

# IMAGINING THE UNITED STATES: REFLECTIONS FROM CONSTITUTIONAL LAW

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## I

### INTRODUCTION

The United States exists, in an important sense, in our imaginations. This is not unique. There is nothing new or peculiarly American about the idea that a nation exists in and through the ways its people imagine it. The ancient Athenian statesman Pericles was credited with a speech delivered in honor of his city-state's war dead. The speech pictured Athens and the Athenian way of life as democratic, tolerant, egalitarian, characterized by great individual freedom and profound social bonds, with citizens committed equally to beauty and the life of the mind and defending their city skillfully and courageously in battle. "Taking everything together then, I declare that our city is an education to Greece."<sup>1</sup> We need not be cynical or even unduly skeptical about this portrait of fifth-century Athens to recognize that it was not simply listing facts about the Athenian state in 431 B.C.E. From a twenty-first century perspective, Athens was an exclusively male oligarchy, neither democratic nor egalitarian. The speech presented an ideal, an Athens of the mind and heart, that could serve as inspiration for flesh and blood Athenians, and as a measure of their failure should they fall short. "Athens, alone of the states we know, comes to her testing time in a greatness that surpasses what was imagined of her."<sup>2</sup>

Americans have been imagining what the United States is, sketching portraits of the America of the mind and heart, since the beginning. In 1782, the French aristocrat-turned-American patriot J. Hector St. John de Crèvecoeur published a collection of essays, *LETTERS FROM AN AMERICAN FARMER*. The essays won Crèvecoeur literary acclaim on both sides of the Atlantic for the answer he gave, using a distinctly American English, to a question that he was among the first to ask: just what is an American? "The American is a new man who acts upon new principles; he must therefore entertain new ideas and form new opinions."<sup>3</sup> The

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1. THUCYDIDES, *HISTORY OF THE PELOPONNESIAN WAR* 119 (Rex Warner trans., 1954).

2. *Id.*

3. J. HECTOR ST. JOHN DE CRÈVECŒUR, *LETTERS FROM AN AMERICAN FARMER* 44 (W.B. Blake ed., E.P. Dutton & Co. 1926) (1912).

United States that these new men were building, as Crèvecoeur described it, was already the home of what would come to be known as “the American dream,” a society marked by “industry, good living, selfishness, litigiousness, country politics, the pride of a freeman, religious indifference.”<sup>4</sup> Most later attempts to imagine the United States, to capture its meaning, its essence, and its promise, have resulted in recognizable variations on Crèvecoeur’s original answer.<sup>5</sup>

That most Americans have imagined their country along broadly similar lines is unsurprising. If that were not the case, the country could hardly carry on; without some substantial, shared understanding of what a country is and stands for, the “nation” can only be a political contrivance held together by circumstance or force. On the one past occasion that our shared understanding of how to imagine the United States fell apart entirely, we fought a great civil war. To this day perhaps our sharpest debate over how to imagine this country concerns what we think about that war and its legacy, and their relationship to the moral evil of racism. But put to one side—for the moment—that deepest of all American divisions. Even a profound general sense of what it is to be America would not eliminate all disagreements of politics and policy, and those disagreements in turn would reveal the existence of disagreement over the idea and ideals that make up the United States of the imagination.

The possibility of serious controversy on the imaginative as well as the policy levels of national life is not in itself a bad thing. Indeed, I believe that this possibility—which the American commitment to freedom of thought and speech fosters—is one of the most important and central enduring attractions of America as we can and should imagine it. But disagreement over how to name the idea and the ideals of the United States—and how to act on those ideals—creates a risk that is beyond what is likely to result from debate which remains on the level of policy. Along with many others, I believe that our current divisive political climate displays this more fundamental level of disagreement. That we are in a time of national discord over the very idea of the United States is evident from the fact that many Americans have come to doubt the value of the First Amendment itself. The depth of our divisions is equally clear in many specific areas of national political choice as well.

Think about immigration policy, to name an issue that has been the subject of fierce disagreement for years. From any perspective and in any country, how society is to deal with the stranger is a matter of high moral significance. This issue implicates serious questions about the security and territorial integrity of the community as well as how to treat the powerless stranger with compassion and justice. In the United States, our discordant views about whom we shall welcome, and how we shall treat the legally unwelcomed who nonetheless find their

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4. *Id.* at 46.

5. *Id.* This is true even of “religious indifference,” by which Crèvecoeur meant that most revolutionary-era Americans were opposed to (Protestant) Christian intolerance toward other Christians, not that they were resolute secularists. What Crèvecoeur would have thought about our current debates over the role of religion in the United States is unknowable.

way here, reflect very specific questions about what in our history we should praise and what we should never repeat. These are questions we cannot answer without making assumptions about what the United States is or ought to be, and about what we should imagine America to be. In other words, debate over immigration policy is not simply a discussion about which policies will best pursue goals we generally share. Even the language we think it right to use in discussing particular issues about immigration policy reflect how we understand our country; consider the difference between “illegal alien” and “undocumented resident.” My sense is that discussion over what would be in any circumstances a difficult set of questions about immigration policy has become one of several battles over identifying the “true” idea of America, over how to imagine the United States. We are no longer simply in disagreement over how to address a significant social issue. We are at war over what our society is and should be. When that happens, the possibility for agreement on humane and just policies fades or vanishes outright, and the imaginative dimension of national life becomes a source of division rather than union.

