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Courts and Collectivities

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I. Introduction

The relationship between courts and collectivities[1] creates significant problems in a society that values liberty and justice. Formulations advanced by Alexander Hamilton suggest that justice cannot be achieved when sanctions are imposed on collectivities. Yet any large modern society with a sophisticated economy depends upon elaborate interorganizational arrangements in which collectivities transact with one another. Because interacting collectivities are necessary to modern life, two questions arise. First, when is it appropriate to sanction collectivities? And second, when is it necessary to unravel the collectivities' networks of authority relationships and establish individual accountability?

This essay investigates these questions without presuming to fully understand the nature of the problem or hoping to resolve it. Hopefully, however, this essay will clarify some aspects of the problem. To this end, parts II and III consider Hamilton's formulations and the implications that follow from sanctioning collectivities. Part IV then addresses the jurisprudential questions that arise from the application of Hamilton's analysis in a federal system of government. In conclusion, part V draws some inferences for courts and collectivities from the analysis presented in part IV.

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1. Reference to collectivities is not confined to governments, but also includes any circumstance in which individuals arrange to make binding joint decisions and then act with reference to those decisions.

II. HAMILTON'S FORMULATIONS

The American constitutional system was designed with reference to two basic propositions simply stated by Montesquieu. The first appears in the opening sentence of Book IX of *The Spirit of the Laws*:[2] "If a republic is small it is destroyed by foreign force; if it be large it is ruined by internal imperfections."[3] The second appears in Book XI, where Montesquieu asserts that the embodiment of liberty requires that "power should be a check to power."[4]

The exposure of small republics to aggression by larger foreign forces requires no explanation in light of human history. The imperfection of large republics, especially democratic republics, requires an examination of the strong oligarchical tendencies inherent in all large democratic assemblies.

The physical characteristics of human beings permit us to listen to and understand only one speaker at a time. This limitation requires that all democratic assemblies be organized with a leadership that directs their proceedings and controls their agenda. The larger the assembly, the more dominant the leadership and the more attenuated the voice of each individual member of the deliberative assembly.[5]

If both small and large republics can be expected to fail, albeit for different reasons, the viability of democratic societies in a world plagued by warfare is not very favorable. Montesquieu proposed confederation as a way of resolving this problem.[6] Small republics might confederate together to aggregate sufficient defensive capabilities to withstand the military force of powerful neighbors. Further, by maintaining the constitutional viability of small republics, the oligarchical tendencies inherent in large republics might be avoided.

Preserving the viability of small republics in a larger confederation requires that power be used to check power. This is a way of interposing limits upon the exercise of governmental pre-

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2. C. MONTESQUIEU, THE SPIRIT OF THE LAWS (1949).

3. *Id.* at 126.

4. *Id.* at 150.

5. The rudiments for such an analysis are stated by Madison in *The Federalist* numbers 55 and 58. *See* THE FEDERALIST Nos. 55, 58 (J. Madison) (E. Earle ed. n.d.). This is also developed in chapter five of *The Political Theory of a Compound Republic. See* V. OSTROM, THE POLITICAL THEORY OF A COMPOUND REPUBLIC: DESIGNING THE AMERICAN EXPERIMENT (Rev. ed. 1987).

6. C. MONTESQUIEU, *supra* note 2, at 126-27.

rogatives. Unless such limits exist, Montesquieu anticipates that "every man vested with power is apt to abuse it, and to carry his authority as far as it will go."[7]

In *Federalist* 51, James Madison suggests that "[t]his policy of supplying, by opposite and rival interests [using power to check power], the defect of better motives, might be traced through the whole system of human affairs, private as well as public."[8] Madison further asserts that "[t]hese inventions of prudence cannot be less requisite in the distribution of the supreme powers of the State."[9]

The American experiment with confederation under the Articles of Confederation failed, as evidenced by the calling of the Constitutional Convention of 1787. Hamilton's analysis of the grounds for failure turned upon two arguments. One is a linguistic argument; the other is a hypothetical argument which impacts the conduct of public affairs.

