

## Effect Of Governmental Immunity On Declining Governmental Ethics—The King Can Do Wrong!

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Some of the decline in ethics in government must be attributed to the awareness of governmental officials that they generally cannot be sued for their wrongful or unethical conduct. The long standing judicial doctrine of sovereign immunity, which prevents citizens from suing the government unless the government gives its consent to such suits, is an antiquated carryover from the days of the near-absolute power of the English kings<sup>1</sup> and is based on the philosophy that the sovereign cannot commit a legal wrong and, thus, should be immune from civil suit. While the doctrine fell into some disfavor in the past, recently U.S. courts have applied the doctrine more vigorously to continue the judicial notion that citizens cannot bring suits against the government. The justification seems to be that the government would be hindered substantially in its performance of public duties if it were subjected to repeated suits as a matter of right of any citizen, but more realistically the reason for the court's continuing application of such an antiquated doctrine is grounded on another established but often inconsistently applied doctrine, the principle of *stare decisis*. Based on this principle, the Supreme Court has treated the tenet that citizens cannot sue their government as a fabric of our jurisprudence from the time of the drafting and ratification of the Constitution and the institution of the first U.S. courts to present.<sup>2</sup>

*Stare decisis* is a Latin legal term which means “to stand by decided cases.” It expresses

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<sup>1</sup>Discussion in *Humane Society of the United States v. Clinton*, 236 F.3d 1320, 1326 (Fed. Cir. 2001).

<sup>2</sup>Discussion in *United States v. Lee*, 106 U.S. 196, 205 (1882). In 1999, a majority of the justices of the Supreme Court, in *Alden v. Maine*, 527 U.S. 706, 714, (1999), asserted that when the Constitution was ratified it was well established in English law that the Crown could not be sued without consent in its own courts. Over a hundred years prior to the *Alden* decision, in *Chishom v. Georgia*, 2 U.S. 419 (1793), Chief Justice Marshall acknowledged, on behalf of the newly constituted Supreme Court, that the United States could not be sued (2 U.S. at 425). Chief Justice Marshall stated that “the head of a confederacy is not within the reach of the judicial authorities of its inferior members.” However, Justice Marshall, in writing the opinion for the Court, did sustain the right of a South Carolina citizen to bring a lawsuit against the State of Georgia. Justice Marshall reasoned that a state's immunity was qualified by the general provisions of Article III of the U.S. Constitution and, more specifically, by the provision in Article III, § 2, cl. 1, which extended the federal judicial power to controversies between a state and citizens of another state. Later, as noted *infra*, the adoption of the Eleventh Amendment eliminated the right of a citizen of one state to bring a suit against another state. Further, the Supreme Court subsequently decided, in the 1890 landmark case of *Hans v. Louisiana*, 134 U.S. 1, (1890), that a citizen also may not sue the state of her residence in a federal court. Thus, as discussed *infra*, the Supreme Court since 1890 has sanctioned dual sovereign immunity. The states now are immune from suit in federal courts pursuant to the Eleventh Amendment, and most state courts also acknowledge immunity for the states for suits brought in state

the notion in common law that prior court decisions must be recognized as precedents. However, the doctrine of *stare decisis* has not been applied consistently. Depending upon the subject matter of a particular decision, a majority of members of the Supreme Court may choose to overrule a previous decision they disapprove.<sup>3</sup> The doctrine of *stare decisis* treats as general law prior court opinions, specifically those of the U. S. Supreme Court. However, some would question whether this treatment provides for judicial usurpation of the legislative power granted Congress by Article I of the Constitution, which provides that Congress alone can make the laws.<sup>4</sup>

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courts.

<sup>3</sup>For an interesting discourse by Justice Scalia of the effect of *stare decisis* on decisions relating to governmental immunity, see *College Savings Bank v. Florida Prepaid Postsecondary Education Expense Board*, 527 U.S. 666, 680, (1999). Despite *stare decisis*, the majority of the Court in *College Savings Bank* overruled a decision of the Court that was rendered in an unanimous opinion thirty five years previously. Justice Scalia referred to the prior decision, *Parden v. Terminal R. of Ala. Docks Dept.*, 377 U.S. 184 (1964), as “an elliptical opinion that stands at the nadir of our waiver (and, for that matter, sovereign-immunity) jurisprudence.” *Id.* at 676. In *Parden*, the Supreme Court ruled that employees of a railroad owned and operated by Alabama could bring an action against their employer under the Federal Employers’ Liability Act, 45 U.S.C. § 51. The Court decided that, despite the absence of any provision in that statute specifically referring to the states, the Act authorized suits against the states by virtue of the Act’s general provision subjecting to suit “[e]very common carrier by railroad...engaging in commerce between...the several states.” Twenty three years later in *Welch v. Texas Dept. Of Highways and Public Transp.*, 483 U.S. 468, 478 (1987), the Supreme Court overruled *Parden* “to the extent it was inconsistent with the requirement that an abrogation of Eleventh Amendment immunity by Congress must be expressed in unmistakably clear language.” Thirty five years after *Parden*, the Supreme Court, in *College Savings Bank*, 527 U.S. at 680, expressly overruled “whatever may remain or our decision in *Parden*.” The majority of the Court in *College Savings Bank* decided that “the constructive-waiver experiment of *Parden* was ill conceived,” and stated that there was “no merit in attempting to salvage any remnant of it.” *Id.* at 680. The Court commented that “the very cornerstone of the *Parden* opinion was the notion that state sovereign immunity is not constitutionally grounded.” *Id.* at 682. In *College Savings Bank*, 527 U.S. at 687, Justice Scalia, writing for the majority of the Court, referred to what he termed “the still-warm precedent of *Seminole Tribe* and to the 110-year old decision in *Hans* that supports it.” [In *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 54, 66-68 (1996), the Supreme Court reaffirmed its ruling in *Hans*, which had repudiated its earlier decision in *Chisholm v. Georgia*, 1 L.Ed. 440 (1793), that Article III of the Constitution superseded the sovereign immunity of the states.] Justice Scalia then referred to the dissenters in *College Savings Bank* as having “adopted a decidedly perverse theory of *stare decisis*.” *Id.* at 689.

