No. 4-04-00582-CV

IN THE COURT OF APPEALS FOR THE

FOURTH COURT OF APPEALS DISTRICT

SAN ANTONIO, TEXAS

Ronald F. Avery,
APPELLANT

VS.

GUADALUPE-BLANCO RIVER AUTHORITY, et at.
APPELLEES

ON APPEAL FROM THE 25TH JUDICIAL DISTRICT COURT

GUADALUPE COUNTY, TEXAS

THE HONORABLE B. B. SCHRAUB, JUDGE PRESIDING

APPELLANT'S APPENDIX

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1. Texas Jurisprudence 3rd, §19:

> "A constitution is adopted with reference to existing laws that are not changed unless they are inconsistent with constitutional provisions."[1]

2. Stone v. Ariz (Sov Imm came by common law court ruling and it can go be common law court ruling):

> "We are of the opinion that when the reason for a certain rule no longer exists, the rule itself should be abandoned. After a thorough re-examination of the rule of governmental immunity from tort liability, we now hold that it must be discarded as a rule of law in Arizona and all prior decisions to the contrary are hereby overruled."[2]

> "In 75 A.L.R. 1196, a classic observation as to the sociological aspects of sovereign immunity appears which has since been quoted with approval in several jurisdictions: "* * * **The whole doctrine of governmental immunity form liability for tort rests upon a rotten foundation**. It is almost incredible that in this modern age of comparative sociological enlightenment, and in a republic, the medieval absolutism supposed to be implicit in the maxim, 'the King can do no wrong,' should exempt the various branches of the government from liability for their torts, and that the entire burden of damage resulting from the wrongful acts of the government should be imposed upon the single individual who suffers the injury, rather than distributed among the entire community constituting the government, where it could be borne without hardship upon any individual, and where it justly belongs."[3]

> "It requires but a slight appreciation of the facts to realize that if the individual citizen is left to bear almost all the risk of a defective, negligent, perverse or erroneous administration of the state's functions, an unjust burden

[1] Texas Jurisprudence 3rd, §19
[2] Stone v. Arizona Highway Commission 381 P.2d 107, @ 109 (1963)
[3] 75 A.L.R. 1196 & Stone v. Arizona Highway Commission 381 P.2d 107, @ 109; Baker v. City of Santa Fe, 47 N.M. 85, 136 P.2d 480, 482 quoted again in Molitor v. Kaneland Community Unit Dist. No. 302 163 N.E.2d. 89 @ 94 (Ill. 1959)

will become graver and more frequent as the government's activities are expanded and become more diversified."[4]

"Sovereign or governmental immunity began with the personal prerogatives of the King of England upon the theory that "the King can do no wrong," and even though at a very early date in American history we overthrew the reign of the English King the doctrine somehow became entrenched in our judicial code. Professor Borchard has termed this phenomenon as "one of the mysteries of legal evolution."[5]

"Its survival (sovereign or governmental immunity) for such a great period of time in this country, where the royal prerogative is unknown, has perhaps been even more remarkable, considering it has been universally criticized as an anachronism with out rational basis. Most writers and cases considering this fact have claimed that its only basis of survival has been on grounds of antiquity and inertia."[6] (Parenthesis added)

"The first case in Arizona which held that the sovereign was immune from tort liability occasioned by the negligence of its agents was State v. Sharp, supra. Without examining any real basis or reason for sustaining this court stated: "As to this question it is well settled by the great weight of authority that the state, in consequence of its sovereignty, is immune from prosecution in the courts and from liability to respond in damages for negligence, except in those cases where it has expressly waived immunity or assumed liability by constitutional or legislative enactment."[7] This case set a precedent and other Arizona cases have since followed the rule without arriving at any basis other than that of stare decisis.[8]

"In a 1957 case, The Colorado court stated: In Colorado 'sovereign immunity' may be a proper subject for discussion by students of mythology but finds no haven or refuge in this

[4] Hernandez v. County of Yuma, 91 Ariz. 35, 36, 369 P.2d 271, 272 (1962)
[5] Stone v. Arizona Highway Commission 381 P.2d 107, @ 109 (1963)
[6] Stone v. Arizona Highway Commission 381 P.2d 107, @ 109 (1963)
[7] State v. Sharp 21 Ariz. 426, 189 P. 632.
[8] Stone v. Arizona Highway Commission 381 P.2d 107, @ 110 (1963)

court."[9] However, this feeling was short-lived for three years later the same court invoked the immunity theory as to the governmental functions of a county."[10]

"The Florida court emulated Colorado, abolishing immunity as to governmental functions of municipalities on the ground that the Revolutionary War abrogated the doctrine that "the King can do no wrong,[11]" and thereafter retreating to say that this did not apply to the state, its counties, or its county school boards.[12]"[13]

"The city of Milwaukee case stated that even though the principal case only related specifically to a city, the abrogation of the doctrine should be considered as total: "to all public bodies within the state: the state, counties, cities, villages, towns, school districts, sewer districts, drainage districts, and any other political subdivisions of the state-whether they be incorporated or not.[14]"[15]

"After considering all the facets of the problem, we feel that the reasoning used by the California court in Muskopf v. Corning Hospital District, supra, has more validity and therefore we adopt it. The substantive defense of governmental immunity is now abolished not only for the instant case, but for all other pending cases, those not yet filed which are not barred by the statute of limitations and all future causes of action. All previous decisions to the contrary are specifically overruled."[16]

"It has been urged by the adherents of the sovereign immunity rule that the principle has become so firmly fixed that any change must come from the legislature. In previous decisions (the latest being Lee v. Kunklee, supra)[17] this court concurred in this reasoning. Upon reconsideration we realize

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[9] Colorado Racing Com'n v. Rrushing Racing Ass'n. 136 Colo. 279, 284, 316 P.2d 582, 585 (1957).
[10] Stone v. Arizona Highway Commission 381 P.2d 107, @ 111 (1963)
[11] Hargrove v. Town of Cocoa Beach, 96 So.2d. 130, 60 A.L.R.2d 1193, (Fla.1957)
[12] Kaulakis v. Boyd, 138 So.2d 505 (Fla. 1962); Back v. McLean, 115 So.2d 764 (Fla.App.1960)
[13] Stone v. Arizona Highway Commission 381 P.2d 107, @ 111 (1963)
[14] 115 N.W.2d 625.
[15] Stone v. Arizona Highway Commission 381 P.2d 107, @ 112 (1963)
[16] Stone v. Arizona Highway Commission 381 P.2d 107, @ 112 (1963)
[17] Re: Larsen v. County of Yuma. Several of the cases relied on in Dunklee have been overruled by the Muskopf v. Corning Hospital District decision, supra.

that the doctrine of sovereign immunity was originally judicially created. We are now convinced that a court-made rule, when unjust or outmoded, does not necessarily become with age invulnerable to judicial attack. This doctrine having been engrafted upon Arizona law by judicial enunciation may properly be changed or abrogated by the same process."[18]

"Under the theory of respondeat superior, the State itself as employer would also be liable."[19]

3. Muskopf v. Corning Hospital Dist. Cal.Sup.Crt.1961:

"After a re-evaluation of the rule of governmental immunity from tort liability we have concluded that it must be discarded as mistaken and unjust."[20]

"The rule of county or local district immunity did not originate with the concept of sovereign immunity. The first case to hold that local government units were not liable for tort was Russell v. men of Devon, 100 Eng.Rep. 359. The case involved an action in tort against an unincorporated county. The action was disallowed on two grounds: since the group was unincorporated there was no fund out of which the judgment could be paid; and "it is better that an individual should sustain an injury than that the public should suffer an inconvenience."[21]

"The rule of the Russell case was first brought into this country by Mower v. Inhabitants of Leicester, 9 Mass. 247, 249. There the county was incorporated, could sue and be sued, and there was a corporate fund out of which a judgment could be satisfied. Ignoring these differences, the Massachusetts court adopted the rule of the Russell case, which became the general American rule."[22]

"None of the reasons for its continuance can withstand analysis. No one defends total governmental immunity. In fact, it does not exist. It has become riddled with

[18] Stone v. Arizona Highway Commission 381 P.2d 107, @ 113 (1963)
[19] Stone v. Arizona Highway Commission 381 P.2d 107, @ 113 (1963)
[20] Muskopf v. Corning Hospital District 359 P.2d 457 @ 458 (1961)
[21] Muskopf v. Corning Hospital District 359 P.2d 457 @ 459 (1961)
[22] Muskopf v. Corning Hospital District 359 P.2d 457 @ 459 (1961)

exceptions, both legislative and judicial, and the exceptions operate so illogically as to cause serious inequality."[23]

"It is strenuously urged, however, that it is for the Legislature and not the courts to remove the existing governmental immunities. Two basic arguments are made to deny the court's power: first, that by enacting various statutes affecting immunity the Legislature has determine that no further change is to be made by the court; and second, that by the force of stare decisis the rule has become so firmly entrenched that only the Legislature can change it. Neither argument is persuasive."[24]

"The doctrine of governmental immunity was originally court made."[25]

4. A clear understanding of the operations of government:

"Abrogation of governmental immunity does not mean that the state is liable for all harms that result from its activities. Both the state and individuals are free to engage in many activities that result in harm to others so long as such activities are not tortuous. Thus the harm resulting form free competition among individuals is not actionable, nor is the harm resulting form the diversion of business by the state's relocation of a highway. People v. Symons, 54 Cal.2d 855, 9 Cal.Rptr. 363, 357 P.2d 451; Holloway v. Purcell, 35 Cal.2d 220, 230, 217 P.2d 665. It does not follow, however, that torts may not be committed in carrying on such activities. A competitor may be liable for the harm resulting from his violation of traffic laws in getting his product to market, just as the state may be liable for the harm caused by its agents' violations of such laws. Although it "is not a tort for government to govern." (Jackson, J., dissenting in Dalchite v. United States, 346 U.S. 15, 57, 73 S.Ct. 956, 979, 97 L.Ed. 1427), and basic policy decisions of government within constitutional limitations are therefore necessarily nontortious, it does not follow that the state is immune form liability for the torts of its agents. These considerations are relevant to the question whether in any

[23] Muskopf v. Corning Hospital District 359 P.2d 457 @ 460 (1961)
[24] Muskopf v. Corning Hospital District 359 P.2d 457 @ 461 (1961)
[25] Muskopf v. Corning Hospital District 359 P.2d 457 @ 461 (1961)

given case the state through its agents has committed a tort (see 3 Davis, Administrative Law (1958), § 25.11, p. 482, § 25.13, p. 489), but once it is determined that it has it must meet its obligations therefor."[26]

"Thus in holding that the doctrine of governmental immunity for torts for which its agents are liable has no place in our law we make no startling break with the past but merely take the final step that carries to its conclusion an established legislative and judicial trend."[27]

5. Molitor v. Kaneland Community Unit District No. 302 (163 N.E.2d 89):

They were unwilling to distinguish between how a school district was formed as to its immunity and called all "quasi-municipal corporations"[28] No more "highly technical distinctions" just like GBRA In Illinois too the court created sovereign immunity and can abolish it:

"It appears that while adhering to the old immunity rule, this court has not reconsidered and re-evaluated the doctrine of immunity of school districts for over fifty years. During these years, however, this subject has received exhaustive consideration by legal writers and scholars in articles and texts, almost unanimously condemning the immunity doctrine. See, Borchard, Governmental Liability in Tort."[29]

"Historically we find that the doctrine of the sovereign immunity of the state, the theory that "the King can do no wrong," was first extended to a subdivision of the state in 1788 in Russell v. Men of Devon, 2 term rep. 671, 100 Eng.Rep. 359. * * * the decision that the county was immune was based chiefly on the fact that there were no corporate funds in Devonshire out of which satisfaction could be

[26] Muskopf v. Corning Hospital District 359 P.2d 457 @ 462 (Cal. 1961)
[27] Muskopf v. Corning Hospital District 359 P.2d 457 @ 463 (Cal. 1961)
[28] Quasi municipal corporations: Bodies politic and corporate, created for the sole purpose of performing one or more municipal functions. Public corporations organized for governmental purposes and having for most purposes the status and powers of municipal corporations (such as counties, townships, school districts, drainage districts, irrigation districts, etc.), but not corporations proper, such as cities and incorporated towns. Blacks Law Dictionary 6th.
[29] Molitor v. Kaneland Community Unit Dist. No. 302 163 N.E.2d. 89 @ 90 (Ill. 1959)

obtained, plus a fear of multiplicity of suits and resulting inconvenience to the public."[30]

"It should be noted that the Russell case was overruled by the English courts, and that in 1890 it was definitely established that in England a school board or school district is subject to suit in tort for personal injuries on the same basis as a private individual or corporation. (Crisp v. Thomas, 63 L.T.N.S. 756 (1890).) Non immunity has continued to be the law of England to the present day. See Annotation, 160 A.L.R. 7, 84."[31]

"Later decisions following the Kinnare doctrine have sought to advance additional explanations such as the protection of public funds and public property, and to prevent the diversion of tax moneys to the payment of damage claims."[32]

"Rather we interpret that section as expressing dissatisfaction with the **court created doctrine of governmental immunity** and an attempt to cut down that immunity were insurance is involved."[33]

"It is a basic concept underlying the whole **law of torts** today that **liability follows negligence**, and that individuals and corporations are responsible for the negligence of their employees acting in the course of their employment. The doctrine of governmental immunity runs directly counter to that basic concept. What reasons, then, are so impelling as to allow a school district, as a quasi-municipal corporation, to commit wrongdoing without any responsibility to its victims, while any individual or private corporation would be called to task in court for such tortuous conduct?"[34]

"The original basis of the immunity rule has been called a "survival of the medieval idea that the sovereign can do no wrong. (38 Am. Jur., Mun.Corp., sec 573, p. 266.)"[35]

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[30] Molitor v. Kaneland Community Unit Dist. No. 302 163 N.E.2d. 89 @ 91 (Ill. 1959)
[31] Molitor v. Kaneland Community Unit Dist. No. 302 163 N.E.2d. 89 @ 91 (Ill. 1959)
[32] Molitor v. Kaneland Community Unit Dist. No. 302 163 N.E.2d. 89 @ 91 (Ill. 1959)
[33] Molitor v. Kaneland Community Unit Dist. No. 302 163 N.E.2d. 89 @ 92 (Ill. 1959)
[34] Molitor v. Kaneland Community Unit Dist. No. 302 163 N.E.2d. 89 @ 93 (Ill. 1959)
[35] Molitor v. Kaneland Community Unit Dist. No. 302 163 N.E.2d. 89 @ 93 (Ill. 1959)

> "Likewise, we agree with the Supreme Court of Florida that in preserving the sovereign immunity theory, courts have overlooked the fact that the Revolutionary War was fought to abolish that "devine right of kings" on which the theory is based."[36]

6. False Tautology:

Regarding the inclusion of liability in the purpose of Government: Circular Argument or false tautology:

> "In the first place, analysis of the theory shows that it is based on the idea that payment of **damage claims is a diversion of educational funds to an improper purpose**. As many writers have pointed out, the fallacy in this argument is that it assumes the very point which is sought to be proved, i.e., that payment of damage claims is not a proper purpose. Logically, the 'No fund' or 'trust fund' theory is without merit because it is of value only after a determination of what is a proper school expenditure. To predicate immunity upon the theory of a trust fund is merely to argue in a circle, since it assumes an answer to the very question at issue, to wit, what is an educational purpose?"[37]

7. Government is similar to insurance:

Government paying for its own torts is not economically harmful for the whole but should function the same as insurance. Government is a form of insurance with different terms where in it must not do itself what it is to prevent in others, and if it does, it must pay.

