INFORMATION AND CONSTRUCTION OF LAW

> *It has cost me many a Sleepless Night to find out the most obnoxious Part of the proposed Plan.—And I have finally fixed upon the exclusive Legislation in the Ten Miles Square.*
>
> *And have not this supreme Legislature a Right to naturalize me there; whether I will or not?*
>
> *May not the sovereign of the Country, Grant exclusive Privilidges to all that are willing to be naturalized in that hallowed Spot?*

American patriot Samuel Osgood wrote these words in a letter to fellow revolutionary Samuel Adams in January, 1788,[1] reflecting a suspicion toward *any* national territory perhaps lost on contemporary observers. As one noted legal authority asked in 1899, "What extent of territory do the United States of America comprise? In order to answer this question intelligently, it is necessary to ascertain the meaning of the term 'United States.'"[2] The answer has never meant more.

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[1] Bernard Bailyn, *The Debate on the Constitution*, *Part One* 704 (1993).
[2] C.C. Langdell, *The Status of Our New Territories*, 12 Harv. L. Rev. 365, 365 (1899).

Today, the grave issue is whether our United States will become a consolidated government absolute in its jurisdiction, with the people exercising their rights and powers by its sufferance, or remain a union of states and a nation of people as intended by the framers.[3]

[3] James Madison's report of the "Debates in the Federal Convention of 1787." The compromise between the sovereignty of the states and the sovereignty of the people over all results in a "union of states" and a "nation of people." "This is the distilled essence of our republican form of government." *Harris v. Anderson*, 194 Kan. 302, 318 (Fatzer, J., dissenting) (1965). Madison's writings, especially his convention notes, are advised. Thomas Jefferson acknowledged to John Adams in 1815, "Do you know that there exists in manuscript the ablest work of this kind ever yet executed, of the debates of the constitutional convention of Philadelphia in 1788? The whole of every thing said and done there was taken down by Mr. Madison, with a labor and exactness beyond comprehension." 3 Max Farrand, *The Records of the Federal Convention of 1787* 421 (1911). "The affairs of the United States, he perhaps, has the most correct knowledge of, of any Man in the Union." (William Pierce: Character Sketches of Delegates to the Federal Convention). 3 *id*. at 94.

Abstract of American Law

God attends American jurisprudence as the source of our unalienable rights and is recognized as our Creator[4] by the "unanimous Declaration of the thirteen united States of America" in Congress, July 4, 1776.[5]

Armed revolution sustained their declaration, and the successful termination of the War of Independence proved them to be thirteen "Free and Independent States," each replete with the attributes of sovereignty, each with a people, a territory and government of its own, all together a "teeming nation of nations"[6] chartered under common law.

In addition, "when a new State is admitted into the Union, it is so admitted with all of the powers of sovereignty and jurisdiction which pertain to the original States…."[7] Thus, in legal contemplation, each one of America's fifty States is primarily "free, sovereign and independent" as conceded.[8] In this way "'Both the States and the United States existed before the Constitution[,]'"[9] when no part of the American governmental system was held in common by all of the people of the United States.

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[4] *God* is defined as "the creator, and the sovereign of the Universe." 1 Noah Webster, *An American Dictionary of the English Language* 93 (1828).

[5] "We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness." *The Declaration of Independence* para. 2 (U.S. 1776).

[6] Walt Whitman, *Leaves of Grass* iii (1855).

[7] *Coyle v. Oklahoma*, 221 U.S. 559, 573 (1911).

[8] Definitive Treaty of Peace, September 3, 1783, U.S.-Gr. Brit., T.S. No. 104, Article 1. Notice how Britain conceded all territorial rights to the United States -- namely, to each State.

[9] *New York v. United States*, 505 U.S. 144, 162 (1992) (quoting *Lane County v. Oregon*, 7 Wall. 71, 76 (1869)).

Conventional compromise amid perfect States or a perfect Nation resulted in a partial eclipse of State sovereignty, and a more perfect United States under the Constitution than under the existing Articles of Confederation:[10]

> In a word; the two extremes before us are a perfect separation & a perfect incorporation, of the 13 States. In the first case they would be independent nations subject to no law, but the law of nations. In the last, they would be mere counties of one entire republic, subject to one common law.[11]

The people engrafted federal jurisdiction on to their extant common-law States "in Order to form a more perfect Union," rather than to consolidate the Union into one government absolute in its jurisdiction.[12] After all, "the local or municipal authorities form distinct and independent portions of the supremacy…."[13]

"Our federalism" delimitates a *compound* republic, a system designed to divide government power and reserve the broad liberty jurisdiction to the people.[14] "For when the Revolution took place, the people of each state became themselves sovereign…."[15]

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[10] "We have seen that in the new government, as in the old, the general powers are limited…." *The Federalist* No. 40, at 251 (James Madison) (Clinton Rossiter ed., 1961).

[11] 1 Max Farrand, *The Records of the Federal Convention of 1787* 449 (James Madison) (1911).

[12] United States Const. pmbl.

[13] *The Federalist* No. 39, at 245 (James Madison) (Clinton Rossiter ed., 1961).

[14] *The Federalist* No. 51, at 323 (James Madison) (Clinton Rossiter ed., 1961).

[15] *Martin v. Waddell*, 41 U.S. 367, 410 (1842).

As an incidence of the sovereignty created when this country achieved its independence, "the prerogatives of the crown devolved upon the people of the States. And this power still remains with them, except so far as they have delegated a portion of it to the federal government."[16]

Any true survey of law comprehends its affinity for territory,[17] suggested by the very term "law of the land," and correlates the limited extent of United States territory, which the Constitution always identifies as the territory of the States.[18] Along those lines, our nation's high court has long held the source of an American's fundamental rights to be State law, not United States law.[19]

No wonder that "Federal privileges and immunities may seem limited in their formulation by comparison with the expansive definition given to the privileges and immunities attributed to state citizenship…."[20] There is no territory under the Union.