<sup>4</sup>Interestingly, in *College Savings Bank*, cited in note 3, 527 U.S. at 683, Justice Scalia stated that recognizing “a congressional power to exact constructive waivers of sovereign immunity through the exercise of Article I powers would also, as a practical matter, permit Congress to circumvent the antiabrogation holding of *Seminole Tribe*.” (In *Seminole Tribe*, cited above in note 3, the Supreme Court ruled that Congress lacks authority to abrogate the States’ Eleventh Amendment immunity.) In a dissenting opinion in that case, Justice Breyer concluded that the Supreme Court had made the sovereign immunity doctrine immune from congressional Article I modification, and thus had made “it more difficult for Congress to decentralize governmental decisionmaking and to provide individual citizens, or local communities, with a variety of enforcement powers.” *Id.* at 705. Justice Breyer opined that by diminishing congressional flexibility, the Supreme Court has made it “more difficult to satisfy modern federalism’s more important liberty-protecting needs.” *Id.* Thus, Justice Breyer concluded that the doctrine of sovereign immunity is “counterproductive.” *Id.*

In *Alden v. Maine*, cited in note 2, 527 U.S. at 711, the Court ruled that the powers delegated to Congress under Article I of the U.S. Constitution do not include the power to subject nonconsenting states to private suits for damages in state courts.

## Forum on Public Policy

Neither of the reasons courts have used to justify their adherence to the doctrine of sovereign immunity (a public policy concept that governmental operations would be halted if citizens could sue the government or *stare decisis*) overrides the need to make governmental officials accountable for their actions and subject them to sanctions in a court of law if they injure citizens by their failure to exercise due care in the performance of their duties. Moral responsibility in our government may be lacking because governmental officials can avoid liability for their unethical conduct under the outdated, illogical, and legally indefensible doctrine of sovereign immunity.

A consideration of ethics in government necessitates a critique of the bundle of concepts that are inherent in the branch of philosophy called ethics. Two of these concepts are the notions of morality and justice. Morality is the concept that assesses right and wrong. We often define justice in simple terms of giving each person “his or her due.” Both concepts, morality and justice, are integrated into ethical precepts.

Normative ethics is the attempt to arrive at moral standards that inform us on how to judge right from wrong. The normative “virtue” ethicist enunciates the “virtues” one should acquire. The normative “utilitarian” ethicists look to the “greatest good for the greatest number.”<sup>5</sup> The virtue approach considers actions that demonstrate human behavior at its best. The rights approach to ethical decision making focuses on the claims we make on each other.<sup>6</sup> In either context, whether we quantify our “rights” and the claims we can make on each other or the actions that demonstrate our behavior at its best, as we demand from society a deference to our rights, we also must consider our obligation to recognize and respect the rights of others. This requirement then brings responsibility and accountability into the sphere of ethical decision making.

Actions that demonstrate our behavior “at its best” include a recognition and respect for the rights of others. Accountability for one’s failure to respect the rights of others must be a part of ethical codes of behavior. To ensure accountability, there must be some form of penalty for wrongful conduct. The law then must come into play to provide for penalties in the form of damages awarded to those who are harmed by unethical governmental conduct. The problem

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<sup>5</sup> See discussion in “A Framework for Thinking Ethically. *Issues in Ethics* (Winter 1988). V1 N2. “Who Counts?” *Issues in Ethics* (Spring 1991). V4 N1. “Thinking Ethically: A Framework for Moral Decision Making.” *Issues in Ethics* (Winter 1996). V7 N1.

<sup>6</sup>Id.

with the judicially created and sanctioned doctrine of sovereign immunity is that it can eliminate the need for responsibility and accountability for governmental conduct as it prevents wronged citizens from seeking redress in the form of damages for harm inflicted by unethical governmental officials.<sup>7</sup>

As philosophers have maintained, justice is part of the central core of morality.<sup>8</sup> Aristotle, a “virtues” ethicist, postulated that the “most fundamental principle of justice is the principle that “equals should be treated equally and unequals unequally.”<sup>9</sup> On the other hand, utilitarian philosophers, such as John Stuart Mill, recognized that justice is derived from the more basic standard of rightness.<sup>10</sup> In a democratic society, this equates to individuals being treated the same. There should be no “unequals.” The concept of justice pertains to the ordering of individuals within a society. It has been called “the first virtue of social institutions.”<sup>11</sup>

Institutions, particularly governments, must provide for justice. Their legitimacy and justification should be founded on their ability to administer justice to their citizens. The ethicist John Rawls<sup>12</sup> pointed out that the stability of a society depends upon the extent to which members of that society feel they are being treated justly. When members of society feel they are subject to unequal treatment, the foundations are laid for social unrest, disturbances, and strife.”<sup>13</sup> Rawls postulated that social unity depends on just institutions. Unfortunately both our laws and our institutions, to include our government, do not always treat persons equally. Further, when governmental officials cannot be held accountable for their wrongful behavior because they cannot be sued, governmental decision making may be devoid of ethics.

Normative ethical principles have been applied to politics, to the professions, to businesses, to the health care industry, to the field of criminal justice, and should be applied to

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<sup>7</sup>In *College Savings Bank*, cited in note 3, 527 U.S. at 685, Justice Scalia stated: “in the sovereign-immunity context..’evenhandedness’ between individuals and States is not to be expected.” Justice Scalia quoted previous Supreme Court decisions [*Welch v. Texas Dept. Of Highways and Public Transp.*, 483 U.S. 468, 477 (1987) and *Atascadero State Hospital v. Scanlon*, 473 U.S. 234 (1985)] to conclude that the “constitutional role of the States sets them apart from other employer and defendants.” *Id.* at 685-6.

<sup>8</sup>Velasquez, Manuel; Andre, Claire; Shanks, Thomas; and Meyer, Michael (Spring 1990). *Issues in Ethics* V3 N2.

<sup>9</sup>*Id.*

<sup>10</sup>*Id.*

<sup>11</sup>Rawls, John (1999). *A Theory of Justice*, Oxford: Oxford University Press. 3.

<sup>12</sup>*Id.*

<sup>13</sup>*Id.*

governments. The recent awareness that corporate America was not policing itself<sup>14</sup> led Congress to enact the Sarbanes- Oxley Act<sup>15</sup> wherein Congress attempted to use the law to mandate ethical conduct for corporate management. Applied ethics in the professions, in business, and in government define social expectations of honest dealings and disclosure. Ethical principles, often referred to as moral values, often are applied in codes of behavior. These moral codes, which are based on value systems, evolve into forms of legal codes, which provide for penalties for immoral behavior. The professions have ethical codes that define the common responsibility of members of the professions to the public. The Sarbanes-Oxley Act incorporated into law a requirement that corporate managers adopt a Code of Ethics to address conflict of interest transactions.<sup>16</sup> Unfortunately governmental officials generally are not subjected to ethical codes of behavior. Further, when they violate clearly defined legal principles, they often cannot be held responsible because they have “immunity” from liability.