A. Hamilton's Linguistic Argument

The linguistic argument turns upon the meaning of "government," which Hamilton associates with "the power of making laws."[10] Hamilton then elaborates upon what that implies:

> It is essential to the idea of a law, that it be attended with a sanction; or, in other words, a penalty or punishment for disobedience. If there be no penalty annexed to disobedience, the resolutions or commands which pretend to be laws will, in fact, amount to nothing more than advice or recommendation.[11]

When such a concept of government is applied to the traditional conception of a confederacy, where the "government" of a confederation adopts resolutions that depend upon the authority of constituent republics to enforce, that "government" cannot meet the minimal defining criterion for being a government. Before a government can be said to exist, it must be capable of enforcing its resolutions as effective laws. For this reason, Hamilton suggests that a confederation that cannot enforce its resolutions as binding laws does not "deserve the name of govern-

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7. *Id.* at 150.
8. THE FEDERALIST No. 51, at 337 (J. Madison) (E. Earle ed. n.d.).
9. *Id.* at 337-38.
10. THE FEDERALIST No. 15, at 91 (A. Hamilton) (E. Earle ed. n.d.).
11. *Id.* at 91.

ment."[12] Thus, Hamilton asserts that language is used incoherently when presuming that sovereign governments may govern other sovereign governments.

Those who argued that the states were sovereign, while acknowledging the weaknesses inherent in the confederate government, put themselves into a basic dilemma:

> They seem still to aim at things repugnant and irreconcilable; at an augmentation of federal authority, without a diminution of State authority; at sovereignty in the Union, and complete independence in the members. They still, in fine, seem to cherish with blind devotion the political monster of an *imperium in imperio*."[13]

B. Hamilton's Hypothetical Argument

Hamilton's hypothetical argument turns upon the use of two different ways of applying sanctions to enforce laws. He refers to one as the "agency of the courts and ministers of justice."[14] The other he refers to as the use of "military force" or the "COERCION of arms." Hamilton also associates these methods with the application of sanctions to collectivities: "The first kind can evidently apply only to men [individuals]; the last kind must of necessity, be employed against bodies politic, or communities, or States."[15]

Drawing upon these distinctions, Hamilton argues that justice cannot be achieved when the coercion of arms is applied to collectivities. The requirements of justice can only be met when proceedings in courts of law are addressed to the actions of individuals.[16]

For Hamilton, the critical consideration was the nexus of coercive authority in a federal system of government to the standing of individuals. This nexus required an alteration in the "first principles and main pillars of the fabric"[17] of government in order to conceptualize government in a federal system as an alternative to confederation. The new design for a government

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12. *Id.* at 92.
13. *Id.* at 89 (emphasis in original).
14. *Id.* at 91.
15. *Id.*
16. *See id.* at 91-92.
17. *Id.* at 89.

of the United States was required to meet the following conditions:

> It must carry its agency to the persons of the citizens. It must stand in need of no intermediate legislations; but must itself be empowered to employ the arm of the ordinary magistrate to execute its own resolutions. The majesty of the national authority must be manifested through the medium of the courts of justice. The government of the Union, like that of each State, must be able to address itself immediately to the hopes and fears of individuals; and to attract to its support those passions which have the strongest influence upon the human heart. It must, in short, possess all the means, and have a right to resort to all the methods, of executing the powers with which it is entrusted, that are possessed and exercised by the governments of the particular States.[18]

Hamilton can be viewed as asserting a basic principle in the organization of government: The basic constituent unit is the individual, "the persons of the citizens," and, if justice is to be achieved, the application of sanctions must apply to individuals. Hamilton's focus was upon a constitutionally limited federal system of government exercising authority concurrently with state governments. Hamilton associates "the agency of the courts and ministers of justice" with the application of sanctions that can evidently "apply only to men."[19] Unfortunately, he does not develop an argument to further address the relationship between courts and collectivities. His focus was upon a limited national government in a federal system of government. Therefore, this essay attempts to extend the implications of Hamilton's arguments.