> "We are in accord with Dean Green when he disposed of this problem as follows: "There is considerable talk in the opinions about the tremendous financial burdens tort liability would cast upon the taxpayer. In some opinions it is stated that this factor is sufficient to warrant the courts in protecting the taxpayer through the immunity which they have thrown around municipal corporations. While this factor may have had compulsion on some of the earlier courts, I seriously doubt that it has any great weight with the

[36] Molitor v. Kaneland Community Unit Dist. No. 302 163 N.E.2d. 89 @ 94 (Ill. 1959)
[37] Molitor v. Kaneland Community Unit Dist. No. 302 163 N.E.2d. 89 @ 94 (Ill. 1959)

courts in recent years. In the first place, taxation is not the subject matter of judicial concern where justice to the individual citizen is involved. It is the business of other departments of government to provide the funds required to pay the damages assessed against them by the courts. Moreover, the same policy that, would protect governmental corporations from the payment of damages for the injuries they bring upon others would be equally pertinent to a like immunity to protect private corporations, for conceivably many essential private concerns could also be put out of business by the damages they cold incur under tort liability. But as a matter of fact, this argument has no practical basis. Private concerns have rarely been greatly embarrassed, and in no instance, even where immunity is not recognized, has a municipality been seriously handicapped by tort liability. This argument is like so many of the horribles paraded in the early tort cases when courts were fashioning the boundaries of tort law. It has been thrown in simply because there was nothing better at hand. The public's willingness to stand up and pay the cost of its enterprises carried out through municipal corporations is no less than its insistence that individuals and groups pay the coust of their enterprises. Tort liability is in fact a very small item in the budget of any well organized enterprise." Green, Freedom of Litigation, 38 Ill.L.Rev. 355, 378."[38]

8. Municipal[39] Corporation capable of much harm and responsibility:

"As Dean Harno said: "A municipal corporation today is an active and virile creature capable of inflicting much harm. Its civil responsibility should be co-extensive. The municipal corporation looms up definitely and emphatically in our law, and what is more, it can and does commit wrongs. This being so, it must assume the responsibility of the position it occupies in society." (Harno, Tort Immunity of Municipal Corporations, 4 Ill.L.Q. 28, 42.)"[40]

[38] Molitor v. Kaneland Community Unit Dist. No. 302 163 N.E.2d. 89 @ 95 (Ill. 1959)
[39] Municipal: In its broader sense, it means pertaining to the public or governmental affairs of a state or nation or of a people.
[40] Molitor v. Kaneland Community Unit Dist. No. 302 163 N.E.2d. 89 @ 95 (Ill. 1959)

> "We conclude that the rule of school district immunity is unjust, unsupported by any valid reason, and has no rightful place in modern society.
>
> "Defendant strongly urges that if said immunity is to be abolished, it should be done by the legislature, not by this court. With this contention we must disagree. The doctrine of school district immunity was created by this court alone. Having found that doctrine to be unsound and unjust under present conditions, we consider that we have not only the power, but the duty, to abolish that immunity. **"We closed our courtroom doors without legislative help, and we can likewise open them."** Pierce v. Yakima Valley Memorial Hospital Ass'n. 43 Wash.2d 162, 260 P.2d 765, 774.[41]

9. Reward of Appellant Apply new rule in instant case:

> "First, if we were to merely announce the new rule without applying it here, such announcement would amount to mere dictum. Second, and more important, to refuse to apply the new rule here would deprive appellant of any benefit from his effort and expense in challenging the old rule which we now declare erroneous. Thus there would be no incentive to appeal the upholding of precedent since appellant could not in any event benefit from a reversal invalidating it."[42]

Dickson v. Strickland, Secretary of State, et al. (265 S.W. Tex.1012 1924) Constitutional law and Common Law and Statutes overruled as inconsistent with Constitution:

> "Ruling Case Law says: Where the Constitution declares the qualifications for office, it is not within the power of the Legislature to change or add to these unless the Constitution gives that power." 9 R.C.L. 1124."[43]
>
> "In our judgment, when the Constitution undertakes to prescribe qualifications for office, its declaration is

[41] Molitor v. Kaneland Community Unit Dist. No. 302 163 N.E.2d. 89 @ 96 (Ill. 1959)
[42] Molitor v. Kaneland Community Unit Dist. No. 302 163 N.E.2d. 89 @ 97 (Ill. 1959)
[43] Dickson v. Strickland, Secretary of State, et al. (No. 4215) (Supreme Court of Texas. Oct. 15, 1924) p. 1015.

conclusive of the whole matter, whether in affirmative or in negative form."[44]

"It is the declared law, by both the Court of Criminal Appeals and the Supreme Court of this State, that it is beyond the power of the Legislature to add and additional qualification for an elector to those prescribed by the Constitution."[45]

"So, it was utterly beyond the power of the Legislature to authorize the courts to keep the name of a candidate for Governor off any election ballot, when possessed of every constitutional qualification, regardless of whether he possessed the additional qualifications specified in article 3082."[46]

10. Supreme Court Admission that People of Texas are Sovereign:

"When the competency of women to hold office in Texas is challenged, the fundamental inquiry is as to the extent of restrictions on the people in their sovereign capacity with respect to freedom of choice of their public servants."[47]

"To approach the subject from any other viewpoint would not accord with the constitutional history of Texas. Among the first words of the state's declaration of independence, adopted March 2, 1836, is the declaration that government derives all its legitimate powers from the people. In the Constitution of the Republic is a statement of rights never to be violated on any pretense whatever. There we find it recorded that "all political power is inherent in the people, and all free governments are founded on their authority, and instituted for their benefit." The declaration is carried into every Constitution, appearing as section 2 of article 1 of the Constitution of 1876. With the ultimate political sovereignty of the people so forcefully declared throughout

[44] Dickson v. Strickland, Secretary of State, et al. (No. 4215) (Supreme Court of Texas. Oct. 15, 1924) p. 1015.
[45] Dickson v. Strickland, Secretary of State, et al. (No. 4215) (Supreme Court of Texas. Oct. 15, 1924) p. 1015.
[46] Dickson v. Strickland, Secretary of State, et al. (No. 4215) (Supreme Court of Texas. Oct. 15, 1924) p. 1016.
[47] Dickson v. Strickland, Secretary of State, et al. (No. 4215) (Supreme Court of Texas. Oct. 15, 1924) p. 1019.

our history, the court would be unmindful of its high responsibility were it not careful in examining any claim of restriction on the liberty and authority of those who establish governments, and can change them in the mode prescribed by the fundamental law."[48]

"It would be in the power of such convention to take away or destroy individual rights, but such an intention would never be presumed; and to give effect to a design so unjust and unreasonable would require the support of the most direct, explicit affirmative declaration of such intent."[49]

"The Constitution is the supreme law of the state. It is elementary that a statute or principle of the common law in conflict with the Constitution is void. So, if there be any conflict between the common law, declaring Mrs. Ferguson ineligible, and the Constitution, declaring her eligible, it is our duty to give effect to the Constitution."[50]

"The truth is that the old common law principles invoked against Mrs. Ferguson have never been in force in Texas, and certainly are not in force at the present time.
England, as she advanced in Christian civilization, was fast to find means to rid herself of the iniquities which must have resulted, had some of the strict common-law rules governing marital rights and duties been rigidly applied."[51]

"An office is essentially a trust or agency for the benefit of the public. The supreme qualification is unselfish fidelity to duty."[52]

11. Southwestern Law Journal vol. 23 p. 341, May 1969:

Southwestern Law Journal – The Governmental Immunity Doctrine in Texas – An Analysis and Some Proposed Changes by Glen A. Majure,

[48] Dickson v. Strickland, Secretary of State, et al. (No. 4215) (Supreme Court of Texas. Oct. 15, 1924) p. 1020.
[49] Dickson v. Strickland, Secretary of State, et al. (No. 4215) (Supreme Court of Texas. Oct. 15, 1924) p. 1020.
[50] Dickson v. Strickland, Secretary of State, et al. (No. 4215) (Supreme Court of Texas. Oct. 15, 1924) p. 1021.
[51] Dickson v. Strickland, Secretary of State, et al. (No. 4215) (Supreme Court of Texas. Oct. 15, 1924) p. 1021.
[52] Dickson v. Strickland, Secretary of State, et al. (No. 4215) (Supreme Court of Texas. Oct. 15, 1924) p. 1023.

W.T. Minick and David Snodgrass, Southwestern Law Journal vol. 23 p. 341, May 1969(Sw L J 23:341 My'69):

> "Governmental immunity is one of the more ancient of the common law rules. The doctrine deprives the judiciary of power to adjudicate disputes against the government, the theory being that the sovereign is above the courts and thus not susceptible of being sued in its own courts.
> Sovereign immunity, as it developed in England, was a logical extension to the concept of the devine right of kings, but the transplantation to America is a philosophical paradox. Being common law doctrine, governmental immunity was first introduced in the United States in Mower v. Inhabitants of Leicester.[53] This was a quarter of a century after the American Constitution had set out a government of limited powers. Thus, the philosophical underpinnings of sovereign immunity did not apply to the United States when it was introduced to this country.
> Nevertheless, the doctrine won rapid and widespread acceptance in the United States, primarily through court decision. **The first reported Texas case on point adopted governmental immunity without citation of authority**.[54] The court apparently believed that the immunity of the government was so commonly accepted that citation of authority was superfluous."[55]

> "The trend throughout the United States definitely is toward abrogation of the doctrine of governmental immunity, either in whole or in part. Perhaps this is because the arguments in favor of preserving it have lost their vitality. The proposition that the doctrine protects the state from nuisance suits is unproven at best. Those states which have abolished the doctrine have experienced no greater raid on the public treasury. Furthermore, **the doctrine is in derogation of the basic principle underlying all tort law; for every wrong there should be a remedy**. Tin fact, the Texas Constitution provides that "[a]ll courts shall be open, and every person for an injury done him, in his lands, good, person or reputation, shall have remedy by due course of

[53] 9 Mass. 247 (1812).
[54] Homer v. DeYoung, 1 Tex. 764 (1847).
[55] The Governmental Immunity Doctrine in Texas – An Analysis and Some Proposed Changes by Glen A. Majure, W.T. Minick and David Snodgrass (Sw L J 23:341 My'69) p. 341.

law.[56] Thus, in future legislation, Texas should re-evaluate its position and should assume fully the constitutionally prescribed posture which its courts have so long emasculated."[57]

"*Scope of Constitutional Inquiry.* First, the scope of the constitutional problems relating to legislative abrogation of governmental immunity in Texas must be defined. In some jurisdictions the immunity of the state is established by the constitution itself, usually in the form of a directive that the state shall not be made a defendant in any action in the courts of the state.[58] Such is not the case in Texas, however, for immunity is derived from the common law.[59] As a common law doctrine, governmental immunity can be changed by the legislature or by the courts; thus, the constitutional prohibitions, if any, are indirect."[60]

12. Foregoing correct except for means of solution:

The last part of the foregoing would be true if it were not for the fact that sovereign and governmental immunity are repugnant to the Texas Constitution and cannot be manipulated in any way by the Legislature other than to declare them void from inception as unlawful, while it is left to the judiciary to find them repugnant under their common law jurisdiction under Texas Constitution Art. 16 Sec. 48.