Integrating ethics into a system of laws requires that governments enact just laws. The concept of justice embodies the concept that all are treated equally, that laws apply equally to everyone. Indeed “equal justice under the law” is a most crucial principle in a democratic society. Equal justice under the law equates to “equal access to the law” and, of necessity, is linked to the right of each citizen to have her “day in court.” When one citizen imposes on the rights of another, an ethical system of justice permits the wronged citizen to have his “day in court” to persuade a court of law to penalize the wrongdoer for his irresponsible and unethical actions. However, the citizen who has been wronged by the government generally finds he cannot seek recourse in American courts because the doctrine of sovereign immunity now is embedded in American jurisprudence. Unfortunately, this archaic rule inherited from the days of absolute monarchy is an anachronism that has produced great injustice in the U.S. courts for it denies citizens their “day in court” when the wrongdoer is the sovereignty.

We must consider the relationship of ethics to the law so that we can analyze ethical, or self imposed limitations on behavior, to legal, or extraneously imposed restraints, on governmental conduct. Natural law, which is associated with morality, dictates that unjust laws

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<sup>14</sup>The Enron scandal in which investors lost several billions in investment dollars and corporate employees lost jobs and retirement accounts is an example.

<sup>15</sup>15 U.S.C. §§7201-66.

<sup>16</sup>Id. at § 7246.

are not true laws. According to the natural law theorists, law should have an internal morality.<sup>17</sup> On the other hand, legal positivism, which means that the law is “posited” or fixed, would view laws as seeking to enforce justice and morality but would deem laws as being valid regardless of whether or not they are successful in doing so. The legal positivists consider laws as a set of rules that provide order and governance of society.<sup>18</sup>

Justice Souter, in a recent dissenting opinion in the 1999 *Alden v. Maine* decision,<sup>19</sup> contended that the majority of the Justices of the Supreme Court must attribute the sovereign immunity doctrine to natural law because the majority of the Court referred to the government’s immunity from suit as an “inherent right.”<sup>20</sup> Souter concluded, however, that “natural law thinking on the part of a doubtful few” does not support the Court’s position on sovereign immunity.<sup>21</sup> Justice Kennedy, in delivering the opinion of the majority in *Alden*, refused to attribute his support of governmental sovereignty to what the dissenters termed the majority’s “natural law thinking,” calling the dissenters’ reference to natural law phraseology as an “apparent attempt to disparage a conclusion” with which Justice Souter and the other dissenting justices disagreed.<sup>22</sup> Whether the doctrine of sovereign immunity is a common law concept or has its origins in natural law theory, it evolved from the long discredited concept that “the king can do no wrong.” In either context, modern legal philosophy should reject the doctrine.

A dissenting Michigan justice declared in a 1961 case that the only argument supporting the doctrine of governmental immunity was an argument that “age has lent weight to the unjust whim of long-dead Kings.”<sup>23</sup> This justice postulated:<sup>24</sup>

It is hard to say why the courts of America have adhered to this relic of absolutism so long a time after America overthrew monarchy itself!

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<sup>17</sup>Interestingly Justice Breyer, in a dissenting opinion in *College Savings Bank*, cited in note 3, 527 U.S. at 701, concluded that the majority of the Court in *Alden v. Maine*, cited in note 2, 527 U.S. at 762-4, treated sovereign immunity as a principle of natural law.

<sup>18</sup>See discussion in Joseph Raz (1979). *The Authority of Law*. Oxford: Oxford University Press. 37-52, 103-122.

<sup>19</sup>Justice Souter’s dissenting opinion in *Alden v. Maine*, cited in note 2, 527 U.S. at 760-1, with whom Justice Stevens, Justice Ginsburg, and Justice Breyer joined.

<sup>20</sup>Id.

<sup>21</sup>Id. Souter noted that the “common law conception of sovereign immunity differed from the natural law version,” which, according to Souter “understood immunity as derived from the fact that the sovereign was the font of the law, which could not bind him.” The common law conception was “not couched in terms of who was the font of the law.” Id.

<sup>22</sup>Id.

<sup>23</sup>Justice Edwards, dissenting opinion in *Williams v. City of Detroit*, 111 N.W.2d 1, 24 (Mich. 1961).

The fact that one of the basic principles of American jurisprudence evolved from the theory of absolute sovereignty is strange indeed. The Declaration of Independence recorded the many wrongs of the King. Clearly the colonists rejected the fiction that the king could do no wrong when they declared their independence from the Crown.<sup>25</sup> For the founding fathers to institute almost immediately after obtaining independence a principle of law that the government is above the law questions the basic concepts on which a democratic government was formed in the United States. Indeed justices of the Supreme Court recently acknowledged that while “the American people had rejected other aspects of English political theory, the doctrine that a sovereign could not be sued without its consent was universal in the states when the Constitution was drafted and ratified.”<sup>26</sup> A most interesting quirk of legal history is that while the United Kingdom retains a vestigial monarchy, English courts have permitted actions against the government since the early 1900s<sup>27</sup> while U.S. courts continue to rule that the sovereign immunity principle prevents suits against the government without its consent.

Some legal theorists have agreed that the courts’ original reliance on the notion that a divinely ordained monarch “can do no wrong” has been “thoroughly discredited.”<sup>28</sup> Further, one Supreme Court Justice conceded in a recent lawsuit,<sup>29</sup> that “its persistent threat to the impartial administration of justice has been repeatedly acknowledged and recognized.”<sup>30</sup> Despite its ancient lineage, the doctrine of sovereign immunity is solely a judge-made rule that “rests on considerations of policy given legal sanctions” by the Supreme Court.<sup>31</sup> Further, while scholars and some courts have recognized the lack of justification for, and the inequities caused by, this

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<sup>24</sup>Id.

<sup>25</sup>Discussion in *Nevada v. Hall*, 440 U.S. 410, 415 (1979). In *Langford v. United States*, 101 U.S. 341, 343 (1880), members of the Supreme Court stated: “We do not understand that...the English maxim (that the king can do no wrong) has an existence in this country.” Further discussion in *Williams v. City of Detroit*, cited in note 23, 111 N.W. 2d at 24.

<sup>26</sup>Discussion in *Alden v. Maine*, cited in note 2, 527 U.S. at 716.

<sup>27</sup>See e.g., *Shrimpton v. Hertfordshire County Council*, 104 Law Times Rep. 145, 2 N.C.C.A. 238 (1911); *Ching v. Surrey County Council*, 1 K.B. 736, 2 N.C.C.A. 229 (1910); and *Smith v. Martin and the Corporation of Kingston-Upon-Hull*, 2 K.B. 775, 2 N.C.C.A. 215 (1911).

<sup>28</sup>Justice Stevens, in *United States v. Nordic Village*, 503 U.S.30, 42 (1992).

<sup>29</sup>*Nordic Village*, cited in note 28, 503 U.S. at 43.

<sup>30</sup>Id.