Crèvecoeur asked what an American is, and how should we imagine the United States, at a time of hope for many Americans, when the United States was on the verge of establishing its independence. And the answers he gave reflected the sense of newness and endless possibility that independence seemed to offer. His book appeared in the same year that Congress approved the Great Seal of the United States with *E pluribus unum*, “out of the many, one” on the obverse, and *Novus ordo seclorum*, “the new order of the ages” on the reverse. Over two and a third centuries later, our commitment to seek a vision of the country that unites us seems frayed, and our disagreements over the ideal of America too long-standing and deeply rooted to overcome. The United States of the imagination appears to have come apart.

In this article, I propose that United States constitutional law has a role to play in resolving the current impasse in American political life *on the level of the imagination*. However, although I am a constitutional lawyer, I do not suggest that our national discord can be fixed by law, or lawyers, or Supreme Court decisions on constitutional law issues. Constitutional law questions sometimes must be asked, and answered, whether doing so unifies or disunites. Yet, I think it is quite unclear to what extent, under present circumstances, the courts actually further American unity, as opposed to providing an additional vehicle through which we Americans can wage our ongoing, and quite uncivil, ideological wars. In any event, I do not mean here to contribute to those wars, but to propose what I believe is part of the path away from them.

My claim is that constitutional law can be a resource for Americans of every political and ideological persuasion who seek an answer to the question of how we should imagine the United States that reaches across our divisions. Constitutional law may serve these Americans, who believe that there is—or can be—an idea and an ideal of what it is to be Americans, and to be America, that is not the private possession of a particular party or ‘ism. Let me put my thesis another way.

Constitutional law is not simply one of the institutional tools by which American government is structured. Constitutional law is, additionally and, I think, more fundamentally, one of the central modes by which the people of the United States constitute their nation in their minds, on the plane of the imagination. If, as I asserted above, nations exist in and through the ways they are imagined to be, then we should expect to find the America of the mind and heart sketched out, no doubt only in part, in the ideas and ideals embedded in American *constitutional* law, the law that addresses the fundamental structures of our society.

On the face of it, I've just made a *very* bizarre suggestion. Surely, you may object, it is the artists and writers—Crèvecoeur!—historians and philosophers, and perhaps the occasional politician—Pericles!<sup>6</sup>—to whom we should turn if we want to understand what the idea of a nation is or how we should go about imagining its ideals. Constitutional lawyers and judges deal not in broad imaginative strokes but in the technicalities of legal language and analysis. As Justice Robert H. Jackson pointed out long ago, even cases raising broad political and constitutional issues seldom say much about those issues “because of the judicial practice of dealing with the largest questions in the most narrow way.”<sup>7</sup> Even if our courts are relatively dispassionate in the exercise of their authority—a proposition many Americans question—that authority is itself too limited to afford the opportunity for much reflection on the meaning of America.

The objection that constitutional law is a sheerly technical practice—and it is a technical practice, in part—that has nothing to say about the United States of the imagination sounds reasonable. But, I think it is quite wrong in the end. Several years ago, the great American philosopher Jean Bethke Elshtain made a striking assertion: “constitutional law has been the primary vehicle in and through which Americans have done, and continue to do, political thought.”<sup>8</sup> Elshtain's point was empathically *not* to dismiss the value of other modes of thought to American public life; she was herself the author of several distinguished contributions to American political reflection. She was instead making a simple, if contestable, historical observation that in the United States the fundamental political arguments that have mattered most have been framed, more often than not, in the language of constitutional law. Issues that in other societies seem like moral or political questions to be answered in political or even philosophical forums, Americans have often treated as legal controversies amenable to judicial resolution. How this came to be so—Alexis de Tocqueville thought it was true already in the 1830s—is a fascinating historical question that Elshtain did not address. Nor shall I; her claim has enough historical plausibility that I propose to assume she was right, and treat American constitutional law as a repository of fundamental arguments over the form and the ideals of the American nation. Just as the funeral oration of Pericles offered a picture of how to imagine what the Athens of his day was and should be, so in American constitutional law we can

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6. Or Thucydides, who was writing as an historian but was himself an Athenian politician.

7. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 (1952) (Jackson, J., concurring).

8. JEAN BETHKE ELSHTAIN, *SOVEREIGNTY: GOD, STATE, AND SELF* 153–54 (2008).

find ideas that may serve us as we try to imagine what the United States of our day is and could be. What we shall find there will not be a set of self-evident truths, and certainly not a collection of binding legal authorities. The history of our constitutional law has been a story of conflict and disagreement far more often than one of unproblematic consensus, and this is not a book *of* law in which there could be binding authority in a lawyer's sense. I shall make no claim that any reasonable reader *must* agree with my judgments about the ways in which constitutional law illuminates an idea and ideal of America that Americans can and should embrace. As I have already suggested, integral to that idea and ideal as I understand it is a principled refusal to impose an ideological orthodoxy on the nation or to shut down debate, even when continuing disagreement seems to many to threaten the nation's unity or moral integrity. Agreement about how to imagine the United States of the mind and the heart is always an achievement to be won by persuasion rather than imposed by fiat or force.<sup>9</sup> This article is, then, an invitation to readers to consider two themes in constitutional law, and then to decide whether, as I believe, each of them ought to be part of how they imagine this country and its meaning. That neither I nor anyone else can claim to compel another's decision on that question is itself an essential element in the meaning of America that I believe constitutional law suggests.

