

OUR SOVEREIGN BODY

NARRATING THE FICTION OF SOVEREIGN IMMUNITY IN THE SUPREME COURT

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INTRODUCTION

Sovereign immunity is a fiction. But it is a fiction that jurists uncomfortably accept as true. In the words of Justice Stevens, it is “the vainest of all legal fictions.”¹ Perhaps, though the moral qualities of the doctrine does not prevent its continued application. For Justice Stevens continues “its persistence cannot be denied, but ought not be celebrated.”² Or consider the description by the Supreme Court in *Nevada v. Hall*: “We must of course reject the fiction [sovereign immunity]. It was rejected by the colonists when they declared their independence from the Crown... But the notion that immunity from suit is an attribute of sovereignty is reflected in our cases.”³ Or again, Justice Stevens suggesting that the doctrine of sovereign immunity continues to flourish despite the perishing of its “*raison d’être*.”⁴

To understand sovereign immunity and its fictional origins, one must understand the narratives that surround the fiction.⁵ Fictions are intangible and depend on normative

¹ *United States v. Dalm*, 494 U.S.596, 622 (1989) (Stevens, J. Dissenting).

² *Id.*

³ *Nevada v. Hall*, 440 U.S. 410, 415 (1978).

⁴ *Will v. Michigan Dept. of State Police*, 491 U.S. 58, 87 (1988).

⁵ Another way of saying this is as Jeff Powell said in *The Moral Tradition of American Constitutionalism* - that American Constitutionalism requires a normative framework that includes both historical and normative descriptions called traditions. See POWELL, THE MORAL TRADITION OF AMERICAN CONSTITUTIONALISM 44 (1993). Powell builds his argument on the normative tradition as defined by Alasdair Macintyre, who defines tradition as “an argument extended through time in which certain fundamental agreements are defined and redefined in terms of two kinds of conflict: those with critics and enemies external to the tradition..., and those internal, interpretive debates through which the meaning and rationale of the fundamental agreements come to be expressed and by whose progress a tradition is constituted.” See *id.* at 13-14 citing ALASDAIR MACINTYRE, WHOSE JUSTICE, WHICH REALITY (1988). Notably, this article suggests that the primary tradition or narrative that American Constitutionalism has adopted for sovereign immunity is one external to the system, leading to little internal and interpretive debate regarding its meaning.

presuppositions.⁶ You cannot test a legal fiction by feeling its body or by logical deduction. It's a non-truth. But it's a non-truth that we accept as real, as if it were concrete and tangible. For that reason, legal fictions depend on something outside of its own words to support its meaning. That something is always normative. It can be in the form of stories histories or as proverbial wisdom but it always carries normative weight. The narratives that are told in support of fictions become embedded in the legal subconscious and in some ways become sacramental in fulfillment of the fiction. Fictions could possibly manifest an existence outside of law, but never outside of its story.

The sovereign immunity fiction raises uncomfortable conclusions. First, and contrary to Justice Steven's assertion, it is not an acknowledgement that everything the government does is always right, but rather, that claims against the government have no forum for resolution. So the majority in *United States v. Dalm* did not need to consider the equitable claims of the matter. Rather the majority's analysis is rather terse: (1) "under settled principles of sovereign immunity, the United States as Sovereign is immune from suits, save as it consents to be sued, and the terms of its consent to be sued in any court define that court's jurisdiction to entertain the suit;"⁷ (2) a statute of limitations requiring that a suit against the government be brought within a certain time

⁶ See Robert M. Cover, *Forward: Nomos and Narrative*, 97 HARV. L. REV. 4, 4, (1983) ("No set of legal institutions or prescriptions exists outside of the narratives that locate it and give it meaning. For every constitution, there is an epic, for each Decalogue, there is a scripture.").

⁷ *Dalm*, 494 U.S. at 608 *citing* *United States v. Testan*, 424 U.S. 392, 399 (1976); *United States v. Sherwood*, 312 U.S. 584, 586 (1941).

period is one of those terms;⁸ (3) the court does not have the power to expand Congress's determination of jurisdictional limits;⁹ and (4) because Ms. Dalm failed to bring her action within the prescribed time period, the United States wins.¹⁰ Justice Stevens chastises this analysis as merely a jurisdictional apology in the face of equitable facts.¹¹ However, the uncomfortable lesson from the majority may simply be that the sovereign sets the boundaries for its own liability.