In American law, the people of the Union delegated the powers of national sovereignty by particulars, limited to certain subject matters, rather than by broad territorial cession. Remarkably, admitting a State into the Union has the effect to *withdraw* from federal jurisdiction all the territory within the boundaries of the new State.[21]

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[16] *Fontain v. Ravenel*, 58 U.S. 369, 384 (1854).

[17] "The boundary line is the line of sovereignty," *Central R.R. Co. v. Jersey City*, 209 U.S. 473, 478 (1908). "We repeat that boundary means sovereignty," *id*. at 479.

[18] C.C. Langdell, *The Status of Our New Territories*, 12 Harv. L. Rev. 365, 368 (1899).

[19] *Slaughterhouse Cases*, 83 U.S. 36 (1873).

[20] *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 844 (1995) (Kennedy, J., concurring).

[21] *Fort Leavenworth R.R. Co. v. Lowe*, 114 U.S. 525, 527-531 (1885).

The sovereignty of a body politic commonly extends to *all* of the valid subjects of lawful government within its territorial jurisdiction.[22] This is even true of the United States pursuant to Article 1, § 8, clause 17, where we find out the only geographic area ceded from the States to the United States is at the seat of government.

This makes Washington, D.C., the extent of durable national territory, realizing the complete power of the Nation, to be exercised over *all* the legitimate subjects of lawful government, but reaching only the District of Columbia and like places.[23] As to United States authority among the several States, "The powers delegated by the proposed Constitution to the federal government are few and defined."[24]

By design, then, a comprehensive national power is prohibited generally, although the District of Columbia is "constitutionally distinct from the States."[25]

Evidently, certain underlying features inherent in the Constitution support the common sense of that instrument to confirm that the United States are so a union of states and a nation of people as reported.[26]

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[22] Thomas M. Cooley, *Constitutional Limitations* 4 (6th Ed. 1890).

[23] The District of Columbia et al. "are the only cases, within the United States, in which all the powers of government are united in a single government," *Pollard's Lessee v. Hagan*, 44 U.S. 212, 223 (1845).

[24] "Those which are to remain in the State governments are numerous and indefinite." *The Federalist* No. 45, at 292 (James Madison) (Clinton Rossiter ed., 1961).

[25] *Palmore v. United States*, 411 U.S. 389, 395, 397-398 (1973).

[26] *See generally* Max Farrand, *The Records of the Federal Convention of 1787* (1911).

"Union of States"

These *United States* began, famously, on July 4, 1776. Collectively, they are limited to certain delegated powers enumerated in the Constitution.[27] The enumeration incorporated no State territory, except for areas like the "ten Miles square" surveyed *infra*. This means the people retained the common-law republics embraced by State lines, and never delegated any common law to the United States in general (except the Constitution itself).[28]

> [T]he preservation of the States, and the maintenance of their governments, are as much within the design and care of the Constitution as the preservation of the Union and the maintenance of the National government. The Constitution, in all its provisions, looks to an indestructible Union, composed of indestructible States.[29]

> No political dreamer was ever wild enough to think of breaking down the lines which separate the states, and of compounding the American people into one common mass.[30]

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[27] U.S. Const. art. 1, § 8. U.S. Const. amends. IX, X.

[28] "There is no federal general common law." *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938). "The common law is not a brooding omnipresence in the sky" but "always is the law of some State," not the States *en bloc*. *Southern Pacific v. Jenson,* 244 U.S. 205, 222 (Holmes, J., dissenting) (1917).

[29] *Texas v. White*, 74 U.S. 700, 725 (1868). It remains legally impossible to destroy the United States or any of them. On the other hand, national governments typically fall by ballot, whereby elections may bring down the government rather than merely change or maintain its administration.

[30] "Of consequence, when they act, they act in their States." *McCulloch v. State*, 17 U.S. 316, 403 (1819).

At the time the American people established the Constitution, they withheld their State territory from the new sovereign to retain for themselves "those fundamental rights of person and property attached to citizenship by the common law and enactments of the states."[31]

As the *Federalist*[32] emphasizes, although *operation* of United States law is "national, not federal," *jurisdiction* of United States law is "federal, not national,"[33] the term *federal* referring to the American Union of the *States*, the term *national* more strictly synonymous with *people*.[34]

The very structure of the Constitution precludes extensive authority over the people of the States by withholding the sort of national jurisdiction claimed by every other national society in world history.

In law, jurisdiction is always considered first.[35]

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[31] *Hague v. C.I.O.*, 307 U.S. 496, 521 n.1 (1939). Defining these rights fully calls for external referents, such as *Commentaries on the Laws of England* by William Blackstone, "whose works constituted the preeminent authority on English law for the founding generation." *Alden v. Maine*, 527 U.S. 706, 715 (1999).

[32] A series of essays titled *The Federalist Papers* was published while the Constitution was before the country for adoption or rejection. Two of its authors helped to frame the Constitution. "The opinion of the *Federalist* has always been considered as of great authority. It is a complete commentary on our constitution; and is appealed to by all parties in the questions to which that instrument has given birth. Its intrinsic merit entitles it to this high rank," *Cohens v. Virginia*, 19 U.S. 264, 418 (1821).

[33] *The Federalist* No. 39, at 246 (James Madison) (Clinton Rossiter ed., 1961).

[34] Thomas M. Cooley, *Constitutional Limitations* 3 (6th Ed. 1890).

[35] "*Jurisdiction*, in its most general sense, is the power to make, declare or apply the law," and "is limited to place or territory, to persons, or to particular subjects." 2 Noah Webster, *An American Dictionary of the English Language* 2 (1828).