At least in American law schools, most introductory courses in federal constitutional law are focused on the study of "cases." More precisely, these courses focus on the study of opinions issued by justices of the Supreme Court of the United States to justify, or criticize if the justice disagrees, the Court's decisions in particular lawsuits. This long-standing pedagogical choice is debatable on a theoretical level but makes great practical sense in professional schools where the goal is to train students for professional practice. After all, judicial cases, and above all the Supreme Court's cases, provide the framework of reasoning and the terms of debate in the vast majority of situations in which lawyers and judges discuss "the Constitution." But this professional orientation toward particular decisions might not seem apposite in a discussion of constitutional law as a primary vehicle of American political thought and imagination. Even for this broader purpose, however, I believe there is value in keeping a close connection to specific cases. In discussing how we are to imagine the United States, and how we should answer questions about the nation's meaning, the danger of a lapse into meaningless abstraction—into the "imaginary" in the sense of make-believe—is ever-present. This article, therefore, begins by considering a constitutional law decision, in fact one of the first such decisions, and then asks what that

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9. The Civil War is the obvious counterexample, but only on the surface. The Union armies settled the political issue of whether the Republic would be sacrificed so that slavery could be secure. Yet, the Union victory alone could not reconcile secessionists to a Republic that refused to be sacrificed for such a purpose, nor persuade all Americans that we are all truly American, truly equal, regardless of race. Over a century and a half later, work remains to be done to achieve that second objective.

decision has to say about the United States of the imagination in light of a later case.

## II

### *CHISHOLM V. GEORGIA*

The Supreme Court's first federalism decision was a political disaster. On February 19, 1793, the day after the Court decided *Chisholm v. Georgia*,<sup>10</sup> a bill proposing an amendment to overturn it was introduced in the House of Representatives, Congress sent the state legislatures an amendment for that purpose on March 4, 1794, and by February 7, 1795, the required supermajority of states had approved what we now know as the Eleventh Amendment. From decision to overruling by amendment in less than two years! Due to the haphazard communications of the era, no one noticed that the amendment had been adopted for another three years. As a matter of precedent and technical law, *Chisholm* is as dead as a doornail.

But the premise of this article is that constitutional law, some of the time, is about more than technical law, and a judicial opinion may lack precedential force and yet address broader questions about the identity of the United States with wisdom and permanent value. In his great treatise on constitutional law, Justice Joseph Story long ago commended the opinions of the justices in *Chisholm* for "their very able exposition of many constitutional principles."<sup>11</sup> I think we can usefully follow Story's advice in reflecting on how we should imagine the United States.

The plaintiff in *Chisholm* was the executor of a South Carolina merchant who sold the state of Georgia supplies needed for the state's defense during the Revolutionary War. The story of what went wrong was rather complicated, but the basic claim was not seriously in dispute: the state received what it bargained for but the merchant was never paid. Decades later, the Georgia legislature finally enacted a bill to pay the debt. When executor Chisholm filed an action for damages in the Supreme Court, invoking its original jurisdiction pursuant to Article III section 2—"In all Cases . . . in which a State shall be Party, the supreme Court shall have original Jurisdiction"—the Georgia authorities refused to defend the action legally.<sup>12</sup> Instead, they submitted a "remonstrance" asserting that the state as a sovereign was immune from suit without its consent.

By a divided vote, Justice James Iredell in dissent, the Court held that it could assert jurisdiction over Chisholm's action. The Court's rejection of the idea that states enjoy sovereign immunity from the federal courts' jurisdiction ignited a

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10. 2 U.S. (2 Dall.) 419 (1793).

11. 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION § 1677 n.1 (1833). Story quoted two long paragraphs from Chief Justice Jay's opinion elsewhere in the COMMENTARIES. See *id.* at § 488 n.2 (citing Chief Justice Jay's description of the legal state of the United States prior to the adoption of the Constitution).

12. U.S. CONST. art. III, § 2.

hailstorm of protest. Some protested based on a principled objection to the decision's broad implications, although the more potent political motivation was widespread concern that the Court would successfully force heavily indebted states to pay their creditors, foreign as well as domestic.

The four justices in the *Chisholm* majority agreed in seriatim opinions that the text of Article III, "Controversies . . . between a State and Citizens of another State," granted the Court jurisdiction.<sup>13</sup> But Justice James Wilson and Chief Justice John Jay thought that beneath the surface of this technical question of federal jurisdiction a deeper issue was waiting: the very relevance of the ideas of sovereignty and of the states as sovereign to the constitutional structure of the United States. As Wilson put it, "This [jurisdictional] question, important in itself, will depend on others, more important still; and, may, perhaps, be ultimately resolved into one, no less radical than this: 'do the people of the United States form a Nation?'"<sup>14</sup> Wilson and Jay offered distinct although compatible explanations for why the answer to that question is an emphatic yes, and therefore the notion of state sovereignty is at best misleading. Their arguments, which I think were the "constitutional principles" Story praised several decades later, are the first major statements within constitutional law of a perspective on how we should imagine the United States that I, like Story, find persuasive.

Wilson, one of the country's first professors of law, delivered an opinion that began with the grandiose promise to examine the issue "from every possible point of sight . . . By the principles of general jurisprudence . . . By the laws and practice of particular States and Kingdoms . . . and chiefly, I shall examine the important question before us, by the Constitution of the United States."<sup>15</sup> The opinion that followed was ostentatiously learned, with the histories of the ancient Greek city-states and medieval French feudalism, a lawsuit brought by Christopher Columbus's son, and a saying of Frederick the Great of Prussia, among other esoterica, all marshalled in support of Wilson's conclusion. One may question the value of Wilson's display of erudition, but at the core of his opinion Wilson was making a simple, profound claim. In his view, the American political system involves no mysticism about government and no Rousseau-like exaltation of the collective over the actual human beings who make up the political community.

Wilson was no anarchist, and described the "State," by which in this context he meant the political community—so that the ultimate American "State" is the United States—as the "most transcendently excellent" of "all human contrivances." But the artificial personality of the State "derives all its acquired importance" from the "native dignity" of the actual persons who make it up. Government, the magistrates who exercise the community's political authority, occupy a still lower position in the American system: that of a mere means to

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13. *Id.*

14. *Chisholm*, 2 U.S. (2 Dall.) at 453 (opinion of Wilson, J.).

