Publius’s Protectors of Liberty: A Still-Important Role for States

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INTRODUCTION

Some of the Founders’ debates are familiar today, while others have passed out of public consciousness. The debate over states’ role in our federal system is both.

In The Federalist Papers, Alexander Hamilton, James Madison, and John Jay painted states as the primary protectors of the people’s

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liberty. That role is familiar. From elementary school, we learn that the Constitution divides power between the states and the central government to protect liberty.\(^1\) Even as the public continues to debate how power should be divided, this underlying purpose of federalism remains widely recognized.

But what does this mean? How do states protect liberty? What does it mean for states to “check” the federal government? The answers to these questions are surprisingly unfamiliar. Indeed, the specific ways that The Federalist Papers expected states to protect liberty have, to a large extent, passed from public consciousness.

In The Federalist Papers, Alexander Hamilton, James Madison, and John Jay (writing under the pseudonym “Publius”) explained the theory of the Constitution to voters in New York. All government existed to “advance the public happiness.”\(^2\) Governments thus needed to regulate in a way that respected their citizens’ natural liberties. To ensure that the new American government would operate without violating these liberties, the Constitution divided sovereign power between separate governments, setting these governments in competition so that they could “watch[] and control[]” each other.\(^3\) Skeptical of the central government, the Constitution, explained Publius, gave states a much greater role in protecting liberty than the federal government. The lynchpin of Publius’s constitutional theory—the way the people could give government enough power to be functional without giving it so much power that it would devolve into oppressive tyranny—was for states to check federal encroachment on individual liberty.\(^4\) States were the primary protectors of the people’s liberty.

How would states carry out this role? This is where Publius starts to sound unfamiliar. Publius highlighted two specific


\(^{2}\) The Federalist No. 45, at 238 (James Madison) (George W. Carey & James McClellan eds., 2001) (“[N]o form of government whatever, has any other value, than as it may be fitted for the attainment of this object.”) [hereinafter The Federalist]. The Federalist 2, supra, at 5 (John Jay); The Federalist 30, supra, at 148 (Alexander Hamilton).

\(^{3}\) The Federalist 52, supra note 2, at 276 (James Madison).

\(^{4}\) The Federalist 31, supra note 2, at 153 (Alexander Hamilton) (arguing, “all observations[] founded upon the danger of usurpation,” referring to the fear the central government would usurp powers not delegated to it, “ought to be referred to the composition and structure of the government, not to the nature and extent of its powers”); The Federalist 51, supra note 2, at 270 (James Madison) (noting power is “first” divided between the federal and state governments.).

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ways in which states would protect the people from federal encroachment. First, states would exercise lawful power over the selection of federal officers, thereby influencing federal policy. Second, as watchdogs, states would sound the alarm whenever the federal government overstepped its bounds. Because Publius thought states would play a more important role in the people’s lives than the central government, Publius predicted that the people would trust the states. Thus, when state governments complained of federal encroachment, Publius thought the people would quickly respond, voting out the culpable federal officers.

These principles may sound surprising today, even to lawyers. Do states really play a more important role than the federal government? Do states really have more power than the federal government? Isn’t it the federal government that protects the people from state violations of liberty, rather than the reverse? Is it really a good idea for state governments to influence federal elections? And use that influence to “control[]” the federal government? Contrary to Publius, some today may believe that states are functionally subsidiaries of the federal government, even if politically separate. Others may elevate states’ right to political autonomy (the state qua state) over their role to protect liberty.

Whatever the reason, most today would probably find Publius’s view about states’ role in protecting liberty to be unfamiliar, if not plainly wrong.

5. THE FEDERALIST 45, supra note 2, at 240 (James Madison).
6. THE FEDERALIST 44, supra note 2, at 235 (James Madison).
7. See Daniel v. Paul, 395 U.S. 298, 315 (1969) (Black, J., dissenting) (criticizing the Court for “giv[ing] the Federal Government complete control over every little remote country place of recreation in every nook and cranny of every precinct and county in every one of the 50 States”).
8. Public discourse frequently views intervention by the federal government as necessary to protect individual rights from states rather than the reverse. See, e.g., Dobbs v. Jackson Women’s Health Org., 142 S. Ct. 2228, 2317–18 (2022) (Breyer, J., dissenting) (listing ways in which states would likely trample individual rights following the overruling of Roe); Oklahoma v. Castro-Huerta, 142 S. Ct. 2486, 2522–23 (2022) (Gorsuch, J., dissenting) (noting, in the context of evaluating whether the federal government has exclusive jurisdiction over certain crimes, that “state governments have sometimes proven less than reliable sources of justice for Indian victims”). Here, I do not take a position on whether that perception is correct; I merely make the observation that public discourse today often views the federal government as more protective of individual rights than the states.
There may be good reasons for Publius’s views to be unfamiliar; we live in a different world.\(^{10}\) The Constitution today differs dramatically from the 1789 Constitution, and some changes have directly undermined the ways Publius predicted states would protect liberty. For example, the Seventeenth Amendment directly curbs states’ ability to influence federal elections, and the Reconstruction Amendments embody a massive structural shift in the way the Constitution divides power to protect liberty. Many of these changes embody a new perception that states pose a greater risk to individual liberty than does the central government.\(^{11}\)

Whether for good reason or not, it seems clear that, though the idea that states protect liberty by checking the federal government is familiar, the ways that Publius thought states would check the federal government are not.

This Note brings Publius’s view back to light. To change constitutional structures without first understanding why the structures exist is to risk our liberty. This is especially true with respect to states’ powers because federalism is the first and primary mechanism the Constitution uses to protect liberty. If we upset the balance of federalism without understanding the role states were intended to play, we may inadvertently leave our rights with little structural protection down the road, leaving the rights of political minorities to a majority’s mercy. Of course, this is not to say that we cannot disagree with Publius. We may conclude that Publius was wrong or that giving states less power than Publius expected would better protect our liberty. But whether we ultimately agree with Publius or not, we should begin with an understanding of what role states were originally intended to play. Unfortunately, the specifics of that role have passed from our consciousness, and this Note seeks to resurrect them. Despite

\(^{10}\) There are some poor reasons for this shift as well. Many have noted that the American public is become increasingly unaware of the role that constitutional structures play in our system of government. E.g., Neil M. Gorsuch, A REPUBLIC, IF YOU CAN KEEP IT 27–34 (2019) (describing that trend).

\(^{11}\) This shift in perception is embodied in the most prominent Constitutional and statutory amendments occurring in the last 150 years. The Reconstruction Amendments empower the federal government to oversee state legislation while limiting state power. U.S. Const. amends. XIII–XV. Legislation enacted under Section 5 authority authorizes the federal government to enforce new limits on states. See, e.g., Section 5 of the Voting Rights Act, 42 U.S.C. § 1973c; 42 U.S.C. § 1983. In the case of Section 1983, there is no comparable legislation for federal violations. But see Bivens v. Six Unknown Named Agents, 403 U.S. 388 (1971).
contemporary changes to our federal structure, states’ role in protecting liberty may remain vitally important.

This Note proceeds as follows. Part I discusses why the conclusions reached in this Note are important and defends the Note’s methodology. Part II analyzes the roles Publius thought the states would play. Part III shows Publius thought states would protect liberty by influencing the people and federal officers. Part IV overviews changes in the Constitution that have undermined the states’ ability to protect liberty but argues the states retain that role.

I. METHODOLOGY

First, a word (or two) about the scope of this Note: this Note discusses the role select Framers thought states would play in protecting individual liberty. It focuses on the views expressed in The Federalist Papers, citing antifederalists and other political thinkers mostly as context. The point of this focus is not to indicate that The Federalist Papers are more important or more representative than other sources. Rather, this Note focuses on The Federalist Papers because they are so frequently cited and so much more familiar to lawyers and the public than other sources. And, despite the papers’ ubiquity, because many would probably be surprised to hear the specific ways The Federalist Papers describe states’ role in protecting liberty. Whereas a statement that modern thinkers have largely elided what Elbridge Gerry thought about states’ rights likely wouldn’t surprise many (though Gerry was one of the most vocal delegates at the Convention and an influential opponent of the Constitution), a claim that scholars have failed to appreciate the specific role that Hamilton, Madison, and Jay seemed to think states should play is important.

Indeed, the authors of The Federalist Papers include the “Father of the Constitution,”†13 the “father of the American government,”†14 and individuals who, between the three of them, served as President of the United States,†15 first Chief Justice of the United States,†16 Secretary of State,†17 Secretary of the Treasury,†18 Representative in Congress,†19 Governor of New York,†20 and Chief Justice of New York,†21 among other positions. All three were delegates to the Continental Congress, Jay serving as its president.†22 And two were delegates to the Constitutional Convention.†23 It’s hard to think of a list of co-authors whose ideas had a greater impact on constitutional law. And The Federalist Papers were written to explain the structure of the Constitution to those who would vote on it.†24

Of course, the papers are biased. They are op-eds written in response to opposing op-eds during a robust public debate about the meaning and utility of the Constitution.†25 Publius had an agenda—to convince citizens in New York’s ratifying convention to ratify the Constitution.†26 And the papers make no attempt to appear unbiased, instead expressly affirming a political aim†27 and too often resorting to mudslinging and other cheap political tricks.†28 Moreover, The Federalist Papers did not reflect the views of many

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15. CHENEY, supra note 13, at 352.
17. Id. at 271–72; CHENEY, supra note 15, at 8.
18. CHERNOW, supra note 14, at 287.
19. CHENEY, supra note 13, at 186.
22. Id., at 93–94; CHENEY, supra note 13, at 88–89; CHERNOW, supra note 14, at 261.
23. CHERNOW, supra note 14, at 227; e.g., CHENEY, supra note 13, at 166.
24. THE FEDERALIST NO. 1 (Alexander Hamilton) (explaining the project’s aims).
25. Id.
26. THE FEDERALIST 1, supra note 2, at 3 (“[I]t has been my aim, fellow citizens, to put you upon your guard against all attempts . . . to influence your decision [on whether to adopt the Constitution].”).
27. Id. (“I am clearly of opinion, it is your interest to adopt [the Constitution]. . . . I will not amuse you with an appearance of deliberation, when I have decided.”).
28. E.g., id. at 2 (accusing future opposition as being motivated by “perverted ambition,” “avarice, animosity, party opposition, and many other motives, not more laudable than these”).
Founders, and may not even reflect the true beliefs of their authors. As such, they should be cited with caution.

