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States, Courts, and Founders: Remarks on Killenbeck

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Let none presume
To wear an undeserved dignity.
O, that estates, degrees, and offices
Were not deriv'd corruptly, and that clear honour
Were purchased by the merit of the wearer![1]

Among the matters that have occupied scholars of the Constitution of the United States, four related themes have frequently recurred. One concerns the character of the founding. The second concerns the ongoing implications of the founding, both for governing values and for institutional relations, especially relations between the nation and states. The third concerns the proper role of the national judiciary—most visibly, the Supreme Court. Lurking behind all these concerns is a fourth: the location and character of sovereignty. Mark Killenbeck's ambitious and insightful article[2] takes on all of these themes.

These are huge matters. Consistent with my limited charge in this reply, I shall confine myself to two modest purposes. I shall first recapitulate what I take to be Professor Killenbeck's basic claims.[3] Then I shall offer some critical observations, a task made more difficult by the fact that there is much in the article with which I fundamentally agree. With respect to the former purpose, I should note that I take some liberty with the organization and presentation of the article's thesis. I hope that,

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1. WILLIAM SHAKESPEARE, THE MERCHANT OF VENICE act. 2, sc. 9, lines 38-42 (M.M. Mahood ed., 2003).

2. Mark R. Killenbeck, *In(re)Dignity: The New Federalism in Perspective*, 57 ARK. L. REV. 1 (2004).

3. I confine myself here to the claims in the instant article and therefore resist discussing Professor Killenbeck's other excellent work in this area. *See, e.g.*, Mark R. Killenbeck, *The Physics of Federalism*, 51 U. KAN. L. REV. 1 (2002).

in doing so, I avoid doing violence to his argument. With respect to the latter purpose, I do not attempt a comprehensive nor systematic account of the Court's various (and dizzily inconsistent) doctrines, but aim merely to sketch chiaroscuro a few general questions and observations that might engender further engagement.

I. KILLENBECK'S THESIS

Professor Killenbeck offers a perceptive critique of the Supreme Court's recent innovations in federalism. He examines two related doctrinal areas: (1) the extent of national power, especially in relation to the power of states; and (2) the claim that states enjoy sovereign immunity from judicial (and administrative) actions by private parties, even actions that Congress has authorized. The commonly cited textual foundations for the claims of states in these areas are the Tenth Amendment (for state versus national powers) and the Eleventh Amendment (for immunity from judicial action). With respect to both areas, Killenbeck considers also the proper institutional relation between Congress and the Court.

An early sign that some Justices were willing to insulate states from general standards of an otherwise constitutional act of Congress was *National League of Cities v. Usery*.[4] Writing for the Court, Justice Rehnquist cited the Tenth Amendment to justify striking down the Fair Labor Standards Act's minimum-wage and maximum-hours provisions as applied to employees of states.[5] Having overruled an earlier decision,[6] however, *National League of Cities* itself was overruled nine years later in *Garcia v. San Antonio Metropolitan Transit Authority*.[7] If short-lived, *National League of Cities* was a portent of things to come, as Justices Rehnquist, O'Connor and Powell threatened in dissents in *Garcia*.[8]

4. 426 U.S. 833, 851-52 (1976) (holding that the Tenth Amendment barred Congress from protecting the minimum wage and maximum hours of state employees, via the Fair Labor Standards Act, as amended in 1974).

5. *Id.* at 852.

6. Maryland v. Wirtz, 392 U.S. 183 (1968).

7. 469 U.S. 528, 555-57 (1985) (holding that Congress could regulate the minimum wage and maximum hours of state employees, via the Fair Labor Standards Act, as amended in 1974).

8. *Id.* at 558 (Rehnquist, C.J., & O'Connor, J., dissenting).

The engine of doctrinal change began to move again in the latter half of the 1980s, evidenced by *CTS Corporation v. Dynamics Corporation of America.*[9] It picked up steam in the early 1990s, with *Gregory v. Ashcroft*[10] and *New York v. United States.*[11] It took on the appearance of a speeding locomotive in the mid-1990s, beginning with *United States v. Lopez,*[12] continuing with a substantial line of decisions,[13] and culminating in (though likely not terminating with) *Federal Maritime Commission v. South Carolina State Ports Authority.*[14] The first of those decisions explicitly overruled a prior decision only seven years old,[15] and the last resurrected the shade of a doctrine that many scholars had considered essentially dead: the notion

9. 481 U.S. 69, 94 (1987) (holding that a state law restricting corporate takeovers was not preempted by the Williams Act or the "Dormant Commerce Clause").

10. 501 U.S. 452, 473 (1991) (holding that a state's mandatory age for retirement for certain judges prevailed over a claim that such a requirement violated the federal Age Discrimination in Employment Act).

11. 505 U.S. 144, 188 (1992) (holding, *inter alia*, that the United States may not "commandeer" states to solve problems related to the disposal of nuclear waste).

12. 514 U.S. 549, 561 (1995) (striking down the Gun Free School Zones Act of 1990 on a narrow reading of Congress's commerce power).

13. *See* Board of Tr. of Univ. of Ala. v. Garrett, 531 U.S. 356, 374 (2001) (holding that the Americans with Disabilities Act unconstitutionally abrogated the immunity of states); United States v. Morrison, 529 U.S. 598, 627 (2000) (holding the Violence Against Women Act to be an unconstitutional intrusion into the province of the states); Kimel v. Florida Bd. of Regents, 528 U.S. 62, 91 (2000) (holding that the United States may not subject states to the jurisdiction of state or federal courts for violating federal statute prohibiting discrimination against the disabled); Alden v. Maine, 527 U.S. 706, 759-60 (1999) (holding that the United States may not subject states to the jurisdiction of state or federal courts for violating federal statute mandating the payment of overtime wages); Florida Prepaid Postsecondary Educ. Expense Bd. v. College Sav. Bank, 527 U.S. 627, 647-48 (1999) (holding the Patent Infringement Remedy Act unconstitutional); *see also* College Sav. Bank v. Florida Prepaid Postsecondary Educ. Expense Bd., 527 U.S. 666, 691 (1999) (holding that the United States may not subject states to the jurisdiction of state or federal courts, in a case involving claims that the state had appropriated for its own use the trademarked or copyrighted material of private citizens); Printz v. United States, 521 U.S. 898, 935 (1997) (holding that the United States may not "commandeer" states to conduct background checks on purchasers of firearms); Seminole Tribe of Fla. v. Florida, 517 U.S. 44, 75-76 (1996) (holding that Congress's commerce power could not justify abrogation of states' sovereign immunity).