The second uncomfortability is both textual and normative; more precise, it is non-textual and normative. That is, nowhere in the Constitution's seven articles and twenty-seven amendments are the words "sovereign immunity" construed or construable to create a federal immunity. Indeed, if one takes the absence of the textual right in the original constitution, together with the Court's denial of state sovereign immunity in *Chisolm v. Georgia*, one might rightly conclude that sovereign immunity did not cross

⁸ *Dalm*, 494 U.S. at 612 *citing* *United States v. Mottaz*, 476 U.S. 834, 841 (1986); *Block v. North Dakota ex rel. Board of University and School Lands*, 461 U.S. 273, 287 (1983).

⁹ *Dalm*, 494 U.S. at 612 *citing* *United States v. Mottaz*, 476 U.S. 834, 841 (1986); *United States v. Kubrick*, 444 U.S. 111, 117-118 (1979); *Library of Congress v. Shaw*, 478 U.S. 310, 318 (1986); *United States v. King*, 395 U.S. 1, 4 (1969) ("waivers of sovereign immunity by congress "cannot be implied but must be unequivocally expressed.").

¹⁰ *Dalm*, 494 U.S. at 609-610. Ms. Dalm brought an action for recoupment of overpaid taxes under 28 U.S.C. § 1346(a)(1), which provides jurisdiction in the district courts for the recovery of any "internal revenue tax alleged to have been erroneously or illegally assessed or collected. The Court, in its holding required 28 U.S.C. § 1346 to be read in *para materia* with sections 7422(a) and 6511(a). Section 7422(a) requires that before a suit may be instituted for a refund that a claim be presented to the secretary of the treasury. Section 6511(a) required that claims for refund of overpayment of taxes be brought within three years of the date the tax return was filed. The Court found that Ms Dalm complied with neither.

¹¹ *Dalm*, 494 U.S. at 612. Justice Stevens also decries sovereign immunity as "majestic voices" with a "haunting charm." *Id.* at 616. Continuing on, Justice Stevens heroically defends *Bull v. United States*, saying the court then, "reasoned not in obedience to these siren-like voices but rather under the reliable guidance of a bright star in our jurisprudence: the presumption that for every right there should be a remedy. *Id. citing* *Marbury v. Madison*, 1 Cranch 137, 162-163 (1803).

the Atlantic with the original colonists.¹² This position may be defensible as to state sovereign immunity, but towards the Federal Government, *Chisolm* does not venture so far: “I hold it, therefore to be no degradation of sovereignty, in the states, to submit to the Supreme Judiciary of the United States. At the same time, by way of anticipating an objection, I assert that it will not follow, from these premises, that the United States themselves may be sued.”¹³

Chisolm v. Georgia involved a citizen from the state of South Carolina who sued the state of Georgia in Federal District Court under Article III, section 2 of the Constitution. Article III, section 2 reads: “The judicial power of the United States shall extend to all cases, in Law and equity, arising under this Constitution, the Laws of the United States, and treaties made under their authority... between a State and citizens of another state.”¹⁴ As we noted above, the Court decided that sovereign immunity did not bar the suit between the citizen of South Carolina and the state of Georgia since the Constitution specifically authorized such a suit.¹⁵ But shortly after *Chisolm v. Georgia* was decided, two and three days to be exact, amendments were proposed on the floor of the House of Representatives to correct *Chisolm’s* erroneous holding and secure sovereign immunity towards the states. One of those amendments was the Eleventh Amendment ultimately ratified and which reads:

The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States

¹² See *Nevada v. Hall*, 440 U.S. at 415.

¹³ *Chisolm v. Georgia*, 2 U.S. (Dall.) 419, 425 (1792).

¹⁴ U.S. Const. Art. III § 2.

