Making a Hash of Sovereignty, Part I

Jack N. Rakove

THANKS TO THE First Amendment, we Americans have the right to use the word *sovereignty* whenever we wish. Local magistrates cannot fine us for arguing that the Tenth Amendment really recognizes some irreducible sovereignty of the fifty states, or for wondering whether the right to operate gambling casinos is a distinctive badge of Native American sovereignty. Nor can we be held in contempt of court for declaiming that the finality of judicial review makes the politically unaccountable Supreme Court the true possessor of sovereignty in the American constitutional order. So, too, we can fairly argue that state sovereignty would have been gravely wounded had the Supreme Court upheld the provision of the Brady Act that threatened to "commandeer" your local sheriff into conducting federally required checks of gun purchasers. Sovereignty is a word we can't purge from our political vocabulary – and as long as it's there, we might as well make the most of it, expropriating it for situations where a prude might blush at its appearance.

As a historian of American federalism, however, I've long had a nagging desire to banish this word from our political lexicon. From the start (that is, from the era of the American Revolution), our practice and theory alike have made a hash of the traditional concept of sovereignty that the colonists inherited from European theorists. That traditional concept emphasized sovereignty's unitary and absolute nature; ours parcels sovereignty out into bits and pieces that are scattered throughout our system of governance, yet somehow mystically reunited in the ineffable concept of an all-sovereign American people. If the traditional theory resembles the systematic theology of an all-conquering, catholicizing monotheism, the American doctrine has a markedly protestant, even pagan cast, with sects and monuments of sovereignty cropping up all over the landscape. Only the transubstantiation of these dispersed powers into the holy mystery of popular sovereignty exposes the sacred roots from which the American heresy long ago diverged.

Understanding the serious problems posed

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by the survival of any concept of sovereignty on our formerly colonial shores requires the solution of two historical puzzles. The first involves explaining why the traditional conception was so ill-suited for American usage; the second, understanding why the concept has proved so resilient. In this essay, I will offer a short account of the reasons why the theory of sovereignty and the practice of American constitutionalism were a poor match from the beginning.[1] In a later installment, I will speculate about the vampirical reasons why sovereignty cannot be killed.

Sovereignty is a relatively modern idea, and while we need not belabor its origins, a brief review is a useful point of departure. In the conventional story, the concept emerged as part of the drastic reordering of political theory that followed the political turmoil which the Reformation unleashed upon the crazy-quilt map of sixteenth-century European statehood, with its kingdoms, principalities, electorates, duchies, and other odd jurisdictions. In the classic formulation of its initial leading theorist, Jean Bodin, sovereignty by its nature had to be both absolute and unitary. That is (to follow one recent commentary), "a truly sovereign power must have all the power that a state could legitimately exercise," and further, "there had to exist in every commonwealth a single individual or group in which the entire power of a state was concentrated."[2] A sovereign could delegate the exercise of particular powers to subordinate authorities, but it could not permanently alienate those powers without losing the essential character of sovereignty.

Why did this concept prove so attractive in the brave new world of post-Reformation Europe, with its massacres and martyrs, rebellions and civil wars, and the horrific Thirty Years War between Catholic and Protestant states which ended with the Treaty of Westphalia (1648)? This near-century of strife encouraged the emerging nation-states of Europe to mobilize their resources, both to suppress internal disorder and to repel external threats, and this in turn promoted the centralization of authority which the doctrine of sovereignty did so much to legitimate. In a crude sense, the political theory of sovereignty and the political practice of state-building went hand in hand.

A second dimension of sovereignty became evident when the Treaty of Westphalia ushered in a new European order based on the understanding that the former world of Latin Christendom – a world once unified, however tenuously or even nominally, under the authority of the papacy – could never be repaired. In this new order, there was no

1 The literature on sovereignty is enormous; my own interest in it arises primarily from my immersion in eighteenth-century American history. I have benefited enormously from the writings of many distinguished colleagues in this area, including the following: Bernard Bailyn, The Ideological Origins of the American Revolution (1967); Gordon S. Wood, The Creation of the American Republic, 1776-1787 (1969); Jack P. Greene, Peripheries and Center: Constitutional Development in the Extended Polities of the British Empire and the United States, 1607-1788 (1986); Edmund S. Morgan, Inventing the People: The Rise of Popular Sovereignty in England and America (1988); and Peter S. Onuf, The Origins of the Federal Republic: Jurisdictional Controversies in the United States, 1775-1787 (1983). But my reflections derive primarily from my own writings: The Beginnings of National Politics: An Interpretive History of the Continental Congress (1979); and Original Meanings: Politics and Ideas in the Making of the Constitution (1996).

