

# THE APPROPRIATIONS POWER AND SOVEREIGN IMMUNITY

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*Discussions of sovereign immunity assume that the Constitution contains no explicit text regarding sovereign immunity. As a result, arguments about the existence—or nonexistence—of sovereign immunity begin with the English and American common-law doctrines. Exploring political, fiscal, and legal developments in England and the American colonies in the seventeenth and eighteenth centuries, this Article shows that focusing on common-law developments is misguided. The common-law approach to sovereign immunity ended in the early 1700s. The Bankers’ Case (1690–1700), which is often regarded as the first modern common-law treatment of sovereign immunity, is in fact the last in the line of English common-law decisions on sovereign immunity. After (and in part because of) the Bankers’ Case, settling claims against the Crown became a function of Parliament, swept up within its newly won powers over finance and appropriations. After examining comparable developments in the American colonies and during the Confederation period and the formation of the Constitution, the Article demonstrates that the Appropriations Clause embedded in the Constitution the principle of congressional supremacy—and a resulting lack of judicial power—over monetary claims against the United States, a point recognized by early cases and commentators. As such, the Appropriations Clause provides a textual basis for the federal government’s immunity from suits on claims seeking money damages.*

## TABLE OF CONTENTS

INTRODUCTION .....	1208
I. ENGLISH ANTECEDENTS .....	1211
A. <i>Sovereign Immunity in England Before 1776</i> .....	1211
B. <i>Financing Government: The Foundation of             Parliament’s Constitutional Preeminence</i> .....	1217

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1.	<i>The Gathering Storm: Finance Before the Stuarts</i> .....	1217
2.	<i>The Stuarts and the Struggle for Parliamentary     Supremacy</i> .....	1220
3.	<i>Finance After the Stuarts</i> .....	1227
C.	<i>The Bankers' Case and Its Aftermath</i> .....	1230
II.	THE AMERICAN EXPERIENCE WITH APPROPRIATIONS.....	1238
A.	<i>Following the English Example: Colonial Legislatures     and the Control over Appropriations</i> .....	1240
B.	<i>Post-Revolutionary Legislative Supremacy     over Appropriations</i> .....	1247
C.	<i>The Appropriations Clause</i> .....	1248
1.	<i>The Constitutional Convention</i> .....	1248
2.	<i>Ratification Debates</i> .....	1255
D.	<i>Closing the Loop: The Appropriations Power and     Sovereign Immunity</i> .....	1258
CONCLUSION	.....	1264

## INTRODUCTION

At a certain level of abstraction, historical arguments for and against sovereign immunity have a common quality. Those who use history to argue against the existence of a constitutional basis for sovereign immunity point to procedural devices by which the Crown could be sued—such as the petition of right, the *monstrans de droit*, and the traverse of office<sup>1</sup>—to infer that sovereign immunity did not exist in absolute form in English common law from the Middle Ages on; the argument by extension is that no such doctrine existed in the U.S. Constitution at the time of the founding.<sup>2</sup> For those who argue for reading sovereign immunity into the Constitution, by contrast, the limitations of these devices—including the need for the Crown’s formal consent to suit, the lack of remedies for the torts of the Crown, and the cumbersomeness and infrequency of suit<sup>3</sup>—point toward an immunity in English law that cemented itself in the interstices of the Constitution.<sup>4</sup> These opposing positions share three commonalities. First, appeals to historical evidence often distill a complex history into a monolithic “yes” or “no” answer to the question of American sovereign immunity. Second, historical arguments focus principally on the common law,<sup>5</sup> ignoring English political

1. For a discussion of these devices, see *infra* notes 21–34 and accompanying text.

2. See *Alden v. Maine*, 527 U.S. 706, 764–70 (1999) (Souter, J., dissenting); Louis L. Jaffe, *Suits Against Governments and Officers: Sovereign Immunity*, 77 HARV. L. REV. 1, 2–19 (1963).

3. For a discussion of these limitations, see *infra* notes 30–31, 36–44 and accompanying text.

4. See *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419, 435–46 (1793) (Iredell, J., dissenting); *cf. Alden*, 527 U.S. 706 (finding that Congress’s lack of power to waive a state’s immunity from private suits for damages inheres in the structure of the Constitution).

5. Classic legal histories of English and American sovereign immunity are Edwin M. Borchard, *Government Liability in Tort* (pts. 1–3), 34 YALE L.J. 1, 129, 229 (1924–25); Louis L. Jaffe, *Suits Against Governments and Officers: Damage Actions*, 77 HARV. L. REV. 209 (1963); and Jaffe,

and financial history that also bears on the question. Third, both sides agree that the appeal to history is necessary because the Constitution itself is silent on the existence—or nonexistence—of sovereign immunity.<sup>6</sup>

In this Article, we seek to dislodge these assumptions. In the American system, the permutations created by three independent variables (federal vs. state immunity, damages vs. injunctive relief, and suits against the sovereign vs. suits against officials) yield eight distinct categories of immunity.<sup>7</sup> This Article focuses on the central category: suits brought against the United States for damages. Incorporating contemporaneous developments in English politics and economics, and in American colonial history, we provide the context in which to understand the constitutional foundation for this type of federal sovereign immunity.<sup>8</sup>

In doing so, we recover an early understanding of sovereign immunity—suggested by St. George Tucker<sup>9</sup> and Joseph Story<sup>10</sup>—that the immunity of the United States from damage actions has an explicit source in the Constitution: the Appropriations Clause, which bars the expenditure of money “but in Consequence of Appropriations made by Law.”<sup>11</sup> Among

*supra* note 2. The classic history of English sovereign immunity from medieval times to the early twentieth century is 9 WILLIAM HOLDSWORTH, A HISTORY OF ENGLISH LAW 4–45 (3d ed. 1944).

6. See Erwin Chemerinsky, *Against Sovereign Immunity*, 53 STAN. L. REV. 1201, 1205 (2001) (“Sovereign immunity . . . is a right that cannot be found in the text or the framers’ intent.”); David L. Shapiro, *The Role of Precedent in Constitutional Adjudication: An Introspection*, 86 TEX. L. REV. 929, 952 (2008) (“Sovereign immunity is nowhere mentioned in the Constitution . . .”). Compare *Alden*, 527 U.S. at 741 (arguing that the best inference from silence is the existence of state sovereign immunity), with *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 104 (1996) (Souter, J., dissenting) (arguing that the best inference from silence is a lack of state sovereign immunity). One of the few scholars to argue that the Constitution’s text speaks to sovereign immunity—and finding the requisite waiver in the Petition Clause of the First Amendment—is Professor Pfander. 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).

7. The eight categories are: (1) sovereign immunity for the United States against suits seeking damages; (2) sovereign immunity for the United States against suits seeking injunctive relief; (3) sovereign immunity for federal officials against suits seeking damages; (4) sovereign immunity for federal officials against suits seeking injunctive relief; (5) sovereign immunity for a state against suits seeking damages; (6) sovereign immunity for a state against suits seeking injunctive relief; (7) sovereign immunity for state officials against suits seeking damages; and (8) sovereign immunity for state officials against suits seeking injunctive relief. In categories 3, 4, 7, and 8, a further division can be made between official-capacity suits and individual-capacity suits. See *Will v. Mich. Dep’t of State Police*, 491 U.S. 58 (1989); *Edelman v. Jordan*, 415 U.S. 651 (1974).

8. We do not suggest that our historical analysis carries over to the other seven categories of sovereign immunity. English common law varied for suits against the Crown and suits against officials. See Jaffe, *supra* note 2, at 2–19. Moreover, England had no federal division of political authority. Equity precedents regarding sovereign immunity were few. One of the few cases seeking equitable relief against the Crown was *Pawlett v. Attorney-General*, Hardres 465, 145 Eng. Rep. 550 (Exch. 1668). In *Pawlett*, relief was sought in the Court of Exchequer, a fact that bears significance for the scope of sovereign immunity. See *infra* notes 59–60 and accompanying text.

9. See *infra* notes 426–428 and accompanying text.

10. See *infra* note 429 and accompanying text.

11. U.S. CONST. art. I, § 9, cl. 7. The first half of Clause 7 is the Appropriations Clause. The second half is the Statement and Accounts Clause. Clause 7 reads in full: “No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law; and a regular Statement and Account of the Receipts and Expenditures of all public Money shall be published from time to time.” *Id.*

Americans who knew the history of Parliament's rise to political preeminence and recollected the resistance of colonial assemblies to royal governors,<sup>12</sup> the Clause was a political given. Its "power of the purse" was intended as the counterweight to the President's "power of the sword."<sup>13</sup>

The move made by Tucker and Story was to recognize that the third branch of government—the judiciary—fell within the reach of the Appropriations Clause. Their move is plausible, but hardly required. There is an evident distinction between entering a judgment against the United States and appropriating its funds; the lack of the latter power does not necessarily imply the lack of the former.<sup>14</sup> Indeed, although courts have occasionally noted the link between the Appropriations Clause and federal sovereign immunity,<sup>15</sup> the references are sparse, short, and usually not substantive. Academic commentary is similarly thin; the few scholars who have considered the connection have generally failed to be impressed with it.<sup>16</sup>

The burden of this Article is to show that the connection between sovereign immunity and the appropriations power is stronger and closer than is usually believed. Part I examines the histories of sovereign immunity and appropriations in England; it focuses particularly on the seventeenth century, when the ideas of parliamentary sovereignty, fiscal control, and sovereign

12. See *infra* Sections I.B, II.A.

13. Modern scholarship on the Appropriations Clause has concentrated on the extent to which the appropriations power allows Congress to control the actions of the executive. Compare Kate Stith, *Congress' Power of the Purse*, 97 YALE L.J. 1343 (1988) (arguing that Congress can control executive conduct by refusing to appropriate funds for certain actions), with J. Gregory Sidak, *The President's Power of the Purse*, 1989 DUKE L.J. 1162 (stating that Congress alone has the power to decide whether to appropriate funds and that the President retains authority to determine how to spend appropriated funds).

14. For instance, a court could enter a judgment against the United States but rely on Congress to appropriate the funds necessary to pay it. Or a court could enforce its judgment by ordering the executive branch to seize assets of the United States—an action that arguably does not directly impinge on Congress's power of appropriation. *But see* *Buchanan v. Alexander*, 45 U.S. (4 How.) 20, 20 (1846) (refusing to enforce a writ attaching the wages of a navy seaman because funds "appropriated to certain national objects" cannot be "diverted and defeated by state process or otherwise").

15. See *Office of Pers. Mgmt. v. Richmond*, 496 U.S. 414, 423–24 (1990); *Pullman Constr. Indus., Inc. v. United States*, 23 F.3d 1166, 1168 (7th Cir. 1994) (Easterbrook, J.) ("Federal sovereign immunity today is nothing but a condensed way to refer to the fact that monetary relief is permissible only to the extent Congress has authorized it, in line with Art. I, § 9, cl. 7 . . ."); *Jaffee v. United States*, 663 F.2d 1226, 1251 (3d Cir. 1981) (Gibbons, J., dissenting) (stating that federal sovereign immunity "has constitutional underpinnings" and citing the Appropriations Clause).

16. The best commentary is Vicki C. Jackson, *Suing the Federal Government: Sovereignty, Immunity, and Judicial Independence*, 35 GEO. WASH. INT'L L. REV. 521, 535–36, 543–46, 592–605 (2003) [hereinafter Jackson, *Suing the Federal Government*]. See also Susan Bandes, *Reinventing Bivens: The Self-Executing Constitution*, 68 S. CAL. L. REV. 289, 344 nn.259 & 263 (1995) (arguing that the Appropriations Clause does not bar a judgment requiring a federal official to pay damages); Vicki C. Jackson, *The Supreme Court, the Eleventh Amendment, and State Sovereign Immunity*, 98 YALE L.J. 1, 94–95 n.379 (1988) [hereinafter Jackson, *Supreme Court*] (arguing that the Appropriations Clause might create a "constitutional basis" for sovereign immunity in cases seeking monetary recovery from the United States, but also noting that a court's inability to "compel the appropriation" may not mean that a court "lacks power to issue a judgment"); *The Supreme Court, 1989 Term, Leading Cases*, 104 HARV. L. REV. 129, 295 (1990) ("[T]he Court [in *Richmond*] may have unwittingly established a constitutional fountainhead for federal sovereign immunity, at least as to money claims.").

immunity underwent significant development and ultimately intersected in the *Bankers' Case*.<sup>17</sup> The *Bankers' Case*, a set of lawsuits that wound through the English courts from 1690 to 1700, figures prominently in accounts of some opponents to sovereign immunity because it permitted an action that arose from a breach of contract by the Crown.<sup>18</sup> We describe the way in which the *Bankers' Case* must be understood against the backdrop of Parliament's rise to preeminence in the English constitutional order—a rise rendered successful only by Parliament's control over appropriations. Part II examines the analogous American history during colonial times, at the time of the Constitutional Convention, and during the early years of the Republic. We demonstrate that, during the eighteenth century, the constitutional preeminence of legislatures in determining governmental appropriations—a preeminence that the Appropriations Clause embedded in the Constitution—supplanted the common law as the basis for sovereign immunity. We conclude by considering the implications of this thesis for the doctrine of sovereign immunity.

## I. ENGLISH ANTECEDENTS

This Part begins by sketching England's five-hundred-year history of sovereign immunity prior to the American Revolution. We then describe a more contested constitutional conflict—supremacy between the Crown and Parliament—whose outcome turned on the question of government finance. We end by describing how these two currents in English legal, political, and economic history merged at the start of the eighteenth century into a principle of legislative supremacy over appropriations—a principle that requires a reinterpretation of the standard account of sovereign immunity in England.

### A. Sovereign Immunity in England Before 1776

Compressing the history of English sovereign immunity into a few pages is a difficult task, made easier only by a number of excellent prior treatments.<sup>19</sup> The main lines of the history are clear enough, although

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17. The best collection of the proceedings in the *Bankers' Case* is *The Case of the Bankers* [hereinafter *Bankers' Case*], in 14 A COMPLETE COLLECTION OF STATE TRIALS 1 (photo. reprint 2000) (T.B. Howell ed., 1812). Some proceedings are also found in other reporters. See *R v. Hornely & Williams*, Carthew 388, 90 Eng. Rep. 825 (Exch. Chamber 1696); *R v. Hornby* (The Bankers Case), 5 Mod. 29, 87 Eng. Rep. 500 (Exch. Chamber 1695); The Bankers Case, Skinner 601, 90 Eng. Rep. 270 (Exch. Chamber 1695); *R v. Hornby, Comberbach* 270, 90 Eng. Rep. 472 (Exch. Chamber 1694); *In re Hornbee*, 1 Freeman 331, 89 Eng. Rep. 246 (Exch. 1692). For some of the same reported proceedings—as well as the lawyers' arguments in the Court of Exchequer—see SAMUEL DODD'S REPORTS 1678–1713 AND MISCELLANEOUS EXCHEQUER CASES 1671–1713, at 98, 103, 104, 111, 168 (W. Hamilton Bryson ed., 2000) [hereinafter DODD'S REPORTS].

18. See, e.g., 9 HOLDSWORTH, *supra* note 5, at 32–42; Jaffe, *supra* note 2, at 7–8.

19. The classic treatment of the origins of sovereign immunity is Ludwik Ehrlich, *Proceedings Against the Crown (1216–1377)*, in 6 OXFORD STUDIES IN SOCIAL AND LEGAL HISTORY pt. 12 (Octagon Books 1974) (Paul Vinogradoff ed., 1921). For other treatments, see 9 HOLDSWORTH, *supra* note 5, at 4–45; 1 FREDERICK POLLOCK & FREDERIC WILLIAM MAITLAND, THE HISTORY OF ENGLISH LAW 197, 515–18 (2d ed. 1899); and Jaffe, *supra* note 2, at 1–19.

some judges and scholars have not been sufficiently attentive to its nuances and context to extract modern salience.

We begin with an uncontested point: from the thirteenth century forward, it was possible to sue the Crown. In the earliest days, when the lines of adjudicatory authority blurred in a soup of “proto-courts”—councils such as the early Parliament and quasi-administrative tribunals over which the King himself sometimes presided—all requests for royal justice, including requests to bring suit against the Crown, began as petitions that passed before the King and Chancellor.<sup>20</sup> Over the course of the centuries, the process for bringing suit against private individuals became routinized; obtaining a writ—the document necessary to commence a case in one of the three common-law courts (Common Pleas, King’s Bench, and the Exchequer)—was no longer a matter of royal grace but a ministerial function handled within the Chancery.<sup>21</sup> The same became true for invoking the jurisdiction of the Chancery, which operated the alternate system of justice known as equity.<sup>22</sup>

Bringing suit against the Crown, however, never lost the original quality of a respectful request for royal aid. Because the King’s courts were constituted by, and therefore regarded as inferior to, the King himself, the notion that courts could as a routine matter entertain suits against the King was unimaginable.<sup>23</sup> But subjects could always petition the King for his permission to hear their claims against him.<sup>24</sup> Soon distinctions among petitions emerged. On the one side were petitions issued as a matter of royal grace or discretion; on the other were petitions of right.<sup>25</sup> Petitions of right claimed, in essence, that the petitioner’s interests had been injured in such a way that, had the action involved a private defendant

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20. See 1 WILLIAM HOLDSWORTH, A HISTORY OF ENGLISH LAW 354–55 (A.L. Goodhart & H.G. Hanbury eds., 7th rev. ed. 1956); 9 HOLDSWORTH, *supra* note 5, at 13–15.

21. See 1 HOLDSWORTH, *supra* note 20, at 396–99; THEODORE F.T. PLUCKNETT, A CONCISE HISTORY OF THE COMMON LAW 164 (5th ed. 1956).

22. See 1 HOLDSWORTH, *supra* note 20, at 445–76; PLUCKNETT, *supra* note 21, at 180–81.

23. Initially, this lack of amenability to suit was an offshoot of the well-accepted medieval principle that a lord could not be sued in his own manor court. See 9 HOLDSWORTH, *supra* note 5, at 8; 1 POLLOCK & MAITLAND, *supra* note 19, at 518. The question was also caught up in the nature of the King: whether he was an ordinary man (and thus subject to suit) or the personification of the realm (and thus above the law). Medieval theory tended to the former view; the latter view emerged later. See 3 WILLIAM HOLDSWORTH, A HISTORY OF ENGLISH LAW 458–69 (5th ed. 1942) (discussing the shift in views of the Crown’s nature); 1 POLLOCK & MAITLAND, *supra* note 19, at 511–18; Ehrlich, *supra* note 19, at 39–41. In neither event was the King thought to be subject to legal process in the same manner as ordinary citizens. See 2 BRACTON DE LEGIBUS ET CONSUEUDINIBUS ANGLIÆ [BRACTON ON THE LAWS AND CUSTOMS OF ENGLAND] 33 (George E. Woodbine ed., Samuel E. Thorne trans., Harvard Univ. Press 1968) (ca. 1258) [hereinafter BRACTON] (stating that “no writ runs against” the King).

24. See Ehrlich, *supra* note 19, at 34, 82.

25. The distinctions between the two forms of petition, and the exact procedures used in the petition of right, were never completely worked out, in part due to the development of other processes for suing the Crown. See 9 HOLDSWORTH, *supra* note 5, at 13–16, 22, 37; *infra* notes 32–35 and accompanying text. Professor Ehrlich dates the widespread use of petitions of right to early in the reign of Edward I (1272–1307). Ehrlich, *supra* note 19, at 84.

rather than the Crown, the petitioner would have had a legal claim. The petition of right asked the Crown to submit itself to the laws that applied to private persons. With the standard notation, “Let right be done,”<sup>26</sup> the King usually endorsed such petitions. Indeed, the well-known phrase “The King can do no wrong” did not carry, as it did in later days,<sup>27</sup> the implication that the King was immune from legal process; to the contrary, the aphorism meant that the King was incapable of being a party to injustice and would therefore consent to suits when his actions harmed the legal interests of a subject.<sup>28</sup> Although obtaining permission to sue the Crown was never as routine as obtaining a writ to sue a private party,<sup>29</sup> suits against the Crown were unremarkable.

Equally uncontested is the elasticity of the judicial system in fashioning processes for resolving these suits. Although the petition of right emerged as an early mechanism for holding the Crown accountable, it possessed certain shortcomings. For instance, a petition of right only authorized a commission to investigate the merits of the claim; if the commission found in favor of the petitioner’s right, the petitioner still needed to take additional steps to bring the case into court.<sup>30</sup> The Crown enjoyed procedural advantages not available to ordinary litigants.<sup>31</sup> Indeed, because of the delays and complexities in the petition of right, the courts developed other, streamlined processes for the most common disputes involving the Crown. As these processes—the *monstrans de droit*, the traverse of office, and the writ of *liberate*—became popular,<sup>32</sup>

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26. In law French, “soit fait droit.” Ehrlich, *supra* note 19, at 97.

27. The Tudors would eventually transform the understanding of monarchy by conflating the King as a person with the King as the embodiment of sovereignty. See 1 POLLOCK & MAITLAND, *supra* note 19, at 511. For the effect of this transformation on the meaning of “the King can do no wrong,” see WILLIAM BLACKSTONE, 1 COMMENTARIES \*239 (Univ. Chi. Press 1979) (1765). Blackstone argued that the phrase meant two things: that any illegality of the King’s agents should not be imputed to the King, and that, because “the law will not suppose the king to have meant either an unwise or an injurious action,” it will assume that the King was somehow deceived to engage in such action. *Id.*

28. See 9 HOLDSWORTH, *supra* note 5, at 19–22; Ehrlich, *supra* note 19, at 42–44, 127–30.

29. See 1 BLACKSTONE, *supra* note 27, at \*236 (“[I]f any person has, in point of property, a just demand upon the king, he must petition him in his court of chancery, where his chancellor will administer right as a matter of grace, though not upon compulsion.”).

30. See 9 HOLDSWORTH, *supra* note 5, at 22.

31. See *id.* at 23–24.

32. The details of the *monstrans de droit* and the traverse of office are not significant to this Article. Both involved methods for determining the Crown’s interests in property held in feudal obligation. For a further discussion, see 9 HOLDSWORTH, *supra* note 5, at 24–26; *Bankers’ Case*, *supra* note 17, at 77–82 (opinion of Lord Keeper Sommers); and Ehrlich, *supra* note 19, at 175–79. Parliament extended these remedies by legislation. 2 & 3 Edw. 6, c. 8 (1548); 36 Edw. 3, Stat. 1, c. 14 (1362).

The writ of *liberate* allowed the Exchequer to pay the Crown’s obligations. 9 HOLDSWORTH, *supra* note 5, at 21. The Crown or Chancellor issued the writ when authorizing work to be performed on the Crown’s behalf; a copy went to the Exchequer to serve as an accounting record that justified the Exchequer’s payment. H.M. Colvin, Book Review, 4 ARCHITECTURAL HIST. 95, 95–96 (1961) (reviewing 4 CALENDAR OF THE LIBERATE ROLLS PRESERVED IN THE PUBLIC RECORD OFFICE (1959)). Thus,

the petition of right fell into disuse.<sup>33</sup> At the start of the eighteenth century, in the *Bankers' Case*, the House of Lords blessed yet another process—the issuance of a writ against the barons of the Exchequer—when neither the *monstrans de droit* nor the traverse of office was available and the petition of right was not requested.<sup>34</sup> Indeed, by the mid-eighteenth century, Blackstone declared confidently that “the law ha[d] provided a remedy” to subjects should the Crown “invade their rights, either by private injuries, or public oppressions.”<sup>35</sup>

But this history, which appears to refute the existence of a foundational English (and, by extension, American) immunity in the years before the American Revolution, tells less than the complete story. First, the Crown retained a special place in the legal order. Although the *monstrans de droit* did not require the Crown’s consent,<sup>36</sup> the petition of right—a more generally useful remedy—did; and however liberally it might have been granted, consent was never a given.<sup>37</sup> In addition, the writ of *rege inconsulto* provided a means for the Crown to suspend proceedings against it;<sup>38</sup> sometimes judges waited for a command from the Crown to proceed with a case.<sup>39</sup> More generally, although views of the Crown’s constitutional prerogatives changed through history,<sup>40</sup> the King always had a sphere of independent authority on which neither Parliament nor the courts could intrude.<sup>41</sup> Nor did ordinary rules of law always apply to the King. Blackstone argued that contract actions against the King succeeded not as a matter of legal right but only because “no wise prince will ever refuse to stand to a lawful contract.”<sup>42</sup> Blackstone further admitted that some “public oppressions” of the King lay beyond legal remedy.<sup>43</sup> Likewise, Locke (and Blackstone, who followed Locke’s reasoning) thought that tort suits against the King were impermissi-

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the writ did not serve as a vehicle to force the Crown to pay obligations that it had not agreed to incur.

33. See 9 HOLDSWORTH, *supra* note 5, at 28.

34. *Bankers' Case*, *supra* note 17; see *infra* Section I.C.

35. 1 BLACKSTONE, *supra* note 27, at \*236.

36. 9 HOLDSWORTH, *supra* note 5, at 26. In addition, during the reign of Henry VIII, Parliament extended relief against the Crown in the newly created courts of Augmentations, Wards, and Surveyors. 33 Hen. 8, c. 39 (1542) (Court of Surveyors); 32 Hen. 8, c. 46 (1540) (Court of Wards); 27 Hen. 8, c. 27 (1536) (Court of Augmentations). These statutes represent early legislative efforts to establish the scope of sovereign immunity. Although they moved the power of consent from the executive to the legislative branch, the necessity of consent to suit remained unchanged.