15. *Id.*

achieve the ends of the political community that in turn owes its legitimate claims to the human beings who constitute it.<sup>16</sup>

The relevance of this vision of the relationship of persons, community, and government in the United States to the suability of Georgia comes through the language by which Georgia's apologists attempted to justify its defiance of the Court. Georgia was not obliged to do justice to Chisholm's decedent, not because Chisholm's claim was contrary to moral justice, but because Georgia was a sovereign and it is beneath the dignity of a sovereign to be hauled into court at the behest of an individual. But this reasoning turns the moral realities upside down in Wilson's view. Precisely because the political community can be viewed meaningfully as an artificial person of moral and political significance, "It has its rules: It has its rights: And it has its obligations," chief among them the duty "to do justice" to individual human beings who make it up and for whom it acts.<sup>17</sup>

States and Governments were made for man . . . As the State has claimed precedence of the people; so, in the same inverted course of things, the Government has often claimed precedence of the State; and to this perversion in the second degree, many of the volumes of confusion concerning sovereignty owe their existence.<sup>18</sup>

The very language of sovereignty, Wilson believed, was the source of much of the mischief caused by sovereignty talk, and the self-interest of magistrates most of the rest. The idea of a "sovereign has for its correlative, subject," and its natural home was in European feudalism and the absolutism of Louis XIV's "l'état, c'est moi," and has no place in the United States.<sup>19</sup> "Under [the American] Constitution there are citizens, but no subjects."<sup>20</sup>

To the Constitution of the United States the term SOVEREIGN, is totally unknown. There is but one place where it could have been used with propriety. But, even in that place it would not, perhaps, have comported with the delicacy of those, who ordained and established that Constitution. They might have announced themselves "SOVEREIGN" people of the United States: But serenely conscious of the fact, they avoided the ostentatious declaration.<sup>21</sup>

The only political community in the United States that has no superior is the community of the whole, and that community owes its superiority over the lesser communities of the individual states to its origin in the will of the human beings who constitute it. "[T]he people of the United States intended to form themselves into a nation for national purposes," but in doing so they did not create a many-headed Louis XIV.<sup>22</sup> Even the national sovereignty is a political contrivance serving the needs of the actual people.

Wilson worried that Americans were already in danger of losing sight of just how radical their break with the European past was. It is all too easy, he feared,

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16. *Id.* at 455.

17. *Id.*

18. *Id.*

19. *Id.* at 456, 461.

20. *Id.* at 456.

21. *Id.* at 454.

22. *Id.* at 465.



to talk about the world as if governments and nations are ultimately more substantial and important than the human beings who make them up.

Sentiments and expressions of this inaccurate kind prevail in our common, even in our convivial, language. Is a toast asked? ‘The United States,’ instead of the ‘People of the United States,’ is the toast given. This is not politically correct. The toast is meant to present to view the first great object in the Union: It presents only the second: It presents only the artificial person, instead of the natural persons, who spoke it into existence.<sup>23</sup>

And if the nation is not a mystical entity demanding homage but an artificial person created “for national purposes,” still less can the individual states lay any claim to sovereignty, or any exemption from the legal processes the American people created “to establish Justice.”<sup>24</sup> The technical argument that Article III’s language cannot be read to impose suability only on individuals is a reflection of the fundamental primacy of human beings in the American constitutional order.<sup>25</sup>

The constitutional vision that Wilson laid out grandiloquently, Jay stated in less cosmic terms, and at times with the air of a Legal Realist *avant la lettre*. In explaining why the very idea that states are immune from lawsuits by individuals makes no moral and *therefore no constitutional* sense, Jay dismissed the assertion that states are “sovereigns” as essentially meaningless.

It is agreed, that one free citizen may sue any number on whom process can be conveniently executed; nay, in certain cases one citizen may sue forty thousand . . . In this city [Philadelphia] there are forty odd thousand free citizens, all of whom may be collectively sued by any individual citizen. In the State of Delaware, there are fifty odd thousand free citizens, and what reason can be assigned why a free citizen who has demands against them should not prosecute them? Can the difference between forty odd thousand, and fifty odd thousand make any distinction as to right? . . . In this land of equal liberty, shall forty odd thousand in one place be compellable to do justice, and yet fifty odd thousand in another place be privileged to do justice only as they may think proper? Such objections would not correspond with the equal rights we claim; with the equality we profess to admire and maintain, and with that popular sovereignty in which every citizen partakes. Grant that the Governor of Delaware holds an office of superior rank to the Mayor of Philadelphia, they are both nevertheless the officers of the people; and however more exalted the one may be than the other, yet in the opinion of those who dislike aristocracy, that circumstance cannot be a good reason for impeding the course of justice.<sup>26</sup>

The United States, in other words, “rests on this great moral truth, that justice is the same whether due from one man or a million, of from a million to one man,” and “the value of our free republican national Government” lies in large measure in the ability of the national government to “place[] all our citizens on an equal footing” in reality and not just in theory.<sup>27</sup>

23. *Id.* at 462.

24. *Id.* at 465.

25. *See id.* (discussing the constitutionally protected structure of the government).

26. *Id.* at 472–73 (opinion of Jay, C.J.).