2 Julian H. Franklin, *Sovereignty and the mixed constitution: Bodin and his critics*, in J. H. Burns, ed., The Cambridge History of Political Thought, 1400-1700 at 307 (1991).

authority to replace the papacy as a potential mediator of secular strife. In theory, each of the emerging nation states was equally sovereign within its own borders and in its relation to other sovereigns. Nations might vary in power, of course, but as legal entities, they claimed an equal sovereign status.[3]

In England, the leading theorist of sovereignty was, of course, Thomas Hobbes (1588-1679). The general repudiation of his *Leviathan* (1651) both by Stuart royalists, with their absolutist pretensions, and by the proponents of parliamentary privilege, might have encouraged English thinkers to dispense with the doctrine of sovereignty altogether. Instead, the political turmoil of the seventeenth century – the civil war of the 1640s, the Interregnum and Commonwealth period (1649-60), the Exclusion Crisis (1678-81), and the Glorious Revolution (1688-89) – worked to encourage the development of a distinctively English version of the basic concept. On the continent, where representative institutions were in decay if not disappearing altogether, the doctrine of sovereignty was markedly royalist; in England, it became distinctively parliamentarian. In 1689, the English monarchy was safely constitutionalized when William and Mary came to the throne at the invitation of the Convention Parliament. Thereafter, sovereignty could be said to reside in the trinitarian institution of the King-in-Parliament; that is, in a bicameral legislature whose bills became law only with the royal assent. On the eve of the American Revolution, Sir William Blackstone stated the orthodox view. In every state "there is and must be … a supreme, irresistible, absolute, uncontrolled authority, in which the *jura summi imperii*, or rights of sovereignty, reside."[4]

Blackstone's *Commentaries* first appeared, conveniently enough, amid the Stamp Act controversy of 1765-66, which in turn quickly placed sovereignty at the heart of the constitutional quarrel which ended in American independence a decade later. Before 1765, only a handful of colonists had any reason to give the idea of sovereignty more than a passing thought. No one could plausibly describe their small-scale provincial governments as bastions of sovereignty. All were, in one way or another, the creatures of the British crown, which had granted (and sometimes revoked) rights of government over territories whose extent it had also specified. By 1765, colonists were used to a substantial measure of self-government; but no one could confuse a measure of provincial autonomy with a claim to sovereignty.

Nevertheless, in the quarter century of upheaval that the Stamp Act inaugurated, questions about the location of sovereignty – first within the British empire, and then within the American federal union – moved to the forefront of political debate. There were three major phases in the development of American thinking about sovereignty: the imperial debate of 1765-1776; the formation of new state constitutions and the Articles of Confederation in the wake of independence; and the great constitutional debate of 1787-89.

The imperial debate. The agitation over the Stamp Act began as a dispute about representation, but it quickly escalated into a debate about sovereignty. It was irrelevant whether or not the colonists were represented in Parliament, spokesmen for the British position contended. Parliament was the sovereign legis-

3 In practice, the survival of countless lesser jurisdictions, especially in the Holy Roman Empire of the German principalities and city-states, makes this use of sovereignty a less than perfect way of describing the map of Europe. Nevertheless, scholarly convention looks back to 1648 as a crucial date in the emergence of the modern world of independent nation-states completely sovereign within their own borders.

4 Blackstone, 1 COMMENTARIES *49.

lature for the greater polity of which the colonies were indubitably a part, and because sovereignty was by nature indivisible and ultimate, there could be no limitation on Parliament's authority over America. Thus when colonial protests led to the repeal of the Stamp Act in the spring of 1766, Parliament covered its retreat by passing a Declaratory Act affirming its power to legislate for the colonists "in all cases whatsoever." In one sense, the Declaratory Act was a symbolic statement to ease the stamp duty repeal through a restive Parliament; but in another sense, it was a powerful and ominous expression of the doctrine of sovereignty in its pristine form.