"Nation of People"

The people set forth this *United States* to become the name of the new sovereign created by the Constitution.[36]

They excised an area "not exceeding ten Miles square" to be "the Seat of the Government of the United States," granting Congress power over it, "To exercise exclusive Legislation in all Cases whatsoever."[37] Here, "Exclusive legislative power is in essence complete sovereignty."[38] Despite "complete authority at the seat of government"[39] the Constitution still withholds from Congress "a general police power of the sort retained by the States."[40]

> This grant of comprehensive legislative power over certain areas of the Nation, when read in conjunction with the rest of the Constitution, further confirms that Congress was not ceded plenary authority over the *whole* Nation.[41]

The Supreme Court has always declined to convert congressional authority under the Commerce Clause into "a plenary police power that would authorize enactment of every type of legislation."[42]

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[36] Our national state came to be on June 21, 1788, when the Constitution went into effect.
[37] U.S. Const. art. I, § 8, cl. 17.
[38] *S.R.A., Inc. v. State of Minnesota*, 327 U.S. 558, 562 (1946).
[39] *The Federalist* No. 43, at 272 (James Madison) (Clinton Rossiter ed., 1961).
[40] *United States v. Lopez*, 514 U.S. 549, 567 (1995).
[41] *United States v. Lopez*, 514 U.S. 549, 589 n.3 (1995) (Thomas, J., concurring).
[42] *United States v. Lopez*, 514 U.S. 549, 566 (1995).

Authoritative historical opinion is clear that when contemplated in relation to the extent of its powers "the proposed Government cannot be deemed a *national* one; since its jurisdiction extends to certain enumerated objects only, and leaves to the several States a residuary and inviolable sovereignty over all other objects."[43]

The Constitution prohibits Congress from exercising exclusive legislation throughout the country, because "States are not mere political subdivisions of the United States."[44] Nor are their citizens simply political constituents of the national forum. Americans today are descendants of the people of the original Union, the "posterity" of their Constitution. As successors to the blessings of liberty referred to in the preamble, the common law is our birthright and our inheritance.

Moreover, the critical postulate that sovereignty is *reserved to the people* distinguishes those citizens from mere national subjects:

> It will be admitted on all hands, that with the exception of the powers surrendered by the Constitution of the United States, the people of the several States are absolutely and unconditionally sovereign within their respective territories.[45]

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[43] *The Federalist* No. 39, at 245 (James Madison) (Clinton Rossiter ed., 1961). "Were it wholly national, the supreme and ultimate authority would reside in the *majority* of the people of the Union; and this authority would be competent at all times, like that of a majority of every national society to alter or abolish its established Government." *Id*. at 246.

[44] *New York v. United States*, 505 U.S. 144, 188 (1992).

[45] *Ohio Life Ins. and Trust Co. v. Debolt*, 57 U.S. 416, 428 (1853).

So consider the articulation of States which form and occupy our Union. See the people there.

Then consider that "sovereignty is mainly territorial, unless a different meaning clearly appears."[46] Notice as well that this "sovereignty of the States" is designed exclusively "for the protection of individuals," not for the benefit of the States or state governments, or even the public officials governing the States.[47]

At the heart of the matter, "The constitution of the United States was ordained and established, not by the states in their sovereign capacities, but emphatically, as the preamble of the constitution declares, by 'the people of the United States.'" It follows that the people had a right "to reserve to themselves those sovereign authorities which they might not choose to delegate to either" government.[48]

By the Declaration of Independence, aforesaid God grants these rights; governments are instituted to secure them. This revolutionary end was accomplished when the country ratified the Constitution, establishing its novel system of coordinate sovereigns.

Divided authority is based on the assumption that in division there is not only strength but freedom from tyranny.[49] Often missed in the American dialectic between Union and Nation is this point, that "State sovereignty is not just an end in itself: 'Rather, federalism secures to citizens the liberties that derive from the diffusion of sovereign power.'"[50]

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[46] *Central R.R. Co. v. Jersey City*, 209 U.S. 473, 479 (1908).
[47] *New York v. United States*, 505 U.S. 144, 181 (1992).
[48] *Martin v. Hunter's Lessee*, 14 U.S. 304, 324-325 (1816).
[49] *Reid v. Covert*, 354 U.S. 1, 40 (1957).
[50] *New York v. United States*, 505 U.S. 144, 181 (1992) (quoting *Coleman v. Thompson*, 501 U.S. 722, 759 (1991) (Blackmun, J., dissenting)).

On the other hand, nationalism detracts from citizens the liberties informed by their common law, ramparted by their States, and guaranteed by their United States. Against the resulting confusion of sovereign power, the American people comprise a land of the lost.

If instead the United States are "the land of the free" as anthemed, then each one of them safeguards its geographic portion of the supremacy.

In the United States,[51] liberty goes with the territory.

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[51] "The term 'United States' may be used in any one of several senses." It may be "the collective name of the states which are united by and under the Constitution." Since the adoption of the Constitution, it has also been "merely the name of a sovereign occupying the position analogous to that of other sovereigns in the family of nations. It may designate the territory over which the sovereignty of the United States extends," *Hooven & Allison Co. v. Evatt*, 324 U.S. 652, 671-672 (1945). Therefore, "the conclusion is that the meaning which that term had the day after Independence was declared, it still retains, and that this is its natural and literal meaning." C.C. Langdell, *The Status of Our New Territories*, 12 Harv. L. Rev. 365, 368 (1899). "It will be seen, therefore, that, while the United States, in its second sense, signifies the body politic created by the Constitution, in its first sense it signifies the members of that body politic in the aggregate. A consequence is that, while in its first sense the term 'United States' is always plural, in its second sense it is in strictness always singular." *Id*. at 369. "It is very important, however, to understand that the use of the term 'United States' to designate all territory over which the United States is sovereign, is, like the similar use of the word 'empire' in England and other European countries, purely conventional; and that it has, therefore, no legal or constitutional significance. Indeed, this use of the term has no connection whatever with the Constitution of the United States….

