September 1987

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Gerald Bobango
West Virginia University College of Law

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SUIT AGAINST THE SOVEREIGN: THE DUBIETY OF THE ELEVENTH AMENDMENT

Recent American history has brought a resurgence of the two hundred year old debate in this country on the nature of federalism and the relations between the general and particular governments comprising the union of the several sovereign states which dominated the political dialogue of the early national period of our history. Indeed, one might argue that this fundamental debate has never been far below the surface in the American experiment, and one must have a shallow understanding of the nineteenth century in the United States to believe that the Civil War settled the issue. "Resurgence," in fact, may be an incorrect term. "Continuation" is more accurate. A recent demonstration of the historic resistance of the states to the imposition of federal laws and standards was the various reactions to the civil rights movements in the 1960s.

Those who insisted that the New Deal, with its sometimes egregious nationalizing and centralizing tendencies, marked the demise of the states qua states found signs half a century later that American particularism was not dead. Some states, for instance, openly refused to be intimidated by the threat of losing federal funds because they refused to conform to national policy goals on speed limits, drinking ages, or seat belts. Revenue sharing was accepted in some communities as long as local politicians could build political empires with federal monies. Now that revenue sharing is about to end, there is lamentation and hand-wringing, as though no state had ever financed its own way prior to 1972. Occupational Safety & Health Act (OSHA) restrictions, compulsory arbitration of labor disputes, Federal Election Commission (FEC), and Employee Retirement Income Security Act (ERISA) constraints are thought by some to be inappropriate to the proper sphere of the general government. The debate goes on, here quietly, here loudly, a steadfast rear-guard action in a nationalizing age.

Recent Supreme Court decisions have revived the debate over the immunity of the states from suit by private parties. *Quern v. Jordan*¹

held that a suit under 42 U.S.C. a§a 1983 does not override the eleventh amendment immunity of the states, while, only three years ago in *Pennhurst State School & Hospital v. Halderman*,2 the Court held that a federal court may not award injunctive relief against state officials on the basis of state law. Even earlier, in *Edelman v. Jordan*,3 the Court concluded that the eleventh amendment bars some forms of injunctive relief against state officials even for violations of federal law.

Throughout these decisions, and the line of cases from which they stem going back to the early twentieth century, the Court indulged in phraseology dear to the hearts of the Anti-federalists, such as “the supremacy of federal law must be accommodated to the constitutional immunity of the States,”4 and “federal jurisdiction over suits against unconsenting States ‘was not contemplated by the Constitution when establishing the judicial power of the United States.’”5

Regardless of opinions as to the correctness of these decisions, their language raises a number of historical and jurisprudential, if not procedural, problems; and their logic is far from crystal clear. Commentators on the problem have not been totally helpful. If decisions such as *Pennhurst* and *Edelman* reaffirm the traditional notion of sovereign immunity applied to the states (*i.e.*, if the states do indeed *have* sovereign immunity in the standard and traditional meaning of that phrase), how can it be waived, and what are we to make of language such as “unconsenting States” if this doctrine of immunity is constitutionally mandated, either by article III or by the eleventh amendment? Can a state (or the federal government for that matter) waive its constitutionally guaranteed freedom from suit without appropriately amending the Constitution? One either

4 *Pennhurst*, 465 U.S. at 105.
has constitutional immunity from suit by private parties or one does not. Any other alternative presumes that Congress by its legislative authority, or state governments by their own authority, have bypassed the amending process and obviated the eleventh amendment by a simple act of lawmaking. Just what did the framers intend?

Other qualifications abound. A state may waive sovereign immunity in its own courts, and this does not constitute a waiver of the eleventh amendment immunity in the federal courts. Furthermore, the eleventh amendment "does not extend to counties and similar municipal corporations." However, the eleventh amendment does in fact bar relief against county officials in certain circumstances, viz., to protect state treasuries from liability that would be akin to a judgment against the state itself. The result of the Supreme Court's decision on immunity is a maddening inconsistency.

Much of the theoretical confusion stems from the fact that pure sovereignty, outside of its conceptual form, seldom existed in the western tradition. Even in its more concrete manifestation of legislative or parliamentary sovereignty in seventeenth century England, it did not survive the transition to America in unadulterated form. The second half, the "immunity" portion, merely denotes the degree to which that person or body which possessed and exercised sovereignty was willing to be bound by the laws of its own polity.

Originally, as derived from the Latin superanus through the French term souverainete, "sovereignty was meant to be the equivalent of supreme power." Very seldom, however, did sovereignty means supreme power in England, the source of the American tradition to which this survey is confined.

The immunity of the state has been justified in the United States on one of two principal theories: (1) The king (mistakenly trans-
muted into the state) can do no wrong; and (2) the conclusion advanced by Mr. Justice Holmes that the state, the authority that makes the law, cannot be subject to the law, and thus cannot be chargeable with or sued in tort. Both tenets are mistaken readings of history. The thought that "the king can do no wrong," to be sure, is so widely accepted an axiom that few realize the utter misconstruction of the dictum by modern people. This was never meant to suggest that the monarch (in England, France, or any nation sharing in the tradition of western political thought) could do anything he chose to do and was immune from any restrictions. On the contrary, it meant that the king was not permitted to do wrong, in the sense that he, even more than most men, was bound by the dictates of both divine and natural law and by the temporal laws which he himself was sworn to uphold and apply to his subjects. It meant, in effect, "the king must always do right," he must always give justice. He was, far from being above the law, the very temporal and earthly manifestation of the law and, as such, the one most bound to enforce it.