The appeal to sovereignty was the most potent *theoretical* weapon the British government could wield, but its deployment proved a fateful *political* error. For in its potency and purity, sovereignty was not a term that admitted of dilution. An eighteenth-century government could no more be a little bit sovereign than Queen Charlotte could have been a little bit pregnant. Yet in demanding American obedience to the parliamentary sovereign, the British were in reality acting from a position of political weakness. Had they truly enjoyed sovereignty – that is, had they really commanded American obedience – they would not have had to keep reminding the colonists of their subservience. The fact that the British had to insist that they *did too* possess sovereignty was the very proof that ultimately the Empire wore no clothes.

After 1766, moderates in both countries understood that the best way to keep the Empire safely garbed was to avoid the sovereignty question entirely. The more closely this problem was examined, the less room for compromise there could be. Colonial efforts to "draw a line" limiting what Parliament might and might not do in the realm of American governance were bound to encounter stiff assertions that Parliament's authority must be unbounded. But in 1773, events spiraled out of control in Massachusetts when Governor Thomas Hutchinson first engaged the provincial legislature in a debate on this very question, then tried to recoup his losses by forcing his opponents to accept the landing of the legally dutied tea whose importation the colonists were committed to blocking.[5] In response, the ministry of Lord North pushed the Coercive Acts through Parliament, closing the port of Boston until restitution was made for the tea brewed in the harbor, altering the royal charter of provincial government, and protecting British officials and soldiers accused of crimes against Americans from prosecution in Massachusetts courts. From then on, there could be no doubt that the theoretical claim of parliamentary sovereignty over America had taken on a drastic, concrete meaning, definitively clarifying the issues that had been in dispute since 1765. What made George III into the final target of American wrath was not his desire to fasten a royal autocracy upon his once grateful subjects, but rather his conscientious support for the claims of Parliament.

In striving to define their rights within the empire, the Americans had been moving, however tentatively, toward the idea of dividing sovereignty in just the way that federalism is supposed to do. The authority of the orthodox, unitary definition, as conveniently restated by Blackstone, made that task extraordinarily difficult. Once the empire was sundered, however, the question must inevitably arise, where would sovereignty come to roost after it took wing from its apartments in Westminster and St. James and sought a new home across the water?

5 There is a wonderful account of this dramatic, critical year in Bernard Bailyn, THE ORDEAL OF THOMAS HUTCHINSON 201-73 (1974).

Revolutionary constitutionalism: the first phase. There was no easy answer to this question, nor did Americans initially have much incentive, let alone time, even to ask it. For from the start, the structure of constitutional authority in the American federal union posed messy problems that conventional definitions of sovereignty could not tidily resolve. And, amidst a revolutionary war, there were more urgent problems to master.

It is hard to square the political realities of 1774-76 with the idea that the separate states were the original inheritors or possessors of American sovereignty. Those political realities were revolutionary in nature, and arguably the turbulence of a revolutionary transition affords the least favorable occasion for applying as formal a concept as sovereignty. But the deeper political reality underlying American constitutionalism was that sovereignty was effectively divided – parceled out – from the origin of the Republic(s). It did not leap the Atlantic in one fell swoop, to be partitioned among thirteen sovereign states, or to be vested intact in the national government of the Continental Congress. Rather, Congress and the states emerged simultaneously as effective institutions of government, each exercising powers that could be described as traditional marks of sovereignty, each collaborating in supporting the other's authority, and each compelled to place the imperatives of revolution above any concern about preserving sovereignty in its virginal, unitary purity.

As the American *colonies* metamorphosed into *states*, they alone possessed the sovereign power to enact statutes, collect taxes, and maintain the judicial systems that best defined the rights and duties of citizens. Yet in matters of war and diplomacy – the traditional badges of sovereignty in its international usage – the Continental Congress enjoyed an undisputed monopoly from its own inception in 1774. Significantly, too, when the time came to replace the defunct colonial regimes and the extralegal apparatus of revolutionary conventions with new legal governments, local authorities always solicited the approval of Congress before proceeding to draft the written charters that set American constitutionalism on its distinctive course. Yet when Congress in turn began drafting articles of confederation to define its own authority, its members recognized that whatever document they drafted would require approval by the states.