14. 535 U.S. 743, 760 (2002) (holding that the United States may not subject states to the jurisdiction of an administrative agency or of the federal courts for violation of Shipping Act of 1984).

15. *Seminole Tribe*, 517 U.S. at 72 (overruling *Pennsylvania v. Union Gas Co.*, 491 U.S. 1, 22-23 (1989), which had upheld, under the Commerce Clause, a federal environmental statute permitting suits for damages against states).

of dual sovereignty.[16] The rest were more coy. To be sure, there have been a few "outliers," decisions that depart from the states-rights mold.[17] But the general tenor of the Court's recent decisions, taken as a whole, is that states' reserved powers and immunity are substantial impediments to congressional policy and national enforcement.

Political scientists of a behaviorist bent might smugly point out that the critical shift in doctrine occurred after a notable change in the composition of the Court.[18] This observation, in turn, might lend credence to the skeptical position that the Court's jurisprudence of federalism is explained less by law than by political ideology.[19] As I read him, Killenbeck is

16. *Federal Maritime Comm'n*, 535 U.S. at 751 ("Dual sovereignty is a defining feature of our Nation's constitutional blueprint."). In the early years of the republic, dual sovereignty was an important part of the jurisprudence of Roger Brooke Taney. *See, e.g.*, Scott v. Sanford, 60 U.S. 393, 401-03, 434-38 (1856); *see also* THE OXFORD COMPANION TO THE SUPREME COURT, *infra* note 72, at 857-59. Dual sovereignty posited that nation and states were essentially co-equal sovereigns. *See, e.g.*, *Scott*, 60 U.S. at 438-41. The aim of the doctrine was to expand the realm of authority in states to regulate commercial matters beyond the realm permitted in John Marshall's nationalist jurisprudence. The consequence was to carve out a politically significant role for the Court as referee between the two sovereigns. By the late 19th century, the doctrine permitted the Court to strike down legislation of both nation and states that impinged on interests of capital. The doctrine went into decline in the late 1930s. *See* WALTER F. MURPHY ET AL., AMERICAN CONSTITUTIONAL INTERPRETATION 517-22 (2d ed. 1995) (providing a brief, but useful, discussion).

17. *See* Pierce County v. Guillen, 537 U.S. 129, 147 (2003) (upholding 23 U.S.C. § 409 (2002) under Congress's commerce power and declaring that certain reports, surveys, etc., that were compiled by states for the purpose of procuring federal funds for highway safety, "shall not be subject to discovery or admitted into evidence in a Federal or State court proceeding or considered for any other purpose in any action for damages arising from any occurrence at a location mentioned or addressed in such reports, surveys, [etc]") (quoting 23 U.S.C. § 409)); *see also* Nevada Dept. of Human Res. v. Hibbs, 123 S. Ct. 1972, 1976 (2003) (upholding provision of the Family and Medical Leave Act of 1993 authorizing private claims for damages against a state); Geier v. American Honda Motor Co., Inc., 529 U.S. 861, 886 (2000) (upholding federal preemption of state law); Jones v. United States, 529 U.S. 848, 859 (2000) (upholding federal arson statute); Idaho v. Coeur d'Alene Tribe of Idaho, 521 U.S. 261 (1997) (affirming doctrine of *Ex Parte Young*, 209 U.S. 123, 146 (1908) which permitted suits in federal court for declaratory and injunctive relief against individual state officials); United States Term Limits v. Thornton, 514 U.S. 779, 837 (1995) (striking down a state's imposition of term limits on candidates for Congress).

18. During Ronald Reagan's tenure as President, Justice Rehnquist became Chief Justice and Justices O'Connor, Scalia, and Kennedy were appointed to the Court. George H. W. Bush appointed Justice Thomas. These are the five Justices who have manufactured the shift in doctrine.

19. *See* JEFFREY A. SEGAL & HAROLD J. SPAETH, THE SUPREME COURT & THE

sympathetic to such a suggestion. Hence, his denomination of the Chief Justice and Justices O'Connor, Scalia, Kennedy, and Thomas as the "Federalism Five" and his musing about "result-oriented" jurisprudence.[20] But ideological motive *per se* is not Killenbeck's primary concern.

Instead he worries that decisions expressive of the "New Federalism," as proponents have called it, violate three basic norms of what I shall call "constitutional legality." First, the decisions deviate from prior decisions, violating the norm of *stare decisis*. Second, they are inconsistent with one another, violating the norm of rational coherence (or what Ronald Dworkin has called "articulate consistency"[21]). Third, they violate the Constitution's substantive vision—more specifically, its structural commitment. Among these three, for Killenbeck, the third is most important.

But what is the Constitution's structural commitment? How do we know? And what norms follow from it? To answer these questions, Killenbeck says we should begin at the beginning. The founders of the American constitutional order were pragmatists who sought workable solutions to serious problems. The problems grew out of the deficiency—Alexander Hamilton called it "the imbecility,"[22] Killenbeck calls it the "chaos"—of the Articles of Confederation, under which states had primacy, and the national government, such as it was, was virtually powerless to deal with basic national needs. The "founding generation," as Killenbeck characterizes it, perceived the states to be part of the problem, in that they impeded coordinated solutions. What was required was a national government, both powerful and efficient. The makers of the Constitution, therefore, radically altered the character and content of institutional relations. In matters of national import, enumerated in the constitutional text, national policy was now to be supreme, and national institutions were to have "plenary" authority to enforce it.[23] In addition to meeting critical needs,

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ATTITUDINAL MODEL REVISITED (2002).

20. *See* Killenbeck, *supra* note 2, at 3.

21. RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 88 (1977).

22. THE FEDERALIST NO. 15 (Alexander Hamilton).

23. The use of "plenary" in this context can cause confusion, as it has been commonplace to describe the reserved powers of states as plenary. That is, states' powers extend to all regulable aspects of human behavior, to promote collective interests in health,

this arrangement would consolidate union and promote a happy national existence.

Killenbeck argues that authority to enforce national norms necessarily implicated the use of judicial power. This power extended to suits by private parties against states, as authorized by national law. The ostensible sovereignty of states would not bar such actions. We know this, he says, from several sets of sources. One is textual. Article VI's Supremacy Clause was an obvious clue. More subtly, Article III extended the national judicial power to controversies "between a State and citizens of another State" and to those "between a State . . . and foreign States, Citizens or Subjects." Article III, moreover, authorized the Supreme Court to exercise original jurisdiction in cases "in which a State shall be a Party." These sources buttressed the notion of an expansive national power with the suggestion of a restricted (perhaps non-existent) immunity of states. To prop up this suggestion, Killenbeck returns to the founders and their world.