13. Villanova Law Review –(Vill L Rev 13:583 Spring '68):

Villanova Law Review – The American Doctrine of Sovereign Immunity: An Historical Analysis by David T. Murphy 1968 (Vill L Rev 13:583 Spring '68) This is real sovereign immunity dealing with foreign sovereigns where immunity is lawful:

"Over the span of a century and a half many legal rules and concepts evolve and unfold in response to variant social

[56] Tex. Const. art. 1, § 13.
[57] The Governmental Immunity Doctrine in Texas – An Analysis and Some Proposed Changes by Glen A. Majure, W.T. Minick and David Snodgrass (Sw L J 23:341 My'69) p. 346.
[58] Ala. Const. art. 1 § 14; Ark. Const. art. 5, § 20; W. Va. Const. art. 6 § 35.
[59] Hosner v. DeYoung, 1 Tex. 764 (1847).
[60] The Governmental Immunity Doctrine in Texas – An Analysis and Some Proposed Changes by Glen A. Majure, W.T. Minick and David Snodgrass (Sw L J 23:341 My'69) p. 347.

conditions and as a means of restructuring social activity. Frequently a legal doctrine as presently understood and applied bears little relation, and may even be inapposite, to its germinal case.[61] The original contours of a legal concept may, therefore, often be of small practical import in its current application. This general thesis is not applicable, however, to the doctrine of sovereign immunity – that principle which provides that a recognized foreign sovereign is not susceptible, without its consent, to the judicial process of the courts in any other state. Although more than one hundred and fifty years old, the case vivifying this legal concept, *The Schooner Exchange v. McFadden*,[62] is still repeatedly referred to in judicial opinions.[63]"[64]

"Under the absolute theory the sole inquiry is whether or not the entity being sued is a foreign sovereign. If so the court will dismiss the action.[65]"[66]

"The premise requires that all exemptions from the sovereign's absolute power must come from within, from the consent of the sovereign state itself.[67]"[68]

"Thus, the Court concluded that if the port is open to ships of all nations, an armed public vessel may enter and obtain the protection of the local sovereign, and the immunity from jurisdiction, although no specific license to enter is granted.[69]

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[61] For a concise demonstration of this proposition in the instance of the development of the doctrine of the manufacturer's liability for defective products see E. Levi, An Introduction to Legal Reasoning 8-27 (1948); H. Berman & W. Greiner, The Nature and Functions of Law 400-72 (2d ed. 1966).

[62] 11 U.S. (7 Cranch) 116 (1812).

[63] **** five cases cited all from '64-67 the last being* 385 U.S. 822 (1967).

[64] Villanova Law Review – The American Doctrine of Sovereign Immunity: An Historical Analysis by David T. Murphy 1968 (Vill L Rev 13:583 Spring '68) p. 583.

[65] See C. Fenwick, International Law 308 (3d ed. 1948). For additional discussion see Lauterpacht, *The Problem of Jurisdictional Immunities of Foreign States,* in 28 Brit. Y.B. Int'l L. 220-26 (1951); Fensterwald, *Sovereign Immunity and Soviet State Trading,* 63 Harv. L. Rev. 614, 616-20 (1950).

[66] Villanova Law Review – The American Doctrine of Sovereign Immunity: An Historical Analysis by Daniel T. Murphy 1968 (Vill L Rev 13:583 Spring '68) p. 583-4.

[67] 11 U.S. (7 Cranch) at 136.

[68] Villanova Law Review – The American Doctrine of Sovereign Immunity: An Historical Analysis by Daniel T. Murphy 1968 (Vill L Rev 13:583 Spring '68) p. 585.

[69] 11 U.S. (7 Cranch) at 141-44.

> The foundation of these concessions is the common consent of the nation states and their coequal dignity. "One sovereign being in no respect amenable to another; and being bound by obligations of the highest character not to degrade the dignity of his nation, by placing himself or its sovereign rights within the jurisdiction of another, can be supposed to enter a foreign territory only under an express license, or in the confidence that the immunities belonging to his independent sovereign station, though not expressly stipulated, are reserved by implication, and will be extended to him.[70]"[71]
>
> "For more than a hundred years following *The Schooner Exchange* the vast majority of the cases involving a possible plea of sovereign immunity were suits in admiralty. Ships of foreign nations were libeled in American ports, and jurisdiction in rem and quasi in rem was thereby established. The opinions in these cases are weighted with references to *The Schooner Exchange*. Immunity was generally granted to those ships in the actual possession of a foreign government and employed for a public purpose. Mere governmental ownership of the vessel, without allegation of public use and possession, was, however, held to be insufficient."[72]

14. Sovereignty has to do with Foreigners:

Herein, is the real nature of Sovereign Immunity from jurisdiction. It was not for the agent of the sovereign citizen to harm the citizen with impunity but to avoid prosecution of the agent of the sovereign by a foreigner, which was to be resolved between jurisdictions. This was so that the agents of all nations would be respected in each others territory. The violation of the rights of citizens of other nations if not settled between the nations brought on wars. But the state of Texas should not be in a state of war with Texans. The state of Texas is not sovereign over Texans but merely their agent. And when an agent violates the contract creating the agency, the agent is subject to suit in the court of the sovereign citizen.

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[70] 11 U.S. (7 Cranch) at 137.
[71] Villanova Law Review – The American Doctrine of Sovereign Immunity: An Historical Analysis by Daniel T. Murphy 1968 (Vill L Rev 13:583 Spring '68) p. 586.
[72] Villanova Law Review – The American Doctrine of Sovereign Immunity: An Historical Analysis by Daniel T. Murphy 1968 (Vill L Rev 13:583 Spring '68) p. 587-8.

"Throughout this rather abstract discussion of the absolute and restrictive theory of sovereign immunity, the pragmatic interests of the private party plaintiff hae been given only passing consideration. Since the absolute theory of sovereign immunity subsumes the restrictive and grants to a foreign nation even greater measure of protection, there can be little diplomatic or political embarrassment to our government consequent to its application by our courts. Thus, any determination to recast the doctrine of sovereign immunity will probably be based on considerations of fairness and justice to the private plaintiff.[73] Those same pressures which impelled enactment of the Federal Tort Claims Act and the Tucker Act may force a more definitive articulation of a plaintiff's rights. Two possible procedures might be utilized. Treatise may be entered into which more precisely detail the rights of citizens of one contracting party to sue the other nation state.[74] Alternatively, a congressional enactment such as the Hickenlooper Amendment[75] might be employed to delineate the precise scope of the sovereign immunity doctrine in American courts."[76]

15. Duke Law Review – The Role of the Courts in Abolishing Governmental Immunity (Duke L R 1964:888):

"The abolition of the governmental immunity doctrine has been urged since before the turn of the century. Until recently, however, courts have refused to give tort relief in the absence of legislation or facts on which the immunity doctrine could be circumvented. Since governmental enterprises continue to expand in scope at an ever increasing rate, their contact with and influence on the individual becomes more significant. **Therefore, the unpredictable and often inequitable consequences resulting from the "governmental-proprietary" dichotomy, "discretionary-ministerial" distinction and other judicial attempts to designate areas of governmental tort liability and immunity**

[73] See Cardozo, *Sovereign immunity: The Plaintiff Deserves a Day in Court,* 67 Harv. L. Rev. 608 (1954).
[74] Treaty of Commerce, Friendship and Navigation with the Republic of Ireland, Jan. 21, 1950, art. 15 [1950] 1 U.S.T. 1859, T.I.A.S. No. 2155.
[75] Foreign Assistance Act of 1964, Pub. L. No. 88-633, Part III, ch. 1, § 301, 78 Stat. 1009.
[76] Villanova Law Review – The American Doctrine of Sovereign Immunity: An Historical Analysis by Daniel T. Murphy 1968 (Vill L Rev 13:583 Spring '68) p. 603.

have been increasingly lamented from the bench as well as the bar. Reinforced by growing acceptance of a "spread-the-loss" philosophy, commentators have urged that public entities should be held responsible for torts committed by their employees within the scope of their employment.
Despite appeals for reform from the courts and commentators, most state legislatures have failed to provide a satisfactory solution. Within the last seven years, however, several courts have abolished the governmental immunity doctrine by judicial fiat,[77] and it seems likely that other courts will soon follow that path."[78]

16. Yale Law Journal – Government Liability in Tort by Edwin M. Borchard (34 Yale L J 1):

"The common law and the political theory underlying both British and American constitutional law have been regarded as a bulwark of protection to the individual in his relations with the government. The "rule of law" which Dicey and others extol is designed by judicial control to restrict within the bounds of legality the operation of the governmental machine in its contact with the citizen. Yet it requires but a slight appreciation of th facts to realize that in Anglo-American law the individual citizen is left to bear almost all the risks of a defective, negligent, perverse or erroneous administration of the State's functions, an unjust burden which is becoming graver and more frequent as the Government's activities become more diversified and as we leave to administrative officers in even greater degree the determination of the legal relations of the individual citizen. Obviously the Administration cannot be held to the obligation of guaranteeing the citizen against all errors of defects, for life in an organized community requires a certain number of sacrifices and even risks. The unexampled expansion of the police power in the United States daily illustrates the uncompensated sacrifices to which the individual is exposed by the rightful operation of the

[77] *** The rationale which the courts have employed in asserting their power to abolish the immunity doctrine is that, since the courts first created the rule, they can abolish it without legislative action. See, e.g., Stone v. Arizona Highway Comm'n, supra at 393, 381 P.2d at 113; Muskopf v. Corning Hosp. Dist., supra at 218, 359 P.2d at 461, 11 Cal. Rptr. At 93. *To that can now be added Hosner v. DeYoung.*

[78] Duke Law Review – The Role of the Courts in Abolishing Governmental Immunity (Duke L R 1964:888) p. 889

State's public powers. Yet there is no reason why the most flagrant of the injuries wrongfully sustained by the citizen, those arising from the torts of officers, should not be allowed to rest, as they now generally do, in practice if not in theory, at the door of the unfortunate citizen alone. This hardship becomes the more incongruous when it is realized that it is greatest in countries like Great Britain and the United States, where democracy is assumed to have placed the individual on the highest plane of political freedom and individual justice. When Justice Miller of the United States Supreme Court remarked in *Gibbons v. United States*[79] that "no government has ever held itself liable to individuals for the misfeasance, laches or unauthorized exercise of power by its officers or agents," his horizon was extremely limited, for he overlooked the fact that practically every country of western Europe has long admitted such liability."[80]

"It was Lord Macaulay who remarked that "the primary end of Government is the protection of the persons and property of men.

"The reason for this long-continued and growing injustice in Anglo-American law rests, of course, upon a medieval English theory that "the King can do no wrong," which without sufficient understanding was introduced with the common law into this country, and has survived mainly be reason of it antiquity. The facts that the conditions which gave it birth and that the theory of absolutism which kept it alive in England never prevailed in this country and have since been discarded by the most monarchial countries of Europe, have nevertheless been unavailing to secure legislative reconsideration of the propriety and justification of the rule that the State is not legally liable for the torts of its officers. * * * But no serious effort has been made to penetrate the mysticism encumbering this department of the law and to relieve it of its theological and metaphysical conceptions and misconceptions.

"Realization spasmodically by the courts, and occasionally in particular cases by legislatures, of the unwarranted hardship often worked by the rule that the State is not liable for the torts of its officers, and the desire to spuare the demands

[79] (1868, U.S. 8 Wall. 269.

[80] Yale Law Journal *Government Liability in Tort* Edwin M. Borchard (34 Yale L J: 1) p. 1-2.

of justice with the maintenance of a legal anachronism canonized as a legal maxim, have brought about the result, by the introduction of fictions, artificial distinctions and concessions to expediency, that the law governing the redress of the individual against the public authorities, national, State, or municipal, for injuries sustained in the exercise of governmental powers, is in a state of incongruity and confusion unique in history. The hazards run by the administrative officer who may have acted in perfect good faith, and by the private individual, illustrated in such cases as *Miller v. Horton* and *Little v. Barreme*, manifest defective social engineering-to use Roscoe Pound's term-hardly creditable to an enlightened community."[81]

"Nothing seem more clear than that this immunity of the King form the jurisdiction of the King's courts was purely personal. How it came to be applied in the United States of America, where the prerogative is unknown, is one of the mysteries of legal evolution. Admitting its application to the sovereign and its illogical ascription as an attribute of sovereignty generally, it is not easy to appreciate its application to the United States, where the location of sovereignty-undivided sovereignty, as orthodox theory demands-is a difficult undertaking. It is beyond doubt that the Executive in the United States is not historically the sovereign,[82] and the legislature, which is perhaps the depository of the widest powers, is restrained by constitutional limitations. The federal government is one of delegated powers and the states are not sovereign, according to the Constitution, as demonstrated forcibly by the Civil War and the resulting Amendments. That brings us to the only remaining alternative, that sovereignty resides in the American electorate or the people.[83] Thus, we are led to the conclusion that the prerogative of the King's immunity from the jurisdiction and alleged resulting infallibility, the

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[81] Yale Law Journal *Government Liability in Tort* Edwin M. Borchard (34 Yale L J: 1) p. 2-3.

[82] 2 Goodnow, *Comparitive Administrative Law* (1893) 156. *United States v. Lee* (1882) 106 U.S. 196, 205, I Sup. Ct. 240.

