THE INEVITABILITY OF FEDERAL SOVEREIGN IMMUNITY

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I. INTRODUCTION

OUR nation was founded more than two hundred years ago through a popular revolution against a sovereign monarch. Having forsaken reverence for the British Crown, “[u]nder our system the people, who are there called subjects, are sovereign.”1 In the past half-century, avenues for litigation have expanded, along with more frequent invocation of rights as claims in court—constitutional, statutory, and common-law. For better or worse, in the present day, individual sovereignty appears to be the cultural byword, celebrating unconstrained personal autonomy. Thus, the proposition that the government may be excused from having to answer to individuals in court may seem antithetical to most Americans.

And yet few doctrines are more solidly anchored in Supreme Court precedent than that the United States government may not be sued without its consent.2 Indeed, even when the federal government has granted permission by statute, courts (too) often restore a large measure of exemption from liability by declaring that a waiver of sovereign immunity must be construed strictly and narrowly in favor of the government.3

Before the Supreme Court and in the Congress, the debate rages on about whether the states should be regarded as retaining immunity from suit even when litigation is authorized by federal legislation. But the premise that the federal government is not subject to suit without its consent occasions little meaningful dissent in public life today. To be sure, the source and legitimacy of sovereign immunity anywhere on this continent continues to attract thoughtful examination by legal historians and academic theorists, including those participating in this symposium. But those with the power to translate theory into law—the members of the

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2. See United States v. Mitchell, 463 U.S. 206, 212 (1983) (“It is axiomatic that the United States may not be sued without its consent and that the existence of consent is a prerequisite for jurisdiction.”); Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 411-12 (1821) (holding principle that United States may not be sued without its consent as “universally received opinion”).
federal judiciary and the Congress—regard federal sovereign immunity as a given baseline. (However, the circumstances under which that immunity should be surrendered and the manner in which waiver statutes should be interpreted continue to be disputed and the law continues to evolve.) As Laurence Tribe says, “[t]he doctrine of sovereign immunity is in no danger of falling out of official favor any time soon.”

Why is that so?

In this symposium Article, I submit that federal sovereign immunity not only does not contradict popular sovereignty, but enhances democratic rule and fortifies the separation of powers between the political and judicial branches. Properly understood, and given the longstanding acceptance of judicial restraint of ongoing government conduct that truly contravenes constitutional directives, federal sovereign immunity fits comfortably with popular sovereignty, divided and diminished government power, and political accountability for public officers.

As I have written previously, “sovereign immunity—or something like it—may have been an inevitable legal development, because open-ended and unconstrained access to the courts by those who object to governmental policies or actions could undermine effective governance by the people through an electoral majority.” Although this argument has a weaker purchase when the government’s actions are challenged as breaching our nation’s foundational charter, the Supreme Court long since has affirmed a constitutional exception to federal sovereign immunity. And, in any event, Congress acted decades ago to waive the sovereign immunity of the United States by statute for challenges to government actions contrary to the Constitution.

Accordingly, for any continuing struggle about federal sovereign immunity, the battleground lies on the field of common-law and non-constitutional legal claims. In particular, as I will illustrate with a leading and historically-significant case, the doctrine of sovereign immunity prevents the judiciary from abusing tort law concepts like negligence and strict liability to substitute its judgment for the policy choices made by the political branches. When people do suffer significant harm as a result of policy choices made within constitutional bounds by the government, the rem-

5. See infra Part II.A.
6. See infra Part II.B.
10. See Dalehite v. United States, 346 U.S. 15 (1953); see also infra Part II.C.
edy lies in democratic governance. Sovereign immunity leaves ample room for arguments based on social justice and morality and on demands for political accountability in the public square.

At the same time, when the federal government has been made amenable to litigation by the democratically-elected Congress, the courts should not reconstruct a broader immunity through a jaundiced and hostile interpretation of the statute. If a statutory waiver of federal sovereign immunity is construed too strictly and narrowly, so that every statutory term is slanted against the claimant, the legislative promise of meaningful judicial relief may be frustrated. Here too, I will illustrate my point with a Supreme Court case addressing the liability in tort of the federal government, an encouraging decision of ordinary statutory construction that bolsters the remedy that Congress intended.

II. A GENERAL DEFENSE OF FEDERAL SOVEREIGN IMMUNITY

A. Integrating Popular Sovereignty and the Sovereign Immunity of the United States Government

I acknowledge the considerable and venerable jurisprudence on the sovereignty of God, State, and Individual, which variably but strictly defines that sovereignty in terms of supreme authority, plenary independence, or absolute will. My purpose and exegesis in this Article are more pedestrian. In saying that the federal government is “sovereign,” I mean nothing more than to identify that entity which serves as the authoritative political embodiment of the collective American people.

To be sure, scholars from political philosopher Jean Boudin in the 16th century to Catholic sage Jacques Maritain in the last century have alternately pronounced or condemned the concept or at least the lexicon of “sovereignty” as quintessentially absolutist in nature. As our host Patrick Brennan has cogently argued, careless invocation of sovereignty, such as by conferring the pretension of sovereign “dignity” to state governments, could foster an attitude of submission by citizens, submerging individual rights and dignity to the overweening power of the state. But

11. See infra Part II.D.
12. See infra Part III.
13. See Dolan v. U.S. Postal Serv., 546 U.S. 481 (2006); see also infra Part III.
15. See Alden v. Maine, 527 U.S. 706, 714-15 (1999) (“The federal system established by our Constitution preserves the sovereign status of the States [including reserving] to them a substantial portion of the Nation’s primary sovereignty, together with the dignity and essential attributes inhering in that status.”).
to the fears of sovereign despotism or “the road to serfdom,” a partial rejoinder at least may be found in the American experience and the resili-ence of individual liberty here for the past two hundred years.

Let us begin at the beginning of limited government, with John Locke, whose influence on this nation’s founding generation was considerable. He wrote that “when any number of Men have, by the consent of every individual, made a Community, they have thereby made that Community one Body, with a Power to Act as one Body, which is only by the will and determination of the majority.”18 This and nothing more is what I mean by characterizing the federal government as a sovereign entity. As I’ve written previously, “[a]lthough casting off the autocracy of historical monarchy and being grounded instead upon democratic approval, the United States is a sovereign government, empowered to act for the collective good in an authoritative manner, distinct from any private individual or private organization.”19

For two hundred years, the federal government has exercised sovereignty in this sense of being empowered to act for the popular majority without being subject to all of the restrictions that rightly constrain an individual while interacting with his or her neighbors. And, with a few sad but temporary deviations, the United States government has assumed this form of sovereignty without a catastrophic blow to liberty, a loss of democratic accountability, or denial of the rule of law. One may be troubled about the growth of government, especially at the national level, and one may decry the proliferation of law and regulation as corrosive to liberty, as I do. But these problems cannot be laid at the doorstep of federal sovereignty and sovereign immunity.

Still, as I said at the outset, I do confess that my purpose in this Article is more prosaic and less ambitious than the scholarly endeavors of those who have thoughtfully explored the concept, history, jurisprudence, and theology of sovereignty. Moreover, I do take the point of those who protest that when a government entity or official must share power with others and is constrained by constitutional limitations, the term “sovereign” may be misplaced. If it were to take root in our legal and political discourse, another term would meet with no objection from me, other than perhaps on grounds of style. In preference to the language of sovereignty, Pavlos Eleftheriadis of the Oxford University Faculty of Law speaks alternatively of “a scheme of political dominion under the civil condi-

17. See generally Friedrich A. Hayek, The Road to Serfdom (1944) (expressing fear that populist redistributionist policies and welfare state would lead to loss of liberty).
18. John Locke, Two Treatises of Government 331 (Peter Laslett ed., Cambridge Univ. Press 1988) (1690) (emphasis added); see also Orestes A. Brownson, The American Republic 68 (Regnery Pub. Inc., 2003) (1865) (“The political sovereignty, under the law of nature, attaches to the people, not individually, but collectively, as civil or political society.”).
19. Sisk, supra note 7, at 526.
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...—although that more descriptive phrase is something of a mouthful.