Nonetheless, the papers were foundational. And, in various contexts, some of the papers’ “vices” may actually be strengths. For example, the fact that the papers were politically motivated op-eds may strengthen the papers’ ability to shed light on the original meaning of the Constitution. Had the papers been written instead as a modern law review article, written to academics, full of technical language, and rarely read, the papers would do little to show what “the People” understood about the Constitution. But written by prominent authors in accessible newspapers to “fellow-citizens” of one of the most populous states and representing the winning side of an ongoing, nationwide debate, The Federalist Papers indeed provide significant evidence of what “the People” thought the Constitution meant—including what states’ role would be under the Constitution.

Indeed, courts and policymakers have treated the papers as authoritative indicators of the Constitution’s meaning for 200 years. Even if the papers did not accurately reflect the views of


30. For example, Hamilton changed his view on the President’s removal power after ratification. Compare THE FEDERALIST 77, supra note 2 (Alexander Hamilton) (“The consent of [the Senate] would be necessary to displace as well as to appoint . . . .”), with Letter from William Smith to Edward Rutledge (June 21, 1789), in 16 Documentary History of the First Federal Congress 1789-1791 831, 832–33 (Charlene Bangs Bickford et al. eds., 2004) (noting Hamilton “had changed his opinion & was now convinced that the Presidt. Alone shod. Have the power of removal at pleasure”). Clearly contrary to The Federalist Papers (and what he had argued at the Constitutional Convention), Madison would later argue that the House had power to reject the Jay Treaty. Compare THE FEDERALIST 75, supra note 2, at 389-90 (Alexander Hamilton) (explaining why the Constitution does not involve the House in treatymaking), and THE FEDERALIST 63, supra note 2, at 325 (James Madison) (noting the House is too “numerous and changeable” to properly engage in foreign affairs), with CHERNOW, supra note 14, at 497, 499 (noting Madison argued the House needed to approve the Jay Treaty, contrary to his former statements in the Constitutional Convention).

31. THE FEDERALIST 1, supra note 2, at 3 (Alexander Hamilton).

32. James G. Wilson, The Most Sacred Text: The Supreme Court’s Use of The Federalist Papers, 1985 BYU L. REV. 65, 66 (tabulating Supreme Court citations to The Federalist Papers by decade up to the 1980s); Ira Lupu, The Most-Cited Federalist Papers, 15 CONST. COMMENT. 403, 406-09 (1998) (reviewing the five most-cited papers); see also Kurt T. Lash, The Federalist
many individuals attending the Philadelphia Convention or voting in ratification conventions, our Constitution has been interpreted—almost since the founding generation—with the view that The Federalist Papers are authoritative indicators of the Constitution’s original meaning. The views of The Federalist Papers may have simply won out in the long run.\(^3^3\)

The biases of The Federalist Papers may be less concerning in some topics than in others. Writing to convince people to transfer power from the states to the federal government, Publius espoused a decidedly pro-federal-government perspective, and this bias makes Publius’s positive claims about states’ roles more representative.\(^3^4\) Publius’s views about the positive role states would play in protecting liberty were likely much more representative of the views of the median Founder.\(^3^5\) Of course, that is an empirical claim and not one that this Note proves. But, intuitively, The Federalist Papers are better evidence of the positive roles states were originally expected to play than they are of the positive roles the President would play, for example. (And The Federalist Papers have been liberally cited as authoritative on the latter point.) Nonetheless, to emphasize the limitation of this Note’s scope, this Note will make claims about what role “Publius” thought the states would play rather than making claims about what role “the Founders” more generally expected states to play.

One final point about this Note’s scope. Some readers may wonder whether The Federalist Papers are the wrong sort of

\(^{33}\). See generally, e.g., William Baude, Constitutional Liquidation, 71 STAN. L. REV. 1 (2019) (discussing the process of liquidation).

\(^{34}\). On the other hand, this bias would make likely Publius’s negative claims about states’ roles (i.e., things states should not do) less representative.

\(^{35}\). The Federalist 1, supra note 2, at 1 (Alexander Hamilton) (expecting people to criticize the Constitution because it “innovates upon too many local institutions”); id. at 2 (describing the “most formidable” obstacle to ratification as state officials’ “obvious interest . . . to resist all changes which may hazard a diminution of the power, emolument and consequence . . . they hold under the state establishments”).
historical evidence to understand the meaning of the Constitution. Originalist scholarship is generally interested more in the understanding of the People who ratified the Constitution than that of the individuals who wrote it (i.e., it is interested more in the original public meaning than original intent).\(^{36}\) “The People” well may have disagreed with The Federalist Papers but voted to ratify anyway. This concern is mitigated for the reasons discussed above. The Federalist Papers were written in accessible language to convince “the People” to ratify the Constitution. And The Federalist Papers’ view of states’ positive role—which this Note discusses—is likely more representative of the median voter than Publius’s view on other issues.\(^{37}\) Additionally, the distinction between original intent and original public meaning is muted in this Note’s context. The distinction between public meaning and intended meaning is a linguistic quibble, a distinction that makes sense when talking about the meaning of constitutional language. The distinction is inapposite, however, in nonlinguistic

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\(^{36}\) When modern originalism surfaced, it was viewed as an intentionalist theory. Keith E. Whittington, *The New Originalism*, 2 GEO. J.L. & PUB. POL’Y 599, 603 (2004) (“[O]riginalism during this period was an emphasis on the subjective intentions of the founders”); Paul Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U. L. REV. 204, 204 (1980) (discussing public-meaning and intended-meaning originalisms). *But see* Whittington, *supra* (doubting whether the first modern originalists were actually committed to legislative intent). To obviate some practical objections to originalism, there was a shift to public-meaning originalism. RANDY E. BARNEST, *RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY* 92–96 (2003) (explaining the shift to public-meaning originalism). That has since been the dominant approach, though some today do advocate for a focus on intended meaning. Jamal Greene, *The Case for Original Intent*, 80 GEO. WASH. L. REV. 1683, 1702–05 (2012) (defending original intent); Larry Alexander, *Originalism, the Why and the What*, 82 FORDHAM L. REV. 529, 540 (2013) (advocating an intended-meaning approach). In discussing original-intent originalism, it is important to not conflate an interpretive focus on subjective, counterfactual intent with a focus on intended meaning. Unlike the former, a focus on intended meaning is linguistic (just a different conception of “meaning”) and is theoretically consistent with textualism. Frank H. Easterbrook, *The Role of Original Intent in Statutory Interpretation*, 11 HARV. J.L. & PUB. POL’Y 59, 59–60 (1988) (critiquing the notion of a subjective legislative intent); Thomas R. Lee & Stephen C. Mouritsen, *Judging Ordinary Meaning*, 127 YALE L.J. 788, 817 (2018) (noting intended meaning is “a viable, distinct basis for crediting ordinary meaning”).

\(^{37}\) E.g., *THE FEDERALIST NO. 34* (Alexander Hamilton) (arguing the federal taxing power should be “unlimited”); *THE ESSENTIAL ANTIFEDERALIST* 108 (Brutus I) (W.B. Allen & Gordon Lloyd eds., 2d ed. 2002) [hereinafter EAF] (arguing an unlimited taxing power was a bad idea).
contexts—and constitutional structures implicate questions of law more than questions of linguistics.  

In short, because this Note focuses on the views of The Federalist Papers, it should not be taken to discuss the views of the Founders generally. Nonetheless, this Note’s focus on The Federalist Papers is both appropriate and helpful. The conclusion that The Federalist Papers discuss a role for states that has long been forgotten in our public consciousness is a compelling one, one that ought to inspire greater attentiveness to what The Federalist Papers contain.

II. THE STATES’ ROLES

Publius thought states, like every government, existed to secure public happiness. As part of this duty, states had a responsibility to protect the people’s liberty.

A. States, Like All Governments, Existed to Secure Happiness

Publius thought states existed to secure the public happiness, a view that reflected the era’s prevailing theory of government at the time. Publius thought public happiness would best be secured by a federal system. In the federal system described by Publius, states had primary responsibility for securing the public good.

1. All Government Existed to Secure Public Happiness

“[T]he object of government... is the happiness of the people.” 39 This view, which hearkens back to the classical legal

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38. The “standard picture” of legal interpretation today is that an enactment’s legal content is the linguistic content of its text (usually defined as its “ordinary meaning”). Mark Greenberg, The Standard Picture and its Discontents, in 1 OXFORD STUDIES IN PHILOSOPHY OF LAW 39, 48 (Leslie Green & Brian Leiter eds., 2011); Lee & Mouritsen, supra note 36, at 793–96 (proposing linguistic solutions to problems in the current “standard picture”). Some have challenged that view. William Baude & Stephen E. Sachs, The Law of Interpretation, 130 HARV. L. REV. 1079, 1083 (2017) (arguing the interpretation of legal texts is a question of law); Abbe R. Gluck, The Federal Common Law of Statutory Interpretation: Erie for the Age of Statutes, 54 W.M. & MARY L. REV. 753 (2013) (making a similar argument); see also 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 68 (1765) (“the rules of expounding wills, deeds, and acts of parliament”). But even proponents of the standard picture would likely agree that the separation of powers and federalism are less linguistic than legal—though often tied to the Vesting Clauses, these structural principles are often described as the legal theories underpinning the Constitution’s text rather than the linguistic import of particular provisions.

