 773, in 1 Laws of the Commonwealth of Pennsylvania 449 (1810).

n399. See id. 5, at 451-52.

n400. Id. 14, at 457. Those with claims to real and personal property were given six and three months, respectively, to assert them. Id.

n401. Id. at 458.

n402. See id. 15, at 458.

n403. See id. 17, at 458. Section 17 recognizes that individuals may claim a sum or sums of money from the forfeited estates. It thus provides for the Supreme Executive Council to issue certificates, bearing interest at six percent, to such claimants in the amount "determined to be due them severally by the decrees of the said Supreme Court." It then directs the treasurer to pay the certified amount, "without any deduction or fee" out of "such rents and profits as shall be paid into his hands from the respective estates." Id. Claimants were thus entitled to principal and interest as soon as the forfeited estates brought revenues into the state treasury.

n404. See Pennsylvania Laws, ch. 821, Act of March 29, 1779, in 1 Laws of the Commonwealth of Pennsylvania 461.

n405. See id. 3, 4, at 467-68 (speedy sale and role of Supreme Court preserved).

n406. See id. 10, at 469 (providing for trial by jury according to the usual course of the law in cases involving claims of five pounds or more).

n407. Id. 7, at 468.

n408. See Act of March 1, 1778, no. 248, 3-6, A Digest of the Laws of Georgia (1800) in 1 The First Laws of the State of Georgia 213-14 (John D. Cushing ed., 1981) [hereinafter First Georgia Laws].

n409. See id. 3, at 211.

n410. After calling upon the board to submit the more dubious claims to the state's attorney general for consideration, see id. at 211-12, the act directs the attorney general "to defend the right of the State as well before the said boards as in any of the superior courts against the same." Id.

n411. See id. 12, at 216.

n412. See Act of May 4, 1782, no. 267, in *First Georgia Laws, supra* note 408, at 250.

n413. See id. 9, at 246 (specifying the right of person having claims or demands to lay them "before the said commissioners").

n414. See id. at 247 ("where any claimant shall so chuse, he or they shall have recourse to his or their action at law").

n415. Id. These certificates were also made a legal tender in payment at sales of forfeited estates.

n416. Act of July 29, 1783, in *First Georgia Laws, supra* note 408, at 277.

n417. After reciting the existence of "many demands" against confiscated estates, the act provides for the abatement of such claims in the following terms:

That from and after the passing of this act, it shall not be lawful for any person or persons whatsoever, to sue or implead the public, or State, as such, in any court of law of justice within the same, (except in cases herein after mentioned) and all actions already brought, or now depending, of that nature, shall, and the same are hereby declared to be discontinued.

Id. at 277. The statute provides for the determination of claims by a newly appointed board of commissioners, which it specifically authorizes to issue certificates to successful claimants payable by the state. Id.

While at first blush the statute may appear to limit the right of all claimants to pursue claims in courts, its impact was largely limited to claims by creditors of confiscated estates. Two elements make such a limitation clear. First, the act goes on to provide that claimants may not recover more than the value that the confiscated lands fetched in the sheriff's sale - a sensible enough provision designed to limit creditors to the value of debtors' estate. See id. 14, at 278. Second, a proviso to the Act of 1783 preserves the jurisdiction of the courts in all cases in which individuals seek to contest title to real or personal property, thereby preserving the courts' role in adjudicating conflicting claims of ownership involving the state. Id. In effect, then, the right of individuals to claim title to the confiscated property itself were preserved for judicial determination in keeping with English practice.

n418. Act of Feb. 22, 1785, no. 310, in *First Georgia Laws, supra* note 408, at 316.

n419. Id. The period for filing was due to expire in August 1785 but it was extended for an additional year by later legislation. See Act of Feb. 13, 1786, no. 339, 1, in *First Georgia Laws, supra* note 408, at 335 (extending time for filing claims for a period of nine months from the effective date of the act, or to August 1786).

n420. See id. 5, at 317.

n421. Id.

n422. See Act of June 26, 1778, ch. 29, 2, in 2 Laws of the State of Delaware 636-38 (1797) [hereinafter Delaware Laws].