In any event, my focus in this Article is on judicial intervention in political decisions made by the government, rather than defending sovereignty more generally. Saying that he did not endorse the suggestion that the Founders were committed “to the universal availability of individually adequate remediation of legal wrongs” by the government, Patrick Brennan explained that he spoke “not so much against sovereign immunity, as against sovereignty.”\(^{21}\) In this symposium Article, I write not so much in favor of sovereignty, as in favor of sovereign immunity.

In defending sovereign immunity, I should not be understood as saying too much or speaking too broadly. When I profess the baseline concept of sovereign immunity, I do not mean thereby to defend the dignity or majesty of the federal government as though it were an exalted personage. I certainly do not wish to preserve the absolute authority of a sovereign king in the medieval tradition or the supreme state of the totalitarian variety. And, as for the age-old question about separate sovereignties for Church and State, I touch on that subject only to affirm the legitimacy of religious sentiments in making non-sectarian political judgments.

As I use the term here, the doctrine of “sovereign immunity” means nothing more than that the judiciary is restricted in its ability to substitute its judgment for how government should act for the choices made by the political branches. As Richard Pierce says in his administrative law treatise, when defending discretionary function immunity from governmental tort liability, “[t]he process of governing almost always helps some and hurts others, but those who are hurt should not necessarily be entitled to damages from the government.”\(^{22}\)

Objecting to the sort of argument that I present here, Donald Doernberg argues that attempts to “marry both sovereign immunity and the rule of law” ultimately lead to “an extraordinary degree of cognitive dissonance.”\(^{23}\) As applied to sovereign immunity at the federal level, I simply disagree. To be sure, if one equates the rule of law with a judicial

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decree, then sovereign immunity obviously undermines the rule of law by obstructing judicial intervention.

If, however, sovereignty in the United States resides with the people, who are represented at the federal level in Congress assembled and by an elected President, then the rule of law may be protected in many, perhaps most, instances by resort to democratic processes. To again quote John Locke, when people create a “Political Society” by mutual consent, “the Community comes to be Umpire, by settled standing rules.”24 And if those government officials authorized to speak for the community fail to uphold their legal duties, they are subject to removal. As Doernberg aptly reminds us, in American history, “[c]onsent of the governed became a continuous process.”25

Now to the extent that the federal government were to be granted personhood separate from the people that form it by their political consent, I wholly concur with Doernberg that “[t]he true sovereignty in a Lockean society remained at all times with the members of the society collectively; it never passed to the government.”26 But in the United States, at least with respect to non-constitutional matters, that may be a distinction without a difference. The “One Body” that Locke says is empowered to act by direction of the majority is sovereign in a collective sense, as the embodiment of that popular majority.27

Sovereign immunity thus may be reconciled with and even enhance popular sovereignty. In an autocratic or totalitarian system, permitting the sovereign to withhold permission to claims against itself in court would be a cause for great concern. But in a democratic society, reserving to the sovereign the power to consent to suit against itself ultimately means reserving the power to govern to the people. In addition, democratic processes also remain available—by political means other than the judicial process—to directly redress grievances.28

Arguing that sovereignty was effectively renounced by the Founders, Brennan portrays the American Revolution as a battle against sovereignty.29 But, as Bernard Bailyn explains, the theoretically intricate question of sovereignty arose from the more “basic problems” of “[r]epresentation and consent, constitution and rights” during the Revolutionary Era.30 Among the earliest sparks that eventually caught fire in the

24. L OCKE, supra note 18, at 324. For further discussion of Locke and sovereignty, see generally DOERNBERG, supra note 23, at 45-63.
26. Id. at 57.
27. See also J ÜRGEN HABERMAS, BETWEEN FACTS AND NORMS 89 (William Rehg trans., 1998) (”T[he] source of all legitimacy lies in the democratic lawmaking process, and this in turn calls on the principle of popular sovereignty.”).
28. See infra Part II.D.
Revolutionary War was the vigorous protest against “taxation without representation,” as the colonists were subjected to taxes by an English Parliament in which Americans were not represented. Most acutely and in down-to-earth terms, then, the American Patriots fought and died for the freedom to elect their own representatives to make the laws that would govern them. As political scientist Robert Dahl emphasizes, “[t]he right to self-government through the democratic process is itself one of the most fundamental rights a person can possess.”

This fundamental right of self-government could be undermined by undue expansion of judicial review over governmental decisions, even if the judges were to defend their interventions on the grounds of accountability or popular sovereignty or by dismissing sovereign immunity as an anachronism ill-suited to modern sensibilities or theories of social justice. As Lawrence Rosenthal says, “whenever a judge or jury unilaterally directs a commitment of government resources to a particular plaintiff, requiring the imposition of additional taxes or a reordering of budgetary priorities, republican values are compromised.”

In sum, when the decisions of the political community are challenged by individuals who dissent on political grounds or regard themselves as personally aggrieved, an entity must be recognized that is capable of speaking for the whole and resisting the reach of unelected judges tempted to question the wisdom of those decisions made through democratic governance. By necessity, that entity is the government and the nature of that resistance is sovereign immunity. Sovereign immunity thereby bolsters popular sovereignty by restraining the legal elite from imposing their policy preferences and by denying judges the power to evaluate the prudence of the political choices made by the majority.

B. Federal Sovereign Immunity as a Manifestation of Constitutional Separation of Powers

On sovereign immunity and constitutional separation of powers, Harold Krent explains sovereign immunity as “deriva[ing] not from the infallibility of the state but from a desire to maintain a proper balance among the branches of the federal government, and from a proper commitment to majoritarian rule.” When deciding whether to waive federal sovereign immunity, Krent writes, “Congress plausibly may conclude that the poten-
tial harm to majoritarian policymaking from damage actions outweighs the benefits in added deterrence of tortious conduct by the government, increased efficiency in contracting, and more equitable compensation of injured parties.\textsuperscript{35}

On the imperative question of how to uphold individual rights and remedies while preserving democratic rule, Krent concludes, “we trust Congress, unlike any other entity, to set the rules of the game.”\textsuperscript{36}

Given the constitutional reservation of monetary appropriations to Congress,\textsuperscript{37} and the absence of a textual constitutional basis for awarding money damages for constitutional wrongs (with a few distinct exceptions, such as the Takings Clause of the Fifth Amendment),\textsuperscript{38} the immunity of the federal government from a money judgment in court is well-grounded in our national charter.\textsuperscript{39} Moreover, Vicki Jackson submits that “[w]hat we call the ‘sovereign immunity’ of the United States in many respects could be described instead as a particularized elaboration of Congress’ control over the lower court’s jurisdiction.”\textsuperscript{40} In sum, sovereign immunity and the Constitution need not be adversaries.