27. *Id.* at 479. Jay made it clear that he did not think the national political community should be immune from individual suit in principle, but he did not address the constitutional status of federal sovereign immunity. He also acknowledged, in his proto-Realist way, a difference between that question and the issue of state immunity. In executing a judgment against a state, the Court would have the support of

As the long quotation you just read suggests, Jay strongly emphasized the importance of the idea of *equality* to what the United States means. Like Wilson, Jay pointed out that the language of sovereignty, rooted as it is in European feudal ideas, implies almost inexorably the existence of subjects, a concept radically inconsistent with the fundamental political and moral norm of the American constitutional order. Before the Revolution, Americans were “fellow subjects, and in a variety of respects one people;” the Revolution was fought and won by Americans who saw themselves, “in a national point of view” and “for general purposes” “as one people.”<sup>28</sup> As for sovereignty, the Revolution devolved it on that national, united, American political community and thus dissolved its prior meaning altogether. The old sovereign/subject distinction, which made sense out of the sovereign’s claim to immunity in European law, has no rightful place in the United States, where “the citizens of America are equal as fellow citizens, and as joint tenants in the sovereignty” and no individual is inferior.<sup>29</sup> To the extent that one can continue to refer to sovereignty in the United States, therefore, its content is supplied by the moral equality of individuals and to their ability to act together as a community of equals.<sup>30</sup>

The centrality of the language of equality in Jay’s opinion is striking. The opinion takes up approximately ten pages in Dallas’s report, and in those ten pages the words “equal” or “equality” appear nineteen times to express Jay’s transmutation of sovereignty into a priority Americans share as persons and that they jointly expressed in the Constitution. If one adds paraphrases and allusions, the obvious importance of equality only deepens.

[T]rue Republican Government requires that free and equal citizens should have free, fair, and equal justice . . . [State immunity from suit would] do violence to the great and leading principles of a free and equal national government, one of the great objects of which is, to ensure justice to all: To the few against the many, as well as to the many against the few. . . . [Supreme Court jurisdiction over lawsuits against states by citizens of other states] performs the promise which every free Government makes to every free citizen, of equal justice and protection.<sup>31</sup>

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“the arm of the Executive power of the United States; but in cases of actions against the United States, there is no power which the Courts can call to their aid.” *Id.* at 478. Financial claims against the federal government generally had to be presented as petitions to Congress prior to the creation of the Court of Claims in 1855, with jurisdiction over government-contract claims, and the enactment of the Federal Tort Claims Act in 1946.

28. *Id.* at 470.

29. *Id.* at 472.

30. At one point Jay defines “sovereignty [as] the right to govern.” *Id.* at 472. In that sense he is willing to be a little less draconian than Wilson in attempting to ban the term entirely. Jay can refer to “the residuary sovereignty of each State” as the role in American government the American people have left to the states, but in context this simply means that the distinct political community of each state has delegated those governing responsibilities to its local magistrates that the American people as a whole have not entrusted to the national government. *Id.* at 471.

31. *Id.* at 476–79.

For Jay, the equality of Americans is at the heart of what it means to call the United States a republic inextricably linked with the duty and constitutional purpose of treating individual persons with justice.

From a twenty-first century perspective, one might question just how far Jay meant his ringing statements of equality to extend. There is no reason to think, from his opinion or—as far as I know—from his life, that he seriously questioned his era’s assumptions about the roles of men and women in society.<sup>32</sup> The *Chisholm* opinion’s discussion of individual equality in terms of citizens, entirely understandable in light of the language of Article III at issue, left no direct reflection on Jay’s views of the place of immigrants in the American political community. However, Jay’s insistence on the relationship between equality and “the dictates of justice” and “great moral truth” at least suggested that the United States has moral duties toward citizens of other countries.<sup>33</sup> Wilson’s opinion, with its express theological foundation, is even more easily read to imply that immigrants and visitors should be the objects of constitutional protection.<sup>34</sup>

Still other issues that seem obviously questions of equality to us were entirely beyond Jay’s purview. In my view, this last observation tells us little about the intellectual integrity or the contemporary relevance of Jay’s constitutional vision beyond the obvious fact that he was a person of his time and not ours. The same is true of us, and I do not doubt that Americans in the future will look back and see us as a society remarkably blind to moral concerns that are clear to them. But on one issue, race and equality, Jay’s opinion can be challenged meaningfully because the issue was already salient in his time and in his mind.

Jay recognized that racial discrimination in American life is a moral and political evil. For example, in a letter to Benjamin Rush written eight years before *Chisholm*, Jay stated that “I wish to see all unjust and all unnecessary Discriminations every where abolished, and that the Time may soon come when all our Inhabitants of every Color and Denomination shall be free, and equal partakers of our political Liberty.”<sup>35</sup> Like the great majority of the founders, Jay thought slavery morally wrong in principle. But unlike most of the founders, Jay was a public advocate of abolition, in his native New York and more generally, and played at least some significant role in moving public opinion in that state against

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32. Jay’s relationship with his wife, the remarkable Sarah Livingston Jay, and with their three daughters, displayed a high respect for their abilities and opinions. Yet, that amiable domestic conduct was often shown by men in the early Republic whose public opinions could not be termed proto-feminist in any sense. Anya Jabour’s study of marital relationships in early nineteenth-century America is revealing. See generally ANYA JABOUR, *MARRIAGE IN THE EARLY REPUBLIC: ELIZABETH AND WILLIAM WIRT AND THE COMPANIONATE IDEAL* (1998). On the Jay family’s relationships, see WALTER STAHR, *JOHN JAY: FOUNDING FATHER* (2006) (recounting John Jay’s career and personal life).

33. *Chisholm*, 2 U.S. (2 Dall.) at 472, 479 (opinion of Jay, C.J.).

34. See *id.* at 455 (opinion of Wilson, J.) (“Man, fearfully and wonderfully made, is the workmanship of his all perfect Creator: A State; useful and valuable as the contrivance is, is the inferior contrivance of man . . .”).

