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Richard Henry Seamon

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A Brief Comment on the Current Eleventh Amendment Jurisprudence of the Supreme Court

RICHARD H. SEAMON*

I believe that the Supreme Court's understanding of state sovereign immunity is generally correct.¹ Thus, the Court is probably correct that state sovereign immunity was built into the original Constitution, and that this immunity is broader than that implied by the Eleventh Amendment.² In particular, the Court is probably correct that state sovereign immunity can bar private actions arising under federal law.³

However, I do not buy the Court's immunity case law lock, stock, and barrel. For example, I think that the states have a stronger claim to immunity in their own courts than in federal court.⁴ Moreover, I suspect that the Court too restrictively interprets Congress' power to abrogate state sovereign immunity under Section 5 of the Fourteenth Amendment.⁵

I also dislike some of the results that the Court's immunity jurisprudence can produce. The potential results are familiar and, in my view, indisputable: immunity can prevent someone who has been wrongly hurt by the government from getting a remedy. In addition, immunity can encourage governments to violate the law. Who can be in favor of these results?

Despite my disagreement with some facets of the Court's caselaw and my dislike of its potential results, I find much academic criticism of the Court unconvincing for two reasons. First, it depicts the Court's case law as implausible and result-driven. Second, it depicts state sovereign immunity as a monolithic evil. In my opinion, the Court's case law may be wrong, but it is eminently reasonable. Furthermore, I think that sovereign immunity is justified in certain areas. In short, state sovereign immunity, as understood by the Court, is a mixed bag. I will now briefly elaborate on these views.

I understand the Court's sovereign immunity jurisprudence to rest on three

* Associate Professor, University of South Carolina School of Law; Visiting Professor, Washington and Lee University School of Law.

1. I deliberately qualify the leadoff statement in the text. I cannot completely commit to any understanding of state sovereign immunity, including the Court's, because I believe that a correct understanding should accord with history. As I am not a historian, I am not in a position to choose definitively among the competing historical views that you will find in case law and commentary on state sovereign immunity.

2. *See, e.g.*, *Alden v. Maine*, 527 U.S. 706, 730 (1999) (noting that state sovereign immunity "inheres in the system of federalism established by the Constitution").

3. *See, e.g.*, *Hans v. Louisiana*, 134 U.S. 1, 9-15 (1890).

4. *See generally* Richard H. Seamon, *The Sovereign Immunity of States in Their Own Courts*, 37 *BRANDEIS L.J.* 319 (1998).

5. "The Congress shall have power to enforce, by appropriate legislation, the provisions of this [Amendment]." U.S. CONST. amend. XIV, § 5. For discussion of the Court's restrictive interpretation of Section 5, see Evan H. Caminker, "Appropriate" Means-Ends Constraints on Section 5 Powers, 53 *STAN. L. REV.* 1127 (2001).

propositions. First, an inherent attribute of a sovereign is immunity from private lawsuits to which the sovereign has not consented. Second, the states were sovereign before the Constitution was ratified and therefore enjoyed this immunity. Third, the original Constitution did not alter the states' immunity, as sovereigns, from private lawsuits to which they did not consent.⁶

I believe there is plenty of support for each of the three propositions. The first two propositions find support, most famously, in a statement by Alexander Hamilton:

It is inherent in the nature of sovereignty not to be amenable to the suit of an individual without its consent . . . [A]nd the exemption, as one of the attributes of sovereignty, is now enjoyed by the government of every State in the Union. Unless, therefore, there is a surrender of this immunity in the plan of the convention, it will remain with the State.⁷

Both historically and today, the dispute centers not so much on the “inherentness” of immunity or the sovereignty of the states as on the issue of whether the immunity was surrendered in the Constitution.⁸

I think it was not. State sovereign immunity survived ratification. My reasoning is not novel. It is essentially that of the Court in *Hans v. Louisiana*,⁹ and it has been stated recently and articulately by Professor Alfred Hill.¹⁰ The states were deep in debt when the Constitution was up for ratification; they were also worried about being sued for violating the Peace Treaty of 1783.¹¹ Under these circumstances, the Constitution would not have been ratified if it had been widely understood to override state sovereign immunity or empower Congress to do so.

I do not find convincing the argument by some Justices and commentators that, even if state sovereign immunity survived ratification, it did so only as a common law protection.¹² I think it is more accurate to characterize state sovereign immunity, both before and after ratification of the Constitution, as a creature of state law rather than common law. Thus, if the competent branch of state government abolishes immunity or waives immunity to specific suits, the

6. See, e.g., *Alden*, 527 U.S. at 713 (noting that “the States’ immunity from suit is a fundamental aspect of the sovereignty which the States enjoyed before the ratification of the Constitution, and which they retain today . . . except as altered by the plan of the Convention or by certain constitutional amendments”).