As a matter of public and social policy, imposing liability on government also may have severe consequences “on governmental budgeting, or on those who depend on government budgets for the variety of social goods allocated through that process.”\textsuperscript{41} In terms of social justice, Gerald Frug warns that “[t]he allocation of scarce resources by court order is not

35. Id. at 1531.
36. Id. By contrast, the late Kenneth Culp Davis contended that the doctrine of sovereign immunity was unnecessary as a “judicial tool,” because we may trust the courts to refrain from interfering in crucial governmental activities, such as the execution of foreign affairs and military policies, by limiting themselves to matters appropriate for judicial determination and within the competence of the judiciary. See Kenneth Culp Davis, Sovereign Immunity Must Go, 22 Admin. L. Rev. 383, 395 (1970).
37. See U.S. Const. art. I, § 9, cl. 7 (“No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law.”).
38. See U.S. Const. amend. V. For further discussion of the history of statutory provision for takings claims against the United States, and the Supreme Court interpretation of that statute, see generally Sisk, supra note 7, at 566-71.
39. See Rosenthal, supra note 33, at 802-03; see also Paul F. Figley & Jay Tidmarsh, The Appropriations Power and Sovereign Immunity, 107 Mich. L. Rev. 1207, 1258 (2009) (asserting close connection between sovereign immunity and congressional appropriations power, saying that “shared understanding” of both supporters and opponents of Constitution during framing period “was that legislatures, which controlled appropriations from the public treasury, controlled the award of claims against the sovereign”); Vicki C. Jackson, Suing the Federal Government: Sovereignty, Immunity, and Judicial Independence, 35 Geo. Wash. Int’l L. Rev. 521, 545 (2003) (saying Appropriations Clause “lends force to the argument that money judgments against the United States cannot be paid without an appropriation from Congress”) (emphasis added).
40. Jackson, supra note 39, at 570.
41. Rosenthal, supra note 33, at 845.
likely to be from the fortunate to the powerless; it is already the powerless to whom the state largely directs its resources.\textsuperscript{42}

Now the courts should intervene to insist that the political branches abide by the constitutional rules of the game. But whether the federal government may be restrained through judicial review from undertaking or continuing along an unconstitutional course is not really in much doubt. The Supreme Court has long since recognized a “constitutional exception to the doctrine of sovereign immunity.”\textsuperscript{43} In any event, the Administrative Procedure Act expressly waives the sovereign immunity of the United States for lawsuits, other than those seeking money damages, that challenge action, including when the government has acted “contrary to constitutional right, power, privilege, or immunity.”\textsuperscript{44} And, of course, when the government itself has called upon the judiciary to issue a judgment, either civil or criminal, against a citizen (that is, when the government is the plaintiff or prosecutor), sovereign immunity has never had much play. The citizen ordinarily may raise constitutional or statutory, and sometimes common-law, defenses.\textsuperscript{45} Indeed, the rule of law is most powerfully realized, and most urgently needed, when the citizen is a defendant against the government in court.

By contrast, we do not promote the rule of law by referring questions infused with policy considerations to the courts. On questions of political advisability, social justice, and moral philosophy, judges have no special competence. That is not to say that social justice or moral principles have no claim on the exercise of judicial power. Still, I do insist that judges are not well-equipped to decide those controversies that are best framed as political or moral questions. If we waive sovereign immunity too precipitously or expand governmental liability too extravagantly, we injudiciously ask jurists to step out of their constitutionally-assigned legal role and instead speak as political or moral actors. In a democratic society, questions of conscience in public policy should be reserved to the people and those they elect to office.

During most of our country’s history, the debate about federal sovereign immunity in the Supreme Court, and whether immunity extended as well to officers of the federal government, revolved around alleged com-


\textsuperscript{45} For a discussion of the United States government as a civil plaintiff in court, see generally Sisk, \textit{supra} note 43, at 503-37.
mon-law wrongs.\textsuperscript{46} That debate carried through the 1882 decision of \textit{United States v. Lee},\textsuperscript{47} in which the plaintiff sought to eject military officials from property seized during the Civil War and later dedicated as Arlington National Cemetery, to the 1949 decision in \textit{Larson v. Domestic & Foreign Commerce Corp.},\textsuperscript{48} in which the plaintiff sought specific performance of a government contract by bringing suit against the agency administrator. In these and other cases, the Supreme Court struggled with the question whether the decisions and actions of government that allegedly were unlawful under substantive common-law could be reviewed by the courts, absent a waiver of sovereign immunity.\textsuperscript{49} Ultimately, the Supreme Court ruled that, absent congressional authorization, “[t]he Government, as representative of the community as a whole, cannot be stopped in its tracks by any plaintiff who presents a disputed question of property or contract right,” that is, a common-law claim of right.\textsuperscript{50}

Accordingly, my focus in the next subpart of this Article is on that question which has dominated the historical debate about federal sovereign immunity: whether the federal government, directly or through its agents, may be held liable under the common law, absent an express statutory waiver of sovereign immunity. In other words, the subject of my attention here is not the unauthorized use of government power, but rather the allegedly harmful use of government power exercised according to constitutional authority.

C. \textit{Defending the Legitimacy of Federal Sovereign Immunity Even in the Hard Case: The Texas City Disaster of 1947}

If one presumes to defend sovereign immunity, then one must be ready and willing to defend it in the hard case, where the harm was great and the plea of the injured is most compelling. In this subpart of the Article, I relate a tragic story of staggering loss of life and massive property damage for which the federal government was directly responsible and which should have been prevented or mitigated, even though the exigencies for the government’s actions were equally great. The story is that of the “Texas City Disaster” of 1947, which came before the Supreme Court four years later in the landmark case of \textit{Dalehite v. United States}.\textsuperscript{51}

\textsuperscript{46} See id. § 5.07(a), at 373 (noting that “common-law suits for ordinary torts against individuals who happened to be government employees, even when those employees were acting within the scope of their government duties,” had “been attempted since the early days of the Republic”).

\textsuperscript{47} 106 U.S. 196 (1882).

\textsuperscript{48} 337 U.S. 682 (1949).


\textsuperscript{50} \textit{Larson}, 337 U.S. at 704.

\textsuperscript{51} 346 U.S. 15 (1953).
The Devastation of Europe After World War II and the American Response

The beginning of the story of the Texas City Disaster requires us to go back to the end of another story, one of war and misery. That preface began on May 8, 1945. As military historian John Keegan paints the picture of that day: “In Britain and America crowds thronged the streets . . . to celebrate ‘VE-Day’; in the Europe to which their soldiers had brought victory, the vanquished and their victims scratched for food and shelter in the ruins the war had wrought.” Prior to the formal surrender of Germany that ended the Second World War in Europe, foreign correspondent Anne O’Hare McCormick of the New York Times wrote: “The human problem the war will leave behind has not yet been imagined, much less faced by anybody. There has never been such destruction, such disintegration of the structure of life.”

When Germany surrendered on May 8, 1945, more than thirteen million people already were displaced in Europe, wandering homeless through the devastated countryside. By 1946, the newly formed United Nations reported that 100 million people in Europe were so malnourished that their health was seriously endangered. As President Truman later recalled, “[m]ore people faced starvation during the year following the war than during all of the war years combined.” With the expulsion of the ethnic German populations from Eastern Europe by the advancing Soviet army, as many as a million German civilians had perished from exposure, trauma, or starvation, with millions more destitute refugees flooding into the western zones of occupied Germany.

As the situation in Europe became desperate, the Soviet Union was poised to take advantage by both exercise of military force and by political appeal to remove ever larger regions of Europe behind the Iron Curtain. The Soviet Union already had established coercive control over even such anti-Bolshevik nations in Eastern Europe as Poland and Romania. The Russian occupation sector in Germany was the heart of the worst privation, with some cities, such as Berlin, rendered seventy-five percent uninhabitable, while the occupying Soviet army took savage revenge on the defeated population, raping as many as two million German women. Communist guerillas were engaged in a civil war against the elected government in

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54. Id.
55. Id. at 23-24.
56. Id. at 23 (characterizing Truman’s later writings).
57. See Keegan, supra note 52, at 592-95. 
59. Behrman, supra note 53, at 23.
Greece, while the formidable Soviet army was threatening Turkey.60 Elsewhere in Europe, Soviet-sponsored communist movements promised that an all-powerful state would bring an end to the suffering. In 1946 elections, communist parties in France and Italy received twenty-nine and forty percent of the vote respectively.61