¹⁵ *Chisolm*, 2 U.S. (Dall.) at 425.

by citizens of another state, or by citizens or subjects of any foreign state.¹⁶

Textually the eleventh amendment would appear to put to rest any questions of either State or Federal Sovereign Immunity. State Immunity was directly addressed by the terms of the amendment. But by implication, the Federal government too shielded itself from suits; put another way, if the states are protected under the Constitution, how much more is the supreme sovereign protected by its own charter.¹⁷

Chisolm offers further insight as to Sovereign Immunity's origins – that of the peace of the realm as derived by common law. The court theorizes the possibilities if states were not able to sue one another. If a the State of Georgia injures a citizen of the state of South Carolina, South Carolina must remonstrance on behalf of its own citizen. If South Carolina has no means of doing so, the allegiance the citizen had to South Carolina will naturally become suspect. So the natural next step is war between South Carolina and Georgia. Because a primary principle of the federal government is maintaining peace amongst the several states, it is better to allow a citizen of one state sue another state than to force a state of war between the two states.¹⁸ But under the same logic, the federal authority may not be sued, precisely for the same reason that there is no threat of war towards the United States were it to injure its citizen.

¹⁶ U.S. Const. Amend. XI.

¹⁷ *Chisolm*, 2 U.S. (Dall.) at 426 (“The judicial act recognizes the jurisdiction over states. Instead of using the first expression in the Constitution, to wit “cases and controversies between , etc.” it adopts the second, namely “where a state shall be a party.” Thus, it makes no distinction between a state as a plaintiff or as defendant.”) Thus according to the Judiciary act of 1789 and Article III, the text suggested that Sovereign Immunity as to the States was not a valid defense.

¹⁸ *Chisolm*, 2 U.S. (Dall.) at _____. Chief Justice John Jay also reaffirmed that sovereign immunity would still bar suits against the United States, when it did not against the several states. *See Chisolm*, 2 U.S. (Dall.) at 478 (Jay, C.J.).

And Justice ___ may have a valid argument. Consider the one time that our states did enter into combat against one another. Arguably, its purpose was to vindicate the rights of one state's citizens (the southern states) against the governments of the northern states, who tried to politically deprive Southern slave holders the right to certain property. Whether we agree with the moral implications of the Southern States' arguments (which I do not) one could argue that were Sovereign immunity a non-possibility, the entire civil war could have been no more than one large litigation, perhaps still mired in discovery or some other procedural aspect, and rendering the house divided into more of a *Bleak House* pitting one Jarndyce against another.¹⁹

Certainly our Republican origins, the Constitution itself, and the opinion in *Chisolm v. Georgia* begs the question whether sovereign immunity made the trans-Atlantic journey. And the answer we get is as unsatisfactory as fictions almost always are. As we have already said, *Chisolm v. Georgia* was not the beginning of the end for sovereign immunity. Instead, Congress reaffirmed principles of sovereign immunity towards the states in the Eleventh Amendment, which barred suits from citizens of foreign states against a sovereign state. And since that time, war has not broken out between two states to protect one citizen's rights against that state.²⁰

In addition to the 1793 Congress that urged the eleventh Amendment directly in relation to the *Chisolm* holding, other early founders certainly believed Sovereign Immunity was inherent in the Constitution. The Federalist Papers contain some of the most powerful and politically charged statements relating to Sovereign Immunity and

¹⁹ See Bicknel, (Constitution produced litigation instead of revolution).

²⁰ We of course assume the Civil War to have much more contextual circumstances than the southern states protecting themselves against the Northern States. Rather, properly interpreted, the Civil War's sovereignty problems relate more directly to the Southern States protecting their sovereignty against the Federal government.

form great evidence of its retention in the Constitution. Among those statements include Alexander Hamilton's concise description of Sovereign Immunity as a form of the social contract:

It is inherent in the nature of sovereignty not to be amenable to the suit of an individual without its consent. This is the general sense and the general practice of mankind ... The contracts between a nation and individuals are only binding on the conscience of the sovereign, and have no pretensions to a compulsive force. They confer no right of action independent of the sovereign will.²¹

Hamilton introduces normative concepts into the question of Sovereign Immunity, namely that sovereigns have as a natural part of existence immunity from suit by its own citizens.

To this point we have described the tensions that federal sovereign immunity begets: namely that sovereign immunity leads to uncomfortable results when the sovereign acts inappropriately; that sovereign immunity at the federal level is not described in any complete detail in the Constitution unlike state immunity (but that by implication, and the Supremacy Clause, there may be inferred immunity); and that sovereign immunity may be read as a necessary term within the social contract of a Federal system both to preserve peace as suggested by *Chisolm v. Georgia* and as a natural result of being sovereign. Now, a fuller description of federal sovereign immunity will illuminate these tensions.