39. THE FEDERALIST 62, supra note 2, at 322 (James Madison).
tradition, has resurged in recent common-good scholarship.\textsuperscript{40} But it may still sound foreign to many. In our individualistic, autonomy-based liberal democracy, we are not accustomed to thinking that happiness and human flourishing are tied to government—rather, the conventional wisdom is that happiness is achieved on an individual basis, without government involvement.\textsuperscript{41} Indeed, individuals have rights that preclude government interference and that operate as counterweights to government’s commitment to the common good.\textsuperscript{42} This view stands in contrast to what some today

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40. See generally ADRIAN VERMEULE, COMMON GOOD CONSTITUTIONALISM (2022). I take phrases like “public happiness” and “common good” to be synonymous.
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42. E.g., Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 872–78 (1992) (plurality op.) (weighing individual rights against societal interests). This view reflects both the difference between the natural law and natural rights traditions and the shift to modern philosophy.
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The natural law tradition rests on the view that humans are by nature social, and that society is prior to the individual. ARISTOTLE, THE POLITICS Bk. I, at 5, I.2, 1253a 15–17 (B. Jowett trans. 1885) (basing natural law on a claim that “[a] social instinct is implanted in all men by nature”); id. at 4, I.2, 1253a 12–14 (noting society is prior to the individual); THOMAS AQUINAS, SUMMA THEOLOGICA Pt. I-II, Q. 91, art. 2, co. (Fathers of the English Dominican Province trans. 1947) (1485) (basing natural law on a claim that humans are rational by nature). For these theorists, the role of society is to pursue the common good. AQUINAS, supra, at Pt. I-II Q. 90, art. 2, co. (“[L]aw must needs regard properly the relationship to universal happiness... [and] every law is ordained to the common good.”). In one version of this view, the common good is a separate, communitarian good that is not reducible to the good of its component parts—the whole is greater, and distinct, from the sum of its parts. VERMEULE, supra note 40, at 4, 127. Under this view, then, rights operate within “law’s larger ordering to the common good.” Id.; see AQUINAS, supra, at Pt. I-II, Q. 90, art. 3 ad.3 (responding to the argument that law may be in pursuit of private good rather than collective good) (“N[oth]ing [has the nature of a law] unless it be directed to the last end which is the common good...”). On this view, it does not make sense to talk about a right “trumping” or even “weighing against” society’s interests—those rights are subsumed within society’s interests. VERMEULE, supra note 40, at 4, 127. But see Mark C. Murphy, The Common Good, 59 REV. METAPHYSICS 133, 136 (2005) (noting two additional ways the common good can be conceptualized); see also J. Joel Alicea, The Moral Authority of Original Meaning, 98 NOTRE DAME L. REV. 1 (2022) (same).

In contrast, the natural rights tradition views the individual as prior to society. JOHN LOCKE, TWO TREATISES OF GOVERNMENT Pt. II § 128 (1690), reprinted in V THE WORKS OF JOHN LOCKE 207, 474 (New Ed., 1823). Rather than viewing government as the natural end of society, many natural rights theorists view government as existing contingently, by individual consent. Id. § 131 (noting government is constituted by consent). As such, this tradition is much more prone to view individual rights as counterbalances to society’s pursuit of the common good rather than operating within that framework. Though many Founding-era natural rights theorists might have maintained the natural law view that
take to be the Founders’ view: that government seeks to secure the common good and that individuals find happiness as part of a well-ordered society.\footnote{See Jud Campbell, Natural Rights and the First Amendment, 127 Yale L.J. 246 (2017) (arguing the Founders viewed natural rights as regulable).}

Also in contrast to our (current) positive-law tradition, Publius thought government’s grand commission derived directly from the “transcendent law of nature and of nature’s God”—those laws require that “safety and happiness of society are the objects at which all political institutions aim.”\footnote{See Gertz v. Robert Welch, Inc., 418 U.S. 323, 356 (1974) (Douglas, J., dissenting) (arguing the First Amendment allows “no accommodation” of its freedoms); New York Times Co. v. Sullivan, 376 U.S. 254, 283 (1964) (Black, J., concurring) (same); N.Y. State Rifle & Pistol Ass’n, Inc. v. Bruen, 142 S. Ct. 2111, 2126–30 (2022) (holding Second Amendment claims are analyzed under a historical analysis, rather than tiered scrutiny).} Publius stated that “no form of government whatever has any other value than as may be fitted for the attainment of [the public good].”\footnote{See discussion supra note 42.} As such, the people

government could regulate rights in pursuit of the common good. See Jud Campbell, Natural Rights and the First Amendment, 127 Yale L.J. 246 (2017) (arguing the Founders viewed natural rights as regulable).

The shift from natural law to natural rights builds on the shift to modern philosophy. Whereas premodern philosophers started with external existence as given and asked how individuals fit into that existence, see Aristotle, supra, at 4, 1.2, 1253a 12–14, modern philosophers start with internal existence—i.e., the individual—and ask how the individual affects external existence. This is exemplified by Descartes, often called the first modern philosopher, who began with the premise “I think.” Rene Descartes, Meditations on First Philosophy 220–22 (Stanley Twyman ed., 1993) (1641). And it is explicitly argued by perhaps the prototypical modern philosopher, Immanuel Kant. Immanuel Kant, Critique of Pure Reason 110–11 (Paul Guyer & Allen W. Wood trans. & eds., 1998) (1781) (noting Copernicus “made the observer revolve and left the stars at rest” rather than the reverse and proposing a similar revolution in how humans relate to the world). Once society focused its primary attention on the individual and began to view the individual as having priority to society, the ground was set for society to view rights as trumps or counterbalances to society’s interests.


See discussion supra note 42.

SEE THE FEDERALIST 45, supra note 2, at 237–38 (James Madison) (grammar modernized and emphasis added).
had a natural right to abandon any government or government action that did not serve common happiness.\textsuperscript{46}

Publius was not alone. A 1776 Continental Congress resolution recommended “adopt[ing] such government as shall . . . best conduce to the happiness and safety [of the people].”\textsuperscript{47} A few months later, the Declaration of Independence asserted governments “are instituted” to protect the people’s right to, \textit{inter alia}, the "pursuit of Happiness."\textsuperscript{48} Antifederalist Samuel Bryan, writing as Centinel, evaluated government institutions by whether they “promote[d] the happiness of the whole community.”\textsuperscript{49} And the letter (signed by George Washington) that delivered the proposed Constitution to the Continental Congress stated the Constitution was intended to “secure . . . freedom and happiness.”\textsuperscript{50}

This belief—that government was necessary for and existed to achieve public happiness—echoed a long tradition of theorists whose views were foundational to the founding. Aristotle had argued that government was not only necessary for the flourishing of the individual, but also for the end of the individual, for “the state is a creation of nature and prior to the individual.”\textsuperscript{51} Building on this tradition, Aquinas defined law as ordered toward “universal happiness” and argued that any government action not ordered to the common good was “devoid of the nature of a law.”\textsuperscript{52} Locke asserted, “the end of government is the good of mankind.”\textsuperscript{53}

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\bibitem{46} Id. ("Let the [sovereignty of the states] be sacrificed to the [happiness of the people"); \textit{The Federalist} 40, \textit{supra} note 2, at 204–06 (James Madison).
\bibitem{47} 4 \textit{Journals of the Continental Congress} 342 (1776).
\bibitem{48} \textit{The Declaration of Independence} ¶ 2 (U.S. 1776).
\bibitem{49} \textit{EAF, supra} note 37, at 99 (Centinel 1).
\bibitem{50} George Washington, Letter to the President of Congress Transmitting the Constitution (Sept. 17, 1787), https://avalon.law.yale.edu/18th_century/translet.asp.
\bibitem{51} \textit{Aristotle, Politics} 4 (B. Jowett trans., Oxford 1885), 1–2 (Bekker No. 1253a 12–14).
\bibitem{52} \textit{Aquinas, supra} note 42, at Pt. I-II Q. 90, art. 2.
\bibitem{53} \textit{Locke, supra} note 42, Pt. II § 229 (1690); \textit{see also} id. § 131 (noting that government’s power can seek “no other end but the peace, safety, and public good of the people.”); \textit{id.} at § 135 (arguing that, because in the state of nature, humans only had power conducive to preservation and because humans could not cede more power to government than that which they had, government has power to act to preserve society only). When Locke said government should pursue the “good of mankind,” he meant government should pursue the people’s happiness. For Locke, “good” meant pleasure (a lesser happiness), and only “the true intrinsic good” caused true happiness. II \textit{John Locke, An Essay Concerning Human Understanding} ch. 21. § 54 (Project Gutenberg eBook ed. 2017) (1689). \textit{See also} id. ch. 20 § 2 (“Things then are good or evil only in reference to pleasure or pain”); \textit{id.} ch. 21 § 52 (calling the “pursuit of happiness” “our greatest good”).
\end{thebibliography}
Government power could be “directed to no other end, but the peace, safety, and public good of the people.” 54 Blackstone also wrote that “the principal aim of society is to protect individuals in the enjoyment of [their] absolute rights,” 55 which Sharswood interpreted to include “the inalienable right . . . to secure . . . happiness.” 56

Building on a long train of classical thinkers, Publius thought states, like the rest of government, were ordained with the sole purpose to secure public happiness.

2. States Would be the Primary Means of Securing Public Happiness

All government was ordained for the same purpose of securing the common good, but not all governments were equally suited to fulfill that purpose. Publius argued a federal system would best secure public happiness and thought, within that system, that states were more important for the public happiness than the federal government.

In Publius’s view, the Articles of Confederation was failing to serve its great purpose to secure public happiness and was destined to continue to fail. “[A] sovereignty over sovereigns . . . is subversive of the order and ends of civil polity.” 57 For that reason, “no prudent man” would “choose to commit his happiness” to the Articles of Confederation, in which the central government (a sovereign over sovereigns) could not operate directly on the people, only on the states. 58 Only if the federal government was endowed as a “real government,” 59 endowed with power to directly regulate the people, did Publius think securing public

54. LOCKE, supra note 42 §§ 3, 131, 140, 159, 163 (describing the end of government variously as the “preservation of property,” the “preservation of all,” and the “good of the community”).

55. BLACKSTONE, supra note 38, at 120.

56. I WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 128 n.8 (George Sharswood ed. 1875) (1765) ("It has become a favourite maxim that it is the great duty of government to promote the happiness of the people. The phrase may be interpreted . . . well, but it is . . . inaccurate . . . It is the inalienable right of the people to pursue their own happiness; and the true and only true object of government is to secure them this right.").

57. THE FEDERALIST 20, supra note 2, at 99 (James Madison).

58. THE FEDERALIST 15, supra note 2, at 72–73 (Alexander Hamilton); THE FEDERALIST 1, supra note 2, at 3 (Alexander Hamilton).

59. See HADLEY ARKES, BEYOND THE CONSTITUTION 8 (1990) (calling the federal government a “real government” in part because it can operate directly on the people).
happiness was possible. In other words, Publius thought a federal system would secure government’s purpose better than a confederation. So, the Constitution divided power among the states and the federal government.

Within that federal system, states would be the primary players in securing public happiness. Both governments would directly regulate the people, and both would be sovereign. But states would have more power than the central government. While the federal government had only “few and defined” powers, states’ powers were “numerous and indefinite.” States held, exclusively, all powers not delegated to the federal government and, concurrently, all powers delegated to the federal government unless prohibited by the Constitution or preempted. States thus had more power.