Speaking in Zurich in 1946, Winston Churchill reported that “[o]ver wide areas a vast quivering mass of tormented, hungry, careworn, and bewildered human beings gape at the ruins of their cities and homes, and scan the dark horizons for the approach of some new peril, tyranny, or terror.”62 Churchill continued: “Indeed but for the fact that the great Republic across the Atlantic Ocean has at length realized that the ruin or enslavement of Europe would involve their own fate as well, and has stretched out hands of succor and of guidance, but for that the Dark Ages would have returned in all their cruelty and squalor.”63 “Gentlemen,” Churchill warned, “they may still return.”64

The following winter was one of the most brutal in living memory, adding frost-bite to hunger and making hunger worse. In a parody of the Beatitudes, a graffiti artist in Berlin sermonized from the shattered walls of the Reichstag: “Blessed are the dead, for their hands do not freeze.”65 In France and Italy, millions of acres of autumn wheat were lost to the cold and snow.66 As British historian Alan Bullock observed, by reason of freezing temperatures and twenty-foot-high piles of snow, “British industrial production was effectively halted for three weeks—something German bombing had never been able to do.”67 By 1947, Churchill had become even more alarmed, describing Europe as “a rubble-heap, a charnel house, a breeding ground of pestilence and hate.”68

Across the Atlantic, the American administration in early 1947 was gravitating toward a two-pronged foreign policy for the post-war era. Under what came to be known as the Truman Doctrine, the United States had adopted a policy of containment toward the Soviet Union, promising both military aid to pro-western governments and American military intervention when necessary.69 The second half of American policy was “the

61. BEHRMAN, supra note 53, at 29.
63. Id.
64. Id.
65. BEHRMAN, supra note 53, at 25.
66. Id.
68. PATTERSON, supra note 60, at 130 (citing ROBERT H. FERRELL, HARRY S. TRUMAN: A LIFE 71 (1994)).
69. Id. at 128-29.
so-called Marshall Plan of economic aid to western Europe,”70 what was formally titled the European Recovery Program.71

At the Harvard commencement ceremony in 1947, the new Secretary of State and former Army Chief of Staff, George C. Marshall, assured the assembled graduates and their faculty and families that the United States was now “deeply conscious of our responsibilities in the world.”72 Announcing a concerted program against “hunger, poverty, desperation, and chaos” in Europe, Marshall maintained that

[t]he truth of the matter is that Europe’s requirements for the next three or four years of foreign food and other essential products—principally from America—are so much greater than her present ability to pay that she must have substantial additional help or face economic, social, and political deterioration of a very grave character.73

Adverting to the strategic and national security motives behind the plan, Marshall urged his audience to appreciate “the plight and consequent reactions of the long-suffering peoples [in these distant troubled areas], and the effect of those reactions on their governments in connection with our efforts to promote peace in the world.”74 As foreign relations scholar Greg Behrman summarizes, this new Marshall Plan “would transform Europe, dramatically reconfigure the international political landscape, and launch America forward as a modern superpower with global responsibilities.”75

2. The Texas City Disaster

By the time that Marshall spoke at Harvard in June, 1947, the plan that would bear his name was already underway. As a central part of American efforts to redevelop the devastated nations of Europe, the United States government was ramping up production of fertilizer for agricultural use overseas, as direct shipment of foodstuffs for all needs was not practicable.76 The primary ingredient in the only fertilizer that could be produced in sufficient quantities was ammonium nitrate, which had also been used in explosives during the war.77 In particular, decommissioned ordnance plants were well-suited for the task and were re-fitted to produce

70. Id. at 129.
71. MAZOWER, supra note 58, at 569.
73. Id.
74. Id.
75. BEHRMAN, supra note 53, at 2.
77. In re Texas City Disaster Litigation, 197 F.2d 771, 777 (5th Cir. 1952) (en banc).
fertilizer rather than bombs.\textsuperscript{78} To prevent caking and hardening of the fertilizer by water absorption, which would make it difficult to store and later spread on farm-land, the fertilizer was coated with a water-repellent mixture of petrolatum, rosin, and paraffin (PRP).\textsuperscript{79}

On April 15, 1947, thousands of tons of newly-manufactured fertilizer had been loaded on to two ships operated by the French government, the \textit{Grandcamp} and the \textit{High Flyer}, which were anchored in the harbor at Texas City, Texas.\textsuperscript{80} On April 16, 1947, smoke was sighted rising out of the hold of the \textit{Grandcamp}.\textsuperscript{81} The cause of the fire was never definitely established. Hugh Stevens, who has written the most comprehensive documentary on the disaster, concludes that the blaze was started by a crewman’s “carelessly discarded cigarette.”\textsuperscript{82} A federal district court judge later concluded that the volatile mixture of fertilizer had combusted spontaneously.\textsuperscript{83} A majority of the Supreme Court could only say that the ignition of the fertilizer was “a complex result of the interacting factors of mass, heat, pressure and composition.”\textsuperscript{84}

Shortly after the smoke was seen, the \textit{Grandcamp}’s hatches were closed and steam was introduced into the hold.\textsuperscript{85} But such efforts were to no avail and indeed likely made things worse by increasing temperatures and pressure inside the closed hold toward “the critical point.”\textsuperscript{86} Moreover, at high temperatures, ammonium nitrate can itself produce the oxygen to feed a fire,\textsuperscript{87} and the water-repellent and combustible nature of the carbon-based PRP coating further reduced the temperature at which the fertilizer could ignite.\textsuperscript{88}

After only about an hour, as Texas City fire-fighting crews arrived and crowds including school-children gathered on the docks to watch the fire,\textsuperscript{89} the ship exploded with such force that windows were shattered in

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\item \textsuperscript{78} Dalehite, 346 U.S. at 19-21.
\item \textsuperscript{79} Id. at 21.
\item \textsuperscript{80} Id. at 22.
\item \textsuperscript{81} Id. at 23.
\item \textsuperscript{82} Hugh W. Stephens, The Texas City Disaster, 1947, at 41 (1997); see also Dalehite, 346 U.S. at 54-55 (Jackson, J., dissenting) (noting conflicting testimony about whether seaman had been smoking around hold).
\item \textsuperscript{83} See Dalehite, 346 U.S. at 54 (Jackson, J., dissenting).
\item \textsuperscript{84} Id. at 42 (majority opinion).
\item \textsuperscript{85} See id. at 47-48 (Jackson, J., dissenting).
\item \textsuperscript{86} Stephens, supra note 82, at 34; see also id. at 31 (describing high temperatures raised by steam as "initiat[ing] thermal decomposition of the fertilizer and trigger[ing] the explosion").
\item \textsuperscript{87} Dalehite, 346 U.S. at 23 n.7; see also Moore Memorial Public Library, Texas City Disaster 1947 Online Exhibition: Fire on the Grandcamp, http://www.texascitylibrary.org/TCDisasterExhibit/tc1947p7.html (last visited Sept. 26, 2010).
\item \textsuperscript{88} Dalehite, 346 U.S. at 46 (quoting district court finding); Stephens, supra note 82, at 22; see also Brief for Petitioners at 69, Dalehite v. United States, 346 U.S. 15 (1953) (No. 308) (citing trial record).
\item \textsuperscript{89} Stephens, supra note 82, at 34.
\end{itemize}
Houston, forty miles away, the wings of two small airplanes circling above were sheared off, and the Grandcamp’s one-and-a-half ton anchor was thrown nearly two miles into the city.

More than 560 people were killed, including spectators, executives, and employees of companies in the area, as well as half of the city’s firemen. Three thousand more people were injured. Many of the onlookers who had survived the initial blast, but lay injured on the docks, were drowned by the fifteen-foot tidal wave created by the exploding Grandcamp that swept ashore and then receded back into the bay. One witness described the survivors in the dock area: “Grotesque figures they were, black with fuel oil and smoke, and red with their own and comrades’ blood, walking with arms broken and dangling, or crawling with mangled legs and feet.” Some of the survivors stumbled away naked, as their clothes had been blown off by the force of the explosion. With buildings, warehouses, propane and benzol tanks, and oil refineries having been set on fire, others were trapped and burned to death, while broken water mains prevented efforts to put out the flames.