²¹ THE FEDERALIST No. 81, at 487-88 (Alexander Hamilton).

Sovereign immunity is based on the supposition that the sovereign cannot be sued without its consent.²² The first case that recognized that sovereign immunity was a bar to suits was *Cohens v. Virginia*.²³ *Cohens* is an important statement for federal sovereign immunity because it involved a citizen of the state of Virginia suing the state of Virginia; this in contrast to *Chisolm v. Georgia* which involved a citizen of South Carolina suing the state of Georgia.²⁴ In supporting its argument that the federal court maintained no jurisdiction to hear a suit brought against the state of Virginia, the court looked to the sovereign status of the states prior to the Federal compact. The Court said:

It is an axiom in politics that a sovereign and independent state is not liable to the suit of any individual, nor amenable to any judicial power, without its own consent. All the States of this union were sovereign and independent before they became parties to the federal compact: hence I infer that the judicial power of the United States would not have extended to them, *eo nomine* upon the face of the Constitution.²⁵

And as we discussed above, the *Cohens* court came to the same conclusion as *Chisolm v. Georgia*, inferring that the Constitution had in fact extended that judicial power in the Constitution, Article III, section 2. But, the matter before the *Cohens* court was different. Involving a citizen of the sovereign sued, the Court found no authority in the Federal Compact for entertaining judicial power over the state of Virginia. “The case of a contest between a state and one of its own citizens, is not included in [the enumeration of Article III, section 2]; and consequently, if the principle I have advanced is a sound

²² *United States v. Lee*, 106 U.S. 196, 204 (1882).

²³ CITE. As noted above, the Justices in *Chisolm v. Georgia*, recognized that while sovereign immunity would not apply to the states, they were more uncomfortable with the same conclusion as applied to the Federal government. *See CITES*.

²⁴ *See e.g.*, *Cohens v. Virginia*, 6 U.S. (Wheaton) 264, 302 (1821); and *Chisolm*, 2 U.S. (Dall.) at _____. *See also* _____.

²⁵ *Chohens*, 6 U.S. (Wheaton) at 303.

one, the judicial power of the United States does not extend to it.”²⁶ Thus in 1821, the principle firmly established was that citizens may not sue their own sovereign except where the sovereign consents.

This position begged the theoretical and difficult question in the United States – who is sovereign that can consent to suit. The Court in *U.S. v. Lee* offered a theoretical solution.

Under our system the people, who are there called subjects are the sovereign. Their rights, whether collective or individual, are not bound to give way to a sentiment of loyalty to the person of a monarch. The citizen here knows no person, however near to those in power, or however powerful himself, to whom he need yield the rights which the law secures to him when it is well administered.²⁷

Simply put the people are sovereign in the American republic, owing no allegiance to any executive that exists above the law; the question of infallibility is discussed in greater detail in Part A. Thus, the logical doctrine that developed and which holds true today is that the United States may not be sued unless Congress, representative of the people (sovereign) consents.²⁸

The questions that the above description asks are situated on two different levels – a macro and a micro. On the Micro level, it asks “have we gotten Sovereign Immunity right?” That is, does Justice Stevens have a point when he notes that the institution is out of sync with the narrative we tell ourselves about our Constitution. Or is this a case of the trivially true, an inconsistency we have learned to live with.

²⁶ *Id.* at 303.

²⁷ *United States v. Lee*, 106 U.S. 196, 204 (1882).

²⁸ CITE

On the macro level, it asks a central question of constitutional theory. That is, how do we approach problems that appear to have historical antecedents with inconsistent results. The same analysis could be done with regard to how the Constitution can be about freedom, yet still endorse slavery. This topic, though less sexy, is arguably more relevant.²⁹

The thesis that all of the foregoing, and the balance of this project supports is two fold. Generally, the thesis holds that the notion to sovereign immunity should be tied to the ways we define our sovereign. The way a sovereign is defined may be done in two ways: we can either normalize what we want the sovereign to look like, and then work out the way that the sovereign legally interacts with his surroundings; or we can define the legal boundaries of what the sovereign is bound by, and then normalize him around the boundaries. Said more abruptly, we can either fictionalize our sovereign by telling stories about him, and then develop the law of the sovereign around those stories, or we can bind the sovereign to reality by tying him solely to the law. I suggest that in the United States, our tendency has been to assimilate to the former, though the nature of our Constitution begs the later. Thus, our judges have told stories of sovereigns and the fictions that originate in the English Common Law (which I argue appears to have a fully integrated fiction) instead of basing the doctrine on law.