III. An Extension of Hamilton's Arguments

Hamilton's assertion that the agency of courts can evidently apply only to "men" (i.e., to the individuals in their standing as persons or as citizens) must be extended to analyze the result of sanctioning collectivities. Again, reference to collectivities is not confined to governments, but also may apply to any situation in which individuals arrange to make binding joint decisions and then act with reference to those decisions. Under such circumstances, arrangements exist under which agents can make deci-

18. The Federalist, No. 16, at 98-99 (A. Hamilton) (E. Earle ed. n.d.).
19. The Federalist, No. 15, at 91 (A. Hamilton) (E. Earle ed. n.d.).

sions that are binding upon principals. The question thus arises: What limits apply?

If we take the hypothetical case of a private corporation, we might pursue the implication of what would happen if the corporation were to violate a law subject to criminal sanctions. Obviously, a corporation cannot be arrested or imprisoned. Arrest and imprisonment apply only to individuals.

A corporation, however, can be fined. Alternatively, the assets of a corporation might be seized by public officials. When a fine is discharged by drawing upon corporate assets, who ultimately bears the burden for the payment of the fine? This is established by determining who contributes to and has claims upon the revenues or assets of the corporation. In the case of an electrical utility functioning as a monopoly in its service area, the fine's burden most likely falls either upon customers or shareholders or a combination of the two. The customers or shareholders are likely to be innocent bystanders not culpable for the criminal offense. Thus, when penalties are imposed upon innocent bystanders, justice cannot be achieved. However, if stockholders are assumed to be responsible in a political sense, and a fine against the corporation is assumed to be appropriate, then the stockholders or their representatives are presumed to be competent to judge those culpable for the offense. The burden of law enforcement and due process is then shifted from public authorities to private individuals. Such arrangements are not consistent with basic principles of criminal law.

The existence of a corporation as a collectivity may carry the corollary implication that corporate liability can serve as a shield to protect individuals culpable of wrong-doing. The assignment of criminal liability to a corporation, if not accompanied by the indictment of individuals for criminal offenses, can then both protect those culpable of wrong-doing and impose burdens for discharging penalties upon innocent bystanders.

This hypothetical example can be extended to a public corporation such as a school district where *de facto* segregation exists and such a condition is presumed to be a violation of the fourteenth amendment which prohibits any state from denying "any persons within its jurisdiction the equal protection of the laws."[20] If *de facto* segregation were taken as sufficient legal grounds for providing a judicial remedy, courts would fail to es-

20. U.S. CONST. amend XIV, § 1.

tablish the essential link between the *de facto* circumstance and any breach of law for which judicial remedies may be available. In addition, the parties before the court may not be those who have it within their power to provide a remedy appropriate to the situation.

Proceedings to secure remedies against school districts for *de facto* segregation may fail to identify the problems that cause segregation in neighborhood schools. Statistical evidence alone about the racial composition of students attending a school does not establish a nexus between the decisions of the governing school board and segregation. For example, the ethnic composition of a school district generally is determined by the ethnic composition of the neighborhood. In turn, the ethnic composition of neighborhoods is determined by decisions made in real estate markets. Arrangements approximating cartels may exist due to the manner in which developers and realtors operate with reference to realty boards and land-use planning authorities. Racial or ethnic segregation may derive from the voluntary choices of those seeking housing. If cultural differences exist among blacks and non-blacks, apart from the genetic heritage of race, segregation can occur under conditions of lawful choice. French-Canadians, for example, who are proud of their French heritage, often prefer to reside in French-speaking communities and have access to French-language schools.

To presume that racial balance can be established by judicial decree without a judicial inquiry into the *de jure* grounds for segregation establishes the grounds for arbitrary decisions. It is hard to imagine how justice can be achieved when the problem that causes segregation is not properly identified. Therefore, remedies directed to the school district will impinge upon individuals within the district's boundaries and impose substantial costs upon innocent bystanders. If anyone has been culpable of wrong-doing, the courts' failure to properly identify the causes of segregation coupled with the presumption of corporate liability may serve as shields to protect wrongdoers. Further, court decrees can easily intrude upon the legitimate exercise of a school district's authority and substitute judicial authority for the constitutional authority of the state, the community of people organized as a school corporation, the legislative authority of the district's governing board, the executive authority of school administrative officials, and the authority of teachers to discharge their educational responsibilities most effectively.