37. See Ehrlich, *supra* note 19, at 85, 188.

38. *Brownlow v. Cox*, 3 Bulstrode 32, 81 Eng. Rep. 27, 29 (K.B. 1615); 9 HOLDSWORTH, *supra* note 5, at 23; Francis Bacon, *Argument in the Case de Rege Inconsulto* (Jan. 25, 1616), reprinted in 7 THE WORKS OF FRANCIS BACON 687, 689 (James Spedding et al. eds., new ed., London, Longmans & Co. 1879).

39. 9 HOLDSWORTH, *supra* note 5, at 23.

40. See *supra* notes 23–25. For Bracton’s views, see 2 BRACTON, *supra* note 23, at 33, 305–06. For Blackstone’s views, see 1 BLACKSTONE, *supra* note 27, at \*230–326.

41. 1 BLACKSTONE, *supra* note 27, at \*230–70.

42. *Id.* at \*236.

43. *Id.* at \*236–37.

ble because their potential for mischief to the “peace of the public, and security of the government” outweighed the need to compensate individuals injured by the King’s personal wrongdoing.<sup>44</sup>

Second, nearly all of the cases in which the Crown was amenable to suit involved “real actions”—the branch of the common law that dealt with rights in real property. The Crown’s willingness to be a defendant in these actions was both logical and necessary. In medieval England, land was the measure of wealth, status, and power.<sup>45</sup> Smith, who held land in fee (in other words, free of feudal obligations to others), would grant Jones possession of the land in return for Jones’s agreement to provide rents or other services to Smith; thus, Smith became the lord and Jones the vassal.<sup>46</sup> In turn, Jones would subdivide possession of the land between Green and Black in exchange for their agreement to provide Jones rents or services; Green and Black became Jones’s vassals, and Jones their mesne lord. Green and Black might then do the same to others. The “incidents of tenure,” or obligations that ran between lords and vassals, established a latticework of relationships that wove together the economic, social, and political fabric of English feudal life. At the top of the pyramid was the Crown, of whom all land was originally seised (according to the prevailing political theory).<sup>47</sup> It was essential that the Crown be a party to these real actions, for otherwise it might be impossible to determine proper feudal relationships. In some cases, the Crown might have a direct interest in a dispute over tenure.<sup>48</sup> In other cases, the principal dispute lay between private parties; the interest of the Crown was remote or contingent.<sup>49</sup>

Over time, however, the incidents of tenure gave way; and after Parliament abolished the last incidents in 1660,<sup>50</sup> the most common ground for suit against the Crown no longer existed. Although other real actions remained,<sup>51</sup> no general theory of sovereign liability existed. The Crown was

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44. JOHN LOCKE, *SECOND TREATISE OF GOVERNMENT* § 205, at 104 (C.B. Macpherson ed., Hackett Publ’g Co. 1980) (1690); 1 BLACKSTONE, *supra* note 27, at \*236 (quoting John Locke).

45. *See* 2 WILLIAM HOLDSWORTH, *A HISTORY OF ENGLISH LAW* 55–56 (4th ed. 1936).

46. Although it was common to provide rents (or socage tenure), other obligations could substitute. Until its abolition, the obligation of “frankalmoin” granted possession to an abbey or church in return for an agreement to say prayers for the grantor. Likewise, Jones might take the land subject to a military tenure, which obliged him to serve as a knight for a certain number of days each year. Tenure by serjeanty was a complex class of obligations usually requiring that a person render personal services for the grantor. 1 POLLOCK & MAITLAND, *supra* note 19, at 240–96.

47. *Id.* at 232–33.

48. *See* 9 HOLDSWORTH, *supra* note 5, at 24.

49. Indeed, as the years progressed, some suits joining the Crown were fictional. Such disputes involved two private individuals, but the processes for proceeding against the Crown possessed advantages over other forms of action. Therefore, one party would fictitiously plead an interest of the Crown in the dispute and add the Crown as a party. *See* PLUCKNETT, *supra* note 21, at 160–61.

50. 12 Car. 2, c. 24 (1660).

51. The remedy against the Crown in real actions was “*amoveas manus*,” or removal of the Crown’s hands from the land. In some cases, such judgments might also involve an award of damages against the Crown. *See* 9 HOLDSWORTH, *supra* note 5, at 20–21.

subject to an action for the payment of money in some early cases.<sup>52</sup> But because the common law did not develop a general theory of contractual obligation until the seventeenth century,<sup>53</sup> these cases do not support an overarching view of the Crown's liability for breach of contract.<sup>54</sup>

Third, in a way that our modern sensibilities have difficulty comprehending, procedural form dominated substantive thinking at common law.<sup>55</sup> The question was never whether the sovereign should be liable; the question was whether a form of action existed to hold the sovereign liable.<sup>56</sup> The *monstrans de droit* and the traverse of office streamlined real actions against the Crown; they provided neither monetary recovery nor a procedure to sue the Crown generally. After these remedies developed, the petition of right—a broader but more cumbersome form that could in theory have been the procedural vehicle for recovering money from the Crown—fell into desuetude, not to be resurrected until the nineteenth century.<sup>57</sup> We have already mentioned the lack of any writ by which the Crown could be held responsible for its torts.<sup>58</sup> Thus, although procedures existed to hold the Crown accountable in specific situations, no generally applicable process held the Crown responsible for its wrongdoing. Given the lack of ready procedure, any modern effort to tease from the historical material a general, substantive theory of sovereign liability is misguided.

Finally, the few cases in which damages might have been awarded against the Crown involved a restriction that is of critical, although overlooked, importance: they were filed in the Court of Exchequer. Like all royal courts, the Exchequer began as an administrative wing of the Crown.<sup>59</sup> But unlike the other royal courts, the Exchequer never completely lost its duality

52. Such cases rarely resulted in an award of money, which was scarce; the Crown preferred to grant (and many creditors preferred to receive) land or the proceeds associated with one of the Crown's incidents of tenure. See Ehrlich, *supra* note 19, at 32.

53. See, e.g., Slade's Case, 4 Co. Rep. 92 b, 76 Eng. Rep. 1074 (Exch. 1602).

54. See 9 HOLDSWORTH, *supra* note 5, at 21.

55. See HENRY SUMNER MAINE, DISSERTATIONS ON EARLY LAW AND CUSTOM 389–90 (New York, Henry Holt & Co. 1886). As Maine states,

So great is the ascendancy of the Law of Actions in the infancy of Courts of Justice, that substantive law has at first the look of being gradually secreted in the interstices of procedure; and the early lawyer can only see the law through the envelope of its technical forms.

*Id.* at 389.

56. Indeed, even in the *Bankers' Case*, which is sometimes regarded as the first case in the modern era to address sovereign immunity, the issue was one of procedure rather than substance: whether a writ could issue against the barons of the Exchequer to require them to pay an obligation of the Crown. See *infra* note 193 and accompanying text.

57. See *infra* notes 241, 247–248 and accompanying text.

58. See *supra* note 44 and accompanying text; see also 9 HOLDSWORTH, *supra* note 5, at 19–20, 42–43 (noting the lack of remedy for torts).

59. See PLUCKNETT, *supra* note 21, at 11–12, 146–47. Although they achieved a measure of independence from the Crown, the common-law courts were not a third branch of government as in the modern American system. Judges were a part of the royal administration, paid by the Crown from its revenue and appointed (and dismissed) by the Crown at its pleasure. See *infra* note 372 and accompanying text.

as agency and court. In its administrative capacity, the Exchequer served as the treasury into which royal revenue flowed and from which funds were disbursed. In its judicial capacity, the Exchequer served as the tribunal that held accountable those who collected revenue, and that adjudicated the liability of those who did not provide revenue that the Crown argued was due. Because it controlled the revenue, the Exchequer was the logical place for a subject to file a monetary claim against the Crown.<sup>60</sup>

By locating claims against the Crown in the Court of Exchequer, the legal system effectively made these claims a part of the machinery of government finance. We now turn to the history of financing the English government, and show how the struggle between the Crown and Parliament for fiscal control, which became the cornerstone on which modern constitutional democracy was built, requires a reinterpretation of sovereign immunity.

### *B. Financing Government: The Foundation of Parliament's Constitutional Preeminence*

Chapter 12 of the Magna Carta seems an unlikely fountainhead for either modern constitutional democracy or modern sovereign immunity. By agreeing that “[n]o scutage nor aid shall be imposed on our kingdom, unless by common counsel of our kingdom,”<sup>61</sup> King John limited the Crown’s power to raise revenue and injected the “common counsel” (that is, Parliament) into the process of financing government. But Chapter 12 also harbingered a power struggle that ended, more than 475 years later, with Parliament wresting control of government finance from the Crown. With such power came political supremacy.

#### *1. The Gathering Storm: Finance Before the Stuarts*

In the beginning, Chapter 12 affected only a portion of government finance. Until the eighteenth century, the Crown had two basic sources of

60. See WILLIAM BLACKSTONE, 3 COMMENTARIES \*428–29 (Univ. Chi. Press 1979) (1768). (“[C]hancery [cannot] give any relief against the king, or direct any act to be done by him, or make any decree disposing of . . . his property . . . . Such causes must be determined in the court of exchequer, as a court of revenue; which alone has power over the king’s treasure . . . .”). Blackstone mentions as the only exception the duchy court of Lancaster. *Id.*

61. WILLIAM SHARP MCKECHNIE, MAGNA CARTA: A COMMENTARY ON THE GREAT CHARTER OF KING JOHN 232 (2d ed. 1914). Translated from Latin, Chapter 12 provides in full:

No scutage nor aid shall be imposed on our kingdom, unless by common counsel of our kingdom, except for ransoming our person, for making our eldest son a knight, and for once marrying our eldest daughter; and for these there shall not be levied more than a reasonable aid. In like manner it shall be done concerning aids from the city of London.

*Id.* “Scutage” allowed knights, who were obliged to fight for the Crown, to avoid royal conscription by paying a fee. Eventually, scutage became nothing more than a tax levied against barons even when no war was being fought. King John’s effort in 1214 to raise scutage from two to three marks was a major grievance that led to the baronial insurrection that forced John to sign the Magna Carta in 1215. See *id.* at 69–76. “Aid” included other taxes or impositions. See *id.* at 232–34.

revenue. The first was the hereditary revenue, which included rents from Crown lands and other income.<sup>62</sup> Some of this revenue was the Crown's by right; the new monarch inherited it.<sup>63</sup> The remainder of the hereditary revenue was vested upon the King or Queen for life upon accession to the throne.<sup>64</sup> The Crown was expected to "live of its own"—in other words, to use the hereditary revenue to pay for both the expenses of the royal household and the costs of government, including support of the navy.<sup>65</sup>

If an expense could not be met from the hereditary revenue, the Crown needed to rely on the second source of funding: taxes. These were the "aids" that, under the Magna Carta, required Parliament's approval.<sup>66</sup> As a general rule, "taxes were intended as exceptional grants to meet the extraordinary necessities of the crown."<sup>67</sup> These necessities typically involved wars.<sup>68</sup> Although it occasionally appropriated funds only for specific purposes,<sup>69</sup> Parliament rarely sought to control how the King used tax revenues.<sup>70</sup>

Over time, the Crown's hereditary revenue was unable to keep pace with inflation, increasing emoluments, an expanding civil service, and the rising

62. Other hereditary income included feudal dues, judicial fees, and customs duties (called tonnage and poundage). See 1 BLACKSTONE, *supra* note 27, at \*272–96 (detailing eighteen branches of the Crown's ordinary revenue during the eighteenth century); PAUL EINZIG, *THE CONTROL OF THE PURSE: PROGRESS AND DECLINE OF PARLIAMENT'S FINANCIAL CONTROL* 29, 49 (1959); DAVID LINDSAY KEIR, *THE CONSTITUTIONAL HISTORY OF MODERN BRITAIN SINCE 1845* 10–12 (9th ed. 1969).

63. See 1 BLACKSTONE, *supra* note 27, at \*271–72. Over time, as various kings and queens sold off Crown lands in return for money, this branch of the royal revenue decreased in value. *Id.* at 271–77.

64. For instance, a King or Queen was traditionally granted customs duties for life. See EINZIG, *supra* note 62, at 58; KEIR, *supra* note 62, at 12; Gwyneth McGregor, *Tudor Tactics*, 10 U. TORONTO L.J. 190, 195 (1954) (noting Henry VIII's lifetime grant of customs).

65. See WILLIAM C. BANKS & PETER RAVEN-HANSEN, *NATIONAL SECURITY LAW AND THE POWER OF THE PURSE* 12 (1994); EINZIG, *supra* note 62, at 29–30; KEIR, *supra* note 62, at 12; MCKECHNIE, *supra* note 61, at 239. For centuries, peacetime England had no standing army to support. See EINZIG, *supra* note 62, at 29–30. The King could gain additional liquidity by borrowing against expected tax revenues, or by compelling towns, clergy, or individuals to provide loans. See *id.* at 93–99; KEIR, *supra* note 62, at 12. He could also obtain loans secured by the hereditary revenue or his valuables. See EINZIG, *supra* note 62, at 95 ("The Crown itself was repeatedly pawned.").

66. See EINZIG, *supra* note 62, at 33–35; J.D. Alsop, *The theory and practice of Tudor taxation*, 97 ENG. HIST. REV. 1, 2–3 (1982).

67. Alsop, *supra* note 66, at 2 ("Emergencies produced by incompetence, extravagance, or the monarch's personal whims or ambitions were at least in theory excluded. In practice everything depended upon the circumstances." (footnote omitted)).

68. Other necessities included such things as a voyage for Richard II (1377–99), the coronation of Henry IV (1399–1413), and funds with which a king could pay his debts. See EINZIG, *supra* note 62, at 79–80.

69. See *id.* at 77–78. For instance, the Saladin tithe of 1188 expressly funded a crusade. See *id.* Likewise, the money collected for the ransom of Richard I (1189–99) was paid into an "exchequer of ransom." *Id.* at 77. The first known example of an appropriation by the Commons was a 1340 bill of extraordinary supply, which provided that the revenue be spent on "the Maintenance [and] the Safeguard of our said Realm of England, and of our Wars in Scotland, France, and Gascoign, and in no places elsewhere during the said Wars." 14 Edw. 3, Stat. 2, c. 1 (1340) (alteration in original) (footnote omitted); EINZIG, *supra* note 62, at 79.

70. See F.W. MAITLAND, *THE CONSTITUTIONAL HISTORY OF ENGLAND* 309 (photo. reprint 2001) (1909).

costs of government.<sup>71</sup> As a result, the Crown began to apply more frequently to Parliament for funding.<sup>72</sup> Taxes that the Crown had previously justified as necessary for an extraordinary circumstance were often applied to meet the ordinary, ongoing expenses of government.<sup>73</sup> In the time of Henry VII (1485–1509), English subjects complained that the government deceptively raised threats of war to obtain parliamentary grants that it used for other purposes.<sup>74</sup> But Henry VII and the subsequent Tudors were generally able to avoid provisions in the grants that appropriated money for specific purposes.<sup>75</sup> Under Henry VIII (1509–47), tax revenue paid for such standard items as stables, gifts, and the household expenses of princesses Mary and Elizabeth.<sup>76</sup> By the reign of Elizabeth I (1558–1603), the Crown paid a large percentage of regular, peacetime government costs out of tax receipts.<sup>77</sup>

Had it not been for its role in granting funds to the Crown, Parliament—the prototype of the modern democratic legislature—might well have ceased to exist. As it was, Parliament met irregularly, convening when the Crown, facing a financial crisis, called it into session.<sup>78</sup> The financial circumstances needed to be dire, for convening Parliament was often an unhappy event for the Crown. As early as the thirteenth century, Parliament established the principle that it would discuss its grievances against the Crown before approving a levy; and within a century, it insisted that the Crown agree to remedy these grievances.<sup>79</sup> Parliament’s control over extraordinary grants thus became the source—indeed, the only source—of its power over royal

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71. See Alsop, *supra* note 66, at 16 (describing funding shortages in the time of the Tudors).

72. See Todd D. Peterson, *Controlling the Federal Courts Through the Appropriations Process*, 1998 WIS. L. REV. 993, 1008–09; Peter Raven-Hansen & William C. Banks, *Pulling the Purse Strings of the Commander in Chief*, 80 VA. L. REV. 833, 891 (1994).

73. See Alsop, *supra* note 66, at 17.

74. *Id.* at 21. Alsop claims, “Under the guise of abnormal necessity, taxation was justified for the regular, recurring requirements of the state.” *Id.* at 17.

75. See EINZIG, *supra* note 62, at 82; MAITLAND, *supra* note 70, at 309.

76. See Alsop, *supra* note 66, at 24.

77. See J.R. TANNER, *ENGLISH CONSTITUTIONAL CONFLICTS OF THE SEVENTEENTH CENTURY 1603–1689*, at 7 (1928); Alsop, *supra* note 66, at 17.

78. See KEIR, *supra* note 62, at 37–39; *infra* notes 94–95, 121–122 and accompanying text.

79. See BANKS & RAVEN-HANSEN, *supra* note 65, at 12–13; EINZIG, *supra* note 62, at 42–43. In the thirteenth and fourteenth centuries,

[t]he presentation of gravamina was made an invariable preliminary to the discussion of a grant, the redress of grievances was the condition of the grant, and the actual remedy, the execution of the conditions, the fulfilment of the promises, the actual delivery of the purchased right, became the point on which the crisis of constitutional progress turned.

2 WILLIAM STUBBS, *THE CONSTITUTIONAL HISTORY OF ENGLAND IN ITS ORIGIN AND DEVELOPMENT* 601 (4th ed. 1906).

action. In reality, even this degree of control depended largely on the popularity and political skill of the Crown.<sup>80</sup>

## 2. *The Stuarts and the Struggle for Parliamentary Supremacy*

The accession of the Stuarts upon the death of Queen Elizabeth set the stage for the political storyline of seventeenth-century England: the emergence, by century's end, of Parliament's constitutional preeminence over the Crown.<sup>81</sup> The struggle between the Stuarts and Parliament ranged over many issues, including religion, the degree of Scottish independence, and the divine rights of kings.<sup>82</sup> But there was, above all, the problem of money. The Crown's precarious finances and Parliament's increasing willingness to assert control over royal action through control of the purse eventually propelled Parliament into a predominant position.<sup>83</sup>

The Crown was deeply in debt when James I (1603–1625) came to the throne, and his failure to maintain Elizabeth's tradition of frugality exacerbated matters considerably.<sup>84</sup> Hopes that the rising debt might be paid from future budget surpluses or generous parliamentary grants were neither realistic nor fulfilled.<sup>85</sup> The conundrum facing the Stuart kings was that “[p]arliamentary discussion of grants carried the distasteful corollary of attempted extension of parliamentary power, which eventually might, and ultimately did, lead to parliamentary control of appropriation.”<sup>86</sup> For instance, the Commons of 1621 and 1624 sought to dictate key aspects of foreign

80. See EINZIG, *supra* note 62, at 46–47. To some extent, the ability of the Crown to obtain loans undermined Parliament's power over taxation and expenditures. *See id.* at 95. Members of Parliament, however, were often the Crown's creditors. *See id.* at 94.

81. See ANN LYON, *CONSTITUTIONAL HISTORY OF THE UK 197–98* (2003).

82. See M.M. KNAPPEN, *CONSTITUTIONAL AND LEGAL HISTORY OF ENGLAND 369–71, 420–48* (1942). On the difficulties of governing England and Scotland, see PETER DONALD, *AN UNCOUNSELLED KING: CHARLES I AND THE SCOTTISH TROUBLES, 1637–1641*, at 3–4 (1990). The Stuart accession united England, Scotland, and Ireland under one king (James I of England, who was already James VI of Scotland). *See id.* at 2; KEIR, *supra* note 62, at 155, 180. As King of England, James was the head of the Church of England, and as King of Scotland, he was the head of the Church of Scotland. The Church of England was Anglican in theology and governed by bishops; the Church of Scotland was Calvinist in theology and governed by church elders. *See DONALD, supra*, at 9–11; TANNER, *supra* note 77, at 83–84.

83. See Douglass C. North & Barry R. Weingast, *Constitutions and Commitment: The Evolution of Institutions Governing Public Choice in Seventeenth-Century England*, 49 J. ECON. HIST. 803, 808–15 (1989).

84. See TANNER, *supra* note 77, at 7–8; Robert Ashton, *Deficit Finance in the Reign of James I*, 10 ECON. HIST. REV. 15, 18–19 (1957). Elizabeth's “peace expenditure[s]” ran to about £220,000; in 1607, James I incurred expenditures of £500,000. J.R. TANNER, *CONSTITUTIONAL DOCUMENTS OF THE REIGN OF JAMES I*, at 336 (1930) [hereinafter TANNER, *CONSTITUTIONAL DOCUMENTS*]. In 1603 the debt was £400,000. Through short-term measures, James I managed to reduce the debt to £280,000 by 1610, but it ballooned to £726,000 by 1617. LYON, *supra* note 81, at 198–99, 202.

85. Ashton, *supra* note 84, at 28.

86. *Id.* at 18; see also TANNER, *CONSTITUTIONAL DOCUMENTS, supra* note 84, at 337 (describing the “vicious circle” under which Parliament's grievances drove the Stuarts to avoid convening Parliaments, which required them to find other means of raising revenue, which created new grievances, which led to even more contentious Parliaments when the King was finally forced to convene them).

policy and military strategy.<sup>87</sup> The latter forced James to accept the Subsidy Act of 1624: an appropriation scheme that required money granted for war to be paid to treasurers, appointed by and responsible to Parliament, who would ensure that the funds were spent as Parliament specified.<sup>88</sup>

Upon his accession, Charles I (1625–1649) had repeated disputes with Parliament over money. The Parliament of 1625 sought to exercise its power of the purse by limiting the duration of Charles’s grant of customs duties to one year.<sup>89</sup> Likewise, the Parliament of 1626 refused to vote supplies for war against Spain until Charles addressed its grievances (to which Charles responded by dissolving Parliament and resorting to arguably unconstitutional revenue-raising mechanisms).<sup>90</sup> Most significantly, the Parliament of 1628 forced Charles to accept the Petition of Right, by which he acknowledged that no person could be compelled to make a “Guift[,] Loane[,] Benevolence[,] Taxe or such like Charge without cōmon consent by Acte of Parliament.”<sup>91</sup> Sometimes described as one of the three most important constitutional documents circumscribing monarchical power,<sup>92</sup> the Petition of Right theoretically hogtied the King’s legal authority to raise money on his own.

Whatever its historical significance, however, the Petition of Right had no impact on Charles’s behavior.<sup>93</sup> The Parliament of 1629 ended in turmoil. Unhappy with the session, challenged for allegedly violating the Petition of Right, and refusing to have his royal officers questioned, Charles summarily ordered Parliament to adjourn and dissolved it eight days later.<sup>94</sup> It would be the last Parliament for eleven years.<sup>95</sup>

Teetering on the brink of constitutional irrelevance, Parliament was saved only by Charles’s eventual inability to finance his government. He

87. See BANKS & RAVEN-HANSEN, *supra* note 65, at 13 (discussing the Commons of 1621); KEIR, *supra* note 62, at 184–88 (discussing the Commons of 1621 and 1624).

88. 21 Jac. 1, c. 33 (1624); see TANNER, *supra* note 77, at 269–70.

89. Austin Woolrych, *The English Revolution: an introduction*, in THE ENGLISH REVOLUTION 1, 12 (E.W. Ives ed., 1968). Traditionally, a new king had been voted customs duties for life. See *supra* note 64 and accompanying text. The attempt to limit Charles’s right to these duties failed, so Parliament never granted Charles the use of the duties. See Simon Healy, *Oh, What a Lovely War? War, Taxation, and Public Opinion in England, 1624–29*, 38 CAN. J. HIST. 439, 441 (2003). Charles nonetheless collected them, and even rebuffed later parliamentary efforts to validate his actions *ex post facto*. See LYON, *supra* note 81, at 208.

90. See Healy, *supra* note 89, at 441, 444–47; Woolrych, *supra* note 89, at 12–13. On the nature of Parliament’s grievances, see KEIR, *supra* note 62, at 189.

91. Petition of Right, 1627, 3 Car. 1, c. 1, § 8. The Petition of Right also established other important limitations on the royal prerogative, including the abolition of imprisonment without trial. *Id.* The Petition of Right should not be confused with the petitions of right by which a subject could sue the Crown. See *supra* notes 25–29 and accompanying text.

92. E.g., EDWARD CREASY, THE RISE AND PROGRESS OF THE ENGLISH CONSTITUTION 5 (17th rev. ed., Macmillan & Co. 1907) (1853); KNAPPEN, *supra* note 82, at 373–74. The other two documents are the Magna Carta and the 1688 Bill of Rights.