35. Letter from John Jay to Benjamin Rush (Mar. 24, 1785), in 4 *SELECTED PAPERS OF JOHN JAY* 72, 72 (Elizabeth M. Nuxoll ed., 2015).

slavery's retention. Running for governor in 1792 and warned by a supporter about criticism that he supported emancipation, Jay replied that "every man of every color and description has a natural right to freedom, and I shall ever acknowledge myself to be an advocate for the manumission of slaves in such way as may be consistent with the justice due to them."<sup>36</sup> Jay narrowly lost the election, thus insuring that he was on the Court when *Chisholm* was decided, but after he resigned he was elected governor. During Jay's term in office the state legislature adopted a gradual emancipation law, a change for which Jay deserves at least some credit. Years later, Jay broke his long silence on political issues during the debate over the admission of Missouri as a slave state, publicly stating that slavery "ought not to be . . . permitted in any of the new states" and indeed should be "finally abolished in all of them."<sup>37</sup>

Jay, then, was well aware that racism, and racism's ultimate institutionalization in slavery, exposed his *Chisholm* vision of the United States as "this land of equal liberty"<sup>38</sup> to the charge of rank hypocrisy. However, he acknowledged the problem at only one place in his opinion, at the end of his discussion of the unacceptability, in the United States, of the feudal idea that the "sovereign" need not submit to suit by individual "subjects."

No such ideas obtain here; at the Revolution, the sovereignty devolved on the people; and they are truly the sovereigns of the country, but they are sovereigns without subjects (unless the African slaves among us may be so called) and have none to govern but themselves; the citizens of America are equal as fellow citizens, and as joint tenants in the sovereignty.<sup>39</sup>

To paraphrase what I think Jay was saying: there was *no* means by which slavery could be reconciled with the inherent connections between freedom, equality, and justice on which he thought the United States was founded. The existence of slavery was therefore a constitutional surd, a straightforward contradiction between the idea of America and the reality of America.

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36. Letter from John Jay to John C. Dongan (Feb. 27, 1792), in 5 SELECTED PAPERS OF JOHN JAY 361, 361 (Elizabeth M. Nuxoll ed., 2017). Jay immediately went on to explain that he supported gradual rather than immediate abolition, a compromise reflected in his ownership of a small number of slaves who were personal servants. See STAHR, *supra* note 32, at 238–39. On the to-our-eyes bizarre picture of a federal judge running for governor, it is worth noting that late eighteenth-century political campaigns did not usually involve barnstorming by the candidate himself, and Jay insisted that he would not engage in public electioneering. The Federalist/Republican political divide was only just emerging in 1792 but the "lack of formal political parties did not make the campaign any less intense." Jay apparently won a razor-thin majority of the popular vote, but a majority of the legislative committee charged with determining the outcome were supporters of the opposing candidate, and voted to throw out the votes from an overwhelmingly pro-Jay county on technical grounds. See *id.* at 283–89 (discussing the election).

37. See STAHR, *supra* note 32, at 372; see *id.* at 372–73 (discussing Jay's widely publicized intervention during the Missouri crisis); for the judicious conclusion, see *also id.* at 347 ("New York would at some point have passed manumission legislation; but it is not an accident that it passed the law during Jay's tenure as Governor.").

38. *Chisholm*, 2 U.S. (2 Dall.) at 472 (opinion of Jay, C.J.).

39. *Id.* at 471–72.

The ostensible suggestion that “the African slaves among us” might be called “subjects” in the old European sense was not in fact hypocrisy so much as a confession of incoherence twice-over. The statement acted as both an invocation of a label meaningless in American political speech and a description of human beings who precisely because they are among us are therefore part of us. As he wrote Dr. Rush a few years before, it is “all our inhabitants of every colour and denomination” who should be “equal partakers” of American liberty.<sup>40</sup> Unwilling simply to ignore the fact of slavery, Jay had nothing sensible to say about its place in the United States because there was nothing sensible to be said.

### III

#### *MISSOURI V. HOLLAND*

The argument for why we can dismiss *Chisholm v. Georgia* as irrelevant to the question in 2022 of how to understand the United States of the imagination is obvious. Justice Wilson and Chief Justice Jay wrote opinions filled with lofty rhetoric, but in the end they dealt with the glaring discrepancy between their imagined America and a racist, slave-owning reality by simply ignoring the problem, like Wilson, or descending into unintelligible babble, like Jay. On a different level, as discussed above, the national political community’s reaction to *Chisholm v. Georgia* was remarkably swift and decisively negative. Even if we could explain or excuse the internal tensions in their opinions, surely the most we can say about Wilson’s and Jay’s constitutional vision is that it was a road most definitely *not* taken.

Perhaps, as I wrote earlier, I am not offering an argument that proves anything that the reader must accept as logically entailed by agreed-on premises. But before we reach that conclusion, I want us first to consider briefly another Supreme Court opinion that I believe sheds useful light on how we should understand the United States of the imagination. The opinion also suggests, I think, the way in which we may find value in what Jay and Wilson wrote.

By the late nineteenth century it was evident that one consequence of the expansion of settlement by Americans of European ancestry was a sharp decline in the numbers of many kinds of wildlife. The most famous examples were the passenger pigeon—extinct in the wild by the beginning of the twentieth century—and the American bison—nearly extinct by 1900—but the problem was much broader. Effective steps to stem the decline of migratory birds in particular clearly demanded national and indeed international action, and in 1916 the United States and the United Kingdom, acting for Canada, entered into a convention for their protection that Congress implemented in the Migratory Bird Treaty Act of 1918.