The conclusion that justice cannot be achieved when sanctions are applied to collectivities and that governments cannot govern governments may be addressing a problem of universal significance in human societies. The application of collective sanctions upon nation-states for what are alleged to be breaches of international law appears to be consistent with Hamilton's arguments. Following this conclusion, the application of sanctions to families as collectivities in Imperial China indicates why these sanctions were inconsistent with Western standards of justice. Further, the Soviet doctrine of collective liability of citizens for what transpires in the workplace and in the community is inconsistent with Hamilton's requirements of both freedom and justice.

In his assessment of the failure of confederation, Hamilton variously observed that "the novel refinements of an *erroneous* theory"[21] became "the cause of incurable disorder and imbecility in the government."[22] We might anticipate then that it is entirely possible for courts to do the same: engage in novel refinements of erroneous theories that become the cause of incurable disorders and imbecility in government. The improper application of sanctions upon collectivities is likely to be seriously amplified by the improper identification of problems. Such circumstances may in turn contribute to conditions where the character of a people, quoting Tocqueville, "presents so strange a mixture of passions, ignorance and erroneous notions that they are unable to discern the causes of their own wretchedness and they fall a sacrifice to ills of which they are ignorant."[23] If we are to avoid such "wretchedness," we must address the jurisprudential questions involved and consider how these questions might be resolved within our federal system of government.

IV. JURISPRUDENTIAL QUESTIONS

To resolve the dilemma in which both large and small republics can be expected to fail, the American federal system of governance presumes the existence of concurrent and overlapping units of government in which authority is distributed in such a way that power may be used to check power. This structure can be extended to include all forms of voluntary associa-

21. THE FEDERALIST No. 9, at 53 (A. Hamilton) (E. Earle ed. n.d.) (emphasis added).
22. *Id.* at 52.
23. A. TOCQUEVILLE, DEMOCRACY IN AMERICA 231 (P. Bradley ed. 1945).

tions and private corporations that function as collectivities capable of taking joint action on behalf of their constituents. Reliance upon the principle of "opposite and rival interests" to constitute "the whole system of human affairs"[24] implies that patterns of interorganizational and intergovernmental relationships pervade American society. How are we to address the proper ordering of these relationships?

A logical interpretation of Hamilton's formulation implies that the networks of these relationships need to be based upon individuals as principals and as agents acting in relation to one another in accordance with the rules of each collectivity. Individual responsibility implies that individuals have access to methods of normative inquiry and to standards of moral judgment distinguishing that which is prohibited from that which is permitted or required in a system of rule-ordered relationships. Such methods of inquiry and standards of judgment are necessary to establish the requirements of justice and liberty. To be one's own governor, to be a responsible actor in a democratic system of government, requires knowledgeable grounds for rendering moral judgments.

Furthermore, the doctrine of separation of powers implies that each organization employs multiple agents who independently exercise limited agency relationships on behalf of the particular collectivity. Such a system requires careful attention to design characteristics, operating principles, standards of moral judgment and the social dilemmas that confound human relationships. Only then can people diagnose the causes of their wretchedness and explore appropriate remedies.[25]

For example, the principle that the institutions of government reach to individuals poses a potential threat to the autonomous standing of multiple units of government having concurrent jurisdiction with reference to the same land and people. This threat can be illustrated by referring to the constitutional mandate that no state deny any person within its jurisdiction "the equal protection of the laws." Does equal protection of the laws imply that a uniform rule of law must apply to all state and local instrumentalities of government created in accordance with state constitutional and statutory provisions? Or can the condi-

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24. THE FEDERALIST No. 51, at 337 (J. Madison) (E. Earle ed. n.d.).

25. The problem of moral judgment and normative inquiry is seriously neglected in *The Federalist*. For clarification of this problem, see Ostrom, *Religion and the Constitution of the American Political System*, 39 EMORY L.J. 165 (1990).

tion of equal protection of the laws be met by uniform standards within each state but which allow for variable standards among states? Or can each instrumentality of state and local government make provision for equal protection of the laws within its jurisdiction and allow for variable standards among all different jurisdictions?