States’ powers were also more important to the everyday life of citizens. States had exclusive power to govern for “local purposes,” including the administration of criminal justice and private justice between citizens of the same state, the “supervision of agriculture,” and all other “concerns of a similar nature.” Regulating “all the objects” concerning “the lives, liberties, and properties of the people[,] and the internal order, improvement,

60. The “great and radical vice” of the Articles was that it lacked power to legislate directly on the people. The Federalist 15, supra note 2, at 71 (Alexander Hamilton). Publius spent six essays persuading readers to give the federal government that power. The Federalist 15–20. Madison concluded those essays by stating “a sovereignty over sovereigns, a government over governments . . . is a soecism in theory, so in practice; it is subversive of the order and ends of civil polity.” The Federalist 20, supra note 2, at 99 (James Madison) (grammar modernized).
61. The Federalist 51, supra note 2, at 270 (James Madison) (“[P]ower . . . is first divided between [the federal and state governments.]”)
62. The Federalist 45, supra note 2, at 241 (James Madison).
63. The Federalist 32, supra note 2, at 155 (Alexander Hamilton). Concurrent regulatory jurisdiction has been more complicated in the Commerce Clause realm. The Marshall Court held the two governments could regulate the same objects, but only if using separate powers. Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1 (1824). The Taney Court shifted to give states exclusive power over local issues and the federal government exclusive power over national issues. By the New Deal, the Court shifted again, giving states exclusive power over objects indirectly affecting interstate commerce and the federal government exclusive power over objects directly affecting it. Hammer v. Dagenhart, 247 U.S. 251 (1918). The New Deal Court rejected dual federalism. NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937).
64. The Federalist 9, supra note 2, at 41 (Alexander Hamilton).
65. The Federalist 17, supra note 2, at 82 (Alexander Hamilton) (noting states have power over “local legislation”).
and prosperity of the state,” states would regulate the objects that the people would care most about.66

Every exercise of government power, if it was deemed law at all, needed to further public happiness.67 With more power and more important powers, states would play a greater role securing the public’s happiness than would the federal government. That Publius championed this conclusion so clearly is notable, given Hamilton’s federal preferences.

B. States Were the Primary Protectors of Liberty

What does securing the public happiness mean? The principal fault of the classical tradition is that the “common good,” then a synonym for “public happiness,” is indeterminate.68 But one aspect of securing the public happiness was clear: to secure the public happiness, government had to protect individual rights.69 Both Blackstone and the Declaration of Independence expressed government’s duty to the collective well-being in terms of a duty to protect individual liberty. Blackstone had argued “the principal aim of society is to protect individuals in the enjoyment of [their] absolute rights,”70 and the Declaration claimed the protection of liberty was the reason “[g]overnments are instituted.”71

Would the role of protecting liberty fall to the federal government or to the states? Publius thought states would be the primary protectors of the people’s liberty. States would check federal encroachment, protecting rights from improper federal interference, and would act as the primary trustees of the people’s rights, as the people would cede more rights to the states.

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66. THE FEDERALIST 45, supra note 2, at 241 (James Madison).
67. Supra Section II.A.1.
68. MARK C. MURPHY, NATURAL LAW IN JURISPRUDENCE AND POLITICS 176 (2006).
69. As discussed more in depth below, even as the Founders adopted the social contractarian view that individuals ceded natural rights to form government, they held that government could not violate natural rights.
70. BLACKSTONE, supra note 38, at 120.
71. THE DECLARATION OF INDEPENDENCE ¶ 2 (U.S. 1776) (listing grievances).
1. States Would Check Federal Encroachment

Publius was skeptical of human nature, and worried that officials would use power to trample the rights of others.72 “[I]n every political institution, a power to advance the public happiness[] involves a discretion which may be misapplied and abused.”73 This worry was well founded; problems caused by the too-powerful English monarchy74 and unchecked state legislatures75 were fresh on the mind.

The Constitution was intended to “combin[e] the requisite stability and energy in government with the inviolable attention due to liberty.”76 But many thought it gave too much “energy” with not enough “attention . . . to liberty.” It lacked a bill of rights77 and gave the federal government powers that were often undefined,78 in some contexts limitless,79 and always supreme.80 Many plausibly worried the Constitution was a tyrannical consolidation waiting to happen.81

Publius’s response? Structures, including federalism. Addressing the fear that the federal government would usurp state power, Hamilton wrote, “all observations, founded upon the danger of usurpation, ought to be referred to the composition and structure of the government, not to the nature or extent of its powers.”82 Publius understood that limiting federal power on paper would not alone protect liberty; ambition had to counterbalance

72. THE FEDERALIST 10, supra note 2, at 43–44 (James Madison); THE FEDERALIST 51, supra note 2, at 268 (James Madison).
73. THE FEDERALIST 41, supra note 2, at 207–08 (James Madison).
74. THE DECLARATION OF INDEPENDENCE (U.S. 1776) (listing grievances).
76. THE FEDERALIST 37, supra note 2, at 181 (James Madison).
77. Patrick Henry, Speech in the Virginia Convention (17 June 1788).
78. EAF, supra note 37, at 110 (Brutus 1) (discussing Necessary and Proper Clause).
79. Id. at 91 (Federal Farmer XVII) (discussing Tax Clause); THE FEDERALIST 23, supra note 2, at 113 (Alexander Hamilton) (arguing defense powers “ought to exist without limitation”); THE FEDERALIST 34, at 163 (Alexander Hamilton) (same for taxing power).
80. EAF, supra note 37, at 107 (Brutus 1) (discussing Supremacy Clause).
81. Id. 70–71 (Plebian); id. 107–08 (Brutus 1) (“[A]ll that is reserved for the individual states must very soon be annihilated.”).
82. THE FEDERALIST 31, supra note 2, at 153 (Alexander Hamilton).
the federal government’s ambition. Thus, the Constitution’s first structural principle gave the federal government power over “certain enumerated objects only, and le[ft] to the several states, a residuary and inviolable sovereignty over all other objects.” Each wielding sovereign power, the states and the central government had “the disposition and faculty of resisting and frustrating the measures of each other.” “Hence a double security arises to the rights of the people. The different governments will control each other; at the same time that each will be controlled by itself.”

Thus, states were the “suspicious and jealous guardians of the rights of the citizens, against encroachments from the federal government.” States would display an “inviolable attention . . . to liberty” precisely by checking the federal government.

Of course, federalism entailed the inverse principle as well—the federal government could also check encroachments by the states. As discussed in more detail in Part III below, however, Publius was much more focused on states’ check on federal power than the reverse. Because states had greater power and regulated more important issues, Publius thought, and intended, that states would have the clear upper hand in any power struggle between the governments. For now, suffice it to note that federalism was the Constitution’s primary means of protecting liberty, and states were intended to check the federal government.

83. The Federalist 48, supra note 2, at 256 (James Madison) (calling paper limits “greatly overrated” and calling for “a more adequate defen[s]e”); The Federalist 51, supra note 2, at 268 (James Madison) (supplementing paper limits with “ambition to counteract ambition”).
84. The Federalist 51, supra note 2, at 270 (James Madison) (“[P]ower . . . is first divided between [the federal and state governments].”)
85. The Federalist 39, supra note 2, at 198 (James Madison); The Federalist 45, supra note 2, at 239 (James Madison) (“the states will retain . . . a very extensive portion of active sovereignty”).
86. The Federalist 45, supra note 2, at 239 (James Madison); The Federalist 26, supra note 2, at 130 (Alexander Hamilton).
87. The Federalist 51, supra note 2, at 270 (James Madison) (spelling modernized).
88. The Federalist 26, supra note 2, at 130 (Alexander Hamilton).
89. The Federalist 37, supra note 2, at 181 (James Madison).
90. The Federalist 45, supra note 2, at 239 (James Madison).
91. Infra Part III.
2. States Were Primary Trustees of the People’s Rights

States were also the primary trustees of the people’s rights. By investing the states with more power, the people ceded more rights to the states than to the federal government.

a. The people ceded more rights to the states. Many Founders believed government power and individual rights were two sides of the same coin. In The Federalist Papers, Jay noted that “in order to vest [government] with requisite powers,” “the people must cede to it some of their natural rights.”92 This echoed Blackstone, who had written that “every man, when he enters into society, gives up a part of his natural liberty”; “as the price” of being part of society, “the law . . . diminishes the natural [rights].”93 Other theorists agreed.94 Every power given to government required ceding an aspect of liberty.95

The people ceded more rights to the states. By ratifying the Constitution, the people ceded “few and defined” powers to the federal government, thereby ceding only those “few” rights tied to the “defined” powers.96 On the other hand, states had “numerous and indefinite” powers, meaning the people had ceded to them “numerous and indefinite” rights.97 The Constitution did not define state powers (for it established the federal government, not the states’), but Publius noted states had power to regulate “all the objects” that “concern the lives, liberties, and properties of the people[,] and the internal order, improvement, and prosperity of

92. THE FEDERALIST 2, supra note 2, at 5 (John Jay).
93. BLACKSTONE, supra note 38, at 121–22.
94. Among social contract theorists, Rousseau perhaps went the furthest in favor of democracy by arguing that joining society entailed the “total alienation to the whole community of each associate with all his rights.” JEAN-JACQUES ROUSSEAU, THE SOCIAL CONTRACT 15, 23 (H.J. Tozer trans., Wordsworth ed. 1998) (1762) (emphasis added). See also JOHN STUART MILL, ON LIBERTY 1 (Walter Scott Publishing Co., 1901) (1859) (defining civil liberty as “the nature and limits of the power which can be legitimately exercised by society over the individual”). For a contemporary writer, see Kurt T. Lash, A Textual-Historical Theory of the Ninth Amendment, 60 STAN. L. REV. 895, 913 (2008) (“Retained rights, therefore, are powers not delegated to the national government.”); id. at 910–11 (equating the “denial” of rights with the “erroneous enlargement of government power over that particular subject”).
95. See THE FEDERALIST 26, supra note 2, at 126–27 (Alexander Hamilton) (noting more rights implied lesser government power and greater government power implied fewer rights); FEDERALIST 83, at 432 (Alexander Hamilton).
96. See THE FEDERALIST 45, supra note 2, at 241 (James Madison).
97. Id.
the state.” Clearly, Publius thought the people had ceded to the states significant rights related to their everyday lives.

Moreover, while all the rights ceded to the federal government were protected through an intricate system of federalism, separation of powers, and checks and balances, the Constitution required nothing of the sort for the rights ceded to the states. States had a broad police power to legislate for the health, safety, welfare, and morals of the community, and the Constitution left most positive-law limits to be worked out at the state level. States could use this police power to legislate for the common good, even when that legislation infringed on individual liberty — especially if today’s new classicalists are correct in arguing that the police power authorized any action for the common good regardless of textual protections for individual liberty (i.e., that textual limits should be read in light of the government’s power to operate for the common good). Whether or not the new classicalists are right, states were given broad power, largely without federal oversight.