n423. Id. 4, at 640.

n424. See id. 5, at 641.

n425. See Act of June 5, 1779, ch. 43, in 2 Delaware Laws, supra note 422, at 658. The preamble recites that the earlier statute had made no provision for "determining any disputes ... respecting the title of any messuages, lands, or tenements, that have been or hereafter may be sold by virtue of the said act."

n426. See id. 3, at 659.

n427. See id. 7, at 661.

n428. See id. 2, at 658-59.

n429. Id. 7, at 661.

n430. In addition to the forfeiture provisions, New Jersey's provisions for the settlement of public accounts bear a striking resemblance to Exchequer practice. See Act of Dec. 20, 1781, ch. 291, Acts of the General Assembly of the State of New Jersey, in The First Laws of the States of New Jersey 231 (John D. Cushing ed., 1981) [hereinafter New Jersey Laws]. The act requires the state's sheriffs and other collectors of public revenue to pay money to the treasurer and account with auditor on pain of suit for failures and delinquencies, see id. 1-3, 6; following the practice of

"estreating" revenue claims into Exchequer, the act calls upon the clerks of court to furnish the auditor with extracts of all fines, amercements and forfeitures, see id. 3; perhaps most interesting, the act indicates that those who pay money to the treasurer shall take the treasurer's receipt to the auditor so as to enable the auditor to maintain a check on monies lodged in the treasury. See id. 18. This latter provision appears to follow the course of Exchequer in securing a check on those who take in the public treasure.

n431. See Act of June 5, 1777, no. 4, in *New Jersey Laws, supra* note 430, at app. 5.

n432. See Act of Apr. 18, 1778, ch. 87, in *New Jersey Laws, supra* note 430, at 43-46.

n433. Id. 1, at 43-45.

n434. Id. 2, at 45.

n435. See Act of Dec. 11, 1778, ch. 122, in *New Jersey Laws, supra* note 430, at 67.

n436. Id. 5, at 70. Curiously enough, the act declares that the inquisition was to operate only against the property of the British loyalist, and not against his or her person. Id. 2, at 68. The inquests thus appeared to have served two functions: to entitle New Jersey, by establishing the fact of disloyalty, and to instruct the state as to the real property in question.

n437. Id. 4, at 68 (proceedings for return and trial of inquisitions "shall be the same as are directed in the first and second sections" of the act of April 1778).

n438. Id. 16, at 73.

n439. Id.

n440. Id. Like other similar provisions, the act sensibly provides for the treasurer to pay the full amount of the demands only in cases where the produce of the forfeited estate exceed the amount of the demands.

Subsequent legislation effected no significant change in the system for adjudicating claims against forfeited estates. The Act of December 23, 1783, see *New Jersey Laws, supra* note 430, at 384, does provide for the treasurer to issue notes in cases where the state of the treasury will not "admit of Payment" to creditors. Id. 3, at 385. But it retains its provisions for the judicial determination of such claims and extends the time for such claimants to come forward. Id. 7, at 386.

n441. See Act of March 28, 1778, no. 1094, in 4 The Statutes at Large of South Carolina 441, 442, 1 [hereinafter South Carolina].

n442. Id. (joint ballot of General Assembly and Legislative Council).

n443. Id. 3.

n444. See Act of Feb. 26, 1782, no. 1153, in *South Carolina, supra* note 441, 2, 3, at 516, 517.

n445. See id. 17, at 521 (allowing creditors until February 20, 1783 to make demands). Subsequent legislation extended the time for making such claims to March 26, 1785, see Act of March 26, 1784, No. 1222., in 4 *South Carolina, supra* note 441, at 620 (allowing twelve additional months from the date of the act for rendering claims against confiscated estates), and then to June 11, 1786. See Act of March 11, 1786, no. 1310, in 4 *South Carolina, supra* note 441, at 727 (three month extension from date of act).