At the time of the founding, the British notion of sovereign immunity, accurately restated by Blackstone,[24] was essentially feudal and statist: the jurisdiction of courts did not run against the monarch.[25] This conception had at least two implications in the parts of British North America that would become the United States. One was that, if the monarch was sovereign, the

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safety, welfare, or morals. Killenbeck uses the term merely to recapitulate a doctrine of national power that grows out of *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824): that the nation's power was confined to enumerated objects, like the power to regulate commerce among the several states, but was supreme and comprehensive within its sphere. *Id.* at 46; *see also* United States v. Darby, 312 U.S. 100, 115 (1941) (referring to Congress's power over commerce as "plenary"); Hoke v. United States, 227 U.S. 308, 323 (1913) (upholding the White Slave Act, under the Commerce Clause, which delegated a "power . . . complete in itself"); Hipolite Egg Co. v. United States, 220 U.S. 45, 57 (1911) (upholding provisions of the Pure Food and Drug Act of 1906 as a regulation of health, within the ambit of the Commerce Clause); Champion v. Ames, 188 U.S. 321, 363 (1903) (upholding prohibition of the importation, mailing, or interstate transportation of lottery tickets as an exercise of Congress's power to regulate commerce, though the purpose of the regulation was moral). *But see Lopez*, 514 U.S. at 566 (noting that the Constitution "withhold[s] from Congress a plenary police power").

24. 1 WILLIAM BLACKSTONE, COMMENTARIES *49, *230-70 (specifying attributes of the "royal dignity" of the king).

25. *Id.* at *232. I use the word "statist" in this context to refer to the governmental institutions of a nation-state, not to states as local units of government.

colonies themselves were not.[26] This meant, of course, that they could not claim immunity as sovereigns. The other implication derived from the feudal origin and statist character of Blackstone's notion of sovereignty. Despite the kinship between the British and emerging American forms of government, a statist conception of sovereignty was inappropriate to a constitutionalist polity whose authority resided ultimately in the people.[27] In short, sovereignty in government—even in local governments possessing rudimentary democratic processes—was a categorical error in the new American order.[28]

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26. On the notion that the colonies lacked sovereignty, Joseph Story sometimes acknowledged that the historical record was not without its complications. He conceded, for example, that "each [colony], in a limited sense, was sovereign within its own territory." JOSEPH STORY, 1 COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 177 (1833). Where this characterization held, it tended to do so with respect to matters of internal governance, not with respect to relations among colonies or with other nations. *Id.* In any event, the presumption was that the colonies were neither "parcel of the realm of Great Britain" nor independent, but "dependencies of the British crown." *Id.* § 175. "Hence, the attributes of sovereignty, perfection, perpetuity, and irresponsibility, which were inherent in the political capacity of the king, belonged to him in all the territories subject to the crown." *Id.* § 184. Again, however, the record is not straightforward. Thus, when Professor Killenbeck quotes Story for the proposition that "antecedent to the Declaration of Independence, none of the colonies were, or pretended to be sovereign states," it is worth noting that Story himself did not frame the proposition in such stark terms. Killenbeck, *supra* note 2, at 25. He said merely that the colonies were not sovereign states, in the sense, in which the term "'sovereign' is sometimes applied to states." STORY, *supra*, § 207. That is, the colonies lacked sovereignty "in its largest sense"—in the sense of possessing "supreme, absolute, uncontrollable power." *Id.* But the implication is that they possessed sovereignty in subtle, but limited ways.

27. By "constitutionalism" I have in mind an enterprise in which "people . . . self-consciously attempt . . . to conceive the design for a new political world . . . to embody that design in some sort of text, and . . . to implement it in the world." MARK E. BRANDON, FREE IN THE WORLD: AMERICAN SLAVERY & CONSTITUTIONAL FAILURE 10 (1998) [hereinafter BRANDON, FREE IN THE WORLD]. Such an enterprise entails at least the following:

> (1) institutions authorized by and accountable to the people (both in the making of the order and the regular operation of government); (2) some notion of limited government (whether by the designation of purposes for governmental action, the specification of rights, or the allocation of authority among institutions); and (3) rule of law (which connotes the regularization of processes by which public norms are made and applied).

Mark E. Brandon, *War and American Constitutional Order*, 56 VAND. L. REV. 1815 (2003).

28. At its inception in the United States, this constitutionalist conception of popular sovereignty had less to do with a concern for "rule of law"—i.e., for institutions of government subject to and limited by law—than with popular "political" control of those institutions. This control extended to the authority to create and dissolve government itself.

Neither of these implications is to suggest that the states became irrelevant. They were preserved, says Killenbeck, but they were demoted, for the Constitution authorized a dynamic political system with a "superior sovereign" at the head.[29] The Court in *Chisholm v. Georgia*,[30] he argues, properly understood these implications. The Eleventh Amendment, ratified in 1795, departed from them in "suits . . . commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State."[31] This was a limited departure, confined to the facts of *Chisholm*. In *Hans v. Louisiana*,[32] however, the Court read into the Amendment a general immunity from suits, including those brought by a state's own citizens.[33] Killenbeck notes that *Hans* was the final installment in a series of cases involving not the majestic dignity of a sovereign but crude attempts by states to avoid paying their just debts. He argues that the current Court is not only repeating the error of *Hans*, but compounding it by extending the holding to cases in which Congress has authorized the cause of action. This extension, he says, goes far beyond the framers' understanding of the proper allocation of institutional authority.

What should the Court be doing in cases in which states claim exemption or immunity from congressional enactments? The basic contours of Killenbeck's answer to this question are clear. First, the Court should give effect to the full range of national powers. This includes enforcing Congress's enactments pursuant to its power to regulate commerce. Killenbeck argues that one controversial application of that power—*Wickard v. Filburn*[34]—was correctly decided. Although the founders in their own time could not have anticipated present uses of this power (or others), says Killenbeck, they might well approve of

29. William A. Fletcher, *The Diversity Explanation of the Eleventh Amendment: A Reply to Critics*, 56 U. CHI. L. REV. 1261, 1297 (1989).

30. 2 U.S. (2 Dall.) 419 (1793).

31. U.S. CONST. amend XI.

32. 134 U.S. 1 (1890).