Although not noticed for many hours in the aftermath of the initial blast, the fire had spread to the second ship containing the fertilizer, the High Flyer, which was docked nearby. After unsuccessful efforts to put out that fire or tug the ship out to sea, the High Flyer exploded as well, early on the morning of April 17. With evacuations from the dock area, casualties from the second explosion were light, although they apparently included Father William Roach of St. Mary’s Catholic Church who had remained behind to tend to the injured and was nearly decapitated by shrapnel from the second ship explosion. Witnesses said that the High Flyer exploded with even more force than had the Grandcamp, further devasting the city.

The successive blasts destroyed the thriving harbor of Texas City, including industrial plants, oil refineries, warehouses, wharves, and a grain storage silo.

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91. Stephens, supra note 82, at 3.
92. Id. at 40; Brief for Petitioners, supra note 88, at 111 (citing trial record).
93. Dalehite, 346 U.S. at 48 (Jackson, J., dissenting); Stephens, supra note 82, at 36, 43; Brief for Petitioners, supra note 88, at 111 (citing trial record).
94. Dalehite, 346 U.S. at 48 (Jackson, J., dissenting).
95. Stephens, supra note 82, at 36-37.
96. Id. at 48-49 (quoting safety engineer who returned to dock after explosion).
97. Id.
98. Id. at 53.
99. Id. at 5, 75-82.
101. Stephens, supra note 82, at 83.
102. Id. at 83-86.
elevator, as well as the town hall, a nearby elementary school, and much of the commercial and residential areas.  

That ammonium nitrate fertilizer can be explosive was a lesson the nation learned again the hard way a half century later with the domestic terrorist bombing of the federal building in Oklahoma City. The casualty figures in Texas City in 1947 were almost four times higher.

3. *The Texas City Disaster Litigation and the Dalehite Decision*

Just one year earlier, in 1946, Congress had enacted the Federal Tort Claims Act (FTCA), which generally waives federal sovereign immunity for claims against the United States sounding in tort. The FTCA grants the United States District Courts exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

Thus, the United States is liable under the FTCA on the same basis and to the same extent as recovery would be allowed for a tort committed under like circumstances by a private person in that state.

Even when Congress has granted consent to suit by statute, however, sovereign immunity seldom is wholly abrogated. As explained in my treatise on federal government litigation:

While the FTCA does waive federal sovereign immunity for tort claims generally, the United States remains the beneficiary of several special rules and protections, notably including restrictions on the standards of liability (such as the exclusion of strict liability); numerous defined exceptions to liability that bar certain types of claims (such as claims for assault, libel, misrepresentation, and interference with contract) and preclude liability arising out of certain governmental activities (including discretionary or policymaking functions, transmission of mail,  

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103. *Id.* at 44, 47; *see also* Brief for Petitioners, *supra* note 88, at 69 (summarizing damage and citing trial record).  
106. *See* United States v. Olson, 546 U.S. 43, 44 (2005). For a discussion of the standards for liability under the FTCA, including the analogy of the government to a private person, see generally *Sisk,* *supra* note 43, § 3.05, at 124-40.
and military combat); restrictions on damages available (precluding prejudgment interest and punitive damages); and the exclusion of certain categories of people (federal civilian employees covered by a compensation act and military servicemembers injured incident to service) from eligibility to seek a damages remedy under the FTCA.  

In particular, the “discretionary function” exception to the FTCA preserves the government’s immunity “from liability based upon an employee’s exercise or failure to exercise a discretionary function or duty . . . whether or not the discretion involved be abused.” 108 Thus, when the governmental decision at issue in a case was “susceptible to policy analysis,” 109 constitutional separation of powers warns the courts not to set out “on an aggressive course far afield of judicial competence and replete with matter of policy entrusted elsewhere.” 110

After the Texas City Disaster, the survivors brought a series of FTCA suits against the federal government, alleging tortious wrongdoing in various phases of the fertilizer program and production, including the government decision to manufacture the fertilizer, the government’s specifications for the manufacturing process, and the transportation of the fertilizer. The district court granted judgment for the plaintiff after trying a test case, but the court of appeals sitting en banc reversed. 111 After granting certiorari in Dalehite v. United States, a divided Supreme Court affirmed the dismissal of the claims under the discretionary function exception. 112

The Dalehite Court majority explained the discretionary function exception as barring any tort suit that projects “into the realm of the validity of legislation or discretionary administrative action.” 113 Saying that “where there is room for policy judgment and decision there is discretion,” 114 the Court majority had little difficulty concluding that each of the decisions in the series made by the government in determining to manufacture and transport fertilizer for recovery of war-torn nations was permeated with policy implications. The Cabinet-level decision to produce fertilizer in an effort to stave off starvation in war-torn countries obvi-

107. Sisk, supra note 7, at 537 (citing FTCA).
111. In re Texas City Disaster Litigation, 197 F.2d 771 (5th Cir. 1952) (en banc).
113. Id. at 27.
114. Id. at 36.
ously involved significant policy factors. Likewise, the Court held the government specifications for production of the fertilizer were covered by the discretionary function exception because alternative measures that might have reduced the volatility of the ammonium nitrate would have increased the cost of production, delayed shipment, or made the fertilizer less effective for agricultural use.

Justice Jackson, joined by two other members of the Court, dissented in *Dalehite*, arguing that the ruling permitted the government to “clothe official carelessness with a public interest.” Despite the majority’s postulation of important policy bases for each of the choices made by the government in production and transport of the fertilizer, Justice Jackson argued forcefully that the case involved nothing more than the kind of “conflict between safety and expediency” that is at the heart of every claim that an actor failed to exercise due care. After all, Justice Jackson insisted, “[t]he Court certainly would hold a private corporation liable in this situation, and the statute imposes the same liability upon the Government. . . .”

4. **Sovereign Immunity and Hard Political Choices**

If we were considering the choices made by a private industrial concern about production and shipment of a hazardous product, a court surely would apply the basic standard of negligence (or even an absolute standard of strict liability) and almost certainly would impose liability on a manufacturer for what occurred in the Texas City case. Factors such as increased cost, delays in production, reduced levels of production, and reduced effectiveness of the product are regularly weighed by private manufacturers. Yet the courts do not hesitate to second-guess the choices made by a manufacturer in determining whether the manufacturer was negligent or should be subject to strict liability.

When policy considerations underlie what might appear to be parallel governmental conduct, however, the sometimes countervailing factors of efficiency and risk are weighed not in the pursuit of commercial profit but to consider which course best advances the common good. In such a situation, those same factors take on political overtones that are largely absent in the private context. Thus, in making the choices of whether and how to act, the government generally proceeds not to obtain economic advantage but as an exercise in political judgment.