The most superficial study of the Middle Ages, moreover, cannot fail to notice that kings were hardly sovereign in any absolute sense. The theory itself clearly attaches not to the Middle Ages but to sixteenth and seventeenth century absolutist theory which, in England at least, never enjoyed an unmitigated sway.

Professor Jaffee points out a distinction which is a vital starting point in examining the English background of the problem, namely that the immunity of the sovereign from suit (sovereign immunity) and his capacity or non-capacity of violating the law are distinct and independent concepts. Holmes’ comment that "there can be no legal right as against the authority that makes the law on which the right depends" flies in the face of centuries of English tradition;

12 Literature on this is copious. See, e.g., Borchard, Governmental Responsibility in Tort, V, 36 YALE L.J. 757 (1926) [hereinafter Borchard, V] and related articles in this series.
13 See Borchard, Governmental Responsibility in Tort, 34 YALE L. J. I passim (1924).
and Holmes' reputation was, obviously, that of a jurist, not a historian.\textsuperscript{16} A thorough explication of the limited powers of the sovereign in England and remedies against the crown and its officers from the earliest days is too vast an undertaking in the confines of this article; a survey of the highlights will have to do.

Where the doctrine of the non-suability of the ruler began is impossible to say, but there appears to be some basis for it in Roman law.\textsuperscript{17} Until England had some recognizable centralized monarchy with defined legal procedures, one can only speculate as to the relation between sovereign and subjects. There is some authority for believing that even prior to the time of Edward I the English King could be sued, thus witnessing the impact of Christianity and the feudal system on the evolving law.\textsuperscript{18} Horne's famous \textit{Mirrour of Justices} tells us that at some time between Alfred and Edward I "it was ordained that the King's courts should be open to all plaintiffs, so that they might have without delay remedial writs, as well against the King and Queen, as against any other people."\textsuperscript{19}

We ordinarily think of strong and absolute sovereignty in England as beginning with the Norman Conquest, when William introduced the strong centralized administrative machinery of Normandy into England and sternly enforced royal rights. But this should not be overdone. William, in fact, incorporated the Anglo-Saxon usage of the Witan into his new \textit{Curia Regis}, took advice from his own tenants-in-chief, and guaranteed the burgesses of London, both French and English, that they should enjoy all the laws of which they were "worthy" in King Edwards's day (referring to the Confessor).\textsuperscript{20} Moreover William's Norman sheriffs still administered in the counties what was essentially Anglo-Saxon law, and this use of "ancient custom" continued as late as 1100.\textsuperscript{21} The regularization of

\textsuperscript{16} Jaffe is more polite in his evaluation of Holmes' comment, writing that Holmes made this assertion "somewhat casually, as was perhaps often his wont . . ." Jaffe, \textit{supra} note 14, at 4.
\textsuperscript{17} Borchard, \textit{Governmental Responsibility in Tort}, \textit{VI} [sic], 36 \textit{Yale L.J.} 1, 8 (1926).
\textsuperscript{18} Borchard, V, \textit{supra} note 12, at 798.
\textsuperscript{19} \textit{Id.} at 798 n.115.
\textsuperscript{20} T. Plucknett, 3 \textit{A Concise History of the Common Law} 13 (5th ed. 1956).
\textsuperscript{21} The most thorough treatment of the early centuries is F. Pollock & F. Maitland, \textit{The History of English Law before the Time of Edward I} (2d ed. 1898).
courts, justiciars, assizes, and inquests during the next two centuries testified to the rule of law, as opposed to the rule of a single person, being established in England. The establishment of “constitutional” government, the terms of the Magna Carta, and the continual reaffirmations by subsequent kings of Henry I’s Charter of 1100 served to modify whatever immunities the monarch enjoyed as against his own laws.

While it was generally true that by the time of Henry III the “King could not be sued in the central Courts of law, because they were his Courts, and no lord could be sued in his own Court,” this did not mean that there were no remedies against the king. It meant only that the king, as the source of authority, would not issue a writ against himself, which is the most plausible ground on which exemption from suit can be defended and no doubt the basis of popular assumptions such as those indulged in by Holmes centuries later. However, the whole matter of writs is hardly the answer. In feudal times the overlord could be sued, at least by his peers, in the seigniorial courts; and sovereigns in various European countries submitted to the jurisdiction of royal courts. Holdsworth, while agreeing “that the King could not be brought into court by a writ of summons,” finds in Bracton that “litigants would sometimes vouch the King to warrant, as if he were a common person.” As late as 1293 a reporter thinks it worthwhile to note that the king should not be subject to this procedure. Bracton wrote that when the King consented to be a defendant, the difference between him and a private person was less marked in the thirteenth century than later; and when a plaintiff, the king employed one of the ordinary writs.