33. *Id.* at 15.

34. 317 U.S. 111 (1942) (upholding the Agricultural Adjustment Act of 1938 as a valid regulation of interstate commerce, even when applied to a farmer who grew and consumed wheat on his own farm, because the economy-wide effect of home consumption practices would be to reduce demand for wheat and thus lower its interstate price).

those uses if they could see today's conditions.[35] The founders would appreciate the need to understand their system in light of the nation's experience, which has transformed the role of the national government (and properly so, says Killenbeck).

Second, however, this does not mean the Court should defer to Congress's invocations of constitutional authority for its enactments, at least not when there is a colorable countervailing interest or authority in the states. Thus, the hyper-deferential version of "rational-basis" review is inappropriate.[36]

Third, the Court should employ a heightened (but not strict) standard of review, akin to a standard sometimes invoked in cases involving challenges to decisions or policies of administrative agencies: the "hard look." The inquiry implied by this standard, says Killenbeck, is not into the substantive fit between enactment and ostensible authority. It is instead an examination of the extent to which Congress duly deliberated on the evidence supporting its enactment.[37] This standard is consistent with James Madison's desire for government that is not only effective but also deliberative.[38] The Court, then, should ask whether Congress acted reasonably.[39] Alternatively, the Court should ask whether the statute in question was genuinely "necessary and proper." That is, was the subject of the statute one which the states could not solve, one in which

35. This interpretive strategy has an ancient source. *See* ARISTOTLE, NICOMACHEAN ETHICS (Horace Rackham trans., Harvard Univ. Press 1947) (1934); *see also* BLACKSTONE, *supra* note 24, at *61.

36. *See, e.g.*, Williamson v. Lee Optical of Okla., 348 U.S. 483 (1955) (upholding, under very deferential rational basis review, an Oklahoma statute prohibiting anyone other than licensed optometrists or ophthalmologists from installing lenses in or replacing eyeglass frames).

37. For a parallel proposal concerning judicial evaluation of legislative fact-finding, see Phillip P. Frickey, *The Fool on the Hill: Congressional Findings, Constitutional Adjudication, and* United States v. Lopez, 46 CASE W. RES. L. REV. 695 (1996).

38. The notion of deliberation lies behind Madison's justification for the structure of government in the Constitution. See, for example, *The Federalist No.* 10, in which Madison argues that an aim of delegating legislative power to "a small number of citizens elected by the rest" is "to refine and enlarge the public views, by passing them through the medium of a chosen body of citizens, whose wisdom may best discern the true interest of their country, and whose patriotism and love of justice, will be least likely to sacrifice it to temporary or partial considerations." For other examples of Madison's commitment to deliberation, see *The Federalist Nos.* 55, 58, 63. For a parallel commitment from Alexander Hamilton, see *The Federalist No.* 71.

39. Again, as I read the argument, reasonableness is the fit between policy and empirical findings, not essentially that between policy and substantive purpose.

uniform rules or standards are desirable, or one in which there is a risk that states would defy an appropriate national norm?

Conscientiously applied, says Killenbeck, this standard can ensure that congressional policy both reflects the people's will and comports with the limits entailed in constitutional language. Moreover, it can supply a foundation for critically evaluating the Court's recent decisions. Hence, the Court was correct to strike down the Gun-Free School Zones Act in *Lopez*; but it might have erred in striking down the Violence Against Women Act in *United States v. Morrison*.[40]

II. CRITICAL OBSERVATIONS

There might be reasons to quibble with the first two of Killenbeck's criticisms of the Court's jurisprudence of federalism: that it violates *stare decisis* and that it is incoherent. With respect to the first, it has long been acknowledged that *stare decisis* exerts a less powerful pull in constitutional adjudication than it does in the common law.[41] This acknowledgment may be justified both by the importance of constitutional judgments (which implies the desirability of getting them "right") and by the difficulty of altering the Court's judgments in the political processes for amending the Constitution.

With respect to the second, we might note that law's coherence is continually in a condition of flux. This is partly a function of the dynamic social ground for the creation of legal norms. As society changes, the rules of law—even those employed by judges—must adapt if they are to continue to matter. Another reason for law's continuing flux is built into the sociology of legal process. Less cryptically, lawyers are advocates. They are paid, sometimes handsomely, to argue for a reading of precedents that comports with their clients' needs. Nor are judges—who are lawyers after all—immune to this pressure, though they doubtless experience it differently. As Cardozo recognized, most judges have deep commitments as to policy and value; and, being mortal, they are frequently, sometimes imperceptibly, impelled to use law to promote those

40. 529 U.S. 598.

41. *See, e.g.*, 20 AM. JUR. 2D § 161 (2d ed. 2003).

aims and values.[42]

How is it that lawyers on opposing sides can appeal to identical precedents to support their positions? How is it that judges of different temperaments or with different aims or values can equally claim to rely on rules laid down to reach divergent conclusions about the disposition of a single case? An answer lies in what Karl Llewellyn identified as kindred methods of reading prior decisions.[43] Simply put, one may read a precedent strictly or narrowly, confining the holding of a case closely to its facts; or one may read it liberally or broadly, giving the holding the fullest potential application to a wide range of factual scenarios. There is nothing controversial in the presence of choice between these two methods. They are standard tools of the profession, and mastering them is an early piece of the business of first-year law students. Thus, the Court is not susceptible to criticism when it employs the tools to push constitutional doctrine down unexpected paths.

Having said this, we should concede to Killenbeck that the "Federalism Five" are doing more than the standard distinguishing of prior decisions. For one thing, it is difficult to square *Nevada Department of Human Resources v. Hibbs*[44] with the Court's other recent decisions on states' sovereign immunity.[45] They are performing, in more radical fashion, like prototypal Legal Realists. Hence, Killenbeck is correct that the old-time religion of John Marshall in *M'Culloch v. Maryland*,[46] *Gibbons v. Ogden*,[47] and *Willson v. Black-Bird Creek Marsh Co.*[48] is not the faith of the Federalism Five. They are jettisoning old rules and adopting new ones. They are not discovering law, in either the classical sense of Langdell[49] or the

42. BENJAMIN N. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 9-12 (1921).

43. KARL N. LLEWELLYN, THE BRAMBLE BUSH: ON OUR LAW & ITS STUDY (4th prtg. 1973).

44. 538 U.S. 721 (2003).