The conclusion, therefore, is that, while the term 'United States' has three meanings, only the first and second of these are known to the Constitution; and that is equivalent to saying that the Constitution of the United States as such does not extend beyond the limits of the States which are united by and under it," *id*. at 371.

The Common Law

Among the most elementary of our legal concepts is that of the adoption of the English common law as the basis of American jurisprudence. The *common law* is all the statutory and case law background of England and the American Colonies before the American Revolution.[52] This "birthright" of inherited rights came down through history from 1215 and the Great Charter, its binding force independent of written or statute law.

> That body of rules, principles and customs which have been received from our ancestors, and by which courts have been governed in their judicial decisions. The evidence of this law is to be found in the reports of those decisions, and the records of the courts.[53]
>
> Those who emigrated to this country from England brought with them this great privilege "as their birthright and inheritance, as a part of that admirable common law which had fenced around and interposed barriers on every side against the approaches of arbitrary power."[54]

Fortunately for us, each of the new states promptly adopted the existing body of English common law.

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[52] *Black's Law Dictionary* 276 (6th ed. 1990).
[53] 1 Noah Webster, *An American Dictionary of the English Language* 42 (1828).
[54] *Thompson v. Utah*, 170 U.S. 343, 349-350 (1898) (quoting 2 Story, Const. § 1779). "Our ancestors were entitled to the common law of England when they emigrated," as they pleased. C. Bradley Thompson, *The Revolutionary Writings of John Adams* 238 (2000).

The common law proved to be "the best foundation on which to erect an enduring structure of civil liberty which the world has ever known. It was the peculiar excellence of the common law of England that it recognized the worth, and sought especially to protect the rights and privileges, of the individual man."[55]

> It fills up every interstice, and occupies every wide space which the statute law cannot occupy…"we live in the midst of the common law, we inhale it at every breath, imbibe it at every pore; we meet with it when we wake and when we lay down to sleep, when we travel and when we stay at home; and it is interwoven with the very idiom that we speak; and we cannot learn another system of laws without learning, at the same time, another language."[56]

Under no system of law is personal liberty more potent and a free State more secure than under that system known as the common law. The whole structure of our present jurisprudence stands upon the original foundation of the common law.

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[55] Thomas M. Cooley, *Constitutional Limitations* 33 (6th Ed. 1890). Furthermore, "arbitrary power and uncontrolled authority were not recognized in its principles. Awe surrounded and majesty clothed the king, but the humblest subject might shut the door of his cottage against him, and defend from intrusion that privacy which was as sacred as the kingly prerogatives. The system was the opposite of servile; its features implied boldness and independent self-reliance on the part of the people…." *Id*.

[56] James Kent, *Commentaries on American Law* Lecture 16 (1826) (quoting Du Ponceau on Jurisdiction, p. 91).

The best evidence of this "unwritten law" may be extracted from our charter documents, judicial opinions and the sources upon which the courts themselves rely. "Of course, 'Blackstone's Commentaries are accepted as the most satisfactory exposition of the common law of England.… [U]ndoubtedly the framers of the Constitution were familiar with it.'"[57]

This matters because the legal interpretation of the Constitutional text can only be made by consulting the common law, the principles, history and terminology of which were close to the people, and the first Congress. "The language of the Constitution, as has been well said, could not be understood without reference to the common law."[58]

> There is no common law of the United States, in the sense of a national customary law, distinct from the common law of England as adopted by the several States each for itself, applied as its local law, and subject to such alteration as may be provided by its own statutes….
>
> There is, however, one clear exception to the statement that there is no national common law. The interpretation of the Constitution of the United States is necessarily influenced by the fact that its provisions are framed in the language of the English common law, and are to be read in the light of its history.[59]

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[57] *Bloom v. State of Illinois*, 391 U.S. 194, 199 n.2 (1968) (quoting *Schick v. United States*, 195 U.S. 65, 69 (1904)).
[58] *United States v. Wong Kim Ark*, 169 U.S. 649, 654 (1898).
[59] *Smith v. Alabama*, 124 U.S. 465, 478 (1888).

The common-law prerogatives reassured by the Ninth and Tenth Amendments of the Constitution include those rights "retained by the people" and those powers "reserved to the States respectively, or to the people" under this instrument, "the adoption of which, was in its day, regarded a prodigy."[60] Both articles confirm rights and powers that reckon July 4, 1776, to ratification of the Constitution, guarding its successors against legislative innovation.[61] American freedom is our success, because "the common law is the best and most common birthright that the subject hath, for the safeguard and defence of his rights of person and property."[62] Common-law rights are as familiar as the Bill of Rights itself, as basic as life, liberty and property; the right to speak freely and travel about, or to be left alone; to earn a living, to contract and to socialize; to due process and the jury. They comprise the general liberty, and must include "the natural right of resistance and self-preservation…."[63]

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[60] James DeWitt Andrews, *American Law and Procedure* Vol. XIII, *Jurisprudence and Legal Institutions* 243 (1913). Enumerated objects of control and authoritative judicial review "present the unique and striking features of the American constitution," *id*.

[61] "Fear of federal encroachment led to the adoption of the Ninth and Tenth Amendments, which, if they did not weaken the instrument, were intended to prevent its expansion by legislation. By the Ninth Amendment it is declared that the enumeration of certain rights shall not be construed to deny others retained by the people, while the Tenth Amendment reserves to the people or the states those powers not expressly granted to the government and not expressly forbidden to the states. These two amendments not only satisfied the opponents of nationalism but did much to give the Constitution a rigidity which has kept the system close to the letter of the original document." Everett Kimball, *The National Government of the United States* 40 (1920).