To better understand how this may be so, let us look more closely at two of the specifications for manufacturing of the fertilizer in 1947, ele-

115. *Id.* at 37.
116. *Id.* at 38-41.
117. *Id.* at 47-60 (Jackson, J., dissenting).
118. *Id.* at 56-57.
119. *Id.* at 57.
ments that the district court concluded played major contributing roles in instigating the Texas City Disaster:

First, as noted earlier, the government decided to coat the ammonium nitrate fertilizer with a carbon-based water repellent sealant known as PRP. Because this coating itself was combustible, and also reduced the temperature at which the fertilizer could ignite, the district court found that “[m]ore than any other one thing . . . this coating made this commodity one of the most dangerous of explosives.”120 But, as the Supreme Court majority in *Dalehite* explained: “At stake was no mere matter of taste; ammonium nitrate when wet, cakes and is difficult to spread on fields as a fertilizer. So the considerations that dictated the decisions were crucial ones, involving the feasibility of the program itself . . . .”121

Second, the district court heavily faulted the bagging and shipment of the fertilizer at high temperatures as a likely cause of spontaneous combustion in the hold of the *Grandcamp*.122 But again the government’s decision on bagging temperatures was not made haphazardly or with disregard for alternatives. While, in retrospect, it is possible that bagging the fertilizer at high temperatures may have increased the instability of the fertilizer mix, reducing those temperatures by holding the product in graining kettles for a longer period of time or by installing cooling equipment would have significantly raised costs and reduced production.123 Indeed, in response to a suggestion to bag the fertilizer at 120 degrees rather than at 200 degrees, the commanding officers at the ordnance plants reported that this would reduce production to less than one-half of the projected need for fertilizer in war-torn regions.124

Thus, we are brought face-to-face with the hard political questions raised by the Texas City Disaster case: How high a risk was justified in manufacturing and shipping a potentially dangerous product as a central part of an emergency response to a human catastrophe unfolding in Europe? Is the level of acceptable risk greater if the policy is not only one of humanitarian relief but necessary to preserve world security and international liberty, by giving hope to desperate people tempted to turn to totalitarianism to end their suffering? Indeed, what if the alternative to expeditious action may be another war? What changes should have been made in manufacturing specifications and what additional safety measures should have been taken, while knowing that such steps would delay shipment and slash production of an essential tool in rejuvenating agriculture in Europe? Moreover, how should elected leaders and their appointees weigh the likelihood that increases in costs will test the patience of the

120. *Id.* at 46 (appendix quoting district court finding).
121. *Id.* at 40 (majority opinion).
122. See *id.* at 47 (appendix quoting district court finding); Brief for Petitioners, *supra* note 88, at 69 (citing trial record).
124. *In re* Texas City Disaster Litigation, 197 F.2d 771, 779 (5th Cir. 1952) (en banc).
American taxpayer who has been greatly burdened with the expenses of waging a world war and now is being asked to finance an ambitious and unprecedented program of foreign aid? (To the extent that simple human error played a role in the disaster, particularly in the government’s failure to warn shippers and others along the path of transportation of the potential dangers of the fertilizer and to be prepared for emergency response if necessary, these mistakes too may be difficult to separate from the exigencies of the situation. Moreover, this phase of the operation must also be evaluated in light of the destitution and dangers posed by instability in Europe, as well as the downsizing of government operations and military demobilization following World War II.)

5. Sovereign Immunity, Political Judgments, and Judicial Restraint

In my own opinion, the risk taken in the Texas City Disaster case was too high and the efforts to reduce the risk were woefully inadequate. Because the United States government’s first responsibility is to the safety of its own people, the manufacturing of an explosive product without additional safety measures and transportation of it through a populated area without greater care and notice of the danger to the local community was inexcusable.\textsuperscript{125} I agree with Justice Jackson’s dissent in \textit{Dalehite} to this extent: “This was a man-made disaster; it was in no sense an ‘act of God.’”\textsuperscript{126} In plain terms, the United States government betrayed the public trust.

But I emphasize that I am making a political, not a legal, judgment here. I am accusing the government of policy misjudgment, not of legal negligence. And, I must acknowledge, the starving masses in Europe might have reached a very different conclusion than have I, sitting comfortably in my law school office decades after the fact and far from the refugee camps of the post-war era. Europeans suffering in the wake of the war understandably might have regarded any meaningful delay or reduction in shipments of life-sustaining agricultural supplies as intolerable. Unavoidably, lives were at stake, on both sides of the equation. And therein lies the tragedy.

Opponents of sovereign immunity may assure us that the courts would act prudently on the merits in such a case, refraining from imposing liability by judicious application of common-law principles. Pointing to Learned Hand’s famous negligence formula for balancing risks and utilities,\textsuperscript{127} they might suggest that such a cost-benefit model adequately captures the countervailing values and would counsel judicial deference to government decisions, even without sovereign immunity. But introducing political, social, and moral values so directly into the tort liability calculus

\textsuperscript{125}. See \textit{Stephens}, supra note 82, at 18 (describing “the apparent ignorance and indifference of officials about the hazardous potential of the fertilizer, the absence of governmental supervision over dock operations, and the weakness of safety management and practices there”).

\textsuperscript{126}. \textit{Dalehite}, 346 U.S. at 48 (Jackson, J., dissenting).

\textsuperscript{127}. See United States v. Carroll Towing Co., 159 F.2d 169, 173 (2d Cir. 1947).
would be troubling and unworkable. Would we really contemplate a court openly balancing the prospect of mass starvation and war in Europe against the risks of injury posed by particular government responses within our own borders? And how would the court measure and allocate weight to and among the various policy and value factors? To engage in informed balancing, wouldn’t the court have to hold extended hearings on political and foreign policy, including adversarial witnesses who challenge the government’s understanding of the situation, choice of priorities, and means of implementing those policy decisions?

That eminent scholar of administrative law, Louis Jaffe, writing with specific reference to the Texas City Disaster case, acknowledged that “[a]n attempt to transmute in the alembic of negligence these competing considerations [of costs, alternatives, risks, and public interest] into a judgment of ‘reasonableness’” would only confirm the unsuitability of the judicial process for such matters. Thus, Jaffe concluded, something like the discretionary function exception to the FTCA “must obtain, if only because . . . a court cannot undertake to determine whether complex government decisions are ‘reasonable.’” If the courts were to accept common-law review on the merits of an allegedly negligent or otherwise wrongful governmental action that hinges on disputed questions of policy, the traditional legal standard of reasonableness would too easily shade into an evaluation of political wisdom.

In sum, the Texas City Disaster, considered in the full context of what the government was trying to do and why it was trying to do it, raises many difficult questions: questions of political prudence, questions of foreign policy, questions of national security, questions of budgetary allocations and use of taxpayer resources, questions of domestic safety and well-being, and questions of social justice. These, however, are not legal questions, and they should not be answered by a court of law.

For these reasons, the doctrine of federal sovereign immunity properly removes these questions from the judiciary and reserves them to the political branches for resolution by democratic means. In the words of a federal appellate court two decades ago:

The wellspring of the discretionary function exception is the doctrine of separation of powers. Simply stated, principles of separation of powers mandate that the judiciary refrain from deciding questions consigned to the concurrent branches of the government. If substantial constitutional issues are not implicated, the

129. Id. at 237.
wisdom of decisions made by the executive and legislative branches are not subject to judicial review.\textsuperscript{130}

D. \textit{Federal Sovereign Immunity and the Demands of Justice}

The story of the Texas City Disaster does not end with the Supreme Court’s dismissal of the FTCA lawsuit against the United States. After the Court held the government immune from liability in \textit{Dalehite}, Congress provided a legislative remedy by enacting a private bill providing compensation to the victims of the Texas City Disaster.\textsuperscript{131}

As evidenced by the Texas City episode, “political forces come powerfully into play when the government endangers the public’s safety, even when there is immunity from liability.”\textsuperscript{132} Louis Jaffe cited the statutory compensation in the Texas City case as “serv[ing] to emphasize that the damage action is only one, and not always the best, method for providing compensation when the government miscalculates.”\textsuperscript{133}

Political accountability persists and can be a giant when awakened. In a democratic society, sovereign immunity and judicial restraint leave ample room for arguments based upon social justice and morality. The venue shifts, however, from the courtroom to the public square.

Affirming sovereign immunity as a restraint on oversight by unelected judges need not, and should not, entail licensing government agents to act with impunity or inflict harm on citizens without recourse. Nor need one deny the ultimate sovereignty of God or the primordial claims of natural law to say that democratic processes should be the primary instrument for bringing government into alignment with moral demands. Indeed, I submit that moral principles and the traditional understanding of natural law are more likely to be advanced in the open political engagement of citizens in democratic governance than in the elite chambers of judges.