45. *See, e.g.*, Board of Tr. of Univ. of Ala. v. Garrett, 531 U.S. 356 (2001); Kimel v. Florida Bd. of Regents, 528 U.S. 62 (2000); Alden v. Maine, 527 U.S. 706 (1999); Seminole Tribe of Fla. v. Florida, 517 U.S. 44 (1996).

46. 17 U.S. (4 Wheat.) 316 (1819).

47. 22 U.S. (9 Wheat.) 1 (1824).

48. 27 U.S. (2 Pet.) 245 (1829).

49. *See, e.g.*, CHRISTOPHER COLUMBUS LANGDELL, A SELECTION OF CASES ON THE LAW OF CONTRACTS, WITH REFERENCES & CITATIONS v-vii (1870).

revisionist sense of Llewellyn;[50] they are, in short, making it. Again, this strategy is permissible, though there are institutional risks in following it too frequently. But the bottom line is this: judgment is ultimately one of value or policy, the contest for which is unavoidably "political," writ small and writ large. Hence, while Justice Scalia (in another context) may criticize others for engaging in a *kulturkampf*,[51] he himself is engaged in a similar struggle. As he recognizes, the prize of this struggle is the soul of constitutional law, which is, among other things, an expression of social value. It is at the level of value that Killenbeck's third criticism resonates: that the Federalism Five are substantively mistaken. It is to this claim that I devote the remainder of my attention.

A. Conceptions of the Founding

Some scholars denigrate preoccupation with the constitutional founding. They disparage it as, at best, intellectually misguided and, at worst, a kind of fetishism bordering on necrophilia.[52] I understand these criticisms. In fact, I too have criticized devotion to originalism as a dominant or the exclusive method for interpreting the Constitution.[53] Nonetheless, the founding of a constitutionalist order does matter. It matters not because it is an extraordinary manifestation of divine intercession in human affairs.[54] Nor does it matter simply because (or to the extent that) it cranks the constitutional engine, whether or not it is "a machine that would go of itself."[55] A founding is significant for a constitutionalist order because it is an event that must be justified.

Why? An answer, which I have belabored elsewhere,[56] begins with the observation that a constitutionalist order

50. *See generally supra* note 43.

51. *See* Romer v. Evans, 517 U.S. 620, 636 (1996) (Scalia, J., dissenting).

52. *See, e.g.*, Barak Cohen, *Empowering Constitutionalism with Text from an Israeli Perspective*, 18 AM. U. INT'L L. REV. 585, 605 n.87 (2003).

53. BRANDON, FREE IN THE WORLD, *supra* note 27, at 22-28.

54. *See* CATHERINE DRINKER BOWEN, MIRACLE AT PHILADELPHIA: THE STORY OF THE CONSTITUTIONAL CONVENTION, MAY TO SEPTEMBER 1787 (1966).

55. *See* MICHAEL KAMMEN, A MACHINE THAT WOULD GO OF ITSELF: THE CONSTITUTION IN AMERICAN CULTURE (1986) (using the metaphor of the machine to describe the United States Constitution).

56. BRANDON, FREE IN THE WORLD, *supra* note 27, at 186-89.

purports to govern not through "accident and force" but through "reflection and choice."[57] This presumption requires not only that the *actions* of such an order be justified in a way that permits or presupposes reflection and choice, but that its very *existence* also be justified. The founding, then, is not a brutish fact of the matter. It is an event that needs to be explained and justified. This is so because the authority of the order depends upon it. And, as we shall see, the characterization of the founding can have implications for the operation of political institutions. These considerations help explain the continuing preoccupation with stories of the founding.[58] The stories matter to the order, not only to get it up and running but also to keep it running. Consequently, founding stories matter also to people who want to use the order to pursue or prevent certain policies.

One difficulty is that, just as the founding is not a given, neither is any specific view of the founding. Hence, the story one might tell about it—its formulation, adoption, revision, and rejection—is contestable. On this point, I part company with Professor Killenbeck.

He argues for a particular account—a particularly federalist account—of the American constitutional founding. That is, the purpose for the Constitution was to create a vigorous, effective national government, with broad authority and with powers sufficient to execute that authority. Alexander Hamilton was fond of this explanation—especially in matters military and economic—and he had no discernible qualms about speaking of states as mere political subdivisions of the nation.[59] Without embracing Hamilton's hyper-nationalism, John Marshall explained how the procedure for ratifying the Constitution presupposed a nationalist purpose. The Constitution was authorized by the people of the nation. In authorizing the new

57. THE FEDERALIST NO. 1 (Alexander Hamilton).

58. "Stories" here need not imply "fictions," though they might (and often) do so. Suffice it to say that we might think of founding stories as factual accounts, as mythic fictions, or as some combination of the two.

59. JAMES MADISON, NOTES OF DEBATES IN THE FEDERAL CONVENTION OF 1787 129-39 (1987) (containing Hamilton's remarks in the Constitutional Convention); THE FEDERALIST NO. 27 (Alexander Hamilton); *cf.* Printz v. United States, 521 U.S. 898, 971 (1997) (Souter, J. dissenting) (arguing that Hamilton's position in *The Federalist*, No. 27 permits the United States to harness the judicial power of the states to enforce national law).

order, they acted *in* states, but they did not act *for* states. The people acted for themselves as members of a national union. "The government of Union . . . is, emphatically and truly, a government of the people. [I]t emanates from them. Its powers are granted by them, and are to be exercised directly on them, and for their benefit."[60]

This may be an appealing account—especially for many today, in the wake of the Civil War and the New Deal—and it doubtless captured the sense of many who framed or ratified the Constitution or who lived at the time of the founding. But it was not the only way to understand the character of the actions that made the Constitution. During the debates over ratification, James Madison invoked a countervailing characterization, which presumed that the authority of the Constitution (and hence of the national government), derived from "the people, not as individuals composing one entire nation, but as composing the distinct and independent States to which they respectively belong. It is to be the assent and ratification of the several States."[61] Madison himself was conflicted over the implications of this account. He was sometimes a committed localist and sometimes a nationalist. For our purposes, however, the bottom line is this: From the beginning, the characterization of the Constitution's authority was contested.

Of course, the Constitution itself was also contested. The advocates we know as the Antifederalists opposed it.[62] Some of them did so because they feared it was too strongly nationalist as Hamilton and Marshall described it. The federalist description of the Constitution thus became a reason for the Antifederalists to oppose it. In the years after ratification, however, the localists did not spurn the Constitution. For one thing, it would have been quixotic to do so, given its rapid entrenchment in the various polities of the United States. For another, many localists perceived that the Constitution brought genuine benefits. For still another, some saw that it was possible to embrace the Constitution as an instrument for preserving a significant degree

60. *M'Culloch*, 17 U.S. (4 Wheat.) at 404-05.