[62] *Strother v. Lucas*, 37 U.S. 410, 437 (1838).

[63] 1 William Blackstone, *Commentaries* *139. "This natural life being… the immediate donation of the great creator," 1 *id*. at *129.

As there are two distinct systems of law in the world, the advancement of any people will be determined in large part by whether the underlying principles of the English *Common Law* or those of the Roman *Civil Law* are adopted.[64]

Though the legal systems of the individual States are primarily based upon the common law, there is no national equivalent other than the Constitution itself. The United States government is a *civil law* state, a singular national community elaborating, like other of the world's civilian nations, upon Roman law; but apart from the operation of their national government, allegiance to the common law has been characteristic of the American people. Constitutional authority that the common law belongs to the people of the United States is plain,[65] even conspicuous in the Seventh Amendment.

The most important characteristic of the common law is the recognition, not merely theoretical, but practical, of equality before the law, though not actually taken up in the sovereignty of any people on earth until it was announced in our Declaration of Independence, and put on general exhibit.[66]

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[64] Emlin McClain, *The Civil and the Common Law in the Louisiana Purchase* 7 (1905).

[65] "What could the Convention have done? If they had in general terms declared the Common law to be in force, they would have broken in upon the legal Code of every State in the most material points…." 3 Max Farrand, *The Records of the Federal Convention of 1787* 130 (James Madison) (1911).

[66] "The spirit which everywhere displayed itself at the commencement of the struggle, and which vanquished the obstacles to independence, is the best of proofs that a sufficient portion of liberty had been everywhere enjoyed to inspire both a sense of its worth and a zeal for its proper enlargement." *The Federalist* No. 52, at 329 (James Madison) (Clinton Rossiter ed., 1961).

By "sovereignty" in its constitutional sense is meant the supreme law, the absolute rule of action and decision for the government and all its parts. In the United States, the primary source of sovereignty became their people.[67] They delegated only certain powers to the public domain, still controlling its career by way of the republican form of government guaranteed in the Constitution.[68]

Noah Webster was a contemporary of the founding fathers and a commissioned publicist of the federalist cause. His lexicon of 1828 remains a fundamental text and a unique repository of the original meaning of terms used in the founding years of this nation:

> SOVEREIGN, *a*.
> 1. Supreme in power; possessing supreme dominion; as a *sovereign* prince. God is the *sovereign* ruler of the universe.
> 2. Supreme; superior to all others; chief. God is the *sovereign* good of all who love and obey him.
>
> SOVEREIGNTY, *n*.
> Supreme power; supremacy; the possession of the highest power, or of uncontrollable power. Absolute *sovereignty* belongs to God only.[69]

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[67] "The very meaning of sovereignty is that the decree of the sovereign makes law." *American Banana Co. v. United Fruit Co.*, 213 U.S. 347, 358 (1909).

[68] U.S. Const. art. IV, § 4. "The genius of republican liberty seems to demand on one side not only that all power should be derived from the people, but that those intrusted with it should be kept in dependence on the people…." *The Federalist* No. 37, at 227 (James Madison) (Clinton Rossiter ed., 1961).

[69] 2 Noah Webster, *An American Dictionary of the English Language* 76 (1828).

Having secured this God-given sovereignty against the Crown of England in 1776, the people entrusted part of it to their respective States and, more recently, to the new United States of the Constitution.[70]

They kept the rest by devising their constitution to effectively protect the many rights which antecede that document and even the States themselves,[71] and avoided the dangers of a national police power by restricting its operation to the seat of the government, and those "territories and possessions" belonging to the United States.[72]

> Generally speaking, within any State of this Union the preservation of the peace and the protection of person and property are the functions of the state government, and are no part of the primary duty, at least, of the nation. The laws of Congress in respect to those matters do not extend into the territorial limits of the States, but have force only in the District of Columbia, and other places that are within the exclusive jurisdiction of the national government.[73]

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[70] "The federal and State governments are in fact but different agents and trustees of the people, constituted with different powers and designed for different purposes…. [T]he ultimate authority, wherever the derivative may be found, resides in the people alone," *The Federalist* No. 46, at 294 (James Madison) (Clinton Rossiter ed., 1961).

[71] "Here, in strictness, the people surrender nothing; and as they retain everything they have no need of particular reservations," *The Federalist* No. 84, at 513 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

[72] U.S. Const. art. IV, § 3, cl. 2.

[73] *Caha v. United States*, 152 U.S. 211, 215 (1894).

Notwithstanding the moment, the commerce clause,[74] the 14th Amendment or other constitutional specification, "a state has the same undeniable and unlimited jurisdiction over all persons and things, within its territorial limits, as any foreign nation; where that jurisdiction is not surrendered or restrained by the Constitution of the United States[,]" and "all those powers which relate to merely municipal legislation, or what may, perhaps, more properly be called *internal police*, are not thus surrendered or restrained…."[75] As a matter of law throughout the Union, it is the State, not the United States, which is presumably sovereign.[76]

> The very highest duty of the States, when they entered into the Union under the Constitution, was to protect all persons within their boundaries in the enjoyment of these "unalienable rights with which they were endowed by their Creator." Sovereignty, for this purpose, rests alone with the States.[77]

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[74] U.S. Const. art. I, § 8, cl. 3. In fact, "the 'power to regulate commerce among the several States'…was intended as a negative and preventive provision against injustice among the States themselves, rather than as a power to be used for the positive purposes of the General government, in which alone, however, the remedial power could be lodged." 3 Max Farrand, *The Records of the Federal Convention of 1787* 478 (James Madison) (1911).

[75] *New York v. Miln*, 36 U.S. 102, 139 (1837).