<sup>31</sup>Justice Frankfurter in *National City Bank of New York v. Republic of China*, 348 U.S. 356, 358 (1955). Justice Frankfurter stated that the doctrine “has become solely through adjudications of this Court.” Id. See also *Nordic Village*, cited in note 28, 503 U.S. at 42.

judicially created doctrine, the doctrine has become a principle of American jurisprudence and is strictly adhered to by U.S. courts that have become the “self-constituted” guardians of the Treasury.<sup>32</sup>

Although the concept of governmental immunity was adopted initially by the first U.S. courts, some judges did disapprove of the doctrine of sovereign immunity early in its employment. In 1882, one Justice of the Supreme Court concluded that the doctrine clearly had no justification in our system of jurisprudence. In pointing out that the principle of sovereign immunity “is derived from the laws and practices of our English ancestors,”<sup>33</sup> this Justice traced the doctrine that the king of England was “not suable in the courts of that country” from the time of Edward the First.<sup>34</sup> In questioning whether the king was suable “in his kingly character as other persons” prior to the establishment of the petition of right, a king apparently was never suable of common right.<sup>35</sup> However, during the reign of Edward the First, one could sue the king in his own courts if the king gave consent in a “petition of right.” Apparently the purpose of the petition of right, as it was used in England, was to secure rights of suitors against the crown in the same manner as did legal controversies between subjects of the king among themselves. However, after the “petition of right” was instituted, one could sue the king in any court only as permitted in the petition.<sup>36</sup>

The English remedy of petition of right was never introduced into the United States. As one Justice of the Supreme Court recognized in 1882,<sup>37</sup> there is in the United States “no such thing as the petition of right” just as there is “no such thing as a kingly head to the nation, or to any of the States which compose it.” The Justice then questioned the reasons that would forbid one to sue the king in the king’s own court and how those reasons apply to the “political body corporate which we call the United States of America.”<sup>38</sup> As the Justice noted, a reason given by

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<sup>32</sup>Discussion in *Indian Towing Co. v. United States*, 350 U.S. 61, 69 (1955). In *Alden v. Maine*, cited in note 2, 527 U.S. at 750, the Court stated that a “general federal power to authorize private suits for money damages would place unwarranted strain on the State’s ability to govern in accordance with the will of their citizens.” The Court decided that while a judgment creditor of a state could have a legitimate claim for compensation, “other important needs and worthwhile ends compete for access to the public fisc.” *Id.* According to the Court, because “all cannot be satisfied in full,” difficult decisions must be made. *Id.* Those decisions obviously must relegate debts owed private citizens to the bottom of the heap.

<sup>33</sup> Justice Miller in *United States v. Lee*, cited in note 2, 106 U.S. at 205.

<sup>34</sup>*Id.* at 205.

<sup>35</sup>*Id.*

<sup>36</sup>*Id.*

<sup>37</sup>*Id.* at 205-6.

<sup>38</sup>*Id.* at 206.



the old judges, that being the absurdity of the king's sending a writ to himself to command the King to appear in the King's court, does not exist in our government.<sup>39</sup> In the United States process runs in the name of the president and may be served on the attorney general. Further, as the Justice noted, the "dignity of the government" is not degraded by its appearing as a defendant in the courts of its own creation because "it is constantly appearing as a party in such courts and submitting its rights as against the citizens to their judgment."<sup>40</sup>

The doctrine of sovereign immunity as it originated in England assumes that it is "inconsistent with the very idea of supreme executive power, and would endanger the performance of the public duties of the sovereign, to subject the king to repeated suits as a matter of right, at the will of any citizen, and to submit to the judicial tribunals the control and disposition of his public property."<sup>41</sup> However, there is no person in the United States who performs the public duties of a sovereign; thus, it is difficult to determine what solid foundation of principle that exemption from liability to suit rests.<sup>42</sup> Further, there is a vast difference in the essential character of the government of England in the days of the Stuarts and that of the United States as regards the source and the depositaries of power.<sup>43</sup> Although the crown was stripped of its power since the days of the Stuarts, the monarchy undoubtedly is looked upon with sufficient reverence so that it should not be subjected to the demands of the law as are ordinary persons.<sup>44</sup> However, in the United States the people, who in England are called subjects, are the sovereign.<sup>45</sup> Their rights should not give way to a loyalty to the government. No citizen should be expected to yield rights secured by law to her when laws are rightfully administered to the federal or the state governments. Officials of the government, from the highest to the lowest, are creatures of the law and should be bound to obey it. Courts of justice should be established not only to decide upon the rights of citizens as against each other but also as against the government.

The old form of bringing a claim against the English monarchy by petition of right was

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<sup>39</sup>Id.

<sup>40</sup>Id.

<sup>41</sup>Id.

<sup>42</sup>Id.

<sup>43</sup>Id. at 208.

<sup>44</sup>Id.

<sup>45</sup>Id.

tedious and expensive and, thus, fell into disuse.<sup>46</sup> However, royal consent later was granted as a matter of course.<sup>47</sup> The Secretary of State for the home department would bring a petition before the monarch for the monarch's consideration. Still, if the monarch refused to grant his fiat, the claimant was without a remedy.<sup>48</sup> However, in 1947, the United Kingdom granted suits against the government in tort and contract by the Crown Proceedings Act of 1947. This Act permits claims against the government if the claims can be brought against any other defendant. Civil proceedings against the Crown must be instituted against the appropriate authorized governmental department or, if none is appropriate or there is doubt as to whether any is appropriate, against the Attorney General.<sup>49</sup> All documents required to be served on the Crown must be served on the solicitor for the appropriate department or if there is no such solicitor upon the Solicitor of the monarch's treasury.<sup>50</sup>

Ironically, while the doctrine of sovereign immunity for the most part has been repudiated in England, it continues as a "fabric of our law."<sup>51</sup> While courts in the United States rationalize that the public would be harmed, public service would be hindered, and public safety endangered if the government was subjected to suit at the instance of every citizen,<sup>52</sup> the doctrine of sovereign immunity cannot be justified if society is to hold governmental officials accountable for their unethical behavior.

Because in a constitutional monarchy the sovereign is the historical origin of the authority that creates the courts, the argument follows that the courts have no power to compel the sovereign to be bound by the courts it created. In the United States courts were created by Article III of the U.S. Constitution.<sup>53</sup> Article III of the Constitution extends federal judicial power to controversies "between a State and Citizens of another State." Relying on this language, the U.S. Supreme Court in 1793 assumed original jurisdiction over a suit brought by a

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<sup>46</sup>Id.

<sup>47</sup>*Eastern Archipelago Co. v. Queen*, 2 El & Bl. 856, 914.

<sup>48</sup>*Tobin v. Queen*, 14 C.B. (N.S.) 505, 521.

<sup>49</sup>Section 17(3) and section 18 of the Crown Proceedings Act of 1947.

<sup>50</sup>Id. In Scotland civil proceedings against the Crown are directed against the Advocate General for Scotland.