These questions cannot be answered in a coherent way without referring to the conceptual-computational logic that makes up a federal system of government. To presume that the fourteenth amendment's language regarding equal protection of the laws applies uniformly across all states and local instrumentalities of government places federalism at risk: the autonomy of state and local instrumentalities of government are subordinated to uniform national standards. To presume that equal protection requirements apply uniformly within each state places the constitutional authority of the citizens of each state at risk. States' choices would be confined to the constitution of a unitary republic within each state. Where states are themselves constituted as federal republics, the conceptual-computational logic of a federal system of government would imply that equal protection requirements apply to each jurisdiction with variability permitted across jurisdictions.

For example, when a rule of "one-man; one-vote" is used uniformly to apportion representatives to legislative bodies in each state and in each local instrumentality of government, principles of federalism are placed at risk. Uniform rules are presumed to apply to all states and localities, and national instrumentalities of government are presumed to be competent to make those decisions. The people of the states are, for example, denied constitutional authority to rely upon the apportionment rules used to constitute the United States Senate. Those rules offend the "one-man; one-vote" formulation.

The "one-man; one-vote" rule has its place in a conception that pertains to majority rule as legitimate grounds for collective action in a democratic society. The analysis offered by Hamilton and Madison in explaining the principles of the American system of government explicitly rejects majority rule as a sufficient basis for taking collective action. Instead, majority rule was presumed to allow for majority tyranny. It was for this reason that the American system of government had recourse to "auxiliary precautions" to complement majority rule. The complementary arrangements have reference to limits upon the authority of the

national government plus veto capabilities afforded by a bicameral legislature, an independent executive, and an independent judiciary.

Hamilton gives explicit attention to the power given to the federal courts by the Constitution and their relationship with the exercise of legislative authority. The courts, Hamilton argues, are obliged to adjudicate a particular case and hold an act of a legislature "contrary to the manifest tenor of the Constitution void. Without this, all the reservations of particular rights and privileges would amount to nothing."[26] Hamilton elaborates further:

> 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 [i.e., agent] 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.[27]

The basic principle inherent in a general theory of limited government—"every act of a delegated authority, contrary to the tenor of the commission under which it is exercised is void"—presumably applies to all exercises of constitutional authority, including the exercise of judicial authority. If this is not the case, then "men acting by virtue of powers, may do not only what their powers do not authorize, but what they forbid."[28] When unauthorized authority is exercised, constitutional government is abandoned. Yet the exercise of unauthorized authority can readily occur because, as Montesquieu asserts, "every man invested with power is apt to abuse it, and to carry his authority as far as it will go."[29] This principle is applicable to men of goodwill who extend their authority to accomplish what they conceive to be in the public good.

In the racial segregation cases, for example, the Warren Court took three critical steps which overstepped its authority. First, the Court presumed that *de facto* segregation was wrong-

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26. THE FEDERALIST No. 78, at 505 (A. Hamilton) (E. Earle ed. n.d.).
27. *Id.* at 505-06.
28. *Id.* at 506.
29. C. MONTESQUIEU, *supra* note 2, at 150.

ful. Second, the Court presumed that judicial remedies were available to right those wrongs. And third, the Court presumed that these remedies could be applied to collectivities. If these presumptions are contrary to the tenor of the constitutional exercise of judicial authority, we need to examine the consequences that follow from them.

As indicated earlier, the presumption that *de facto* segregation is a wrong does not provide an appropriate foundation for judicial intervention because this presumption fails to account for the reasons segregation exists. Without an adequate basis upon which to make a factual assessment of the problem, no appropriate foundation for judicial intervention exists.

The presumption that a court may remedy a school district's improper exercise of authority means that the court has gone beyond merely holding the school board's actions to be void. When a presumed exercise of authority is void, then remedies necessary to correct the purported exercise of authority require judicial inquiry into the school board's acts to establish the grounds upon which a remedy may be fashioned. The individuals involved may potentially be subject to civil damages, criminal liability, or an equitable remedy. A critical question becomes whether remedies can be applied to collectivities without having determined the inchoate rights/powers and duties/liabilities of the diverse individuals associated with the collectivity.