The most important mechanism, however, whereby a subject could secure justice against the monarch was petition, a procedure which, like many other rules of English law, was fixed in outline by the reign of Edward I. Although he could not usually sue the king, the

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22 Holdsworth, The History of Remedies Against the Crown, 38 L.Q. Rev. 141, 142 (1922).
23 Borchard, V, supra note 12, at 799.
24 Holdsworth, supra note 22, at 144-45.
25 Id.
subject could bring his petition of right, which, if acceded to by the king, would enable the law courts to give redress. This was an intricate and long drawn out affair; but it was admitted that, as the fountain of justice and equity, the king could not refuse to redress wrongs when so petitioned. To provide more efficient remedies, the procedures of traverse of office and *monstrans de droit* were added in Edward III’s time. Yet the petition of right remained the subject’s basic recourse against the crown and its officers, and by the time of the great constitutional crisis under Charles I it had centuries of tradition and weight behind it.

Meanwhile, in the fourteenth and fifteenth centuries, a bifurcation of this general remedy evolved. Petitions of grace, those which merely sought a favor or special boon from the king, and petitions of rights, which implied that something was being asked for that was a legal right of the party, became distinguished. With the coming of the Tudors this practice crystallized to the extent that there must always be a reply to a petition of right, while the monarch or his Council could merely assent or refuse without judgment to a petition of grace “because the ordinary course of the common law is not pursued.” To add to such circumscription of the king’s power, of course, we must bear in mind the entire overall course of the foundation and growth in power of Parliament between the time of de Montfort in 1265 and the concession by Henry V in 1414 to the Commons that “it hath ever been their liberty and freedom that there should no statute nor law be made unless they give thereto their assent.” The view of the king as the sole giver of law in England had changed to the “King-in-Parliament” as supreme authority. Thus when Jaffe writes that “[f]rom time immemorial many claims affecting the Crown could be pursued in the regular courts”

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27 Holdsworth, *supra* note 22, at 149.
so long as "they did not take the form of a suit against the Crown,'"30 he makes the vital distinction long recognized in certain scholarly writings that such immunity of the king was purely personal.31 "When it was necessary to sue the Crown eo nomine, consent apparently was given as a matter of course."32 Precedents for actions against the king's officers and against local officials, with and without royal consent, are plentiful, from the Statute of Westminster I, in 1275, onward.33 If the English Crown enjoyed "sovereign immunity," then, certainly such "immunity did not stand in the way of justice where the English government was concerned."34 Given the modern understanding of the term, one might question whether such a doctrine ever existed in England in any pure form at all.

Where, then, did the modern notion originate? The best answer seems to be with the transition from the feudal to the national state. This transition was accompanied by the rise of theories of political absolutism, perhaps best embodied by the notion of the government of Louis XIV in France, with its constantly misquoted and constantly misunderstood "Etat, c'est moi!" In England absolutism reached its apogee, short-lived as it was, in the reigns of the first two Stuart kings, reigns culminating in Parliamentary rebellion, revolt, and civil war by 1642. Focusing on the seventeenth century and the divine right theory propounded by James I and Charles I lends credence to the beliefs of some writers that modern notions of sovereign immunity stem, not from the non-suability of the sovereign, but from an outgrowth of modern kingship, divine right, and royal prerogative as developed by theorists like Jean Bodin, royalist apologists such as Francis Bacon, and royalist divines like Roger Maynwaring.35

James I brought his idea of the divine rights of the King with him from Scotland in 1603. Departing from a tradition of Parlia-

30 Jaffe, supra note 14, at 4.
32 Jaffe, supra note 14.
33 Id. at 9-10.
ment as a co-equal body, James sought to treat it as an advisory body only and dismissed it at his pleasure. "Reason of state," a phrase introduced in Italy in the sixteenth century, became a justification for the Stuart monarchs between 1603 and 1642 to make use of forced loans, the notorious ship money taxes, and attainders against their political enemies, all in the name of Bodin's *patria potestas*, the origin of all superior power. Like movements were experienced on the continent; but the difference was that in France and the Empire and Spain there was little or no tradition of common law and of Parliamentary rights binding the monarchy, to which the king's subjects could compare such radical departures from tradition. The result is well known. After the tragedies of civil war, the beheading of a king, and the gloom of the commonwealth and the Lord Protector, the English restored the Stuarts only to reject them again in 1688 and solidly reaffirm in the Bill of Rights the liberties they had won against the Crown over many centuries. New ideas of sovereignty, based on the balancing and sharing of political power in the state, came to the fore with the justifications of Locke and others. Or were they merely medieval ideas reaffirmed in new language?