93. See KEIR, *supra* note 62, at 195–96; LYON, *supra* note 81, at 208–09.

94. See ESTHER S. COPE, POLITICS WITHOUT PARLIAMENTS, 1629–1640, at 11–12 (1987).

95. *Id.* at 1.

faced inflation and increasing costs of governing.<sup>96</sup> The costs of maintaining the military had risen dramatically.<sup>97</sup> Scotland was an additional drain on royal finances.<sup>98</sup> Charles had become caught in a cycle of deficit financing; past obligations paid from current revenue left little for present expenses and necessitated borrowing against future income.<sup>99</sup>

Charles tried various means to generate revenue to compensate for the lack of parliamentary grants.<sup>100</sup> He instructed his lawyers to find devices to raise revenue.<sup>101</sup> He reinstated compulsory knighthood for certain landowners, thus requiring them to pay fees.<sup>102</sup> He resurrected ancient forest rights and fined those who could not prove title.<sup>103</sup> He granted monopolies and special favors.<sup>104</sup> In 1635 he extended the collection of ship money, which was traditionally levied against seaports to supply ships and funds for the navy, to inland counties.<sup>105</sup> And in 1636 he used the same levy again, demonstrating that ship money was no longer a wartime measure, but a questionable, and potentially permanent, tax.<sup>106</sup>

Ship money and other fundraising artifices caused widespread ill will in England.<sup>107</sup> From Charles's perspective at the time, however, they were successful. He restored financial solvency,<sup>108</sup> and increases in taxes and reductions in expenditures even produced a surplus beginning in 1637.<sup>109</sup> Had England been the only country for Charles to rule, he might have retained control, ruled as an absolute monarch, and consigned English democracy to the dustbin of history.<sup>110</sup> But England was not Charles's only country.

96. See KEIR, *supra* note 62, at 158.

97. See Mark Charles Fissel, *Scottish war and English money: the Short Parliament of 1640*, in *WAR AND GOVERNMENT IN BRITAIN, 1598–1650*, at 193, 194–95 (Mark Charles Fissel ed., 1991) [hereinafter *WAR AND GOVERNMENT*].

98. In 1625, the Crown's ordinary revenue in Scotland did not meet expenses. Overall, ordinary Scottish revenue was much less than ordinary English revenue. See David Stevenson, *The King's Scottish Revenues and the Covenanters, 1625–1651*, 17 *HIST. J.* 17, 18 (1974).

99. See Ashton, *supra* note 84, at 29.

100. See EINZIG, *supra* note 62, at 60.

101. See *id.* Professor Tanner characterizes these efforts as “not so much a breach of the law as a systematic attempt to take advantage of the law's technicalities.” TANNER, *supra* note 77, at 74.

102. See COPE, *supra* note 94, at 135–37; EINZIG, *supra* note 62, at 60.

103. See COPE, *supra* note 94, at 138–40; EINZIG, *supra* note 62, at 60.

104. See COPE, *supra* note 94, at 140; TANNER, *supra* note 77, at 75–76.

105. See EINZIG, *supra* note 62, at 60; TANNER, *supra* note 77, at 76–77.

106. See TANNER, *supra* note 77, at 77.

107. See COPE, *supra* note 94, at 113–21; TANNER, *supra* note 77, at 79 (“[T]he King's financial policy was uniting all classes against him . . .”).

108. See KEIR, *supra* note 62, at 205–06.

109. See *id.*

110. See KNAPPEN, *supra* note 82, at 420.

In 1638 Scotland rebelled in the face of the effort of Charles and bishops of the Church of England to “Anglicanise” the Scottish Church.<sup>111</sup> In 1639, in what came to be known as the First Bishops’ War, Charles organized an army without having consulted Parliament and marched to the Scottish border.<sup>112</sup> After brief skirmishing with the Scottish rebels, Charles agreed to their demands and withdrew.<sup>113</sup> The underlying issues were not resolved, and Charles was finally forced to summon Parliament to approve the aid necessary to coerce the Scots.<sup>114</sup> Because Parliament refused to provide funds until its grievances were redressed, however, Charles summarily dissolved it after three weeks, earning it the title of the Short Parliament.<sup>115</sup> He then embarked on another campaign against Scotland without parliamentary support.<sup>116</sup>

The army Charles sent against Scotland for the Second Bishops’ War was underfunded, mutinous, poorly armed, and, by the time of the fighting, out of pay.<sup>117</sup> Facing such a force, the Scots attacked into England. On August 28, 1640, they won the Battle of Newburn and then captured an undefended Newcastle and its London coal trade.<sup>118</sup> The fighting ended with an agreement that required England to pay £850 a day for the Scottish army’s keep until a permanent settlement was reached.<sup>119</sup> This agreement also left the Scottish army in possession of some English counties as security for the payment.<sup>120</sup>

Without a parliamentary grant, Charles could not pay the Scots, “and if he failed to keep his engagements and they elected to march on London, there was no armed force strong enough to stop them.”<sup>121</sup> Therefore, he had no choice but to call Parliament into session.<sup>122</sup> Already in a weak position, Charles lacked the personal and political skills to preserve the Crown’s

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111. See TANNER, *supra* note 77, at 83–86. The issues underlying the Bishops’ Wars included imposition on the Scots of a prayer book similar to that of England and church rule by bishops (episcopacy) rather than presbyters. See *id.* For a history, see MARK CHARLES FISSEL, *THE BISHOPS’ WARS: CHARLES I’S CAMPAIGNS AGAINST SCOTLAND, 1638–1640* (1994).

112. KNAPPEN, *supra* note 82, at 423; TANNER, *supra* note 77, at 86–87. This was the first significant English war since 1399 that had not been brought before Parliament. Caroline M. Hibbard, *Episcopal warriors in the British wars of religion*, in *WAR AND GOVERNMENT*, *supra* note 97, at 164, 164.

113. See TANNER, *supra* note 77, at 87.

114. KNAPPEN, *supra* note 82, at 423; TANNER, *supra* note 77, at 87–88.

115. KNAPPEN, *supra* note 82, at 423–24; TANNER, *supra* note 77, at 88–89.

116. See KNAPPEN, *supra* note 82, at 423–24; TANNER, *supra* note 77, at 89–90.

117. CONRAD RUSSELL, *THE FALL OF THE BRITISH MONARCHIES 1637–1642*, at 140–43 (1991); see Hibbard, *supra* note 112, at 165.

118. See RUSSELL, *supra* note 117, at 142–45.

119. See KNAPPEN, *supra* note 82, at 424; TANNER, *supra* note 77, at 90.

120. See KNAPPEN, *supra* note 82, at 424; TANNER, *supra* note 77, at 90.

121. TANNER, *supra* note 77, at 92.

122. KNAPPEN, *supra* note 82, at 424; TANNER, *supra* note 77, at 90.

financial independence or, ultimately, his own life.<sup>123</sup> Parliament met on November 3, 1640, and did not dissolve until 1660 (the Long Parliament).<sup>124</sup> That twenty-year period saw an Irish Rebellion; two English civil wars; the execution of Charles I; wars with Scotland, Ireland, the Dutch Republic, and Spain; the near-dictatorial rule of Oliver Cromwell; and the rise and fall of both the Commonwealth (1649–53) and the Protectorate (1653–60).<sup>125</sup>

In its initial phase, from 1640 until 1642, the Long Parliament showed that it well understood the source of its political power and took action that put it more firmly in possession of the purse.<sup>126</sup> It enacted legislation that precluded the King from assessing ship money,<sup>127</sup> restored the boundaries of the royal forests,<sup>128</sup> outlawed compulsory knighthood,<sup>129</sup> and limited customs duties to those approved by Parliament.<sup>130</sup> With this legislative package, “[t]he Long Parliament had now succeeded in preventing [the King] from obtaining any more money without common consent . . . and . . . in making itself indispensable in the State.”<sup>131</sup>

After Cromwell’s death in 1658 and a brief period of confusion, the Cavalier Parliament of 1660 restored the Stuarts to the throne. Charles II (1660–85), the son of Charles I, received from Parliament “the royal title, the royal property, and nominally the royal prerogative.”<sup>132</sup> In return, he promised a general amnesty, freedom of religion, security of property acquired during the disturbances, and back pay for the army.<sup>133</sup> In addition, he acknowledged as valid the parliamentary acts of 1641 and 1642 that, among other things, had given Parliament the power of the purse.<sup>134</sup>

For the time, this power remained a limited one. The Cavalier Parliament still “meant that the king should ‘live of his own.’”<sup>135</sup> Parliament did not direct how Charles II should spend his permanent revenue (the hereditary income

123. See KEIR, *supra* note 62, at 158–59; L.J. REEVE, CHARLES I AND THE ROAD TO PERSONAL RULE 173–77 (1989).

124. KNAPPEN, *supra* note 82, at 424.

125. KEIR, *supra* note 62, at 208–09; KNAPPEN, *supra* note 82, at 419–41.

126. See TANNER, *supra* note 77, at 98–99.

127. 16 Car., c. 14 (1641).

128. 16 Car., c. 16 (1641).

129. 16 Car., c. 20 (1641).

130. 16 Car., c. 36 (1642).

131. TANNER, *supra* note 77, at 99. Yet, the control Parliament had won over the purse would lay dormant for years. Under Cromwell, Parliament exercised little influence over expenditures because he “effectively controlled the ‘controllers.’” EINZIG, *supra* note 62, at 83. Likewise, in matters of taxation the Lord Protector had more authority than any of Britain’s monarchs. See *id.* at 62.

132. KNAPPEN, *supra* note 82, at 442.

133. See *id.*

134. See KEIR, *supra* note 62, at 230; KNAPPEN, *supra* note 82, at 440; TANNER, *supra* note 77, at 214–15.

135. Clayton Roberts, *The Constitutional Significance of the Financial Settlement of 1690*, 20 HIST. J. 59, 70 (1977).

and lifetime grants).<sup>136</sup> And with some exceptions,<sup>137</sup> it did not direct how the Crown should spend the temporary supplies it granted.

Nevertheless, Parliament's changes in the terms under which Charles II was to "live of his own" created a new arrangement whose full implications would be realized thirty years later. In 1660 Parliament abolished the last of the feudal incidents that produced revenue for the Crown.<sup>138</sup> Parliament replaced this ancient hereditary revenue with a hereditary grant of excise duties;<sup>139</sup> then, it replaced the remainder of the Crown's revenue with other excise duties and with customs duties that it bestowed on Charles II for life.<sup>140</sup> With Charles's acquiescence to this financial settlement, which was estimated at £1,200,000 per year,<sup>141</sup> Parliament "possessed an indisputable sovereignty in legislation and taxation."<sup>142</sup> For now, however, "the disbursement of revenue was still within the domain of Prerogative."<sup>143</sup>

For a number of reasons—among them, that he was a man "who liked his fun, thought Puritanism no religion for a gentleman, and acted accordingly"<sup>144</sup>—Charles II was unable to govern on his revenue and often requested additional supplies from Parliament.<sup>145</sup> Parliament typically controlled Charles's expenditures by keeping the supplies inadequate rather

136. See *id.* at 70, 72 (noting that the Convention Parliament of 1690, which was less willing to allow the King to "live of his own" than the Cavalier Parliament, was nonetheless "content" to leave "the executive machinery of state . . . with the king"); cf. 1 BLACKSTONE, *supra* note 27, at \*271, \*296 (describing the Crown's ordinary revenue as its "fiscal prerogatives" and the "proper patrimony of the crown").

137. See *infra* note 147 and accompanying text.

138. See *supra* note 50 and accompanying text. Such revenues had been shrinking for centuries. See 1 BLACKSTONE, *supra* note 27, at \*295–96; TANNER, CONSTITUTIONAL DOCUMENTS, *supra* note 84, at 345.

139. 12 Car. 2, c. 24 (1660). This excise grant was "hereditary" in the same sense as the old hereditary revenue had been: it was a perpetual grant regarded as the Crown's own money and was available to the next King or Queen who acceded to the throne without any settlement by Parliament. See 1 BLACKSTONE, *supra* note 27, at \*271–96.

140. See 8 ENGLISH HISTORICAL DOCUMENTS 1660–1714, at 274 (Andrew Browning ed., 1953). The statute that bestowed customs duties is sometimes called the Great Statute. *Id.* at 274, 289. For the text of the Great Statute, see 12 Car. 2, c. 4 (1660).

141. See EINZIG, *supra* note 62, at 83. Parliament chose this amount after a committee determined that the annual expenditures of Charles I from 1637 to 1641 were £1,095,000. See 8 H.C. JOUR. 150 (1660). The estimate of the value of the excise and customs revenues was optimistic and never approached £1,200,000. To make up the difference, Parliament added an unpopular hearth tax to the Crown's hereditary revenue. 14 Car. 2, c. 10 (1662); 8 ENGLISH HISTORICAL DOCUMENTS 1660–1714, *supra* note 140, at 274; E.A. Reitan, *From Revenue to Civil List, 1689–1702: The Revolution Settlement and the 'Mixed and Balanced' Constitution*, 13 HIST. J. 571, 571 (1970). When William III renounced the hearth tax in a message to the House of Commons in 1689, see 10 H.C. JOUR. 38 (1689), that portion of the revenue became available to future monarchs.

142. KEIR, *supra* note 62, at 231.

143. *Id.* at 236.

144. KNAPPEN, *supra* note 82, at 443–44.

145. See, for example, Charles II's speech to the House of Commons on June 12, 1663. 8 H.C. JOUR. 500 (1663). In the 1670s Charles discovered a new source of revenue: secret payments from Louis XIV in return for his agreement to follow France's lead on certain matters. See Clyde L. Grose, *Louis XIV's Financial Relations with Charles II and the English Parliament*, 1 J. MODERN HIST. 177 (1929).

than specifying the authorized uses of the money.<sup>146</sup> In 1665, however, when it granted a supply for a war against Holland, Parliament included an appropriation clause that required the entire sum to be spent on the war.<sup>147</sup>

As a result of his ongoing financial difficulties, Charles resorted to mortgaging the realm's future. Charles obtained loans from numerous financiers against his promise to repay them out of the revenue for future years. In 1667, to forestall these financiers' demands for immediate repayment, Charles issued a proclamation under which "his Majesty [would] hold firm and sacred" his "inviolable" obligations to repay these loans.<sup>148</sup> He ordered the Chancellor, Treasurer, and officials in the Exchequer to "observe the same, as they [would] be answerable to his Majesty at their utmost perils."<sup>149</sup> After making good for five years, however, Charles's desperate need for money to finance a war with Holland led him to order a "stop" on the Exchequer—a suspension of payments to the bankers.<sup>150</sup> The matter was resolved in 1677, when Charles granted the bankers annuities paying six percent per annum in perpetuity,<sup>151</sup> to be paid out of the hereditary excise that Parliament had granted.<sup>152</sup> But the Crown again stopped payment in

146. See EINZIG, *supra* note 62, at 83.

147. 18 & 19 Car. 2, c. 1, § 33 (1666); MAITLAND, *supra* note 70, at 433; see EINZIG, *supra* note 62, at 84; KEIR, *supra* note 62, at 249. Parliament included similar appropriation clauses in a number of subsequent grants. See EINZIG, *supra* note 62, at 84; MAITLAND, *supra* note 70, at 310, 433. During the reign of Charles II the two Houses of Parliament clashed over which controlled the purse. See EINZIG, *supra* note 62, at 113–14; MAITLAND, *supra* note 70, at 310–11. In 1662, over the protest of some of the lords, the House of Commons refused to permit the House of Lords to amend a bill raising revenue, claiming that the sole power lay in the Commons. See 11 H.L. JOUR. 469 (1662). Thereafter the Commons continued to assert its privilege to originate tax and appropriations bills and to deny the Lords the power to amend them. This resolution of the Commons was typical:

*Resolved, &c.* That all Aids and Supplies, and Aids to His Majesty in Parliament, are the sole Gift of the Commons: And all Bills for the Granting of any such Aids and Supplies ought to begin with the Commons: And that it is the undoubted and sole Right of the Commons, to direct, limit and, appoint, in such Bills, the Ends, Purposes, Considerations, Conditions, Limitations, and Qualifications of such Grants; which ought not to be changed, or altered by the House of Lords.

9 H.C. JOUR. 509 (1678). The House of Lords finally acquiesced on the point in 1701. See EINZIG, *supra* note 62, at 113–14; MAITLAND, *supra* note 70, at 310–11. "Thus the House of Commons became in practical power the superior of the two houses." MAITLAND, *supra* note 70, at 311.

148. Proclamation declaring the inviolability of the Exchequer (June 18, 1667), reprinted in 8 ENGLISH HISTORICAL DOCUMENTS 1660–1714, *supra* note 140, at 350, 351.

149. *Id.*

150. The stop occurred either in late 1671, see 9 HOLDSWORTH, *supra* note 5, at 32; *Bankers' Case*, *supra* note 17, at 2, or early 1672, see J. Keith Horsefield, *The "Stop of the Exchequer" Revisited*, 35 ECON. HIST. REV. 511, 512 (1982). The proclamation announcing the stop was published on January 6, 1672. See Proclamation announcing the stop of the Exchequer (Jan. 4–8, 1672), reprinted in 8 ENGLISH HISTORICAL DOCUMENTS 1660–1714, *supra* note 140, at 352. Charles II continued to repay debts other than those of the bankers. See William A. Shaw, *Introduction* to 3 CALENDAR OF TREASURY BOOKS pt. 1, at vii, xxv–xxx (William A. Shaw ed., 1908).

151. See 9 HOLDSWORTH, *supra* note 5, at 33; Shaw, *supra* note 150, at xlvii–xlix. The annuities cost Charles approximately £78,900 per year, see Shaw, *supra* note 150, at xlvi, or roughly 6.5 percent of the £1,200,000 on which he was expected to govern.

152. On the grant of the hereditary excise, see *supra* note 139 and accompanying text.

1683, and payments remained in arrears when the *Bankers' Case* commenced in 1690.<sup>153</sup>

### 3. Finance After the Stuarts

With the *Bankers' Case*, the questions of parliamentary supremacy, fiscal policy, and sovereign immunity collided. Before we examine that case, however, it is necessary to relate briefly the political and fiscal history of the rest of the seventeenth and eighteenth centuries. When James II (1685–88) came to the throne, his hereditary revenue, plus the lifetime revenue granted on his accession, amounted to £1,500,000 per year; Parliament then granted James further revenues for a term of years that brought his income above £1,900,000—an amount that was sufficient, in James's frugal hands, to make the Crown financially independent of Parliament.<sup>154</sup> Both temperamentally and philosophically an absolute monarchist, James II made swift use of his independence, using the prerogatives of his office to promote Roman Catholicism in England.<sup>155</sup> In 1688, resentment over this and other actions<sup>156</sup> led seven peers, representing both parties of Parliament and a broad coalition of English society, to invite William of Orange, the Dutch husband of James's Protestant daughter Mary, to bring an armed force to England.<sup>157</sup> After his army deserted, James abdicated and fled the country.<sup>158</sup> In 1690, Sir Edward Seymour observed that “from such easy concessions” by Parliament of the revenue “came our miseries.”<sup>159</sup>

Parliament never made the same mistake again. An adequate revenue was, in the words of the Lord Treasurer for Charles II, “the sinewes of the monarchy”;<sup>160</sup> or, as Sir Joseph Williamson observed more prosaically in 1690, “when Princes have not needed Money, they have not needed us.”<sup>161</sup>

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153. See *Bankers' Case*, *supra* note 17, at 107. Professor Horsefield states that the bankers received three quarterly payments during the reign of James II, Horsefield, *supra* note 150, at 517, but at least one banker denied receipt of any payments after 1683, see *Bankers' Case*, *supra* note 17, at 107.

154. See Robert Howard, Report to the House of Commons (Mar. 1, 1689), in 10 H.C. JOUR. 37–38 (1689); Roberts, *supra* note 135, at 64, 71–72.

155. See MAITLAND, *supra* note 70, at 312; TANNER, *supra* note 77, at 203.

156. Among other sources of friction were James's manipulation of boroughs to ensure a subservient Parliament, his collection of taxes that Parliament had granted to Charles II but not to him, and his decision to keep a standing army of 16,000 soldiers without Parliament's consent. See MAITLAND, *supra* note 70, at 291, 309, 328.

157. See TANNER, *supra* note 77, at 260–61.

158. KNAPPEN, *supra* note 82, at 446–48.

159. 10 DEBATES OF THE HOUSE OF COMMONS 1667–94, at 13–14 (Anchitell Grey ed., London, D. Henry, R. Cave, & J. Emonson 1763) [hereinafter GREY'S DEBATES] (remarks of Edward Seymour on Mar. 27, 1690).

160. Memorandum of Thomas Osborne, Lord Treasurer, to Charles II (Mar. 17, 1674), in 2 ANDREW BROWNING, THOMAS OSBORNE: EARL OF DANBY AND DUKE OF LEEDS 1632–1712, at 64, 65 (1944).

161. 10 GREY'S DEBATES, *supra* note 159, at 11 (remarks of Joseph Williamson on Mar. 27, 1690).

Thus, the Convention Parliament<sup>162</sup> settled on William and Mary (1689–1694 as joint rulers; 1694–1702 for William III as sole ruler) a revenue of roughly £1,200,000 per year. Specifically, it provided hereditary and excise revenue of £690,000 granted for life, and £577,000 in customs revenue for a four-year period.<sup>163</sup> Not only was this sum grossly inadequate,<sup>164</sup> but limiting nearly half the revenue to a four-year grant also created a recurring need for the Crown to call Parliament into session. And this was precisely the point: Parliament recognized that starving the Crown for revenue was the only way in which it could incline the Crown against corrupt ministers or secure the passage of legislation.<sup>165</sup> As Sir Thomas Clarges observed, “[T]his House hath nothing to get a good bill passed but their money, which when they have once parted with they have no great power.”<sup>166</sup>

By laying an axe to the ancient root that the King should “live of his own,” Parliament carved a new constitutional order as the seventeenth century ended.<sup>167</sup> In this order, “the question of finance was crucial, for Parliament saw in control of finance the most effective instrument to limit the power of the Crown, while the Crown insisted that monarchy could not maintain its proper place in the constitution without some degree of fiscal independence.”<sup>168</sup> The financial settlement on William and Mary “had taken the first steps in the establishment of parliamentary supremacy in finance.”<sup>169</sup> William III still resisted Parliament’s efforts to encumber or to direct the expenditure of his hereditary revenue, on the principle that the money was his to spend as he pleased.<sup>170</sup> But William gave other financial

162. The Convention Parliament, which was called to constitute a government after James’s abdication, was so named because James had thrown the Great Seal into the Thames and without it “the King’s name could not be used on the summonses.” KNAPPEN, *supra* note 82, at 448.

163. Roberts, *supra* note 135, at 62.

164. Professor Roberts estimates that the grant of £1,200,000 was £200,000–£300,000 less than the expenses that William and Mary faced and that, in addition, another £200,000—including almost £80,000 due the financiers in the *Bankers’ Case*—was encumbered to service the interest on past debts. *Id.* at 64–65. Parliament picked “the time-honoured sum of £1,200,000” without regard to the actual needs of the Crown but rather with an eye to ensuring that the Crown would not become financially independent. See Reitan, *supra* note 141, at 578; Roberts, *supra* note 135, at 70.

165. Roberts, *supra* note 135, at 72–73.

166. THE PARLIAMENTARY DIARY OF NARCISSUS LUTTRELL 1691–93, at 193 (Henry Horwitz ed., 1972) [hereinafter PARLIAMENTARY DIARY] (remarks of Thomas Clarges on Feb. 18, 1692).

167. See KEIR, *supra* note 62, at 275–77; Reitan, *supra* note 141, at 571; Roberts, *supra* note 135, at 65.

168. Reitan, *supra* note 141, at 571; see 1 BLACKSTONE, *supra* note 27, at \*323–26 (arguing that the Crown’s revenue was the source of its independence from Parliament).

169. Reitan, *supra* note 141, at 580. Even after its power of the purse was secured, Parliament did not grasp firm political control until the nineteenth century. Indeed, it remained largely indifferent to the details of the Crown’s civil administration and to military affairs during much of the eighteenth century. See EINZIG, *supra* note 62, at 117–21, 130; HENRY ROSEVEARE, THE TREASURY: THE EVOLUTION OF A BRITISH INSTITUTION 86–91 (1969). For example, in 1706, Parliament ceded to the Crown one of its central fiscal powers: the right to initiate requests for expenditure. EINZIG, *supra* note 62, at 130.

170. See Reitan, *supra* note 141, at 587–88; Roberts, *supra* note 135, at 62.

ground to Parliament, “sacrific[ing] the principle of an independent Revenue” in return for money to finance “his purpose in life”: his great war with France.<sup>171</sup> By the mid-1690s, the Crown and Parliament had reached a *détente* that separated the supply for military expenditures from that for civil expenditures.<sup>172</sup> In 1698, Parliament granted William lifetime revenues, estimated at £700,000, to be spent on the “civil list,” which was the money that maintained the royal household and the civil government.<sup>173</sup> At the same time, it assumed responsibility for the national debt and for funding the military—moves that further increased its power and established a new relationship between private and public capital markets.<sup>174</sup> The Glorious Revolution had ushered in a “Financial Revolution” that simultaneously stabilized (and drove down the cost of) government borrowing and altered the constitutional landscape forever.<sup>175</sup>

In the end, even the civil list, which Blackstone extolled as a principal bulwark maintaining the Crown’s “constitutional independence,”<sup>176</sup> gave way to Parliament’s control. Led by Edmund Burke, Parliament brought the civil list within its ambit in 1782 by limiting the Crown’s prerogative to spend from the list.<sup>177</sup> After this legislation, civil expenditures were largely handled in the same fashion as military expenditures.<sup>178</sup> Ministers of the government were subject to questioning about expenditures in Parliament.<sup>179</sup> Burke’s act had “destroyed another of the few remaining vestiges of an independent executive power in the Crown. . . . The eighteenth-century tension between the conflicting principles of parliamentary supremacy and an independent financial provision for the Crown had been resolved—as it had to be—in favour of parliamentary supremacy.”<sup>180</sup>

171. Reitan, *supra* note 141, at 582.

172. *Id.* at 582–84.