By applying a legal or equitable remedy to a public corporation, the court is substituting its authority for the authority of those who constitute the public corporation. For example, prescribing a busing program intrudes upon the legislative and executive authorities who operate a school district and who assign students to particular schools and classrooms. Prescribing rules for the assignment of teaching personnel to schools and classrooms has similar effects. Yet courts have taken it upon themselves to specify rules defining the way that educational enterprises are conducted without policy guidance from the citizens who are the constituents of school districts. Because court decrees are enforceable by contempt proceedings, federal district court judges are engaged in the exercise of both legislative and executive authority subject only to appellate court review.

Judicial remedies and judicial processes are thus being substituted for the exercise of constitutional, electoral, legislative, and executive authority. Because the application of these judicial decrees applies to school districts as collectivities, the de-

crees impose burdens upon innocent bystanders while possibly shielding wrongdoers, if indeed a wrong has been committed.

Similarly, unsupported judicial decrees have been extended to a wide variety of state and local public corporations and agencies responsible for such things as prisons, mental institutions, hospitals, public housing, and public transportation. The remedies are being extended to claimants who allege discrimination in relation to gender, to sexual relationships, and to a variety of different attributes.

Even if one could presume that *de facto* segregation were wrongful and that judicial remedies could effectively right that wrong, application of these remedies to collectivities seems a doubtful proposition. As discussed above, because sanctions against collectivities tend to harm innocent bystanders while simultaneously protecting actual wrongdoers, courts should recognize Hamilton's assertion that sanctions can be applied effectively only to individuals. Yet because courts have presumed otherwise, we can expect further novel refinements in the relationship between courts and collectivities. If a public or private corporation can be alleged to have violated laws for which criminal sanctions can lawfully be imposed, it is but one more step to allege that the members of such a corporation are engaged in a conspiracy to violate the law. Anti-racketeering legislation now authorizes seizure of the property of those engaged in a conspiracy to violate the law. Because seizure of property is a threat to the viability of any enterprise, such legislation has given prosecutors a powerful tool for plea bargaining, especially in securities cases. Members of a corporation may be coerced to accept a guilty plea for some "lesser" offense as a condition to forestall the seizure of assets and the destruction of an enterprise as a going concern.

The lack of judicial concern for the difficulty of sanctioning collectivities may represent a new frontier in the unfolding relationships between courts and collectivities. Compounding this lack of concern with the judiciary's apparent inability to fashion remedies irrespective of any wrongdoing on the part of the constituent members of a collectivity, we are left with rich opportunities for judges to overstep their authority.

V. Conclusion

Serious jurisprudential questions arise in the relationships between courts and collectivities. Hamilton's concern about ap-

plying sanctions to individuals in a federal system of government raises a critical issue. Applying sanctions to collectivities burdens innocent bystanders and may shield those who are culpable of wrong-doing. The grant of authority inherent in a corporate charter can give a corporate officer or employee power, when acting in good faith and within the scope of the agent's authority, to take action for which a corporation is accountable. In reliance on this investiture of authority to the agents of collectivities, elaborate networks of transactions, both in market economies and public economies, are conducted through implicit and explicit contractual relationships among firms and among public agencies and units of government. A federal system of government necessarily implies the emergence of interorganizational and intergovernmental relationships among its constituent members.

The question remains, however, whether a collectivity's agent can commit an unlawful offense for which a corporation is liable. Or is there a breakdown in semantics when referring to an agent "acting in good faith and within the scope of an agent's authority," and "committing an unlawful offense"? Is not committing an unlawful offense beyond the scope of an agent's lawful authority?

The concept of a "civil penalty," then, seems to confuse rather than clarify the issue: the term is an oxymoron. If a corporate charter contains provisions for assuming liability for the unlawful conduct of its agents, might those provisions be used as evidence to indicate that the corporation is engaged in a criminal conspiracy, and was created with the intention to violate the law? This dilemma cannot be resolved unless we can address the proper use of language. The problem is deeply imbedded in conceptual, linguistic, and epistemological considerations.