Two important results of the seventeenth century attempt to subvert the old ways in England must be borne in mind. First, in all of its theory and criticism against the Tudor-Stuart usurpations of power through prerogatives and divine right notions, Parliamentary doctrine insisted at bottom that the question was not one of creating new legal rights for the Commons and its spokesmen in Parliament but of *restoring* that which Englishmen had always enjoyed prior to 1628. The whole idea of *potestas suprema* in the state was foreign to the medieval way of thought. If, as James insisted, there must be a *meum et tuum*, Parliament, representing the people, must be the *meum*. But a second lesson was learned as well - Parliament

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37 See Tanner, *supra* note 29 for an introduction to these events.
alone must not be allowed to exercise supreme power any more than the monarchy. The Cromwellian experience was instructive. Mixed monarchy was the best solution, as the compromise under William and Mary and Queen Anne demonstrated. By the second decade of the eighteenth century, cabinet government emerged as more or less institutionalized under Walpole; and with Germans on the throne the monarchy would never again be the same.\textsuperscript{40} The last monarch who sought to upset the balance between King, Lords, and Commons even mildly, and thus ignore the hard won "rights of Englishmen," was George III.\textsuperscript{41}

All of which is by way of preface to the curious convolutions which immunity theory was to follow in the emerging United States. What is most clear about the transition of sovereignty to the New World is that there are many theories but few solid answers. Much discussion centers on the eleventh amendment as incorporating English notions of the immunity of the Crown, but this is far from satisfactory. The statement that "the King can do no wrong" was misconstrued by many, even some of our most eminent jurists, from the beginning. What does emerge from a study of the scholarly literature, the debates over the new Constitution, and the embroglio over \textit{Chisholm v. Georgia},\textsuperscript{42} is that there was more assumption than substance, and certain fundamental misreadings of the past extend even down to our own time.

As recently as 1973, for example, one of Pennsylvania's most respected justices, Samuel Roberts, writing the opinion in a landmark case in which the Commonwealth abolished governmental immunity for municipal corporations, \textit{Ayala v. Philadelphia Board of Education},\textsuperscript{43} stated, "It is generally agreed that the historical roots of the governmental immunity doctrine are found in the English case of \textit{Russell v. Men of Devon}, 2 T.R. 667, 100 Eng. Rep. 359 (1788)."\textsuperscript{44} Though Roberts went on to point out that "[w]hile some

\textsuperscript{40} Carrington & Jackson, supra note 28, at 467-75.
\textsuperscript{41} Id. at 535.
\textsuperscript{42} Chisholm v. Georgia, 2 U.S. (2 Dall.) 419 (1793).
\textsuperscript{44} Id. at 588, 305 A.2d at 879.
attribute the immunity of municipal... corporations to an extension of the theory that ‘the King can do no wrong,’... there is no mention of the phrase” in Russell. This, however, does not save the situation. Given the time required for communication with England in 1788 (the date is important), it is very unlikely that any member of the Philadelphia Convention debating sovereignty in the new frame of government had any idea of the decision just handed down in Russell. Even if they did, given the state of mind against England in that era, would they have felt constrained to follow it?

The “King can do no wrong” assumption is widespread. In the seventh edition of a respected casebook, the authors repeat the assumption, adding the comment:

The explanations for the initial acceptance of this feudal and monarchistic doctrine in the democracy of this country are quite obscure. It was first recognized on the purely procedural basis that the federal government could not be sued without consent. When justifications were finally offered, they were consistent with this procedural rule.46

Several things are wrong with this. We cannot have “feudal and monarchistic” combined as though they were simple complements. In fact they are antithetical. And incidentally, although it is not our subject herein, the authors cannot intend to say that immunity was adopted in the United States in the Jacksonian era, for that would be too late; and they surely do not think that a democracy existed or was created in 1789. The statement is an enigma. This text goes on, though, to add that the immunity of state governments has the same origin as that of the national government, and this was later extended to state agencies.47 Yet no time frame is given for either extension, which makes the whole rather futile. What we can agree with is the “quite obscure.” With this latter, the best scholars of the subject agree.

In speaking of the confusion of the distinction between the king in his public and his private capacity, a confusion which accorded to the crown those personal immunities and prerogatives which at-

45 Id.
47 Id.
tached to Hobbes' and Cokes' theoretically absolute monarch, Bourchard comments: "What is more surprising is that these mysteries and metaphysical reasons were permitted to invade the United States to rationalize the same desire to escape obligations."\textsuperscript{48}

Another author puts it less formally. "It seems somewhat unusual that the American states and the United States should have adopted the English doctrine of sovereign immunity."\textsuperscript{49} Bourchard writes elsewhere, with reference to immunity, "How it came to be applied in the United States of America, where the prerogative is unknown, is one of the mysteries of legal evolution."\textsuperscript{50} This evolution, however, "cannot qualify as a very respectable mystery. It is only a mystery if one ignores legal history and plants oneself blindly on the ground of current assumptions."\textsuperscript{51} Jaffee placed government tort immunity in the difficulties surrounding the doctrine of \textit{respondeat superior} in nineteenth century England, which is a far cry from the usual theory.\textsuperscript{52} "American courts and lawyers have swallowed whole the doctrines supposed to be the peculiar outgrowth of kingship, divine right and royal prerogative," one writer stated frankly in 1925.\textsuperscript{53}

Thus the question as to the source of this assumption of governmental immunity is far from answered. What is evident is that the assumption was indeed made and was part of the corpus of given or received truth in the minds of many of the most influential men who participated in the framing and ratification of the United States Constitution. A thorough examination of the source of this belief has yet to be made, but certain vital factors which must form