n446. Id. Subsequent legislation transferred the assembly's authority to review demands by creditors to the auditor of the state. See Act of March 16, 1782, no. 1177, in 4 *South Carolina, supra* note 441, 6, at 555, 556 (providing for demands to be laid before the auditor "and if he should refuse to pass such accounts, the demandants shall then have an action against the commissioners of confiscated estates").

n447. Id.

n448. See Act of March 26, 1784, in 4 *South Carolina, supra* note 441, 3, at 639, 640 ("Where any property has been sold by virtue of the confiscation law, and no claim preferred for the same previous to such sale, no action shall be commenced against the said commissioners, or any person possessing such property for the same, without a previous application being made for that purpose to the Legislature of this State.").

n449. The provision extending the time for the assertion of claims by creditors, see supra note 445, made it possible for creditors to assert claims after the estate itself had already been sold.

n450. See supra note 446.

n451. See Act of March 22, 1786, in 4 *South Carolina, supra* note 441, at 740 (providing for payment to Jane Villepontoux, claimant of funds held in trust by Gideon DuPont, Jr. that were forfeited to the state of South Carolina).

n452. See An Act to establish a Board of Auditors for settling and adjusting the public Accounts of this State, and other Purposes, April Session 1780, ch. 8, in 2 The First Laws of the State of North Carolina 398-99 (John D. Cushing ed., 1984) [hereinafter First North Carolina Laws].

n453. See id. 3, at 399.

n454. Id.

n455. Subsequent provisions relaxed this control but only slightly. In September 1780, the General Assembly established district auditors to pass upon "claims against this State." See An Act for appointing District Auditors for the Settlement of Public Claims, September Session 1780, ch. 3, in 2 First North Carolina Laws, supra note 452, at 410. This act invested the auditors with the power "finally to settle and adjust all Claims against the State for Articles heretofore furnished or impressed for the Use thereof." Id. 2. But the legislature retained control over the appointment of the auditors and over the value assigned to the claims. See, e.g., id. ("for every pound of fresh beef one Pound, twelve shillings ... salt beef per Barrel eight hundred Pounds" and so forth).

n456. See An Act to Carry into Effect an Act ... for confiscating the Property of all such Persons as are inimical to the United States, April Session 1778-79, ch. 5, in 1 First North Carolina Laws, supra note 452, 3-5, at 364-65. As the title of the Act suggests, the actual forfeiture of the property was effected by earlier legislation. See An Act for confiscating the Property of all such Persons as are inimical to the United States, November Session 1777, ch. 17, in 1 First North Carolina Laws, supra note 452, at 341-42.

n457. See id. 7, at 366.

n458. Id. 9, at 366.

n459. Subsequent legislation made it clear that those who purchased property as a result of confiscation proceedings were immune from suit by British loyalists, or those tracing their title to British loyalists. Compare An Act to secure and quiet in their Possessions, November Session 1785, ch. 7, in 2 First North Carolina Laws, supra note 452, at 553-54 (persons holding title pursuant to confiscation acts immunized from lawsuits brought by persons specified in the confiscation acts) with An Act to amend, November Session 1786, ch. 6, in 2 First North Carolina Laws, supra note 452, at 579 (citizens of North Carolina may prosecute suits to recover property sold in forfeiture proceedings).

n460. See Act of Apr. 30, 1779, in 1 The General Laws of Massachusetts 50 (T. Metcalf ed., 1823) [hereinafter Massachusetts].

n461. See Act of March 2, 1781, in 1 *Massachusetts, supra* note 460, at 50. The act identifies commissioners for each county in section 10. Id. at 53-54.

n462. Id. 5, at 51-52.

n463. Id. 5, at 52. A subsequent provision calls for the judge to issue a certificate to any creditor reflecting the value of claims that have been "liquidated and allowed by the commissioners of claims, as aforesaid." Id. 10, at 54. Committees appointed by the legislature to oversee the sale of the estates were then directed to pay such claims out of the proceeds of the sale and transfer the residue to the treasury. Id. 3, at 51.

n464. Act of Nov. 28, 1778, ch. 19, in 4 Laws of New Hampshire 191 (H.H. Metcalf ed., 1916).

n465. Laws of New Hampshire, ch. 14, March 18, 1780, in 4 *Laws of New Hampshire, supra* note 464, at 286.