173. Civil List Act, 1698, 9 Will. 3, c. 23.

174. See E.A. Reitan, *The Civil List in Eighteenth-Century British Politics: Parliamentary Supremacy versus the Independence of the Crown*, 9 HIST. J. 318, 318–19 (1966). In 1695 Parliament created the Bank of England, using it to issue negotiable Exchequer bills that financed the government. KEIR, *supra* note 62, at 275.

175. See North & Weingast, *supra* note 83, at 808–17. Professors North and Weingast use the term “Fiscal Revolution,” *id.* at 819, although others use the term “Financial Revolution,” e.g., HENRY ROSEVEARE, *THE FINANCIAL REVOLUTION 1660–1760* (1991). *But see* Stephen Quinn, *The Glorious Revolution’s Effect on English Private Finance: A Microhistory, 1680–1705*, 61 J. ECON. HIST. 593 (2001) (critiquing the thesis of North and Weingast and arguing that the Glorious Revolution’s political settlement raised rates on private debt).

176. 1 BLACKSTONE, *supra* note 27, at \*323. See generally *id.* at \*319–23 (describing the rise and significance of the civil list). Although not mentioned by Blackstone, one of the significant aspects of the civil list in practice was that it provided the Crown with a bankroll with which it might buy influence in Parliament. See Reitan, *supra* note 174, at 321–22.

177. See Civil Establishment Act, 1782, 22 Geo. 3, c. 82, § 24; EINZIG, *supra* note 62, at 164–65.

178. EINZIG, *supra* note 62, at 165.

179. *Id.*

180. Reitan, *supra* note 174, at 337.

### C. *The Bankers' Case and Its Aftermath*

With this context, the significance of the *Bankers' Case* may be fully appreciated. The *Bankers' Case* arose out of the loans given to Charles II in 1667 to finance his government.<sup>181</sup> By 1677, when the debt was renegotiated, the unpaid principal and accrued interest was nearly £1,315,000.<sup>182</sup> Because Parliament had not yet assumed responsibility for financing the debt,<sup>183</sup> any debts that Charles incurred on behalf of the government were very much a personal—not Parliament's—obligation.<sup>184</sup> Desperately short of cash, Charles provided the bankers with annuities paying six percent per annum in perpetuity, to be paid out of the hereditary excise that Parliament had granted him.<sup>185</sup> In retrospect, this scheme constituted “the first . . . ‘funding’ operation in English history” and blazed the way for the eventual creation of a national debt funded by tax revenues.<sup>186</sup>

Charles fell behind on payments again in 1683, but the bankers<sup>187</sup> delayed their lawsuit for years. They first petitioned Parliament for payment in 1689.<sup>188</sup> Parliament never acted.<sup>189</sup>

As a result, the financiers brought an action in the Court of Exchequer, seeking a writ ordering the barons of the Exchequer to pay the amounts due on the annuities.<sup>190</sup> Legally, the case presented two critical issues.<sup>191</sup> The first

181. See *supra* notes 148–153 and accompanying text.

182. See Shaw, *supra* note 150, at xlviii.

183. The idea and utility of a national debt serviced out of tax revenues developed after the Glorious Revolution in 1688. See 1 BLACKSTONE, *supra* note 27, at \*315–18; HARVEY E. FISK, ENGLISH PUBLIC FINANCE FROM THE REVOLUTION OF 1688, at 75, 86–87 (1920); North & Weingast, *supra* note 83, at 823; *supra* notes 154–174 and accompanying text.

184. See FISK, *supra* note 183, at 75–76; PARLIAMENTARY DIARY, *supra* note 166, at 123 (remarks of Charles Sedley on Jan. 12, 1692); Shaw, *supra* note 150, at xxxi–xxxiii (criticizing Parliament's “iniquitous and disgraceful” refusal to address Charles II's debt).

185. See *supra* notes 151–152 and accompanying text. Because they had lent money on the strength of Charles's promise to repay, the bankers were understandably reluctant to accept a promise of repayment from Charles's lifetime revenue, which was always a heartbeat away from drying up.

186. ROSEVEARE, *supra* note 169, at 69 & n.

187. There were twenty-five financiers in total, three of whom were owed more than £960,000. Shaw, *supra* note 150, at xlviii. Six were described as “goldsmiths,” *id.*, who were the prototypes of modern bankers, PLUCKNETT, *supra* note 21, at 58. To make the loans, some of the financiers borrowed from others or used assets on deposit; in turn, some assigned the annuity income to their depositors or to others. *Bankers' Case*, *supra* note 17, at 106–07; Bruce G. Carruthers, *Politics, Popery, and Property: A Comment on North and Weingast*, 50 J. ECON. HIST. 693, 694 n.9 (1990). One estimate put the number of creditors affected by Charles's default on the annuities at more than 10,000. *Bankers' Case*, *supra* note 17, at 2–3.

188. See Horsefield, *supra* note 150, at 518; Reitan, *supra* note 141, at 578.

189. Horsefield, *supra* note 150, at 518. As late as January 1692, the bankers were still trying to strike a deal with the Commons for payment. See 10 H.C. JOUR. 631–32 (1692).

190. *Bankers' Case*, *supra* note 17, at 24, 43. According to Comberbach's report, the case began when the financiers presented to the Exchequer the letters patent that Charles II had given them. The report gives “Hillary-term, 1 Will. & Mar.” as the date of the presentation. R v. Hornby, Comberbach 270, 90 Eng. Rep. 472, 472 (Exch. Chamber 1694). That date places the filing as some time early in 1690. Professor Horsefield gives the filing date as January 1691. Horsefield, *supra* note 150, at 518.

191. In the Exchequer Chamber, Lord Chief Justice Treby argued a third issue: defects in the judgment that the Court of Exchequer had entered. *Bankers' Case*, *supra* note 17, at 23–24. In their

was whether Charles II could alienate his hereditary revenue—in other words, whether his grant of annuities was legally binding on successors to the throne.<sup>192</sup> Assuming that the alienation was proper, the second issue was whether a petition to the barons was the proper procedure for obtaining relief.<sup>193</sup>

Despite the technicality and dryness of these issues, the case attracted great attention.<sup>194</sup> Lord Chief Justice Holt thought that the first issue was “the great point of the case.”<sup>195</sup> Lord Somers described the first issue as “a subject of the highest importance” and the second as “a point of as great moment as ever came to be discussed in Westminster-hall.”<sup>196</sup> The case attracted attention, in part, because of the number of affected individuals<sup>197</sup> and the amount of money at stake.<sup>198</sup> But another reason for its salience was its effect on the nascent systems of professional banking and government finance.<sup>199</sup> Although acknowledging these concerns, Somers disclaimed them as the true reasons for the case’s significance. Instead, he said, the case mattered so greatly “because it does in so high a degree concern the government, and disposal of the public revenue, and the treasure of the Crown; whereof the law has always had a superlative care, as that upon which the safety of the king and kingdom must, in all ages, depend.”<sup>200</sup>

The Attorney General demurred generally to the petition,<sup>201</sup> and in 1692, the Court of Exchequer held for the bankers.<sup>202</sup> Three barons<sup>203</sup> found that

opinions in the Exchequer Chamber, Lord Chief Justice Holt and Lord Keeper Somers passed over this argument, *see id.* at 29, 42–43, although Holt mentioned briefly that any defects could and should be corrected, *id.* at 38.

192. *Id.* at 6, 23, 29, 42.

193. *Id.*

194. The *Bankers’ Case* is a staple in English legal histories. *See, e.g.*, 9 HOLDSWORTH, *supra* note 5, at 32–45; PLUCKNETT, *supra* note 21, at 704 (“The most important case [Somers] decided was the *Bankers’ Case* . . .”).

195. *Bankers’ Case*, *supra* note 17, at 29.

196. *Id.* at 43.

197. *See supra* note 187.

198. According to Lord Somers’s opinion in 1696, the amount at stake was £42,385. *Bankers’ Case*, *supra* note 17, at 43. There is no explanation of the difference between this amount and £78,900, the amount of the annuities granted in 1677. *See supra* note 151 and accompanying text.

199. *See* PLUCKNETT, *supra* note 21, at 58–59; North & Weingast, *supra* note 83, at 824–25 (dating the beginnings of private capital markets in England to the early eighteenth century); *supra* note 174 (discussing the creation of the Bank of England).

200. *Bankers’ Case*, *supra* note 17, at 43.

201. *Id.* at 8.

202. *In re Hornbee*, 1 Freeman 331, 89 Eng. Rep. 246 (Exch. 1692).

203. According to Freeman’s report, the three were Chief Baron Atkyns and Barons Turton and Powell. *See id.* Freeman renders Atkyns’s name as “Atkins.” Chief Baron Atkyns gave his opinion on February 6, 1692, eight days after Letchmere and the other two barons had given theirs. 2 NARCISSUS LUTTRELL, A BRIEF HISTORICAL RELATION OF STATE AFFAIRS FROM SEPTEMBER 1678 TO APRIL 1714, at 347–48, 351–52 (London, Univ. Press 1857). The principal opinion was delivered by Turton and Powell; Dodd’s report indicated that Atkyn’s opinion “concurred with Powell and Turton for the petitioners and in all things against the king.” DODD’S REPORTS, *supra* note 17, at 114.

Charles's grant was "good to bind the successor, so as to continue a charge upon the said revenue,"<sup>204</sup> that "the remedy by petition to the Barons was a proper remedy, and that it was in their power to relieve the petitioners, and give judgment for them."<sup>205</sup> Baron Letchmere dissented on the first (and, for him, dispositive) issue, arguing that "the King could not alien or charge this revenue."<sup>206</sup>

The Attorney General then brought a writ of error in the Exchequer Chamber,<sup>207</sup> a court that served several functions<sup>208</sup> and heard claims of error from the common-law courts.<sup>209</sup> The stature of three of the judges whose opinions in the Exchequer Chamber have survived—George Treby, the Lord Chief Justice of the Court of Common Pleas;<sup>210</sup> John Holt, the Lord Chief Justice;<sup>211</sup> and John Somers, the Lord Keeper<sup>212</sup>—gives further proof of the

204. *Hornbee*, 89 Eng. Rep. at 246.

205. *Id.* at 247.

206. *Id.* The statute granting the hereditary excise to Charles II stated that the revenue "shall be paid unto the Kings Majestie His Heires and Successors for ever hereafter." 12 Car. 2, c. 24, § 14 (1660). Letchmere argued that this language—as well as the lack of language such as "to do therewith as he pleased," which Parliament had used in other grants to the Crown—indicated the inalienability of the hereditary revenue. *Hornbee*, 89 Eng. Rep. at 247. It is not clear if Letchmere joined the other barons on the second issue—whether a petition to the barons was a proper remedy. Freeman's report states that "[a]ll the Barons held" the remedy to be proper, *id.* (footnote omitted), but a footnote in the *English Reports* questions whether this statement applied to Letchmere, *id.* at 247 n.(a).

207. *Bankers' Case*, *supra* note 17, at 8.

208. *See* 1 HOLDSWORTH, *supra* note 20, at 242–46; PLUCKNETT, *supra* note 21, at 161–63.

209. The grants of jurisdiction to the Exchequer Chamber can be found in 31 Edw. 3, c. 12 (1357), and 27 Eliz., c. 8 (1585), amended by 31 Eliz., c. 1 (1589). Its proceedings were notoriously expensive, cumbersome, and slow, *see* 1 HOLDSWORTH, *supra* note 20, at 245, which probably explains why its decision in the *Bankers' Case* was not announced until 1696. By statute, the sole judges in the Exchequer Chamber were the Lord Treasurer and the Lord Chancellor, but they were assisted by the justices of the Court of Common Pleas, the justices of the King's Bench, and the Chief Baron of the Exchequer. *See* M. Hemmant, *Introduction to 2 SELECT CASES IN THE EXCHEQUER CHAMBER BEFORE ALL THE JUSTICES OF ENGLAND xi* (M. Hemmant ed., 1948). After 1668, the Lord Keeper was able to render judgment in the Exchequer Chamber when the offices of Lord Treasurer and Lord Chancellor were vacant. 19 & 20 Car. 2, c. 2 (1667–68). As the title implies, the Lord Keeper of the Great Seal had physical custody of the Great Seal of England. The Lord Keeper performed the functions of the Lord Chancellor when the latter office was vacant, and the powers of the office were equivalent to those of the Lord Chancellor. But the office was thought to carry less dignity, for its holder was often a commoner. *See* 5 Eliz., c. 18 (1563); 1 LORD CAMPBELL, *LIVES OF THE LORD CHANCELLORS AND KEEPERS OF THE GREAT SEAL OF ENGLAND 20* (New York, Cockcroft & Co., 7th ed. 1878); R.F.V. HEUSTON, *LIVES OF THE LORD CHANCELLORS 1885–1940*, at xvi (1964).

210. Treby's opinion can be found in *Bankers' Case*, *supra* note 17, at 23–29. It was delivered in June 1695. *Thomas v. R.*, 10 L.R.Q.B. 31, 40 (1874). Judicial ethics were perhaps not what they are today. Treby was the Attorney General when the *Bankers' Case* commenced; he filed the demurrer and argued the Crown's case in the Court of Exchequer. *See* DODD'S REPORTS, *supra* note 17, at 104–06; 7 EDWARD FOSS, *George Treby, in THE JUDGES OF ENGLAND 364, 365* (photo. reprint 2003) (1864); *Bankers' Case*, *supra* note 17, at 107–08.

211. For Holt's opinion, *see Bankers' Case*, *supra* note 17, at 29–38. It was delivered on November 12, 1695. *See* 3 LUTTRELL, *supra* note 203, at 549–50. At the time, the Lord Chief Justice headed the King's Bench. Aside from the Lord Chancellor, he was the highest-ranking judicial officer in England.

212. For Somers's opinion, *see Bankers' Case*, *supra* note 17, at 39–105. It was delivered on June 23, 1696. *See* 4 LUTTRELL, *supra* note 203, at 75–76. A close advisor of William III, Somers had

significance of the case.<sup>213</sup> So does the quality of their arguments. On the merits, Treby and Somers argued for reversal of the judgment favoring the bankers, while Holt argued that it should be affirmed. Treby and Holt believed that Charles II could alienate his hereditary revenue and thus bind his successors,<sup>214</sup> but Somers thought it unnecessary to decide the issue.<sup>215</sup> On the second issue, Treby argued that the barons of the Exchequer “could not give” the “very extraordinary” remedy of granting the bankers’ petitions for payment,<sup>216</sup> but Holt believed that they could.<sup>217</sup> Holt’s argument seized on prior processes—the petition of right, the *monstrans de droit*, and the writ of *liberate*—as well as several prior cases to argue that the petition was “a very proper and legal remedy.”<sup>218</sup> In language and logic familiar to every student of *Marbury v. Madison*,<sup>219</sup> he put the point plainly: “We are all agreed that they have a right; and if so, then they must have some remedy . . . .”<sup>220</sup>

Somers agreed with Treby. His argument, however, was far more sophisticated—indeed, he “distinguished himself by one of the most elaborate Arguments ever delivered in Westminster-hall.”<sup>221</sup> In essence, Somers contended that the proper remedy for the bankers was a petition of right to the Crown, not a petition to the barons of the Exchequer, for the barons had no independent authority to grant relief. Extensively tracing remedies against the Crown through history, Somers showed that the cases on which Holt relied had arisen under particular statutory remedies that Parliament had authorized in lieu of the petition of right.<sup>222</sup> Because no such statute covered the bankers’ situation, he argued, their only recourse was to the ancient petition of right.<sup>223</sup>

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held the title of Lord Keeper since 1693. See 7 EDWARD FOSS, *John Somers, in THE JUDGES OF ENGLAND*, *supra* note 210, at 348. Before becoming Lord Keeper, Somers had been Solicitor General for England from 1689 to 1692 and Attorney General from 1692 to 1693 (in both cases succeeding Treby in office). Thus, he too was involved in the arguments on the *Bankers’ Case* in the Court of Exchequer. See *Thomas*, 10 L.R.Q.B. at 40; DODD’S REPORTS, *supra* note 17, at 103; *Bankers’ Case*, *supra* note 17, at 107–08.

213. Aside from the separate opinions of Treby, Holt, and Somers, a report of the joint opinion of justices of the King’s Bench also exists. *R v. Hornby, Comberbach* 270, 90 Eng. Rep. 472 (Exch. Chamber 1694).

214. See *Bankers’ Case*, *supra* note 17, at 23, 29–34.

215. *Id.* at 43.

216. *Id.* at 23.

217. *Id.* at 37–38.

218. *Id.* at 34.

219. 5 U.S. (1 Cranch) 137 (1803).

220. *Bankers’ Case*, *supra* note 17, at 34.

221. *Id.* at 3. Somers reportedly spent hundreds of pounds collecting books and materials for his argument. *Id.* at 39 n.

222. *Id.* at 42–105.

223. Somers closed his opinion with the observation that the Crown would grant such petitions if they were sought. *Id.* at 105 (“It must be presumed the crown will pay its just debts.”). Given this concession, Professor Desan has argued that the principle Somers tried to preserve was the discretion of Treasury officials to decide how to order payments to creditors, especially during a period of war like the 1690s. Christine A. Desan, *Remaking Constitutional Tradition at the Margin*

Somers had the better of the legal merits.<sup>224</sup> But he faced a significant obstacle. As he acknowledged, “much the greater part of my lords the judges” of the Exchequer Chamber had “delivered their opinions for the affirmance” of the barons’ judgment.<sup>225</sup> Somers asked for the opinions of “all the Judges of England” (including the barons)<sup>226</sup> regarding whether the Lord Chancellor and Lord Treasurer (which, under the circumstances, meant Somers alone<sup>227</sup>) were bound to accept the majority’s opinion.<sup>228</sup> Holt then polled the judges and reported that, by a vote of seven to three, Somers (as Lord Keeper) was “at liberty to give judgment according to his own” opinion.<sup>229</sup> Somers concurred in this view, and reversed the judgment in favor of the bankers “meerly [sic] upon his own opinion.”<sup>230</sup>

The bankers then brought a writ of error to the House of Lords. On January 23, 1700, after two days of argument<sup>231</sup> and with eleven lords dissenting, the House of Lords reversed Somers’s judgment in the Exchequer Chamber.<sup>232</sup>

On the surface, the *Bankers’ Case* provides unequivocal support for those who argue that sovereign immunity did not exist in England in the years before the American Revolution. The affirmative answer given to the second issue in the case—whether a petition to the barons was a proper procedure—seems dispositive on the point. Indeed, even Somers admitted that *some* remedy existed when the Crown failed to keep its contracts.

A deeper examination of the case and its aftermath, however, points to the opposite conclusion. The reason relates to the oft-overlooked first issue

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of the Empire: The Creation of Legislative Adjudication in Colonial New York, 16 LAW & HIST. REV. 257, 271–72 (1998).

224. Even Holdsworth, no fan of sovereign immunity, acknowledged that “[p]robably Lord Somers was right in the explanation which he gave of [the] cases.” 9 HOLDSWORTH, *supra* note 5, at 35. Unsurprisingly, however, some accused Somers of allowing politics to enter into his decision. Horsefield, *supra* note 150, at 520.

225. *Bankers’ Case*, *supra* note 17, at 105; see also R v. Hornely & Williams, Carthew 388, 90 Eng. Rep. 825, 826 (Exch. Chamber 1696). Somers never gave the exact number of justices in the majority. According to Comberbach, however, the justices of the King’s Bench unanimously favored affirmance, “and so did all the other justices in their several arguments, as I was informed, except Treby;” R v. Hornby, Comberbach 270, 90 Eng. Rep. 472, 473 (Exch. Chamber 1694). The same unanimity is reported in Narcissus Luttrell’s diary. 3 LUTTRELL, *supra* note 203, at 549.

226. *Hornely*, 90 Eng. Rep. at 826.

227. Because the offices of Lord Chancellor and Lord Treasurer were both vacant in 1696, Horsefield, *supra* note 150, at 519, the Lord Keeper was empowered to render judgment alone. *Bankers’ Case*, *supra* note 17, at 3.

228. *Bankers’ Case*, *supra* note 17, at 105.

229. *Id.*; see also *Hornely*, 90 Eng. Rep. at 826. Holt was one of the three dissenters.

230. *Hornely*, 90 Eng. Rep. at 826; see *Bankers’ Case*, *supra* note 17, at 105.

231. *Bankers’ Case*, *supra* note 17, at 110. As part of the argument, the Lords heard or received written reports from each of the judges who had rendered an opinion in the Exchequer Chamber. Somers and Holt were principal speakers. 4 LUTTRELL, *supra* note 203, at 606.

232. See *Williamson v. Attorney General*, 16 H.L. JOUR. 499 (1700). The *Journals* list 104 lords as being present on that day, but they do not record the number voting in the affirmative. Nor do they include an opinion for the majority. The dissenters filed a four-paragraph opinion that broke no new ground. *Id.* at 499–500.

that all the judges but Somers resolved: whether the Crown was able to dispose of its hereditary revenue as it wished. Although all agreed that the Crown could do so, the Financial Revolution had effectively mooted the issue for the future. By the time that the *Bankers' Case* was decided, Parliament had seized control of the hereditary revenue, substituting lifetime and annual grants to the Crown in its stead.<sup>233</sup>

That fact might not seem significant, but events soon proved otherwise. First, despite the Lords' judgment, virtually none of the bankers received any compensation from the Exchequer.<sup>234</sup> Instead, the game shifted to Parliament. Over the bankers' protests, the House of Commons fully appropriated the Crown's hereditary revenue to other purposes in 1700.<sup>235</sup> In 1701, Parliament enacted legislation to compensate the bankers beginning in 1705, but it slashed the annuities from Charles II's promised six percent to just three percent and made them redeemable on the payment of half the principal.<sup>236</sup> In 1726, Parliament redeemed the annuities by borrowing against the sinking fund that it had created to reduce the national debt.<sup>237</sup> As these actions demonstrate, the bankers were dependent upon Parliament for payment of the government's liability. And Parliament funded this liability as a part of the ordinary appropriation process.

Second, as part of its effort to control fiscal policy, Parliament put a stop to the Crown alienation that the judges had blessed in the *Bankers' Case*. In 1702, in the act that settled a lifetime revenue on Queen Anne (1702–14), Parliament prevented the Crown from alienating in perpetuity nearly all Crown lands or estates.<sup>238</sup> In the same legislation, it also barred the Crown from alienating the income associated with its traditional hereditary revenue for "longer than the Life of . . . such King or Queen as shall make such Alienation or Grant."<sup>239</sup> Because lenders would be unlikely to grant loans

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233. See *supra* notes 162–175 and accompanying text.

234. One banker reportedly received two payments from the treasury. See Horsefield, *supra* note 150, at 522.

235. *Id.*

236. 12 & 13 Will. 3, c. 12, § 24 (1700–01). The statute charged the payments to the hereditary revenue. *Id.* The reason that Parliament shaved the interest rate and the repayment of principal remains a mystery. Professor Horsefield traces the decision to beliefs that the bankers had extorted a high interest rate from Charles II and that the original debts had been bought up by speculators for far less than full value. Horsefield, *supra* note 150, at 518–19, 523. As part of an act establishing the South Seas Company, Parliament further reduced the interest rate to 2.5 percent in 1716. Compare 3 Geo. 1, c. 7, §§ 12–13 (1716) (stating a 5 percent rate), with 13 Geo. 1, c. 3, § 7 (1726) (noting that the 5 percent interest was payable only on the moiety, effectively making the rate 2.5 percent).

237. 13 Geo. 1, c. 3, § 7 (1726). Professor Horsefield estimates that, in the final analysis, the bankers received a poor rate of return (perhaps 1.5%) and even had the principal significantly written down. As he understates, "the owners of the debt . . . had been hardly done by." Horsefield, *supra* note 150, at 523.

238. 1 Ann., c. 1, § 5 (1702). The stated term was either thirty-one years or another term determinable by "One Two or Three Lives." *Id.* "Advowsons of Churches and Vicaridges" were excluded from the prohibition. *Id.*

239. *Id.* § 7.

whose collection depended on a monarch's continued good health,<sup>240</sup> Parliament had effectively gained control of the Crown's access to nonappropriated funds. Moreover, it had effectively overturned the decision on the first issue in the *Bankers' Case*—that a monarch's alienation of revenue could bind his or her successors—thus ensuring that there would never be another case like it.

Contrary to common understandings, therefore, the *Bankers' Case* was the end of an era in the history of sovereign immunity, not the start. The eighteenth century contained no further common-law sovereign immunity decisions.<sup>241</sup> Henceforth, settling claims against the government was *ab initio* a legislative function, interwoven with Parliament's control over finance and appropriations.