\textsuperscript{48} Borchard, V, \textit{supra} note 12, at 757, 799.
\textsuperscript{49} Mathis, \textit{supra} note 34, at 210.
\textsuperscript{50} Borchard, \textit{supra} note 13, at 4.
\textsuperscript{51} Jaffee, \textit{Suits Against Governments and Officers: Damage Actions}, 77 Harv. L. Rev. 209 (1963). Also grounding sovereign immunity in the nineteenth century, but in a much broader fashion, is T. Giuntari, \textit{The American Law of Sovereign Immunity} (1970) who opens his work by saying that "absolute" immunity (not even sovereign) was formulated and fashioned "largely in the nineteenth century," and goes on to an outright wrong statement that the nineteenth century was a time "when concepts of laissez-faire and absolute sovereignty were dominant in political thought." \textit{Id.} at vii. Even Bismarck would not have claimed this, much less the leaders of France after 1815 or Queen Victoria.
\textsuperscript{52} Jaffee, \textit{supra} note 51, at 210.
\textsuperscript{53} Angell, \textit{supra} note 31, at 151.
part of the constellation can be offered here. There are, as to the American scene, the lack of a king, the nature of the colonial/state governments, their assumption of parliamentary privilege by way of the English colonial experience, and the strong element of federalism which marked the early national period, a federalism reinforced by the doctrine of popular sovereignty. No one of these factors, of course, is other than obvious to students of the eighteenth century, but their implications as to subsequent interpretations of governmental immunity in America, as a totality, still await an author.

If immunity in England originated with the person of the king, where was sovereignty to be laid in the United States since there was no king or other sovereign after 1783 in either the states or the United States? The answer supplied by enlightenment political theory of the sort imbibed by colonial lawyers was with the people; but this did not solve the practical problem of locating sovereignty in some specific locii, some political mechanism through which to express the people’s will. The answer, given the entire 180 year colonial experience to 1787, was the state legislatures. Thus the first republic of the modern period adopted state sovereignty and its concomitant notion of governmental immunity, a theory at first glance out of keeping with the equally accepted principle of the day, popular sovereignty.

A number of writers comment on what appears to them as a curious dichotomy of theory and practices. Their puzzlement stems from the common error of ascribing contemporary usage of words to those of the past. Popular sovereignty in practice hardly meant “popular” in today’s sense of universal or mass. It referred to those who made up the political nation or state or colony. Be this as it

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54 Mathis, supra note 34, at 210. Mathis actually refers to the United States as “the first of the democracies of the modern period,” which is hardly an accurate description of the United States in 1789.

55 Id.

56 Carelessness in terminology and, likely, unfamiliarity with modern historiography appears to produce recurring errors when writers of law review materials make forays into historical topics. One area is frequent anachronisms, another is the notion that “nations” appeared suddenly on the scene fully-grown, with all their modern attributes, as though there were no stages of development for nations as for anything else. See in this connection B. Shafer, Nationalism, Myth and Reality (1955), and G. Bobango, The Emergency of the Romanian National State (1979).
may, the first point is simple enough. "Sovereignty," whatever it was, if it was to be transferred, received, or sent to America by some trans-Atlantic transmogrification, had to be in that place which pre-1787 Americans considered the repositories of political rights and power - their thirteen legislatures. Nor did this change immediately after 1787. On the contrary, some might argue the shift to the "nation" was hardly complete until the twentieth century.

The second factor, that of the particularistic nature of the American colonial governments and their fear of centralized power, hardly needs to be documented. Any standard history of colonial America is replete with examples of the pattern within each colony of the struggle between assemblies, councils, and governors for political control. The trend of history was inevitably in favor of the assemblies. What requires emphasis here is the widespread dissemination of liberal doctrine from England in the seventeenth and eighteenth centuries which affected the evolution of colonial government.

With the exception of Quebec, every British colony in North America, both island and continental, had a representative assembly before the end of the Revolution. A few of the self-governing colonies originally developed their own governmental systems, and the assemblies of Virginia and Bermuda were called into being by the proprietary companies that started these colonies. The great majority of all the assemblies which were established, though, owed their existence to royal commands expressed in charters or instructions. "The very genius of British political thought seemed to involve this idea of representation; and it is hardly possible to put too much emphasis on the extent to which England disseminated representative institutions. . . ."57

What is even more impressive is the sum total of the colonists' years of political experience, which were conditioned by two fundamental factors: (1) the correlation between the political struggles in England and the resulting impact on political developments in the colonial governments; and (2) the degree to which distance from England, the geography, and the economics of the new world al-

allowed colonial people to rapidly undermine royal influence and establish their own version of the rights of Englishmen. The degree of success naturally varied from one colony to another. In liberal environments such as Pennsylvania, Massachusetts and Rhode Island, the degree of royal control was never as strong from the outset as it was and would remain in more homogeneous and English-oriented places such as Virginia, New York, or the Carolinas.