61. THE FEDERALIST NO. 39 (James Madison).

62. *See generally* HERBERT J. STORING, WHAT THE ANTI-FEDERALISTS WERE FOR (1981) (providing a systematic treatment of the views of those who opposed the adoption of the Constitution).

of localism. They could view the Constitution in this light in part because of the Tenth Amendment, which was ratified in 1791, and in part because Madison's localist account of the Constitution's authority was available. This conversion of Antifederalists (and their political descendants), from opponents of the Constitution to faithful adherents to it, laid the foundation for a contest over the basic meaning and institutional structure of the order. The contest continues today to be the source of a dynamic tension in the order. There is reason to think that Madison would not bemoan this circumstance. He argued that this sort of conflict—"horizontal" competition among institutions of the national government and the "vertical" division of authority between the nation and states—was crucial to the proper operation of the constitutional order.[63]

Like them or not, therefore, the Federalist Five have a legitimate claim as participants in that contest. If they are wrong, it is not because of a mistaken view of the founding. On the other hand, if they are right, it is not because they have *the* correct account of the founding; for there is more than one possible correct account. And the contest between (or among) them is a matter of constitutional politics.

B. The Constitutional Politics of Nation and States

Killenbeck would oppose the notion that there is more than one possible correct view of the constitutional creation, but he might embrace a weakened version of my other observations. He can claim, for example, that his founders are not stuck in a mythic or long passed past, but have adapted (or are adaptable) as the order itself has changed over the centuries. Hence his urging that we bring the founders forward to our own time to see whether they would approve of present nationalist policies. He might argue that, as Justice Holmes put it, the founders "created an organism;" they "called into life a being the development of which could not have been foreseen completely by the most gifted of its begetters."[64]

But what has been the character of that "development?"[65]

63. THE FEDERALIST NO. 51 (James Madison).

64. Missouri v. Holland, 252 U.S. 416, 433 (1920).

65. *Id.* I use Holmes's term, without adopting it as my own, for it presumes a theme

Holmes posited that it was a gradual trajectory toward nationhood.[66] This position may have been informed by his having fought on the winning, nationalist side of the Civil War. It might also have stemmed from a skeptical or cosmopolitan aversion to provincialism. Or it might have been traceable to an Hegelian sense that history's unfolding is teleological—not only dynamic, but progressive; the thrust is toward universality, of which the nation-state was the presumptive embodiment.[67] In fact, however, Holmes was sometimes suspicious of the teleological view,[68] and he was right to be. History frequently proceeds in fits and starts. Even if it does not boil down to Holmes's youthful fancy of rule of the stronger, neither does it invariably follow a clean, linear, and well-lighted path. The end is not consistently clear (in part because the beginning is not). Such is the nature of political conflict. And such has been the nature of American constitutional experience. I cannot recount that experience in detail here. Instead, I shall briefly refer to the general contours of three periods in which themes of federalism were distinctly apparent. The periods and themes are familiar to anyone acquainted with American constitutional history: the antebellum period, the regime after the Civil War, and the New Deal.

The battle lines between nationalism and localism were

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of progress that I think is frequently empirically unjustified even if it is normatively attractive.

66. *Id.*

67. *See, e.g.*, LOUIS MENAND, THE METAPHYSICAL CLUB: A STORY OF IDEAS IN AMERICA 263-68 (2001).

68. In his essay on "Natural Law," for example, Holmes observed:

> I used to say, when I was young, that truth was the majority vote of that nation that could lick all the others. Certainly we may expect that the received opinion about the present war [World War I] will depend a good deal upon which side wins (I hope with all my soul it will be mine).... I love granite rocks and barberry bushes, no doubt because with them were my earliest joys that reach back through the past eternity of my life. But while one's experience thus makes certain preferences dogmatic for oneself, recognition of how they came to be so leaves one able to see that others, poor souls, may be equally dogmatic about something else. And this again means scepticism. Not that one's belief or love does not remain. Not that we would not fight and die for it if important—we all, whether we know it or not, are fighting to make the kind of world that we should like—but that we have learned to recognize that others will fight and die to make a different world, with equal sincerity or belief.... [H]is grounds are just as good as ours.

Oliver Wendell Holmes, Jr., *Natural Law*, 32 HARV. L. REV. 40, 40-41 (1918).

visible in the earliest years of the republic. In fact, Chief Justice Marshall's jurisprudence embodied the tension. Although he was a committed nationalist on most matters of commerce,[69] he was localist in his understanding of the reach of the Bill of Rights[70] and in his approach to slavery.[71] His successor, Roger Brooke Taney, however, tended to be localist on matters of commerce (except when a national policy benefited interests of agriculture),[72] but he became a nationalist where the protection of slavery was concerned.[73]

The Civil War and the post-War amendments would seem to have struck the balance decisively in favor of the nation. The Supreme Court, however, pushed the genie of nationhood back into the constitutional bottle. In the *Slaughter-House Cases*,[74] for example, the Court denied a constitutional challenge to a local monopoly.[75] In the *Civil Rights Cases*,[76] the Court circumscribed Congress's authority to proscribe certain violations of civil rights.[77] The one area in which the Court was receptive to a nationalist approach was protection for capital. The Court not only nationalized this protection but entrenched it constitutionally against many forms of regulation by any level of government.[78] Among the doctrinal devices the Court employed to this end were the Due Process and Contracts Clauses (against regulation by states) and the Tenth Amendment and dual sovereignty (against regulation by Congress).

The event that eventually shook the Court from its servility to capital was an economic crash, the Great Depression, which threatened the survival of the order. This collapse was so broad and deep that neither capital alone nor the intervention of states seemed adequate to meet it. Even so, the Court waited out the Depression for eight years before disavowing its anti-

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69. *See, e.g., Gibbons*, 22 U.S. (9 Wheat.) at 1; *M'Culloch*, 17 U.S. (4 Wheat.) at 316.

70. *See* Barron v. Mayor of Baltimore, 32 U.S. (7 Pet.) 243 (1833).

71. *See generally* BRANDON, FREE IN THE WORLD, *supra* note 27, at 50-55.

72. *See generally* THE OXFORD COMPANION TO THE SUPREME COURT 857-59 (Kermit L. Hall et. al. eds. 1992).

73. *See* BRANDON, FREE IN THE WORLD, *supra* note 27, at 99-100, 109-115.