This sea change is best reflected in the opinion of Lord Mansfield in *Macbeath v. Haldimand*,<sup>242</sup> which has gone virtually unnoticed in debates over sovereign immunity.<sup>243</sup> In *Macbeath*, a contractor had agreed to provide supplies to or on behalf of the British military during the American Revolution. He sued the military governor of Quebec for failing to honor portions of the contracts that the governor thought exorbitant. During its deliberations, the jury asked the trial judge if the contractor would have any remedy if it found for the governor. The judge instructed the jury that the existence of other remedies “was no part of their consideration,” but he went on to opine that, “if the plaintiff's demand were just, his proper remedy was by a petition of right to the Crown. On which [the jury] found a verdict for the [governor].”<sup>244</sup>

240. See EDWARD HUGHES, *STUDIES IN ADMINISTRATION AND FINANCE 1558–1825*, at 167 (1934).

241. See Desan, *supra* note 223, at 276 n.43 (“The development of sovereign immunity doctrine in the eighteenth century remains obscure . . .”); cf. *R v. Powell*, 1 Q.B. 352, 113 Eng. Rep. 1166, 1171 (1841) (stating that the remedies of petition of right, *monstrans de droit*, and traverse of office “are now very much out of use,” but suggesting in dicta that they would be available). The *Bankers' Case* was cited on a few occasions in the eighteenth century for some of its subsidiary propositions, but never to hold the Crown legally responsible for its actions. See, e.g., *R v. Roberts*, 2 Strange 1208, 93 Eng. Rep. 1131, 1132 (K.B. 1744); *Queensberry & Dover's Case*, 1 P. Wms. 582, 24 Eng. Rep. 527, 530 (H.L. 1719) (appeal taken from Ch.). It was also twice cited by lawyers in the course of their arguments, but not in cases seeking recovery against the Crown. *Nabob of the Carnatic v. E. India Co.*, 1 Ves. Jun. 371, 30 Eng. Rep. 391, 398 (Ch. 1791); *Stafford v. Buckley*, 2 Ves. Sen. 170, 28 Eng. Rep. 111, 112 (Ch. 1750).

242. 1 T.R. 172, 99 Eng. Rep. 1036 (K.B. 1786).

243. A search of the “TP-all” database in Westlaw (“macbeath /3 haldimand”) on February 25, 2009 revealed only thirteen articles or treatises that cite the case. None of these authorities contains a significant analysis of Mansfield's sovereign-immunity discussion. Four mention it in passing. See Christine A. Desan, *The Constitutional Commitment to Legislative Adjudication in the Early American Tradition*, 111 HARV. L. REV. 1381, 1442 nn.279 & 282 (1998) [hereinafter Desan, *The Constitutional Commitment*]; Desan, *supra* note 223, at 267 n.17, 276 n.43, 277 n.44; Janet McLelan, “Crown Him with Many Crowns”: *The Crown and the Treaty of Waitangi*, 6 N.Z. J. PUB. & INT'L L. 35, 42 (2008); Janet McLean, *The Crown in Contract and Administrative Law*, 24 OXFORD J. LEGAL STUD. 129, 147 n.59 (2004). The remaining nine authorities cite *Macbeath* for other propositions, such as its discussion of the right of jury trial.

244. *Macbeath*, 99 Eng. Rep. at 1038.

The plaintiff sought a new trial, alleging both that the defendant was personally liable and that “the jury had been induced to give their verdict” by the judge’s assertion that a petition of right was available, when in fact “the plaintiff had no remedy against the Crown by a petition of right.”<sup>245</sup> The case ultimately turned on the first point, with the King’s Bench unanimously holding that, on the facts, the agent (the governor) was not personally responsible for a contract that the principal (the government) had allegedly breached.<sup>246</sup> But Mansfield began his opinion by discussing the second point in language deserving extended quotation:

His Lordship said, that great difference had arisen since the [Glorious] Revolution, with respect to the expenditure of the public money. Before that period, all the public supplies were given to the King, who in his individual capacity contracted for all expenses. He alone had the disposition of the public money. But since that time, the supplies have been appropriated by Parliament to particular purposes, and now whoever advances money for the public service trusts to the faith of Parliament.

That according to the tenor of Lord Somers’s argument in *The Banker’s case*, though a petition of right would lie, yet it would probably produce no effect. No benefit was ever derived from it in *The Banker’s case*; and Parliament was afterwards obliged to provide a particular fund towards the payment of those debts. Whether however this alteration in the mode of distributing the supplies had made any difference in the law upon this subject, it was unnecessary to determine; at any rate, if there were a recovery against the Crown, application must be made to Parliament, and it would come under the head of supplies for the year.<sup>247</sup>

Mansfield believed that Parliament’s assumption of power over appropriations had in all probability destroyed the power of courts to grant relief against the Crown; claimants against the government were required to submit their claims through the appropriations process.<sup>248</sup> Two points about *Macbeath* bear emphasis. First, *Macbeath* was decided in May 1786, a little over a year before the Constitutional Convention ensconced the Appropriations Clause in the U.S. Constitution. Second, Mansfield’s

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245. *Id.*

246. *Id.* at 1040–41.

247. *Id.* at 1038 (footnotes omitted).

248. In the nineteenth century, the petition of right received a new lease on life when Parliament enacted the Petition of Right Act, 1860, 23 & 24 Vict., c. 34. The Act allowed people to sue the Crown as long as their claims “would have been cognizable if the same had been a Matter in dispute between Subject and Subject.” *Id.* § 1. Section 7 provided that the statute did not expand remedies against the Crown “in any Case in which he would not have been entitled to such Remedy before the passing of this Act.” *Id.* § 7. This phrase required courts to decide whether any remedy existed for the Crown’s breach of contract before 1860. In *Thomas v. R.*, 10 L.R.Q.B. 31 (1874), Justice Blackburn glided over Mansfield’s argument in *Macbeath* with something less than intellectual honesty, holding that, because a petition of right lay for breach of contract in the *Bankers’ Case*, the breach-of-contract remedy sought in *Thomas* was not new and was therefore actionable. See *Thomas*, 10 L.R.Q.B. at 39–44. In any event, however, the Petition of Right Act made the payment of judgments subject to Parliament’s appropriation of funds. 23 & 24 Vict., c. 34, § 14.

discussion of the fate of the petition of right was soon noted on the American side of the ocean.<sup>249</sup>

## II. THE AMERICAN EXPERIENCE WITH APPROPRIATIONS

On its face, the Appropriations Clause—“No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law”<sup>250</sup>—rejects the outcome of the *Bankers’ Case*. The language of the Clause precludes resort to the type of writ that the bankers sought to draw money from the Treasury.<sup>251</sup> It also readily accommodates Mansfield’s logic in *Macbeath*: just as the fiscal control that Parliament secured in the Financial Revolution relegated claimants against the English sovereign to Parliament’s appropriations process, so the Appropriations Clause relegates suitors against the United States to Congress’s appropriations process.

In this Part, we examine whether this simple proposition holds true. But in doing so, we face issues of translation. The sea change in the law of English sovereign immunity that resulted from Parliament’s control of the fiscal machinery of state lacks a precise parallel in colonial life. American colonists were so far removed from direct dealings with the Crown that none, to our knowledge, ever sued the Crown *itself*.<sup>252</sup> Moreover, the colonial governments—against whom colonists might be expected to bring suit—were proprietorships, charter companies, corporations, or political subdivisions; the rules for suing such entities varied from the rules for suing the Crown directly.<sup>253</sup> Unsurprisingly, therefore, we find in colonial history no *Bankers’ Case* in miniature, where we can examine how legislative, executive, and judicial power collided in the intersection of colonial politics and

249. See *infra* notes 420–422 and accompanying text. Mansfield’s opinions were worthy of considerable weight; he is regarded as “one of the most remarkable of the many great lawyers who have helped to build up the fabric of modern English law.” 12 WILLIAM HOLDSWORTH, *A HISTORY OF ENGLISH LAW* 477 (1938). Indeed, Holdsworth assesses him as a “sound constitutional lawyer,” citing as evidence his judgment in *Macbeath. Id.* at 487.

250. U.S. CONST. art. 1, § 9, cl. 7.

251. Such writs do not appear to be “Appropriations made by Law.” Cf. Sidak, *supra* note 13, at 1170–72 (arguing that an executive branch decision or regulation can be a “Law” within the meaning of the Appropriations Clause). Judicial writs are not “Appropriations” within the common understanding of that term. Moreover, in Article I, the word “Law” refers to legislation Congress enacts. U.S. CONST. art. I, § 7. Finally, the history of the enactment of the Appropriations Clause, see *infra* Sections II.A–C, does not suggest that judicial processes fell within the meaning of the Clause.

252. See John J. Gibbons, *The Eleventh Amendment and State Sovereign Immunity: A Reinterpretation*, 83 COLUM. L. REV. 1889, 1896 (1983). It bears remembering that the common law had nothing akin to modern public-law litigation, which holds the government accountable for broad constitutional violations. To sue the Crown successfully, a person needed to point to some immediate action of the Crown that caused a wrong cognizable within the then-extant forms of action (principally, what we might regard today as torts and contracts). But the Crown was not thought to be liable for its torts, see *supra* notes 44, 58 and accompanying text, and in any event, no monarch ever directly injured a colonist. Nor, to our knowledge, did any English monarch ever enter into, and then breach, a contract with a colonist.

253. See 1 ALFRED H. KELLY ET AL., *THE AMERICAN CONSTITUTION: ITS ORIGINS AND DEVELOPMENT* 2–11 (7th ed. 1991); Gibbons, *supra* note 252, at 1896–98.

fiscal authority. We are left at the point of inference—the point that has divided judges and scholars as they have debated the nature of the sovereign-immunity doctrine, if any, that made its way into the U.S. Constitution.

Although a complete study of sovereign immunity in the American colonies has never been undertaken,<sup>254</sup> a few pieces of data are well established. First, the seventeenth-century charters or constitutions of a number of the colonies contained “sue and be sued” clauses that waived sovereign immunity.<sup>255</sup> Second, the procedural forms for suing the English sovereign—the petition of right, the *monstrans de droit*, and the traverse of office—never made the trip across the ocean.<sup>256</sup> Third, in the eighteenth century many colonies adjudicated claims against the government in their legislatures.<sup>257</sup> Fourth, during the Revolutionary War, some state legislatures developed a process—similar in many ways to the petition of right—by which claimants dissatisfied with the settlement of their claims could petition the judicial branch for relief.<sup>258</sup>

In this Part, we add another well known piece of evidence that has thus far been ignored in the debates over sovereign immunity: namely, the parallel between the seventeenth-century fiscal battles between Crown and Commons and the eighteenth-century fiscal battles between royal governors and colonial assemblies. The colonial battles had precisely the same outcome as their English predecessors, with the colonial assembly gaining effective hegemony over the royal governor. We assert that the Appropriations Clause enshrined this legislative supremacy by vesting the “power of the purse” in Congress. We then draw the inference—supported by the language in the *Federalist Papers* and the ratification debates, and reflected in the subsequent writings of St. George Tucker and Joseph Story—that the Appropriations Clause embodied the same congressional control over the national government’s legal obligations that Parliament had achieved in England.

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254. For an overview, see Gibbons, *supra* note 252, at 1896–99. For a detailed treatment of sovereign immunity in New York, see Desan, *supra* note 223.

255. Gibbons, *supra* note 252, at 1896.

256. *United States v. Lee*, 106 U.S. 196, 238–39 (1882) (Gray, J., dissenting) (“The English remedies of petition of right[,] *monstrans de droit*, and traverse of office, were never introduced into this country as part of our common law . . .”); Jaffe, *supra* note 2, at 19.

257. *Lee*, 106 U.S. at 239 (Gray, J., dissenting) (“[I]n the American Colonies and States claims upon the government were commonly made by petition to the legislature.”); Desan, *The Constitutional Commitment*, *supra* note 243, at 1383; Pfander, *supra* note 6, at 929–32. Professor Desan indicates that, in New York, the first such claim was settled in 1706, just a few years after the resolution of the *Bankers’ Case*. See Desan, *The Constitutional Commitment*, *supra* note 243, at 1404–08 (describing the political and financial circumstances leading to this legislative settlement). It is important to note that not all claims submitted for legislative adjudication involved matters that had ripened to the point of litigation. Rather, submitting a claim to the legislature was part of the ordinary process for securing payment. See JACK P. GREENE, *THE QUEST FOR POWER: THE LOWER HOUSES OF ASSEMBLY IN THE SOUTHERN ROYAL COLONIES 1689–1776*, at 53 & n.6, 97 (1963) [hereinafter GREENE, *QUEST*]; Pfander, *supra* note 6, at 932–33. On the more general use of colonial assemblies as courts, see MARY PATTERSON CLARKE, *PARLIAMENTARY PRIVILEGE IN THE AMERICAN COLONIES 14–60* (1943).

258. Pfander, *supra* note 6, at 934–45.

A. *Following the English Example: Colonial Legislatures  
and the Control over Appropriations*

After the Restoration in 1660, English authorities imposed an English model upon colonial governments, with governors, councils, and assemblies taking the roles of the Crown, the House of Lords, and the House of Commons, respectively.<sup>259</sup> By 1700 each colony possessed this tripartite structure of government.<sup>260</sup> The colonists were well aware that this structure mirrored the British constitution.<sup>261</sup> “Belief in a fundamental correspondence between the English constitution and the separate colonial constitutions, almost an axiom of political thought in eighteenth-century America, had gained currency rapidly at the end of the seventeenth century.”<sup>262</sup> In particular, colonists analogized their legislative bodies to Parliament, with their “lower House[s] possessing powers akin to those won and exercised by the House of Commons.”<sup>263</sup>

The assemblies also modeled their actions on the House of Commons.<sup>264</sup> Colonial representatives had access to the proceedings of the Commons, as well as to historical collections, Whig literature of the Stuart era, philosophical works, and parliamentary commentaries and procedural books.<sup>265</sup>

259. See JACK P. GREENE, *PERIPHERIES AND CENTER: CONSTITUTIONAL DEVELOPMENT IN THE EXTENDED POLITIES OF THE BRITISH EMPIRE AND THE UNITED STATES, 1607–1788*, at 30–31 (1986) [hereinafter GREENE, *PERIPHERIES*]. Sometimes Crown officials indirectly encouraged the view that the lower houses had the same powers as the Commons. For instance, from 1730 to 1754, Crown officials sent instructions to North Carolina’s Lower House forbidding them from exercising “any power or privilege whatsoever which is not allowed by us to the House of Commons or the members thereof in Great Britain.” 1 *ROYAL INSTRUCTIONS TO BRITISH COLONIAL GOVERNORS 1670–1776*, at 113 (Leonard Woods Labaree ed., 1935) [hereinafter *ROYAL INSTRUCTIONS*]. Likewise, Governor Burnet told the Massachusetts House in 1728 that the British Parliaments “have a just Claim to be a Pattern to the Assemblies in the Plantations.” Governor William Burnet, Speech to the Massachusetts House of Representatives (July 24, 1728), in 8 *JOURNALS OF THE HOUSE OF REPRESENTATIVES OF MASSACHUSETTS 1727–1729*, at 245, 245 (1927). At least one royal official, however, asserted that Britain would never “suffer those Assemblies to erect themselves into the power, and authority, of the British House of Commons.” The Opinion of the Attorney-General Pratt, on the several powers of the Council and Assembly of Maryland (n.d.), in *OPINIONS OF EMINENT LAWYERS 264, 267* (George Chalmers ed., Burlington, C. Goodrich & Co. 1858).

260. KELLY ET AL., *supra* note 253, at 24–25, 29–30; CHARLES A. KROMKOWSKI, *RECREATING THE AMERICAN REPUBLIC: RULES OF APPORTIONMENT, CONSTITUTIONAL CHANGE, AND AMERICAN POLITICAL DEVELOPMENT 1700–1870*, at 60–61 (2002).

261. In the eighteenth century three distinct constitutions shaped the development of the colonial legislatures and British–colonial relations: the unwritten British constitution pertaining to the English government; the imperial constitution, acknowledged but ill-defined, pertaining to relations between the English government and the colonies; and each colony’s separate constitution. GREENE, *PERIPHERIES*, *supra* note 259, at 67–68; KROMKOWSKI, *supra* note 260, at 54–61.

262. BERNARD BAILYN, *THE ORIGINS OF AMERICAN POLITICS* 60 (1968).

263. JOHN F. BURNS, *CONTROVERSIES BETWEEN ROYAL GOVERNORS AND THEIR ASSEMBLIES IN THE NORTHERN AMERICAN COLONIES* 14 (1923).

264. See JACK P. GREENE, *NEGOTIATED AUTHORITIES: ESSAYS IN COLONIAL POLITICAL AND CONSTITUTIONAL HISTORY 194–95* (1994) [hereinafter GREENE, *NEGOTIATED AUTHORITIES*].

265. *Id.* Professor Greene observes that the colonials had access to the works of “Henry Neville, Algernon Sydney, and John Locke (each of which carefully defined the functions of the House and elaborated the proper relationship between prerogative and Parliament).” *Id.* at 195. See

From these sources they learned about managing elections, appointing officers, and the myriad details of running a legislative body.<sup>266</sup> Equally significant, these sources taught the colonists the “institutional imperatives for representative bodies” and provided “a concrete program of political action.”<sup>267</sup>

Many colonial leaders—whose families often had emigrated to America during the reigns of the Stuarts—continued to see the political world through the lens of the seventeenth century struggle between the Crown and Parliament long after that conflict had lost salience in England itself.<sup>268</sup> In large measure, their adherence to this old model was appropriate. Although the relationship between the metropolitan government in London and the colonies was never completely resolved,<sup>269</sup> and although the metropolitan government encouraged the development of representative assemblies to a point,<sup>270</sup> neither the Crown nor the colonial governors ever accepted the notion—which colonists widely shared<sup>271</sup>—that colonists enjoyed all the rights of those on English soil, including those secured in the Glorious Revolution.<sup>272</sup> English officials saw the colonies as “creations of the king,” and saw their constitutional development as “wholly dependent on royal authorization.”<sup>273</sup> English officials further maintained that the colonial assemblies existed only by grace and sufferance; that they did not have the standing of the Commons; and that they were temporary, subordinate agencies with limited lawmaking authority rather than legitimate, organic sources of power.<sup>274</sup> Moreover, governors enjoyed certain powers that the Crown did not.<sup>275</sup> Some tried to rule

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generally BERNARD BAILYN, *THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION* 23–54 (1967) (discussing the range of literature that influenced Revolutionary-era leaders).

266. GREENE, *NEGOTIATED AUTHORITIES*, *supra* note 264, at 196.

267. *Id.* at 197.

268. See BAILYN, *supra* note 265, at 53–54; BURNS, *supra* note 263, at 14–15; GREENE, *NEGOTIATED AUTHORITIES*, *supra* note 264, at 189–207.

269. See *supra* note 261; GREENE, *PERIPHERIES*, *supra* note 259, at 76 (“[T]he authority of the assemblies in the peripheries vis-à-vis that of the crown and the Parliament at the center remained in an uncertain state as late as the 1760s.”); *supra* notes 259, 264 and accompanying text.

270. See *supra* note 259.

271. See GREENE, *PERIPHERIES*, *supra* note 259, at 67; KELLY ET AL., *supra* note 253, at 30.

272. GREENE, *NEGOTIATED AUTHORITIES*, *supra* note 264, at 34; KELLY ET AL., *supra* note 253, at 26 (“The English denied that the principles of the Glorious Revolution applied to the colonies. The colonists insisted that they did . . .”). Whatever the difference in view, political dynamics after the Glorious Revolution favored greater rather than lesser colonial power. See GREENE, *NEGOTIATED AUTHORITIES*, *supra* note 264, at 78–92.

273. KROMKOWSKI, *supra* note 260, at 66; see GREENE, *PERIPHERIES*, *supra* note 259, at 32–35, 43 (noting the Crown’s position that it exercised a greater power in the colonies than in England).

274. See GREENE, *NEGOTIATED AUTHORITIES*, *supra* note 264, at 34–35, 173–74; GREENE, *QUEST*, *supra* note 257, at 15.

275. Governors had the authority to veto legislation, to appoint and dismiss judges, and to sit alone as courts of equity. Most also had the power to discontinue or dissolve their general assembly long after the Crown’s power to prorogue Parliament had effectively ended. Some governors also had powers over the election of the speaker of the assembly, church appointments, and fees. See BAILYN, *supra* note 262, at 67–69; BURNS, *supra* note 263, at 16, 27–28; GREENE, *NEGOTIATED*

with an absolutism and eye toward private gain that eclipsed, in the eyes of the colonists, the worst of the perceived Stuart excesses.<sup>276</sup>

In this environment, assemblies and governors that engaged in political confrontations knew how similar events had played out between Commons and the King, and both sides modeled their actions accordingly.<sup>277</sup> Assemblies readily saw in each arbitrary, venal, or corrupt governor<sup>278</sup> another Charles I or James II.<sup>279</sup> Governors saw the assemblies' opposition to their programs or to royal instructions "as at least a covert challenge to the essential prerogatives of the crown or proprietors"<sup>280</sup>—one that portended a resurrection of the then-discredited Long Parliament.<sup>281</sup>

As a result, eighteenth-century America replayed the political drama of seventeenth-century Stuart England, with its tension between executive assertions of the prerogative and legislative defenses of liberty.<sup>282</sup> In particular, colonists sought to move their own constitutions toward the idealized version of the British constitution that had resulted from the Glorious Revolution: "that is, toward increasing limitations upon prerogative power and greater security for individual and corporate rights under the protection of a strong legislature."<sup>283</sup> Even "[a]s the function of representation within

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AUTHORITIES, *supra* note 264, at 83–84; KELLY ET AL., *supra* note 253, at 33. Governors' powers were not, however, absolute; in many ways, governors were weaker than the Crown in England. They never had "the aura of the concept that the king could do no wrong." GREENE, NEGOTIATED AUTHORITIES, *supra* note 264, at 205. Most found their power to grant patronage to be constricted. BAILYN, *supra* note 262, at 74–76; GREENE, NEGOTIATED AUTHORITIES, *supra* note 264, at 67–69. Nor did their councils, or upper houses, provide a royally exploitable counterbalance to the assemblies, as the Lords did to the Commons. Though usually appointed by the Crown, council members were not from a hereditary aristocracy (America having none), but from the elite of colonial society. Thus, council members had backgrounds and interests like those who sat in the lower houses. Understandably, they often sided with their lower houses against the governor. GREENE, QUEST, *supra* note 257, at 12; KELLY ET AL., *supra* note 253, at 33; *see also* BAILYN, *supra* note 265, at 275 (describing the position of councils in colonial government).

276. *See* GREENE, NEGOTIATED AUTHORITIES, *supra* note 264, at 203–05.

277. *Id.* at 199–202.

278. There were a number of ready examples. *See* BURNS, *supra* note 263, at 119 (describing Massachusetts Governor Belcher's "passion for prestige"); *id.* at 246 (describing New Hampshire Governor Cransfield's greed); GREENE, NEGOTIATED AUTHORITIES, *supra* note 264, at 203–04 (describing colonial impressions of greedy and power-hungry governors). Some governors avoided conflicts by identifying with the colonial interests, going along with the assemblies, or skillfully doling out patronage. *See* GREENE, NEGOTIATED AUTHORITIES, *supra* note 264, at 67–68; GREENE, PERIPHERIES, *supra* note 259, at 47; GREENE, QUEST, *supra* note 257, at 12. Eventually, efforts by metropolitan authorities to take away patronage appointments from governors, GREENE, PERIPHERIES, *supra* note 259, at 47, and to force governors to abide by their explicit instructions, GREENE, NEGOTIATED AUTHORITIES, *supra* note 264, at 73–74, hampered the discretion of governors to handle these confrontations.

279. GREENE, NEGOTIATED AUTHORITIES, *supra* note 264, at 199–200.

280. *Id.* at 200.

281. *Id.* at 201; *see also* KROMKOWSKI, *supra* note 260, at 73 (describing eighteenth-century perceptions of the excesses of the Long Parliament and unrestrained democracy).

282. *See* GREENE, NEGOTIATED AUTHORITIES, *supra* note 264, at 197–202.

283. *Id.* at 39; *see also id.* at 90 (discussing the colonists' perception of their rights following the Glorious Revolution). Despite a common reverence for the Glorious Revolution, *see* BAILYN, *supra* note 265, at 45–47, one critical difference that divided colonists from the English was the colonists' rejection of the view that the Glorious Revolution had established the principle of legisla-

the British constitution was changing dramatically in the eighteenth century, the practices and conceptualizations of representation in the American colonies continued to be defined in the customary terms of executive restraint, remedial action, and legislative independence.”<sup>284</sup>

The outcome of this replay was essentially the same as that of seventeenth-century England, with an even more decisive victory for legislative supremacy. As scholars have often noted, the power and importance of the colonial assemblies increased dramatically over the course of the eighteenth century. Each assembly followed a similar, three-step pattern to preeminence.<sup>285</sup> Beginning from weakness relative to their governors in the seventeenth century, colonial assemblies first obtained the power to tax, to initiate laws, and to sit independently.<sup>286</sup> Next, in the early eighteenth century, they gained the strength to “battle on equal terms with the governors and councils and challenge even the powers in London if necessary.”<sup>287</sup> Finally, by 1763, and in some colonies much earlier, assemblies had achieved “political dominance” within their colonial governments and held “a position to speak for the colonies in the conflict with the imperial government that ensued after 1763.”<sup>288</sup>

The path to power was the familiar one that Parliament had blazed in the seventeenth century: control of the fisc.<sup>289</sup> The Crown’s position was that the colonies could be taxed only by Parliament or with the consent of a colony’s elected house.<sup>290</sup> From the early days of colonial administration, the Crown had granted taxing authority to the assemblies.<sup>291</sup> Parliament slept on

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tive omnipotence. Colonists viewed legislatures as the better protectors of liberty, but they believed that this liberty constrained legislative power. *See id.* at 46–47; GREENE, PERIPHERIES, *supra* note 259, at 75.