It then happened almost naturally that the rise of parliamentary privilege and the growth of mixed government in England between 1607 and 1776 coincided more or less precisely with the effect of new world separatist tendencies toward what might be termed "distributive sovereignty." By the exercise of such privilege vis-a-vis royal control (always tenuous at best even from the earliest days), the colonial assemblies constantly became more and more like their English model "and even came to be referred to as little parliaments."

At the same time, by the eighteenth century a legal profession was identifiable in America, as it had not been earlier; and an increasing number of colonial lawyers had been trained in the Inns of Court. The common law was firmly transplanted, with all its notions of rights, privileges, and "immunities" such as they were against the crown. In America this meant immunity for the legislatures of the several states, which by 1776 had won the hard-fought struggle of many decades against the royal governors and the supervisory power of the Privy Council. Aside from those Americans trained in England, any American-reared lawyer had been brought up on two fundamental legal works: Coke's Institutes, published between 1628 and 1644, and Blackstone's Commentaries, which appeared between 1765 and 1769, both replete with the philosophy of the "immemorial rights" of the English people.

What is most important here is that colonial defenders of these rights saw their own legislatures as the shield and protector of such ancient usages—both against England herself and against any potential national government which might be created to govern all

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58 Id. at x.
60 Id. at 61.
thirteen self-contained political entities. What was more logical, then, in 1776 but to see the legislatures, the highest authority in each colony or state, as the successor to that sovereignty which had been renounced?

The assumption of power by the states became part of the perceived order of things, as does so much in life, without much serious questioning of whether this was in fact legal, logical, or grounded on sound theory. Speaking to the Pennsylvania State Convention on November 24, 1787, James Wilson discussed the difficulties entrusted to the Federal Convention in framing a government for "thirteen independent and sovereign states." Why or how sovereign? Well, they just must be. Look at how they act and have always acted.

Wilson was hardly alone in his belief. Many of the best minds in America, while disagreeing as to the wisdom of the new Constitution or various parts of it, indicated implicitly in their public speeches or writings that sovereignty of the states was a given fact. These included men such as Madison, Hamilton, Marshall, Randolph, Henry, and Mason. The thirteen colonies were recognized as states by Great Britain in 1783, while "Jefferson and many other so-called 'states-rights' men held at one time or another that the states were sovereign and the nation was not, because it was only a league of states instead of a federation."

Revolutionary thinkers could look back on two significant proofs to reinforce such a notion. From the beginning of colonization, every serious effort to form any kind of central government over the colonies or over a group of colonies, from the Confederation of England in 1634 to the Dominion of New England in the 1680s to Franklin's Albany Plan of Union in 1754, had been met with recalcitrance and lack of cooperation whenever it appeared that the states' autonomy was threatened in any serious manner. The first

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lasting general union, the Articles of Confederation, was hardly a union at all. Article II of the government launched in 1777 could not have been more clear: "Each state retains its sovereignty, freedom and independence, and every Power, Jurisdiction and right, which is not by this confederation expressly delegated to the United States, in Congress assembled."  

Even with such a weak, quasi-central government, the distaste for central authority was so pervasive that the Articles of Confederation took four years to be ratified and go into effect.

The second proof of sovereignty was theoretical and was based on the founders' general agreement that the teachings of Locke, Montesquieu, Rousseau, and the contract philosophers were correct and that popular sovereignty represented the most enlightened political wisdom. The convolutions that marked the reception of such doctrines in America is too involved to discuss here; but it is worth noting that in the ideological struggle, beginning with the Proclamation of 1763 and progressing through the Stamp Act Congress and the reaction to the so-called Intolerable Acts, colonial theory focussed on the king and cabinet as the nominal source of American difficulties, implying somehow that George, Lord North, and the Cabinet were frustrating the rights which Parliament would protect were it not for the usurping administration. Setting one branch of the master government against another is now a familiar revolutionary tactic; but it was grounded in a belief that somehow, were the Americans adequately represented in the Commons, justice would be done, for Commons embodied the people's will. Removal of Parliament left the American legislatures as guardian of the people's sovereignty. Parliament (and, by extension, the state legislatures in America) thus spoke for the sovereign people.

The theory of state sovereignty would be challenged and dissected as years passed. What is important is it formed a fundamental belief at the time the Constitution was adopted, and some writers would never depart from it. Vestiges of the assumption persist to

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65 See the section entitled Political Rights and Sovereignty in 1 Elliot's Debates 63-67 (1836).
this day. "Since, in our country, the prerogatives of the crown devolved on the people of the states, the state as a sovereign, now stands in the situation of parens patriae."\(^6\) Is this some comment from 1787? No, it is from Michie's Jurisprudence.