[83] In *Yick Wo v. Hopkins* (1886) 118 U.S. 356, 6 Sup. Ct. 1064, Mathews, J., said: "in our system, while sovereign powers are delegated to the agencies of government,"-a somewhat doubtful proposition-"sovereignty itself remains with the people by whom and for whom all government exists and acts." So Miller, J., in *United States v. Lee* (1883) 106 U.S. 196, 208, I Sup. Ct. 251: "Under our system the *people* . . . are the sovereign." See also Leroy G. Pilling, *An Interpretation of the Eleventh Amendment* (1917) 15 Mich. L. Rev. 468. We shall later criticize the theory of popular sovereignty.

apotheosis of absolutism, have by evolution devolved upon the democratic American people, presumably both as citizens of the States and of the United States. The awkwardness of this conclusion is heightened by the fact that whereas in England, to prevent the jurisdictional immunity resulting in too gross an injustice, the petition of right, whose origin has been traced back to the thirteenth century, was devised as a substitute for a formal action against the Crown, in America no substitute except an appeal to the generosity of the legislature has in most jurisdictions been afforded."[84]

"Since many state have not yet granted such consent and since those that have, have so qualified it as to exclude practically all cases of liability for tort, it is proper to show that the reasons which once may have been deemed to justify the public policy of immunity form suit and responsibility do not in fact to-day prevail, and that public policy now requires that the State shall voluntarily submit to the jurisdiction of judicial tribunals to answer for torts committed by its officers against the person or property of its citizens."[85]

"But an even greater injustice is done by reason of the maxim that the doctrine of ***respondeat superior*** has no application the King or Crown or, with us, **the State - which in theory can neither do nor authorize a wrong,** and that even a superior officer is not liable for the torts of his subordinates, unless he expressly commands the tort-not a common case."[86]

"This defective social engineering can only be rightly improved by placing the risk of honest official mistakes upon the community, where it properly belongs."[87]

"Inasmuch as the state can act only through officers, it would always be possible to implead the state in the guise of its officer were the courts not careful to maintain proper criteria between personal acts and acts in the name of the state. This the courts have attempted to do, but a survey of

[84] Yale Law Journal *Government Liability in Tort* Edwin M. Borchard (34 Yale L J:1) p.4-5.
[85] Yale Law Journal *Government Liability in Tort* Edwin M. Borchard (34 Yale L J:1) p.6.
[86] Yale Law Journal *Government Liability in Tort* Edwin M. Borchard (34 Yale L J:1) p.8.
[87] Yale Law Journal *Government Liability in Tort* Edwin M. Borchard (34 Yale L J:1) p.8.

their effort in this direction is hardly convincing of the existence or soundness of the alleged principles they assume to adopt."[88]

"We have seen that this separation, involving also a denial of the principle of *respondeat superior* in official "governmental" relations, and other manifestation of solicitude for superior officers, has resulted practically in limiting the recourse of the injured citizen, even where he could sue, to an action against subordinate and usually irresponsible minor officials, which in practical effect was not far removed from a denial of relief of any kind."[89]

"It may be well to recall here that the same argument of *ultra vires* might, if admitted as applicable to the relation between the state and its officer committing an illegal act, serve automatically to absolve the state from all liability, for it is doubtless true that the state, even admitting the power, never, or very rarely, authorizes a tort.[90] Fortunately, this plea of *ultra vires* has not been admitted in this relation, any more than it has in the case of corporations, including municipal corporations, generally, yet it has troubled the theory of state responsibility not a little. Its effect is practically attained, of course, through the antiquated doctrine of State immunity and infallibility and the inapplicability of the State of the usual rules of agency, leaving the officer, and then only the most subordinate as a rule, to bear personally the consequences of his mistake, negligence or misfeasance in the performance of official duties, and leaving to the individual merely this often doubtfully remedy."[91]

"The practical requirement, thus enforced, that the subordinate officer assume the risk of the constitutionality, legality and correctness of the orders of his superior officers alone demonstrates the injustice and inequity of the existing rule as to all parties concerned-the subordinate officer, the victim of the injury, and the State or public

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[88] Yale Law Journal *Government Liability in Tort* Edwin M. Borchard (34 Yale L J:1) p.13.
[89] Yale Law Journal *Government Liability in Tort* Edwin M. Borchard (34 Yale L J:1) p.16.
[90] In *Feather v. Regina* (1865, K. B.) 6 B. & S. 257, 295. 122 Eng. Rep. 1191, 1205, Cockburn, C.J., indeed said: "From the maxim that the King can do no wrong, it follows, as a necessary consequence, that the King cannot authorize a wrong."
[91] Yale Law Journal *Government Liability in Tort* Edwin M. Borchard (34 Yale L J:1) p.20.

which employs all officers. It is flagrantly defective social engineering."[92]

17. Catch 22!

"**The Supreme Court no longer seems to regard as important the point once raised that if the act sought to be enjoined is not the state's act, then he Fourteenth Amendment and the due process clause is not involved, whereas if it is the state's act, then the Eleventh Amendment interposes to deny jurisdiction**."[93]

"It must be confessed that it is almost impossible to discover any guiding principle for determining when a suit against an officer is a suit against the State and most of those who have dealt with the subject have contented themselves with an enumeration of the cases, without for the most part any serious effort to educe an underlying principle or criticize inconsistencies."[94]

"This decision, rendered by Justice Holmes, the most vigorous defender of the sanctity of the doctrine of State immunity, would seem to indicate the vulnerability of the doctrine in the eyes of its most convinced proponent; for it seems hardly reasonable that the mere intermediation of a corporation organized and owned by the State for the performance of a particular function of the Government should alter so settled a principle as State immunity, a principle which is fully enforced when the enterprise is conducted by a State official or commissioner-unless indeed the conclusion is drawn, as we think it must be, that the doctrine rests not on rational and substantial, but on antiquated and technical grounds and that the courts eagerly seek artificial methods of escape from its implications."[95]

"It often becomes necessary to determine whether the tort-feasor is an agency or sub-division of the State sharing its immunities, or an independent contractor with the State. As may be imagined the decisions are not harmonious, furnishing

[92] Yale Law Journal *Government Liability in Tort* Edwin M. Borchard (34 Yale L J:1) p.21.
[93] Yale Law Journal *Government Liability in Tort* Edwin M. Borchard (34 Yale L J:1) p.21.
[94] Yale Law Journal *Government Liability in Tort* Edwin M. Borchard (34 Yale L J:1) p.22.
[95] Yale Law Journal *Government Liability in Tort* Edwin M. Borchard (34 Yale L J:1) p.23-24.

additional evidence, if that were needed, that the whole subject, enmeshed in artificialities and unsound distinctions, requires re-examination in the light of principle and reason."[96]

"Thus a denial or questioning of the owner's right to the property, by the assertion by the Government of an adverse or constitutional claim or the denial of an intent to pay will defeat recovery, for the taking is then tortuous. The more flagrant and unjustifiable the Government's act, the less becomes its liability, hardly a commendable principle of law."[97]

"The reluctance of the Supreme Court to widen the relief of the individual injured and compelling him rather than the public at large to bear the risk of defective public service, is due to the individualistic conceptions which lie at the foundation of the American theory of state immunity from suit and responsibility and to the erroneous belief that by being held to discharge obligations, the public service is hampered."[98]

"If it is just and sound that the Government should assume responsibility to the public for the torts of its agents, like other corporations, then the principle should be acknowledged without limitation of liability and judicial relief should be afforded."[99]

"Nor can the Government, he says, be guilty of a fault or "tort" since it itself makes the law and is therefore not bound by it, a proposition to which Justice McKenna expressed vigorous dissent. The validity of this theory of Justice Holmes, which he founds upon the authority of Bodin, Hobbes and Austin, we shall have further occasion to examine."[100]

"Indeed, if Justice Holmes' theory is correct, even voluntary submission to suit would not enable the court to impose damages on the Government, for there never was a liability and none could, it would seem, be created, by merely waiving

[96] Yale Law Journal *Government Liability in Tort* Edwin M. Borchard (34 Yale L J:1) p.27-28.
[97] Yale Law Journal *Government Liability in Tort* Edwin M. Borchard (34 Yale L J:1) p.30-31.
[98] Yale Law Journal *Government Liability in Tort* Edwin M. Borchard (34 Yale L J:1) p.32.
[99] Yale Law Journal *Government Liability in Tort* Edwin M. Borchard (34 Yale L J:1) p.33.
[100] Yale Law Journal *Government Liability in Tort* Edwin M. Borchard (34 Yale L J:1) p.40.

the immunity from suit. The fact is, we venture to believe, that the theory is unsound, being dominated by a slavish worship of an antiquated conception of absolutism and finding in the absence of a "tort"-a term of private and not public law-an absence of injury or operative fact of which the courts may properly take account when they can obtain jurisdiction."[101]

"Indeed, it is believed that with the deflation of he conception of sovereignty and the realization that all political group organizations, from the smallest to the largest, are merely means adopted by the people to enable them to perform certain public services, that there is no sound reason either for differentiating their responsibility according to size or form or organization or to grant them immunity for the torts of their agents and employees."[102]

"Judge Foote in the case of *Lloyd v. new York,* commonly regarded as a leading case, after announcing the time-honored formula, came to the discouraging conclusion that there was no guiding rule for the courts and that "all that can be done with safety is to determine each case as it arises." In the light of such confession of lack of principle, it is not surprising that judicial utterances are irreconcilable and that the effort to determine the law governing the liability of municipal corporations in tort resolves itself into a study of local arbitrariness in the different jurisdictions, thereby justifying a challenge against all the formulas, phrases and terminology under the control of which the courts profess to be acting. If consistency in the law is necessary to give it prestige, as Judge Learned Hand has recently remarked, then this branch of the law is greatly in need of reform."[103]

"Until recently, when a tendency to minimize the distinction as one of degree only, has been noticeable, it served to determine in several countries the principle of the responsibility of the state for the torts of its officers, not being applied to cities alone, as with us, but more logically to all political communities, from the largest, the

[101] Yale Law Journal *Government Liability in Tort* Edwin M. Borchard (34 Yale L J:1) p.41.
[102] Yale Law Journal *Government Liability in Tort* Edwin M. Borchard (34 Yale L J:1) p.45.
[103] Yale Law Journal *Government Liability in Tort* Edwin M. Borchard (34 Yale L J:1) p.130.

state, to the smallest, the village, acting as repositories of the public power as agents of the people."[104]

"**Just why public functions cannot be performed properly unless the city is immune from responsibility for the torts of its officers is not apparent**. On the contrary, it might be more convincingly argued that greater efficiency and justice would be attained by accompanying power with responsibility, and if this does not induce greater respect for law, it would at least respond more satisfactorily to a public sense of justice if losses inflicted on the individual by the wrongful acts of agents of the community are spread over the community as a whole rather than allowed to rest upon the unfortunate victim alone. The reason assigned by Ashhurst, J. in *Russell v. Men of Devon* for holding a county not liable for injuries resulting from a defective bridge, namely, that "it is better that an individual should sustain an injury than that the public should suffer an inconvenience," is to-day no more palpably immoral than the frequently uttered explanation that public moneys raised by taxation for public uses cannot lawfully be applied to the payment of damages caused by the wrongful acts of public officers."[105]

"Nor can we give serious consideration to the attempt of certain courts to explain municipal exemption from responsibility for the torts of officers in the performance of "governmental" acts or its so-called police powers on the ground that illegal or unlawful acts of officers in such cases are *ultra vires* and therefore incapable of rendering the municipality liable. This discredited idea once had considerable vogue on the continent in freeing all corporations from responsibility for the torts of their agents, but it has long been discarded in most civilized jurisdictions and its spasmodic revival can only be attributed to insufficient analysis or carelessness."[106]

"But our difficulty has been to overcome the belief that the relation of agency or *respondeat superior* could not exist between the group and the officer when he was performing a so-called governmental or public function. If this difficulty

[104] Yale Law Journal *Government Liability in Tort* Edwin M. Borchard (34 Yale L J:1) p.132.
[105] Yale Law Journal *Government Liability in Tort* Edwin M. Borchard (34 Yale L J:1) p.134.
[106] Yale Law Journal *Government Liability in Tort* Edwin M. Borchard (34 Yale L J:1) p.136.

has been to a considerable degree overcome, at least in principle and logically, when the group is the city or incorporated town, there should not be much difficulty in securing legislative permission to impose liability and thus satisfy the demands of justice, when the group represented is the county or the state. The historical anachronism which enable the community, when organized as a county or state, to escape subjection to the customary rules of law, should be repealed by a frank recognition of its unsoundness and injustice under present conditions."[107]

18. Thomas Hobbes *The Leviathan* Part II Chap 26, 2:

Defender of Sovereign Immunity for the Monarchist and Statest:

"2. The Soveraign of a Common-wealth, be it an Assembly, or one Man, is not Subject to the Civill Laws. For having power to [138] make, and repeale Lawes, he may when he pleaseth, free himselfe from that subjection, by repealing those Lawes that trouble him, and making of new; and consequently he was free before. For he is free, that can be free when he will: Nor, is it possible for any person to be bound by himselfe; because he that can bind, can release; and therefore he that is bound to himselfe onely, is not bound."[108]

"3. When long Use obtaineth the authority of a Law, it is not the Length of Time that maketh the Authority, but the Will of the Soveraign signified by his silence, (for Silence is sometimes an argument of Consent;) and it is not longer Law, when the Soveraign shall have a question of Right grounded, not upon his present Will, but upon the Lawes formely made; the Length of Time shal bring no prejudice to his Right; but the question shal be judged by Equity. For many unjust Actions, and unjust Sentences, go uncontrolled a longer time, than any man can remember. And our Lawyers account no Customes Law, but such as are reasonable, and that evill Customes are to be abolished: But the Judgement of what is reasonable, and of what is to be abolished, belongeth to him

[107] Yale Law Journal *Government Liability in Tort* Edwin M. Borchard (34 Yale L J:1) p.138.
[108] Thomas Hobbes *Leviathan* (Penguin Putman Inc. 375 Hudson Street, New York, N.Y. 10014, USA 1985, first published 1651) 313.

that maketh the Law, which is the Soveraign Assembly, or Monarch."[109]