Only gradually did revolutionary leaders even begin to think seriously about how to reconcile the traditional notion of sovereignty with the inherent federalism of the American union. The most interesting debate took place in the spring of 1777, when a new and ornery delegate from North Carolina arrived in Congress just as the delegates were struggling to complete the Articles of Confederation. The name of Thomas Burke (1747-83) is known only to a handful of historians, but if anyone deserves the title of founding father of states'-rights, it would be this argumentative attorney and Irish immigrant. It was Burke who found the existing draft of the Confederation wanting for failing to acknowledge the sovereignty of the states. That language reserved to each state "the sole and exclusive Regulation and Government of its internal police, in all matters that shall not interfere with the Articles of this Confederation." Burke proposed a substitute article declaring that each state would retain "its sovereignty, freedom, and independence, and every power, jurisdiction, and right, which is not by this confederation expressly delegated" to Congress. Burke himself noted that his amendment was initially so poorly understood that it was not even seconded; but eventually Congress approved Burke's amendment decisively.[6]

6 Rakove, Beginnings of National Politics, 164-76.

In practical terms, however, the question of sovereignty did not become a serious issue until war's end. During the war years proper, neither Congress nor the states had any incentive to puzzle out the anomalies of federalism; both struggled the best they could, amid poor communications, to coordinate the war effort from their respective ends. But after the peace of 1783, the collapse of the external threat and the reassertion of parochial interests exposed the fault line of a federal system in which the national government retained the sovereign responsibility of conducting foreign affairs while the states exercised the sovereign powers of government that most affected Americans' daily lives.

The flow of power away from Congress after 1783 certainly supported the idea that the states were more likely possessors of sovereignty than the nation. But their governments had problems of their own. Bearing the burden of enforcing the costs of war, state governments were increasingly resented by their own constituents, and mistrust followed in resentment's footsteps. In the 1780s, American politics took on a markedly populist character, and this in turn made it easier to support a new claim about sovereignty. As Gordon Wood has so aptly observed, "In the contest between the states and the Congress the ideological momentum of the Revolution lay with the states; but in the contest between the people and the state governments it decidedly lay with the people."[7]

As Wood tells the story, this pervasive questioning of the capacity of any government to represent the people encouraged a crucial transformation in the American notion of sovereignty. The more Americans came to distrust all their governments, the more receptive they grew to the idea that sovereignty actually resided not in government but in the people. Sovereignty was not something the people had long ago alienated to the state; it remained their property, and they were free to delegate particular chunks of it as they chose. From being an essential, concentrated attribute of the highest level of government, sovereignty was well on its way to becoming the diffuse right of the people at large. But the question that American federalism still left unanswered was whether there was one sovereign people or thirteen (and potentially more) sovereign peoples.

The great constitutional debate, 1787-89. In preparing his agenda for the Federal Convention, James Madison hoped to harness this new concept of popular sovereignty to rescue a traditional notion of national sovereignty while checking the drift toward state sovereignty. That is, he hoped to ground the supreme authority of a new national government on the foundation of an explicit act of popular ratification, the better to relegate the state governments to a status where they would be "subordinately useful" without endangering the "aggregate sovereignty" of the Union. Madison regarded his position as a "middle ground" lying somewhere between "a consolidation of the whole into one simple republic," on the one hand, and a recognition of the "individual independence of the States," on the other. Yet that he meant to reduce the states to a condition beneath sovereignty is evident from the priority he placed on the two proposals to which he seemed most deeply attached.

The first of these proposals was his pet scheme to give the national government a negative on state laws, which (in his most expansive visionary moments) he hoped to extend to *all* state laws. Writing to Washington a month before the Convention was due to assemble, Madison observed that "a negative *in all cases whatsoever* on the legislative acts of the States, as heretofore exercised by the Kingly

7 Wood, Creation of the American Republic, 362.

prerogative, appears to me to be absolutely necessary, and the least possible encroachment on the State jurisdictions." Given this dual allusion to both the Declaratory Act ("all cases whatsoever") and royal prerogative to annul colonial legislation, it would be hard to imagine a more forthright assault on the legislative sovereignty of the states.

Madison's second (and better known) proposal was to insist that rules of proportional representation be applied to *both* houses of the new Congress. Against this demand, defenders of the small states' claim to retain an equal vote in at least one house of Congress argued that the states were indeed sovereign entities – and if the states were indeed sovereign, they were equally so. Rejecting this equation, Madison declared that "there was a gradation" of authority "from the smallest corporation, with the most limited powers, to the largest empire with the most perfect sovereignty." "The states are not in that high degree Sovereign," he observed, "they are Corporations with the power of Bye Laws."[8] His ally Rufus King was equally blunt.