The thought that the people would cede numerous and indefinite rights to states may seem outrageous to many today. But the people trusted states, or at least, they trusted less a national government that claimed authority to limit state power. Indeed, one of the first decisions made by the First Congress was to reject an amendment that would limit state power as a matter of federal law. Madison’s proposed bill of rights included an amendment that would prevent states from “infring[ing] the equal rights of

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98. *Id.*; *The Federalist* 17, *supra* note 2, at 80 (Alexander Hamilton).


100. This observation is a little unfair because the Federal Constitution constituted the federal government, not the states. State constitutions also contained structural and written limits on state power. But the point is still apt, I think, because of the broad police power. See *Commonwealth v. Alger*, 61 Mass. (7 Cush) 53 (1851).

101. *Alger*, 61 Mass. at 53; Jacobson v. Massachusetts, 197 U.S. 11 (1905); Victoria Nourse, Buck v. Bell: A Constitutional Tragedy from a Lost World, 39 PEPP. L. REV. 101, 109–10 & n.65 (2011) (“One of the central premises of the police power rule was that if the government believed that your rights were interfering with or harming others, it had the police power to regulate.”).

102. See *Vermeule*, *supra* note 40, at 31–33; see *Arkes*, *supra* note 59, at 5–7, 83 (arguing the federal government is not a real government unless it has power to remedy any “wrong” under natural law); see also Campbell, *supra* note 42 (arguing the Founders viewed natural rights as generally regulable).

103. *EAF*, *supra* note 37, at 188 (Brutus XI).

104. See, e.g., I Annals 755 (Tucker).

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conscience . . . freedom of . . . the press [or] trial by jury in criminal cases."\textsuperscript{105} In support of the amendment, Madison argued that "[i]f there were any reason to restrain the Government of the United States from infringing upon these essential rights, it was equally necessary that they should be secured against the State Governments,"\textsuperscript{106} But the amendment failed in the Senate (Senators were selected by state legislators).\textsuperscript{107} The statement of one representative is illustrative of why: the amendment alters "the Constitution of the United States" but "goes only to the alteration of the constitutions of particular States," and "[i]t will be much better . . . to leave the State Governments to themselves, and not to interfere with them more than we already do; and that is thought by many to be rather too much."\textsuperscript{108} In other words, the federal constitution should focus on limiting the central government, not the states; the federal government could not be trusted with more power to oversee the states.

Of course, there were limits on state power. Because the Constitution organized the federal government, not state governments, the fact that it left state powers \textit{indefinite} is not surprising.\textsuperscript{109} State constitutions contained bills of rights and other limits on state power.\textsuperscript{110} Additionally, the Founders believed the natural law limited all government action.\textsuperscript{111} Arbitrary government actions were not "law," nor were government actions that failed to

\begin{itemize}
\item \textsuperscript{105} Id.
\item \textsuperscript{106} Id.
\item \textsuperscript{107} The failure of this amendment is especially notable because \textit{Antifederalists} in Pennsylvania proposed an amendment that would have applied what is now the Sixth Amendment against the states. Pennsylvania Convention Debates, Dec. 12, 1787 (statement of Rep. Whitehill), \textit{reprinted in} 2 Bernard Schwartz, \textit{The Bill of Rights: A Documentary History} 658 (1971) (proposing an amendment similar to the Sixth Amendment that would apply "as well in the federal courts, as in those of the several States").
\item \textsuperscript{108} 1 Annals 755 (Tucker).
\item \textsuperscript{109} See, e.g., id.
\item \textsuperscript{110} Antifederalist No. 84, \textit{On the Lack of a Bill of Rights} (Brutus), available at https://famguardian.org/Publications/AntiFederalistPapers/alp84.htm ("I need say no more, I presume, to an American, than that . . . in all the Constitutions of our own States, there is not one of them but what is either founded on a declaration or bill of rights, or has certain express reservation of rights interwoven in the body of them.").
\item \textsuperscript{111} Calder v. Bull, 3 U.S. 386 (1798); Arkes, supra note 59, at 24–30 (discussing Chisholm v. Georgia, 2 U.S. (2 Dall.) 419 (1793), and Fletcher v. Peck, 10 U.S. (6 Cranch) 87 (1810)). \textit{See also} The Federalist 78, supra note 2, at 406 (Alexander Hamilton) (noting courts can "mitigate[e]" "unjust and partial laws" that injure "the private rights of particular classes," even if otherwise constitutional).
\end{itemize}
secure the common good. Still, however, the Founders’ view was that states could be trusted to work out limits on their own powers individually, without federal oversight. And again, to the extent that Publius shared the classical view that rights were generally regulable by laws directed toward the common good, these state rights would not have been absolute in the way we view them today. With sweeping police power to regulate for the health, safety, welfare, and morals of the people and without a federal check on most state actions, states were, as a formal matter, left to legislate largely as they saw fit. Whereas the people ceded only few rights to the federal government, they ceded broad, undefined rights to states.

b. The people empowered states to remedy more rights violations. The people also entrusted more rights to states. By “entrusting rights,” I mean that the people empowered government to remedy violations of those rights. States had greater power to remedy rights violations than the federal government. Though there are many ways of categorizing rights violations, this Section looks first at the authority of the respective judiciaries’ general powers to remedy rights violations and the power to remedy rights violations caused by government actors, specifically, second.

First, federal courts had jurisdiction to remedy fewer rights than state courts. To be sure, Article III, which fixed the outer limits of federal jurisdiction, allowed for broad power to remedy rights violations. For example, with diversity jurisdiction, federal

112. BLACKSTONE, supra note 38, at 41 (“This law of nature . . . being dictated by God himself . . . is of course superior in obligation to any other . . . [N]o human laws are of any validity, if contrary to this, and such of them as are valid derive all their force . . . from this original.”); Madison, Memorial and Remonstrance. This of course reflected the natural law tradition. ST. AUGUSTINE: THE PROBLEM OF FREE CHOICE 44 (Mark Pontifex ed. & trans. 1955) (387) (“A law which is not just does not seem to me to be a law.”); AQUINAS, supra note 42, Pt. I-II Q.95, art.2, co. (“If in any point [positive law] deflects from the law of nature, it is no longer a law but a perversion of law.”).

113. See supra notes 42 and 101 and accompanying text.


115. The people also entrusted rights through judicial review of Constitutional limits on federal powers. Since powers are the inverse of rights, a limit on governmental power marks the boundary of an individual or collective right. See THE FEDERALIST 78, at 403 (Alexander Hamilton). Thus, by enforcing constitutional limits, courts remedy enumerated rights expressed in the negative.

116. THE FEDERALIST 80, supra note 2, at 415–16 (Alexander Hamilton).
courts could hear suits based on the violation of any and every right, so long as it was asserted against a diverse defendant.\footnote{Arising-under jurisdiction gave federal courts power to remedy state violations of the few constitutional rights that applied against them and power to decide any case with a federal ingredient, cases that could include a host of private rights.\footnote{Federal courts would have jurisdiction over law and equity, and the Supreme Court appellate jurisdiction over law and fact. This represented a broad potential power to remedy rights violations, a power that Publius justified by arguing that the federal judiciary was too weak to ever endanger liberty. Still, state courts had power to remedy more rights violations. First, it's worth noting that Article III's limits were outer bounds, not self-executing grants.\footnote{By placing the federal judiciary's jurisdiction in Congress's hands (subject to constitutional limits), the Constitution punted on the question of the federal courts' jurisdiction. And because they selected Senators, states would have significant say in fixing courts' jurisdiction and would likely not authorize the full extent of federal jurisdiction. In fact, Congress did not give federal courts wide-ranging arising-under jurisdiction.}


\footnote{This was likely a political necessity, given how vehemently the Antifederalists later opposed the federal judiciary's powers. See, e.g., EAF, supra note 37, at 186–90 (Brutus XI) (arguing the federal judiciary would usurp completely state power and lead to a consolidation); id. at 101 (Centinel I) (same); id. at 71 (Plebian) (same).}
until after the Civil War\textsuperscript{124} and still has not authorized arising-under or diversity jurisdiction to the full extent allowed by Article III.\textsuperscript{125} Additionally, sovereign immunity prevented suits against states (except for suits enforcing the few constitutional limits imposed on them) without state consent.\textsuperscript{126} This also limited federal court’s ability to remedy rights violations more narrowly than allowed by Article III. State courts, in contrast, are courts of general jurisdiction and are generally not subject to such limits.

Even if federal courts exercised jurisdiction to the full extent allowed by Article III, the Founders gave state courts greater remedial power. As noted by Publius, state courts had “concurrent jurisdiction in all cases arising under the laws of the union[]” unless “expressly prohibited[]”\textsuperscript{127} in addition to exclusive jurisdiction over all suits not falling within Article III.\textsuperscript{128} Notably, Publius expected state courts would be primarily responsible for criminal suits, which adjudicated the most important rights: liberty and, in capital cases, life itself.\textsuperscript{129} States had more—and more important—power to remedy private rights violations.