19. Rev. Samuel Rutherford - ***Lex Rex or The Law and the Prince:***

Rev. Samuel Rutherford Professor of Divinity in the University of St. Andrews ***Lex Rex or The Law and the Prince****; a dispute for The Just Prerogative of King and People*: *Containing THE REASONS AND CAUSES OF THE MOST NECESSARY DEFENSIVE WARS OF THE KINGDOM OF SCOTLAND. And of Their EXPEDITION FOR THE AID AND HELP OF THEIR DEAR BRETHREN OF ENGLAND; In which their innocency is asserted, and a full answer is given to a Seditious Pamphlet, Entitled, "SACRO-SANCTA REGUM JAJESTAS,"or The Sacred and Royal Prerogative of Christian Kings; under the name of I. A., but penned by John Maxwell, The Excommunicate Popish Prelate; with a scriptural confutation of the Ruinous Ground of W. Barclay, H. Grotius, H. Arnisaus, Ant. De Domi. Popish Bishop of Spalato, and of other late Anti-Magistratical Royalists, as the author of Ossorianum, Dr Ferne, E. Symmons, THE DOCTORS OF ABERDEEN, ETC. IN FORTY-FOUR QUESTIONS.* (London: Printed for *John Field*, and are to be sold at his house upon Addle-hill, near *Baynards-Castle*. Octob. 7, 1644: Crown Rights Book Company P.O. Box 386 Dahlonega, Georgia 30533 2004)

> "The first I conceive is clear, 1st, Because all living creatures have radically in them a power of self-preservation, to defend themselves from violence, — as we see lions have paws, some beasts have horns, some claws, — men being reasonable creatures, united in society, must have power in a more reasonable and honourable way to put this power of warding off violence in the hands of one or more rulers, to defend themselves by magistrates. 2nd, If all men be born, as concerning civil power, alike, — for no man cometh out of the womb with a diadem on his head or a sceptre in his hand, and yet men united in a society may give crown and sceptre to this man and not to that man, — then this power was in this united society, but it was not in them formally, for they should then all have been one king, and so both above and superior, and below and inferior to themselves, which we cannot say; therefore this power must have been virtually in them, because neither man nor

[109] Thomas Hobbes *Leviathan* (Penguin Putman Inc. 375 Hudson Street, New York, N.Y. 10014, USA 1985, first published 1651) 313.

community of men can give that which they neither have formally nor virtually in them. 3rd, Royalists cannot deny but cities have power to create a higher ruler, for royal power is but the united and superlative power of inferior judges in one greater judge whom they call a king.
Conclus. The power of creating a man a king is from the people."[110]

"I think royalists cannot deny but a people ruled by aristocratic magistrates may elect a king, and a king so elected is formally made a lawful king by the people's election; for of six willing and gifted to reign, what maketh one a king and not the other five? Certainly by God's disposing the people to choose this man, and not another man. It cannot be said but God giveth the kingly power immediately; and by him kings reign, that is true. The office is immediately from God, but the question now is, What is that which formally applieth the office and royal power to this person rather than to the other five as meet? Nothing can here be dreamed of but God's inclining the hearts of the states to choose this man and not that man."[111]

"2d, When he hath proved that God is the immediate author of sovereignty, what then? Shall it follow that the sovereign *in concreto* may not be resisted, and that he is above all law, and that there is no armour against his violence but prayers and tears? Because God is the immediate author of the pastor and of the apostle's office, does it therefore follow that it is unlawful to resist a pastor though he turn robber? If so, then the pastor is above all the king's laws. This is the Jesuit and all made, and there is no armour against the robbing prelate but prayer and tears.
"2. He saith in his title, that "the king is no creature of the people's making." If he mean the king in the abstract, that is, the royal dignity, whom speaketh he against? Not against us, but against his own father, Bellarmine, who saith, that "sovereignty hath no warrant by any divine law." If he mean that the man who is king is not created and

[110] Rev. Samuel Rutherford *Lex Rex* (Crown Rights Book Company, P.O. Box 386 Dahlonega, Georgia 30533, 2004) Question 4, p.6.
[111] Rev. Samuel Rutherford *Lex Rex* (Crown Rights Book Company, P.O. Box 386 Dahlonega, Georgia 30533, 2004) Question 4, p.9.

elected king by the people, he contradicteth himself and all the court doctors."[112]

"*P. Prelate*. — We begin with the law, in. which, as God by himself prescribed the essentials, substantiate, and ceremonies of his piety and worship, gave order for piety and justice; Deut. xvii. 14, 15, the king is here originally and immediately from God, and independent from all others. "Set over them" — *them* is collective, that is, all and every one. Scripture knoweth not this state principle, — *Rex est singulis major, universis minor*. The person is expressed *in concreto*, "Whom the Lord thy God shall choose." This peremptory precept dischargeth the people, all and every one, diffusively, representatively, or in any imaginable capacity to attempt the appointing of a king, but to leave it entirely and totally to God Almighty.
"*Ans*. — Begin with the law, but end not with traditions. If God by himself prescribed the essentials of piety and worship, the other part of your distinction is, that God, not by himself, but by his prelates, appointed the whole Romish rites, as accidentals of piety. This is the Jesuits' doctrine. This place is so far from proving the king to be independent, and that it totally is God's to appoint a king, that it expressly giveth the people power to appoint a king; for the setting of a king over themselves, this one and not that one, makes the people to appoint the king, and the king to be less and dependent on the people, seeing God intendeth the king for the people's good, and not the people for the king's good. This text shameth the Prelate, who also confessed, (p. 22,) that remotely and improperly, succession, election, and conquest maketh the king, and so it is lawful for men remotely and improperly to invade God's chair."[113]

"*P. Prelate*. — There is need of grace to obey the king, Psal. xviii. 43; cxliv. 2. It is God who subdueth the people under David. Rebellion against the king is rebellion against God. 1 Pet. ii. 17; Prov. xxiv. 12. Therefore kings have a near alliance with God.

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[112] Rev. Samuel Rutherford *Lex Rex* (Crown Rights Book Company, P.O. Box 386 Dahlonega, Georgia 30533, 2004) Question 5, p.10.
[113] Rev. Samuel Rutherford *Lex Rex* (Crown Rights Book Company, P.O. Box 386 Dahlonega, Georgia 30533, 2004) Question 5, p.12-13.

"*Ans*. — 1. There is much grace in papists and prelates then, who use to write and preach against grace. 2. Lorinus your brother Jesuit will, with good warrant of the texts inter, that the king may make a conquest of his own kingdoms of Scotland and England by the sword, as David subdued the heathen. 3. Arbitrary governing hath no alliance with God; a rebel to God and his country, and an apostate, hath no reason to term lawful defence against cut-throat Irish rebellion. 4. There is need of much grace to obey pastors, inferior judges, masters, (Col. iii. 22, 23,) therefore their power is from God immediately, and no more from men than the king is created king by the people, according to the way of royalists."[114]

"*P. Prelate* — 1. To whom can it be more proper to give the rule over men than to Him who is the only king truly and properly of the whole world? 2. God is the immediate author of all rule and power that is amongst all his creatures, above or below. 3. Man before the fall received dominion and empire over all the creatures below immediately, as Gen. i. 28; Gen. ix. 2; therefore we cannot deny that the most noble government (to wit monarchy) must be immediately from God, without any contract or compact of men.
"*Ans*. — 1. The first reason concludeth not what is in question; for God only giveth rule and power to one man over another; therefore he giveth it immediately. It followeth not. 2. It shall as well prove that God doth immediately constitute all judges, and therefore it shall be unlawful for a city to appoint a mayor, or a shire a justice of peace."[115]

"The Prelate will have it Babylonish confusion, that we are divided in opinion. Jesuits (saith he) place all sovereignty in the community. Of the sectaries, some warrant any one subject to make away his king, and such a work is no less to be rewarded than when one killeth a wolf. Some say this power is in the whole community; some will have it in the collective body, not convened, by warrant or writ of sovereignty; but when necessity (which is often landed) of reforming state and church, calleth them together; some in

[114] Rev. Samuel Rutherford *Lex Rex* (Crown Rights Book Company, P.O. Box 386 Dahlonega, Georgia 30533, 2004) Question 5, p.15.
[115] Rev. Samuel Rutherford *Lex Rex* (Crown Rights Book Company, P.O. Box 386 Dahlonega, Georgia 30533, 2004) Question 7, p.22.

the nobles and peers: some in the three estates assembled by the king's writ; some in the inferior judges.
"I answer, If the Prelate were not a Jesuit himself, he would not bid his brethren take the mote out of their eye; but there is nothing here said but what Barclaius said better before this plagiarius. To which I answer, We teach that any private man may kill a tyrant, void of all title; and that great Royalist saith so also. And if he have not the consent of the people, he is an usurper, for we know no external lawful calling that kings have now, or their family, to the crown, but only the call of the people. All other calls to us are now invisible and unknown; and God would not command us to obey kings, and leave us in the dark, that we shall not know who is the king."[116]

"I am not now unseasonably, according to the Prelate's order, to dispute of the power of lawful defence against tyranny; but, I lay down this maxim of divinity: Tyranny being a work of Satan, is not from God, because sin, either habitual or actual, is not from God: the power that is, must be from God; the magistrate, as magistrate, is good in nature of office, and the intrinsic end of his office, (Rom. xiii. 4) for he is the minister of God for thy good; and, therefore, a power ethical, politic, or moral, to oppress, is not from God, and is not a power, but a licentious deviation of a power; and is no more from God, but from sinful nature and the old serpent, than a license to sin."[117]

"The inferior creatures in nature give no power to the superior, and therefore they cannot give in such a proportion power. The denial of the positive degree is a denial of the comparative and superlative, and so they cannot resume any power; but the designing of these men or those men to be kings or rulers is a rational, voluntary action, not an action of nature, — such as is God's act of creating an angel a nobler creature than man, and the creating of man a more excellent creature than a beast; and, for this cause, the argument is vain and foolish; for inferior creatures are inferior to the more noble and superior by nature, not by

[116] Rev. Samuel Rutherford *Lex Rex* (Crown Rights Book Company, P.O. Box 386 Dahlonega, Georgia 30533, 2004) Question 9, p.33.
[117] Rev. Samuel Rutherford *Lex Rex* (Crown Rights Book Company, P.O. Box 386 Dahlonega, Georgia 30533, 2004) Question 9, p.34.

voluntary designation, or, as royalists say, by naked approbation, which yet must be an arbitrary and voluntary action."[118]

"5. But simply and absolutely the people is above, and more excellent, than the king, and the king in dignity inferior to the people; and that upon these reasons: —
"*Arg*. 1. — Because he is the mean ordained for the people, as for the end, that he may save them, (2 Sam. xix 9;) a public shepherd to feed them, (Psal. lxxviii. 70-73;) the captain and leader of the Lord's inheritance to defend them, (1 Sam. x. 1;) the minister of God for their good. (Rom. xiii. 4.)
"*Arg*. 2. — The pilot is less than the whole passengers; the general less than the whole army; the tutor less than all the children; the physician less than all the living men whose health he careth for; the master or teacher less than all the scholars, because the part is less than the whole; the king is but a part and member (though I grant a very eminent and noble member) of the kingdom.
"*Arg*. 3. — A Christian people, especially, is the portion of the Lord's inheritance, (Deut. xxxii. 9) the sheep of his pasture — his redeemed ones — for whom God gave his blood. Acts xx. 28. And the killing of a man is to violate the image of God, (Gen. ix. 6,) and therefore the death and destruction of a church, and of thousand thousands of men, is a sadder and a more heavy matter than the death of a king, who is but one man."[119]

"But such a consideration (comparison to Christ) cannot befall any mortal king; because, consider the king materially as a mortal man, he must be inferior to the whole church, for he is but one, and so of less worth than the whole church; as the thumb, though the strongest of the fingers, yet it is inferior to the hand, and far more to the whole body, as any part is inferior to the whole. Consider the king reduplicative and formally as king, and by the official relation he hath, he is no more then but a royal servant, an official mean tending, *ex officio*, to this end, to preserve the people, to rule and govern them; and a gift of God, given

[118] Rev. Samuel Rutherford *Lex Rex* (Crown Rights Book Company, P.O. Box 386 Dahlonega, Georgia 30533, 2004) Question 9, p.38.
[119] Rev. Samuel Rutherford *Lex Rex* (Crown Rights Book Company, P.O. Box 386 Dahlonega, Georgia 30533, 2004) Question 19, p.78.

by virtue of his office, to rule the people of God, and so any way inferior to the people."[120]

"*Arg*. 10. — The people in power are superior to the king, because every efficient and constituent cause is more excellent than the effect. Every mean is inferior in power to the end; (*So Jun. Brutus, q*. 31. *Bucher l*. 1. c. 16. *Author Lib. de offic. Magistr. q*. 6. *Henænius disp*. 2, n. 6. *Joan Roffensis Epist. de potest. pap. l*. 2, *c*. 5. *Spalato de Repu. Ecclesiast. l*. 6, *c*. 2, n. 3:) but the people is the efficient and constituent cause, the king is the effect; the people is the end; both intended of God to save the people, to be a healer and a physician to them (Isa. iii. 7); and the people appoint and create the king out of their indigence, to preserve themselves from mutual violence. Many things are objected against this. That the efficient and constituent cause is God, and the people are only the instrumental cause; and Spalato saith, that the people doth indirectly only give kingly power, because God, at their act of election, ordinarily giveth it."[121]

"Those who limit power, can take away so many degrees of royal power; and those who can take away power, can give power; and it is inconceiveable to say that people can put restraint upon a power immediately coming from God. * * * But royalists consent that the people may choose a king upon such conditions to reign, as he hath royal power of ten degrees, whereas his ancestor had by birth a power of fourteen decrees."[122]