<sup>51</sup>Justice Frankfurter in *National City Bank of New York v. Republic of China*, cited in note 31, 348 U.S. at 358.

<sup>52</sup>*United States v. Lee*, cited in note 2, 106 U.S. at 247

<sup>53</sup>Article III courts are law courts, equity courts, and admiralty courts all of which are specifically named in Article III. They sit to determine "cases" or "controversies."

citizen of South Carolina against the State of Georgia.<sup>54</sup> The decision created great concern as to the reach of federal judicial power and led immediately to the proposal and enactment of the Eleventh Amendment.<sup>55</sup> The Eleventh Amendment 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 by Citizens of another State, or by Citizens or Subjects of any Foreign State.

Courts now contend the principle of sovereign immunity was incorporated into the Constitution through the Eleventh Amendment but as a constitutional limitation on the federal judicial power established in Article III of the Constitution.<sup>56</sup>

In an 1890 decision, *Hans v. Louisiana*,<sup>57</sup> the Supreme Court ruled that, despite the limited terms of the Eleventh Amendment, a federal court also cannot entertain a suit brought by a citizen against his own State. After reviewing the constitutional debates concerning the scope of Article III, the Court decided that the framers of the Constitution did not contemplate federal jurisdiction over suits against nonconsenting States when they established through the Constitution the judicial power of the United States.<sup>58</sup> Since that decision, the Supreme Court has ruled consistently that a State may not be sued without its consent.<sup>59</sup> As the Supreme Court has stated,<sup>60</sup> its “repeated decisions” have established as “a fundamental rule of jurisprudence” the principle that a State cannot be sued without its consent. The Supreme Court also has ruled that “neither substantive federal law nor attempted congressional abrogation under Article I bars a State from raising a constitutional defense of sovereign immunity in federal court.”<sup>61</sup> Further, according to the Supreme Court, the states “retain an analogous constitutional immunity from

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<sup>54</sup>*Chisholm v. Georgia*, 2 Dall. 419, 1 L.Ed. 440 (1793).

<sup>55</sup>Discussion in *Monaco v. Mississippi*, 292 U.S. 313, 325 (1934).

<sup>56</sup>Discussion in *Pennhurst State School & Hospital v. Halderman*, 465 U.S. 89 (1984).

<sup>57</sup>134 U.S.1 (1890).

<sup>58</sup>*Id.* at 15.

<sup>59</sup>In *Alden v. Maine*, cited in note 2, 527 U.S. at 716-7, the Supreme Court noted that the principle of sovereign immunity was applicable to state governments as early as the ratification of the Constitution. The court referred to Alexander Hamilton’s assurance to the states in Federalist No. 81 when he stated: “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; and the exemption, as one of the attributes of sovereignty, is now enjoyed by the government of every state in the Union.” *Id.* The Court noted James Madison’s statement at the Virginia ratifying convention: “It is not in the power of individuals to call any state into court.” *Id.*

<sup>60</sup>*Pennhurst State School & Hospital*, cited in note 56, 465 U.S. at 98.

<sup>61</sup>*Alden v. Maine*, cited in note 2, 527 U.S. 748.

private suits in their own courts.”<sup>62</sup> Thus, the Supreme Court has taken the position that the Eleventh Amendment has incorporated into the U.S. Constitution what it titles the common law doctrine of sovereign immunity. It has stated that while “the Constitution grants broad powers to Congress, our federalism requires that Congress treat the States in a manner consistent with their status as residuary sovereigns and joint participants in the governance of the Nation.”<sup>63</sup> The Court referred to the “founding generation thought” that the several states of the Unions should not be summoned to answer as defendants “the complaints of private persons.”<sup>64</sup>

The Supreme Court views the Eleventh Amendment as being consonant with principles of federalism.<sup>65</sup> It has stated that sovereign immunity is “a guarantee that is implied as an essential component of federalism” and is “sufficiently fundamental to our federal structure to have implicit constitutional dimension.”<sup>66</sup> As a result, the Supreme Court has insisted that any State must consent to suit against it in federal court and its consent must be “unequivocally expressed.”<sup>67</sup> The Supreme Court also has ruled that a State’s waiver of sovereign immunity in its own courts is not a waiver of the Eleventh Amendment immunity in the federal courts.<sup>68</sup> Further, the Court recently ruled that “in light of history, practice, precedent, and the structure of the Constitution,” the states “retain immunity from private suit in their own courts,” and this immunity is “beyond the congressional power to abrogate by Article I legislation.”<sup>69</sup>

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<sup>62</sup>Id.

<sup>63</sup>Id.

<sup>64</sup>Id.

<sup>65</sup>*Hutto v. Finney*, 437 U.S. 678, 691 (1978).

<sup>66</sup>See *Nevada v. Hall*, 440 U.S. 410, 418-419 (1979).

<sup>67</sup>*Edelman v. Jordan*, 415 U.S. 651, 673 (1974).

<sup>68</sup>*Florida Department of Health v. Florida Nursing Home Assn.*, 450 U.S.147, 150 (1981).

<sup>69</sup>*Alden v. Maine*, cited in note 2, 527 U.S. at 754.

U.S. Courts have not granted foreign governments immunity from suit in federal courts in like manner as it has provided immunity for the federal and state governments. In 1812 in *Schooner Exchange v. McFaddon*, 7 Cranch 116, 3 L.Ed. 287 (1812), then Chief Justice Marshall ruled that foreign sovereigns had no right to immunity in our courts. However, Chief Justice Marshall explained that, as a matter of comity, members of the international community had implicitly agreed to waive the exercise of jurisdiction over other sovereigns in certain classes of cases. As a result the U.S. Supreme Court had “consistently...deferred to the decisions of the political branches—in particular, those of the Executive Branch—on whether to take jurisdiction” over particular against foreign sovereigns. See *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 486 (1983). Until 1952 the Executive Branch followed a policy of requesting immunity in all actions against friendly sovereigns. However, in that year the State Department concluded that immunity should no longer be granted in certain types of cases. Foreign nations often placed diplomatic pressure on the State Department and political considerations led to the Department filing “suggestions of immunity” where immunity otherwise would not have been available. Responsibility fell to the courts to determine whether sovereign immunity existed. See discussion in *Austria v. Altmann*, 541 U.S. 677, 690 (2004).

In *National City Bank of New York v. Republic of China*, cited in note 31, Justice Frankfurter reasoned that

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For a time governmental immunity fell into disfavor in the United States. A “chilling feeling against sovereign immunity” was reflected in federal legislation as early as 1797 when Congress decided that when the United States sues an individual, the individual could offset any amount due him from the federal government.<sup>70</sup> However, this early trend to waive immunity of the federal government did not appear again until 1855 when Congress enacted the Court of Claims Act<sup>71</sup> to permit citizens to sue the United States for debts of the federal government. While there was no general provision determining claims against the United States for more than 60 years after adoption of the constitution, the 1855 act reflected Congressional decision that individuals and entities should be able to bring certain defined claims against the government in the courts. Congress established the Court of Claims in 1855 to permit this defined class of claim that could be brought against the government.