Jesus observed that “[a] prophet is not without honor except in his native place and in his own house,”\textsuperscript{134} He could have added as well that a prophet is without honor in a modern American courtroom. But this is as it should be. Far from being prophetic, the rule of law is crafted to be steady and dependable. And when the law courts presume to utter words of prophecy or philosophy, we are likely to cringe. Whatever one’s view on the question of abortion, most readers of Supreme Court opinions remain at least a little embarrassed about the plurality’s “sweet-mystery-of-

\textsuperscript{130} In re Joint Eastern and Southern Districts Asbestos Litigation (Robinson v. United States), 891 F.2d 31, 35 (2d Cir. 1989). In the interests of full disclosure, the author of this Article was appellate counsel for the government in this case.

\textsuperscript{131} See Laird v. Nelms, 406 U.S. 797, 802 (1972) (reporting enactment of compensation legislation for Texas City disaster victims).

\textsuperscript{132} Rosenthal, supra note 33, at 849.

\textsuperscript{133} Jaffe, supra note 128, at 237.

\textsuperscript{134} See Matthew 13:57 (New American).
life” passage on the meaning of liberty in Planned Parenthood v. Casey.135 The voice of the prophet should be heard in the bully pulpit, not in the court temple.

Richard John Neuhaus argued that public policy should be informed by “the operative values of the American people, values that are overwhelmingly grounded in religious belief.”136 Moral and religious values are better brought to bear in public debate than in legal briefs. When Stephen Carter wrote about the need for “independent moral voices interposed between the citizen and the state,”137 he was referring to religious and voluntary associations, not to judicial guardians. As Ronald Allen said pointedly many years ago, “[w]ith all due respect to the hard-working and honorable members of the Court, past and present, for whom in fact I have enormous respect, they are not collectively a group that commands our fealty because of the profundity of their moral insight.”138

When a matter of great moral weight has substantial consequences for the common good, the people are entitled to be heard. But their voices are not likely to be welcome in the halls of justice. Adjudication and legal dialect distort discussion of values and exclude the general public from the deliberation. For the average American, who is not a member of the priestly class of our civil religion of law and lawyers, the courtroom and language of the law are alien and alienating.

To be sure, the claim of individual justice for an individual wrong should be heard, and the court is often the proper venue to hear it. Individuals who have been injured by the government through “ordinary common-law torts” should be compensated in court.139 But when the matter is not ordinary and the government action instead is suffused with policy implications, the demands of democratic governance may properly take priority over the adjudication of an individual lawsuit. In such cases, the call to justice should never be far from the council of government.

In Dalehite v. United States, referring to the magnitude of the human tragedy in the Texas City Disaster and the correspondingly large amount of damages sought in court, Justice Jackson complained that dismissal of the lawsuit on sovereign immunity grounds meant “the ancient and discredited doctrine that ‘The King can do no wrong’ has not been uprooted; it has merely been amended to read, ‘The King can do only little

137. STEPHEN L. CARTER, GOD’S NAME IN VAIN 16 (2000).
wrongs.” 

But he was proven wrong in the aftermath of that very case. Through ordinary democratic processes, the nation recognized its responsibility to the victims of the Texas City Disaster and enacted compensation legislation. Indeed, the very greatness of the harm done made it all the more likely that the moral claim would resonate in the public square.

III. REALIZING THE PROMISE OF STATUTORY WAIVERS OF FEDERAL SOVEREIGN IMMUNITY

As I repeat in this Article, “the emergence of something like sovereign immunity probably was inevitable.” 

I also have contended, however, that the concept should be understood “as a clear point of departure for developing a refined policy and practice of government liability in court to private complainants.” 

I do submit that federal sovereign immunity was a natural and common-sense legal development and is justifiable in a regime of popular sovereignty and a constitutional system with separation of powers. But I simultaneously have insisted that sovereign immunity should be only a starting point for developing a more sophisticated and modulated network of statutes authorizing a large and appropriate measure of judicial redress against the government.

Although Congress initially proved to be a slow builder on the bare concrete slab of sovereign immunity, a fairly comprehensive statutory regime is now in place that establishes federal government liability for tortious and contractual harms, balanced however by well-justified policy limitations. Congress has enacted statutory waivers of sovereign immunity that cover most substantive areas of law and apply to most situations in which a plaintiff would seek relief, from claims that sound in tort under the Federal Tort Claims Act (FTCA) or the Suits in Admiralty Act to claims for breach of contract and for compensation for takings of property or by statute under the Contract Disputes Act and the Tucker Act, and beyond to claims for employment discrimination by the federal employer.

140. Id. at 60 (Jackson, J., dissenting).
141. Sisk, supra note 7, at 526.
142. Id.
143. As I have noted previously: “During more than two centuries of American history under our Constitution, Congress has often proven to be an indolent builder of a regime for governmental accountability in court, leaving the foundation bare for decades and then slowly adding a wall at a time, with large breaks of time in between, and only reaching a stage of rough completion in the last few decades.” Id. at 530.
under Title VII\textsuperscript{148} and for environmental harms.\textsuperscript{149} In sum, as I have previously described it, congressional enactments “have woven a broad tapestry of authorized judicial actions against the federal government.”\textsuperscript{150}

After acknowledging the growth of statutory waivers of federal sovereign immunity, Donald Doernberg nonetheless argues that, “[e]ven under the current framework, however, the concept of sovereign immunity from liability for conduct outside the law hovers menacingly in the background.”\textsuperscript{151} Rather than being an unavoidable feature of sovereign immunity itself as a background doctrine, the “menace” that Doernberg identifies may persist because of an overly broad application of a rule of strict construction for statutory waivers.

In arguing for a more coherent theory for judicial construction of statutory waivers of sovereign immunity, I have framed the question in this way:

Even after the government has waived its sovereign immunity for a particular category of claims, does the citizen who seeks judicial redress for a governmental wrong still have a steep hill to climb, with every word of text and every term of the statute being slanted against the claimant? Should the courts regard suits against the sovereign as “suspect, even when allowed,” pursuant to a parsimonious canon of strict construction? Do the rules of construction for statutory waivers “load the dice for or against a particular result,” the upshot being that the government usually wins?\textsuperscript{152}

Not unerringly or with consistent clarity, the Supreme Court appears to be drifting toward an approach that reserves strict construction and presumptions in favor of the government to core questions about whether sovereign immunity has been expressly waived and the basic scope of that waiver.\textsuperscript{153} As the Supreme Court put it in \textit{Lane v. Pena}, “a waiver of the Government’s sovereign immunity will be strictly construed, in terms of its scope, in favor of the sovereign.”\textsuperscript{154} Thus, both the theory of liability asserted in a claim against the United States (that is the cause of action),

\begin{itemize}
  \item \textsuperscript{148} 42 U.S.C. § 2000e-16(a) (2006).
  \item \textsuperscript{149} See, e.g., Clean Water Act, 33 U.S.C. §§ 1365(a)(2), 1369(b) (2006); Clean Air Act, 42 U.S.C. §§ 7604(a)(1)-(2), 7607(b) (2006).
  \item \textsuperscript{151} Doernberg, supra note 23, at 83.
  \item \textsuperscript{152} Sisk, supra note 7, at 521-22 (footnotes omitted) (citing Richard H. Fallon, Jr., \textit{Claims Court at the Crossroads}, 40 Cath. U. L. Rev. 517, 517-18 (1991), and Antonin Scalia, \textit{A Matter of Interpretation} 27-28 (1997)).
  \item \textsuperscript{153} See generally id. at 543-87.
  \item \textsuperscript{154} 518 U.S. 187, 192 (1996) (emphasis added); see also Dep’t of Army v. Blue Fox, Inc., 525 U.S. 255, 261 (1999) (saying that “a waiver of sovereign immunity is to be strictly construed, in terms of its scope, in favor of the sovereign”).
\end{itemize}
and the specific remedy requested (damages, injunction, etc.), must be explicitly authorized under the statute.