284. KROMKOWSKI, *supra* note 260, at 84–85. Professor Kromkowski issues a necessary cautionary note about trying to draw broad conclusions regarding political and ideological commitments from the limited available evidence of the eighteenth century. *Id.* at 65.

285. GREENE, QUEST, *supra* note 257, at 3–9; *see also* KELLY ET AL., *supra* note 253, at 30–33 (discussing the development of the power of colonial assemblies at the expense of colonial governors).

286. GREENE, QUEST, *supra* note 257, at 4; *see also* BURNS, *supra* note 263, at 415–16 (discussing the development of the power of colonial assemblies, particularly with respect to financial matters).

287. GREENE, QUEST, *supra* note 257, at 4.

288. *Id.* Professor Greene notes that only the lower houses in Maryland and New Hampshire had failed to achieve political dominance by 1763, but both had done so by 1776. *Id.* at 7.

289. *See* BURNS, *supra* note 263, at 416 (noting that the assemblies’ control over Northern governors “was effected largely by pressure in the matter of finances”); KELLY ET AL., *supra* note 253, at 31 (“Gaining control over finance was the single most important step in the process.”); LEONARD WOODS LABAREE, ROYAL GOVERNMENT IN AMERICA: A STUDY OF THE BRITISH COLONIAL SYSTEM BEFORE 1783, at 269 (Frederick Ungar Publ’g Co. 1958) (1930) (“The chief weapon which [assemblies] used in their contests for supremacy was their power to control finance.”).

290. GREENE, QUEST, *supra* note 257, at 51.

291. *See id.*; ROYAL INSTRUCTIONS, *supra* note 259, at 167–68. Professor Greene dates legislative taxing authority to 1624, when the Virginia legislature claimed it. GREENE, QUEST, *supra* note 257, at 51. A running dispute in some colonial governments was whether the assembly had the sole power to initiate revenue bills, or whether that power was shared with the council. In general, the

whatever taxing power it possessed:<sup>292</sup> it did not impose a tax on the colonies until the 1765 Stamp Act, which precipitated the constitutional crisis that fueled the American Revolution.<sup>293</sup>

“Power to tax was the most important possession of the lower houses,”<sup>294</sup> and they soon translated this power into authority in other areas. As night follows day, the assemblies asserted the power to appropriate the tax revenues that they collected.<sup>295</sup> Despite having conceded to the assemblies the power to tax, the Crown resisted the notion that they had any authority over appropriations.<sup>296</sup> But until the 1760s,<sup>297</sup> officials in London never successfully imposed their will in the matter.<sup>298</sup> While governors and imperial officials repeatedly requested assemblies to establish a permanent revenue—the equivalent of the hereditary and lifetime revenues of the Crown (or, in eighteenth-century terms, a civil list<sup>299</sup>)—their efforts almost universally failed.<sup>300</sup> As a result, governors had no independent capacity to carry out the imperial government’s programs, to pay colonial officials, or to undertake

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assemblies were successful in wresting control of this power away from the councils. *See id.* at 51–71; *cf. supra* note 147 (describing the comparable struggle between the Commons and the Lords).

292. GREENE, QUEST, *supra* note 257, at 51.

293. *See infra* notes 314–319 and accompanying text.

294. GREENE, QUEST, *supra* note 257, at 51.

295. The impetus to appropriate funds arose from fraudulent behavior by some early governors, but control over appropriations soon became part and parcel of the assemblies’ efforts to control the government. *See* BURNS, *supra* note 263, at 417. Their appropriations function led the assemblies to undertake the task of handling and adjudicating claims against the colonial government. *See supra* note 257 and accompanying text.

296. ROYAL INSTRUCTIONS, *supra* note 259, at 170–71; *see* GREENE, QUEST, *supra* note 257, at 87–88.

297. GREENE, PERIPHERIES, *supra* note 259, at 79–80 (describing the Crown’s attempts to shift the balance of authority away from the colonies, as exemplified by the Stamp Act of 1765).

298. *See id.* at 44–47. In particular, a hands-off approach in colonial affairs characterized the long administration of Robert Walpole from 1721 to 1742. *Id.* at 45–47. The large number of departments and officials with some supervisory responsibility over the colonies made control even more difficult. KEIR, *supra* note 62, at 353.

299. *See supra* note 173 and accompanying text.

300. *See* GREENE, QUEST, *supra* note 257, at 127; KELLY ET AL., *supra* note 253, at 32; ROYAL INSTRUCTIONS, *supra* note 259, at 189–94 (providing the instructions sent to Georgia, North Carolina, and New York that ordered the establishment of a permanent revenue). Only Virginia provided a permanent revenue to the governor, but the assembly nonetheless succeeded in maintaining significant control over that revenue. *See* GREENE, QUEST, *supra* note 257, at 101–04, 127, 130. Although control over finance was critical as a matter of principle, the amounts of money involved were small. Colonial government was “lilliputian by modern standards.” *See* GORDON S. WOOD, THE RADICALISM OF THE AMERICAN REVOLUTION 61 (1991). The annual budget for South Carolina shortly before the Revolution was only £8,000; that of the much larger Massachusetts colony, which employed only six full-time officials, was £25,000. *Id.* at 82. Major budget items were usually the salary of the governor and judges, the legislature’s expenses, and perhaps the salary of some clergy. EDWIN J. PERKINS, THE ECONOMY OF COLONIAL AMERICA 190 (2d ed. 1988). Typically, assemblies appropriated these funds on an annual basis. *See* BURNS, *supra* note 263, at 322–27; GERHARD CASPER, SEPARATING POWER: ESSAYS ON THE FOUNDING PERIOD 73 (1997). *But see* BURNS, *supra* note 263, at 68 (noting semi-annual appropriations of salaries in Massachusetts between 1716 and 1722). Annual appropriations required the assemblies to come back into session frequently—a fact suggesting that the colonists had absorbed another of the lessons in Parliament’s long struggle for power. *See supra* notes 161–166 and accompanying text.

colonial administration.<sup>301</sup> In fact, some colonial assemblies eventually obtained—and occasionally used—the power to disburse money from the treasury without the consent of the governor.<sup>302</sup>

In some colonies, the assemblies had another, particularly effective stick to brandish: they appropriated the money for the governor's salary. Although the Crown set a governor's salary at the time of appointment, it did not typically fund the salary; the governor relied on an appropriation from the assembly for his money.<sup>303</sup> Unsurprisingly, assemblies sometimes threatened to withhold (or, in a few famous instances, actually withheld) the salary until the governor acquiesced to the assembly's desires.<sup>304</sup>

Although governors and assemblies continued to skirmish throughout the colonial period,<sup>305</sup> with some governors possessing more political muscle than others, the ultimate outcome was hardly in doubt.<sup>306</sup> With their power over money secure, the colonial assemblies expanded their authority into other areas. "As a corollary to their extensive control over finance,"<sup>307</sup> assemblies issued paper currency; set salaries and fees; appointed revenue officials, treasurers, and other public officers; controlled public works projects; provided input on military and Indian affairs; created courts; and established terms of office for judges.<sup>308</sup> Assemblies pushed "their authority

301. See KEIR, *supra* note 62, at 355. An exception is Georgia, for which Parliament appropriated funds to meet most expenses of civil government. See GREENE, QUEST, *supra* note 257, at 106, 133.

302. See GREENE, QUEST, *supra* note 257, at 96, 98, 102. Royal officials tried to stop the practice. See ROYAL INSTRUCTIONS, *supra* note 259, at 208–10.

303. See ROYAL INSTRUCTIONS, *supra* note 259, at 254–67 (providing examples of royal instructions that required an assembly to pay a governor, out of available revenues, a specified salary).

304. See GREENE, QUEST, *supra* note 257, at 129; KELLY ET AL., *supra* note 253, at 32; LABAREE, *supra* note 289, at 312–72. The most famous instance of an assembly withholding a salary was that of Governor Burnet in Massachusetts. See BURNS, *supra* note 263, at 76–92; *id.* at 57 (describing the Massachusetts assembly's reduction of a governor's salary during a dispute over the right to veto the assembly's choice of a speaker); *id.* at 323 (noting a New York governor whose salary went unpaid for two years in a dispute over the length of appropriations). In the cases of Virginia, North Carolina, South Carolina, and Georgia, withholding was not an option; London funded governors' salaries out of duties, quitrents, or appropriations. See GREENE, QUEST, *supra* note 257, at 129–47. *But see* GREENE, NEGOTIATED AUTHORITIES, *supra* note 264, at 346–47 (noting that in the 1760s South Carolina did not pay its governor's salary during a dispute over an assembly election).

305. See BURNS, *supra* note 263, at 417 ("Of all these conflicts, those connected with finances were by far the most frequent and the most important."); WOOD, *supra* note 300, at 17 (noting some "successful strong royal governors" in the middle of the eighteenth century).

306. See KEIR, *supra* note 62, at 355 ("At every point, indeed, the governor's authority was circumscribed.").

307. GREENE, QUEST, *supra* note 257, at 222.

308. For a full discussion of the powers that their control over finance allowed the Southern assemblies to assume, see *id.* at 106–25, 148–68, 221–354. See also BURNS, *supra* note 263, at 26 (noting that, in the Northern colonies, the "control of provincial funds" and appropriations allowed the assemblies "to obtain nearly all political desiderata," "effectually to hamper the Governor, and even to venture far into the executive field by encroachments on his military and appointive powers"). Only in the areas of issuing paper currency and defining the jurisdiction of courts and terms of judicial appointment did metropolitan officials uniformly resist the assemblies' influence, and even here their success was only partial. See GREENE, QUEST, *supra* note 257, at 125, 342–43.

well beyond that of the British House of Commons . . . and in many cases obtained a significant share of the traditional powers of the executive.<sup>309</sup>

Indeed, the colonial assemblies had thoroughly internalized the lesson of the Glorious and Financial Revolutions: that a legislature's power to thwart an overbearing executive derived from its control over raising revenue and appropriating money.<sup>310</sup> They understood as well that a legislature must never surrender the "Keys to unlock People[']s Purses."<sup>311</sup> In language that would have been at home during the Convention Parliament,<sup>312</sup> one New Jersey legislator summed up his assembly's political strategy: "Let us keep the dogs poore, and we'll make them do what we please."<sup>313</sup>

For this reason, when Parliament sought to tax the colonies for the first time in the 1765 Stamp Act,<sup>314</sup> colonial assemblies reacted with alarm.<sup>315</sup> Concern increased when Parliament followed the Stamp Act's repeal with the Declaratory Act of 1766, which asserted Parliament's right "to make laws and statutes of sufficient force and validity to bind the colonies and people of *America*" (i.e., "tax"),<sup>316</sup> and the Townshend Acts of 1767, which imposed taxes on imports such as glass, paper, and tea.<sup>317</sup> The Chancellor of the Exchequer, Charles Townshend, "intended and the Americans immediately recognized" that the revenue raised from the Act's duties would be used "to free royal governors and other royal officials from the control of the local assemblies."<sup>318</sup> Faced with a loss of power on two fronts—the power to control taxation and the concomitant power to control royal gover-

309. GREENE, QUEST, *supra* note 257, at 221–22; *see also* KELLY ET AL., *supra* note 253, at 27. On the limits of Parliament's ambition in the eighteenth century, *see* BURNS, *supra* note 263, at 14–15; and *supra* note 168.

310. *See* CASPER, *supra* note 300, at 73.

311. GREENE, NEGOTIATED AUTHORITIES, *supra* note 264, at 197 (alteration in original) (quoting HENRY CARE, ENGLISH LIBERTIES 122 (4th ed., London 1719)).

312. *See supra* notes 161, 166 and accompanying text.

313. MARCUS W. JERNEGAN, THE AMERICAN COLONIES 1492–1750, at 285 (1929).

314. 5 Geo. 3, c. 12 (1765), *repealed by* 6 Geo. 3, c. 11 (1765). The Stamp Act was ostensibly levied to lift from a severely taxed English populace some portion of the burden of a national debt that the Seven Years' War had swollen to £130,000,000, serviced by annual interest payments of £4,000,000. *See* KEIR, *supra* note 62, at 358. But the Act was also designed to test the constitutional proposition that Parliament could tax the colonists. *See* H.W. BRANDS, THE FIRST AMERICAN: THE LIFE AND TIMES OF BENJAMIN FRANKLIN 360–61 (2000); GREENE, PERIPHERIES, *supra* note 259, at 79–82.

315. *See* GREENE, QUEST, *supra* note 257, at 364–72.

316. 6 Geo. 3, c. 12, § 1 (1766).

317. The Acts consisted of several pieces of legislation. In addition to establishing certain rates and duties, 7 Geo. 3, c. 46, § 1 (1767), the Acts permitted customs agents to use unpopular "writs of assistance" (in essence, blank warrants) to search, *see id.* § 10, and suspended the New York assembly until it complied with the Quartering Act of 1765, which required colonies to provide support to British troops, 7 Geo. 3, c. 59 (1767). The duties were repealed, except for the symbolic tax on tea, in 1770. 10 Geo. 3, c. 17 (1770).

318. BRANDS, *supra* note 314, at 389; *see* GREENE, QUEST, *supra* note 257, at 373. The first of the Townshend Acts said as much, providing that the revenue raised could be used by the Crown "for defraying the charges of the administration of justice, and the support of the civil government, within all or any of the said colonies or plantations." 7 Geo. 3, c. 46, § 5 (1767).

nors—colonial assemblies took the position that citizens could be taxed only by a representative body that had elected them.<sup>319</sup> The rest is history.

### B. *Post-Revolutionary Legislative Supremacy over Appropriations*

Less needs to be said of the Revolutionary period. On the national level, the Second Continental Congress did not have the power to tax and did not serve as a lawmaking body.<sup>320</sup> It was an organizing, advisory body that coordinated the efforts of the states to enact legislation, collect taxes, and hold sovereignty.<sup>321</sup> The Articles of Confederation, ratified in 1781, authorized “the United States in Congress” to appropriate money when nine states voted to do so,<sup>322</sup> but gave no power to tax.<sup>323</sup> Although it performed useful coordinating work, the Confederation government was not a true legislature and had no executive branch.<sup>324</sup>

Rather, the prevailing view during the Revolutionary era was that ultimate power resided in the states, which alone had legislatures that represented the will of the sovereign people.<sup>325</sup> Once the Revolution commenced, each state established its own government.<sup>326</sup> New constitutions were adopted in all the colonies except Connecticut and Rhode Island, which continued with their existing charters after deleting references to royal authority.<sup>327</sup>

These state constitutions responded to the prevailing fear of executive authority by increasing the power of the legislatures.<sup>328</sup> Governors were subject to frequent elections, limited in the number of terms they might serve, and given reduced power over appointments.<sup>329</sup> On fiscal matters the state constitutions adopted the mechanisms that had proven successful during the colonial period.<sup>330</sup> Many contained an origination clause providing that

319. See GREENE, QUEST, *supra* note 257, at 373–75.

320. See GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC 1776–1787, at 317, 356 (1969). Because the congresses were not constituted as legislative bodies, they voted on resolves or recommendations rather than coercive legislation. *Id.* at 317.

321. See *id.* Despite its many limitations, the advice of the Congress was heeded and exercised tremendous influence. See *id.* at 355 (noting Congress’s success in “adopting commercial codes, establishing and maintaining an army, issuing a continental currency, erecting a military code of law, defining crimes against the Union, and negotiating abroad”).

322. ARTICLES OF CONFEDERATION, art. IX, § 6 (U.S. 1781) (“The United States, in Congress assembled, shall never . . . appropriate money . . . unless nine States assent to the same . . .”).

323. KELLY ET AL., *supra* note 253, at 79.

324. See *id.* at 79–80.

325. *Id.*

326. See WOOD, *supra* note 320, at 129–30.

327. GORDON S. WOOD, THE AMERICAN REVOLUTION 65–66 (2002). See generally KELLY ET AL., *supra* note 253, at 65–76 (discussing the development of the state constitutions).

328. See KELLY ET AL., *supra* note 253, at 72–73; WOOD, *supra* note 327, at 67–68.

329. WOOD, *supra* note 327, at 67. In Pennsylvania, the office of governor was eliminated altogether. *Id.*

330. See CASPER, *supra* note 300, at 74–75.

money bills must originate in the lower house.<sup>331</sup> Many also provided that the lower house would appoint treasurers.<sup>332</sup> The Maryland, Pennsylvania, and South Carolina constitutions gave their lower houses explicit authority over appropriations; others subjected the governor's expenditures to a warrant requirement or were silent on the matter.<sup>333</sup> According to Professor Casper:

On the whole, the fiscal provisions of the state constitutions confirm . . . that during the founding period money matters were thought of primarily as a legislative prerogative. The reason for this was not simply the insight that appropriations were appropriations of power. It was also the—for us perhaps counterintuitive—hope that assuring legislative supremacy in fiscal matters would bring about the moderation, temperance, and frugality without which free government would be endangered.<sup>334</sup>

### C. *The Appropriations Clause*

#### 1. *The Constitutional Convention*

No appropriations clause appeared in the Convention's competing original plans: the Randolph (or Virginia) Plan, the Patterson (or New Jersey) Plan, the Pinckney Plan, and the Hamilton Plan.<sup>335</sup> The "proto-clause" out of

331. See *id.* at 76; WOOD, *supra* note 320, at 242–43. The lower houses were the successors to the colonial assemblies.

332. See, e.g., CASPER, *supra* note 300, at 76; MD. CONST. OF 1776, art. XIII, *reprinted in* 3 FEDERAL AND STATE CONSTITUTIONS COLONIAL CHARTERS, AND OTHER ORGANIC LAWS OF THE STATES, TERRITORIES, AND COLONIES NOW OR HERETOFORE FORMING THE UNITED STATES OF AMERICA 1693 (Francis Newton Thorpe ed., 1909) [hereinafter FEDERAL AND STATE CONSTITUTIONS]; PA. CONST. OF 1776, sec. 9, *reprinted in* 5 FEDERAL AND STATE CONSTITUTIONS, *supra*, at 3085–86; and VA. CONST. OF 1776, *reprinted in* 7 FEDERAL AND STATE CONSTITUTIONS, *supra*, at 3818.

333. See CASPER, *supra* note 300, at 76. The last clause of the first sentence of Article XVI of the 1778 South Carolina Constitution, for example, used a negative-language formulation that is remarkably similar to that now found in the Appropriations Clause. The sentence provides in full:

That all money bills for the support of government shall originate in the house of representatives, and shall not be altered or amended by the senate, but may be rejected by them, and that no money be drawn out of the public treasury but by the legislative authority of the State.

S.C. CONST. OF 1778, art. XVI, *reprinted in* 2 THE FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS, AND OTHER ORGANIC LAWS OF THE UNITED STATES 1623–24 (photo. reprint 2001) (Ben Perley Poore ed., 2d ed. 1878).

334. CASPER, *supra* note 300, at 77.

335. For Madison's notes on these plans, see 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 20–22 (Max Farrand ed., rev. ed. 1966) [hereinafter FARRAND] (May 29, 1787) (Randolph Plan); *id.* at 242–45 (June 15, 1787) (Patterson Plan); *id.* at 291–93 (June 18, 1787) (Hamilton Plan). Unless otherwise noted, all references to *Farrand* in this Article are to the notes of James Madison.

The exact content of the Pinckney Plan, which Charles Pinckney III presented on the same day as Edmund Randolph presented his, *see id.* at 23 (May 29, 1787), is debated; no record of his proposal has survived. See The Pinckney Plan, in 3 FARRAND, *supra*, app. D, at 595. In any event, Pinckney's plan contained no appropriations clause. Compare *id.* at 595–601 (containing text that Pinckney subsequently claimed was his original proposal), with *id.* at 604–09 (containing reconstructed text akin to Pinckney's likely submission).

which the Appropriations Clause developed is found in Randolph's sixth resolution, which, *inter alia*, gave both legislative branches "the right of originating Acts."<sup>336</sup> After the Constitutional Convention unanimously approved this dual-origination clause as a separate resolution,<sup>337</sup> the clause then crossed paths with the Patterson Plan—which explicitly gave the national legislature the power "to pass acts for raising a revenue"<sup>338</sup>—and became a critical component of the ensuing Great Compromise. Although the wisdom of an appropriations clause was never doubted, the fate of the Constitutional Convention, and of the Constitution itself, ultimately turned on its exact form.

The reason was the nature of the Patterson Plan, which (in contrast to Randolph's proposal for proportional representation in both houses of the legislature) gave an equal vote to every state. Randolph and other delegates from populous states vehemently objected to the Patterson Plan.<sup>339</sup> One of their principal arguments was that, once the national legislature received the power to tax, disproportionate representation would allow a minority of citizens to tax the majority.<sup>340</sup> Trying to find a middle ground, Benjamin Franklin offered a proposal whose language foreshadowed that of the Appropriations Clause: he recommended that equal representation should exist in the second branch of the legislature, but that proportionate voting should be used "in all appropriations & dispositions of money to be drawn out of the General Treasury; and in all laws for supplying that Treasury."<sup>341</sup>

Franklin's proposal went nowhere, but a committee charged with developing a compromise recommended a plan that likewise gave states an equal vote in the second branch. The committee's compromise provided that "all bills for raising or appropriating money" would originate in the first

336. 1 FARRAND, *supra* note 335, at 21 (May 29, 1787).

337. *See id.* at 236 (June 13, 1787). When brought to the Convention floor, this resolution generated no significant debate and passed unanimously. *Id.* at 429 (June 26, 1787).

338. *Id.* at 243 (June 15, 1787).

339. *Id.* at 255–56 (June 16, 1787) (statement of Edmund Randolph); *id.* at 253–54 (statement of James Wilson). The fullest criticism of the plan was Madison's own. *Id.* at 314–22 (June 19, 1787) (statement of James Madison). According to Yates's (but not Madison's) notes, one of Randolph's objections to equal representation focused on the need to provide a national legislature to pay the national government's creditors. *Id.* at 262 (Robert Yates, June 16, 1787) (statement of Edmund Randolph). On the national debt, see *infra* notes 373–385 and accompanying text.

340. *See* 1 FARRAND, *supra* note 335, at 338–39 (June 20, 1787) (statement of George Mason); *id.* at 446–47 (June 28, 1787) (statement of James Madison); *id.* at 464 (June 29, 1787) (statement of James Madison) (arguing that taxation based on unequal representation "would subject the system to the reproaches & evils which have resulted from the vicious representation of G.B. [Great Britain]").

341. *Id.* at 489 (June 30, 1787). Franklin prefaced his proposal with a homey parable that did Poor Richard proud. After noting that the small states feared "their liberties will be in danger" with proportionate representation and that the large states feared "their money will be in danger" without it, he said, "When a broad table is to be made, and the edges (of planks do not fit) the artist takes a little from both, and makes a good joint." *Id.* at 488. Some have credited Franklin's intervention with putting the Great Compromise on course, *see* BRANDS, *supra* note 314, at 682, but the motion to provide equal representation in the second branch was already on the floor when Franklin spoke, *see* 1 FARRAND, *supra* note 335, at 468 (June 29, 1787).

branch; that such bills “‘shall not be altered or amended by the 2d branch: and that no money shall be drawn from the public Treasury, but in pursuance of appropriations to be originated by the 1st branch.’”<sup>342</sup> On July 16, the Convention voted (five states to four, with Massachusetts divided) to adopt the framework of the Great Compromise, including the committee’s language on the origination of revenue and appropriations bills.<sup>343</sup>

At that point, the fireworks that nearly derailed the Convention began. On August 6, the Committee of Detail reported a draft constitution that incorporated the prior debates and decisions. Two clauses were critical. First, Section 5 of Article IV reflected the earlier agreement: “All bills for raising or appropriating money . . . shall originate in the House of Representatives, and shall not be altered or amended by the Senate. No money shall be drawn from the public Treasury, but in pursuance of appropriations that shall originate in the House of Representatives.”<sup>344</sup> Second, Section 12 of Article VI stated: “Each House shall possess the right of originating bills, except in the cases beforementioned.”<sup>345</sup>

The first clause came up for discussion and vote on August 8, and it sparked vigorous debate. Charles Pinckney III moved to strike Section 5 in its entirety, arguing that “[i]f the Senate can be trusted with the many great powers proposed, it surely may be trusted with that of originating money bills.”<sup>346</sup> George Mason argued that “[t]o strike out the section, was to unhinge the compromise of which it made a part,” and that, because the Senate would be an aristocratic body, “[t]he purse strings should never be put into its hands.”<sup>347</sup> James Madison thought that Section 5 was “of no advantage to the large States” and would be “a source of injurious altercations between the two Houses.”<sup>348</sup> Pinckney’s motion carried, seven states to four.<sup>349</sup>

With that vote, the delicate prior compromise blew open. The following morning, Edmund Randolph “expressed his dissatisfaction” about the vote, arguing that it “endanger[ed] the success of the plan, and [was] extremely objectionable in itself.”<sup>350</sup> On August 13, Randolph proposed amendments to the first sentence of Section 5. Arguing for these amendments, George Mason appealed to the English practice that permitted only the House of Commons to originate tax bills because the House of Lords, like the proposed Senate, was “not elected by the people.”<sup>351</sup> After extensive discussion,

342. 1 FARRAND, *supra* note 335, at 526 (July 5, 1787).