"4. If the people by other governors, as by heads of families and other choice men, govern themselves and produce these same formal effects of peace, justice, religion, on themselves, which the king doth produce, then is there a power of the same kind, and as excellent as the royal power, in the people; and there is no reason but this power should be held to come immediately from God, as the royal power; for it is every way of the same nature and kind, as I shall

[120] Rev. Samuel Rutherford *Lex Rex* (Crown Rights Book Company, P.O. Box 386 Dahlonega, Georgia 30533, 2004) Question 19, p.79.
[121] Rev. Samuel Rutherford *Lex Rex* (Crown Rights Book Company, P.O. Box 386 Dahlonega, Georgia 30533, 2004) Question 19, p.80.
[122] Rev. Samuel Rutherford *Lex Rex* (Crown Rights Book Company, P.O. Box 386 Dahlonega, Georgia 30533, 2004) Question 19, p.80.

prove. Kings and judges differ not in nature and specie, but it is experienced that people do, by aristocratical guides, govern themselves, &c.; so then, if God immediately infuse royalty when the people chooseth a king, without any action of the people, then must God immediately infuse a beam of governing on a provost and bailie, when the people choose such, and that without any action of the people, because all powers are, *in abstracto*, from God."[123]

20. The Citizens cannot transfer their Sovereignty to the State:

"*Ans*. 1. — It is false that the people doth, or can by the law of nature, resign their whole liberty in the hand of a king. 1. They cannot resign to others that which they have not in themselves, *Nemo potest dare quod non habet*; but **the people hath not an absolute power in themselves to destroy themselves**, or to exercise those tyrannous acts spoken of, 1 Sam. viii. 11-15, &c.; for neither God nor nature's law hath given any such power. * * * but the people doth not make themselves slaves when they constitute a king over themselves; because God, giving to a people a king, the best and most excellent governor on earth, giveth a blessing and special favour, (Isa. i. 26; Hos. i. 11; Isa. iii. 6, 7; Psal. lxxix. 70-72;) but to lay upon his people the state of slavery, in which they renounce their whole liberty, is a curse of God. * * * If the servant give his liberty to his master, therefore he had that liberty in him, and in that act, liberty must be in a more excellent way in the servant, as in the **fountain**, than it is in the master; and so this liberty must be purer in the people than in the king; and therefore, in that both the servant is above the master, and the people worthier than the king. * * * for the **fountain-power** remaineth most eminently in the people, 1. Because they give it to the king, *ad modum recipientis*, and with limitations; therefore it is unlimited in the people, and bounded and limited in the king, and so less in the king than in the people. * * * But the most eminent and **fountain-power** of royalty remaineth in the people as in an immortal spring} which they communicate by succession to this or that mortal man, in the manner and measure that they think good. Ulpian and Bartolus, cited by our Prelate out of Barclaius, are only

[123] Rev. Samuel Rutherford *Lex Rex* (Crown Rights Book Company, P.O. Box 386 Dahlonega, Georgia 30533, 2004) Question 19, p.80.

to be understood of the derived, secondary, and borrowed power of executing laws, and not of the **fountain-power**, which the people cannot give away, no more than they can give away their rational nature; for it is a power natural to conserve themselves, essentially adhering to every created being."[124]

"*Ans*. — I take the answer thus: Those who are mere means, and only means referred to the end, they are inferior to the end; but the king, as king, hath all his official and relative goodness in the world, as relative to the end. All that you can imagine to be in a king, as a king, is all relative to the safety and good of the people, (Rom. xiii. 4,) "He is a minister for thy good." He should not, as king, make himself, or his own gain and honour, his end."[125]

"But when he abuseth his power to the destruction of his subjects, it is lawful to throw a sword out of a madman's hand, though it be his own proper sword, and though he have due right to it, and a just power to use it for good; for all fiduciary power abused may be repealed. And if the knights and burgesses of the House of Commons abuse their fiduciary power to the destruction of these shires and corporations who put the trust on them, the observator did never say that parliamentary power was so entire and irrevocably in them, as that the people may not resist them, annul their commissions and rescind their acts, and denude them of fiduciary power, even as the king may be denuded of that same power by the three estates; for particular corporations are no more to be denuded of that fountain-power of making commissioners, and of the self-preservation, than the three estates are."[126]

21. Sovereignty is in the Citizen not the King or State:

"7. Sovereignty is not in the community, (saith the P. Prelate). Truly it neither is, nor can be, more than ten, or a thousand, or a thousand thousands, or a whole kingdom, can be one man; for sovereignty is the abstract, the sovereign is the concrete. Many cannot be one king or one sovereign: a

[124] Rev. Samuel Rutherford *Lex Rex* (Crown Rights Book Company, P.O. Box 386 Dahlonega, Georgia 30533, 2004) Question 19, p.81-2.
[125] Rev. Samuel Rutherford *Lex Rex* (Crown Rights Book Company, P.O. Box 386 Dahlonega, Georgia 30533, 2004) Question 19, p.83.
[126] Rev. Samuel Rutherford *Lex Rex* (Crown Rights Book Company, P.O. Box 386 Dahlonega, Georgia 30533, 2004) Question 19, p.84.

sovereign must be essentially one; and a multitude cannot be one. But what then? May not the sovereign power be eminently, *fontaliter*, originally and radically in the people? I think it may, and must be."[127]

"2. The power of a part and the power of the-whole is not alike. Royalty never advanceth the king above the place of a member; and lawyers say, the king is above the subjects, *in sensu diviso*, in a divisive sense, he is above this or that subject; but he is inferior to all the subjects collectively taken, because he is for the whole kingdom, as a mean for the end.
"*Obj*. — If this be a good reason, that he is a mean for the whole kingdom as for the end; that he is therefore inferior to the whole kingdom, then is he also inferior to any one subject; for he is a mean for the safety of every subject, as for the whole kingdom.
"*Ans*. — Every mean is inferior to its complete, adequate, and whole end; and such an end is the whole kingdom in relation to the king; but every mean is not always inferior to its incomplete, inadequate, and partial end. This or that subject is not adequate, but the inadequate and incomplete end in relation to the king."[128]

22. Law is Sovereign over All:

"We may consider the question of the law's supremacy over the king, either in the supremacy of constitution of the king, or or direction, or of limitation, or of co-action and punishing. Those who maintain this, "The king is not subject to the law," if their meaning be, "The king as king is not subject to the law's direction," they say nothing; for the king, as the king, is a living law; then they say, "The law is not subject to the law's direction:" a very improper speech; or, the king, as king, is not subject to the co-action of the law: that is true; for he who is a living law, as such, cannot punish himself, as the law saith.
"*Assert*. 1. — The law hath a supremacy of constitution above the king: —

[127] Rev. Samuel Rutherford *Lex Rex* (Crown Rights Book Company, P.O. Box 386 Dahlonega, Georgia 30533, 2004) Question 19, p.86.
[128] Rev. Samuel Rutherford *Lex Rex* (Crown Rights Book Company, P.O. Box 386 Dahlonega, Georgia 30533, 2004) Question 19, p.87.

"1. Because the king by nature is not king, as is proved; therefore, he must be king by a politic constitution and law; and so the law, in that consideration, is above the king, because it is from a civil law that there is a king rather than any other kind of governor. 2. It is by law, that amongst many hundred men, this man is king, not that man; and because, by the which a thing is constituted, by the same thing it is, or may be dissolved; therefore, 3. As a community, finding such and such qualifications as the law requireth to be in a king, in this man, not in that man, — therefore upon law-ground they make him a king, and, upon law-grounds and just demerit, they may unmake him again; for what men voluntary do upon condition, the condition being removed, they may undo again.
"*Assert*. 2. — It is denied by none but the king is under the directive power of the law, though many liberate the king from the co-active power of a civil law. But I see not what direction a civil law can give to the king if he be above all obedience, or disobedience, to a law, seeing all law-direction is *in ordine ad obedientiam*, in order to obey, except thus far, that the light that is in the civil law is a moral or natural guide to conduct a king in his walking; but this is the morality of the law which enlighteneth and informeth, not any obligation that aweth the king; and so the king is under God's and nature's law. This is nothing to the purpose."[129]

"*Assert*. 5. — The king cannot but be subject to the co-active power of fundamental laws. Because, 1. This is a fundamental law that the free estates lay upon the king, that all the power that they give to the king, as king, is for the good and safety of the people; and so what he doth to the hurt of his subjects, he doth it not as king."[130]

"In matters of goods, the king may be both judge and punisher of himself, as our law provideth that any subject may plead his own heritage from the king before the inferior judges, and if the king be a violent possessor, and in *mala fide* for many years, by law he is obliged, upon a decree of the lords,

[129] Rev. Samuel Rutherford *Lex Rex* (Crown Rights Book Company, P.O. Box 386 Dahlonega, Georgia 30533, 2004) Question 26, p.125-6.
[130] Rev. Samuel Rutherford *Lex Rex* (Crown Rights Book Company, P.O. Box 386 Dahlonega, Georgia 30533, 2004) Question 26, p.126.

to execute the sentence against himself, *ex officio*, and to restore the lands, and repay the damage to the just owner; and this the king is to do against himself, *ex officio*."[131]

"*Assert*. 7. — If a king turn a parricide, a lion, and a waster and destroyer of the people, as a man he is subject to the co-active power of the laws of the land. If any law should hinder that a tyrant should not be punished by law, it must be because he hath not a superior but God, for royalists build all upon this; but this ground is false: —
"*Arg*. 1. — Because the estates of the kingdom, who gave him the crown, are above him, and they may take away what they gave him; as the law of nature and God saith, If they had known he would turn tyrant, they would never have given him the sword; and so, how much ignorance is in the contract they made with the king, as little of will is in it; and so it is not every way willing, but, being conditional, is supposed to be against their will. They gave the power to him only for their good, and that they may make the king, is clear. (2 Chron. xxiii. 11; 1 Sam. x. 17, 24; Deut. xvii. 14-17; 2 Kings xi. 12; 1 Kings xvi. 21; 2 Kings x. 5; Judg. ix. 8.) Fourscore valiant men of the priests withstood Uzziah with corporal violence, and thrust him out, and cut him off from the house of the Lord. (2 Chron. xxvi. 18.)"[132]

"*Arg*. 3. — It is presumed that God hath not provided better for the safety of the part than of the whole, especially when he maketh the part a mean for the safety of the whole. But if God have provided that the king, who is a part of the commonwealth, shall be free of all punishment, though he be a habitual destroyer of the whole kingdom, seeing God hath given him to be a father, tutor, saviour, defender thereof, and destined him as a mean for their safety, then must God have worse, not better, provided for the safety of the whole than of the part. The proposition, is dear, in that God (Rom. xiii. 4; 1 Tim. ii. 2) hath ordained the ruler, and given to him the sword to defend the whole kingdom and city; but we read nowhere that the Lord hath given the sword to the whole kingdom, to defend one man, a king, though a ruler, going on

[131] Rev. Samuel Rutherford *Lex Rex* (Crown Rights Book Company, P.O. Box 386 Dahlonega, Georgia 30533, 2004) Question 26, p.127.
[132] Rev. Samuel Rutherford *Lex Rex* (Crown Rights Book Company, P.O. Box 386 Dahlonega, Georgia 30533, 2004) Question 26, p.127-8.

in a tyrannical way of destroying all his subjects. The assumption is evident: for then the king, turning tyrant, might set an army of Turks, Jews, or cruel Papists to destroy the church of God, without all fear of law or punishment. Yea, this is contrary to the doctrine of royalists: for Winzetus (*adversus Buchananum*, p. 275) saith of Nero, that he, seeking to destroy the senate and people of Rome, and seeking to make new laws for himself, *excidit jure regni*) lost right to the kingdom. And Barclaius (Monarch. l. 3, c. ult. p. 213,) saith, a tyrant, such as Caligula, *spoliare se jure regni*, spoileth himself of the right to the crown. And in that same place, *regem, si regnum suum alienæ ditioni manciparit, regno cadere*, if the king sell his kingdom, he loseth the title to the crown. Grotius, (*de jure belli et pacis, l*. i. *c*. 4, *n*. 7,) *Si rex hostili animo in totius populi exitium feratur, amittit regnum*, if he turn enemy to the kingdom, for their destruction, he loseth his kingdom, because (saith he) *voluntas imperandi, et voluntas perdendi, simul consistere non possunt*, a will or mind to govern and to destroy cannot consist together in one."[133]

"To these, and the like, hear what the excommunicated Prelate hath to say, (c. 15, p. 146, 147,) "They say (he meaneth the Jesuits) every society of men is a perfect republic, and so must have within itself a power to preserve itself from ruin, and by that to punish a tyrant." He answereth, "A society without a head, is a disorderly rout, not a politic body; and so cannot have this power."[134]

"4. They are as orderly a body politic, to unmake a tyrannous commander, as they were to make a just governor. The Prelate saith, "It is alike to conceive a politic body without a governor, as to conceive the natural body without a head." He meaneth, none of them can be conceivable. I am not of his mind. When Saul was dead, Israel was a perfect politic body; and the Prelate, if he be not very obtuse in his head, (as this hungry piece, stolen from others, showeth him to be,) may conceive a visible political society performing a political action, (2 Sam. v. 1-3,) making David king at a

[133] Rev. Samuel Rutherford *Lex Rex* (Crown Rights Book Company, P.O. Box 386 Dahlonega, Georgia 30533, 2004) Question 26, p.128.
[134] Rev. Samuel Rutherford *Lex Rex* (Crown Rights Book Company, P.O. Box 386 Dahlonega, Georgia 30533, 2004) Question 26, p.129.

visible and conceivable place, at Hebron, and making a covenant with him. And that they wanted not all governors, is nothing to make them chimeras inconceivable. For when so many families, before Nimrod, were governed only by fathers of families, and they agreed to make either a king, or other governors, a head, or heads, over themselves, though the several families had government, yet these associated families had no government; and yet so conceivable a politic body, as if Maxwell would have appeared amongst them, and called them a disorderly rout, or an unconceivable chimera, they should have made the Prelate know that chimeras can knock down prelates. Neither is a king the life of a politic body, as the soul is of the natural body. The body createth not the soul; but Israel created Saul king, and when he was dead, they made David king, and so, under God, many kings, as they succeeded, till the Messiah came. No natural body can make souls to itself by succession; nor can sees create new prelates always."[135]

"The community is the remote and last subject, the representative body the nearest subject, the nobles a partial subject; the judges, as judges sent by the king, are so in the game, that when an arbitrary prince at his pleasure setteth them up, and at command that they judge for men, and not for the Lord, and accordingly obey, they are by this power to be punished, and others put in their place."[136]

"*P. Prelate* (p. 147, 148). — The subject of this superintending power must be secured from error in judgment and practice, and the community and states then should be infallible.
"*Ans*. — The consequence is nought. No more than the king, the absolute independent, is infallible. It is sure the people are in less hazard of tyranny and self-destruction than the king is to subvert laws and make himself absolute; and for that cause there must be a superintendent power above the king, and God Almighty also must be above all."[137]

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[135] Rev. Samuel Rutherford *Lex Rex* (Crown Rights Book Company, P.O. Box 386 Dahlonega, Georgia 30533, 2004) Question 26, p.130.
[136] Rev. Samuel Rutherford *Lex Rex* (Crown Rights Book Company, P.O. Box 386 Dahlonega, Georgia 30533, 2004) Question 26, p.130.
[137] Rev. Samuel Rutherford *Lex Rex* (Crown Rights Book Company, P.O. Box 386 Dahlonega, Georgia 30533, 2004) Question 26, p.130.