74. 83 U.S. (16 Wall.) 36 (1872).

75. *Id.* at 60, 81.

76. 109 U.S. 3 (1883).

77. *Id.* at 25.

78. The cases of and secondary literature on this period are massive. *See, e.g.*, Adair v. United States, 208 U.S. 161 (1908); Lochner v. New York, 198 U.S. 45 (1905).

government jurisprudence.[79] When it did switch, why did it do so? Doubtless, the answer was at least partly the gravitational pull of constitutional politics. Franklin Roosevelt's administration prodded Congress to enact (and to re-enact) national legislation whose purpose was to address the crisis. When he failed to obtain an opportunity to appoint a new Justice during his first term, Roosevelt pursued a plan to "pack" the Court.[80] Despite popular conception, the plan was not responsible for turning the tide.[81] But it was emblematic of a political environment that made the Court's anti-democratic positions increasingly untenable—at least for an institution whose members might want to continue to be respected.

The idea that one might influence the composition of the Court by altering the number of Justices was not novel. Lincoln had achieved this policy, as had Jackson before him. But underlying Roosevelt's strategy was something new. His political program presupposed two constitutional norms: (1) a capacious view of the national authority with energy and authority to regulate a wide range of human endeavors; and (2) an insistence that national institutions cooperate in pursuing national goals and implementing national policy. The first norm rested on Marshall's familiar nationalism. The second, however, made Roosevelt's position an innovation in American constitutional thought.

As we saw briefly above, James Madison posited that, under the Constitution, the preservation of liberty depended on the independence of national institutions, which in turn depended upon competition among them. There is reason to believe that Madison's conception of liberty in this context was a collective liberty of (local) self-government instead of a more modern, individualist liberty. I shall not try to defend this reading here. For whichever version he intended, institutional competition was the key to conserving it: "Ambition must be made to counteract ambition. The interest of the man must be

79. *See* NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 49 (1937) (upholding the National Labor Relations Act).

80. FRANKLIN D. ROOSEVELT, ADDRESS BY THE PRESIDENT OF THE UNITED STATES [ON REORGANIZING THE FEDERAL JUDICIARY] (Mar. 9, 1937), S. REP. No. 711, app. D at 41-45 (1937).

81. *See* MURPHY ET AL., *supra* note 16, at 1078-79.

connected with the constitutional rights of the place."[82] And the upshot of this arrangement was not to promote efficient government; on the contrary, it was to erect barriers to ensure inefficiency.

Roosevelt's political program exploited Madison's conception of "opposite and rival interests" as a tactical matter in order to overturn it as a matter of principle.[83] The Court's acquiescence marked the victory of both planks of the New Deal: enhanced regulative authority in Congress and a diminished role for the Court in policing the constitutional limits to national legislation—at least with respect to social and economic policy.[84] During Roosevelt's tenure, the Court's repudiation of its pro-capitalist jurisprudence famously culminated in *Wickard v. Filburn*,[85] a decision that Killenbeck embraces. Initially, the Court's acquiescence was temporary, to deal with the economic emergency. When that crisis, however, merged seamlessly into world war, then into cold war, and later extended to civil rights and the Great Society, the foundation was laid for a continuous national power.

Killenbeck's critique of the Federalism Five is essentially a friendly revision of New-Deal constitutionalism. This is not to disparage the aims of the New Deal or of Killenbeck's thesis. It is merely to emphasize the congeniality of the two and consequently to make a point about the origins of his jurisprudence, which may owe less to the founders (or even one subset of founders) than to the exigencies of maintaining a nation-state in times of economic, military, and social crisis. This view of constitutional change is fine. In fact I think it is correct. I disagree, however, with what I take to be an implicit assumption of Killenbeck's account of change: that constitutional development works in only one direction. On the contrary, as the Court and nation have frequently demonstrated, history is not a one-way ratchet. Thus, if Roosevelt could reverse the founders on certain points, perhaps the New Deal too is subject to reversal (even interment). This, of course, is an aim

82. THE FEDERALIST NO. 51 (James Madison).

83. *Id.*

84. *See, e.g.*, United States v. Carolene Prods Co., 304 U.S. 144 (1938); West Coast Hotel v. Parish, 300 U.S. 379 (1937).

85. 317 U.S. 111 (1942).

of the Federalism Five.

C. The Role of the Court

Professor Killenbeck, in contrast, revises New-Deal constitutionalism to save it, not to bury it. His revision is to posit for adjudicating the constitutionality of national policy a new standard of review: the hard look. As noted above, this standard focuses more on the process by which legislation is enacted than on the substantive fit between policy and purpose. Also as noted, the hard look has found expression in recent cases in administrative law. But the general ground for a process-based approach to adjudication extends far beyond these decisions.

One of the earliest examples resides in a dissent in an early nineteenth-century case from Pennsylvania's supreme court. In *Eakin v. Raub*,[86] Justice Gibson urged that the courts of Pennsylvania lacked authority to adjudicate the substantive compatibility of the legislature's enactments with the state's constitution.[87] Such courts *did* possess authority, he claimed, to inquire into the "forms" of the Constitution—to ensure that the legislature complied with procedural prerequisites for enacting laws.[88] Was the law enacted by majorities in both houses and approved by the executive, or, if vetoed, overridden by super-majorities in both houses? If not, judges are not obliged to enforce it. If so, the enactment is binding on courts, regardless of its substance.

Killenbeck extends the procedural prerequisites beyond these textually grounded rules to encompass also an extra-textual standard: deliberation. There is no denying the value of deliberation. Evaluating the adequacy of process, moreover, is generally conceded to be within the competence of courts.[89] Notwithstanding these considerations, is this standard constitutionally appropriate in this context?

One possible objection is that it violates the Constitution's

86. 12 Serg. & Rawle 330 (Pa. 1825), *available at* 1825 WL 1913, at *1 (Apr. 16, 1825).

87. *Id.* at *15-16 (Gibson, J., dissenting).

88. *Id.* at *15-16, *20-21 (Gibson, J., dissenting).