For other terms, definitions, exceptions, and procedures in a statutory waiver of federal sovereign immunity, however, ordinary rules of statutory interpretation and construction should apply. In general, and remembering that the statute is a waiver of sovereign immunity, the litigation should proceed in a manner consistent with private litigation. In other words, “[a]n early jaundiced judicial attitude has resolved into a greater respect for the legislative pledge of relief to those harmed by their government.”155 Or so I have dared to hope.

And I find encouragement on this score in a recent Supreme Court decision involving the same statutory waiver, the FTCA, which was discussed earlier.156 The particular provision of the FTCA that came before the Supreme Court in Dolan v. United States Postal Service157 was the exception for “[a]ny claim arising out of the loss, miscarriage, or negligent transmission of letters or postal matter.”158 The factual scenario underlying the case was this: Rather than putting it in the mail box, a postal carrier negligently dropped a bundle of letters, packages, and periodicals on Barbara Dolan’s front porch, causing her to trip and fall with serious injuries. The question presented was whether, when mail left by the Postal Service causes a slip-and-fall, the exception for “negligent transmission” of postal matter is triggered.

Now if the governing rule truly is that every jot and tittle in a statutory waiver of sovereign immunity must be construed strictly and narrowly in favor of the government, then a win for the government should have been foreordained. After all, “postal matter” plainly was the immediate cause of the fall, and one could say that the placement of the bundle on her front porch constituted “negligent transmission” of that “postal matter.”

And that is how the court of appeals saw it. Invoking the rule that waivers of sovereign immunity are to be construed strictly in favor of the sovereign, the court of appeals held in Dolan that the FTCA exception for “negligent transmission” of postal matters barred claims based on “unavoidable mishaps incident to the ordinary accepted operations of delivering millions of packages and letters each year,” which covered a slip-and-fall over letters, packages, and periodicals left on the porch.159 Showing that the rule of strict construction was the pivot for its ruling, the court of appeals said that “[t]o the extent that ‘negligent transmission’ is ambiguous at all, any ambiguities in the language of a purported waiver of sovereign immunity must be construed in favor of the government.”160

155. Sisk, supra note 7, at 521-22.
156. For a discussion of the FTCA, see supra Part II.C.3.
160. Id.
Likewise, in the Supreme Court, Justice Thomas stated that “[t]he well-established rationale for construing a waiver in favor of the sovereign’s immunity . . . applies with equal force to the construction of an exception to that waiver.”161 Relying on what he regarded as the ordinary meaning of “transmission,” Justice Thomas “conclude[d] that the postal exception exempts the Government from liability for any claim arising out of the negligent delivery of the mail to a Postal Service patron, including Dolan’s slip-and-fall claim.”162

But, at the Supreme Court, Justice Thomas was alone in dissent. The other participating members of the Court instead applied the exception more narrowly as excluding claims based on a failure to timely deliver mail or on damage to its contents.163

The Dolan Court majority acknowledged that, “[i]f considered in isolation, the phrase ‘negligent transmission’ could embrace a wide range of negligent acts committed by the Postal Service in the course of delivering mail, including creation of slip-and-fall hazards from leaving packets and parcels on the porch of a residence.”164 However, reading the phrase in full context and considering the purpose of the provision, the Court recognized the words “negligent transmission,” “loss,” and “miscarriage” as referring to “failings in the postal obligation to deliver mail in a timely manner to the right address.”165 Moreover, given that a primary objective of the FTCA was to waive sovereign immunity for claims arising out of automobile accidents, and specifically the negligent operation of motor vehicles by postal workers while delivering the mail,166 a broader reading would immunize the United States from any harm resulting from any postal activities performed while mail was being transported. Based on text, context, and legislative intent, the Court concluded that the exception excludes governmental liability “only for injuries arising, directly or consequentially, because mail either fails to arrive at all or arrives late, in damaged condition, or at the wrong address.”167

With respect to principles of statutory interpretation, the Court observed that the FTCA accomplished a waiver of sovereign immunity by “confer[ring] federal-court jurisdiction in a defined category of cases involving negligence committed by federal employees in the course of their

162. Id. at 494.
163. See id. at 485-92 (majority opinion).
164. Id. at 486.
165. Id. at 486-87.
166. See id. 487-88.
167. Id. at 487-89. See, e.g., Sportique Fashions, Inc. v. Sullivan, 597 F.2d 664 (9th Cir. 1979) (holding that FTCA postal matter exception precluded claim against postal service supervisors for business losses suffered when clothing store’s advertising mailers were not timely delivered).
employment," and by directing that the United States is subject to liability in the same manner as a private person under like circumstances.168

Accordingly, the Dolan Court "noted that this case does not implicate the general rule that 'a waiver of the Government's sovereign immunity will be strictly construed, in terms of its scope, in favor of the sovereign.'"169 The Court explained "this principle is 'unhelpful' in the FTCA context, where 'unduly generous interpretations of the exceptions run the risk of defeating the central purpose of the statute,' which 'waives the Government's immunity from suit in sweeping language.'"170 Having identified the "postal matter" provision as an exception to the general waiver of immunity, the Court explained "the proper objective of a court attempting to construe one of the subsections of 28 U.S.C. § 2680 is to identify 'those circumstances which are within the words and reason of the exception'—no less and no more."171

In sum, when the democratic polity has opened the courthouse doors to claims against the government, the judiciary should not slam them shut again in a misguided resurrection of sovereign immunity. As the Dolan case illustrates, the rule of strict construction no longer overweights interpretation of every element of a statute related to a waiver of sovereign immunity. Just as the courts should withhold judgment when sovereign immunity has not been waived, the courts should proceed appropriately when it has been waived. As the Supreme Court had counseled in an earlier decision, "once Congress has waived sovereign immunity over certain subject matter, the Court should be careful not to 'assume the authority to narrow the waiver that Congress intended.'"172

IV. Conclusion

At an academic conference a decade ago, Akhil Amar quipped that "sovereign immunity means never having to say you're sorry."173 'Those of us who came of age during the 1960s and 1970s will recognize this allusion to Erich Segal’s 1970 novel Love Story, and the movie of the same name, in which the character played on the screen by Ryan O’Neal declares that "[l]ove means never having to say you’re sorry."174

When that book and movie came out, my wise mother quickly classified this as another foolish aphorism arising during a sometimes irrespon-

169. Id. at 491 (quoting Lane v. Pena, 518 U.S. 187, 192 (1996)).
170. Id. at 491-92 (quoting Kosak v. United States, 465 U.S. 848, 853 n.9 (1984), and United States v. Yellow Cab Co., 340 U.S. 543, 547 (1951)).
171. Id. at 492 (quoting Kosak, 465 U.S. at 853 n.9).
sible and superficial era. Instead, she admonished us, “love means having to say you’re sorry—again and again and again.”

The same is true of a nation. When we as a people do wrong to a segment of our community, or when a serious and inequitable injury is visited upon an individual or group of people as an unavoidable collateral effect of an otherwise justifiable policy, we have a public duty to apologize and to make it right. Because politics is an imperfect human endeavor, the occasions for apology and redress are likely to be many.

By advancing the inevitability of sovereign immunity as a background doctrine of law that restrains the judiciary, I should not be mistaken as expressing indifference or moral apathy. In fact, “the moral dimension of apology is easily lost when it is injected into the legal arena.” When injustice has occurred, we should not hide behind legalities and doctrines of restraint and the elements of causes of action. The responsibility to hold our government to account lies with all of us, not only or even primarily the courts. The consequences of public policy, for good and ill, are realized in community and must be addressed by that community.