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40. Letter from John Jay to Benjamin Rush, *supra* note 35, at 72.

After a federal grand jury indicted two individuals in Missouri for violating the Act, the defendants moved to dismiss the charges on the ground that the statute and the treaty itself were beyond the scope of Congress's powers and an impermissible invasion of the states' police powers. When the attorney general of Missouri filed a suit to enjoin federal officers from enforcing the Act within the state on the same grounds, the district court heard the challenges together, and upheld both Act and treaty. The state appealed, and the Supreme Court affirmed in an opinion written by Justice Oliver Wendell Holmes.<sup>41</sup>

The state's argument in *Holland* was by no means trivial. Less than two years before, the Supreme Court struck down the Child Labor Act, concluding that "the act in a two-fold sense is repugnant to the Constitution. It not only transcends the authority delegated to Congress over commerce but also exerts a power as to a purely local matter to which the federal authority does not extend."<sup>42</sup> While the Court's reference to a "two-fold repugn[cy]" was murky, its language indicated that there are "purely local matters" that Congress cannot regulate even if the commerce power's affirmative scope appears to encompass the subject. On appeal in *Holland*, the state expanded on this idea, arguing that the regulation of hunting was a matter within the police power reserved exclusively to the sovereign states by the Tenth Amendment, and secondarily that the state of Missouri as trustee for its people had sovereign property rights over wild birds.<sup>43</sup> Anticipating the federal government's claim that the state was attempting "to engraft on the treaty-making power a limitation" contrary to settled practice and to early case law, Missouri's brief denied the presence of any novelty in its reasoning.

We wish, not to create, but to revive an atmosphere: the atmosphere breathed by those who framed and those who ratified and first amended the Constitution of the United States. If the act of Congress now in question would have been unconstitutional then, it is unconstitutional now. The Constitution itself does not change.<sup>44</sup>

Writing for a seven-justice majority, Justice Holmes made short work of the idea that the Tenth Amendment is itself a textual limitation on Congress's power: "it is not enough to refer to the Tenth Amendment, reserving powers not delegated to the United States, because" Article II expressly delegates the treaty

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41. *Missouri v. Holland*, 252 U.S. 416 (1920); *see also* *United States v. Samples*, 258 F. 479 (W.D. Mo. 1919) (laying out unusual procedures employed by the district court).

42. *Hammer v. Dagenhart*, 247 U.S. 251, 276 (1918).

43. The state's lengthy brief rings the changes on these claims throughout. *See, e.g.*, Brief of Appellant at 86, *Missouri v. Holland*, 252 U.S. 416 (1920) (No. 609) ("[T]he reserved powers of a state or a trust which the state holds for the benefit of all its people cannot be annulled by a treaty having for its subject the regulation of a matter which is reserved to the states respectively or to the people by the Tenth Amendment."). Unsurprisingly, the state featured long quotations from *Hammer* in its argument. *See, e.g., id.* at 36, 66 (featuring long quotations). The Department of Justice simply ignored *Hammer* in its brief.

44. *Id.* at 18; *see* Brief for Appellee at 38–39, *Missouri v. Holland*, 252 U.S. 416 (1920) (No. 609) (providing the quotation from the Justice Department brief).

power and Article VI makes federal treaties supreme over conflicting state authority.<sup>45</sup> Given that the protection of an endangered natural resource that can be safeguarded only by cooperation with another international sovereign is “a national interest of very nearly the first magnitude,” Holmes concluded that the treaty was clearly within the Article II power, and the Act “a necessary and proper means to execute the powers of the Government.”<sup>46</sup>

*Missouri v. Holland* is an interesting and important case for many reasons, and was nearly the cause of a constitutional amendment in the 1950s prompted by a misreading of Holmes’s opinion that took him to imply that the treaty power has no limitations. Our interest, however, is in what Holmes wrote in response to Missouri’s claim that its position was more faithful to what the founders anticipated than the government’s. Holmes declined to argue the point: instead, he dismissed it as irrelevant.

[W]hen we are dealing with words that also are a constituent act, like the Constitution of the United States, we must realize that they have called into life a being the development of which could not have been foreseen completely by the most gifted of its begetters. It was enough for them to realize or to hope that they had created an organism; it has taken a century and has cost their successors much sweat and blood to prove that they created a nation. The case before us must be considered in the light of our whole experience and not merely in that of what was said a hundred years ago. The treaty in question does not contravene any prohibitory words to be found in the Constitution. The only question is whether it is forbidden by some invisible radiation from the general terms of the Tenth Amendment. We must consider what this country has become in deciding what that amendment has reserved.<sup>47</sup>

In thinking about this passage, it is important to be clear about what Holmes is *not* saying. His claim is not that the founders’ understanding of the Constitution they wrote has no part to play in latter-day constitutional debate. That the founders could not foresee *completely* all subsequent developments, or that constitutional questions should not be answered *merely* in light of what was said in the past, does not make those understandings and judgments immaterial. Still less did Holmes intend to suggest that the United States has a living Constitution in the debased sense that for practical purposes “the Constitution” simply refers to whatever constitutional-law propositions command a five-justice majority at any given time. The constitutional text is binding law and the judicial function is to apply that law, not make it up out of whole cloth.

But the authoritative text is not just a document, it is “a constituent act” that created an ongoing political community with a history that cannot simply be ignored when attempting to determine which of conflicting constitutional answers is more faithful to the text. To borrow some words from Justice Felix Frankfurter paraphrasing Holmes’s views, when we recall that the Constitution is not simply

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45. *Holland*, 252 U.S. at 432.