343. 2 FARRAND, *supra* note 335, at 14 (Journal, July 16, 1787). Madison’s notes of this language vary slightly from the official journal’s text. *See id.* at 16.

344. *Id.* at 178 (Aug. 6, 1787).

345. *Id.* at 181.

346. *Id.* at 224 (Aug. 8, 1787).

347. *Id.*

348. *Id.*

349. *Id.* at 214, 215 fig. (Journal, Aug. 8, 1787).

350. *Id.* at 230 (Aug. 9, 1787).

351. *Id.* at 274 (Aug. 13, 1787). On the Commons’s power of origination, see *supra* note 147.

the Convention voted down Randolph's amendments, again by a vote of seven states to four.<sup>352</sup> Turning to the second sentence of Section 5—which is the direct precursor to the Appropriations Clause—the Convention voted it down by ten states to one.<sup>353</sup>

This defeat put the fate of the Great Compromise into doubt—not because anyone questioned the wisdom of legislative control over appropriations, but because the sides could not agree whether the right of originating taxation and appropriations bills should rest in a body with proportionate representation. For some, representative control over taxation and appropriations was so vital that, without it, they were willing to overthrow the Compromise and revisit the decision to provide equal representation in the Senate. They had a clear opportunity to do so when Section 12 of Article 6, which needed amendment in light of the votes on August 13, came up for discussion.

The morning of August 15 opened with a discussion of Section 12. Caleb Strong proposed an amendment that substituted language akin to the first sentence of the defeated Section 5 of Article IV for the language of Section 12 of Article VI.<sup>354</sup> It was evident by now that the issues of origination and equal state representation were inextricably entwined—indeed, while the Convention had approved the equal-representation provision on August 9, Mason and Randolph had made plain their intention to seek reconsideration if the decision on origination were not reversed.<sup>355</sup> Thus, when the issue arose on August 15, Hugh Williamson moved to postpone consideration of Section 12 “till the powers of the Senate should be gone over.”<sup>356</sup> The motion carried, six states to five.<sup>357</sup> And when Mason moved to recall Section 12 for discussion on August 21, the Convention voted him down.<sup>358</sup>

The issue arose again on September 5, however, when a committee suggested that Section 12 sever the right of origination from that of appropriation. The compromise provided that “all Bills for raising revenue shall originate in the House of representatives and shall be subject to

352. 2 FARRAND, *supra* note 335, at 280 (Aug. 13, 1787). The principal objections to Randolph's amendments concerned their ambiguities and the legislative gamesmanship that a sole-origination clause would allow. *Id.* at 276–77 (statement of James Madison); *id.* at 279–80 (statement of John Rutledge). Rutledge pointed out that his state, South Carolina, had a comparable clause, *see supra* note 333, which had led to considerable mischief by “continually dividing & heating the two houses.” 2 FARRAND, *supra* note 335, at 280 (Aug. 13, 1787).

353. 2 FARRAND, *supra* note 335, at 280 (Aug. 13, 1787). Only Massachusetts voted in the affirmative. *Id.*

354. *Id.* at 297 (Aug. 15, 1787).

355. *Id.* at 234 (Aug. 9, 1787) (statements of George Mason and Edmund Randolph).

356. *Id.* at 297 (Aug. 15, 1787).

357. *Id.* at 296 & fig. (Journal, Aug. 15, 1787). Curiously, John Rutledge, who had opposed the single-origination idea, *see supra* note 352, seconded Williamson's motion. 2 FARRAND, *supra* note 335, at 297 (Aug. 15, 1787).

358. 2 FARRAND, *supra* note 335, at 353, 355 (Journal, Aug. 21, 1787); *id.* at 357 (Aug. 21, 1787). The vote was again six states to five. Mason had asked for the recall because he “wished to know how the proposed amendment as to money bills would be decided, before he agreed to any further points.” *Id.*

alterations and amendments by the Senate: No money shall be drawn from the Treasury but in consequence of appropriations made by law.”<sup>359</sup>

The Convention initially postponed consideration of the proposal,<sup>360</sup> but returned to it on September 8, when it unanimously agreed to amend the first clause slightly and then voted, nine states to two, to adopt it.<sup>361</sup> The second clause, which is essentially the text of the present Appropriations Clause, was not put to a vote.<sup>362</sup>

The Committee of Style thereafter split the two clauses, putting the sole-origination power over revenue bills into Section 7 of Article I<sup>363</sup> and the dual-origination power over appropriations into Section 9 of Article I.<sup>364</sup> On September 14, the Convention adopted a motion by Mason to add what is now the Statements and Accounts Clause<sup>365</sup> to the end of what is now the Appropriations Clause.<sup>366</sup> After some polishing, the Appropriations Clause became part of the Constitution.

This history reveals two matters of importance. First, the Convention never had in mind that the right of appropriation could be exercised by any branch other than the legislature. The only debate, which occurred only after it became apparent that the Senate would not have proportionate representation, was whether the House would have the sole right to originate revenue and appropriation bills. There is no warrant to believe that judges had any authority to appropriate money from the treasury. On the contrary, the history is clear that the relief obtained in the *Bankers' Case*—a judicial writ to obtain money from the Exchequer—cannot be regarded as an appropriation “made by Law” under the Appropriations Clause.

Second, a reading of the debates of the Convention reveals many issues that divided the delegates—slavery, whether sovereignty resided in the people or in the states, whether representative democracy would work, how much Congress should be permitted to regulate commerce, the strength of the Presidency, and many others. But there was widespread agreement that, in the words of Roger Sherman, “money matters” were for the government “the most important of all”;<sup>367</sup> or, as Madison put it, the “compleat power of

359. *Id.* at 505 (Journal, Sept. 5, 1787).

360. *Id.* The vote was nine states to two. *Id.* at 510 (Sept. 5, 1787). Roger Sherman opposed postponement because he wanted to give “immediate ease to those who looked on this clause as of great moment.” *Id.*

361. *Id.* at 545 (Journal, Sept. 8, 1787); *id.* at 552 (Sept. 8, 1787).

362. *See id.* at 552.

363. Report of Committee of Style (Sept. 12, 1787), in 2 FARRAND, *supra* note 335, at 590, 593; *see also* U.S. CONST. art. I, § 7, cl. 1 (“All Bills for raising Revenue shall originate in the House of Representatives . . .”).

364. Report of Committee of Style, *supra* note 363, at 596.

365. For the text of the Statements and Accounts Clause, *see supra* note 11.

366. 2 FARRAND, *supra* note 335, at 618–19 (Sept. 14, 1787).

367. 1 FARRAND, *supra* note 335, at 342 (June 20, 1787).

taxation [was] the highest prerogative of supremacy . . . proposed to be vested in the National Govt.”<sup>368</sup>

Throughout the debates, delegates expressed concern for the “purse strings”<sup>369</sup> or the “purse”<sup>370</sup>—always regarding the protection of the people’s money as a legislative function.<sup>371</sup> No delegate voiced the opinion that the judicial branch would have any say in the government’s finances. Nor would such a power have made sense at the time. With more than two hundred years’ distance, it is easy to forget that the idea of a judiciary as a distinct branch of government was new. In the English system, courts were part of the Crown’s administration of government; they were in the process of transition to an independent branch during the eighteenth century.<sup>372</sup> To have entrusted fiscal matters to such a group of officials would have been inconsistent with the principle of legislative supremacy over finance.

Indeed, the Convention’s discussions about the national debt are particularly telling. The Confederation government owed approximately \$52 million to its creditors—principally from obligations it had incurred from foreign governments, suppliers, and soldiers during the Revolutionary War.<sup>373</sup> Its inability to repay this debt—in fact, it had suspended interest payments on most of the debt<sup>374</sup>—was one of the principal embarrassments that had led to calls for a stronger national government.<sup>375</sup> But the issue of the national debt was freighted with regional, class, and economic overtones.<sup>376</sup> The delegates agreed that the new government must honor the

368. *Id.* at 447 (June 28, 1787).

369. *See, e.g.*, 2 FARRAND, *supra* note 335, at 274 (Aug. 13, 1787) (statement of George Mason).

370. *See, e.g., id.* at 275 (statement of Elbridge Gerry).

371. Delegates occasionally expressed concern that too much power was being vested in the legislative branch, especially because it controlled both the sword and the purse. *See* 1 FARRAND, *supra* note 335, at 346 (June 20, 1787) (statement of George Mason); 2 FARRAND, *supra* note 335, at 76 (July 21, 1787) (statement of Gouverneur Morris); *id.* at 329 (Aug. 18, 1787) (statement of Elbridge Gerry). Out of this concern eventually developed the one limitation on Congress’s appropriations power: its inability to appropriate funds to “raise and support Armies . . . for a longer Term than two Years” (a period chosen because it corresponded with the cycle of elections for the House). U.S. CONST. art. I, § 8, cl. 12.

372. *See* 10 HOLDSWORTH, *supra* note 249, at 346, 414–16, 720; KEIR, *supra* note 62, at 263, 293–97, 312–14.

373. This amount was Hamilton’s estimate of the debt in 1790. *See* JOSEPH J. ELLIS, *FOUNDING BROTHERS: THE REVOLUTIONARY GENERATION* 55 (2000). States owed another \$25 million. *Id.*

374. RON CHERNOW, *ALEXANDER HAMILTON* 280 (2004).

375. *See* 1 FARRAND, *supra* note 335, at 347 (June 20, 1787) (statement of Roger Sherman); JAMES MADISON, *Preface to Debates in the Convention* (n.d.), in *NOTES OF DEBATES IN THE FEDERAL CONVENTION OF 1787*, at 1, 7–9 (W.W. Norton & Co. 1987) (1966).

376. Because some states (especially in the North) had borne the brunt of the fighting, they tended to have greater debt. In addition, some states had been more vigilant in retiring their debt than others. Therefore, if the federal government assumed state debts, the citizens of those states that had paid their debts were going to be taxed to meet other states’ debts. In addition, there was a general impression that speculators—especially Northern financiers—had taken advantage of destitute soldiers and bought up their securities for pennies on the dollar. *See* CHERNOW, *supra* note 374, at 297–99, 303–04, 322; 2 FARRAND, *supra* note 335, at 356 (Aug. 21, 1787) (statement of Elbridge Gerry); *infra* note 378 and accompanying text.

obligations of the old.<sup>377</sup> But the extent of responsibility and the form that this payment should take depended on an individual delegate's degree of contempt for financiers and speculators.<sup>378</sup> The Convention entertained multiple drafts, trying to find the right words to express the new government's responsibility for the national debt.<sup>379</sup> Delegates argued about whether the Constitution should guarantee payment of the Confederation's debts or Congress should have the power to pay them as it saw fit.<sup>380</sup> They also discussed how payments might be funded, with one draft providing (in language that never made its way into the final document) that Congress could appropriate a "perpetual revenue" to service the interest on the debt.<sup>381</sup> In the end, the delegates compromised on language declaring, "Debts . . . shall be as valid against the United States under this Constitution, as under the Confederation,"<sup>382</sup> and granting power to Congress to levy taxes in order to "pay the Debts."<sup>383</sup> These decisions show that the delegates to the Convention were well aware of the history of the struggle between the Crown and Parliament over appropriations and of its outcome.

The holders of these debts were in exactly the same position toward the United States as the bankers, goldsmiths, depositors, and investors in the *Bankers' Case* had been toward Charles II—right down to the suspension of interest payments and the purchase of the debts by speculators.<sup>384</sup> Never once in the debates was it suggested that these "public Creditors"<sup>385</sup> were within their rights to file a claim in court or that they might be able to do so in the courts of the new government. Handling the claims of creditors was understood to be an appropriations matter—in other words, a legislative

377. See 2 FARRAND, *supra* note 335, at 327–28 (Aug. 18, 1787) (statements of John Rutledge, George Mason, Roger Sherman, Oliver Ellsworth, Charles Pinckney III, and Rufus King).

378. Pierce Butler called the speculators "Blood-suckers," *id.* at 392 (Aug. 23, 1787), and George Mason derided "stock-jobbing," *id.* at 413 (Aug. 25, 1787). See also CHERNOW, *supra* note 374, at 303 (describing vitriol expressed toward such speculators in 1790).

379. For the principal drafts and discussions regarding those drafts, see 2 FARRAND, *supra* note 335, at 325–26 (Aug. 18, 1787); *id.* at 355–56 (Aug. 21, 1787); *id.* at 366–67, 376–77 (Aug. 22, 1787); *id.* at 392 (Aug. 23, 1787); *id.* at 412–14 (Aug. 25, 1787); and *id.* at 497, 499 (Sept. 4, 1787).

380. See *id.* at 356 (Aug. 21, 1787); *id.* at 412–14 (Aug. 25, 1787).

381. See *id.* at 325–26 (Aug. 18, 1787) (motion of Charles Pinckney III). In the ensuing discussions, the Convention unanimously agreed with a motion of George Mason that the drafting committee should "prepare a clause for restraining perpetual revenue." *Id.* at 327. A later draft incorporated this idea. *Id.* at 366–67 (Aug. 22, 1787). The notes of the debates do not explain why this language never made its way into the Constitution.

382. U.S. CONST. art. VI, cl. 1.

383. *Id.* art. I, § 8, cl. 1 ("The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare . . ."). The restriction of army appropriations to two years, see *supra* note 371, made further action on a "perpetual revenue" limitation unnecessary.

384. See *supra* notes 150, 153, 236 and accompanying text.

385. See 2 FARRAND, *supra* note 335, at 325 (Aug. 18, 1787) (motion of Charles Pinckney III).

function. And the delegates reflected this understanding by giving Congress the exclusive power to decide whether to repay them.

## 2. Ratification Debates

The Appropriations Clause was far from the front lines of the ratification debates.<sup>386</sup> Those who have tried to glean from the debates some inkling of the constitutional fate of sovereign immunity have typically focused on a couple of paragraphs in Hamilton's *Federalist No. 81*, certain anti-Federalist writings, and the comments of Henry, Madison, Marshall, and Randolph during the Virginia debates.<sup>387</sup> Those texts, however, deal with the *states'* amenability to suit, and none address the immunity of the national government.<sup>388</sup> A virtual silence on such a matter might seem curious—until considered in light of the widely shared view about legislative supremacy over appropriations. Viewed through this lens, the standard texts take on new meaning, and some usually neglected texts become significant.

First, in *Federalist No. 48*, Madison addressed the need for tension among the different branches of government. He argued that the legislative power was by far the most extensive, in part because—unlike the executive or the judiciary—“the legislative department alone has access to the pockets of the people.”<sup>389</sup> In *Federalist No. 58*, Madison returned to the point. In responding to the concern that the equality of representation in the Senate might allow a minority to frustrate the will of a majority, he famously argued:

The House of Representatives cannot only refuse, but they alone can propose the supplies requisite for the support of government. They, in a word, hold the purse—that powerful instrument by which we behold, in the history of the British Constitution, an infant and humble representation of the people gradually enlarging the sphere of its activity and importance, and finally reducing, as far as it seems to have wished, all the overgrown prerogatives of the other branches of the government. This power over the purse may, in fact, be regarded as the most complete and effectual weapon with which any constitution can arm the immediate representatives of the

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386. For instance, in the Virginia debates over Section 9 of Article I, the Appropriations Clause received only a glancing, matter-of-fact mention by Edmund Randolph. See 3 DEBATES IN THE SEVERAL STATE CONVENTIONS, ON THE ADOPTION OF THE FEDERAL CONSTITUTION 465 (Jonathan Elliot ed., 2d ed., Philadelphia, J.B. Lippincott Co. 1891) [hereinafter ELLIOT'S DEBATES] (remarks of Edmund Randolph on June 15, 1788).

387. For a review of this history, see Susan Randall, *Sovereign Immunity and the Uses of History*, 81 NEB. L. REV. 1, 30–85 (2002). For recent examples of the Supreme Court's selective use of this history, see *Alden v. Maine*, 527 U.S. 706, 716–18 (1999); *id.* at 773–76 (Souter, J., dissenting); *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 70 & nn.12–13 (1996); and *id.* at 104–06, 142–50 (Souter, J., dissenting).

388. For statements of George Nicholas and George Mason containing brief references to the fate of federal sovereign immunity under the Constitution, see *infra* note 397 and accompanying text.

389. THE FEDERALIST NO. 48, at 278 (James Madison) (Clinton Rossiter ed., 1961).

people, for obtaining a redress of every grievance, and for carrying into effect every just and salutary measure.

. . . To those causes we are to ascribe the continual triumph of the British House of Commons over the other branches of the government, whenever the engine of a money bill has been employed.<sup>390</sup>

Second, in *Federalist No. 78*, Hamilton argued for an independent judiciary. In explaining the conclusion reached in the oft-quoted first sentence of this excerpt, he referred to the appropriations power of Congress:

Whoever attentively considers the different departments of power must perceive that, in a government in which they are separated from each other, the judiciary, from the nature of its functions, will always be the least dangerous to the political rights of the Constitution; because it will be least in a capacity to annoy or injure them. The executive not only dispenses the honors but holds the sword of the community. The legislature not only commands the purse but prescribes the rules by which the duties and rights of every citizen are to be regulated. The judiciary, on the contrary, has no influence over either the sword or the purse . . . .<sup>391</sup>

Indeed, even in the sovereign-immunity passage in *Federalist No. 81* that has so provoked debate, Hamilton denied the power of federal courts to entertain suits against the states by means of an example particularly salient to anyone who understood the aftermath of the *Bankers' Case* and the debts of the state and federal governments:

It is inherent in the nature of sovereignty not to be amenable to the suit of an individual *without its consent*. . . . [T]here is no color to pretend that the State governments would, by the adoption of that plan, be divested of the privilege of paying their own debts in their own way, free from every constraint but that which flows from the obligations of good faith.<sup>392</sup>

Hamilton's phrase, "the obligations of good faith," echoes Mansfield's contemporary observation in *Macbeth* that "whoever advances money for the

390. *Id.* No. 58, at 327 (James Madison).

391. *Id.* No. 78, at 433 (Alexander Hamilton); *see also id.* No. 72, at 403–04 (Alexander Hamilton) (noting that the executive's functions included "the application and disbursement of the public moneys in conformity to the general appropriations of the legislature").

392. *Id.* No. 81, at 455–56 (Alexander Hamilton). Some have doubted the sincerity of Hamilton's argument. *See* Randall, *supra* note 387, at 71–79. We have no intent to enter that debate insofar as it relates to whether the states ceded their immunity in the Constitution. Our point here is that, due to legislative control over fiscal matters, the idea of a judicial remedy for a breach of a sovereign's obligation had undergone a transformation from the time of the *Bankers' Case*. Whether or not he believed his argument, Hamilton was invoking the common understanding of the day to persuade his audience.

Hamilton certainly believed that handling the national debt was a legislative—not a judicial—matter once he became Secretary of the Treasury. Convinced the debt should be paid in full to present holders, and further convinced that state debts should be assumed, Hamilton ramrodded the necessary legislation through Congress—outmaneuvering his former ally, James Madison, and earning Madison's undying enmity. Hamilton's plan to repay the debt was in some regards not unlike the plan Parliament implemented in the wake of the *Bankers' Case*: it partially repudiated the interest on the debt through various devices, and it created a sinking fund to deal with the remainder. *See* CHERNOW, *supra* note 374, at 295–306, 320–31.

public service trusts to the faith of Parliament.”<sup>393</sup> Determining the circumstances under which the government was liable for monetary relief was a legislative, not a judicial, function.

The same echo can be heard in Virginia’s ratification debates. In discussing Article VI’s controversial assumption of the Confederation’s debts,<sup>394</sup> Madison observed that the provision created no new obligations toward creditors but merely maintained the old. He then added that payment of this debt “rests on the obligation of public faith only, in the Articles of Confederation. It will be so in this Constitution, should it be adopted.”<sup>395</sup> In response, Patrick Henry referred to recent legislation in Virginia, which had effectively reduced Virginia’s liability to British creditors, and wondered whether similar relief would remain open under Article VI.<sup>396</sup> George Nicholas replied:

There is no law under the existing system which gives power to any tribunal to enforce the payment of such claims. On the will of Congress alone the payment depends. . . . Those who have this money must make application to Congress for payment. . . .

. . . [Henry] supposes that Congress may be sued by those speculators. Where is the clause that gives that power? It gives no such power. This, according to my idea, is inconsistent. Can the supreme legislature be sued in their own subordinate courts, by their own citizens, in cases where they are not a party? They may be plaintiffs, but not defendants.<sup>397</sup>

Edmund Randolph continued Nicholas’s theme, noting that creditors would be in the same position as they had been before Article VI:

There is no tribunal to recur to by the old government. There is none in the new for that purpose. . . .

I come now to what will be agitated by the judiciary. They are to enforce the performance of *private* contracts. . . . The federal judiciary cannot intermeddle with those public claims without violating the letter of the Constitution.<sup>398</sup>

393. *Macbeath v. Haldimand*, 1 T.R. 172, 99 Eng. Rep. 1036, 1038 (K.B. 1786); *see supra* note 247 and accompanying text.

394. *See supra* notes 373–383 and accompanying text.

395. 3 ELLIOT’S DEBATES, *supra* note 386, at 473 (remarks of James Madison on June 15, 1788).

396. *Id.* (remarks of Patrick Henry on June 15, 1788); *see* 10 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 1370 n.14 (John P. Kaminski et al. eds., 1993).

397. 3 ELLIOT’S DEBATES, *supra* note 386, at 476–77 (remarks of George Nicholas on June 15, 1788). George Mason questioned Nicholas’s reasoning that the United States could not be made a defendant, calling it “incomprehensible.” *Id.* at 480 (remarks of George Mason on June 15, 1788). Mason would subsequently point to language in Article III giving federal courts jurisdiction over “Controversies to which the United States shall be a Party,” *see* U.S. CONST. art. III, § 2, cl. 4, as the basis for suits against the United States. 3 ELLIOT’S DEBATES, *supra* note 386, at 525–26 (remarks of George Mason on June 18, 1788).

398. 3 ELLIOT’S DEBATES, *supra* note 386, at 478 (emphasis added) (remarks of Edmund Randolph on June 15, 1788).

Three days later, in discussing whether Article III permitted private citizens to sue states, John Marshall, in oft-quoted language,<sup>399</sup> rejected the notion. He closed his argument with a rhetorical question intended to express the nature of the remedy that private persons enjoyed in the absence of a lawsuit: “If an individual has a just claim against any particular state, is it to be presumed that, on application to its legislature, he will not obtain satisfaction?”<sup>400</sup>

In short, the shared understanding of both those favoring and those opposed to the Constitution was that legislatures, which controlled appropriations from the public treasury, controlled the award of claims against the sovereign.<sup>401</sup>

#### D. Closing the Loop: The Appropriations Power and Sovereign Immunity

At this point, we can assemble the evidence linking the appropriations power and the federal government’s sovereign immunity in damages actions.

In eighteenth-century England, the notion that the Crown could be sued had given way to the new reality that Parliament controlled the disbursement of government funds.<sup>402</sup> At the time of the *Bankers’ Case*, courts were not viewed as a separate branch of government but as a part of the Crown’s machinery for administering the state.<sup>403</sup> That case, in combination with the broader Financial Revolution, ushered a shift from writs in the Exchequer to appropriations in Parliament: a shift, at base, from executive to legislative control over the appropriation of money.<sup>404</sup> As Mansfield perceptively recognized in *Macbeath*, this reallocation of political and fiscal power forced a reconceptualization of the idea of sovereign immunity. As a theoretical matter, it seemed unlikely to Mansfield that the courts, which were still emerging from the shadow of the Crown into an independent branch, had retained the political authority to grant

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399. See, e.g., *Alden v. Maine*, 527 U.S. 706, 718 (1999); *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 267–68 (1985).

400. 3 ELLIOT’S DEBATES, *supra* note 386, at 556 (remarks of John Marshall on June 20, 1788).

401. The arguments of other anti-Federalists that Article III contained a waiver of sovereign immunity against the states assumed that the states were at the time immune from suit except to the extent that they chose to waive immunity. See generally Randall, *supra* note 387, at 47–54 (describing the range of anti-Federalist opinions). These anti-Federalists did not explain their assumption—an interesting omission in light of the English tradition leading up to, as well as the result in, the *Bankers’ Case*. On our reading, the anti-Federalist assumption only makes sense when viewed in the light of a shared understanding that Parliament and the colonial assemblies had both won legislative supremacy over fiscal matters.

402. See *supra* notes 167–180, 233–248 and accompanying text.

403. See *supra* notes 59, 372 and accompanying text.

404. It is helpful to recall Professor Desan’s observation that what Lord Somers tried (and ultimately failed) to preserve in the *Bankers’ Case* was executive discretion in the appropriation of funds. See *supra* note 223 and accompanying text.

monetary relief against the Crown; as a practical matter, claimants' need to obtain parliamentary appropriations rendered inconsequential any arguable residual power that the courts retained.<sup>405</sup>

Nothing in the American experience points to a different conclusion. In the eighteenth century, colonial legislatures fought for—and secured—the same control over appropriations that Parliament had won only a few decades earlier. Indeed, the colonial assemblies in many ways pushed the appropriations envelope farther than Parliament had been willing to do, launching a deeper invasion into traditional executive prerogatives.<sup>406</sup> In the Appropriations Clause, the Constitutional Convention summed up the lesson of 175 years of English and colonial political history: if it was to maintain its power, the legislature—not the executive, nor the nascent judiciary—must control the public purse.