> The States were not "sovereigns" in the sense contended for by some. They did not possess the peculiar features of sovereignty. They could not make war, nor peace, nor alliances, nor treaties. Considering them as political Beings, they were dumb, for they could not speak to any foreign Sovereign whatever. They were deaf, for they could not hear any proposition from such Sovereign.[9]

If the states were not sovereign in their relation to the sovereigns of the wider world, how could they be sovereign within their own realms?

The fact that Madison lost on both of these proposals strongly suggests, of course, that the framers' efforts "to form a more perfect union" stopped well short of a restoration of traditional national sovereignty. The supremacy of national law and the judicial enforcement of limited restraints on state power were not tantamount to an assertion of national sovereignty; conversely, the recognition that states deserved equal representation in one house of Congress, regardless of disparities of population and wealth, seemed to affirm that they retained some irreducible and substantial measure of autonomy. Moreover, the longer the debates went on, the more modest the framers grew in their expectations of the role the national government would play in daily governance.

Together, all these factors meant that the Constitution would only modify, not transform, the essential division of the sovereign *powers* of government that was inherent in American federalism from its outset. The states had, after all, a great deal of inertia on their side; one could speculate about the possibility of reducing the states to mere administrative subdivisions, but that was mere speculation. The national government would henceforth look like a real government, and enjoy the same powers of enacting, executing, and adjudicating law that were the principal badges of state sovereignty. But sovereignty itself would remain diffused – which is to say, it would exist everywhere and nowhere.

The Convention made one other revealing use of the concept of sovereignty when it agreed to submit the Constitution not to the state legislatures (as the Articles of Confederation in fact required) but to popularly elected conventions, acting as the direct voice of the popular sovereign. In taking this step, the framers acted from a striking combination of theoretical and pragmatic motives. One calculation, of course, was that the state legislatures

8 From Madison's speech of June 29, 1787, in Max Farrand, ed., 1 The Records of the Federal Convention of 1787 at 463-64, 477, 479 (1966).

9 Speech of June 19, 1787, id. 323.

would have interested motives to reject a constitution that would circumscribe their own power and vest new and substantial powers in a rival Congress. But securing popular ratification would have longer-lasting advantages. Under the legal doctrine of *quod leges posteriores priores, contrarias abrogant*,[10] a mere legislative approval of the Constitution would mean that subsequent state laws violating the Constitution might well be as authoritative as a prior but merely statutory act of ratification. By submitting the Constitution for popular ratification, the framers could not only ground the subsequent interpretative authority on a more durable foundation; they could also, at one swoop, make it legally superior to the existing state constitutions, all but two of which had been promulgated by provincial legislatures without being submitted to popular ratification.

The newest (popular) version of sovereignty was thus a major component in the rethinking of American constitutionalism that took place in 1787 – but it, too, was problematic. For one thing, popular ratification was still state-based (recall that these were *state* ratifying conventions); it therefore replicated the ambiguity inherent in federalism. For another, the framers insisted that when the sovereign voice of the people finally spoke in full sovereign glory, it could say only one of two majestic words – *yes* or *no* – to the Constitution *in toto*. For it was an essential element in the framers' (and their Federalist supporters') campaign to secure ratification that the decision of the state conventions had to be made in completely unambiguous terms. The sovereign people(s) could not, therefore, ratify one part of the Constitution but not another, or ratify conditionally, pending the adoption of desired amendments.

In the ensuing public debate, the Anti-Federalist opponents of the Constitution evoked the traditional notion of sovereignty as they sought to prove that ratification must ineluctably lead to the *consolidation* of all sovereign power in one nation-state. In their view, the Constitution would create a zero-sum competition between the nation and the states which could only end with one jurisdiction or the other effectively monopolizing all the effective powers of government. Citing the well known maxim which held that *imperium in imperio* – a state within a state, or two sovereignty-claiming authorities within one realm – was a solecism or "monster" in politics, Anti-Federalists alleged that the sovereignty of the states would soon evaporate, leaving a federal Leviathan as the unitary sovereign of the American Union.

The two most important Federalist responses to this charge came from James Wilson, the leading member of the Pennsylvania delegation and future member of the original Supreme Court, and James Madison. Wilson spoke first – in widely publicized and indeed authoritative speeches, the first delivered to a large crowd at Independence Hall in early October 1787, the others presented to the state ratification convention two months later.[11] It was wrong, Wilson argued, to think of sovereignty as a property of government – potentially any government, and certainly any republican government. Sovereignty vested neither in the national or the state governments but in the people themselves, who never

10 Loosely translated: later laws contradicting earlier ones, abrogate them; that is, a more recent statute trumps an earlier statute enacted by the same body. The application of this common law maxim to constitutionalism was a major element in the development of American constitutional theory, because it provided a mechanism for turning a constitution from a mere statute (or perhaps super-statute, in modern parlance) into a truly constitutional (in the modern sense) document.