7. THE FEDERALIST NO. 81, at 455-56 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

8. See, e.g., *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 400, 404-05, 410 (1819) (referring to states as “sovereign” or “sovereignties” both before and after ratification). *But cf.* Daniel A. Farber, *States’ Rights and the Union: Imperium in Imperio, 1776-1876*, 18 CONST. COMMENT. 243, 243-44 (2001) (book review) (discussing competing conceptions of sovereignty throughout United States history).

9. 134 U.S. at 1.

10. Alfred Hill, *In Defense of Our Law of Sovereign Immunity*, 42 B.C. L. REV. 485, 493-98 (2001).

11. See *id.* at 495-99.

12. See, e.g., *Alden*, 527 U.S. at 762 (Souter, J., dissenting).

Constitution does not force immunity back on the state, nor I should think, would it empower Congress to do so. By the same token, it is an issue of federal *constitutional* law whether any provision in the original Constitution overrides the sovereign immunity established by a state's law or empowers Congress to do so.¹³ As stated above, I do not think that the original Constitution had either effect.

I believe that the best counter-argument to my view of original understanding is, "So what?" The "So what?" argument says that, regardless of the original understanding, we should get rid of sovereign immunity because it can be unfair to individuals and encourage government violations of the law. As mentioned above, I think it is indisputable that sovereign immunity has the potential to be unfair and to undermine the rule of law. This leaves two important questions: how do we get rid of sovereign immunity, and how much of it do we get rid?

I believe that the political branches should play a major role in addressing these questions, and in fact they have. Congress and state legislatures have increasingly waived sovereign immunity.¹⁴ Sometimes, they have replaced judicial remedies against the government with administrative remedies. They also often limit liability. Interestingly, some states enact these waivers in response to state court decisions that abolish state sovereign immunity in whole or part. I believe, when possible, state legislative action is a better way of moderating state sovereign immunity than to have moderation imposed by federal courts. If necessary, state legislatures may be spurred by state judicial action. The state legislative method will usually receive more public support and be more comprehensive.

Even so, I believe that federal law and federal courts have a role to play in moderating state sovereign immunity. I would argue that, as sovereign immunity becomes increasingly spotty, the Due Process Clause may compel finding the sovereign liable.¹⁵ This argument stems from the principle that the process that is due—including the remedies due someone who has been wrongfully deprived of life, liberty, or property—can change. In particular, the demands of due process can evolve to reflect standards of fairness widely accepted by the law of many states. Thus, for example, if forty-nine states eventually waive immunity from tort suits for car accidents involving state employees, state liability for those accidents in the fiftieth state could very well be required by the Due Process Clause.

13. Cf. Hill, *supra* note 10, at 526 ("The question of federal judicial power to override state sovereign immunity is governed exclusively by the federal Constitution").

14. See *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 703-04 (1949) ("The Congress has increasingly permitted such suits to be maintained against the sovereign and we should give hospitable scope to that trend"); *Great N. Life Ins. Co. v. Read*, 322 U.S. 47, 53 (1944) (to the same effect); *United States v. Shaw*, 309 U.S. 495, 501 (1940) ("A sense of justice has brought a progressive relaxation by legislative enactments of the rigor of the immunity rule").

15. Cf. Richard H. Seamon, *The Asymmetry of State Sovereign Immunity*, 76 WASH. L. REV. 1067 (2001) (arguing that the Due Process Clause sometimes overrides state sovereign immunity from just compensation claims).

To the extent that islands of sovereign immunity remain prevalent, however, they may reflect situations in which sovereign immunity is justified. For example, I believe there are strong arguments supporting the general rule that you cannot sue the government for specific performance of a contract.¹⁶ There may also be strong arguments for the immunity that remains prevalent for the government's exercise of "discretionary functions."¹⁷

In sum, I believe that the Supreme Court's historical understanding is eminently defensible, as is sovereign immunity in some areas. I nonetheless predict that sovereign immunity will wane, mostly because of legislative or state court waivers, regardless of what the Court decides. My hunch is that few, if any, of the justices would mind this one bit.

16. See Richard H. Seamon, *Separation of Powers and the Separate Treatment of Contract Claims Against the Federal Government for Specific Performance*, 43 VILL. L. REV. 155 (1998).

17. See Richard H. Seamon, *Causation and the Discretionary Function Exception to the Federal Tort Claims Act*, 30 U.C. DAVIS L. REV. 691 (1997).