[76] "'All legislation is prima facie territorial.'" *American Banana Co. v. United Fruit Co.*, 213 U.S. 347, 357 (1909) (quoting *Ex parte Blain*, L.R. 12 Ch.Div. 522, 528; *State v. Carter*, 27 N.J.L. 499; *People v. Merrill*, 2 Parker, Crim.Rep. 590, 596). "Legislation is presumptively territorial, and confined to limits over which the lawmaking power has jurisdiction." *Sandberg v. McDonald*, 248 U.S. 185, 195 (1918).

[77] *United States v. Cruikshank*, 92 U.S. 542, 553 (1875). *See also* Abraham Lincoln, *The Gettysburg Address* para. 1 (November 19, 1863).

Ratification altered the legal build of the United States by creating a national authority to act *under* the Union.[78] The Constitution changed the original structure of the United States "from a form merely federal" during the Articles of Confederation "to one partly national," though under similar limitations.[79]

> Federalism was our Nation's own discovery. The Framers split the atom of sovereignty. It was the genius of their idea that our citizens would have two political capacities, one state and one federal, each protected from incursion by the other. The resulting Constitution created a legal system unprecedented in form and design, establishing two orders of government, each with its own direct relationship, its own privity, its own set of mutual rights and obligations to the people who sustain it and are governed by it. It is appropriate to recall these origins, which instruct us as to the nature of the two different governments created and confirmed by the Constitution.[80]

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[78] United States legislative power over the seat of national business is collocated with the other federal powers in Article 1, section 8 of the Constitution; clause 17 "granted an exclusive authority to the Union…." *The Federalist* No. 32, at 198 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

[79] 3 Max Farrand, *The Records of the Federal Convention of 1787* 484 (James Madison) (1911). In either instance the general terms prefixed to the enumerated powers are limitative rather than expansive, *id*. The term *national* as contradistinguished from the term *federal* "was not meant to express the *extent* of power, but the *mode* of *its operation*," 3 *id*. at 474.

[80] *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 838-839 (1995) (Kennedy, J., concurring).

The end result was "the perfection of the *system*"[81] rather than the outright perfection of the Union, thereby "distinguishing it from a plenary & Consolidated Govt."[82]

> The proposed Constitution, so far from implying an abolition of the State governments, makes them constituent parts of the national sovereignty…and leaves in their possession certain exclusive and very important portions of sovereign power. This fully corresponds, in every rational import of the terms, with the idea of a federal government.[83]
>
> An entire consolidation of the States into one complete national sovereignty would imply an entire subordination of the parts; and whatever powers might remain in them would be altogether dependent on the general will. But as the plan of the convention aims only at a partial union or consolidation, the State governments would clearly retain all the rights of sovereignty which they before had, and which were not, by that act, *exclusively* delegated to the United States.[84]

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[81] *The Federalist* No. 80, at 481 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (emphasis added).
[82] 3 Max Farrand, *The Records of the Federal Convention of 1787* 517 (James Madison) (1911).
[83] *The Federalist* No. 9, at 76 (Alexander Hamilton) (Clinton Rossiter ed., 1961).
[84] *The Federalist* No. 32, at 198 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

The United States of America were never organized by a national government completely sovereign at the top over provinces, districts or states serving merely as "subordinate corporations" of the national state.[85]

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[85] *Chisholm v. Georgia*, 2 U.S. 419, 448 (1793) (opinion of Iredell, J.). "The plan of the convention declares that the power of Congress, or, in other words, of the *national legislature,* shall extend to certain enumerated cases. This specification of particulars evidently excludes all pretension to a general legislative authority, because an affirmative grant of special powers would be absurd as well as useless if a general authority was intended." *The Federalist* No. 83, at 497 (Alexander Hamilton) (Clinton Rossiter ed., 1961). "And that the language of our Constitution is already undergoing interpretations unknown to its founders will, I believe, appear to all unbiased inquirers into the history of its origin and adoption." 3 Max Farrand, *The Records of the Federal Convention of 1787* 464 (James Madison) (1911). "Will you pardon me for pointing out an error of fact into which you have fallen, as others have done, by supposing that the term, *national* applied to the contemplated Government, in the early stage of the Convention…was equivalent to *unlimited* or consolidated. This was not the case. The term was used, not in contradistinction to a limited, but to a *federal* Government." 3 *id*. at 473. "And there being no technical or appropriate denomination applicable to the new and unique System, the term national was used, with a confidence that it would not be taken in a wrong sense, especially as a right one could be readily suggested if not sufficiently implied by some of the propositions themselves." 3 *id*. "It ought to have occurred that the Govt. of the U.S. being a novelty & a compound, had no technical terms or phrases appropriate to it; and that old terms were to be used in new senses, explained by the context or by the facts of the case." 3 *id*. at 517. "[T]he real character of the Govt. was & is obvious; this being necessarily deduced from the actual structure of the Govt. and the quantum of its powers." 3 *id*. at 517-518. "As the System was to be a new & compound one a nondescript without a technical appellation for it, the term 'National' was very naturally suggested by its national features." 3 *id*. at 529. "But what alone would justify & acct. for the application of the term National to the proposed Govt. is that it wd. possess, exclusively all the attributes of a natl. Govt. in its relations with other nations…. A Govt: which alone is known & acknowledged by all foreign nations, and alone charged with the international relations, could not fail to be deemed & called at home, a Natl. Govt." 3 *id*. at 529-530.