Approximately thirty years later, in 1887, Congress enacted the Tucker Act,<sup>72</sup> which waived immunity for suits arising out of express or implied contracts to which the government was a party. The Act extended the jurisdiction of the Court of Claims, now the United States Court of Federal Claims, to constitutional claims, particularly a governmental taking of the property for which the Fifth Amendment provides compensation, and claims founded on acts of

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the limitation of immunity for foreign governments was justified because, according to Justice Frankfurter: “Unlike the special position accorded our States as party defendant by the Eleventh Amendment, the privileged position of a foreign state is not an explicit command of our Constitution.” 348 U.S. at 358-9.

In 1976 Congress sought to remedy problems relating to immunity for foreign governments by enacting the Federal Sovereign Immunities Act. Pursuant to the Foreign Sovereign Immunities Act, 28 U.S.C. § 1601-11, Congress itself has provided foreign states with some immunity from suit in federal courts. However, Congress has excepted the following, among others, from immunity: (1) the foreign state has waived immunity either explicitly or by implication; (2) the action is based upon a commercial activity carried on in the United States by the foreign state; (3) in cases in which rights in property taken in violation of international law are in issue and that property, or property for which it was exchanged, is in the United States; (4) in cases in which are in issue rights in property in the United States acquired by gift or succession or rights in immovable property situated in the United States; and (5) where money damages are sought against a foreign state for personal injury or death or damage or loss of property caused by the tortious act or omission of that foreign state or one of its employees while acting with the scope of office or employment. *Id.* at § 1605.

In *College Savings Bank v. Florida Prepaid Postsecondary Education Expense Board*, cited in note 3, 527 U.S. at 686, a majority of Supreme Court Justices rejected Justice Breyer’s suggestion that the Court limit state sovereign immunity to noncommercial state activities like Congress had done with respect to foreign sovereign immunity. Justice Breyer referred to such a limitation as “the modern trend.” *Id.* However, a majority of the court decided that “state sovereign immunity, unlike foreign sovereign immunity, is a constitutional doctrine that is meant to be both immutable by congress and resistant to trends.” *Id.* The majority noted that text of the Eleventh Amendment made no distinction between commercial and noncommercial state activities.

<sup>70</sup>Discussion in *National City Bank of New York v. Republic of China*, cited in note 31, 348 U.S. at 359.

<sup>71</sup>28 U.S.C. § 171 *et. seq.*

<sup>72</sup>28 U.S.C. § 1491 *et seq.*

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Congress or regulations of executive departments.<sup>73</sup> Some courts have noted that there is no reason why the government should be treated differently from its citizens, particularly in its status as a creditor.<sup>74</sup> For a time, the course of court decisions in the United States reflected the conflicting considerations that apply to the doctrine for in “varying degrees, at different times, the momentum of the historic doctrine” was arrested or deflected “by an unexpressed feeling that governmental immunity runs counter to prevailing notions of reason and justice.”<sup>75</sup>

The immunity of the United States government as a territorial sovereign came under further attack, but not until another sixty years later, when the doctrine was increasingly “found to be in conflict with the growing subject of governmental action to the moral judgment.”<sup>76</sup> Over a half century ago, the U.S. Supreme Court observed that “prerogatives of the government must yield to the needs of the citizen” if governments seek “to ameliorate inequalities as necessities permit.”<sup>77</sup> Following a few limited statutes waiving immunity, the Federal Tort Claims Act<sup>78</sup> was enacted in 1945. This Act waives the federal government’s immunity from suit because of damage to or loss of property or on account of personal injury or death caused by the negligent or wrongful act of any governmental employee while acting within the scope of the employee’s office or employment, under circumstances where the United States would be liable to the claimant if it were a private person.<sup>79</sup> The Federal Torts Claims Act does not provide a waiver of immunity for assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights. The Federal Tort Claims Act was adopted by Congress; it did not result from court action.<sup>80</sup>

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<sup>73</sup>28 U.S.C. § 1491(a)(1). The Court of Claims is an Article I court. Article I courts are agencies of the legislative or executive branch. Because the jurisdiction of the Court of Claims is permissive only, Congress can prescribe its rules and the procedures to be followed in pursuing claims against the government. The judicial functions exercised by Article III courts, on the other hand, cannot be performed by Congress nor delegated to agencies under its supervision and control.

If a plaintiff seeks damages of \$10,000 or less, any federal district courts has jurisdiction along with the United States Court of Federal Claims. If damages sought exceed that amount, the Court of Federal Claims has exclusive jurisdiction.

<sup>74</sup>Discussion in *United States v. Whiting Pools, Inc.*, 462 U.S. 198, 209 (1983) and *United States v. Nordic Village, Inc.*, cited in note 28, 503 U.S. at 43-4.

<sup>75</sup>Justice Frankfurter in a dissenting opinion in *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 703 (1949).

<sup>76</sup>See discussion by Justice Frankfurter in *National City Bank of New York v. Republic of China*, cited in note 31, 348 U.S. at 359.

<sup>77</sup>*United States v. Shaw*, 309 U.S. 495, 501 (1940).

<sup>78</sup>28 U.S.C. § 1291, 1346(b), 1402(b), 1504, 2110, 2401(b), 2402, 2411-2, 2671-2680.

<sup>79</sup>Discussion in *United States v. Yellow Cab Co. v. United States*, 340 U.S. 543, 549 (1951).

<sup>80</sup>Discussion in *Williams v. City of Detroit*, cited in note 23, 111 N.W.2d at 9.

Courts have ruled that the legislative branch of the government alone is “clothed with authority to modify” or extend the doctrine of sovereign immunity.<sup>81</sup>

Although there is copious argument that sovereign immunity and Eleventh Amendment principles run counter to modern democratic notions of the moral responsibility of the State, more recent Supreme Court decisions have reflected current insistence that this “argument has not been adopted” by U.S. courts.<sup>82</sup> The majority of the Justices of the Supreme Court are of the opinion that “the necessity that a sovereign must be free from judicial compulsion in the carrying out of its policies within the limits of the Constitution” collides with the need to bring suits against a government and its officials.<sup>83</sup> The Supreme Court has stated that the “constitutional privilege of a State to assert its sovereign immunity in its own courts does not confer upon the State a concomitant right to disregard the Constitution or valid federal law.”<sup>84</sup> The Court decided that the “good faith of the States” provides “an important assurance” that the states will follow the Constitution and federal laws; it stated it was “unwilling to assume the states will refuse to honor the Constitution or obey the binding laws of the United States.”<sup>85</sup> While a majority of members of the Supreme Court may be assured that there always will be “good faith” on the part of the States, members of the public who are harmed by unethical governmental conduct from governmental officials obviously would question that “assurance.”