\textbf{Second}, in addition to greater remedial power over private rights violations, Publius expected states would have more power to remedy government rights violations. Here also, both governments had authority to remedy rights violations by government actors. The federal government had authority to remedy violations of enumerated rights caused by federal actors.\textsuperscript{130} More interesting is whether the federal government had authority to remedy state

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\textsuperscript{125} Louisville & Nashville R.R. Co. v. Mottley, 211 U.S. 149 (1908) (imposing more stringent test for arising under jurisdiction than that imposed by Article III); 28 U.S.C. § 1332 ($75,000 bar).
\textsuperscript{127} \textit{The Federalist} 82, \textit{supra} note 2, at 428 (Alexander Hamilton).
\textsuperscript{128} \textit{The Federalist} 17, \textit{supra} note 2, at 82 (Alexander Hamilton).
\textsuperscript{129} Id. (“There is one transcendent advantage belonging to the province of state governments[]... I mean the ordinary administration of criminal and civil justice. This, of all others, is the most powerful, most universal, and most attractive source of popular obedience and attachment.”).
\textsuperscript{130} This could occur through the federal judiciary, either through \textit{Bivens} (for those that believe \textit{Bivens} is correctly decided), \textit{Bivens} v. Six Unknown Named Agents, 403 U.S. 388 (1971), or through a congressional authorization, \textit{see}, e.g., 28 U.S.C. §§ 1346, 2674 (Federal Tort Claims Act) (authorizing monetary relief); 5 U.S.C. § 703 (APA) (authorizing injunctive relief).
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It is also interesting and disputed whether the federal government has authority to remedy violations of unenumerated rights, whether those violations were committed by federal or state actors. See, e.g., Kurt T. Lash, The Inescapable Federalism of the Ninth Amendment, 93 IOWA L. REV. 801, 806 (2008) (reading the Ninth Amendment to retain all rights from “undue federal interference[.]” and “reserving control of the same to state majorities[,]” with the federal judiciary enforcing that amendment by limiting federal enumerated powers to preserve local self-government); Thomas B. McAffee, The Original Meaning of the Ninth Amendment, 90 COLUM. L. REV. 1215 (1990) (arguing the Ninth Amendment is not judicially enforceable); LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 776 n.14 (2d ed. 1988) (arguing the Ninth Amendment “is not a source of rights as such” but rather “simply a rule about how to read the Constitution”); Mark C. Niles, Ninth Amendment Adjudication: An Alternative to Substantive Due Process Analysis of Personal Autonomy Rights, 48 UCLA L. REV. 85, 117–23 (2000) (applying what Professor Lash calls the “libertarian” view of the Ninth Amendment, which is that the Ninth Amendment prohibits government power that treads on natural liberty).

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133. THE FEDERALIST 43, supra note 2, at 225 (James Madison).

134. THE FEDERALIST 40, supra note 2, at 203 (James Madison); FEDERALIST 81, supra note 2, at 422–23 (Alexander Hamilton) (discussing immunity).

135. This was interpreted to prohibit states from “discriminating against sojourning citizens with respect to whatever fundamental rights state law happened to recognize[,]” not to require states to recognize fundamental rights. McDonald v. City of Chicago, 561 U.S. 742, 821 (2010) (Thomas, J., concurring in part and in judgment).


137. U.S. CONST. art. III § 2.

138. U.S. CONST. art. III § 3. This was significant because the Crown had used constructive treason as a tool to silence those who publicly denounced the Crown.
contracts, and bills of attainder. These rights were important, but meager—and even these remedial powers were thought by many to give too much power to the federal government. The federal government was an “instrument of redress” against state rights violations, but only in a very narrow range.

States had more extensive remedial power. Of course, states had power to remedy state violations of enumerated rights (just as the federal government had power to remedy federal violations of those rights). In addition, and in contrast to the federal government, states had “independent” power to remedy (or not) violations of all rights that the Constitution did not enumerate—whether the violators were state or private actors. Moreover, as Professor Amar has argued, states may have authority to remedy federal violations of rights enumerated in the Constitution. Thus, while the federal government could remedy federal rights violations and state violations of certain enumerated rights, states could remedy any state or private rights violation and could remedy federal violations of any enumerated federal right.

Thus, the people entrusted more rights to the states. Adjudication is an important way in which the people trust government with power to remedy rights violations. State courts had more expansive jurisdiction than the federal government, meaning they could remedy more rights violations. Expected to have exclusive jurisdiction over criminal justice, states were expected to have exclusive power over perhaps the most important rights. Critically, states could remedy more violations by federal officials than the federal government could of state officials. As Publius saw it, the people would, under the Constitution, entrust

139. U.S. CONST. art. I § 10, art. IV. The writ of habeas corpus did not extend to state prisoners until after the Civil War. Habeas Corpus Act of 1867, 14 STAT. 385.

140. See THE FEDERALIST 43, supra note 2, at 225 (James Madison) (responding to concerns about the Guarantee Clause).

141. THE FEDERALIST 28, supra note 2, at 138–39 (Alexander Hamilton). It is an open and interesting question the extent to which the Founders thought the commerce clause would allow the federal government to define and remedy rights violations by the states.

142. U.S. CONST. amend. X.

more of their rights to the states with more power to remedy violations of their rights.

* * *

Publius thought states would do more to legislate for the people’s happiness than the federal government and would protect liberty by checking federal encroachment. As Publius saw it, the people would also cede more rights to the states under the Constitution and would entrust more rights to the states. In short, states were Publius’s primary protectors of the people’s liberty.

III. STATES PROTECTED LIBERTY BY INFLUENCING THE PEOPLE AND CONGRESS

Publius did more than identify states as the primary protectors of the people’s liberty. Publius also delineated how states would fulfill that role. States would “afford complete security against invasions of the public liberty by the national authority[]”144 in two specific ways. First, they would influence the selection of federal officers. Second, they would provoke the people against federal officers that exceeded constitutional limits.

A. States Would Protect Liberty by Influencing Selection of Federal Officers

According to Publius, states would perform their role in protecting liberty from federal encroachment by influencing the selection of federal officers in all three federal branches.

Congress. State legislatures selected federal senators.145 This gave states a “double advantage”; states could ensure senators were qualified and had “an agency in the formation of the federal government[]”146 No law could be written, no judges or other officers confirmed, no inferior courts established, no treaty made, nor any appropriation made without majority consent of a body selected by states.147 This alone, Publius thought, would “secure the

144. THE FEDERALIST 28, supra note 2, at 139 (Alexander Hamilton).
145. U.S. CONST. art. I § 3, cl. 1. Madison asserted this was “most congenial with the public opinion,” THE FEDERALIST 62, supra note 2, at 320 (James Madison), which may not have been true, see EAF, supra note 37 (Brutus XVI).
146. THE FEDERALIST 62, supra note 2, at 320 (James Madison).
147. See THE FEDERALIST 78, supra note 2, at 402 (Alexander Hamilton). The Senate’s equal state representation ensured that every state had equal say in Congressional action.
authority” of the states. Executive. States also selected presidential electors, “Without the intervention of the state legislatures, the president ... cannot be elected at all.” Publius thought states would have de facto control over selecting the president: “[States] must in all cases have a great share in his appointment, and will, perhaps, in most cases, of themselves determine it.” The thought that states would “of themselves determine” the outcome of a presidential election would likely be excoriated today. But for Publius, control over presidential elections allowed states to protect the people from federal encroachment.

Judiciary. States also influenced the selection of judges. Judges were nominated by the President, whose electors were chosen by states and whom Publius thought states would usually select, and confirmed by the Senate, whose members were directly chosen by the states. With such control over both parties involved in appointing and confirming federal judges, states would have a de facto veto in the selection of federal judges. State control over the judiciary was less direct than the states’ influence over the other two branches. But states’ influence was still significant.

In short, states influenced the selection of officers in each federal branch. This control went in one direction only; state officials would “in no instance be indebted for their appointment” to the federal government. But “each of the principal branches of the federal government w[ould] owe its existence more or less to the favor of the state governments and must consequently feel a dependence[ ]” on—and an “obsequious” disposition

148. THE FEDERALIST 62, supra note 2, at 320 (James Madison); EAF, supra note 37, at 104 (Centinel I) (arguing Senate would predominate other branches).
149. U.S. CONST. art. II § 1 cl. 3.
150. THE FEDERALIST 45, supra note 2, at 240 (James Madison).
151. Id.
153. THE FEDERALIST NO. 68 (Alexander Hamilton); FEDERALIST 45, supra note 2, at 240 (James Madison).
155. THE FEDERALIST 45, supra note 2, at 240 (James Madison).
toward—them. Federal officers would feel “prepossessions . . . favorable to the states” and would “be disinclined to invade the rights of the individual states, or the prerogatives of their governments.”

States could use this control to protect their own interests and, by so doing, would prevent the federal government from infringing on the people’s retained rights. For anytime the federal government exceeded limits on its authority, it infringed on the states’ authority. But states would also use this control to protect the people. The people could “make use of the [states] as the instrument of redress” against federal encroachment. Closer to and knowing the people, Publius thought that states would do the people’s bidding. States would “always be . . . suspicious and jealous guardians of the rights of the citizens” and, having the people’s “confidence and good will,” could “effectually . . . oppose all encroachments of the national government.”

By influencing—in Publius’s view, controlling—the selection of federal officers, states would prevent the federal government from overstepping its bounds and treading on the rights of the people.

B. States Would Instigate the People Against Federal Encroachment

States would also protect liberty by instigating the people against federal acts that would violate liberties. Since every federal act extending beyond constitutional limits “invad[ed]” states’ rights, states would “be ever ready to mark the innovation, to sound the alarm to the people, and to exert their local influence [to]

156. Id. (spelling and grammar modernized). House elections were determined by state constitutions, which the people would not amend against their interest. Federalist 52, supra note 2, at 272–73 (James Madison). Madison still thought states would still have influence over House elections. Federalist 45, supra note 2, at 240 (James Madison).
157. The Federalist 46, supra note 2, at 244 (James Madison) (spelling modernized).
158. Id. at 245.
159. The Federalist 44, supra note 2, at 235 (James Madison).
161. EAF, supra note 37, at 27 (Cato Letter III); id. at 127–32 (Patrick Henry). All seemed to agree the federal government was not as representative. Id. at 29 (Cato Letter III); id. at 123 (Agrippa IV); The Federalist 17, supra note 2, at 81 (Alexander Hamilton).
162. The Federalist 26, supra note 2, at 130 (Alexander Hamilton).
163. The Federalist 17, supra note 2, at 83 (Alexander Hamilton).
164. The Federalist 44, supra note 2, at 235 (James Madison).
effect] a change of federal representatives."\textsuperscript{165} States, in short, would have an incentive to prevent every federal encroachment.