Hamilton in the Federalist addressed state fears that the new frame of government might allow them to be sued: "It is inherent in the nature of sovereignty not to be amenable to the suit of an individual without its consent. . . ."\(^6\) When Pennsylvania Anti-federalists argued that the new Constitution was "not only calculated but designedly framed, to reduce the state governments to mere corporations, and eventually to annihilate them,"\(^6\) James Wilson sought to reassure them by pointing to those clauses which protected and guaranteed that the states qua states would be fully protected, such as the provisions for equal state suffrage in the Senate, for ratification, for approval of Amendments, and for powers denied to the Congress.\(^6\)

The bonds of jurisdiction between the federal government and the respective states "are marked with precision," noted Noah Webster, which was necessary because "[T]he states have very high ideas of their separate sovereignty. . . . The sovereignty and the republic form of government of each state is guaranteed by the Constitution."\(^7\) The consolidation of the states "cannot be admitted," added Richard Henry Lee.\(^7\)

In the debates which produced the Constitution and in the ratification struggles which followed in the states, as well as in the first

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70 Pamphlets on the Constitution of the United States Published During Its Discussion by the People, 1787-1788 159 (1968) (P. Ford ed. 1968).

71 Id. at 46. The "compact" theory of the creation of the nation lasted well into the next century, with the impetus given it by John C. Calhoun and his nullification doctrine. Consider A. Upshur, A brief enquiry into the true nature and character of our Federal Government: being a review of Judge Story's Commentaries on the Constitution of the United States (1971), which is typical of the genre. Indeed, some of us hold the theory today.
federal elections, it is apparent that the notion of the states as sovereign entities representing ultimately the sovereignty of the people organized as states was a basic tenet of American political theory. With such sovereign units naturally followed the idea that they were the natural inheritors of the same governmental immunities enjoyed by their predecessor in England, Parliament and the crown. After 1789, the debate to define and limit this immunity began; and the English restrictions, modifications, and compromises on immunity were repeated here.

Generally two schools of thought became apparent after the new government went into effect. One argued that state immunity survived the Constitution; the other argued that federal supremacy drastically modified state immunity, if not deleted it altogether. All that was clear in the first years of Washington's presidency was a lack of consensus. Article III, worded in a way to possibly permit suits against the states by citizens of other states, posed an immediate problem. "The judicial power shall extend to all Cases, in Law and Equity...between a State and Citizens of another State...." This clause has been interpreted by many students of the period as the first hint of a break with the rule of sovereign immunity of the states, and begins the sequence of events leading to the adoption of the Eleventh Amendment."

In light of everything that has been said here, however, it simply does not make sense to presume that it was the founders' intent to write into article III a major break with the prevailing notion of the states' autonomy from suit. Some have suggested that the inclusion of this clause was inadvertent, but such an argument is

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72 Field, supra note 62, at 525-49.
73 See Mathis, supra note 34.
74 U.S. Const. art. III, § 2.
75 Mathis, supra note 34, at 211.
76 See id. at 211 n.16, which reads as follows:
A. Braxton in The Eleventh Amendment, 20 Rep. of Va. St. 8 Ass'n 175-76 (1907), states that 'if the attention of the Convention had been called to this clause, it would not possibly have passed, no one can doubt who is at all familiar with the complexion of the Convention and with the views of a large majority of its members upon the subject of state sovereignty.' Braxton also states, id. at 174, that the above clause is 'one of the most remarkable instances contained in the Constitution, of either carelessness of language or intentional ambiguity of expression.'
implausible in view of the documentary evidence that the problem was widely discussed.\textsuperscript{77}

It is clear that many Anti-federalists, such as Patrick Henry, George Mason, and Edmund Pendleton, opposed ratification of the Constitution as it stood not only because of the lack of a Bill of Rights, but also because of their fear of suits against the states by citizens of other states.\textsuperscript{78} However, most of the Federalists, whose arguments eventually prevailed, did not think that article III gave jurisdiction to the federal courts of suits against a state by citizens of another state—although a few did.\textsuperscript{79}

Majority thinking among the Federalists, led by Hamilton, appeared to be that because of the doctrine of sovereign immunity a state could never be sued without its consent. Madison and Marshall were among those who agreed with Hamilton’s invocation of what was, to them, standard common law tradition on the subject.\textsuperscript{80}

Evidently the arguments of such prominent leaders were taken as sufficient assurance by those who were chary of the provision. While a number of amendments were immediately introduced in the first Congress, including those ten which became the Bill of Rights, no amendment on the suability of the states was introduced. The controversy was only revived when it became apparent that such suits would soon reach the Supreme Court.

Some would not agree. Professor Jacobs doubts whether the Constitution would have been ratified had the delegates in the states clearly understood the implications of article III with regard to such suits. In any event, he suggests, we probably cannot know for certain. What is clear is that “in any case, the legislative history of the Constitution, hardly warrants the conclusion. . .that there was a general understanding at the time of ratification, that the states would retain their sovereign immunity.”\textsuperscript{81}


\textsuperscript{78} 3 Elliot’s Debates 543 (1836).

\textsuperscript{79} 2 Elliot’s Debates 491 (1836).

\textsuperscript{80} 3 Elliot’s Debates 533, 573 (1836).

\textsuperscript{81} C. Jacobs, The Eleventh Amendment and Sovereign Immunity 21-22 (1972).
Such arguments beg the question which has been raised here, for they assume that the founders intended to write sovereign immunity, or some form of it, into article III. This became an ingrained interpretation that has persisted. With the 1793 decision in *Chisholm v. Georgia*, the Supreme Court resolved the question of federal jurisdiction over such cases; and all those who feared for states’ rights and immunity at once joined to pass the eleventh amendment, to restore the original understanding that article III would not be interpreted to allow such suits. “The one interpretation of the Eleventh Amendment to which everyone subscribes is that it was intended to overturn *Chisholm v. Georgia*,” writes Martha Field in 1978.