In America, the national and state governments are separate jurisdictions having no common superior except the people, however prevalent the misperception may be that the Supremacy Clause of the Constitution somehow makes legislation of Congress per se, even treaties per se, "the supreme Law of the Land."[86]

Forensically, of course, "*this Constitution*" and laws express the absolute rule.[87] The sovereign text by its own terms is the supreme law of the land, emanating from the people, the repository of ultimate sovereignty under our form of government. It is by the hand of the people that the individual States are "no more subject, within their respective spheres, to the general authority than the general authority is subject to them, within its own sphere."[88] Bear in mind a combination of incomplete governments yielding one complete system of American jurisprudence: "This separation of the two spheres is one of the Constitution's structural protections of liberty."[89]

The State governments and the National government all have functions and an expression of sovereignty within a unique *federal system*, which has been termed "Our Federalism." "It should never be forgotten that this slogan, 'Our Federalism,' born in the early struggling days of our Union of States, occupies a highly important place in our Nation's history and its future."[90]

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[86] U.S. Const. art. VI, cl. 2.

[87] "It will not, I presume, have escaped observation that it *expressly* confines this supremacy to laws made *pursuant to the Constitution*…." *The Federalist* No. 34, at 205 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

[88] *The Federalist* No. 39, at 245 (James Madison) (Clinton Rossiter ed., 1961).

[89] *Printz v. United States*, 521 U.S. 898, 921 (1997).

[90] *Younger v. Harris*, 401 U.S. 37, 44-45 (1971).

What emerged from this struggle was a new kind of federal system with a new kind of national government operating in a limited way among otherwise sovereign states. See *United States Reports* Vol. 92 for the record:

> We have in our political system a government of the United States and a government of each of the several States. Each one of these governments is distinct from the others, and each has citizens of its own who owe it allegiance, and whose rights, within its jurisdiction, it must protect. The same person may be at the same time a citizen of the United States and a citizen of a State, but his rights of citizenship under one of these governments will be different from those he has under the other.
>
> Experience made the fact known to the people of the United States that they required a national government for national purposes…. [They] ordained and established the government of the United States, and defined its powers by a constitution, which they adopted as its fundamental law, and made its rule of action.
>
> The government thus established and defined is to some extent a government of the States in their political capacity. It is also, for certain purposes, a government of the people. Its powers are limited in number, but not in degree. Within the scope of its powers, as enumerated and defined, it is supreme and above the States; but beyond, it has no existence.

> The people of the United States resident within any State are subject to two governments: one State, and the other National; but there need be no conflict between the two. The powers which one possesses, the other does not. They are established for different purposes, and have separate jurisdictions. Together they make one whole, and furnish the people of the United States with a complete government, ample for the protection of all their rights at home and abroad.[91]

Fifty states "at home" and one United States "abroad" complement a system[92] to protect the country on all sides: national powers "will be exercised principally on external objects," while "powers reserved to the several states will extend to all the objects which, in the ordinary course of affairs, concern the lives, liberties, and properties of the people, and the internal order, improvement, and prosperity of the State."[93] America's local jurisdictions and individuals have the preponderance of dominion and autonomy.

The general idea is that the several States still retain "all *internal sovereignty*" while the United States possess "the great *rights of external sovereignty*[.]"[94]

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[91] *United States v. Cruikshank*, 92 U.S. 542, 549-550 (1875).
[92] The national and state governments truly are "parts of ONE WHOLE," *The Federalist* No. 82, at 493 (Alexander Hamilton) (Clinton Rossiter ed., 1961).
[93] *The Federalist* No. 45, at 292-293 (James Madison) (Clinton Rossiter ed., 1961).
[94] *Ware v. Hylton*, 3 U.S. 199, 232 (1796).

The Constitution lays down the principles of limited government.[95] Already vested with land and law inside their States, the people of the Union chose to project a United States government predominant along state lines, and denied to their nation "an indefinite supremacy over all persons and things," even "so far as they are objects of lawful government."[96]

Objectionably, our United States devolve into a general municipal authority broadly exercising the type of inland jurisdiction that appropriately squares with the seat of the government. This brand of United States, nominally federal, instead takes on the loose contours of a brooding national superstate elaborating on equity and commercial suasion rather than law in the ordinary sense.[97]

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[95] As conceived, "this is not an indefinite Government, deriving its powers from the general terms prefixed to the specified powers, but a limited Government, tied down to the specified powers which explain and define the general terms." 3 Max Farrand, *The Records of the Federal Convention of 1787* 366 (James Madison) (1911). "For what purpose could the enumeration of particular powers be inserted, if these and all others were meant to be included in the preceding general power?" *The Federalist* No. 41, at 263 (James Madison) (Clinton Rossiter ed., 1961).

[96] *The Federalist* No. 39, at 245 (James Madison) (Clinton Rossiter ed., 1961). "In the first place it is to be remembered that the general government is not to be charged with the whole power of making and administering laws. Its jurisdiction is limited to certain enumerated objects," *The Federalist* No. 14, *id*. at 102 (James Madison).

[97] "The operations of the national government, on the other hand, falling less immediately under the observation of the mass of the citizens, the benefits derived from it will chiefly be perceived and attended to by speculative men." *The Federalist* No. 17, at 120 (Alexander Hamilton) (Clinton Rossiter ed., 1961). "Every new regulation concerning commerce or revenue, or in any manner affecting the value of the different species of property, presents a new harvest to those who watch the change, and can trace it consequences…." *The Federalist* No. 62, at 380 (James Madison) (Clinton Rossiter ed., 1961).

Our Constitution is a legal agreement between and among *We the People of the United States*, and the words "general" and "perfect" are law words, with law meanings, as real as the differences between federal United States and a national United States.