46. *Id.* at 432, 435. There was no change in the Court’s membership between *Hammer* and *Holland*. Holmes, who had written for the four dissenters in the earlier case, picked up three members of the *Hammer* majority. The two dissenters in *Holland* did not file an opinion.

47. *Id.* at 433–34.

“a text for interpretation” but more centrally “the means of ordering the life of a people,” the task of constitutional law involves consideration of both past and present, stability and change.<sup>48</sup> As Holmes wrote many years before *Holland*,

[t]he past gives us our vocabulary and fixes the limits of our imagination; we cannot get away from it. . . . But the present has a right to govern itself so far as it can; and it ought always to be remembered that historic continuity with the past is not a duty, it is only a necessity.<sup>49</sup>

Holmes’s final turn of phrase in the sentences just quoted is memorable, although I suspect it somewhat exaggerates the extent to which he thought the weight of the past lacks normative force in the law. The overall thrust of his earlier comments, however, is an accurate gloss on his discussion of the interplay between origin and development in *Holland*. Founding-era debates, and other generative constitutional discussions, supply constitutional law’s vocabulary. They also shape the intellectual and imaginative possibilities within which we address constitutional law questions by opening some lines of thought and commitment and closing off or rendering more difficult others. But the answers we give should be ours and indeed by necessity they cannot be anyone else’s, even the founders’.

In the “constituent act” passage quoted above, Holmes begins and ends with the specific task of the constitutional judge: to decide a question of law. But the passage as a whole is broader in its import. Precisely because he is writing about a “constituent act,” Holmes is unavoidably writing about how to understand, how to imagine, the being that the founders called into life and that only subsequent development has proven to be a nation. What he wrote about constitutional law specifically, Holmes was necessarily writing about the United States itself as a political community that lives and indeed exists in the mind and heart and imagination, and not simply as a material reality or a concept captured by words on a page. What the United States means is, at one and the same, significantly shaped by its past, by what was said and done by the founders and their successors, while always being a question that can only be answered in the present. There can be no complete escape from the nation’s origins and history, but neither is the past a straitjacket binding the present down by past sins or a guarantee that the present has no serious flaws. My sense is that Americans in the present day are often tempted to one or the other of those views of our past. Holmes in *Holland* would tell us that both are mistaken.

#### IV

#### CONCLUSION

What can Justice Holmes’s opinion in *Holland* tell us about the possible present-day relevance of Justice Wilson’s and Chief Justice Jay’s opinions in

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48. Felix Frankfurter, *Mr. Justice Holmes and the Constitution: A Review of His Twenty-Five Years on the Supreme Court*, 41 HARV. L. REV. 121, 131 (1927).

49. OLIVER WENDELL HOLMES, JR., *Learning and Science*, in THE ESSENTIAL HOLMES: SELECTIONS FROM THE LETTERS, SPEECHES, JUDICIAL OPINIONS, AND OTHER WRITINGS OF OLIVER WENDELL HOLMES, JR. 184, 184 (Richard A. Posner ed., 1992).



*Chisholm*? More specifically, how does Holmes help us see the way in which Wilson and Jay can inform how we think about the United States of the imagination, the United States as an idea and not just a brute—and, tragically, often brutish—fact? It is, as I wrote above, easy to explain why Wilson and Jay can have nothing to say at all to us. They were losers, politically and personally: the Eleventh Amendment nullified *Chisholm*, their opinions spawned no line of case law and have no precedential force, and they themselves were morally compromised in ways that rendered their views fruitless. The nation went in other directions, and rejected the idea of the United States they presented.

If we take Holmes seriously, however, this expects too much of Wilson and Jay, and too little as well. The founders, taken individually and as the group of privileged, white, male Americans who wielded power in their day, were indeed a morally compromised and politically blinkered lot none of whom can serve as heroes, if our heroes must be flawless paragons of timeless virtues.<sup>50</sup> The United States of our imagination can be articulated only “in the light of our whole experience,”<sup>51</sup> which includes changes barely imaginable to the founders—for example, the abolition of slavery—as well as those completely beyond their ken, such as the movements toward a more inclusive equality in the late twentieth and twenty-first centuries. We should not and we cannot define the United States by the limited vision of the eighteenth century.

But we cannot simply disregard the work the founders did, not if we are trying to imagine what the United States means and should mean. This is not, Holmes would add, because we are under some moral obligation to subscribe to their views, but because we stand in the line of historical development that in many ways began with them. “Historic continuity with the past is not a duty, it is only a necessity,” but the American past is not merely one of moral compromise and flawed perception.<sup>52</sup> The founders “called into life a being the development of which” they could not “completely” foresee, but they could and did “hope that they had created an organism” with a meaning.<sup>53</sup> Whatever “this country has become” shows its roots, for good and ill, in their work, and how we choose to shape its future will unavoidably do so as well.<sup>54</sup> That being so, there is value in looking back to discern what hopes they, or some of them, held that we can share and build upon.

Wilson and Jay, in their opinions in *Chisholm*, identified the meaning of the United States with a vision of a political community that was intrinsically committed to the priority of individual human beings and the communities they make up over political arrangements and expediency. For this very reason, they envisioned an American political community that would sustain a national government with the duty and power to ensure justice, equally and to all. The founders,

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50. Whether that should be so is a question for another time.

51. *Holland*, 252 U.S. at 433.

52. HOLMES, *supra* note 49, at 184.

53. *Holland*, 252 U.S. at 433.

54. *Id.* at 434.

Wilson and Jay among them, tolerated a Republic that did not live up to that vision. But their failures are not the only legacy of the founding; their hope for what America should be is as well. The *Chisholm* vision, I propose to the reader, deserves a central place in the United States of the imagination.