American courts have extended sovereign immunity to the sovereign’s officials; thus courts have expanded the doctrine to protect those who carry out the sovereign’s commands. A basic problem with this further expansion of the sovereign immunity doctrine is that granting governmental officials immunity has created “a privileged class free from liability from wrongs inflicted or injuries threatened.”<sup>86</sup>

In applying the sovereign immunity doctrine, English courts traditionally distinguished between the king and his agents based on the theory that the king would never authorize unlawful conduct and, thus, the unlawful acts of the king’s officers should not be treated as acts of the sovereign.<sup>87</sup> The king’s servants were liable for their unlawful acts since the 15<sup>th</sup>

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<sup>81</sup>Id.

<sup>82</sup>*Pennhurst State School*, cited in note 56, 465 U.S. at 116.

<sup>83</sup>Discussion in *Pennhurst*, 465 U.S. at 117.

<sup>84</sup>*Alden v. Maine*, cited in note 2, 527 U.S. at 754-5.

<sup>85</sup>Id.

<sup>86</sup>See discussion in Justice Stevens’s dissenting opinion in *Pennhurst*, cited in note 56, 465 U.S. at 133.

<sup>87</sup>See 1 W. Blackstone (J. Andrews ed. 1909). Commentaries on the Laws of England.

Century.<sup>88</sup> Apparently the rule of law, that the king's officers could do wrong and could be legally liable, was used to curb the king's authority.<sup>89</sup> As one English court stated, although process would not issue against the sovereign himself, it could issue against his officers.<sup>90</sup> By the 18<sup>th</sup> century, this rule of law was not questioned and it was so well-settled in the 19<sup>th</sup> century that citation of authority was not needed.<sup>91</sup>

Courts should acknowledge a distinction between a suit against the government and a suit against its officials. Indeed, in 1883, the Supreme Court ruled that sovereign immunity is not a defense against a suit charging U.S. officials with unconstitutional conduct.<sup>92</sup> Later, however, the Supreme Court ruled that when a suit is brought only against a state official, if the State is the "real, substantial party in interest," sovereign immunity applies.<sup>93</sup> Further, the Supreme Court later ruled that a suit against state officials that is in fact a suit against a State is barred regardless of whether it seeks damages or injunctive relief.<sup>94</sup>

U.S. courts have ruled consistently that only Congress can waive the United States' right to assert the doctrine of sovereign immunity and that a statute's text must contain an "unequivocally clear statement of a waiver of sovereign immunity."<sup>95</sup> Further, as the U.S. Supreme Court recently acknowledged, courts construe any waiver of governmental sovereign immunity strictly in favor of the sovereign.<sup>96</sup> It stated that a court will "construe ambiguities in favor of immunity."<sup>97</sup> While Congress and state legislatures have taken action to ameliorate the hardship of the doctrine, the Supreme Court's current and continued "stubborn insistence on 'clear statements' burdens the Congress" and state legislatures "with unnecessary reenactment of provisions that were already plain enough when read literally."<sup>98</sup>

The Supreme Court originally ruled that Congress can abrogate state immunity under its Article I powers. However, the Court later ruled that Congress lacks power under Article I to

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<sup>88</sup>Id. See discussion in *Pennhurst*, cited in note 56, 465 U.S. at 142.

<sup>89</sup>Id.

<sup>90</sup>*Sands v. Child*, 83 Eng. Rep. 725, 726 (K.B. 1693).

<sup>91</sup>See *Feather v. The Queen*, 122 Eng. Rep. 1191, 1205-1206 (K.B. 1865).

<sup>92</sup>*United States v. Lee*, cited in note 2, 106 U.S. at 219-222.

<sup>93</sup>*Ford Motor Co. v. Department of Treasury*, 323 U.S. 459, 464 (1945). Discussion in *Pennhurst*, cited in note 56, 465 U.S. at 103.

<sup>94</sup>*Cory v. White*, 457 U.S. 85, 91 (1982).

<sup>95</sup>*Lane v. Pena*, 518 U.S. 187, 192 (1996).

<sup>96</sup>Id.

<sup>97</sup>Id.

<sup>98</sup>Justice Stevens in a dissenting opinion in *United States v. Nordic Village, Inc.*, cited in note 28, 503 U.S. at 45.



abrogate state immunity under the Eleventh Amendment.<sup>99</sup> The Supreme Court has ruled that Congress must make its intent to abrogate state immunity “unmistakably clear in the language of the statute.”<sup>100</sup> Further, the Supreme Court also has ruled that a state does not consent to suit in federal court “merely by consenting to suit in the courts of its own creation.”<sup>101</sup> According to a plurality of the Court, Congress must refer specifically to state sovereign immunity and the Eleventh Amendment to make its intention clear.<sup>102</sup> Justice Stevens has criticized this position of the Court by voicing his opinion that “judge-made rules” which “require Congress to use its valuable time enacting and reenacting provisions whose original intent was clear to all but the most skeptical and hostile reader” must “be discarded.”<sup>103</sup>

The Eleventh Amendment does not bar Congress from authorizing suits in state courts to implement federal statutory rights. For example, suits under 42 U.S.C. § 1983 may be brought in state courts.<sup>104</sup> Section 1983 provides that anyone who, under color of state statute, regulation, or custom, deprives another of any rights, privileges or immunities “secured by the Constitution and laws” shall be liable to the injured party. State immunities are not applicable in these suits.<sup>105</sup> Further, state courts presumably must hear § 1983 claims.<sup>106</sup> The Supreme Court has ruled that Congress can abrogate immunity under the Eleventh Amendment from suits by

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<sup>99</sup>*Seminole Tribe of Florida v. Florida*, cited in note 3. In *Alden v. Maine*, cited in note 2, 527 U.S. at 713 (1999), the Court ruled that the sovereign immunity doctrine reelected in the Eleventh Amendment bars suits against state in state courts as well as federal courts. Both *Seminole Tribe* and *Alden* were 5-4 decisions. Chief Justice Rehnquist wrote the majority opinion in *Seminole Tribe*, joined by Justices O’Connor, Scalia, Kennedy, and Thomas. Justice Kennedy wrote the majority opinion in *Alden*, joined by Chief Justice Rehnquist and Justices O’Connor, Scalia, and Thomas. The dissenting justices were Souter, Stevens, Ginsburg, and Breyer.