Part One shows us what a fully fictionalized sovereign looks like. It uses as an example the concept of the King's Two Bodies to show how stories of Sovereigns take shape. This concept of the uncomfortable fiction to describe how Sovereign Immunity's fictions are grounded by form and do indeed flourish and take on new life – even when

²⁹ Though new considerations of how the Thirteenth Amendment and the notion of people as property is a modern concern by Jedediah Purdy. I, then, shall leave that application to him.

its *raison d'être* has long past, is most apparent when viewed under the lens of antiquarian notions of government and order. Accordingly, Part A is mostly historical. The King's Two Bodies held that the King of England was contained in a dual body – one natural and one mystical. The Natural body was subject to decay and to death while the mystical body never died, never aged, never was impaired. Accordingly, the kingly body never suffered at law, because the King was the law and ever maintained the law. From the King's Two Bodies, we show how the normative fiction becomes embedded in the narrative of English theory. Drawing on Fortescue, Locke, and Blackstone, we show three different narratives, all dealing with the same themes, but all trying to make sense of the twin-bodied king. Part I ends by surveying American conflation of Blackstone and Lockean theory in its understanding of sovereignty.

Part two turns to the American Context. Having already in this introduction set forth the way things are regarding sovereign immunity, Part II outlines three approaches that have been taken when approaching the problem of sovereign immunity. The first is the John Jay / James Wilson approach to throw out both the narrative and the institution of Sovereign Immunity under a strict construction of the American narrative. The second, is an approach by Justice Story and Justice Holmes which co-opts the features of the sovereign described and places them within a specific American body; the result is a highly nationalistic sovereign, with nationalistic aims. The third considers the Rehnquist Court's treatment of sovereignty as taking the aims of the British story (without the narrative features itself) and using them to sustain a federalist view point some of the time and a Nationalistic view at other times.

For the reasons described in part three none of these approaches are particularly satisfying. Part three then offers this author's solution – a fourth way of viewing sovereign immunity that incorporates the original conceptions of sovereign immunity with a narrative about the constitution – an aspect of each of the prior narratives that is omitted. It begins by placing the sovereignty/ sovereign immunity discussion within a narrative that explains both its nationalism and federalism dimensions. It continues by suggesting that rhythmic patterns envelope the debate and create reactionary decisions by courts and legislatures. The better way, as this author suggests, is finding a narrative that makes sense Constitutionally, for a doctrine that is not found in the document.

This project is intended to be different from other works relating to sovereign immunity as it tends to support the dispensability of the fiction for the purpose of governmental power. In this regard, it contrasts the position adopted by the distinguished Professor Jaffe who suggested that sovereign immunity was unnecessary as a theoretical inquiry when pursuing claims against government officials.³⁰ Jaffe's analysis begins by a thorough consideration of writs against the Crown from Bracton forward. Jaffe's conclusion, that "Sovereign immunity, whatever it is or is not, has never had, and does not have today much impact on the judicial control of administrative illegality," is more realist than this work is intended to be.³¹ Indeed, Jaffe somewhat acknowledges what one conclusion that this project draws: that fictions animate themselves and create new fictions. He says in the very beginning "by a magnificent irony, this body of doctrine and practice, at least in form so favorable to the subject, lost one-half of its efficacy when

³⁰ See Louis L. Jaffe, *Suits against Governments and Officers: Sovereign Immunity*, 77 HARV. L. REV. 1 (1963).

³¹ *Id.*

translated into our state and federal systems.”³² He means to tell us that the doctrine as alive in England did not relocate the writs of action against governmental officials to the new world. And accordingly, the fiction continued to beget new forms of the fiction and derived new life.

³² *Id.* at 2.