n466. See *id. at 287.*

n467. Id.

n468. Id.

n469. Act of March 25, 1782, ch. 8, in 4 *Laws of New Hampshire, supra* note 464, at 456.

n470. See id. at 457 (declaring that all real and personal property of aliens shall escheat, enure & accrue to the use and benefit of the Government and People of this State).

n471. See id. at 458.

n472. Id. (authorizing probate judge to issue order "directing [the treasurer] to pay the several Creditors their claims"). Later legislation allowed the treasurer to pay such claims by issuing interest-bearing securities. See Act of March 1, 1783, ch. 9, in 4 *Laws of New Hampshire*, *supra* note 464, at 504-05.

n473. See 7 Records of the State of Rhode Island 633-34 (approving by legislative action the payment of the account of Henry Marchant upon recommendation of the auditor); id. at 640 (providing for the payment of a variety of accounts, some less than two pounds).

n474. See An Act for the Confiscating [sic] the estates of certain persons therein described, October Session 1779, 7 Records of the State of Rhode Island 609.

n475. Id. at 611-12. The act bears a striking resemblance to that which New Hampshire later enacted for the escheat of the estates of those deemed aliens. See supra note 470.

n476. Id. at 614.

n477. See An Act for regulating and auditing the Public Accounts, in The Acts and Laws of the State of Connecticut 37-38 (1796) (specifying that the general assembly was to appoint auditors to audit public accounts before the October session of the assembly); An Act for instituting, defining and regulating the Office of Comptroller of the Public Accounts, May 1788, in id. at 116-18 (general assembly shall appoint a comptroller to audit public accounts and lay them before the assembly at its May session).

n478. See An Act directing certain confiscated Estates to be sold, in id. at 172-73.

n479. Id. 1.

n480. Id. 1, at 172.

n481. Id. 2.

n482. See An Act to adjust the debt due from this state, May Session 1781, ch. 17, in The First Laws of the State of Maryland (John D. Cushing ed., 1981) [hereinafter First Maryland Laws].

n483. Id. 2 (governor and council "may give their order on the treasurer" for payment).

n484. Id.

n485. See An Act to seize, confiscate, and appropriate all British property within this state, June Session 1780, ch. 45, in *First Maryland Laws*, *supra* note 482, 8.

n486. Id. 12.

n487. See An Act to dispose of certain confiscated British and forfeited property, May Session 1781, ch. 37, in *FirstMaryland Laws*, *supra* note 482.

n488. See An Act respecting claims to confiscated British property, April Session 1782, ch. 60, in *First Maryland Laws*, *supra* note 482, 1, 2 (allowing a person who previously asserted claims in writing until March 1, 1783 to prosecute "his action for the recovery of [forfeited property]"; allowing a person claiming "any right or interest" in forfeited property to prosecute his action by bringing suit against the state, directed at the commissioners, with a copy of the summons to the commissioners or to the attorney general).

n489. The Revolutionary cause led to government takings and expropriations on a tremendous scale. Late in the war, General Washington depended more on the impressment of goods and the issuance of quartermaster certificates than on the purchase of supplies from merchants to keep his starving Continental line in the field. See Ferguson, supra note 189, at 57-65. Much of the paper money that Continental and state assemblies had emitted to finance the War had depreciated to a mere fraction of its face value. On the emission of paper money in the early years of the war, and its later depreciation, see id. at 27-35. Apart from expropriations through military seizures and indirect inflation, every state directed a formal program of legislative forfeitures at British loyalists.

n490. For a summary of the relevant state constitutional provisions, see supra note 101. On the difficulties of enforcing the early constitutions, see Goebel, supra note 156, at 102 (describing the early declarations of rights in state constitutions as having failed to pay adequate attention to enforcement; invoking the "old maxim 'no writ, no right'" to underscore the point that rights without implementation remain pure abstractions).

n491. Virginia, Georgia, and New Jersey amended their claims procedures in apparent reaction to widespread submission of claims. See supra text accompanying notes 382-84, 417, and 438.