<sup>100</sup>*Atascadero State Hospital v. Scanlon*, cited in note 7, 473 U.S. at 242. In *Great Northern Life Ins. Co. v. Read*, 322 U.S. 47, 54 (1944), the Supreme Court ruled that it will find a waiver of immunity “if the State makes a ‘clear declaration’ that it intends to submit itself to our jurisdiction.” *Id.*

<sup>101</sup>*Smith v. Reeves*, 178 U.S. 435 (1900). This position was reaffirmed, based on the doctrine of *stare decisis*, in *College Savings Bank v. Florida Prepaid Postsecondary Education Expense Board*, cited in note 3, 527 U.S. at 676. The Court stated in *College Savings Bank*, 527 U.S. at 676, that a state does not consent to suit in federal court merely by stating its intention to “sue and be sued.”

<sup>102</sup>See *Dellmuth v. Muth*, 491 U.S. 223, 231 (1989).

<sup>103</sup>Dissenting opinion in *Lane v. Pena*, cited in note 95, 518 U.S. at 212.

<sup>104</sup>See *Maine v. Thiboutot*, 448 U.S. 1 (1980).

<sup>105</sup>In *Martinez v. California*, 444 U.S. 277, 284 (1980), the Court ruled that conduct by persons acting under color of state law which is wrongful under 42 U.S.C. § 1983 cannot be immunized by state law. The Court decided that a construction of a federal statute that permitted a state immunity defense to have controlling effect “would transmute a basic guarantee into an illusory promise.” *Id.*

<sup>106</sup>*Id.* The Court stated in *Martinez* that while it had never considered the question of whether a State *must* entertain a claim under § 1983, where the same type of claim, if arising under state law, would be enforced in the state courts, the state courts generally are not free to refuse enforcement of the federal claim.

recipients of federal financial assistance,<sup>107</sup> and, as a result, Congress has enacted provisions abrogating Eleventh Amendment immunity in these instances.<sup>108</sup> Still, in a suit in state court, the Eleventh Amendment is not in issue.

The Supreme Court has ruled that a suit challenging the constitutionality of a state official's action is not one against the state.<sup>109</sup> Further, if a state official acts contrary to laws of the state, the official would not have immunity because the sovereign could not and would not authorize its officer to violate its own laws.<sup>110</sup> Thus, a suit against a state official that seeks redress for conduct not permitted by state law is a suit against the officer, not the sovereign. Similarly, when a state official violates a state statute, the sovereign has not erected by definition a shield against liability.<sup>111</sup> Still immunity of state officials is qualified and depends upon the responsibilities of the office and the scope of the official's discretion. Most suits against officials are brought under 42 U.S.C. § 1983.

The Supreme Court has recognized an important exception to the general rule that a suit against a governmental official is barred because it is a suit against the state. If an official's action violates the Fourteenth Amendment, § 5 of the Fourteenth Amendment would permit an action against the official. The Fourteenth Amendment was adopted long after the Eleventh Amendment; thus, its alteration of the balance between the states and the federal government remains viable.<sup>112</sup>

Justice Stevens earlier stated in a dissenting opinion that “changes in our social fabric favor limitation rather than expansion of sovereign immunity.”<sup>113</sup> Justice Stevens thought that the concept of sovereign immunity and that “citizens should be remediless in the face of its abuses” was more “a relic of medieval thought than anything else.”<sup>114</sup> Justice Stevens remarked:

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<sup>107</sup>See *Atascadero State Hospital v. Scanlon*, cited in note 7, 473 U.S. at 246, *Dellmuth v. Muth*, cited in note 102, and *Kimel v. Florida Board of Regents*, 120 S.Ct. 631, 640-42 (2000).

<sup>108</sup>42 U.S.C. § 2000d-7 and 20 U.S.C. § 1403. In 17 U.S.C. § 511 Congress made the states and state officials liable in damages for copyright violations.

<sup>109</sup>*Ex parte Young*, 209 U.S. 123 (1908). The Court theorized that an unconstitutional enactment is void and does not impart immunity to a state official. Because the state cannot authorize the action, the officer is “stripped of his official or representative character” and is “subjected to the consequences of his official conduct.” *Id.* at 160.

<sup>110</sup>*Id.*

<sup>111</sup>Discussion in Justice Stevens' dissenting opinion in *Pennhurst*, cited in note 56, 465 U.S. at 159.

<sup>112</sup>See discussion in *Seminole Tribe of Florida*, cited in note 3.

<sup>113</sup>*Pennhurst*, cited in note 56, 465 U.S. at 166.

<sup>114</sup>*Id.*

Whether this immunity is an absolute survival of the monarchical privilege, or is a manifestation merely of power, or rests on abstract logical grounds, it undoubtedly runs counter to modern democratic notions of the moral responsibility of the State.<sup>115</sup>

Justice Stevens referred to Maitland's statement fifty years earlier that "it is a wholesome sight to see 'the Crown' sued and answering for its torts."<sup>116</sup>

We must question how decisions of an "error-guilty judicial branch," rendered in the "dim yesterday" and maintained to this day by the "self-stultifying fetish of *stare decisis*"<sup>117</sup> can be corrected when, according to some judicial minds, "the legislative process remains comatose, year after year, and decade after decade."<sup>118</sup> Perhaps as one justice declared, our legislative bodies have "every right to say" to the courts— you, the "courts created this problem. The courts can solve it."<sup>119</sup> Courts that continue to adhere to the doctrine of sovereign immunity, based on no valid justification other than *stare decisis*, should consider that *stare decisis* does not prevent courts from correcting their own errors or from establishing new rules of law when new and modern circumstances "have rendered an old rule unworkable and unjust."<sup>120</sup> It should be a duty of the courts to bring the law into accordance with present day standards of common sense justice. The doctrine of sovereign immunity currently is justified by the thought of many judges that litigation should not halt or slow down official activities essential to governance of our nation. While some attempt to justify the doctrine on a necessity of permitting government to perform its functions unhindered by judicial intervention, there is considerable doubt that this line of justification outweighs the persistent threat to the impartial administration of justice which the doctrine evokes. While English courts have recognized that the doctrine cannot be justified, the pendulum in the United states has swung in favor of enforcing sovereign immunity no matter how unfair the position may be to those who are harmed by unethical governmental conduct and despite the negative impact it has on the growing need and trend to enforce ethical

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<sup>115</sup>Id.

<sup>116</sup>See *Great Northern Life Ins. Co. v. Read*, 322 U.S. 47, 59 (1944).

<sup>117</sup>Justice Edwards in a concurring opinion in *Williams v. City of Detroit*, cited in note 23, 111 N.W.2d at 17.

<sup>118</sup>Id. at 21. Justice Edwards noted that the Supreme Courts in Florida, Illinois, and California have "squarely rejected the doctrine of governmental immunity." Id.

<sup>119</sup>Id.

standards on governmental action.

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<sup>120</sup>Id. at 23.