Various statutes and decisions pertaining to legal immunity presumably address this issue. However, we immediately confront the whole doctrine of "sovereign immunity." In the traditional theory of sovereignty, the sovereign is presumed to be the source of law, above the law, and not legally accountable. If people in a democratic society are presumed to be sovereign and exercise their basic legislative prerogatives by constitutional choice, establishing the terms and conditions of government through multiple and limited agency relationships, then what types of legal immunities are to be properly applied to those authority relationships? The general rule of sovereign immunity

would seem to be inappropriate, if applied to those who exercise agency relationships under limited constitutional authority.

As citizens in a democratic society which relies upon principles of constitutional government, we are required to think through the terms and conditions that apply to every delegation of public authority so as to establish proper limits to the exercise of that authority. An unavoidable conclusion is that the Warren Court, despite the best of intentions, extended its authority by going beyond appropriate limits. As a consequence, the judicial process has had to swallow untenable presumptions in the name of *stare decisis*, and is itself contributing to serious problems of institutional failure in American society, to inappropriate methods of analysis, and to what Hamilton referred to as imbecility in government.

This imbecility in government is by no means confined to the judiciary. The disorder pervades American society. Hopefully, discussions will contribute to further clarification of the issues associated with corporate liability on the part of all types of collectivities, private as well as public. Perhaps these discussions might also help to clarify how we might better analyze imbecility in government as a source of our current malaise.

Some portion of this malaise derives from a presumption that words contain their own meaning. Phrases like "equal protection of the law" and words like "sovereignty" cannot be construed independently from the design and organization of our system of government. To construe the phrase "equal protection of the laws" as applying uniformly across all public jurisdictions in the United States places federalism at risk. If, for example, Justice Blackmun's interpretation of the meaning of "federalism" in *Garcia v. San Antonio Metropolitan Transit Authority*[30] were to prevail, the eclipse of federalism would already have occurred. If Montesquieu's conjecture is valid, then we can expect that the very large, extended and unitary republic, which is currently being fashioned and called the United States of America, will be "ruined by internal imperfections."

If the term "sovereignty" is to be construed as the right to make laws as is implied by Hamilton's conception of the term "government," a system of government organized on the basis of a general theory of limited constitutions suggests a different meaning of "sovereignty" than would apply to a government or-

30. 469 U.S. 528 (1985).

ganized under a single source of ultimate authority. To look at words on paper and engage in a form of free association in construing the meaning of those words, or to refer to standard dictionaries, is not a valid way to conduct the affairs of a government in a democratic society. Construing meaning in this way is an invitation to arbitrariness.

A system of government based upon the principle of using power to check power relies upon fundamentally different conceptions of governing processes than one that presumes dominance by a single center of ultimate authority. If dominance is presumed to be the basic pattern of order, then using power to check power is an illusion. On the other hand, if using power to check power presumes that the diverse processes of governance occur under conditions where contestation generates information, yields alternative suggestions about how to address problems, and facilitates a search for resolutions, then situations characteristic of the tragedy of the commons can be transformed into mutually productive communities of relationships. The generation of information, the clarification of suggestions, and the emergence of innovations are ways of facilitating inquiry and resolving problems in a society that cannot be achieved when fully integrated systems of dominance prevail.

We are dealing with fundamentally different ways of conceptualizing political orders. This implies different ways of thinking and relating to one another in human societies. These factors are at the root of how commissions to discharge public authority are to be carried out. Unless students of jurisprudence and political science can address these issues, "the refinements of erroneous theory" need not be confined to "imbecility in the government" but may imply imbecility of a wider order.

When a system of government is reformed, drawing upon principles that are contrary to those used to design and create the system, what we call reform is not reform, but rather a reconstitution of the system of order itself. To seek to eliminate overlapping jurisdictions and fragmentation of authority in a perennial reform agenda puts both federalism and constitutional government at risk. Eliminating all overlapping jurisdictions and fragmented authority implies autocracy. When our use of language degenerates to a point where democracy implies autocracy, imbecility has become pervasive in American society.