In fact, this is only partially true. Nowak has shown that fear by the states ran far more to the collection of state debts by Tories, which were among the unresolved series of problems left over from the Treaty of Paris and only partially resolved by Jay’s Treaty in 1794. More importantly, the fundamental concern raised by *Chisholm* was that suits against states would be allowed and decided by independent justices free from state political control or lobbying. Strong evidence in the Convention debates suggests that state representatives had much less fear of Congressional power to grant jurisdiction over suits against states to the federal judiciary, for in Congress the states had control. Such a theory also accounts for the inconsistencies of Federalist argument that denied power over state suits flowing from article III but offered no objection to them under article I. Here they would not be insulated from state influence.

Did the eleventh amendment, then, delete an article III power, an exception to sovereign immunity? The Supreme Court has derived its complex of sovereign immunity rules from the eleventh amendment, which it views as creating a constitutional requirement of sov-

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82 *Chisholm*, 2 U.S. (2 Dall.) 419.
84 Nowak, *supra* note 67, at 1438-40. For the background and details of Jay’s Treaty, see S. Bemis, *A Short History of American Foreign Policy and Diplomacy* 34, 48-51 (1959). C. Warren, *The Supreme Court in United States History* 99 (1922) also supports the point that fear of Tory suits was the primary motive behind the eleventh amendment.
ereign immunity. An erroneous view of the amendment has prevailed. 86

"The problem is that the eleventh amendment is universally taken not to mean what it says." 87 If suits against a state can be brought with a state's consent, then apparently a state may waive the effects of the eleventh amendment, which is not logical. The amendment has been analogized to create federal immunity from suit as well, having been developed as an "almost direct counterpart" to state sovereign immunity doctrines. 88 Moreover, no one doubts that a state may sue a state; and the United States may sue a state. Nothing in article III differentiates between allowable suits and prohibited ones.

The conclusion must be that, as Field, Shapiro, and Chemerinsky argue, sovereign immunity is a common law doctrine rather than a constitutionally mandated one. 89 Common law immunity could be waived; and it was traditional common law immunity that was part of the world view of the founders. The founders cannot be faulted for failing to anticipate the endless convolutions of the Supreme Court and the misreadings of the limited views of sovereignty they sought to perpetuate within the context of their own times. The Anti-federalist fears of the independent judiciary have been all too well confirmed, even if in their favor.

Shapiro makes positive suggestions aimed at obviating much of the dilemma over the misconstrual of immunity doctrine. First, the

86 See Field, supra note 62. As recently as 1984, Justice Powell in Pennhurst State School & Hospital v. Halderman, 465 U.S. 89, reiterated the traditional direct causation between Chisholm and the eleventh amendment and placed sovereign immunity squarely within article III.
87 Field, supra note 62, at 516 (emphasis in original).
88 Id. at 517.

In 1946 Joseph D. Block argued that the only real policy basis for sovereign immunity which remained was the serious interference with the performance of state and federal functions, and with their control over their respective instrumentalities, funds and property. See Block, Suits Against Government Officers and Sovereign Immunity Doctrine, 59 Harv. L. Rev. 1060, 1061 (1946), citing United States v. Lee, 106 U.S. 196, 206 (1882). Balancing such a concern against the interest of private individuals in obtaining relief, there seems no more justification for precluding suit against the "sovereign" than existed in England in an earlier day. Id.
Supreme Court should make a strong statement that, when federal law permits a suit challenging state action, it can be brought only against an individual officer and not against the state or one of its departments. Second, the distinction of Edelman v. Jordan as to "prospective relief requiring substantial state expenditures and retroactive monetary relief for harm done" should be abandoned.

Edwin Chemerinsky likewise points to flaws in present analysis when he notes that, while Pennhurst provides constitutional status to a state’s immunity from federal suits brought by its own citizens, the language of the eleventh amendment clearly does not bar suits by the state’s own citizens. This perpetuation of Hans v. Louisiana is merely an application of common law immunity and not of the eleventh amendment. The "ideal approach" would be to treat the amendment "as a restriction on diversity suits against state governments" only. This "would not preclude federal question suits against state governments," either by residents or non-residents of the state concerned.

Thus far the Supreme Court has been unwilling to pierce the historic veil, and it continues to treat the eleventh amendment as a constitutional limitation on subject matter jurisdiction. Such awe for a doctrine that the framers most likely never intended to have constitutional sanction helps produce a government of "localism" rather than of "federalism," which bodes ill for the future.

Gerald Bobango

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90 Shapiro, supra note 89, at 83-84.
91 Edelman, 415 U.S. 651.
92 Shapiro, supra note 89, at 84.
93 Chemerinsky, supra note 89, at 649.
94 Hans, 134 U.S. 1.
95 Chemerinsky, supra note 89, at 667.