Today, even keeping to a vague preambular authority "to promote the general welfare" would serve to restrict, rather than extend, national governance, insofar as any "general" law by definition applies everywhere *and only everywhere*, to everyone *and only everyone*, without discrimination or suspense. Yet few congressional acts are made to apply generally throughout the United States. Provisions take hold here and there, but not everywhere, even to laws of crime.[98] These intermittent federal zones defy the general nature of United States power and cross geographic stopping points put in place by the people.[99]

Certainly Americans have a right to "come to the seat of government[.]"[100] It is, after all, our national territory. But the Constitution distinguishes incidents within and without State territory, where residence attaches the most fundamental rights to a citizen.[101]

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[98] *United States v. Lopez*, 514 U.S. 549 (1995). "The tendency of this statute to displace state regulation in areas of traditional state concern is evident from its territorial operation." *Id.* at 583 (Kennedy, J., concurring).
[99] U.S. Const. art. I, § 8, cl. 17. U.S. Const. art. IV, § 3, cl. 2.
[100] *Slaughterhouse Cases*, 83 U.S. 36, 79 (1873).
[101] "It may be esteemed the basis of the Union that 'the citizens of each State shall be entitled to all the privileges and immunities of citizens of the several States.'" *The Federalist* No. 80, at 478 (Alexander Hamilton) (Clinton Rossiter ed., 1961). U.S. Const. art. IV, § 2, cl. 1. In keeping with the purposes of the Union and the legal equality of its citizens, this clause offers no rights or protections within the District of Columbia, territories and possessions -- only within the States.

Close

Our courts uphold the first sovereignty of the people, without which the supremacy of the Constitution becomes merely ideal.[102]

Before the Declaration of Independence this concept *was* speculative; but that document advanced the ideas of legal equality and popular sovereignty that came together in the United States Constitution, and the subordination of all powers to law. *The theory of our political system is that the ultimate sovereignty is in the people, and by the constitutions which they form, not even the whole people as an aggregate body are free to take action against these fundamental laws, having set limits upon the extent and mode of law-making even by themselves*.[103]

This is to say that the Constitution secures our basic freedoms by precluding a national electorate, which may alter or abolish the very government itself.[104] Ours is a permanent Constitution. The common law informs its construction, and Americans understand it as higher law.

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[102] Judges "are to be the interpreters of the law," *The Federalist* No. 73, at 446 (Alexander Hamilton) (Clinton Rossiter ed., 1961). "Laws are a dead letter without courts to expound and define their true meaning and operation." *The Federalist* No. 22, *id*. at 150 (Alexander Hamilton).

[103] Thomas M. Cooley, *Constitutional Limitations* 33 (6th Ed. 1890). James DeWitt Andrews, *American Law and Procedure* Vol. XIII, *Jurisprudence and Legal Institutions* 263 (1913). Our national collective is not identified as a body politic for any legal or constitutional purpose; this means "*the total exclusion of the people in their collective capacity*" from any share in the system. *The Federalist* No. 63, at 387 (James Madison) (Clinton Rossiter ed., 1961).

[104] "One's right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections." *West Virginia State Board of Education v. Barnette*, 319 U.S. 624, 638 (1943).

The people made the Constitution by way of their States and may convene there to amend it.[105] The government created by it is not formed or reorganized when we vote. No election can derange it. Perhaps its best source of public confidence and respect is this constancy.[106] Our government has never "fallen" because the people of the United States, rather than confide their sovereignty to each other at the ballot box, put it down in writing in the form of fundamental law in a compact draft, creating a "government of laws, and not of men."[107]

People trust the Constitution because they understand it, as they basically understand their common ground.[108]

The press of money and power may disserve the law; arcane legal rulings may even circumvent its application; occulted legislation may lurk about; but all must answer at last to the plain terms of the Constitution.[109]

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[105] U.S. Const. Art. V. "In opposition to the probability of subsequent amendments, it has been urged that the persons delegated to the administration of the national government will always be disinclined to yield up any portion of the authority of which they were once possessed." *The Federalist* No. 85, at 525 (Alexander Hamilton) (Clinton Rossiter ed., 1961). However, the national rulers are given "no option upon the subject." *Id*. at 526. "Nothing in this particular is left to the discretion of [the Congress]." *Id*.

[106] "The Constitution is a written instrument. As such its meaning does not alter." *South Carolina v. United States*, 199 U.S. 437, 448 (1905).

[107] C. Bradley Thompson, *The Revolutionary Writings of John Adams* 226 (2000). Adams defines a *republic*, advancing the governmental form guaranteed to every State by the Constitution. U.S. Const. art. IV, § 4.

[108] Whereas "rules of legal interpretation are rules of *common sense*," *The Federalist* No. 83, at 496 (Alexander Hamilton) (Clinton Rossiter ed., 1961), the Constitution is not subject to private interpretation.

[109] Admittedly, "the Constitution ought to be the standard of construction for the laws," so that "wherever there is an evident opposition, the laws ought to give place to the Constitution." *The Federalist* No. 81, at 482 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

No other nation on earth has realized the self-control to establish this order of freedom, to set high law against "the mischievous effects of a mutable government[.]"[110]

> [A] very large Field presents to our view without a single Straight or eligible Road that has been trodden by the feet of nations. An Union of Sovereign States, preserving their Civil Liberties and connected together by such Tyes as to Preserve permanent & efective Governments is a system not described, it is a Circumstance that has not Occurred in the History of men; if we shall be so fortunate as to find this in descript our Time will have been well spent.[111]

Thanks to our common-law ground, the plural nature of our Union, and certain distinctive technical features built-in to the Constitution of the United States at least one determination holds true: the United States really are a free country.

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[110] *The Federalist* No. 62, at 380 (James Madison) (Clinton Rossiter ed., 1961). "It will be of little avail to the people that the laws are made by men of their own choice if the laws be so voluminous that they cannot be read, or so incoherent that they cannot be understood; if they be repealed or revised before they are promulgated, or undergo such incessant changes that no man, who knows what the law is today, can guess what it will be tomorrow. Law is defined to be a rule of action; but how can that be a rule, which is little known, and less fixed?" *Id*. at 381.

[111] 3 Max Farrand, *The Records of the Federal Convention of 1787* 46 (North Carolina Delegates) (1911).