11 John Kaminski and Gaspare Saladino, eds., 2 Documentary History of the Ratification of the Constitution 167-72, 471-79 (1976).

truly alienated it but merely delegated particular uses of sovereignty to whichever government they chose.

Wilson's argument had two decided advantages. First, while it displaced the locus of sovereignty from government to the people, it at least preserved its unitary character. Second, even though Wilson had a deserved reputation for his elitist politics, Wilsonian popular sovereignty was (at least in theory) strongly democratic. If the people indeed could be persuaded to support the Constitution, why should their sovereign right to choose their form of government be held captive to the customary powers of the states?

In his own contributions to the ratification debate, Madison echoed Wilson's arguments, but his more revealing responses to the Anti-Federalist charges were characteristically more nuanced. Madison left Philadelphia convinced that the Constitution – lacking his national veto of state laws – had not in fact solved the classic problem of *imperium in imperio*.[12] But how, then, were Americans to make their anomalous federal system work? If the powers of sovereignty were distributed between the nation and the states; if, indeed, the exercise of these powers might well overlap and thus conflict; and if the task of policing the boundaries between these two authorities was left to the untested mechanism of judicial enforcement – then the preservation of federalism would depend, Madison reasoned, on fostering both a spirit of cooperation and a willingness to understand that the messy reality of American governance could not be reduced to the simplistic formula of either national or state sovereignty. The theory of sovereignty, with its emphasis on ultimate and unitary power, offered a convenient way to establish a clear hierarchy of authority. But if power was diffuse and uncentralized, what was required instead was not an effort to seize the commanding heights but a prosaic willingness to map its uneven terrain.

That was what Madison attempted to do in one of his most revealing essays, *Federalist* 39. Here he took as his point of departure the Anti-Federalist objection that the Federal Convention "'ought … to have preserved the *federal* form, which regards the Union as a *Confederacy* of sovereign states; instead of which, they have framed a *national* government, which regards the Union as a *consolidation* of the States.'" To ascertain "the real character of the government in question," Madison made no concessions to simplicity. Instead, he offered a five-pronged analysis of the mixed "federal" and "national" aspects of the Constitution, looking in turn "to the foundation on which it is to be established; to the sources from which its ordinary powers are to be drawn; to the operation of those powers; to the extent of them; and to the authority by which future changes in the government are to be introduced." The resulting analysis was messy, even inelegant – but it captured the essential truth of the American federal system as ably as any description ever since has managed to do.

For what Madison described was a system that defied simple characterization. It was instead a jumble of national and federal features which "in strictness" made it, he concluded, "neither a national nor a federal Constitution, but a composition of both." Any binary or zero-sum formula which looked for the ultimate locus of authority – in the way that sovereignty had traditionally sought to do – would prove inadequate. Wilson's appeal to popular sovereignty might have its uses, to be sure, but they would be limited. In this new regime, neither the nation nor the states would be sovereign; power had been distrib-

12 He confessed as much in his revealing letter to Jefferson of Oct. 24, 1787, 10 Papers of Madison, 209ff (1977).

uted, and the conscientious student of the system would have to observe and trace its multiple facets and workings.

Madison's essay is interesting as a model not only of federalism but of political reasoning more generally. It calls for empirical description and precision in a way that the theory of sovereignty can rarely if ever pretend to do. Put simply, the traditional appeal to sovereignty was always a great simplifier in political debate. Madison understood, however, that federalism was inherently diffuse. Having failed to secure the decisive manifestation of national authority he sought in the veto on state laws, he now knew that the viability of the Constitution would depend on Americans' capacity to reason patiently about its complexities and to work out satisfactory arrangements to mediate the claims of overlapping jurisdictions it would inevitably foster. Appeals to an orthodox definition of unitary sovereignty – whether national or state or even popular – would only complicate that task.

But if the concept of sovereignty had little descriptive use in making sense of the American system, why has this word continued to exert so much power over our politics? That is the question I will revolve in the second installment of this essay. GB