89. *See* JOHN HART ELY, DEMOCRACY & DISTRUST: A THEORY OF JUDICIAL REVIEW 73-104 (1980).

criteria for legal validity. We might state the objection more concretely: The sole criteria for the validity of a legislative enactment are those expressly contained in the procedural rules of Article I.[90] There are three elements to this objection. They are that the constitutional criteria for the validity of an enactment (1) must appear expressly in the text of the Constitution, (2) must be rules and not standards, and (3) must be procedural and not substantive. These elements are partially independent from one another, but all are rooted in a particular theory of law: legal positivism (and a crude version of positivism at that). A comprehensive treatment and rebuttal of this objection are available but would take me far beyond the limited purpose for these remarks. I shall rest, therefore, on an unambitious observation. If the Court were to adopt any one of the elements as unequivocal requirements, it would have to abandon so many of its prior decisions that it would effectively have to rebuild its constitutional jurisprudence from the foundation. This, of course, is theoretically possible, but it is unlikely on terms that the Court would accept.

A second possible objection is that Killenbeck's standard provides insufficient protection against overreaching by Congress. In short, as long as Congress can build a substantial record establishing that it duly considers a particular phenomenon to be a national problem, it may enact virtually any policy it chooses. There is something to this worry. I suspect the only way to meet it is to impose a requirement not (only) of deliberation, but (also) of substantive consistency with Congress's authority. In short, we cannot avoid asking whether Congress's policy bears a reasonable relation to a congressional power enumerated in the Constitution. Killenbeck seems conflicted about this move. At times, he seems to acknowledge its relevance. At others, however, he seems skeptically inclined to think that talk about rational bases will inexorably entail a deferential standard too flimsy to protect against unauthorized actions by Congress. I think the skeptical worry unwarranted. It

90. Something of this crude version of positivism may lie beneath Judge Easterbrook's opinion in *United States v. Marshall*, 908 F.2d 1312 (7th Cir. 1990). "Although nothing in the legislative history suggests that Congress went through such a process of reasoning, it need not. Judges assess the validity of legislative decisions; we do not assign grades to legislative deliberations." *Id.* at 1325.

is possible, that is, to do serious analytical work with rational-basis review. It requires not only that the Court refuse to manufacture reasons or evidence, but also that it take seriously the need to establish a substantive rational connection between policy and power. Killenbeck hints that such substantive analysis could supplement the Court's inquiry into deliberation. I would make the substantive component more visible and less equivocal.

In fact, I would make it primary. The reason rests on a third objection that grows out of the second: As to acts of Congress, the standard is impractical. In light of the vicissitudes, purposes, procedures, and strategic opportunities of the legislative process, it will be difficult to construct workable criteria for specifying and applying the standard of deliberation. I am largely persuaded on this point by Jesse Choper's criticisms,[91] and I worry that Killenbeck defends inadequately against them. This is not to say that a defense is categorically unavailable. It is to say only that I do not presently see it.

I confess an ambivalent sympathy for a fourth objection, which partly cuts against the third. Even if evaluative criteria are available, the Court should refrain from using the standard. It is one thing to apply it to decisions of administrative agencies, which have an ambiguous and unexalted constitutional status. It is another to apply it to Congress, which is the primary seat of lawmaking power for the nation. For the Court to pick apart policies solely because they lack requisite deliberation seems insufficiently sensitive—dare I say it?—to the dignity of Congress. My ambivalence stems from my sense that corruption and imbecility frequently taint the electoral and legislative processes at the national level (for that matter, at all levels) of government. Conceding this taint, the upshot of the fourth objection would be that, in this context, the remedy should lie, for the most part, in hands other than the Court's.[92]

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91. *See* Jesse H. Choper, *Taming Congress's Power Under the Commerce Clause: What Does the Near Future Portend?*, 55 ARK. L. REV. 731 (2003).

92. "For the most part" presupposes, at a minimum, that basic institutions and practices of democracy are in place. Put differently, it presupposes that the channels for political change are open. *See* ELY, *supra* note 89, at 105-34.

D. "Sovereign" Immunity

I close happily on a note of partial agreement with Professor Killenbeck. He suggests that the notion of sovereign immunity is a categorical error as applied to state governments.[93] This is an important insight, for it suggests that the Court is doing battle against the very Constitution it professes to defend. Killenbeck emphasizes that the Court's present Eleventh-Amendment jurisprudence alters the order by upending national supremacy. As indicated above, there is no denying that the Court has essentially nullified John Marshall's conception of national power as capable of binding and constraining even states. But there are two other ways in which the Court has threatened constitutionalist values that are at least as fundamental as national supremacy. One is that the Court has relocated sovereignty from the people, who ostensibly created the order, to government, which is their creation. In a constitutionalist polity, if sovereignty is a sensible and workable notion, it must reside in people not in states (not even nation-states). This precept is so basic that ignoring it risks a fundamental alteration of the order.[94] The other is that it threatens to undermine a basic tenet of rule of law: Where there is a right there is a remedy, even when the wrong-doer is a government or a governmental official.[95]

There might be valid reasons for wanting to insulate government from certain sorts of legal actions. Among the reasons might be protecting the public fisc or preventing policies of governments from being picked apart by legal claims. These are cogent considerations of policy, and they might even implicate states' "dignity," in a weak sense of that word.[96] But

93. James Pfander has done interesting and suggestive work challenging the sovereign immunity of both states and the United States. *See, e.g.*, James E. Pfander, *Sovereign Immunity and the Right to Petition: Toward a First Amendment Right to Pursue Judicial Claims Against the Government*, 91 NW. U. L. REV. 899 (1997); James E. Pfander, *Waiver of Sovereign Immunity in the "Plan of the Convention,"* 1 GEO. J. L. & PUB. POL. 13 (2002); *see also* Erwin Chemerinsky, *Against Sovereign Immunity*, 53 STAN. L. REV. 1201 (2001).

94. *See* BRANDON, FREE IN THE WORLD, *supra* note 27, at 50-51.

95. *See* Marbury v. Madison, 5 U.S. (1 Cranch) 137, 162-63 (1803); *see also Alden*, 527 U.S. at 760-814 (Souter, J., dissenting).

96. By "dignity," I have in mind nothing more than a place of importance within the political order. This usage is distinct from the notion of "human dignity," which is

they have nothing to do with states' possessing sovereignty.

sometimes promoted as a constitutional value. *Compare* William J. Brennan, Jr., *The Constitution of the United States: Contemporary Ratification*, 27 S. TEX. L. REV. 433 (1985-1986), *with* Judith Resnik & Julie Chi-hye Suk, *Adding Insult to Injury: Questioning the Role of Dignity in Conceptions of Sovereignty*, 55 STAN. L. REV. 1921, 1960-62 (2003). And it is antagonistic to Blackstone's notion of royal prerogative. *See* BLACKSTONE, *supra* note 24, at *49, *230-70.