The people would need states' help identifying when the federal government exceeded its limits. If states did not alert the people to federal encroachment, it might go unnoticed. Federal action would "fall[] less immediately under the observation of the mass of the citizens," so only a few, "speculative [people]" would recognize the problem.\textsuperscript{166}

When states sounded the alarm of federal encroachment, the people would have to choose to trust states or the federal government. Publius predicted the people would trust states. States regulated more important interests, provided for "domestic and personal interests[,]" and were more likely to share "ties of personal acquaintance and friendship" with the people.\textsuperscript{167} "The operations of the general government, on the other hand, were "less likely to inspire a habitual sense of obligation[] and an active sentiment of attachment."\textsuperscript{168} Because states would have a "superiority of influence" over the people, when states alerted of federal encroachment, Publius predicted the people would listen.\textsuperscript{169} And because states regulated more important interests, "the extreme hazard of provoking the resentments of the State governments" would "complete[ly] bar[]" federal encroachment.\textsuperscript{170}

Publius expected states' influence over the people would strengthen with time. As states regulated to secure public happiness, the people's confidence in them would grow.\textsuperscript{171} As states checked federal encroachment and otherwise were good stewards of the numerous and indefinite rights entrusted to them, the people's confidence would solidify. This increased confidence would in turn strengthen states' ability to check federal encroachment. The only way, Publius thought, states would lose their advantage is if the federal government acted through states (so that the people could not perceive a difference between the

\begin{footnotesize}
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\item \textsuperscript{165} Id.
\item \textsuperscript{166} The Federalist 17, supra note 2, at 82 (Alexander Hamilton).
\item \textsuperscript{167} The Federalist 46, supra note 2, at 243 (James Madison); The Federalist 17, at 81–82 (Alexander Hamilton).
\item \textsuperscript{168} The Federalist 17, supra note 2, at 82 (Alexander Hamilton).
\item \textsuperscript{169} Id. at 81–82.
\item \textsuperscript{170} The Federalist 32, supra note 2, at 154 (Alexander Hamilton).
\item \textsuperscript{171} The Federalist 17, supra note 2, at 81 (Alexander Hamilton).
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two)\textsuperscript{172} or if states regulated ineffectively.\textsuperscript{173} Outside these two exceptions, states, having the people’s “confidence and good will,” could “effectually . . . oppose all encroachments of the national government.”\textsuperscript{174}

* * *

Publius laid out two specific ways that states would fulfill their role as primary protectors of liberty. States would protect liberty by exerting control over the selection of federal officers and by inciting public opinion against federal encroachment. States were “not only . . . the voice, but [also] . . . the arm of [the people’s] discontent.”\textsuperscript{175} With these powers, states would “complete[ly] bar[ ]” any federal encroachment.\textsuperscript{176}

IV. STATES’ ROLE IN PROTECTING LIBERTY REMAINS RELEVANT TODAY

Today’s Constitution differs from the one Publius promoted. Some early changes to the Constitution solidified, rather than undermined, states’ role as primary protectors of liberty. For example, the passage of the Bill of Rights imposed additional limits on federal power—but did not limit state power.\textsuperscript{177} Specifically, the Tenth Amendment made explicit what was otherwise implicit in the Vesting Clauses—the federal government could remedy state violations of only those rights that the Constitution enumerated and applied against the states.\textsuperscript{178} Moreover, the Ninth Amendment,

\textsuperscript{172} THE FEDERALIST 27, supra note 2, at 134–35 (Alexander Hamilton).

\textsuperscript{173} THE FEDERALIST 46, supra note 2, at 244 (James Madison). Madison also noted the federal government would have greater power during times of war and national danger—but these rare instances are times in which public confidence in all government run low. THE FEDERALIST 45, supra note 2, at 241 (James Madison).

\textsuperscript{174} THE FEDERALIST 17, supra note 2, at 83 (Alexander Hamilton).

\textsuperscript{175} THE FEDERALIST 26, supra note 2, at 130 (Alexander Hamilton) (capitalization normalized).

\textsuperscript{176} THE FEDERALIST 32, supra note 2, at 154 (Alexander Hamilton).

\textsuperscript{177} Barron \textit{ex rel.} Tiernen v. Mayor of Baltimore, 32 U.S. (7 Pet.) 243, 250 (1833) (“These amendments demanded security against the apprehended encroachments of the general government—not against those of the local governments.”).

\textsuperscript{178} There is no enumerated power to remedy unenumerated rights, so the Tenth Amendment reserves that power to the states or to the people. U.S. CONST. amend. X. Of course, the federal government has implied power to remedy \textit{enumerated} rights. See supra note 56 and accompanying text; Prigg v. Pennsylvania, 41 U.S. (16 Pet.) 539 (1842). But that implied power does not—and cannot—extent to \textit{unenumerated} rights. Here’s why.
by telling courts not to interpret the Bill of Rights in a way that expanded federal power, ensured the Bill of Rights would be construed to favor state power, which antifederalists had requested. Limiting only the federal government and reaffirming states’ unfettered discretion in unenumerated cases, the Bill of Rights solidified states’ role as the primary protectors of liberty. 

As discussed in the following subsections, however, other constitutional changes have undermined states’ ability to protect liberty as Publius envisioned. Yet while these changes have undermined states’ ability to fulfill their role as primary protectors of liberty, they have not eliminated that role or made it less important. States’ role in protecting liberty from federal encroachment remains essential.

The Constitution gives the federal government implied power to use unenumerated means in pursuit of enumerated ends, McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819), and power to use enumerated means in pursuit of unenumerated ends, ALEXANDER HAMILTON, REPORT ON THE SUBJECT OF MANUFACTURERS 54 (1791) (arguing the Constitution allows spending for ends as “comprehensive as any that could have been [allowed]”); United States v. Butler, 297 U.S. 1 (1936) (adopting the “Hamiltonian view” that the spending power is not limited to enumerated ends); see also 2 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 922 (1833) (same). But it does not give the federal government power to use unenumerated means in pursuit of unenumerated ends—otherwise, the Tenth Amendment would not be meaningless. To apply this logic to the power to remedy rights violations, note that the federal government’s power to remedy violations of enumerated rights is implied, arising from the fact that the right is enumerated in the Federal Constitution. *Prigg*, 41 U.S. at 539; *The Federalist* 43, supra note 2, at 225 (James Madison) (“[W]here else could the remedy be deposited, than where it is deposited by the Constitution?”). Extending that implied authority to *unenumerated* rights would be to infer unenumerated means for an unenumerated ends, which goes too far.

Of course, the analysis would be different if the Federal Constitution enumerated a power to remedy unenumerated rights. Some have argued the Due Process Clauses do just that. Frederick Mark Gedicks, *An Originalist Defense of Substantive Due Process: Magna Carta, Higher-Law Constitutionalism, and the Fifth Amendment*, 58 Emory L.J. 585 (2009). More commonly, scholars point to the Ninth Amendment. But the Ninth Amendment cannot change the analysis above because it does not enumerate any additional rights. LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 776 n.14 (2d ed. 1988) (“It is a common error . . . to talk of ‘ninth amendment rights.’ The ninth amendment is . . . simply a[n] [interpretive] rule.”). Indeed, the Ninth Amendment expressly distinguishes “enumerate[ed]” from “other[]” rights. U.S. CONST. amend. IX. Thus, there was neither enumerated nor implied federal power to remedy unenumerated rights. See Lash, supra note 94, at 913 (“Retained rights, therefore, are powers not delegated to the national government.”).

A. Legal Changes Have Limited States’ Ability to Protect Liberty

Several constitutional changes have undermined states’ ability to protect liberty in the way Publius envisioned. Consider three examples.

First, the Fourteenth Amendment incorporates some of the Bill of Rights against the states and gives Congress power to remedy state violations of them. In 1789, “ample protection was given against oppression by the Union, but little was given against wrong and oppression by the States.” That “want” of protection against state abuses “was intended to be supplied” by the Reconstruction Amendments. These Amendments strengthened the federal government’s role in protecting the people’s liberty.

This increase in federal oversight over states came with a decrease in a states’ ability to protect rights in the way Publius envisioned. Publius expected states to act as the watchdogs of the people, raising the alarm when federal officials exceeded their powers. States could fulfill this role in part because the people

180. The Privileges or Immunities Clause was written to apply the first eight amendments against states. John Bingham, March 31, 1871, in 2 THE RECONSTRUCTION AMENDMENTS: THE ESSENTIAL DOCUMENTS 625 (Kurt T. Lash ed. 2021); Kurt T. Lash, The Origins of the Privileges or Immunities Clause, Part I: “Privileges and Immunities” as an Antebellum Term of Art, 98 GEO. L.J. 1241 (2010). The Court has instead used the Due Process Clause to incorporate some of them. Justice Thomas has called for undoing the incorporation through the Due Process Clause and for reincorporating (as appropriate) through the Privileges or Immunities Clause. See McDonald v. City of Chicago, 561 U.S. 742, 806 (2010) (Thomas, J., concurring in part and in judgment); Dobbs v. Jackson Women’s Health Org., 142 S. Ct. 2228, 2301–02 (2022) (Thomas, J., concurring). But see Frederick Mark Gedicks, An Originalist Defense of Substantive Due Process: Magna Carta, Higher-Law Constitutionalism, and the Fifth Amendment, 58 EMORY L.J. 585 (2009) (arguing the Due Process Clauses were understood as fonts of natural-law rights).


182. The Slaughterhouse Cases, 83 U.S. (16 Wall.) 36, 128 (Swayne, J., dissenting).

183. Id.

trusted them. But, as reflected in the Reconstruction Amendments, states had consistently and grossly disregarded human rights.\textsuperscript{185} Just as Publius had predicted, the people’s trust was lost through ineffective state governance.\textsuperscript{186} This well-earned popular distrust of states undercuts Publius ability to sound the alarm of federal encroachment. If the people look to the federal government for protection from the states, they are less likely to believe (or care) when state officials draw attention to federal encroachments on individual liberty.

\textit{Second,} the federal government’s power has grown exponentially. When the Court ceased enforcing a “dual federalism” check on the Commerce Clause,\textsuperscript{187} declined to enforce separation-of-powers limits on delegations of legislative power,\textsuperscript{188} and moved away from a substantive reading of the Tenth

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\item \textsuperscript{185} John Bingham, February 26, 1866, \textit{in 2 ReConstruction Amendments, supra note 180, at 100.}
\item \textsuperscript{186} \textit{The Federalist} 46, \textit{supra note} 2, at 244 (James Madison); \textit{The Slaughterhouse Cases}, 83 U.S. (16 Wall.) 36, 128 (Swayne, J., dissenting) (noting “[t]he public mind became satisfied that there was less danger of tyranny in the head than of anarchy and tyranny in the members”).
\item \textsuperscript{187} \textit{NLRB v. Jones & Laughlin Steel Corp.}, 301 U.S. 1 (1937). Dual Federalism is the idea that states and the federal government each operate in exclusive spheres of regulatory authority. \textit{See supra} note 63. The Marshall Court held the two governments each had exclusive powers (even if they could regulate the same objects). \textit{Gibbons v. Ogden}, 22 U.S. (9 Wheat.) 1 (1824) (distinguishing the police power from the commerce power). The Taney Court divided the powers geographically: states had exclusive power over local issues, and the federal government had exclusive power over national issues. Just before the New Deal, the Court had shifted again, giving states exclusive power over objects indirectly affecting interstate commerce and the federal government exclusive power over objects directly affecting it. \textit{Hammer v. Dagenhart}, 247 U.S. 251 (1918). The New Deal Court rejected dual federalism. \textit{NLRB v. Jones & Laughlin Steel Corp.}, 301 U.S. 1 (1937).
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Amendment, the federal government’s power vis-à-vis the states has grown—and incredibly so. Publius expected that states would have the people’s confidence precisely because they would legislate over all the important issues, leaving people to care little (if at all) about the federal government. But, unlike Publius, we can no longer say that states regulate more important issues or that people care more about their state governments. As the federal government’s regulatory sphere and agenda have grown, states’ ability to instigate the people against federal encroachment has grown. This again directly undermines the first tool Publius thought states would use to prevent federal encroachment: sounding the alarm.