"*P. Prelate*. — The parliament may err, then God hath left the state remediless, except the king remedy it.
"*Ans*. — There is no consequence here, except the king be impeccable. Posterior parliaments may correct the former. A state is not remediless, because God's remedies, in sinful men's hands, may miscarry. But the question is now, Whether God hath given power to one man to destroy men, subvert laws and religion, without any power above him to coerce, restrain, or punish?"[138]

"*P. Prelate*. — Why might not the people of Israel, peers or sanhedrim, have convened before them, judged and punished David for his adultery and murder? Romanists and new statists acknowledge no case lawful, but heresy, apostacy, or tyranny; and tyranny, they say, must be universal, manifest as the sun, and with obstinacy, and invincible by prayers, as is recorded of Nero, whose wish was rather a transported passion, than a fixed resolution."[139]

"1. And kings to do injustice to their subjects, because by this the superior cannot sin against the inferior, forasmuch as kings can sin against none but those who have power to judge and punish them; but God only, and no inferiors, and no subjects, have power to punish the kings; therefore kings can sin against none of their subjects; and where there is no sin, how can there be a law? Neither major or minor can be denied by royalists.
"2. We acknowledge tyranny must only unking a prince. The Prelate denieth it, but he is a green statist. Barclay, Grotius, Winzetus, as I have proved, granteth it.
"3. He will excuse Nero, as of infirmity, wishing all Rome to have one neck, that he may cut it off. And is that charitable of kings, that they will not be so mad as to destroy their own kingdom? But when histories teach us there have been more tyrants than kings, the kings are more obliged to him for flattery than for state-wit, except we say that all kings who eat the people of God, as they do bread, owe him little for making them all mad and frantic.

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[138] Rev. Samuel Rutherford *Lex Rex* (Crown Rights Book Company, P.O. Box 386 Dahlonega, Georgia 30533, 2004) Question 26, p.130-1.
[139] Rev. Samuel Rutherford *Lex Rex* (Crown Rights Book Company, P.O. Box 386 Dahlonega, Georgia 30533, 2004) Question 26, p.131.

"4. But let them be Neroes, and mad, and worse, there is no coercing of them, but all must give their necks to the sword, if the poor Prelate be heard; and yet kings cannot be so mad as to destroy their subjects. Mary of England was that mad. The Romish princes who have given (Rev. xvii. 13) their power and strength to the beast, and do make war with the Lamb; and kings inspired with the spirit of the beast, and, drunk with the wine of the cup of Babel's fornications, are so mad; and the ten emperors are so mad, who wasted their faithlulest subjects."[140]

"Mr Bishop, what better is your *affirmanti incumbit*, &c., than mine? for you are the affirmer. 1. I can prove a power in the king, limited only to feed, govern, and save the people; and you affirm that God hath given to the king, not only a power official and royal to save, but also to destroy and cut off, so as no man may say, Why doest thou this?"[141]

"Israel's not rising in arms against king Pharaoh proveth nothing against the power of a free kingdom against a tyrant.
"1. Moses, who wrought miracles destructive to Pharaoh, might pray for vengeance against Pharaoh, God having revealed to Moses that Pharaoh was a reprobate; but may ministers and nobles pray so against king Charles? God forbid.
"2. Pharaoh had not his crown from Israel.
"3. Pharaoh had not sworn to defend Israel, nor became he their king upon condition he should maintain and profess the religion of the God of Israel; therefore Israel could not, as free estates, challenge him in their supreme court of parliament of breach of oath; and upon no terms could they unking Pharaoh: he held not his crown of them.
"4. Pharaoh was never circumcised, nor within the covenant of the God of Israel in profession.
"5. Israel had their lands by the more gift of the king. I hope the king of Britain standeth to Scotland and England in a fourfold contrary relation."[142]

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[140] Rev. Samuel Rutherford *Lex Rex* (Crown Rights Book Company, P.O. Box 386 Dahlonega, Georgia 30533, 2004) Question 26, p.132.
[141] Rev. Samuel Rutherford *Lex Rex* (Crown Rights Book Company, P.O. Box 386 Dahlonega, Georgia 30533, 2004) Question 26, p.132.
[142] Rev. Samuel Rutherford *Lex Rex* (Crown Rights Book Company, P.O. Box 386 Dahlonega, Georgia 30533, 2004) Question 26, p.133.

"He hath written a pamphlet of the inconsistency of monarchy and presbyterian government, consisting of lies, invented calumnies of his church, in which he was baptized. But the truth is, all his arguments prove the inconsistency of monarchs and parliaments, and transform any king into a most absolute tyrant; for which treason he deserveth to suffer as a traitor.

23. Power of the Citizens in America:

"*P. Prelate* (*q*. 1, c. 1). The puritan saith that all power civil is radically and originally seated in the community; he here joineth hands with the Jesuit.
"*Ans*. — In six pages he repeateth the same things, **1. Is this such an heresy, that a colony cast into America by the tyranny of popish prelates, have power to choose their own government?** All Israel was heretical in this; for David could not be their king, though designed and anointed by God, (1 Sam. xvi.,) till the people (2 Sam. v.) put forth in act this power, and made David king in Hebron."[143]

"*P. Prelate*. — They hold sovereign power is primarily and naturally in the multitude, from it derived to the king, immediately from God. The reason of which order is, because we cannot reap the fruits of government unless by compact we submit to some possible and accidental inconveniences.
"*Ans*. 1. — Who saith so the P. Prelate cannot name, — That sovereign power is primarily and naturally in the multitude. Virtually (it may be) sovereignty is in the multitude, but primarily and naturally, as heat is in the fire, light in the sun, I think the P. Prelate dreamed it; no man said it but himself; for what attribute is naturally in a subject, I conceive may directly and naturally be predicated thereof. Now the P. Prelate hath taught as this very natural predication. "Our dreadful and sovereign lord, the multitude, commandeth this and that."
"2. This is no more reason for a monarchy than for a democracy, for we can reap the fruits of no government except we submit to it.

24. On the Accidental Inconveniences the Citizen should Suffer:

[143] Rev. Samuel Rutherford *Lex Rex* (Crown Rights Book Company, P.O. Box 386 Dahlonega, Georgia 30533, 2004) Question 41, p.205.

"3. We must submit in monarchy (saith he) to some possible and accidental inconveniences. Here be soft words, but is subversion of religion, laws, and liberties of church and state. Introducing of popery, Arminianism, of idolatry, altar-worship, the mass, (proved by a learned treatise, "the Canterburian self-conviction," printed 1641, third ed., never answered, couched under the name of inconveniency,) the pardoning of the innocent blood of hundreds of thousand protestants in Ireland, the killing of many thousand nobles, barons, commons, by the hands of papists in arms against the law of the land, the making of England a field of blood, the obtruding of an idolatrous service-book, with armies of men, by sea and land, to block up the kingdom of Scotland, are all these inconveniences only?

"4. Are they only possible and accidental? But make a monarch absolute, as the P. Prelate doth, and tyranny is as necessary and as much intended by a sinful man, inclined to make a god of himself, as it is natural to men to sin, when they are tempted, and to be drunken and giddy with honour and greatness. Witness the kings of Israel and Judah, though *de jure* they were not absolute. Is it accidental to Nero, Julian, to the ten horns that grew out of the woman's head, who sat upon the scarlet coloured beast, to make war against the Lamb and his followers, especially the spirit of Satan being in them?"[144]

"*P. Prelate*. — They infer, 1. They cannot, without violation of a divine ordinance and breach of faith, resume the authority they have placed in the king. 2. It were high sin to rob authority of its essentials. 3. This ordinance is not (illegible Latin) but (illegible Latin) and hath urgent reasons.

"*Ans*. 1. — These nameless authors cannot infer that an oath is broken which is made conditionally; all authority given by the people to the king is conditional, that he use it for the safety of the people; if it be used for their destruction, they break no faith to resume it, for they never made faith

[144] Rev. Samuel Rutherford *Lex Rex* (Crown Rights Book Company, P.O. Box 386 Dahlonega, Georgia 30533, 2004) Question 41, p.209.

to give up their power to the king upon such terms, and so they cannot be said to resume what they never gave."[145]

"3. This ordinance of the people, giving lawful power to a king for the governing of the people in peace and godliness, is God's good pleasure, and hath just reasons and causes. But that the people make over a power to one man, to act all the inconveniences above named, I mean the bloody and destructive inconveniences, hath nothing of God or reason in it."[146]

"*P. Prelate*. — The reasons of this opinion are: — 1. If power sovereign were not in one, he could not have strength enough to act all necessary parts and acts of government. 2. Nor to prevent divisions which attend multitudes, or many endowed with equal power; and the authors say, they must part with their native right entirely for a greater good, and to prevent greater evils. 3. To resume any part of this power, of which the people have totally divested themselves, or to limit it, is to disable sovereignty from government, loose the sinews of all society, &c. *Ans*. 1. — I know none for this opinion, but the P. Prelate himself. The first reason may be made rhyme, but never reason: for though there be not absolute power to good and ill, there may be strength of limited power in abundance in the king, and sufficient for all acts of just government, and the adequate end of government, which is, *salus populi*, the safety of the people. But the royalist will have strength to be a tyrant, and act all the tyrannical and bloody inconveniences of which we spake, an essential part of the power of a king; as if weakness were essential to strength, and a king could not be powerful as a king, to do good, and save and protect, except he had power also as a tyrant to do evil, and to destroy and waste his people. This power is weakness, and no part of the image of the greatness of the King of kings, whom a king representeth.

"2. The second reason condemneth democracy and aristocracy as unlawful, and maketh monarchy the only physic to cure these; as if there were no government an ordinance of God save only absolute monarchy, which indeed is no ordinance of God at

[145] Rev. Samuel Rutherford *Lex Rex* (Crown Rights Book Company, P.O. Box 386 Dahlonega, Georgia 30533, 2004) Question 41, p.209-10.
[146] Rev. Samuel Rutherford *Lex Rex* (Crown Rights Book Company, P.O. Box 386 Dahlonega, Georgia 30533, 2004) Question 41, p.210.

all, but contrary to the nature of a lawful king. (Deut. xvii. 3,)
"3. That people must part with their native right totally to make an absolute monarch, is as. if the whole members of the body would part with their whole nutritive power, to cause the milt to swell, which would be the destruction of the body.
"4. The people cannot divest themselves of power of defensive wars more than they can part with nature, and put themselves in a condition inferior to a slave, who, if his master, who hath power to sell him, invade him unjustly, to take away his life, may oppose violence to unjust violence. And the other consequences are null."[147]

25. Alexander Hamilton *The Federalists Papers* No. 81.

His so-called support for sovereignty of state over the citizen.