It is only a small, and logical, step from constitutionally commanded legislative control over disbursements from the purse to constitutionally commanded legislative control over private claims against the purse. The colonial assemblies had adjudicated monetary claims asserted against the colonial governments;<sup>407</sup> the assumption in the ratification debates was that state legislatures would retain that power after independence and that Congress would enjoy the same power after ratification.<sup>408</sup> Colonial assemblies had worked too hard to obtain dominion over the fisc for it to be credible that the framers intended to cede judges a portion of that power *sub silentio*. The Framers' initial failure to place the functions of originating both tax bills and appropriations bills in the House of Representatives had nearly ruined the Great Compromise. The Constitution had been ultimately rescued by the controversial expedient of splitting the tax and appropriations functions and giving the Senate an equal opportunity to originate appropriations bills.<sup>409</sup> Thus, the idea that the Constitution also handed a chunk of the appropriations power to unelected Article III judges is fanciful at best.

The Appropriations Clause was a statement of raw political power—the second of the two great powers (taxation was the other) from which Parliament and colonial assemblies derived all others. As a practical matter, it rendered lawsuits against the government irrelevant and unnecessary. Indeed, as we look to events after the ratification of the Appropriations Clause, we see precisely this understanding.

In *Chisholm v. Georgia*,<sup>410</sup> the Supreme Court held that Article III gave federal courts subject-matter jurisdiction over actions against a state

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405. See *supra* notes 247–248 and accompanying text.

406. See *supra* notes 307–309 and accompanying text.

407. See *supra* note 257 and accompanying text; see also Desan, *The Constitutional Commitment*, *supra* note 243, at 1443 & n.285 (noting that there is no evidence of the petition of right or other judicial mechanisms being used to adjudicate claims against New York's colonial government).

408. See *supra* Section II.C.2.

409. See *supra* notes 348–366 and accompanying text.

410. 2 U.S. (2 Dall.) 419 (1793).

by a citizen of another state seeking to recover money. This 4–1 decision resulted in the rapid passage of the Eleventh Amendment—and the eventual recognition that Justice Iredell’s dissenting opinion was “the better authority.”<sup>411</sup> But before coming to that dissent, it is worth noting two aspects of the arguments made against state immunity. First, Edmund Randolph believed that a judgment ordering Georgia to pay was enforceable by execution, and that any state found liable would comply with such a judgment.<sup>412</sup> Likewise, Chief Justice John Jay distinguished the case of a state (which he believed was not immune) from the case of the United States (which he believed remained immune) on the principle that federal courts could not require the other branches of the federal government to enforce judgments against the United States.<sup>413</sup> Thus, both Randolph and Jay linked judgment with enforcement; the incapacity of courts to provide a remedy also rendered them incapable of entering judgment against the United States. On this view, if the Appropriations Clause blocks the enforcement of a monetary remedy against the United States, it also blocks the lawsuit.

Second, in arguing for Georgia’s liability, Randolph pointed to the ancient petition of right, the *monstrans de droit*, and the “process in the Exchequer” that was used in the *Bankers’ Case*.<sup>414</sup> Like Jay, he believed that the federal government remained immune from suit. He therefore contended that these common-law remedies had no general applicability to the United States, and that they were “widely remote” from a general principle of “involuntary subjection[] of the sovereign to the cognizance of his own Courts.”<sup>415</sup> Randolph distinguished the *Bankers’ Case* by claiming that it applied only when “the charge is claimed against the Revenue.”<sup>416</sup> This seemingly cryptic distinction makes sense in context. The *Bankers’ Case* had arisen at a time when the Crown had an independent revenue from which it was expected to govern and pay the government’s debts.<sup>417</sup> If the Crown appropriated (i.e., “charged” or “aliened”<sup>418</sup>) this revenue, it was liable under the authority of the *Bankers’ Case*. But that time had long passed. Randolph’s distinction thus parroted Mansfield’s conclusion that Parliament’s decision to end the appropria-

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411. *Rhode Island v. Massachusetts*, 37 U.S. (12 Pet.) 657, 676 (1838).

412. *Chisholm*, 2 U.S. (2 Dall.) at 426–27.

413. *Id.* at 478 (opinion of Jay, C.J.). Jay included an important qualification that bears directly on the effect of legislative financial supremacy on the shape of sovereign immunity: he stated that his reasoning would not extend to suits brought against states by individuals “on bills of credit issued before the Constitution was established, and which were issued and received on the faith of the State, and at a time when no ideas or expectations of judicial interposition were entertained or contemplated.” *Id.* at 479.

414. *Id.* at 425. On these remedies, see *supra* notes 21–34, 181–230 and accompanying text.

415. *Chisholm*, 2 U.S. (2 Dall.) at 425.

416. *Id.*

417. See *supra* notes 65, 135, 183–184 and accompanying text.

418. See *supra* note 206 and accompanying text.

tion of an independent revenue eviscerated the precedential value of the *Bankers' Case* on the issue of the national sovereign's immunity.

Iredell's dissent expanded on Randolph's point in a way that brought the Appropriations Clause directly into the equation. After a thorough examination of the *Bankers' Case*,<sup>419</sup> Iredell turned to "a very late case in England": *Macbeath v. Haldimand*.<sup>420</sup> Relying upon Mansfield's opinion, he observed that the King formerly had "fixed and independent revenues, upon which depended the ordinary support of Government, as well as the expenditure for his own private occasions."<sup>421</sup> Iredell further stated that:

A very important distinction may however perhaps now subsist between [the Crown's private debts and those it incurred to run the government], for the reasons intimated by Lord Mansfield; since the whole support of Government depends now on Parliamentary provisions, and, except in the case of the civil list, those for the most part annual.

Thus, it appears, that in England even in case of a private debt contracted by the King, in his own person, there is no remedy but by petition . . . . If the debt contracted be avowedly for the public uses of Government, it is at least doubtful whether that remedy will lie, and if it will, it remains afterwards in the power of Parliament to provide for it or not among the current supplies of the year.<sup>422</sup>

Turning to the case of state governments, Iredell argued that those who contract with the state "do it at their own peril."<sup>423</sup> In such contracts, he explained, "public faith alone is the ground of relief, and the Legislative body the only one that can afford a remedy, which from the very nature of it must be the effect of its discretion, and not of any compulsory process."<sup>424</sup> Iredell then assumed *arguendo* that a petition of right was still available. This led him to the conclusion that:

The only constituted authority to which such an application could with any propriety be made, must undoubtedly be the Legislature, whose express consent, upon the principle of analogy, would be necessary to any further proceeding. So that this brings us (though by a different route) to the same goal; *The discretion and good faith of the Legislative body*.<sup>425</sup>

Early commentaries on the Constitution also drew an explicit connection between the Appropriations Clause and the sovereign immunity of the federal government in damage actions. In 1803, St. George Tucker

419. *Chisholm*, 2 U.S. (2 Dall.) at 437–42 (Iredell, J., dissenting).

420. *Id.* at 444. For an analysis of *Macbeath*, see *supra* notes 245–248 and accompanying text.

421. *Chisholm*, 2 U.S. (2 Dall.) at 445 (Iredell, J., dissenting).

422. *Id.*

423. *Id.* at 446.

424. *Id.*

425. *Id.* Of necessity, Iredell's conclusion appears to apply to any relief sought from the federal government.

stated that the Clause guarantees “the right of the people . . . to be actually consulted upon the disposal of the money which they have brought into the treasury.”<sup>426</sup> But he noted “an inconvenience” in this generally “salutary check”<sup>427</sup>:

According to the theory of the American constitutions, the judiciary ought to be enabled to afford complete redress in all cases . . . . But . . . no claim against the United States (by whatever authority it may be established,) can be paid, but in consequence of a previous appropriation made by law; unless, perhaps, it might be considered as falling properly under the head of contingent charges against the government.<sup>428</sup>

Likewise, Joseph Story agreed with Tucker that the Appropriations Clause barred suits of “creditors of the government, and other persons having vested claims against it.”<sup>429</sup> But Story disputed whether their inability “to recover, and to be paid the amount judicially ascertained to be due to them out of the public treasury, without any appropriation” was a “defect.”<sup>430</sup> Indeed, he described the “evils of an opposite nature” that might arise “if the debts, judicially ascertained to be due to an individual by a regular judgment, were to be paid, of course, out of the public treasury. It might give an opportunity for collusion and corruption in the management of suits.”<sup>431</sup>

Like some modern scholars,<sup>432</sup> both Tucker and Story saw the Appropriations Clause primarily as a limit on the ability of the government to pay a judgment, not on the ability of a court to enter a judgment. This view failed to appreciate that the history of legislative supremacy over appropriations was not simply a limit on remedy, but also a limit on the very authority to hear the claim. In later cases, however, the Supreme Court has never wavered in holding that the Appropriations Clause bars the judicial branch from entertaining lawsuits seeking relief

426. 1 ST. GEORGE TUCKER, BLACKSTONE’S COMMENTARIES WITH NOTES OF REFERENCE TO THE CONSTITUTION AND LAWS note D, at 362 (photo. reprint 1996) (1803).

427. *Id.*

428. *Id.* at 362–63. Tucker’s reading of the Clause in the context of sovereign immunity is open to some criticism. First, he seems to suggest that the Clause bars only the remedy, not the right to sue—contrary to the views of Randolph and Jay in *Chisholm*. See *supra* notes 412–418 and accompanying text. Second, contrary to Jay, see *supra* note 413 and accompanying text, Tucker thought federal courts could entertain suits against the United States because of the federal question jurisdiction granted them in Article III, see TUCKER, *supra* note 426, at 363 n. Yet, because he believed that the Appropriations Clause made it impossible for the courts to enforce their judgments, he proposed an amendment to the Clause: “that no money shall be drawn from the treasury but in consequence of appropriations made by law; or, of a judicial sentence of a court of [the] United States.” *Id.* at 364.

429. 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1343, at 214 (1833).

430. *Id.*

431. *Id.*

432. See Bandes, *supra* note 16; Jackson, *Suing the Federal Government*, *supra* note 16.

from the federal government.<sup>433</sup> In *Reeside v. Walker*,<sup>434</sup> for example, the Court refused to authorize a writ of mandamus ordering the Secretary of the Treasury to pay a judgment on a counterclaim against the United States.<sup>435</sup> The requested writ looked much like the writ sought in the *Bankers' Case* against the barons of the Exchequer—and it failed because of the “well-known constitutional provision, that no money can be taken or drawn from the Treasury except under an appropriation by Congress.”<sup>436</sup> Noting that “[a]ny other course would give to the fiscal officers a most dangerous discretion,” the Court made clear that “the petitioner should have presented her claim on the United States to Congress, and prayed for an appropriation to pay it.”<sup>437</sup>

More recently, in *Office of Personal Management v. Richmond*,<sup>438</sup> the Supreme Court refused to order the payment of disability benefits to which the plaintiff would have been entitled but for erroneous advice given by a federal employee. It held that “[f]or . . . a claim for money from the Federal Treasury, the Clause provides an explicit rule of decision. Money may be paid out only through an appropriation made by law; in other words, the payment of money from the Treasury must be authorized by a statute.”<sup>439</sup> The Court thus relied explicitly upon the Clause in limiting the judiciary’s ability to enter a judgment against the government.<sup>440</sup> After noting that strict adherence to the Clause prevented fraud and corruption, it acknowledged the Clause’s “more fundamental and comprehensive purpose”: “to assure that public funds will be spent according to the letter of the difficult judgments reached by Congress as to the common good and not according to the individual favor of Government agents or the individual pleas of litigants.”<sup>441</sup>

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433. In addition to the cases discussed in the text, see *McCarty v. McCarty*, 453 U.S. 210 (1981); *United States v. MacCollom*, 426 U.S. 317 (1976); *Cincinnati Soap Co. v. United States*, 301 U.S. 308 (1937); *Hart v. United States*, 118 U.S. 62 (1886); *Knote v. United States*, 95 U.S. 149 (1877); and *Buchanan v. Alexander*, 45 U.S. (4 How.) 20 (1846). See also *Dep’t of the Army v. Blue Fox Inc.*, 525 U.S. 255, 264 (1999) (“[S]overeign immunity bars creditors from attaching or garnishing funds in the Treasury . . . .”); cf. *Republic Nat’l Bank of Miami v. United States*, 506 U.S. 80, 94 (1992) (holding that, in an *in rem* forfeiture action, property can be returned to the owner as long as the proceedings are not “final at the time the appropriations question arose”).

434. 52 U.S. (11 How.) 272 (1850).

435. The United States sued James Reeside, a contractor, for the return of \$32,709.62, which it had overpaid. Reeside presented evidence that the government owed him money for allowances which the government had rejected. A jury found for Reeside in the amount of \$188,496.06. *Id.* at 272–74.

436. *Id.* at 291.

437. *Id.*

438. 496 U.S. 414 (1990).

439. *Id.* at 424.

440. *Id.* at 426 (“[J]udicial use of the equitable doctrine of estoppel cannot grant . . . a money remedy that Congress has not authorized.”).

441. *Id.* at 427–28; see also *id.* at 434 (“The rationale of the Appropriations Clause is that if individual hardships are to be remedied by payment of Government funds, it must be at the instance of Congress.”); *United States v. MacCollom*, 426 U.S. 317, 321 (1976) (“The established rule is that the expenditure of public funds is proper only when authorized by Congress, not that public funds may be expended unless prohibited by Congress.”).

Our point here is simple: the history of the Appropriations Clause reflects, from the outset, that its meaning was never disputed as a matter of principle and its import was clear. Absent Congressional assent, the Clause precluded suits against the federal government for damages.

#### CONCLUSION

On both sides, the standard historical arguments over sovereign immunity start from the same point: the pre-Constitutional common law of sovereign immunity. The sides divide over whether sovereign immunity remained just that—a common-law doctrine amenable to subsequent judicial modification—or instead solidified in 1787 into a constitutional principle.<sup>442</sup> In this Article, we have shown that both sides miss a fundamental point. Rather than being the first modern case to address common-law sovereign immunity, the *Bankers' Case* was in fact the last in the line of common-law authorities addressing the Crown's immunity in damage actions. As the eighteenth century opened, the Glorious and Financial Revolutions had shoved common-law sovereign immunity to the wayside. In its stead, a more muscular Parliament asserted its supremacy in matters of spending. The eighteenth-century American experience was no different. Colonial assemblies leveraged their taxation power into an appropriations power and then leveraged that power into political preeminence. Swept up in this shifting power was the payment of claims against the government. A party's ability to obtain a monetary remedy from the government now rested on the "faith"<sup>443</sup> of the legislature—in other words, on the legislative power over appropriations matters—not on abstract notions of sovereignty or on the intricacies of dusty medieval writs.

Not everyone recognized this change. Blackstone still laid out the old common law of sovereign immunity in his *Commentaries*,<sup>444</sup> and Justice Iredell spent pages on the common law of sovereign immunity<sup>445</sup> before noting that the law of legislative appropriations had changed the game.<sup>446</sup> But for cases against the sovereign seeking damages, common-law sovereign immunity had reached the end of a path; after the *Bankers' Case*, the eighteenth century yielded not a single significant English decision on common-law sovereign immunity. As a functional and constitutional matter, the determination of the sovereign's liability for damages had shifted from the judiciary to the legislature. That shift occurred long before the Constitutional Convention. And nothing in the language of the Appropria-

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442. Compare, e.g., *Alden v. Maine*, 527 U.S. 706 (1999) (holding that state sovereign immunity is constitutionally grounded), with *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 130–42, 159–68 (1996) (Souter, J., dissenting) (arguing that sovereign immunity remained a common-law doctrine).

443. See *supra* notes 392, 395, 424–425 and accompanying text.

444. See *supra* notes 27, 29, 35, 41–43, 60 and accompanying text.

445. *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419, 437–45 (1793) (Iredell, J., dissenting).

446. *Id.* at 445–46. After coming to this conclusion, Justice Iredell then reverted to analyzing the common law—this time of corporations. *Id.* at 446–49.

tions Clause or its history suggests any wobble in the legislature's supremacy over appropriations (and thus its power to handle legal claims against the government).

This conclusion leads to three further reflections. First, we recognize that this history will not end the present debates over the scope of sovereign immunity. Well aware of the skepticism that the Supreme Court has shown for "cobbled together" histories in law reviews,<sup>447</sup> and further aware of the ongoing debates about the role of originalism in constitutional interpretation,<sup>448</sup> we are not arguing that the history of the Appropriations Clause conclusively determines the question of federal sovereign immunity today—or that the political balance that the Appropriations Clause struck must be maintained by modern courts that operate in a different political environment than that of 1787.<sup>449</sup> We are, however, recovering the history of why the balance that was struck in the eighteenth century mattered—and why it might still matter today. At one point, the fate of representative democracy hung by the slender reed of Parliament's powers to tax and appropriate. In any discussion over federal sovereign immunity, this political reality deserves consideration.

Second, placing reliance on the Appropriations Clause as a foundation for sovereign immunity changes the discussion about the nature of the doctrine. The Clause extends immunity only to damage actions against the federal sovereign—not to injunctive claims that require no appropriations from the Treasury, to claims against states, to damage or injunctive suits against federal officers for which the officers are personally responsible, or to suits against state officers.<sup>450</sup> In this sense, the Clause establishes only a partial justification for sovereign immunity; and it is for that reason—for its failure to unite all aspects of the doctrine into a coherent theory—that some might find the Clause an unappealing or unconvincing approach for a normative theory about the scope of sovereign immunity.

Admittedly, most participants in the normative discussion are skeptical about a constitutional foundation for sovereign immunity; but some others staunchly defend it.<sup>451</sup> Our history finds middle ground by suggesting that

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447. *Seminole Tribe*, 517 U.S. at 68.

448. See, e.g., JOHN HART ELY, *DEMOCRACY AND DISTRUST I* (1980) (describing nonoriginalism as a "view that courts should go beyond that set of references and enforce norms that cannot be discovered within the four corners of the document"); ANTONIN SCALIA, *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* 23–25 (Amy Gutmann ed., 1997) (expressing adherence to a philosophy of original meaning); Jack M. Balkin, *Abortion and Original Meaning*, 24 *CONST. COMMENT.* 291, 295–307 (2007) (arguing for an approach faithful to text and principle).

449. Obviously, subsequent events that we have not examined might bear on the issue. The most obvious such event is the ratification of the Eleventh Amendment in 1798. See Pfander, *supra* note 6 (arguing that the First Amendment, ratified in 1791, waives sovereign immunity). *But see* Gary Lawson & Guy Seidman, *Downsizing the Right to Petition*, 93 *NW. U. L. REV.* 739, 739–40 (1999) (criticizing Professor Pfander's argument).

450. On these different categories of governmental liability, see *supra* note 7 and accompanying text.

451. For some of the many contributions that view either state or federal sovereign immunity as a doctrine changeable by courts see Borchard, *supra* note 5; Chemerinsky, *supra* note 6; Gibbons,

federal sovereign immunity from damages actions stands on a different, and more substantial, constitutional footing than other forms of immunity. Indeed, the very incompleteness of the Appropriations Clause's explanatory reach provides its justificatory force. True, it does not justify immunity in injunctive suits against the federal government;<sup>452</sup> but, as a practical matter, such suits have long been permitted through the fiction of official-capacity suits.<sup>453</sup> True, the Clause provides no support for the argument that Congress lacks power to waive state immunity for monetary claims; but that argument is now proving highly contested and unstable.<sup>454</sup>

The Clause does, however, explain sovereign immunity for federal monetary claims, which is the area in which sovereign immunity has always been most impervious to attack. It explains why state legislatures cannot waive federal sovereign immunity, and why the converse proposition—that Congress may waive state sovereign immunity—is a thornier matter. The Clause also suggests that federal immunity from monetary claims and state immunity from monetary claims are not constitutionally commensurate mirror images—a fact that arguably weakens (although it does not conclusively refute) the Court's zigzagging efforts to tease the immunity of states from congressionally authorized damages actions out of the interstices of the Constitution.<sup>455</sup>

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*supra* note 252; Jackson, *Supreme Court*, *supra* note 16; Jaffe, *supra* note 2; and Louise Weinberg, *Of Sovereignty and Union: The Legends of Alden*, 76 NOTRE DAME L. REV. 1113 (2001). For a sample of the defenders of some form of sovereign immunity, see John F. Manning, *The Eleventh Amendment and the Reading of Precise Constitutional Texts*, 113 YALE L.J. 1663 (2004), and Caleb Nelson, *Sovereign Immunity as a Doctrine of Personal Jurisdiction*, 115 HARV. L. REV. 1559 (2002). *Cf.* Ann Woolhandler, *The Common Law Origins of Constitutionally Compelled Remedies*, 107 YALE L.J. 77, 163 (1997) (“[Courts] may properly require remedies against the state itself that are equivalent to the traditional trespass remedy against the individual officer only when the state has substituted a cause of action against itself for the traditional trespass suit against the officer.”).

452. Such suits might be barred to the extent that they require an expenditure of funds that Congress has not appropriated.

453. *E.g.*, *United States v. Lee*, 106 U.S. 196 (1882); *cf. Ex parte Young*, 209 U.S. 123 (1908) (holding that federal courts can enjoin unconstitutional action by state officers).

454. *Compare Alden v. Maine*, 527 U.S. 706 (1999) (Commerce Clause does not authorize Congress to authorize *eo nomine* damages actions against states in state court), and *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44 (1996) (Indian Commerce Clause does not permit Congress to authorize *eo nomine* damages actions against states in federal court), with *Cent. Va. Cmty. Coll. v. Katz*, 546 U.S. 356 (2006) (Bankruptcy Clause permits Congress to authorize *eo nomine* actions against states to set aside preferential transfers), and *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976) (Fourteenth Amendment permits Congress to authorize *eo nomine* damages actions against states). We do not here contend that state sovereign immunity lacks a textual foundation in the Constitution, *see* Nelson, *supra* note 451 (contending that the word “controversy” in Article III is such a textual foundation), only that the Appropriations Clause is not such a text.

455. One of the arguments the Court has made when justifying state sovereign immunity is based upon reciprocity: because the Constitution provides immunity for the federal government from damage actions, the states therefore enjoy the same immunity. *Alden*, 527 U.S. at 722, 749–50. Because the Appropriations Clause applies only to the federal government, however, the reciprocity argument does not work.

On the other hand, we could imagine an argument for state immunity based on the principles of the Appropriations Clause. The Clause requires that the legislative branch, including those immediately elected by the people, have power to appropriate a government's funds. Congressional waiver of a state's immunity places this power in the hands of legislators who do not appropriate the funds—a result arguably inconsistent with the Republican Form of Government Clause, U.S.

Third, placing reliance on the Appropriations Clause as an explanation for sovereign immunity solves one of the doctrine's theoretical difficulties: why Congress—rather than the President, the judiciary, the states, or even the people—is the organ that must give consent for a waiver of federal immunity to be effective.<sup>456</sup> Historically, the requirement of government consent descends from the common law, in which the Crown's consent was necessary for suit.<sup>457</sup> The traditional argument for Congress's power to waive immunity rests on the proposition that, in the Constitution, Congress succeeded to the Crown's sovereignty, including its right to waive immunity.<sup>458</sup> But the matter is not so simple. Congress never inherited all of the sovereignty that the Crown once possessed; rather, the theory of the Constitution is that sovereignty resides in the people, and the Constitution allocates aspects of that sovereignty among the branches of the federal government and between the federal and state governments.<sup>459</sup> The federal legislative branch has preeminence in this allocation, but not the absolute sovereignty of the ancient Crown. So why is Congress's consent to damages suits against the United States necessary? The answer, of course, is the Appropriations Clause, which vests appropriations decisions in the Congress.

Seemingly innocuous and self-evident, the Appropriations Clause is one of the most profound political statements in the Constitution. In 1787, George Mason referred to England's move away from the grant of a perpetual revenue to the Crown, and toward control of the fisc by the representative body of government, as “the paladium [sic] of the public liberty.”<sup>460</sup> As we consider the Appropriations Clause's implications for sovereign immunity, Mason's statement is no less true today.

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CONST. art. IV, § 4, and the reserved powers of the Tenth Amendment. *Cf.* *Cincinnati Soap Co. v. United States*, 301 U.S. 308, 317 (1937) (noting that each state is sovereign, “with full powers of taxation and full power to appropriate the revenues derived therefrom”).

456. The requirement that Congress must waive the federal government's sovereign immunity is constitutional bedrock. *See, e.g.*, *Fed. Deposit Ins. Corp. v. Meyer*, 510 U.S. 471, 475–76 (1994); *United States v. Sherwood*, 312 U.S. 584, 586 (1941). This idea of consent includes the power to impose limits on the waiver of immunity. *See, e.g.*, 28 U.S.C. § 2680 (2000) (imposing limits on the waiver for federal tort liability).

457. *See supra* notes 29, 36 and accompanying text.

458. For Justice Iredell's comparable argument, see *supra* note 425 and accompanying text.

459. *See* THE FEDERALIST NOS. 39, 51 (James Madison).

460. 2 FARRAND, *supra* note 335, at 327 (Aug. 18, 1787).