Third, the Seventeenth Amendment directly undermines the second tool Publius thought states would use to protect liberty from federal encroachment: the ability to influence the selection of federal officers. Before the Seventeenth Amendment, senators were selected by state legislators. As such, Publius could argue “each of the principal branches of the federal government will owe its existence more or less to the favor of the state governments.” After the Seventeenth Amendment, which makes senators popularly elected, today’s federal government is not “indebted for [its] appointment to the direct agency of the [states].” Senators are no


190. Ironically, states’ ability to instigate the people against federal encroachment has grown while the need, in Publius’s eye, for states to instigate the people has grown. Publius thought states would need to sound the alarm because the people would not be sophisticated enough to recognize federal encroachments on their own. FEDERALIST 17, at 82 (Alexander Hamilton); supra note 166 and accompanying text. As the federal government has gotten larger, as people have gotten more used to federal regulation, and as the limits on federal power have become increasingly academic, it has become only more likely that the people will fail to recognize federal encroachment.

191. THE FEDERALIST 45, supra note 2, at 240 (James Madison) (spelling and grammar modernized).

192. Id.
longer beholden to the states in the same way, which means states have also lost their control over judicial appointments.\textsuperscript{193} States no longer can affect the internal policies of the federal government as Publius expected.

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Publius expected states would protect individual liberty from federal encroachment in two specific ways: States would incite the people against federal officials who exceeded their powers, and states would influence the selection of federal officers to prevent them from encroaching on states’ prerogatives and individual liberty. Constitutional changes have undermined both roles. As Publius noted, the first power relies on the states having superior sway over the people’s interests, which the states lost during the years before and after the Civil War (as reflected by the Reconstruction Amendments and corresponding legislation), and which the federal government has gained through its increased involvement in everyday life. The second power relies on the states’ power to select senators, which the Seventeenth Amendment has eliminated. The states have lost both mechanisms Publius expected states could use to protect liberty from federal encroachment.

\textbf{B. States’ Role in Protecting Liberty Remains Vital}

Nonetheless, the states’ role in protecting liberty from federal encroachment remains valid.

Constitutional changes have eliminated the \textit{mechanisms} by which Publius thought states would fulfill their role in protecting liberty from federal encroachment, but they have not eliminated the role itself. For example, while the Reconstruction Amendments strengthened federal checks on states, they did not eliminate state checks on the federal government. Rather, the Amendments merely leveled the playing field, strengthening what was before the weaker of the two governments. To be sure, the Reconstruction Amendments and the corresponding decline in popular trust in the states prevented states from protecting liberty the way

\textsuperscript{193} U.S. Const. amend. XVII; \textit{The Federalist} 45, \textit{supra} note 2, at 240 (James Madison) (discussing how states would influence House). Many states have also passed laws requiring presidential electors to vote according to the popular vote in the state, limiting the states’ ability to control the president. \textit{Faithless Elector State Laws}, \textsc{FAIRVOTE} (July 7, 2020), \url{https://www.fairvote.org/faithless_elector_state_law} [https://web.archive.org/web/20201028085440/http://www.fairvote.org/faithless_elector_state_laws].
Publius envisioned. But they did not eliminate the role itself. Indeed, this leveling of the playing field is consistent with Publius’s vision that states and the federal government were alternative “instrument[s] of redress” for the other’s rights violations.\textsuperscript{194}

Similarly, the Seventeenth Amendment, by transferring control to select federal Senators from state legislatures to the people, merely eliminated a means states had to protect liberty but did not eliminate states’ role in doing so. The same is true of the increase in federal power. States have maintained their role to protect liberty.

Indeed, states continue to play this role, albeit to a lesser extent than envisioned by Publius. States are increasingly active in constitutional litigation, taking positions as amici to enforce limits on federal power.\textsuperscript{195} Some individuals may still trust states more than the federal government, and Publius’s logic still stands that dispersed policymaking allows for a larger percentage of the total population whose views are represented.\textsuperscript{196}

In fact, assuming the Founders’ wariness of government actors is well founded,\textsuperscript{197} states’ role in protecting liberty may be more important today than it was at the founding. Publius wrote thinking states would regulate more than the federal government.\textsuperscript{198} He also thought the people would prefer the states because “of the objects to which the attention of the state administration would be directed.”\textsuperscript{199} Broad interpretations of the Necessary and Proper and Commerce Clauses,\textsuperscript{200} the nationalization of the economy,\textsuperscript{201}

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\textsuperscript{194}. THE FEDERALIST 28, supra note 2, at 138–39 (Alexander Hamilton).
\textsuperscript{196}. Whereas a national policy, constant across all states, could reflect the views of a slim majority of the population (or even less), state policies, which can differ and capture a majority of the views of the populations in each state, could together potentially reflect the views of a substantial majority of the national population.
\textsuperscript{197}. Supra Part I(b)(i).
\textsuperscript{198}. Id.
\textsuperscript{199}. THE FEDERALIST 17, supra note 2, at 81 (Alexander Hamilton).
\textsuperscript{201}. This means more activities are regulable under the Commerce Clause. Gonzalez v. Raich, 545 U.S. 1 (2005).
\end{footnotesize}
the elimination of dual federalism, and the administrative state have flipped these beliefs. The federal government now regulates far more than it did, and often in areas Publius thought belonged to states. Because the federal government’s regulations are more complex, even the few, “speculative [people]” who understand federal action are unlikely to identify encroachment. Regulating more, and with limits that are less ascertainable to the public, the federal government is more likely to overstep its bounds, making states’ ability “to sound the alarm” even more important.

Thus, if federal officers today are just as prone to corruption, inefficient governance, or tyranny than at the Founding (and there is no reason to think they are not), Publius’s logic suggests that federal power requires a stronger counterbalance than before. Constitutional changes have handicapped states in their task of protecting liberty from federal encroachment, but states’ ability to fulfill that role, on Publius’s view, is more important than ever.

CONCLUSION

Antifederalists warned of the slow and steady consolidation of power in the federal government, a government farther from (in distance), further from (in opinion), and less representative of (in proportion) the people. Publius argued Constitutional structures would prevent that. And the Constitution relies on structures to do so. The Constitution’s first structure—federalism—positions states as the people’s primary protectors of liberty. But changes in the Constitution have undermined states’ ability to check federal encroachment, even as the federal government has grown in power. States’ role in protecting liberty has become more important, even as their ability to fulfill that role has become more ephemeral.

202. Supra note 24.
205. THE FEDERALIST No. 17, supra note 2, at 82 (Alexander Hamilton).
206. THE FEDERALIST 44, supra note 2, at 235 (James Madison).
207. EAF, supra note 37, at 188 (Brutus XI).
So, what now? There are at least two responses. One is to conclude the Founders were wrong. Perhaps individual liberty is safe with a strong federal government unchecked by states. Or perhaps weaker state checks suffice to protect liberty. Or perhaps states cannot be trusted to use their power to counterbalance the federal government properly. Under any of these views, the fact that states’ ability to protect liberty from federal encroachment would be less problematic.

A second response is to reinvigorate states’ role. This would be difficult. Reinstating the specific mechanisms Publius thought states could use to protect liberty would require constitutional amendments and a broad change in public perception—each of which is difficult to accomplish. Moreover, reverting the constitution to make space for those mechanisms would conflict with a host of important values, such as majority rule (if popularly elected senators were selected by state legislators). But there are other ways to reinvigorate state checks on federal encroachment, and many of these lie within the states’ control. For example, states could begin to reinvigorate the people’s confidence in them by doing more to protect the people’s liberties. Rather than making state constitutional provisions coextensive with federal provisions, states could go further. States could relax standing requirements to allow state courts to resolve questions of federal constitutional law that federal justiciability doctrines keep out of Article III courts, thereby reasserting themselves as uniquely situated to protect individual liberty.

Regardless of how we choose to respond to the disconnect between states’ intended role and reality, we should respond with an understanding of the role Publius expected states to play. Even if we end up disagreeing with Publius that states are needed as a strong check on federal encroachment, we should make that decision being informed of the role Publius thought states would play. Any policy change is unlikely to be effective if not based on an understanding of the law they seek to change. Skeptics of states’ role in our system may not realize that that the Constitution enumerates few rights, leaving structures to protect most; that federalism is the first structural check against federal tyranny; and

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that many were so worried about possible consolidation that they argued it alone warranted rejecting the Constitution.\textsuperscript{209} While rights may be safe with the federal government today, future rights (especially those not protected by majorities) may not be if state checks continue to atrophy. On the other hand, proponents of states’ role in our system may have forgotten that the reason states exist independently of the federal government is to protect individual liberty, not because “states’ rights” are intrinsically valuable.\textsuperscript{210} Madison wrote, “as far as the sovereignty of the States cannot be reconciled to the happiness of the people, the voice of every good citizen must be: ‘Let the former be sacrificed to the latter.’”\textsuperscript{211} All who discuss the role of states in our federal system should begin with the role states were originally intended to play—and the role our system was structured around.

When discussing the proper role of governance, we should remember a debate that began at the Founding. We should “remind our[elves and our] people that the Framers considered structural protections of freedom the most important ones,” and that when that structure is weakened, “we place liberty at peril.”\textsuperscript{212} Publius’s primary check against tyranny has weakened, and “inviolable attention due to liberty” suggests we at least take note.\textsuperscript{213}

\begin{thebibliography}{99}
\bibitem{209} Supra notes 37, 126.
\bibitem{211} \textit{The Federalist} 45, supra note 2, at 238 (James Madison) (grammar modernized).
\bibitem{213} \textit{The Federalist} No. 37, supra note 2, at 181 (James Madison).
\end{thebibliography}

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