"Though it may rather be a digression from the immediate subject of this paper, I shall take occasion to mention here a supposition which has excited some alarm upon very mistaken grounds. It has been suggested that an assignment of the public securities of one State to the citizens of another, would enable them to prosecute that State in the federal courts for the amount of those securities; a suggestion which the following considerations prove to be without foundation.
"It is inherent in the nature of sovereignty not to be amenable to the suit of an individual without *its consent*. This is the general sense, and the general practice of mankind; and the exemption, as one of the attributes of sovereignty, is now enjoyed by the government of every State in the Union. Unless, therefore, there is a surrender of this immunity in the plan of the convention, it will remain with the States, and the danger intimated must be merely ideal. The circumstances which are necessary to produce an alienation of State sovereignty were discussed in considering the article of taxation, and need not be repeated here. A recurrence to the principles there established will satisfy us, that there 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,

[147] Rev. Samuel Rutherford *Lex Rex* (Crown Rights Book Company, P.O. Box 386 Dahlonega, Georgia 30533, 2004) Question 41, p.210.

free from every constraint but that which flows from the obligations of good faith. The contracts between a nation and individuals are only binding on the conscience of the sovereign, and have no pretensions to a compulsive force. They confer no right of action, independent of the sovereign will. To what purpose would it be to authorize suits against States for the debts they owe? How could recoveries be enforced? It is evident, it could not be done without waging war against the contracting State; and to ascribe to the federal courts, by mere implication, and in destruction of a pre-existing right of the State governments, a power which would involve such a consequence, would be altogether forced and unwarrantable."[148]

26. Alexander Hamilton *The Federalists Papers* No. 31.

His point that when clear principle is rejected it is upon something other than reason:

"IN DISQUISITIONS of every kind, there are certain primary truths, or first principles, upon which all subsequent reasonings must depend. These contain an internal evidence which, antecedent to all reflection or combination, commands the assent of the mind. Where it produces not this effect, it must proceed either from some defect or disorder in the organs of perception, or from the influence of some strong interest, or passion, or prejudice."[149]

27. Alexander Hamilton *The Federalists Papers* No. 32.

His reference to taxation above in letter 81 is to letter 32 only herein quoted:

"ALTHOUGH I am of opinion that there would be no real danger of the consequences which seem to be apprehended to the State governments from a power in the Union to control them in the levies of money, because I am persuaded that the sense of the people, the extreme hazard of provoking the resentments of the State governments, and a conviction of the utility and

[148] Alexander Hamilton *The Federalists Papers* ed. Clinton Rossiter (Penguin Books USA Inc. 375 Hudson Street, New York, N.Y. 10014 U.S.A., 1961) No. 81, p 487.
[149] Alexander Hamilton *The Federalists Papers* ed. Clinton Rossiter (Penguin Books USA Inc. 375 Hudson Street, New York, N.Y. 10014 U.S.A., 1961) No. 31, p 193.

necessity of local administrations for local purposes, would be a complete barrier against the oppressive use of such a power; yet I am willing here to allow, in its full extent, the justness of the reasoning which requires that the individual States should possess an independent and uncontrollable authority to raise their own revenues for the supply of their own wants. And making this concession, I affirm that (with the sole exception of duties on imports and exports) they would, under the plan of the convention, retain that authority in the most absolute and unqualified sense; and that an attempt on the part of the national government to abridge them in the exercise of it, would be a violent assumption of power, unwarranted by any article or clause of its Constitution.

An entire consolidation of the States into one complete national sovereignty would imply an entire subordination of the parts; and whatever powers might remain in them, would be altogether dependent on the general will. But as the plan of the convention aims only at a partial union or consolidation, the State governments would clearly retain all the rights of sovereignty which they before had, and which were not, by that act, *exclusively* delegated to the United States. This exclusive delegation, or rather this alienation, of State sovereignty, would only exist in three cases: where the Constitution in express terms granted an exclusive authority to the Union; where it granted in one instance an authority to the Union, and in another prohibited the States from exercising the like authority; and where it granted an authority to the Union, to which a similar authority in the States would be absolutely and totally *contradictory* and *repugnant*."[150]

"It is not, however a mere possibility of inconvenience in the exercise of powers, but an immediate constitutional repugnancy that can by implication alienate and extinguish a pre-existing right of sovereignty."[151]

28. Alexander Hamilton *The Federalists Papers* No. 78:

[150] Alexander Hamilton *The Federalists Papers* ed. Clinton Rossiter (Penguin Books USA Inc. 375 Hudson Street, New York, N.Y. 10014 U.S.A., 1961) No. 32, p 198.
[151] Alexander Hamilton *The Federalists Papers* ed. Clinton Rossiter (Penguin Books USA Inc. 375 Hudson Street, New York, N.Y. 10014 U.S.A., 1961) No. 32, p 200.

His direct discussion of the Citizen in relation to his State in favor of Sovereignty of Citizen over State and Legislature and Courts:

> "There is no position which depends on clearer principles, than that every act of a delegated authority, contrary to the tenor of the commission under which it is exercised, is void. No legislative act, therefore, contrary to the Constitution, can be valid. **To deny this, would be to affirm, that the deputy is greater than his principal; that the servant is above his master**; that the representatives of the people are superior to the people themselves; that men acting by virtue of powers, may do not only what their powers do not authorize, but what they forbid."[152]

> "If it be said that the legislative body are themselves the constitutional judges of their own powers, and that the construction they put upon them is conclusive upon the other departments, it may be answered, that this cannot be the natural presumption, where it is not to be collected from any particular provisions in the Constitution. **It is not otherwise to be supposed, that the Constitution could intend to enable the representatives of the people to substitute their *will* to that of their constituents**. It is far more rational to suppose, that **the courts were designed to be an intermediate body between the people and the legislature**, in order, among other things, **to keep the latter within the limits assigned to their authority**. The interpretation of the laws is the proper and peculiar province of the courts. **A constitution is, in fact, and must be regarded by the judges, as a fundamental law. It therefore belongs to them to ascertain its meaning, as well as the meaning of any particular act proceeding from the legislative body**. If there should happen to be an irreconcilable variance between the two, that which has the superior obligation and validity ought, of course, to be preferred; or, in other words, **the Constitution ought to be preferred to the statute, the intention of the people to the intention of their agents**.
> "Nor does this conclusion by any means suppose a superiority of the judicial to the legislative power. It only supposes that the power of the people is superior to both; and that

[152] Alexander Hamilton *The Federalists Papers* ed. Clinton Rossiter (Penguin Books USA Inc. 375 Hudson Street, New York, N.Y. 10014 U.S.A., 1961) No. 78, p 467.

where the will of the legislature, declared in its statutes, stands in opposition to that of the people, declared in the Constitution, the judges ought to be governed by the latter rather than the former. They ought to regulate their decisions by the fundamental laws, rather than by those which are not fundamental."[153]

"For I agree, that "there is no liberty, if the power of judging be not separated from the legislative and executive powers."[2] And it proves, in the last place, that as liberty can have nothing to fear from the judiciary alone, but would have every thing to fear from its union with either of the other departments; that as all the effects of such a union must ensue from a dependence of the former on the latter, notwithstanding a nominal and apparent separation; that as, from the natural feebleness of the judiciary, it is in continual jeopardy of being overpowered, awed, or influenced by its co-ordinate branches; and that as nothing can contribute so much to its firmness and independence as permanency in office, this quality may therefore be justly regarded as an indispensable ingredient in its constitution, and, in a great measure, as the citadel of the public justice and the public security.

"The complete independence of the courts of justice is peculiarly essential in a limited Constitution. By a limited Constitution, I understand one which contains certain specified exceptions to the legislative authority; such, for instance, as that it shall pass no bills of attainder, no *ex post facto* laws, and the like. Limitations of this kind can be preserved in practice no other way than through the medium of courts of justice, whose duty it must be to declare all acts contrary to the manifest tenor of the Constitution void. Without this, all the reservations of particular rights or privileges would amount to nothing.

"Some perplexity respecting the rights of the courts to pronounce legislative acts void, because contrary to the Constitution, has arisen from an imagination that the doctrine would imply a superiority of the judiciary to the legislative power. It is urged that the authority which can declare the acts of another void, must necessarily be superior to the one whose acts may be declared void. As this

[153] Alexander Hamilton *The Federalists Papers* ed. Clinton Rossiter (Penguin Books USA Inc. 375 Hudson Street, New York, N.Y. 10014 U.S.A., 1961) No. 78, p 467.

doctrine is of great importance in all the American constitutions, a brief discussion of the ground on which it rests cannot be unacceptable."[154]

"But in regard to the interfering acts of a superior and subordinate authority, of an original and derivative power, the nature and reason of the thing indicate the converse of that rule as proper to be followed. They teach us that the prior act of a superior ought to be preferred to the subsequent act of an inferior and subordinate authority; and that accordingly, whenever a particular statute contravenes the Constitution, it will be the duty of the judicial tribunals to adhere to the latter and disregard the former.

"It can be of no weight to say that the courts, on the pretense of a repugnancy, may substitute their own pleasure to the constitutional intentions of the legislature. This might as well happen in the case of two contradictory statutes; or it might as well happen in every adjudication upon any single statute. The courts must declare the sense of the law; and if they should be disposed to exercise WILL instead of JUDGMENT, the consequence would equally be the substitution of their pleasure to that of the legislative body. The observation, if it prove any thing, would prove that there ought to be no judges distinct from that body.

"If, then, the courts of justice are to be considered as the bulwarks of a limited Constitution against legislative encroachments, this consideration will afford a strong argument for the permanent tenure of judicial offices, since nothing will contribute so much as this to that independent spirit in the judges which must be essential to the faithful performance of so arduous a duty.

"This independence of the judges is equally requisite to guard the Constitution and the rights of individuals from the effects of those ill humors, which the arts of designing men, or the influence of particular conjunctures, sometimes disseminate among the people themselves, and which, though they speedily give place to better information, and more deliberate reflection, have a tendency, in the meantime, to occasion dangerous innovations in the government, and serious oppressions of the minor party in the community. Though I trust the friends of the proposed Constitution will never

[154] Alexander Hamilton *The Federalists Papers* ed. Clinton Rossiter (Penguin Books USA Inc. 375 Hudson Street, New York, N.Y. 10014 U.S.A., 1961) No. 78, p 466.

concur with its enemies,[3] in questioning that fundamental principle of republican government, which admits the right of the people to alter or abolish the established Constitution, whenever they find it inconsistent with their happiness, yet it is not to be inferred from this principle, that the representatives of the people, whenever a momentary inclination happens to lay hold of a majority of their constituents, incompatible with the provisions in the existing Constitution, would, on that account, be justifiable in a violation of those provisions; or that the courts would be under a greater obligation to connive at infractions in this shape, than when they had proceeded wholly from the cabals of the representative body. Until the people have, by some solemn and authoritative act, annulled or changed the established form, it is binding upon themselves collectively, as well as individually; and no presumption, or even knowledge, of their sentiments, can warrant their representatives in a departure from it, prior to such an act. But it is easy to see, that it would require an uncommon portion of fortitude in the judges to do their duty as faithful guardians of the Constitution, where legislative invasions of it had been instigated by the major voice of the community."[155]

29. Alexander Hamilton *The Federalists Papers* No. 84:

A direct discussion showing that the silence of the Constitution pertains to all the rights and Sovereignty of the Citizen over the State.

"It has been several times truly remarked that bills of rights are, in their origin, stipulations between kings and their subjects, abridgements of prerogative in favor of privilege, reservations of rights not surrendered to the prince. Such was MAGNA CHARTA, obtained by the barons, sword in hand, from King John. Such were the subsequent confirmations of that charter by succeeding princes. Such was the *Petition of Right* assented to by Charles I., in the beginning of his reign. Such, also, was the Declaration of Right presented by the Lords and Commons to the Prince of Orange in 1688, and afterwards thrown into the form of an act of parliament

[155] Alexander Hamilton *The Federalists Papers* ed. Clinton Rossiter (Penguin Books USA Inc. 375 Hudson Street, New York, N.Y. 10014 U.S.A., 1961) No. 78, p 468-70.

called the Bill of Rights. It is evident, therefore, that, according to their primitive signification, they have no application to constitutions professedly founded upon the power of the people, and executed by their immediate representatives and servants. Here, in strictness, the people surrender nothing; and as they retain every thing they have no need of particular reservations. "WE, THE PEOPLE of the United States, to secure the blessings of liberty to ourselves and our posterity, do *ordain* and *establish* this Constitution for the United States of America." Here is a better recognition of popular rights, than volumes of those aphorisms which make the principal figure in several of our State bills of rights, and which would sound much better in a treatise of ethics than in a constitution of government."[156]

30. A short history of the Texas Tort Claims Act of 1967:

By R. Michael Northrup *Sovereign Immunity: Why it's Good to be King*

In 1967, the House of Representatives passed H.B. 728, which waived governmental immunity completely. H.J. of Tex., 60th Leg., R.S. 1271 (1967), *cited in Dallas County Mental Health & Mental Retardation v. Bossley*, 968 S.W.2d 339, 341 (Tex. 1998). The bill died on a tie vote in the Senate Committee on Jurisprudence. In 1969, bills were again introduced that would waive immunity in most circumstances. One bill was passed, H.B. 117, which called for a more limited waiver of immunity. *Bossley*, 968 S.W.2d at 342. However, Governor Preston Smith vetoed it, explaining that he believed it was time to reconsider the doctrine of absolute governmental immunity, but he was concerned about imposing such an onerous burden on the taxpayer. *Id.* In response, a bill was passed with a more restricted waiver of immunity. *Id.* This bill is the Texas Tort Claims Act. This bill waives the doctrine of sovereign immunity only under limited circumstances. *Texas Dept. of Mental Health & Mental Retardation v. Petty*, 848 S.W.2d 680, 686 (Tex. 1992) (Cornyn, J., dissenting).

Since 1969, the Tort Claims Act has been amended three times: once to waive sovereign immunity for property damage proximately caused by a state officer or employee arising from the operation or use of a motor-driven vehicle or motor driven equipment; once to raise the liability limits; and once to codify the Tort Claims Act into the Civil Practice and Remedies Code. *Petty*, 848 S.W.2d at 687 (Cornyn, J., dissenting).

[156] Alexander Hamilton *The Federalists Papers* ed. Clinton Rossiter (Penguin Books USA Inc. 375 Hudson Street, New York, N.Y. 10014 U.S.A., 1961) No. 84, p 512-13.

31. The Trial Court’s Order Dismissing the Suit (Defendants’ Plea and Supplemental Plea to the Jurisdiction).

32. The Trial Court’s Cover Letter Accompanying the Order Mailed to the Parties.

33. Texas Tort Claims Act:

34. Republic of Texas Declaration of Independence:

35. Republic of Texas Constitution of 1836: