

## AGAINST SOVEREIGNTY: A CAUTIONARY NOTE ON THE NORMATIVE POWER OF THE ACTUAL

*Patrick McKinley Brennan\**

When all is said and done . . . it is the will symbolism in one or other of its orthodox sovereignty versions which still requires our most vigilant housekeeping attention. This is the reason for concentrating on the concrete organ and the abstract state as candidates for that mythical political god-head in which power becomes *de jure* without benefit of law.

Kenneth Cole<sup>1</sup>

The lack of God in the modern age was compensated for by abstract notions like sovereignty that were expected to sustain autonomous human activities.

Hideaki Shinoda<sup>2</sup>

---

© 2006 Patrick McKinley Brennan. Individuals and nonprofit institutions may reproduce and distribute copies of this Article in any format, at or below cost, for educational purposes, so long as each copy identifies the author, provides a citation to the *Notre Dame Law Review*, and includes this provision and copyright notice.

\* John F. Scarpa Chair in Catholic Legal Studies and Professor of Law, Villanova University School of Law. B.A., Yale College (1988), M.A., University of Toronto (1989), J.D., U.C. Berkeley, Boalt Hall (1993); clerk to the Honorable John T. Noonan, Jr., U.S. Court of Appeals for the Ninth Circuit (1993–94).

This Article grew out of the Brendan F. Brown Lecture that I was honored to deliver at the Columbus School of Law, The Catholic University of America. For honoring me with the invitation to deliver the lecture and for his abounding hospitality during my visits to the Columbus School of Law, I am most grateful to Dean William Fox. My thanks run also to Steve Smith, Rick Garnett, James Weinstein, and Jack Coons for their incisive comments on earlier drafts of this Article. I gratefully acknowledge the research assistance of Roman Galas, Edward Heffernan, Erin Galbally, John Wagner, and Christine Green. The phrase “the normative power of the actual” has been employed by many; I first heard it from Paul Mishkin.

<sup>1</sup> Kenneth C. Cole, *The Theory of the State as a Sovereign Juristic Person*, 42 AM. POL. SCI. REV. 16, 31 (1948).

<sup>2</sup> HIDEAKI SHINODA, RE-EXAMINING SOVEREIGNTY 11 (2000).

## I. AN ONTOLOGICALLY BAROQUE BACKYARD

At a given historical moment, the future is open in particular ways—some wide, others narrower. Once a course of action is taken, previously available options are foreclosed and certain other paths become *privileged*. Michael Mann has referred to these as “caging” moments,<sup>3</sup> and, as Christopher Pierson observes: “The large-scale history of states is largely the story of this recurrent process of choices made and options delimited—a process of caging that finds us bound by the parameters of the modern state.”<sup>4</sup> Pierson is doubtless right. For good or ill, the modern state is pretty much what it is for the foreseeable future. Still, every particular state remains a work in progress, and our own, the United States, is no exception, and today we face an important caging moment.

It concerns the “sovereignty” of our fifty states individually *and* of the United States as a whole; more specifically, it concerns whether these sovereignties should continue to increase, as they did by a series of 5-4 decisions of the Rehnquist Court, whether they should be cabined, or whether they should be scrapped. Starting in the 1996 decision in *Seminole Tribe v. Florida*<sup>5</sup> and continuing until its end, the Rehnquist Court aggressively expanded the strand of Supreme Court jurisprudence that predicated sovereignty of each of the fifty states and of the United States as a whole. It is a widely discussed achievement of the Rehnquist Court that it did what it could to increase the sovereignty of the states.<sup>6</sup>

This way of talking seems to assume that sovereignty is an empirical reality, with the organic capacity for increase and decrease, and perhaps a need for help or hindrance.<sup>7</sup> But what, one might reasonably ask, could it possibly mean for sovereignty—as opposed to, say, brute power or even authority—to be a fact about the world? And a fact to be encouraged, or discouraged? The Supreme Court reports that the states “enjoyed” sovereignty before the ratification of the Constitution, and “retain” it “today . . . except as altered by the plan of the Convention or certain

---

3 1 MICHAEL MANN, *THE SOURCES OF SOCIAL POWER* 39–40, 47–49, 67–69, 105–27 (1986).

4 CHRISTOPHER PIERSON, *THE MODERN STATE* 63 (1996).

5 517 U.S. 44, 47 (1996).

6 WILLIAM P. MARSHALL, *The Battle Over State Immunity*, in *THE REHNQUIST LEGACY* 240 (Craig M. Bradley ed., 2006).

7 “Particularly in the Court’s Eleventh Amendment immunity-from-suit cases, one frequently encounters the image of the States as metaphysical, almost mystical, entities, as demiurges in a kind of constitutional creation ‘myth.’ The States are, a narrow majority of Justices continues to insist, the *kinds of things* that simply cannot be treated, or acted upon, in certain ways.” Richard W. Garnett, *The New Federalism, The Spending Power, and Federal Criminal Law*, 89 *CORNELL L. REV.* 1, 16 (2003).

constitutional Amendments.”<sup>8</sup> We shall have to ascertain what “sovereignty” means before we can judge the truth of the Court’s claims, but there is at least facial plausibility to what a distinguished student of sovereignty says:

Men do not wield or submit to sovereignty. They wield or submit to authority or power. Authority and power are facts as old and ubiquitous as society itself. . . . Although we talk of [sovereignty] loosely as something concrete which may be lost or acquired, eroded or increased, sovereignty is not a fact.<sup>9</sup>

If it is the Court’s claim that sovereignty is not only a fact of our political-legal world, but a fact to be encouraged, this claim will require substantiation: it is by no means self-evident that governments we create can enjoy the predicate “sovereign.” Even assuming such a possibility, does it make even a modicum of sense to suppose that what can be hemmed in by “Amendments” is actually “sovereign?” Can the claim of sovereignty be sustained?<sup>10</sup>

Sovereignty’s future, so to speak, rests, in the main, with the two men who recently succeeded two pro-sovereignty members of the Rehnquist Court. We have reason to suspect where Chief Justice Roberts and Justice Alito have their investments in terms of sovereignty; however, the next caging moment has not quite arrived. For the moment, at least, the future remains open, as neither Chief Justice Roberts nor Justice Alito has spoken to the issue in the United States Reports.<sup>11</sup>

What *has* been said in recent years in the U.S. Reports regarding sovereignty has concerned the conditions under which states are *immune* to unconsented suit in various fora, *viz.*, federal court, state court, administrative agencies, or bankruptcy court. Once upon a time, the Court’s analyses of “sovereign immunity,” both pro and con, advanced for

---

<sup>8</sup> Alden v. Maine, 527 U.S. 706, 713 (1999).

<sup>9</sup> F.H. HINSLEY, SOVEREIGNTY 1 (2d ed., 1986).

<sup>10</sup> See Steven G. Gey, *The Myth of State Sovereignty*, 63 OHIO ST. L.J. 1601, 1603–04 (2002) (“Does the absence of a coherent rationale doom the new state-sovereignty decisions to a short, ignominious life, or are these inconsistent decisions simply preparation for a truly radical return to real state sovereignty, in which fifty different parochial sovereigns can control their own destinies in certain areas free of any coordination or control by the national government? This question cannot be answered until the Court’s majority decides for itself which path it wants to take.”). A new majority is now poised to “decide[] for itself.” *Id.* at 1604. For my reasons for denying that even local control of the sort adumbrated by Gey would not yield “fifty different parochial sovereigns,” see *infra* text accompanying notes 144–66 and 177–227.

<sup>11</sup> Chief Justice Roberts joined Justice Thomas’s dissent from a holding that, acting under the Bankruptcy Clause of Art. I, Congress can abrogate state sovereign immunity. *Cent. Va. Cmty. Coll. v. Katz*, 126 S. Ct. 990, 1005 (2006) (Thomas, J., dissenting).

the most part in the quotidian terms of jurisdiction, Article III of the U.S. Constitution, and the Eleventh Amendment. However, in the course of three leading and multiple complementary opinions, the Rehnquist Court made clear, albeit not uncontroversial, that immunity to unconsented suit is merely one aspect of a quasi-primordial reality called *sovereignty*, possessed in delegated form by the national government and residually by the fifty states.<sup>12</sup> In the words of Justice Kennedy in *Alden v. Maine*:<sup>13</sup>

The federal system established by our Constitution preserves the sovereign status of the States in two ways. First, it reserves to them a substantial portion of the Nation's primary sovereignty, together with the dignity and essential attributes inhering in that status. . . .

Second, even as to matters within the competence of the National Government, the constitutional design secures the founding generation's rejection of "the concept of a central government that would act upon and through the States" in favor of "a system in which the State and Federal Governments would exercise concurrent authority over the people—who were, in Hamilton's words, 'the only proper objects of government.'" . . .

The States thus retain "a residuary and inviolable sovereignty." They are not relegated to the role of mere provinces or political corporations, but retain the dignity, though not the full authority, of sovereignty.<sup>14</sup>

It will be necessary to inquire into the relationship among these three abstract nouns (sovereignty, dignity, and authority), but first, this question: Assuming *arguendo* that sovereignty can be a fact in the world, are we not taken aback by assertions that it is possessed by the states in which we men and women live? After all, claims lodged in the name of sovereignty tend, of their nature, to devolve to the level of strategic force.<sup>15</sup> Sovereigns have subjects, and subjects are, well, in a state of subjection. Are we Americans our states' subjects? Furthermore, history attests that the nation-states which during the first half of the twentieth century propounded their own sovereignty did so to ensure force's ascendancy over intelligence about justice.

Of the work "sovereignty" tends to do, the totalitarianisms of recent memory are just vivid examples, not exceptions. There is always a temptation, in statecraft and in law especially, to substitute force for

---

12 Fed. Mar. Comm'n v. S.C. State Ports Auth., 535 U.S. 743, 760–61 (2002); *Alden*, 527 U.S. at 714–15 (1999); *Seminole Tribe v. Florida*, 517 U.S. 44, 54 (1996); *Blatchford v. Native Vill. of Noatak*, 501 U.S. 775, 780–81 (1991).

13 527 U.S. 706.

14 *Id.* at 714–15 (citations omitted).

15 At least, that is, if we leave God out of the picture, though it must also be said that humans have done the most barbaric things on the coattails of the sovereign God.

intelligence, raw power for authentic authority, and what more useful force or power to wield than one for which *sovereignty* is effectively claimed? “Sovereignty is a club of victors.”<sup>16</sup> The Framers of the United States Constitution knew the history of sovereignty, as a lived reality, as well as a piece of philosophical creation, as by Jean Bodin and Thomas Hobbes.<sup>17</sup> To these they preferred John Locke and Baron de Montesquieu, as every American learns in high school civics.<sup>18</sup> The Articles of Confederation explicitly predicated “sovereignty” of the colonies.<sup>19</sup> The Constitution does not use the word or its cognates.

The Supreme Court, however, asks us to accede to the claim that sovereignty can be found in the United States. According to Justice Thomas for the Court in 2003: “The preeminent purpose of state sovereign immunity is to accord States the dignity that is consistent with their status as sovereign entities.”<sup>20</sup> Allowing Congress to subject states to private suits would be, Justice Thomas continues, “neither becoming nor convenient,” for it would denigrate the sovereignty of the states.<sup>21</sup> This ontologically baroque rhetoric is offered to describe our own backyards.

Should *we*—can *we*—assent to such credulity-straining claims? I said above that the future of a jurisprudence of sovereignty rests “in the main” in the hands of two new members of the Supreme Court. As Alexander Bickel said, the Court labors under the burden to succeed.<sup>22</sup> At the limit, it

---

16 Paul W. Kahn, *The Question of Sovereignty*, 40 STAN. J. INT’L L. 259, 263 (2004). Although my proximate focus here is domestic sovereignty as it is being claimed within and on behalf of the United States, the emergence of positive sovereignty, such as the Court claims on behalf of the fifty states and of the United States collectively, is of course conceptually and historically related to the worldwide emergence of a positive right of free determination on the part of “the nation state.” See PIERSON, *supra* note 4, at 5–63. On how the world came to be organized into “sovereign states,” see generally DANIEL PHILPOTT, *REVOLUTIONS IN SOVEREIGNTY* 75–96 (2001).

17 For discussion of Bodin and Hobbes, see *infra* text accompanying notes 149–57.

18 Cf. DONALD L. DOERNBERG, *SOVEREIGN IMMUNITY OR THE RULE OF LAW* 210 (2005) (arguing that the Constitution embodies a Lockean commitment to a theory of sovereignty that cannot tolerate sovereign immunity, because government must be answerable to its own laws). Doernberg’s mistake, in my estimation, is to exaggerate the Founders’ commitment to the universal availability of individually adequate remediation of legal wrongs. See *infra* text accompanying note 115. What the Founders did repudiate was the proposition that our states are “sovereign” in the sense in which that term has generally been understood since the early seventeenth century. See *infra* text accompanying notes 163–68.

19 ARTICLES OF CONFEDERATION art. II.

20 Fed. Mar. Comm’n. v. S.C. State Ports Auth., 535 U.S. 743, 760 (2002).

21 *Id.* (internal quotation marks omitted) (quoting *Alden v. Maine*, 527 U.S. 706, 748 (1999)). For insightful commentary on this rhetoric, see Ann Althouse, *On Dignity and Deference: The Supreme Court’s New Federalism*, 68 U. CIN. L. REV. 245 (2000).

22 See ALEXANDER M. BICKEL, *THE SUPREME COURT AND THE IDEA OF PROGRESS* 176–81 (1970).

is in the nature of a Hobbesian sovereign to be able to *force and compel* its subjects to assent. The question for us is whether we should freely assent to claims made by a majority of the Court on behalf of sovereignty as a fact of our political and legal reality. My answer is in the negative, but in order to explain why we should resist these claims, and, correlatively, why the Court should stop making them, we shall have to determine the meaning (or meanings) of “sovereignty;” we shall also have to say something about what in *who we are* calls for resistance to claims of state sovereignty. The Supreme Court that claims sovereignty on behalf of states also claims it on our own behalf. “[S]overeignty is vested in the people.”<sup>23</sup> Is it a fact about ourselves that “we” are sovereign?

## II. TURNING TO TEXT: SOVEREIGNTY AND SUBJECTS

Rather than start with these questions about ourselves and our political philosophy, we should turn to a text to help us get started—lawyers are always turning to texts.<sup>24</sup>

To the Constitution of the *United States* the term SOVEREIGN, is totally unknown. There is but one place where it could have been used with propriety. But, even in that place it would not, perhaps, have comported with the delicacy of those, who *ordained and established* that Constitution. They *might* have announced themselves “SOVEREIGN” people of the *United Staes* [sic]: But serenely conscious of the *fact*, they avoided the *ostentatious declaration*.<sup>25</sup>

Thus one text, from the Supreme Court in 1793; it speaks from the seriatim opinion of Justice Wilson in the case *Chisholm v. Georgia*.<sup>26</sup> The decision sustained a South Carolina citizen’s assumpsit claim in federal court against the state of Georgia, rejecting, over the lone dissent of Justice Iredell, Georgia’s claim that an unconsenting state was, by virtue of its sovereignty, immune from suit by a citizen of another state.<sup>27</sup> Article III of the Constitution seemed clearly to countenance such a suit by extending “the judicial Power”<sup>28</sup> of the United States, and specifically the original jurisdiction of the Supreme Court, to controversies “between a State and Citizens of another State,”<sup>29</sup> nothing else in the text of the Constitution contradicting or (relevantly) qualifying this power, which power was given

---

23 U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779, 794 (1995).

24 See Joseph Vining, *Is There an Implicit Theology in the Practice of Ordinary Law?*, 53 MERCER L. REV. 1047, 1047 (2002).

25 *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419, 454 (1793) (Wilson, J.).

26 *Id.* at 453.

27 *Id.* (Blair, J.); *id.* at 466 (Wilson, J); *id.* at 469 (Cushins, J.); *id.* at 479 (Jay, C.J.).

28 U.S. CONST. art. III, § 2.

29 *Id.*

statutory effect (if the original jurisdiction of the Supreme Court was not already self-executing) in the Judiciary Act of 1789.<sup>30</sup> Not even Justice Iredell's dissent, which preferred to rest on an interpretation of the 1789 Act, found the state of Georgia immune to unconsented suit because it was "sovereign."<sup>31</sup> The "shock of surprise"<sup>32</sup> allegedly caused by *Chisholm* prompted speedy introduction of bills from which would emerge the text that before long became the Eleventh Amendment to the Constitution. The Amendment, drawn in terms of how the "the Judicial power of the United States shall not be construed," of course lacks any mention of sovereignty.<sup>33</sup> Nor does any subsequent Amendment breathe a word of sovereignty. The fundamental written law of the United States remains innocent, on its face, of pretensions to sovereignty.

Nevertheless, sovereignty was just beginning its American legal career. If Justice Wilson, vaulting forward two centuries, could review the future decisions of the Court on which he sat, he would have heard, in 1991, then again in 1996, and yet again in 1999, that, "the States entered the federal system with their sovereignty intact."<sup>34</sup> If Justice Wilson were to inquire how such a thing happened without benefit of the text of the Constitution, of which he was a signatory, he would first learn, from Chief Justice Rehnquist's majority opinion in the 1996 case *Seminole Tribe v. Florida*,<sup>35</sup> that this was accomplished through the Court's recognition of a "background principle . . . embodied in the Eleventh Amendment."<sup>36</sup> Only three years later, however, the Court would revise that understanding of the un-amended document itself. Justice Kennedy's majority opinion in *Alden v. Maine*<sup>37</sup> explained that, not the Eleventh Amendment, but "the founding document 'specifically recognizes the States as sovereign entities,'"<sup>38</sup> and that "[a]ny doubt regarding the constitutional role of the States as sovereign entities is removed by the Tenth Amendment, which, like the other provisions of the Bill of Rights, was enacted to allay lingering concerns about the extent of the national power."<sup>39</sup> But shortly the bewildered

---

30 Calvin R. Massey, *State Sovereignty and the Tenth and Eleventh Amendments*, 56 U. CHI. L. REV. 61, 116 (1989) (discussing controversy over whether the original jurisdiction of the Supreme Court is self-executing).

31 *Chisholm*, 2 U.S. (2 Dall.) at 432 (Iredell, J.).

32 *Hans v. Louisiana*, 134 U.S. 1, 11 (1890).

33 U.S. CONST. amend. XI.

34 *Blatchford v. Native Vill. of Noatak*, 501 U.S. 775, 779 (1991), *quoted in Alden v. Maine*, 527 U.S. 706, 713 (1999) *and Seminole Tribe v. Florida*, 517 U.S. 44, 150 (1996).

35 *Seminole Tribe*, 517 U.S. 44.

36 *Id.* at 72.

37 *Alden*, 527 U.S. 706.

38 *Id.* at 713 (quoting *Seminole Tribe*, 517 U.S. at 71 n.15).

39 *Id.* at 713–14.

Justice Wilson would learn from *Federal Maritime Commission v. South Carolina Ports State Authority*<sup>40</sup> that “[t]he principle of state sovereign immunity enshrined in our constitutional framework . . . is not rooted in the Tenth Amendment.”<sup>41</sup>

This last assertion concerning the locus of the principle of state sovereign immunity seems to have been the considered judgment of exactly five members of the Rehnquist Court: Chief Justice Rehnquist, and Justices Scalia, Thomas, Kennedy, and O’Connor.<sup>42</sup> Daniel Meltzer described them as “Five Authors in Search of a Theory.”<sup>43</sup>

What theory or theories will Chief Justice Roberts and Justice Alito advance, or concur in? The Rehnquist Court’s sovereignty jurisprudence is not inevitable. Perhaps the reconfigured Court will resist the normative power of the jurisprudence the late Court made actual.

The Court sent an ambiguous but important transitional signal in *Central Virginia Community College v. Katz*,<sup>44</sup> where it held that the “States agreed in the plan of the Convention not to assert any sovereign immunity defense they might have had in proceedings brought pursuant to ‘Laws on the subject of Bankruptcies.’”<sup>45</sup> Justice Stevens wrote for a majority of five that included Justice O’Connor, the opinion acknowledging that statements in *Seminole Tribe* assumed that the Bankruptcy Clause of Article I did not give Congress the power to abrogate the states’ sovereign immunity.<sup>46</sup> *Katz* has been read by some as putting on the brakes with respect to the development of (the jurisprudence of) sovereignty.<sup>47</sup> However, Justice O’Connor, a member of the *Katz* majority, has been succeeded by Justice Alito. Moreover, Justice Thomas’s dissent, which was joined by Chief Justice Roberts, and Justices Scalia and Kennedy, began with these untemperizing words: “Under our Constitution, the States are not subject to suit by private parties for monetary relief absent their consent or a valid congressional abrogation, and it is ‘settled doctrine’ that nothing in Article I of the Constitution establishes those preconditions.”<sup>48</sup>

---

40 535 U.S. 743 (2002).

41 *Id.* at 767 n.18.

42 *Id.* at 746.

43 Daniel J. Meltzer, *State Sovereign Immunity: Five Authors in Search of a Theory*, 75 NOTRE DAME L. REV. 1011, 1011 (2000).

44 126 S. Ct. 990 (2006).

45 *Id.* at 1004 (quoting U.S. CONST. art I, § 8, cl. 4).

46 *Id.* at 996.

47 See, e.g., Richard Lieb, *State Sovereign Immunity: Bankruptcy is Special*, 14 AM. BANKR. INST. L. REV. 200, 202–03 (2006).

48 *Katz*, 126 S. Ct. at 1005–06 (Thomas, J., dissenting).

More recently, the fully re-configured Court achieved unanimity in holding that only states—not, for example, counties—are sovereign (and therefore immune to unconsented suit), and this because they were sovereign to begin with: “A consequence of this Court’s recognition of preratification sovereignty as the source of immunity from suit is that only States and arms of the State possess immunity from suits authorized by federal law.”<sup>49</sup>

Except by joining the *Northern Insurance Co. v. Chatham County* opinion,<sup>50</sup> Samuel Alito has not spoken to the issue of sovereignty since arriving on the Court. While on the Third Circuit, in *Chittister v. Department of Community & Economic Development*,<sup>51</sup> the much-discussed case arising under the Family and Medical Leave Act, Judge Alito wrote for the Third Circuit:

Under the Eleventh Amendment, a plaintiff other than the United States or a state may not sue a state in federal court without the latter state’s consent unless Congress abrogates the state’s Eleventh Amendment immunity pursuant to a constitutional provision granting Congress that power. The Fourteenth Amendment confers such power, but Article I of the Constitution does not.<sup>52</sup>

Though this might suggest to some that it is obvious that Justice Alito would join the four *Katz* dissenters, thus restoring the remnant quadrumvirate to majority status, it may or may not be significant that still in 2000 Judge Alito was thinking in terms of “Eleventh Amendment immunity,”<sup>53</sup> which the Court had stopped doing in 1999 in *Alden*.<sup>54</sup> One can also add that as a Circuit Judge he was bound by Supreme Court precedent in a way that he no longer is. In any event, an insistence upon a textual basis for sovereignty and sovereign immunity would be the kiss of death for the “preratification sovereignty” project hitherto pursued by the Rehnquist majority.<sup>55</sup>

In service of that kiss, we can ask this question again: Are *we* from the twenty-first century not surprised and shocked when, with increasing frequency and progressively greater effect, the Supreme Court of the United States claims “sovereignty” on behalf of fifty political units and, differently, the nation that comprises them? Are we persuaded when a five-member majority of the Court avers that while the “primary

---

49 *N. Ins. Co. v. Chatham County*, 126 S. Ct. 1689, 1693 (2006).

50 *Id.* at 1692.

51 226 F.3d 223 (3d Cir. 2000).

52 *Id.* at 226 (citations omitted).

53 *Id.*

54 *Alden v. Maine*, 527 U.S. 706, 712–13 (1999).

55 *Chatham County*, 126 S. Ct. at 1693.

sovereignty”<sup>56</sup> remains in the nation and national government, the states “retain ‘a residuary and inviolable sovereignty,’”<sup>57</sup> “together with the dignity and essential attributes” of sovereignty?<sup>58</sup> We should scrutinize these claims while we still can; beware the normative power of the actual. Justice Wilson, I dare say, would be incredulous at the future in which assertions of the state sovereignty are growing ever larger and more prominent in our national political understanding. And what of the conflation “sovereign dignity?”<sup>59</sup>

If we refuse to be dazzled by them, what sense can we make of the Court’s recent decisional essays characterizing the states in soaring terms of sovereignty and deep dimensions of dignity? Judge John T. Noonan, Jr., has observed unexceptionably that these “doctrines are abstract.”<sup>60</sup> Is Noonan correct when he adds that this “[a]bstractness gives them an appearance of depth they do not deserve?”<sup>61</sup> Steven Smith has warned lawyers against the “nonsense” of words that we cannot make sense of in terms of what we believe to be real<sup>62</sup>—that is, in terms of what registers in our “ontological inventory.”<sup>63</sup> Is the Supreme Court’s jurisprudence of “sovereign dignity” just so much abstract judicial nonsense? One commentator, who has some cautiously critical things to say about the Court’s sovereignty jurisprudence in particular, is generally in favor of the Court’s “jurisprudence of ‘big ideas,’” of which sovereign dignity would be an example.<sup>64</sup>

As would “federalism.” Some students of the Court will say—whether in praise or condemnation, it matters not for the present purpose—that the sovereignty jurisprudence that has emerged over the last decade is best understood as the Rehnquist Court’s finding a way to revivify “federalism” by, as it were, resuscitating *National League of Cities v. Usery*<sup>65</sup> through the back-door and there is, no doubt, something to this (and I shall come back to it). My current interest is with what the Court is *saying*—not only about the sovereignty of states and the nation, but also about “dignitary interests” the Court discerns in these “sovereign entities.”

---

56 *Alden*, 527 U.S. at 714.

57 *Id.* at 715 (quoting THE FEDERALIST NO. 39 (James Madison)).

58 *Id.* at 714.

59 *Id.* at 715.

60 JOHN T. NOONAN, JR., NARROWING THE NATION’S POWER 2 (2002).

61 *Id.*

62 Steven D. Smith, *Nonsense and Natural Law*, in AGAINST THE LAW 100, 101–02 (Paul F. Campos et al. eds., 1996).

63 STEVEN D. SMITH, LAW’S QUANDARY 14–15 (2004).

64 Ernest A. Young, *Alden v. Maine and the Jurisprudence of Structure*, 41 WM. & MARY L. REV. 1601, 1604 (2000).

65 426 U.S. 833 (1976).

We hear today that the states “retain the dignity, though not the full authority, of sovereignty.”<sup>66</sup> Judicial rhetoric promoting “sovereign” states and their “dignity” is becoming familiar, but does this familiarity render the claims any more intellectually digestible? Or palatable? The deeds done in the name of “sovereignty” have been bad company to keep, as history more than amply attests.

Still, the meaning of earlier claims to sovereignty does not decide the meaning of today’s claims, even those made with the same words and sounds. Words and clauses spoken today have a real meaning that history does not determine. We should ask, therefore, what participants in a liberal democracy mean when they claim sovereignty, including from the highest bench of the least dangerous branch?<sup>67</sup>

Consider, to begin, that the Court’s claims on behalf of sovereignty occur within the cultural context of a post-modern state and Supreme Court that are sometimes so unsure of their own dominion as to have relocated sovereignty in the individual.<sup>68</sup> It is the same Supreme Court that in one breath, per Justice Kennedy in a breathtaking bit of anti-metaphysics, identifies the “heart of liberty [as] the right to define one’s own concept of existence, of meaning, of the universe, and of the mystery of human life,”<sup>69</sup> that, in a next breath, per the same Justice Kennedy, makes metaphysical claims that would delight the medieval mind. Not only are the states sovereigns, according to Justice Kennedy, they enjoy, as I have already noted, something called “sovereign dignity.”<sup>70</sup> What can it possibly mean for *us* to inhabit this rhetorical dissonance, according to which individuals define the meaning of their existence, but states of our creation come bearing “essential attributes?”

The remarkable language used by the Court to justify its holding unconsenting states immune to private suits has seemed to some scholars worthy of prompt dismissal as mere rhetorical flourishes.<sup>71</sup> Though the appeal of this labor-saving strategy is obvious, it should be resisted. *If* we could conclude that words and concepts issuing persistently from the Supreme Court of the United States of America could be “mere,” we would have a very different case. As things stand, however, who can doubt but that the Supreme Court is a primary determiner of our national culture—of

---

66 *Alden v. Maine*, 527 U.S. 706, 715 (1999).

67 See THE FEDERALIST NO. 82 (Alexander Hamilton).

68 RUSSELL HITTINGER, THE FIRST GRACE 137 (2003).

69 *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 851 (1992).

70 Indeed, such a conflating claim would likely have bedeviled the medieval mind, fascinated as it was with distinguishing, without separating, such realities and concepts. See ERNST H. KANTOROWICZ, THE KING’S TWO BODIES 372–82 (1957).

71 Meltzer, *supra* 43, at 1040.

our matrix of reasons for doing, forbearing, judging, congratulating, of the meaning of what we do in the name of government and law? Lacking religion, ethnicity, and (increasingly) native tongue in common, we absorb the unifying doctrines devised by the Supreme Court, and poof!—*E Pluribus Unum*, one issue at a time or several in one swallow. For instance, the Constitution says nothing of a “wall of separation” between church and state, but in the cafès and on the streetcars one cannot but overhear non-lawyers inveighing and remonstrating about a wall, “free exercise” and “establishment” nowhere and by no one mumbled. Other examples are everywhere to be found. The point is, the ubiquity of law and its language sets part of the stakes for our inquiring whether the court is ingenuous or disingenuous—and whether we are astute or obtuse—as the Court entrenches and we internalize the idea that both states and the national government are sovereign(s), and therefore enjoy sovereign dignity and dignitary interests, with the result that they are immune to suit by persons whom they have harmed.

We face questions of justice; but, because what we say is constitutive of who we are, because the reasons on which we choose to act also contribute to who we *are* as human subjects, we also face questions of the sort of people we are making ourselves to be, as a body politic and as individuals, as we accede to claims of the “sovereign dignity” of the states that are our creations and should be our servants. “[M]an,” Jacques Maritain famously said, “is by no means for the State. The State is for man.”<sup>72</sup> Surely, the Justices of the Supreme Court would not disagree. Is it not, then, exactly because the Court’s “sovereign dignity” rhetoric is *both* unlikely *and* entirely actual, *both* outlandish *and* potentially effective that we should take its measure with care? The Court *could* be saying such strange things to no real purpose or effect, but this seems entirely unlikely, and the stakes—the assignation of sovereignty and its prerogatives—suggest that we should decide this one for ourselves.

Returning now to the questions framed at the outset, I would refine them as follows: Should we accede to the United States Supreme Court’s claims that the fifty states are, first, sovereigns, with, second and consequently, dignitary interests, and, third, as a result, enjoy (with exceptions to which we shall come) immunity to unconsented private suits? I have telegraphed that I shall argue that sovereignty, as a property of states, should be resisted—but I should emphasize that, from the premises that support my resistance, nothing follows immediately about the necessary and sufficient conditions of private suits against states in federal court, state court, or any conceivable other tribunal. Nor will this call for

---

72 JACQUES MARITAIN, MAN AND THE STATE 13 (1951).

resistance entail a rejection of the Supreme Court's efforts and (constitutional) responsibilities to treat the States as members of a federation, rather than as mere departments of one unified nation; indeed, toward the end it will be necessary, in view of what else I have to say here about the place of "text" in our constitutional adjudication, to say something about what should guide the Court's thinking with respect to the States.

The reasons for opposing and not acquiescing in the Court's revision of our political self-understanding, as concerns sovereignty and its dignity, are multiple, but I wish to focus on some of them as they come together as inconsistent with *who we are*. Erwin Chemerinsky has written forcefully *Against Sovereign Immunity*, on the ground that the doctrine favors government to the interests of the governed in being made whole.<sup>73</sup> I write not so much against sovereign immunity, as *against sovereignty*. The core of my opposition to the concept of sovereignty as a property of states we create is that it is false to who we are and, in addition, to who we should wish to become.<sup>74</sup> It is (only) through an appreciation of *who we are* that we can proceed to law and politics correlative to our human dignity.

In an imagined world in which "law" is not correlative to the nature of those bound by that "law," the traction comes not from law but, rather, from brute force and sheer power. In the real world, however, in which law does have (or should have) genuine traction, "the question what the law 'is'

---

73 Erwin Chemerinsky, *Against Sovereign Immunity*, 53 STAN. L. REV. 1201, 1213–15 (2001).

74 The exigence of starting law and politics from an accurate grasp of the human person is a topic I have been pursuing, from a range of angles and applications, in a number of recent writings. See Patrick McKinley Brennan, *Asking the Right Questions: Harnessing the Insights of Bernard Lonergan for the Rule of Law*, 21 J.L. & RELIGION 1 (2006); Patrick McKinley Brennan, *Law and Who We Are Becoming*, 50 VILL. L. REV. 189 (2005); Patrick McKinley Brennan, *Law, Natural Law, and Human Intelligence: Living the Correlation*, 55 CATH. U. L. REV. 731 (2006); Patrick McKinley Brennan, *Locating Authority in Law*, [hereinafter Brennan, *Locating Authority*] in AFTER AUTHORITY (Patrick McKinley Brennan ed., forthcoming 2007); Patrick McKinley Brennan, *Meaning's Edge, Love's Priority*, 101 MICH. L. REV. 2060 (2003) [hereinafter Brennan, *Meaning's Edge*] (reviewing JAMES BOYE WHITE, THE EDGE OF MEANING (2001)); Patrick McKinley Brennan, *On What Sin (and Grace) Can Teach Crime*, 5 PUNISHMENT & SOC'Y 347 (2002) (editing performed by Patrick Brennan and Jeffrie Murphy); Patrick McKinley Brennan, *Realizing the Rule of Law in the Human Subject*, 43 B.C. L. REV. 227 (2002); Patrick McKinley Brennan, *Sovereign States? The State of the Question from a Catholic Perspective*, in FAITH AND LAW: HOW RELIGIOUS TRADITIONS FROM CALVINISM TO ISLAM VIEW AMERICAN LAW (Robert F. Cochran, Jr. ed., forthcoming 2007); Patrick McKinley Brennan, *The "Right" of Religious Liberty of the Child: Its Meaning, Measure, and Justification*, 20 EMORY INT'L L. REV. 129 (2006); see also JOHN E. COONS & PATRICK M. BRENNAN, BY NATURE EQUAL 136–41 (1999) (discussing the nature and meaning of human equality).

is not so different from the question who ‘we’ are.”<sup>75</sup> What is law for us enjoys that status because it respects *who we are*. Who are we? We are partly given and partly self-constituting, rational, purposive agents freely bound by the natural law. It is our opportunity and exigence to realize what is *good for us*, that makes us, first, better than mere objects (to be controlled and ruled by a separate and condescending sovereign) and, second, less than sovereign ourselves, either individually or collectively (and therefore importunate of means of just self-government).

The reality of *who we are* counters claims to terrestrial sovereignty; it also counters claims that would transfer dignity from ourselves to our creations, such as the state. Dignity inheres in our capacity to engage in intentional self-government that is good both for us and for those who, equally with us, are human persons. If there be dignity in states of our creation, it is because we put it there without alienating it from ourselves. There will be more to say about this in due course: the point to flag at the threshold, before we cross over to consider claims on behalf of the sovereignty and sovereign dignity of the states we create, is that it is *who we are* that both allows and limits what we create. We are neither the creators of, nor the proper objects of, terrestrial sovereignty.

### III. TO ESTABLISH SOVEREIGNTY

Sovereignty, as a term of political discourse, has a long history, to some of which we must come. But because our question concerns whether the Court should continue its recent claims in the name of sovereignty, we must begin by ascertaining what those claims are. The Rehnquist Court’s doctrines on sovereignty and the consequent immunity are, as Charles Fried has remarked, “exceedingly complicated.”<sup>76</sup> However, the bottom line, from which we can move backwards, can be fairly easily summarized. A state cannot be sued, absent its consent, in either a federal forum (including an administrative agency) or its own courts by any party other than the federal government or a sister state; thanks to *Alden* (or *Alden*’s sources), Congress is powerless to abrogate a state’s immunity to suit in its own courts.<sup>77</sup> First, an exception to what I just said in summary; second, a note, in several parts, about the context that nourishes and qualifies the claims of sovereignty that justify or allow this immunity to suit.

The exception: Although *Alden* rejects the conclusion of the 1989 case *Pennsylvania v. Union Gas Co.*,<sup>78</sup> which had held in a plurality opinion

---

75 JOSEPH VINING, FROM NEWTON’S SLEEP 128 (1995).

76 CHARLES FRIED, SAYING WHAT THE LAW IS 35 (2004).

77 *Alden v. Maine*, 527 U.S. 706, 752 (1999).

78 *Id.* at 732.

supplemented by Justice White's fifth vote, that Congress, under its Article I Commerce Clause power, could abrogate a state's immunity in its own courts,<sup>79</sup> *Alden* let stand the rule of the 1976 case *Fitzpatrick v. Bitzer*,<sup>80</sup> in which the Court, per then Justice Rehnquist, held Congress possessed of the power to authorize private suits against unconsenting states under its power to enforce the Fourteenth Amendment,<sup>81</sup> the theory being, at least as explained by Justice Kennedy in *Alden*, that in adopting that Amendment "the people required the States to surrender a portion of the sovereignty that had been preserved to them by the original Constitution."<sup>82</sup> *Alden* did explicitly observe the continuing vitality of the rule of *Fitzpatrick v. Bitzer*,<sup>83</sup> but one should also note that in a series of post-*Alden* cases (including *City of Boerne v. Flores*,<sup>84</sup> *Florida Prepaid Postsecondary Education Expense Board v. College Savings Bank*,<sup>85</sup> *United States v. Morrison*,<sup>86</sup> and *Kimel v. Florida Board of Regents*<sup>87</sup>) the Court has narrowed, without questioning, Congress's power under Section 5 of the Fourteenth Amendment.<sup>88</sup> When Congress acts under Section 5, and does so in the way the Court has prescribed, the states are no longer sovereign and, therefore, not immune. A sliding scale of sovereignty?

Before proceeding further to spell out some of the context, we should pause to observe that, whether the Congressional power found by *Bitzer* can avoid slipping into incoherence in the "sovereign dignity" climate created by *Seminole*, *Alden*, and their progeny, is a telling question. It is hard to fathom how what the states ceded by ratifying the Fourteenth Amendment differs utterly from what they ceded in joining the Union in the first place, as concerns the power of Congress to subject the states to federal law. True, we have a clearer record of just how clear the states were as concerns what they were giving up in 1868, and Section 5 of the Fourteenth Amendment does provide that "[t]he Congress shall have power to enforce, by appropriate legislation, the provisions of this article."<sup>89</sup> But, even prescinding from the evidence from the founding period that militates in favor of a strong national government, there is the proximate fact that the

---

79 *Pennsylvania v. Union Gas Co.*, 491 U.S. 1, 5 (1989) (plurality opinion).

80 427 U.S. 445 (1976).

81 *Id.* At 447–48.

82 *Alden*, 527 U.S. at 756.

83 *Id.* (citing *Fitzpatrick*, 427 U.S. at 456).

84 521 U.S. 507 (1997).

85 527 U.S. 627 (1999).

86 529 U.S. 598 (2000).

87 528 U.S. 62 (2000).

88 That power was reaffirmed during the last term in an opinion by Justice Scalia for a unanimous Court. *United States v. Georgia*, 126 S. Ct. 877, 878 (2006).

89 U.S. CONST. amend. XIV, § 5.

Court acknowledged—when in 1985 in *Garcia v. San Antonio Metropolitan Transportation Authority*<sup>90</sup> it overruled *Usery*<sup>91</sup>—that the states are not immune from the national government’s substantive regulation of employee wages.<sup>92</sup> If the states are wide open to regulation by a national government of such expansive (and more-than-enumerated) powers, we might ask whether it makes “sense for states to be subject to [such] federal regulation but to enjoy immunity with respect to major techniques of enforcement of that regulation.”<sup>93</sup> Does the metaphysics of state sovereignty generate, or can it bear the weight of, this distinction?

Now, for some of the context out of which the Rehnquist metaphysics of sovereignty grew. As it was sustained by the Court until the early 1990s and has since been expanded and rationalized afresh, the immunity of states to most unconsented suits presupposes a thick arsenal of jurisdiction and remedies to vindicate private interests and, cumulatively, to keep states generally within the bounds of the law. “Sovereign immunity,” as the Court uses the term, means that states cannot be sued in their own name without their consent—except, as noted above, by the federal government, or a sister state, or thanks to Congress’s acting under Section 5 of the Fourteenth Amendment. Such “sovereign immunity” does not, however, preclude, first, suits for injunctive relief against the appropriate state governmental officers sued in their official capacity, under the doctrine of *Ex parte Young*,<sup>94</sup> or for retrospective relief under 42 U.S.C. § 1983, or through so-called *Bivens* actions<sup>95</sup> in appropriate cases.<sup>96</sup> In addition to suits by individuals of the several types just mentioned, the United States itself can bring suit against states.<sup>97</sup> But although this federal power seems unquestioned, and thus allows the Court a ground on which to affirm that justice *can* be done, we might wonder about the willingness of the national government to devote its own resources to suing states in order to vindicate private individuals’ interests at the expense of the states.<sup>98</sup> In *Alden* itself, for example, once the Supreme Court had found the State of Maine

---

90 469 U.S. 528 (1985).

91 *Id.* at 546–50.

92 *Id.* at 555–57.

93 RICHARD H. FALLON, JR. ET AL., HART AND WECHSLER’S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 1061 (5th ed. 2003).

94 209 U.S. 123 (1908).

95 See *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971).

96 It should be noted in passing that both the scope of *Ex parte Young* and the power of the Court to create *Bivens*-type actions have recently received skeptical treatment from the Court. See FALLON ET AL., *supra* note 93, at 816–21, 1027–28.

97 See, e.g., *United States v. Texas*, 143 U.S. 621 (1892).

98 See FRIED, *supra* note 76, at 37.

immune to suit by probation officers seeking back pay for violation of federal wages and hours laws, absent either a waiver by the State of Maine or suit against state officers, only a suit by the United States Department of Labor against the state of Maine, could vindicate those individual probation officers' interests.<sup>99</sup> Without the Department's attention, energy, and resources being roused, those interests would go un-vindicated (unless through the suits against individuals already mentioned), and even a roused and interested Department of Labor may not be capable of getting the job done.<sup>100</sup>

This picture painted thus far could be misleading, moreover, because, although the Fair Labor Standards Act<sup>101</sup> provides for such suits by the federal government, in many other areas of federal law Congress has not provided jurisdiction that would allow such suits.<sup>102</sup> In fairness, one must also mention that Congress might at some future time authorize individuals to sue in the name of the United States to seek compensation for a state's violation of federal law, but I think it safe to speculate—in part because Justice Scalia has said in an opinion joined by other members of the Court (in dictum in a case decided on statutory grounds) that “there is ‘a serious doubt’” that such an authorization would survive a sovereign immunity inquiry<sup>103</sup>—that the current Court is not about to allow such actions. Finally, of course, a potential plaintiff can become an actual plaintiff thanks to a state's waiving its immunity, something it will be under more or less practical pressure to do (depending on what is at issue). In *Alden*, for example, Maine both insisted upon its immunity and, continuing to flout its obligations under federal law, did not pay damages to petitioners.<sup>104</sup>

There is much more that could be said about the tangled and somewhat speculative web of jurisdiction and remedies that both allows sovereign immunity and softens its bite, but what has been said is enough, I trust, to signal the strangeness of the resulting situation. A whole battery of highly-reticulated law has emerged to allow end-runs around the erratic boulder of sovereign immunity, and this corpus juris is thick with oddities

---

99 See *Alden v. Maine*, 527 U.S. 706, 759–60 (1999); FRIED, *supra* note 76, at 37.

100 *Alden*, 527 U.S. at 810 (Souter, J., dissenting) (“One hopes that . . . voluntary compliance will prove more popular than it has in Maine, for there is no reason to suspect today that enforcement by the Secretary of Labor alone would likely prove adequate to assure compliance with this federal law in the multifarious circumstances of some 4.7 million employees of the 50 States of the Union.”).

101 29 U.S.C. §§ 201–219 (2000).

102 See FRIED, *supra* note 76, at 32–45.

103 *Vt. Agency of Natural Res. v. United States ex rel. Stevens*, 529 U.S. 765, 787 (2000) (quoting *Ashwander v. Tenn. Valley Auth.*, 297 U.S. 288, 348 (1936) (Brandeis, J., concurring)).

104 527 U.S. at 813 n.43 (Souter, J., dissenting).

and inconsistencies. Perhaps we can empathize with Dean Prosser's resignation to law's not making more sense than the rest of life,<sup>105</sup> but there are limits and with those limits the ways around sovereign immunity play fast and loose. For example, if states are truly sovereigns, it is hard to see why they should be vulnerable to unconsented suits by the United States. Further, if, as Justice Scalia has written, their sovereignty excludes them from the coverage of Article III,<sup>106</sup> under the basic rules of federal jurisdiction their waiver should be powerless to get them into an Article III court.<sup>107</sup> The treatment of sovereignty as a "personal privilege," rather than as a rule of jurisdiction, perhaps solves the problem at one level, but creates a new one on another by asking us to regard our states as fictional persons.<sup>108</sup> And, if it's dignity that concerns us, is there not a way in which a state would seem more attenuated or sullied by an unconsented suit by a *sovereigner* sovereign (the national government) than by a lone individual just trying to seek redress for a wrong done him by his own government?

Credulity is further strained, as the first Justice Harlan observed in his lone dissent in *Ex parte Young*, inasmuch as the officer suit there blessed by the majority is transparently a device by which a federal court can, through a fiction, tell the "sovereign" states how to behave.<sup>109</sup> The modern Court has called "the rule of *Ex parte Young* . . . one of the cornerstones of [its] Eleventh Amendment jurisprudence"<sup>110</sup> (that was in 1982; now it would be a cornerstone of the Court's "sovereign dignity" jurisprudence); today's Court, in any event, has been heard to call that cornerstone "an obvious fiction."<sup>111</sup> As Professor David Currie once observed, "[p]eople are not likely to amend constitutions just to change captions on complaints."<sup>112</sup> Yet, as on that raucous British sitcom,<sup>113</sup> appearances are kept up. The states are (residual) sovereigns, and justice, though subordinated and subjected to the need for end-run tactics, does not go undone, at least not too frequently.

---

105 William L. Prosser, Book Review, 27 CORNELL L.Q. 292, 294 (1942).

106 Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd., 527 U.S. 666, 669–70 (1999).

107 See *Mansfield, Coldwater & Lake Mich. Ry. Co. v. Swan*, 111 U.S. 379, 385–86 (1884).

108 See, e.g., *Wis. Dep't. of Corr. v. Schacht*, 524 U.S. 381, 393 (1998) (Kennedy, J., concurring); *Patsy v. Bd. of Regents*, 457 U.S. 496, 515–16 n.19 (1982).

109 *Ex parte Young*, 209 U.S. 123, 168–204 (1908) (Harlan, J., dissenting).

110 *Fla. Dep't of State v. Treasure Salvors, Inc.*, 458 U.S. 670, 685 (1982).

111 *Idaho v. Coeur d'Alene Tribe*, 521 U.S. 261, 270 (1997).

112 David P. Currie, *Sovereign Immunity and Suits Against Government Officers*, 1984 SUP. CT. REV. 149, 151 n.11.

113 *Keeping Up Appearances* (BBC television series 1990–1995).

We should be clear about what my objection is not. Sometimes there is talk that “the rule of law” demands a one-to-one correspondence between legal rights and legal remedies—“*ubi ius, ibi remedium*,” as the Latin maxim has it. Such ideas received enduring encouragement from Chief Justice Marshall in *Marbury v. Madison*,<sup>114</sup> notwithstanding that William Marbury went home commissionless. But, though full of resonance, dicta of the sort Marshall offered are belied by the overall body of our inherited jurisprudence of remedies. Our rule of law, and the justice that it serves and that in turn clothes it with legitimacy, has been satisfied by something less, something that allows the system room to maneuver without room to evade the basic requirements of lawfulness and justice. This is not my report of a Platonic Form; it is rather, my reading of an admittedly fallible, dynamic tradition of reflection on justice and its implementation in the law we inherit. That tradition, as Professors Fallon and Meltzer see it, “demands a system of constitutional remedies adequate to keep government generally within the bounds of law,” and, while simultaneously calling for individually effective redress for all violations of constitutional rights, “tolerate[s] the denial of particular remedies, and sometimes of [any] individual redress” to the victim of a constitutional violation.<sup>115</sup> For almost all constitutional wrongs, some remedy or other will need to be available; but some questions, for example, “political questions,” may lie beyond review and remediation. Presumably, the case is *a fortiori* with respect to sub-constitutional rights and remedies. In any event, Professors Choper and Yoo have recently made out a strong case that lack of adequate individual remediation is not, as an empirical matter, a strong objection to the Court’s sovereign immunity jurisprudence.<sup>116</sup>

Our inherited tradition, whatever its current convulsions, was familiar and largely comfortable with the idea that sometimes claims that the state has violated individuals’ legal rights may not be subject to judicial review (and individual remediation). Perhaps we do not cotton to the fact, but, as Judge Bork pointed out, “[T]he Supreme Court has never suggested . . . that there might be a constitutional difficulty in a statute that merely invoked sovereign immunity with respect to suits challenging the constitutionality of a statutory denial of government benefits.”<sup>117</sup> Judge Noonan has been forceful in his condemnation of the Rehnquist Court’s reducing—among

---

114 5 U.S. (1 Cranch) 137, 147 (1803).

115 Richard H. Fallon, Jr. & Daniel J. Meltzer, *New Law, Non-Retroactivity, and Constitutional Remedies*, 104 HARV. L. REV. 1731, 1778–79 (1991).

116 Jesse H. Choper & John C. Yoo, *Who’s Afraid of the Eleventh Amendment? The Limited Impact of the Court’s Sovereign Immunity Rulings*, 106 COLUM. L. REV. 213, 213–17 (2006).

117 *Bartlett v. Bowen*, 816 F.2d 695, 719–20 (D.C. Cir. 1987) (Bork, J., dissenting).

other means, through its recent expansion of state immunity by its denial of Congress's power to abrogate that immunity under Article I powers—the remedies available to individuals harmed by government wrongdoing.<sup>118</sup> Commentators critical of the Court's recent sovereign immunity jurisprudence have criticized Noonan for exaggerating what injustice occurs because of the Court's adjusting, as it has, the balance between rights and remedies.<sup>119</sup> But this calculus is transcended, for both Noonan and those who share few other of his premises, by the harm that comes to human dignity when to it are preferred the dignitary interests of, as the first Justice Harlan put it, "the intangible thing, called a State . . . ."<sup>120</sup> This is a cardinal point, which I shall pursue below.

But before we can assess this state of affairs, before we can measure the meaning of the Court's invocations of sovereignty and dignity, we should be clear about the reasons the Court advances or implies for privileging state "dignity" over (potential) plaintiffs' interests, state sovereignty over individual plaintiffs' legal rights. We have noted some of the working materials, and we can complete the sketch in fairly short order.

Recall that, when, in *Chisholm*, the Court asked whether a citizen of South Carolina could pursue his assumpsit claim against the state of Georgia in federal court, the affirmative answer turned on Article III's conferring jurisdiction for suits "between a State and Citizens of another State."<sup>121</sup> The Amendment to the Constitution prompted by *Chisholm* provides *in toto*: "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."<sup>122</sup> The words find or render Article III courts powerless over suits predicated on jurisdiction of the sort found in *Chisholm*. However, for more than a century now, this seemingly straightforward language has borne the "interpretation" of the 1890 decision in *Hans v. Louisiana*,<sup>123</sup> which all the Justices currently serving on the Court, with the exception of Justice Stevens, regard as binding, either on the merits or on the ironically shifty ground of *stare decisis*.<sup>124</sup>

---

118 NOONAN, *supra* note 60, at 143–56.

119 See, e.g., Ernest A. Young, *Is the Sky Falling on the Federal Government? State Sovereign Immunity, the Section Five Power, and the Federal Balance*, 81 TEX. L. REV. 1551 (2003) (reviewing NOONAN, *supra* note 60).

120 *Ex parte Young*, 209 U.S. 123, 175 (1908) (Harlan, J., dissenting).

121 *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419, 430–33 (1793) (Iredell, J.).

122 U.S. CONST. amend. XI.

123 134 U.S. 1 (1890).

124 See *Seminole Tribe v. Florida*, 517 U.S. 44, 84 (1996).

*Hans* looms large in the current Court's jurisprudence and even its opinions.<sup>125</sup> The suit was an action in federal court by a Louisiana citizen against his own state, for interest due on its bonds.<sup>126</sup> The plaintiff Hans alleged that an amendment to the Louisiana Constitution barring the State from paying the interest owed due to the coupons was an impairment of the obligation of contract in violation of the United States Constitution.<sup>127</sup> The action was not brought by a citizen foreign to Louisiana, and although what we now call a "federal question" was implicated and properly pled, and thus would seem to have provided a non-diversity ground of jurisdiction, still the Supreme Court denied jurisdiction on the ground that a contrary holding would lead to the "anomalous result" that a state's own citizen could do to it what the citizen of another state or nation could not.<sup>128</sup> The text of the Eleventh Amendment, caricatured by Justice Bradley as "the letter," the Court subordinated to pre-constitutional notions concerning the suability of an unconsenting sovereign.<sup>129</sup> An amendment, proposed by Theodore Sedgwick of Massachusetts, that would have accomplished this result had been defeated in Congress in favor of the text that became the Eleventh Amendment.<sup>130</sup>

Riding on the subordinating wave of *Hans* came *In re New York*<sup>131</sup> in 1921 and *Principality of Monaco v. Mississippi*<sup>132</sup> in 1934; in the former the Court "rejected a long standing interpretation of the amendment that had treated admiralty cases as exempt from the Eleventh Amendment bar because they were not 'in law or equity,'"<sup>133</sup> and, in the latter, the "erosion of the amendment's explicit party alignment limitation became complete"<sup>134</sup> when the Court held that the jurisdictional bar extended to suits against states by foreign governments themselves,<sup>135</sup> notwithstanding that the Amendment mentioned only suits by "citizens" against states.<sup>136</sup> In *Monaco*, in language that was destined to do much work in the

---

125 I say "even," because whatever one thinks of the result in *Hans*, few are heard to admire Justice Bradley's majority opinion in the case.

126 *Hans*, 134 U.S. at 1.

127 *Id.* at 3.

128 *Id.* at 10.

129 *Id.* at 12.

130 John Paul Stevens, "Two Questions About Justice," 2003 U. ILL. L. REV. 821, 824.

131 256 U.S. 490 (1921).

132 292 U.S. 313 (1934).

133 Massey, *supra* note 30, at 68.

134 *Id.*

135 *Monaco*, 292 U.S. at 331.

136 U.S. CONST. amend. XI.

Rehnquist Court's opinions, the Court said that "[b]ehind the words of the constitutional provisions are postulates which limit and control."<sup>137</sup>

Obviously enough, this language of geometry that brings Euclid and Langdell tumbling to mind is easy to mock and dismiss, and is especially so for those jurists and scholars who would like to limit law to what has been posited in "legal texts." But, without becoming a legal geometer, one can observe that those who would limit law to what has been written down in the prescribed places labor against many burdens, including the acknowledged legitimacy (and inescapability?) of "unwritten law" in our very own constitutional tradition.<sup>138</sup> This is not the place for an extensive consideration of the nature and extent of law's unwritten sources, but it is necessary here to say that, as we approach a body of law that makes claims on behalf of unwritten law, I shall simply assume in what follows that the evidence of what the law is, is not *just* what has been written down. Toward the end there will be something to say in defense of this assumption, but here I would simply flag that, as I proceed, I am *not* assuming that sovereignty's failure to appear in our written law is dispositive against its being part of our law. A "right to privacy" is not written into our constitution, and look what a constitutional career it is enjoying.

We shall return to these issues below. For now, we can say, in summary, that the "conventional" view of the Eleventh Amendment, given effect in the pre-1996 Rehnquist Court line of cases just summarized, is that the "[A]mendment made constitutional an original understanding that the states were immune from private suits in the federal courts."<sup>139</sup> A "revisionist" view still holds that the Amendment had "no independent prohibitory force" and simply failed or refused to authorize certain party based assertions of jurisdiction.<sup>140</sup> Both sides, conventional and revisionist, abound with difficulties. The textual problems that beset the conventional view are by now obvious (and are, according to the otherwise-textualist majority of the Court, irrelevant). The revisionists' view, for its part, rises or falls with one's judgment of the history of the Amendment and what it called forth. But even assuming that the history is relevant (a point on which I should wish to insist), my own sense, admittedly tentative, is that, paradoxically, the history is so rich as to be

---

137 *Id.* at 322.

138 *See generally* CHARLES HOWARD MCILWAIN, CONSTITUTIONALISM (rev. ed. 1947) (tracing the history of constitutionalism in written and unwritten form); JAMES R. STONER, JR., COMMON LAW AND LIBERAL THEORY (1992) (discussing the development and influence of unwritten common law on American constitutional tradition).

139 Massey, *supra* note 30, at 62.

140 *Id.*

quite unhelpful. As John Orth said some time ago, “the search for the original understanding on state sovereign immunity bears this much resemblance to the quest for the Holy Grail: there is enough to be found so that faithful of whatever persuasion can find their heart’s desire.”<sup>141</sup> For good or ill, the jurisprudential and legal situation we face today buries the dialectic between the conventional and revisionist views as it rises to a new height. Again, according to the Court in the 2002 *Federal Maritime Commission v. South Carolina State Ports Authority* case: “The preeminent purpose of state sovereign immunity is to accord States the dignity that is consistent with their status as sovereign entities.”<sup>142</sup>

#### IV. SOVEREIGNTY ISOLATED

If immunity to unconsented private suit is preeminently in the service of according units of our government what is theirs in virtue of their being “sovereign entities,” we shall need to know what it means—in addition to being immune to some but not all unconsented suits—to be a “sovereign,” a sovereign “entity.” We could look only to the Court’s contributions on this score, but doing so would suppose the erroneous premise that legal language is a closed universe. The truth is, the Court’s discourse is a fluid subset of our American culture, a loose dialect of our American English. Some of what the Court says is heard only from courts, while most of what the Court says amounts to an admixture of technical language and ordinary language woven more or less seamlessly together to bring about and justify great effects—some of them coercive thanks to the sheriff, some of them voluntary thanks to the Court’s talking in ways that make progress in men’s minds.

Sovereignty, thank God, is not a household word, but it has a history that predates the United States and a usage that, even now, is not primarily of the Court’s creation. The Court has reappropriated the word in the line of cases we have just been considering, but the Court’s doing so has not clipped the word’s wings and thereby given it for all users a universal definition of the Court’s stipulation. Specialized discourse labors under the burden of what it would colonize. In the larger linguistic and cultural context in which the Court and all of us operate, sovereignty is as big as it gets, or at least almost. Analytic philosophers working on the word “sovereignty” often give it a denotation in terms of *authority*. For example, the classic essay by W.J. Rees, *The Theory of Sovereignty Restated*,<sup>143</sup>

---

<sup>141</sup> JOHN V. ORTH, *THE JUDICIAL POWER OF THE UNITED STATES* 28 (1987).

<sup>142</sup> *Fed. Mar. Comm’n v. S.C. State Ports Auth.*, 535 U.S. 743, 760 (2002).

<sup>143</sup> W. J. Rees, *The Theory of Sovereignty Restated*, in *PHILOSOPHY, POLITICS AND SOCIETY* 56, 56–61 (Peter Laslett ed., 1956).

isolates six different meanings of “sovereignty,” in three of which “supreme authority” is at the core (in the other three meanings identified by Rees, it’s power rather than authority).<sup>144</sup> But what are we to make of this translation? Can it avoid being tendentious?

The issue presented is complex, because authority itself is a multivalent term. But a fair first response to trying to make sense of sovereignty as (supreme) authority is that, historically, in conventional and much technical discourse the notion of sovereignty is designed and deployed exactly to bypass considerations of authority. It is in the nature of authority that it comes in different shapes and sizes. Resolution of authorities’ competing claims calls for a prudent, perhaps even Jesuitical, casuistry. Enlightenment *philosophes* disdained and sought to discard authority exactly because where there is authority, there are authorities; such multiple, competing claims or assertion of leaner claims. Modernity was, in Jeffrey Stout’s trenchant insight, in *Flight from Authority*.<sup>145</sup> Sovereignty, as modernity has sought to confect it, would make a clean entrance as a scalar quantity, a rhetorical and procedural trump card. Trading on its supreme and surpassing nature, that for which sovereignty is claimed is licensed thereby to turn away claims, even of justice.

But if the sovereignty of the fifty states works that way now in the Supreme Court and, as a result, around the globe for a class of potential plaintiffs, it was not always so for sovereignty itself. Sovereignty entered only in fits and starts, not at all sovereignly, not at all absolutely. This should not surprise: the absolute is hard to come by, after all. What the historians record is that on the Continent, throughout the period from 1200 right up to about 1600, the ordinary situation was, first, for people to be under the claims of multiple, overlapping “sovereigns,” and, second, for all such “sovereigns” to be understood as subordinate to the higher norms of natural and divine law.<sup>146</sup> Most of the discussion on the Continent took place in Latin, in which not the English word “sovereignty” but the Latin words and phrases “*potestas absoluta*” and “*maiestas*” and the like were the terms of art; and the consistent, though not uniform, judgment was that

---

144 *Id.*; cf. W. J. STANKIEWICZ, ASPECTS OF POLITICAL THEORY 47–95 (1976) (defending, against criticism sounding in terms of “hierarchy,” a conception of sovereignty rooted in authority).

145 JEFFREY STOUT, THE FLIGHT FROM AUTHORITY 2–3 (1981).

146 See KENNETH PENNINGTON, THE PRINCE AND THE LAW 1200–1600, at 284–88 (1993); see also MANLIO BELLOMO, THE COMMON LEGAL PAST OF EUROPE 1000–1800, at 149–59 (Lydia G. Cochrane trans., 1995) (discussing how European society operated under both particularized law and *ius commune*); HAROLD J. BERMAN, LAW AND REVOLUTION 288–94 (1983) (noting that sovereignty was an outgrowth of the Roman concept of *iusdictio* and that numerous state and religious officials would have varying degrees of *iusdictio* over a matter).

these powers of the prince were bounded by the obligation to honor the rights of subjects and to serve the common good. There was, to quote Kenneth Pennington, “[a] subtle dialectic between the rights of subjects and the power of the prince.”<sup>147</sup> Though the historical record cannot conceal that princes misbehaved, there was little question but that the prince’s legitimate power was limned by law not of human creation (as well as by law of human creation).

“Subtle dialectic” was arrested thanks to the work of three giants who signal the early modern period in politics; with them we witness a preoccupation with power as such,<sup>148</sup> and, variously, flirtations with, or even putative embrace of, sovereign power, that is, power understood as *absolute*. Niccolo Machiavelli, Jean Bodin, and Thomas Hobbes: their names are familiar, but even when their names do not come to mind, their ideas remain in the air and they easily enter and, as I say, make progress in men’s minds. Machiavelli was the true innovator, because his ideal prince lacked legitimacy (and the aspiration to it) altogether. Machiavelli’s novel claim was that the prince had no relation to the law.<sup>149</sup> Bodin makes for a slightly different case, because although he held that *no* prince has “absolute power,” if by that we mean that the prince is above divine, natural, and the common law of all nations,<sup>150</sup> Bodin’s way of discussing the *potestas absoluta* of the prince has led more of his readers than not to conclude that he both recognized and commended such a power. Jacques Maritain, one of our generation’s most alert students of sovereignty and the implicated vectors, stresses Bodin’s recognition of the sovereign’s subordination to God, to divine and natural law, and to the *ius gentium*; he also fingers what he regards as the innovative error in Bodin’s thinking:

Since the people have absolutely deprived and divested themselves of their total power in order to transfer it to the Sovereign, and invest him with it, then the Sovereign is no longer a part of the people and the body politic: he is “divided from the people,” he has been made into a whole, a *separate* and transcendent whole, which is his sovereign living Person, and by which the other whole, the immanent [sic] whole or the body politic, is ruled from above. When Jean Bodin says that the sovereign Prince is the image of God, this phrase must be understood in its full force, and means that the Sovereign—submitted to God, but accountable only to Him—transcends the political whole just as God transcends the cosmos.<sup>151</sup>

---

147 PENNINGTON, *supra* note 146, at 283.

148 See HARVEY C. MANSFIELD, JR., *TAMING THE PRINCE* 151 (1989).

149 See PENNINGTON, *supra* note 146, at 271–72.

150 *Id.* at 277–78.

151 MARITAIN, *supra* note 72, at 34.

This, Maritain goes on to say, “was the purpose for which the word Sovereignty was coined”<sup>152</sup> in the vernaculars of modern political theory: to claim and identify a supreme independence and supreme power which is a right both natural and inalienable, which power and independence are in their proper sphere over and separate from, not a part of, the whole over which they sit.<sup>153</sup> Maritain sums it up: Sovereignty is a property which is absolute and indivisible, which cannot be participated in and admits of no degrees, and which belongs to the Sovereign independently of the political whole, as a right of his own.<sup>154</sup> “We cannot use the concept of Sovereignty,” Maritain continues, “without evoking, even unawares, that original connotation.”<sup>155</sup> And should anyone wonder why *the term* “sovereign” resonates so powerfully, one has only to think of the power of the English prose of Thomas Hobbes, according to which the would-be sovereign Leviathan securer of peace and order mutates into nothing short of a “mortal God.”<sup>156</sup>

We shall return to the question of whether we can, *pace* Maritain, use the term without committing a trespass, but first we must canvass more of the history to which Maritain was reacting. With the contributions of Machiavelli, Bodin, and Hobbes, we stand at the threshold of the modern English problematic of sovereignty, which the colonists inherited and bequeathed to us. In the post-Hobbesian English landscape populated and cultivated by Blackstone, John Austin, and A.V. Dicey, sovereignty as the undivided power of the state or “the Crown,” and not itself subject to fundamental law, was constantly on the rebound. Hobbes was “denounced but never really repudiated . . .”<sup>157</sup> The modern nation-states emerged, and it was characteristic of them to make claims, over a territorially delimited expanse, to sovereignty, that is, to undivided supreme or absolute power of which earlier princes, with their cities and roaming empires and feudal structures and estates, were innocent. “The key intellectual argument for sovereignty” of this new sort, as Gianfranco Poggi observes, was “that law and order can only be maintained within each territory if one power alone possesses a distinct prerogative,” and that power, according to Poggi, was “*qualitatively different* from all other social forces, because [it is] exclusively concerned with a distinctive set of interests, of a specifically political nature.”<sup>158</sup> Again Maritain:

---

152 *Id.* at 37–38.

153 *Id.* at 38.

154 *Id.*

155 *Id.*

156 THOMAS HOBBS, LEVIATHAN 114 (J.C.A. Gaskin ed., Oxford Univ. Press 1996).

157 GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC 1776–1787, at 348 (1969).

158 GIANFRANCO POGGI, THE STATE: ITS NATURE, DEVELOPMENT AND PROSPECTS 44

Sovereignty is a property which is absolute and indivisible, which cannot be participated in and admits of no degrees, and which belongs to the Sovereign independently of the political whole, as a right of his own.

Such is genuine Sovereignty, that Sovereignty which the absolute kings believed they possessed, and the notion of which was inherited from them by the absolute States, and the full significance of which has been brought to light in the Hegelian State—and, long before Hegel, in the Hobbesian *Mortal God*.<sup>159</sup>

On the Continent, which Maritain knew firsthand, territorial governments with active aspirations to absolutism became virtual commonplaces; we ordinarily refer to them as totalitarianisms. England was no exception in its aspirations to sovereignty of an absolute sort, but behind the veneer of claims of the absolute sovereignty lodged in parliament was practiced more or less consistently a “flexible constitutionalism,” as Professor Pennington calls it.<sup>160</sup> Sovereignty’s great modern champion, Professor Dicey, kept up appearances when he opined that English judges facing acts of sovereign Parliament that would appear to themselves to violate the moral law would, though powerless to overrule them, give them “whenever possible . . . such an interpretation . . . as may be consistent with the doctrines both of private and of international morality.”<sup>161</sup>

While the English kept on keeping up appearances, the colonists got busy and, as Justice Kennedy would say of their work more than two centuries later, they “split the atom of sovereignty” (though they did so in a way different from the one Kennedy had in mind in the *U.S. Term Limits, Inc. v. Thornton* opinion in which he made the claim).<sup>162</sup> Gordon Wood, in *The Creation of the American Republic*, observes that, “[the doctrine of sovereignty] was the single most important abstraction of politics in the entire Revolutionary era.”<sup>163</sup> What caused the colonists to cathect this question was the judgment, made common by the growth, on all sides, of nation-states bent on centralization and order, that there must be a supreme and undivided power over what we regard as a “state.”<sup>164</sup> The colonists by and large regarded this as a fact to be reckoned with, a threat to be insured

---

(1990) (emphasis added).

159 MARITAIN, *supra* note 72, at 38.

160 PENNINGTON, *supra* note 146, at 285.

161 A.V. DICEY, INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION 63 (10th ed. 1959).

162 *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 838 (1995) (Kennedy, J., concurring).

163 WOOD, *supra* note 157, at 345.

164 *Id.*

against. The rhythm and direction of their debates, of course, led to their taking hold of the ideas of Montesquieu according to which schemes of power would be divided and separated, checked and balanced, both horizontally and vertically. Against the Federalist arguments in favor of such coordinate and shared “sovereignties,” the Antifederalists persisted in denying that such a thing was possible. The idea of shared sovereignty was “a solecism in politics,” a logical and practical impossibility;<sup>165</sup> sovereignty just meant absolute, separate power over a territory and its people.

This apparent *aporia* James Wilson (later, Justice Wilson) dissolved by *agreeing* that the divisions of power and authority in the proposed scheme of government did not attempt the impossibility of dividing sovereignty. In accord with the Antifederalists, but *pace* Justice Kennedy, Wilson held that sovereignty remained undivided, *residing inviolably in the people themselves*. Confrontation with the English, indeed the Blackstonian concept of sovereignty led the prevailing American theorists, thanks to Wilson, to relocate it in the people-at-large. In Gordon Wood’s description:

It was left to James Wilson in the Pennsylvania Ratifying Convention to deal most effectively with the Antifederalist conception of sovereignty. More boldly and more fully than anyone else, Wilson developed the argument that would eventually become the basis of all Federalist thinking. He challenged the Antifederalists’ use of the concept of sovereignty not by attempting to divide it or to deny it, but by doing what the Americans had done to the English in 1774, by turning it against its proponents.<sup>166</sup>

“‘The supreme power,’ said Wilson, ‘is in them; and in them, even when a constitution is formed, and government is in operation, the supreme power still remains.’”<sup>167</sup> He continued: “‘A portion of their authority they, indeed, delegate; but they delegate that portion in whatever manner, in whatever measure, for whatever time, to whatever persons, and on whatever conditions they choose to fix.’”<sup>168</sup>

---

<sup>165</sup> *Id.* at 528.

<sup>166</sup> *Id.* at 530.

<sup>167</sup> *Id.* at 599 (quoting James Wilson, Comparison of the Constitution of the United States, with that of Great Britain, in *THE WORKS OF JAMES WILSON* 309, 317 (Robert Green McCloskey ed., 1967)).

<sup>168</sup> *Id.* at 599–600.

V. MAKING METAPHYSICAL SENSE OF SOVEREIGNTY, DIGNITY, AND SOVEREIGN DIGNITY—AND OURSELVES

And so we come back to the present, perhaps better informed of what people, including Justices of the Supreme Court, might be talking about and claiming when they impute “sovereignty,” and, thus, better prepared to answer our question about whether “we” should grant the current Court’s claims on behalf of sovereignty. The now leading ground the Court offers in justification of the immunity to suit it finds in the states, we should be clear, concerns their sovereignty and its concomitant dignity. Arguments of the fiscal sort have abated (though of course the fisc cannot but remain a powerful force in the background). Professor Meltzer captures some of the current situation in his summary of the rationale of *Alden*:

The Court did not, in fact, seek to justify its decision in *Alden* with a careful analysis of the relationship of the new immunity it recognized to the purposes of constitutional federalism. Instead, the Court’s normative defense of state sovereign immunity rested on two somewhat more abstract notions: the dignity of states and the sovereignty of states.<sup>169</sup>

I say that Meltzer captures “some” but not all of the current situation because it is less than clear that the Court’s claims are, as Meltzer claims, exclusively “normative.”

The Court’s claims, I suggested at the start, should strike us, while they still can, as bizarre. Part of what needs untangling, if we are to make sense of what the Court is claiming with these appeals that are “somewhat evanescent,”<sup>170</sup> is whether the Court is making descriptive claims or normative claims. The language favored by the Court, of which we have quoted many examples, seems rather clearly to postulate that the States simply *are*, in virtue of their *given* nature, sovereign. To what has already been quoted one can add *inter alia* the language of Chief Justice Rehnquist in the *Seminole* case and Justice Thomas in the *Maritime* case: their arguments proceed from what “‘is inherent in the nature of sovereignty,’” the internally quoted phrase being Hamilton’s in *Federalist No. 81*.<sup>171</sup> The normative element in the Court’s current campaign is to bring us along to treating the states as they, *in virtue of their inherent nature*, ought to be treated.

---

<sup>169</sup> Meltzer, *supra* note 43, at 1038.

<sup>170</sup> *Id.* at 1039.

<sup>171</sup> *Seminole Tribe v. Florida*, 517 U.S. 44, 54 (1996) (quoting THE FEDERALIST NO. 81 (Alexander Hamilton)); *Fed. Mar. Comm’n v. S.C. State Ports Auth.*, 535 U.S. 743, 752 (2002) (quoting THE FEDERALIST NO. 81 (Alexander Hamilton)).

There is an unmistakable mismatch between these ontologically thick claims, as to the inherent nature of the fifty states, and a Court that is, across the ideological spectrum, increasingly abstemious in its ontological inventory. Although the quote from *Planned Parenthood of Southeastern Pennsylvania v. Casey* which I included in the beginning<sup>172</sup> is, admittedly, the limit case of the Court's anti-metaphysical leanness, it is continuous with much else that the Court is doing. The conservative wing of the Court, after all, prefers a version of legal positivism ("textualism") to a legal process porously informed and disciplined by the (ontologically thick) natural law. The Court's exception to its metaphysical leanness for metaphysical abundance on behalf of "sovereignty" and "sovereign dignity" cries out for explanation and justification. How can it be that, individuals do not have inherent natures, but states do?

In light of this exotic possibility, I want now to ask what happens if we take the court at its "sovereign dignity" word. Metaphysics isn't necessarily all bad. What comes, then, if we try to unpack these metaphysically thick claims? Can we, *do we*, find persuasive the Court's claims? Do our—do your—ontological inventories bear them out?

Before answering, I should anticipate an objection. As mentioned, the members of the Court who were in the majority in the cases generating the "sovereign dignity" jurisprudence are, in varying degrees, the proponents on the Court of that technique of construction called textualism, a version of legal positivism according to which legal texts are to be given effect according to what "meaning" they would have elicited in an ordinary, reasonable reader at the time of their enactment.<sup>173</sup> Although the Justices loyal to the "conventional" approach descending from *Hans* used to make text-based arguments on behalf of the conventional view and their expansions of it, increasingly the text is eclipsed by those meta-textual "postulates which limit and control"<sup>174</sup> or, by historical-cum-metaphysical claims of the sort advanced by Justice Thomas in *Northern Insurance*: "A consequence of this Court's recognition of preratification sovereignty . . . ."<sup>175</sup>

Not only is constitutional text not supportive of, it is also not what is driving the majority's affirmations of the states' sovereign dignity. Something other than the text is leading the charge. If, then, *per impossible* God mandated "textualism" as the mode of that document's construction, the Court's meta-textual arguments would be *ultra vires* and beside the point. But exactly because textualism is, *pace* the textualists, necessarily

---

172 See *supra* text accompanying note 69.

173 See, e.g., ANTONIN SCALIA, A MATTER OF INTERPRETATION 23–25 (1997).

174 *Principality of Monaco v. Mississippi*, 292 U.S. 313, 322 (1934).

175 *N. Ins. Co. v. Chatham County*, 126 S. Ct. 1689, 1693 (2006).

just one among many competing legitimate theories of interpretation of our Constitution, the majority's embrace of non-textual elements, even metaphysically baroque ones, cannot be ruled out of court *a priori*. Though these claims might render the textualists liable to the charge of hypocrisy (that compliment, as La Rochefoucauld observes, "vice pays to virtue"<sup>176</sup>), still these elements must be listened to, tested, proved or disproved. Claims about the world, including about states and those who create them, are always subject to testing.

Therefore, what are we to make of these claims—not as issues of textual meaning but as claims about the world and about ourselves? Some among us might reply "nothing." Playing the materialist, though, makes nonsense of everything at the same time, both sovereign dignity and all the rest of the non-empirical meaning and value by which and on which we live. We need to be careful, lest unwittingly we remove and reduce ourselves to a world of only sticks and stones.<sup>177</sup> Daniel Farber approaches (or reaches) such a leaden world when he trivializes or dismisses "sovereignty" on the ground that it "lacks any physical existence."<sup>178</sup> Never mind that much that matters most is not "physical"—or have you touched love and been bruised by hatred? It is an aggressive pulverization that limits the real to what springs from dust.

The challenge to separate metaphysically rich claims that are (probably) true from those that are not, including those that concern what is not "physical," is at an apex in our legal undertakings, in which the very physical reality that is coercion always lurks. As Joseph Vining and Steven Smith have been pointing out in a series of articles and books, our legal practice as a whole has been conspicuously resistant to giving up metaphysical claims that the typical modern "educated" mindset, bent on the physical, is poised to deny.<sup>179</sup> To pick just one example, two-thirds of

---

176 FRANÇOIS LA ROCHEFOUCAULD, *MAXIMS* 43 (Stuart D. Warner and Stéphane Douard, trans., 2001).

177 See Brennan, *Meaning's Edge*, *supra* note 74, at 2068.

178 DANIEL FARBER, *LINCOLN'S CONSTITUTION* 33 (2003). Farber's immediate referent is "popular sovereignty," but on his ontological inventory, there is no reason to think that any other possible sort of "sovereignty" would fare better. Farber opines that the dispute over sovereignty "is reminiscent of medieval disputes about the nature of the Trinity. It is not in any real sense a question of fact or even one of law." *Id.* at 29. One can be grateful to learn, from a book concerned with something as terrestrial as the U.S. Constitution and costing just \$27.50 (plus tax), the priceless and lofty truth that there is no matter of fact about the Trinity.

179 See, e.g., SMITH, *supra* note 63; JOSEPH VINING, *THE AUTHORITATIVE AND THE AUTHORITARIAN* (1986) [hereinafter *VINING, AUTHORITATIVE*]; VINING, *supra* note 75; JOSEPH VINING, *THE SONG SPARROW AND THE CHILD* (2004) [hereinafter *VINING, SONG SPARROW*]; Smith, *supra* note 62; Vining, *supra* note 24; Joseph Vining, *Legal Affinities*, 23 GA. L. REV. 1035 (1989).

a century after *Erie Railroad Co. v. Tompkins*<sup>180</sup> overruled *Swift v. Tyson*,<sup>181</sup> mainstream legal practice and discourse still regard decided cases not as “the law” but rather as “evidence” of what the law is; this commitment to the law’s preexisting what we say it is, is borne out in the Court’s increasingly extensive insistence on retroactive application of decisions.<sup>182</sup> Some jurists do not talk this way at all; others credit such talk to the bad faith of the cartel. But the pertinent point Vining and Smith have pursued is that the persistence of this talk, more than a century after Holmes did his acidic best, suggests that there is more than nonsense in our workaday jurisprudential commitments, even though these commitments embrace a world that lacks spatial coordinates. What J.L. Mackie would have regarded as “metaphysically queer” entities may turn out to be our legal staff of life.<sup>183</sup>

But what, specifically, of sovereignty, dignity, and sovereign dignity? If we imagine or stipulate that the real is limited to what we can see and touch and taste, then they are at best, all of them, nothing but verbal nonsense—constructs that obscure reality and purport to fulfill our wishes for what we are not entitled to. Reacting against what he refers to as the Court’s “metaphysics of sovereignty,” H. Jefferson Powell commends Holmes’s counsel against such arrogations: “We must think things not words, or at least we must constantly translate our words into the facts for which they stand, if we are to keep to the real and the true.”<sup>184</sup> No one, I suppose, can be opposed to keeping to the real and the true; the trick, however, is not peremptorily to adjudge what does not rise to the level of thingness or Farber’s physicality to be unreal and untrue. Neither sovereignty nor dignity is a “thing” or a physical presence, but might either or both be real? What are “the facts” to which these abstract nouns refer?

The past half-century’s international declarations of human rights teem with assertions that all humans have “dignity” and consequent (or correlative) natural rights to humane treatment. The world to whom those declarations are declared continues to perpetrate and tolerate gross treatment of human persons; frequently, indeed, the “sovereignty” of nation states is invoked, and not always unsuccessfully, to justify blocking so-called humanitarian intervention.<sup>185</sup> Does the volume of unchecked atrocity against our fellow humans mean that we silently or whisperingly

---

180 304 U.S. 64 (1938).

181 41 U.S. (16 Pet.) 1 (1842).

182 See SMITH, *supra* note 63, at 61–62.

183 J.L. MACKIE, *ETHICS* 38–42 (1977).

184 H. JEFFERSON POWELL, *A COMMUNITY BUILT ON WORDS* 35 (2002) (quoting Oliver Wendell Holmes, Jr.).

185 See FERNANDO R. TESON, *A PHILOSOPHY OF INTERNATIONAL LAW* 39–47, 57–66 (1998).

conclude that dignity and natural rights are legal fictions? I would venture that, if pressed, most of “us” would insist, in one idiom or another, that attribution of dignity and natural rights to humans springs from our discovery of transcendent value in human personhood as such, value of a sort that precludes the commodification of the person. Yes, in law as elsewhere there operate tendencies, to which we all succumb from time to time, to imagine that dignity is the illusion and mechanistic determinism (which determines us to imagine dignity) the reality. Dignity is impossible to see and, at least sometimes, hard to believe (in). But, as Joseph Vining has brought out so beautifully, again in *The Song Sparrow and the Child*,<sup>186</sup> when we try to dissolve or resolve the loved one or even the enemy into his constituent parts, when we imagine that what we face in those eyes of love or hate is exactly the consequence of “‘a world that consists entirely of physical particles in fields of force,’”<sup>187</sup> we have lost something real. Indeed, we have lost the person, the value, the dignified—or vilified—one.<sup>188</sup> No one but a fool vilifies a rock; no mere system of physical particles vilifies.

Now, even assuming what on-duty materialists will deny, to wit, that humans have dignity even though no one can point you toward it or touch it, can any such thing be said of a state? Before an answer is possible, some distinctions must be made. I have been proceeding—because our question concerning the United States Supreme Court on the states’ sovereign immunity has to this point allowed it—as if we are largely agreed about what a “state” is, the only question at issue being whether such “entities” enjoy sovereignty, dignity, and sovereign dignity. But “state” is not a univocal term. As it emerged in the modern context shaped by Machiavelli, Bodin, Hobbes, and their successors, frequently it refers to a territorially bounded people that is under a self-contained government or just to the self-contained leadership over that territorially bounded people.<sup>189</sup> It was “State” understood in something like these terms that led to the conundrum of whether “the several States”<sup>190</sup> could form a national government without losing their identity as “State[s].”<sup>191</sup>

Understood in another sense, “state” refers to the “special agency endowed with uppermost power, for the sake of justice and law”<sup>192</sup> as concerns a particular body politic. By “body politic” I mean the whole of a

---

186 VINING, *SONG SPARROW*, *supra* note 179.

187 *Id.* at 114 (quoting JOHN R. SEARLE, *THE REDISCOVERY OF THE MIND* 86–87 (1994)).

188 *See id. passim.*

189 *See* MARITAIN, *supra* note 72, at 12–19.

190 U.S. CONST. art. I, § 2, cl. 1.

191 MARITAIN, *supra* note 72, at 17 (explaining the absolutist notion that the State “is a whole unto itself, *the* very political whole in its supreme degree of unity and individuality”).

192 *Id.* at 23.

distinct people united in relations of justice (and commingled with aspirations to the same). Of this whole the state is the topmost part; it is not a separate power. It is a web of institutions and energy joined to the whole and serving the interests of that whole.<sup>193</sup> As to this latter sense of state, that is, the instrument of government of a given body politic, called into existence for the common and individual goods of the body politic, the answer is obvious enough: it is bureaucracy, without necessarily all negative connotations the word now bears in this post-Weberian world.

If there be dignity in this arrangement, it belongs to the whole body politic inasmuch as it has organized itself into a unity structured, thanks in part to this top-most bureaucracy, in relations of justice. Jacques Maritain saw this, that the state and the body politic must earn their dignity. After summarizing all the temptations to irresponsibility that a state must resist, Maritain concludes:

Then only will the highest functions of the State—to ensure the law and facilitate the free development of the body politic—be restored, and the sense of the State be regained by its citizens. Then only will the State achieve its true dignity, which comes not from power and prestige, but from the exercise of justice.<sup>194</sup>

Trouble emerges (and predictably) when the topmost leadership of that discrete people purports to emerge as separate from and above the people, a moral person with its own rights (and privileges!), a license to ignore claims of justice. Immunizing the “sovereign” from claims of justice is no way to earn dignity.

The question of the dignity of a state can be approached from another angle. In recent years, the Supreme Court has acknowledged that “state action” can cause “expressive harms.”<sup>195</sup> According to Richard Pildes, “an expressive harm is one that results from the ideas or attitudes expressed through a governmental action rather than from the more tangible or material consequences the action brings about.”<sup>196</sup> The Court’s explicit cognizing of “expressive harms” has concerned citizens injured by states, but some scholars have now suggested that the Court’s solicitude for the dignitary interests of the fifty states is an attempt to prevent the infliction on them of expressive harms.<sup>197</sup> How would this work? In the former context, the Court was seeking to protect, say, members of racial

---

193 *See id.* at 9–12.

194 *Id.* at 19.

195 Richard H. Pildes, *Why Rights Are Not Trumps: Social Meanings, Expressive Harms, and Constitutionalism*, 27 J. LEGAL STUD. 725, 747–50, 755–60 (1998).

196 *Id.* at 725, 755.

197 *See, e.g.,* Evan Caminker, *Judicial Solicitude for State Dignity*, 574 ANNALS AM. ACAD. POL. & SOC. SCI. 81 (2001).

minorities from feeling disrespected by their government's use of race in line-drawing, or members of religious minorities from feeling alienated by their government's privileging and endorsing dominant religions.<sup>198</sup>

In the current context, whom might the Court be protecting? One might be tempted to say that the Court cannot possibly be protecting the states, because states, unlike citizens, do not have feelings. One commentator has complained of "anthropomorphization of states [that] simply reflects a category mistake."<sup>199</sup> To be sure, if the Court is heard to say—and sometimes it does seem to come pretty close to saying—that the states *qua* states feel things, then so much worse for the Court (and those who believe what it says). But perhaps there is more here than meets the eye, since it is worth considering that states can be made worse off—that is, harmed or injured—without their being able to know as much.

Consider first, by way of analogy, the Boy Scouts of America, or a religious congregation. If people begin to speak of either group as a haven for pedophiles and other predators, its capacity to succeed in its corporate mission is reduced as people who (might) interact with the Scouts or the congregation internalize negative associations with those groups. Neither the Scouts nor the congregation as such is, strictly speaking, sentient or intelligent, but both societies, the Scouts and the congregation, is harmed by people's reduced understanding of them. Who wants to associate himself with a group described as a refuge of abusers?

Returning from these groups to the fifty states, we can ask whether they are invulnerable to reduced appreciation of their nature and stature. Would not the states as such be worse off if the Supreme Court in its opinions began regularly modifying the word "states" with the little word "mere?" On the correct assumption that people actually hear and internalize some of what the current Court writes, the affirmative answer is obvious enough. But does a state's being subjected to unconsented suit by a private party work a similar harm? The Court says that it does, but ordinary human beings do not lose their dignity, or have it compromised, when they respond to reasonable judicial process. Rape is one thing; just summonses and procedure, another. What do states lose by complying with such a process? Potentially, something from their treasury; but again, the Court has denied that fiscal prophylaxis is a or the primary justification for (sovereign) immunity to suit.<sup>200</sup> Perhaps the states would risk losing the status (or appearance) of indifferent inviolability? Sure enough, but as we learn in the Hebrew Scripture, even God—who, after all, is sovereign if anyone be—allowed Abraham to press (and press again) the question of

---

198 Pildes, *supra* note 195, at 747–50.

199 Caminker, *supra* note 197, at 85.

200 Fed. Mar. Comm'n v. S.C. State Ports Auth., 535 U.S. 743, 765 (2002).

justice with respect to sparing any just men who might be found in Sodom.<sup>201</sup> God does end up ending the city, of course, but first God listened (and listened again) to the call of justice.<sup>202</sup> Was God demeaned in so doing?

God can take care of Himself, we might reasonably conclude; but states, like the Boy Scouts and religious congregations, need help if they are to be healthy. This is indeed true, both as to the whole body-politic and as to its top-most part with delegated responsibility for governing. The Supreme Court, for its part, seems to be doing what it can to reinvigorate the states. The non-commandeering cases, such as *New York v. United States*<sup>203</sup> and *Printz v. United States*,<sup>204</sup> are doing just that, of course, and so, too, are the cases that, by imputing sovereign dignity to the states, bid us understand them—and thus ourselves, for we are not separate from our states—in richer and deeper terms. The goal of understanding bodies-politic and their government in terms worthy of their importance is hard to quarrel with.

However, in its “expressive harm” jurisprudence, the Court is, as a descriptive matter and a normative matter both, inculcating the judgment that the states are entities that enjoy dignitary interests that both do and should *trump* citizens’ dignitary interests.<sup>205</sup> Caminker offers this diagnosis of a problem:

[A]ccording to the Court’s phraseology, it is precisely *because* private persons are deemed beneath the states in station that suits by the former constitute an “indignity” to the latter. . . .

. . . One therefore cannot easily confine the sovereign immunity doctrine to making a statement about the proper relationship between Congress and the states; it necessarily makes a statement about the relationship between people and the states as well, and here the expression seems squarely antithetical to the presupposed by popular sovereignty.<sup>206</sup>

Assuming that popular sovereignty is our baseline, Caminker objects that claims about other sovereignties and their greater dignities are unsustainable because they are inconsistent with our baseline political self-understanding.<sup>207</sup>

---

201 See Walter Brueggemann, *The Endless Task of Interpretation*, 53 MERCER L. REV. 1019, 1025–26 (2002).

202 *Id.* at 1025.

203 505 U.S. 144 (1992).

204 521 U.S. 898 (1997).

205 Caminker, *supra* note 197, at 84–87.

206 *Id.* at 87.

207 Cf. Judith Resnik & Julie Chi-hye Suk, *Adding Insult to Injury: Questioning the Role*

To this I would offer two, related replies. The first is that it is a familiar though not unchallenged doctrine of much political theory that the good of people as a whole, the common good of the body-politic, is prior to the good(s) of the individuals it serves. Though this idea about “the priority of the common good” is often and correctly associated with pre-liberal political theory, the mere fact of individuals’ inevitable dependence (if they are to survive and flourish) on relationships and institutions larger than themselves militates in favor of acknowledging the ineliminable priority of the body-politic and its proper institutions. Without involvement in relations of justice and the benefit of good government, individuals are destined to exploitation and unnecessary collision with impossibility. Even a perfectly virtuous people would need government authoritatively to determine on which side of the road individuals are to drive. Though I cannot develop the point further here, I would just suggest that Caminker would be quite off-base in supposing that the worthy tools of self-government of persons possessed of dignity do not possess at least an equal dignity.

The second prong of my reply to Caminker’s diagnosis concerns the suggestion that “we the people” are *sovereign*, which brings us back to the question of who the “we” are that is asked by the Supreme Court to assent to claims of sovereignty.

#### VI. SUBJECTS, SOVEREIGNTY, AND SELF-GOVERNMENT

No one disputes that the terms “sovereign” and “sovereignty” are absent from our Constitution. Justice Wilson was right.<sup>208</sup> Nor can anyone deny that Justice Wilson was correct that the colonial rhetoricians sometimes described and thought of themselves and their co-travelers as “sovereign” (whether as a whole, or as constituted colony by colony, state by state, does not matter for present purposes). And the colonists did so, as observed above, in order to wrest power from the Crown. But as both the Declaration of Independence and the Preamble to the Constitution signal, theirs was not a contest of power for power’s sake. They spoke the language of sovereignty in order to best the enemy on its own turf; they did not, when it came time to construct their own instruments of government, reintroduce elements or vestiges of sovereignty, though there is no denying that their understandable failure to shelve the word altogether in their debates, including in the influential propaganda *The Federalist Papers* (especially No. 81), gives today’s would-be absolutizers linguistic

---

*of Dignity in Conceptions of Sovereignty*, 55 STAN. L. REV. 1921, 1927–28 (2003) (considering the contextual value of “role dignity” assigned to groups, including states).

<sup>208</sup> *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419, 454–55 (1793) (Wilson, J.).

fragments to deploy in distraction from clear talk and healthy debate about self-government and justice.<sup>209</sup>

We observed that the pre-Hobbesian users of sovereignty's Latin counterparts frequently had benign ends in mind. When today we use the English words "sovereign" and "sovereignty," however, when today we use them as the Supreme Court does and bids us do, can we but verge on falsehood? It was Maritain's judgment that "[t]he two concepts of Sovereignty and Absolutism have been forged together on the same anvil. They must be scrapped together."<sup>210</sup> Maritain wrote these words in the aftermath of the Second World War, nearly half a century before much of Europe would again see states and their governments bottomed in justice and open to human dignity. No one can think that our American government, whatever its shortcomings, approaches the evils embodied in government that Maritain knew and opposed. Also, however lazy the American people's habits of citizenship have become, we remain a people who conceive of our government as of ourselves, by ourselves, and for ourselves; and we do in fact have the last word on what we shall do with ourselves, in the sense that no higher norms will impose themselves upon our intelligence like a seal upon hot wax. Still, I want to insist that when talking about the people and their power and responsibility of self-government, Maritain is right that "[t]he point is that the term needed is not Sovereignty."<sup>211</sup> It is possible for us to use the term in comparatively benign ways, but, unless we reduce it to idiolect, it cannot help but risk to mislead.

If this seems paranoid, or at least unduly scrupulous, recall that part of what we are doing in law is to create community through language and meaning. At the end of the day, law *can* concern coercion, a fact that to some minds makes approaching law from the angle of language and meaning appear naïve or co-opted. But inasmuch as we recognize that coercion does lurk behind claims made "in the name of the law," is not the exigence of language doing its work—of persuasion and justification, and of creating the meaning of what we are doing—at an apex? As Bernard Lonergan mused wryly, "Is everyone to use force against everyone to convince everyone that force is beside the point?"<sup>212</sup> Force and violence frequently take the form of the bludgeon; other times they cloak themselves in the bullying argument, the conversational strategy that substitutes stipulated obviousness for the opportunity for persuasion that might (or

---

209 Cf. NOONAN, *supra* note 60, at 80–84, 138–40 (discussing the different meanings of the term "sovereignty" used by the Founders and in contemporary society).

210 MARITAIN, *supra* note 72, at 53.

211 *Id.* at 49.

212 BERNARD LONERGAN, *INSIGHT* 632 (1978).

might not) lead to conviction. In a chapter titled, “Meaning What You Say,” J.B. White has illustrated the social violence, intellectual and personal, done by judicial opinions, and other writings “in the name of the law,” that trade on the disingenuous.<sup>213</sup> In the present context, we might be alert to clichés, false confidence, oversimplification, and grandiloquence that whips up castles in the sky.

Talk of sovereignty inevitably imports specters of absolute and separate power. Does your ontological inventory include persons, or separate units, or collectivities possessed of absolute (or near-absolute?) and separate power? Alternatively or concomitantly, are “we the people” godlike in our control over ourselves and our destiny? Are we not bound by the natural law? Though it awaits our free embrace, the natural law, with the natural rights it imports, binds us whether we acknowledge it or not. (We flout it at our peril, but that’s another story). A true sovereign is not bound.

Sovereignty is one case, you may say. Perhaps, by contrast, your ontological inventory *does* include dignity. But as a property of the state, that part of the body politic by which we govern ourselves? If this were to be plausibly true, first we would have to affirm and give effect to the dignity of human persons; only then would we be in position coherently to appreciate the dignity of our creations. Even so, false sacralization of the tools of self-government creates idols that can abuse. In particular, (unless rigorously qualified) talk of dignity inhering in the contingent instruments of self-government detracts from the hard-won dignity of bodies-politic, of those whose dignity it is both to create and discipline those instruments.

Should we not conclude that with its ontologically aggressive claims in terms of “sovereign dignity” the Court is trying to justify *controversialius*, the controversial by the more controversial? With respect to dignity, the Court is asking us to affirm the tools of our creation what it finds hard or impossible to affirm with respect to ourselves. And with respect to sovereignty, is not the Court purporting to colonize what is not its or ours to claim? *Pace* Maritain, there *are* benign uses of the word sovereignty, and of a related dignity analogically understood.<sup>214</sup> But it would be a stretch, I submit, to conclude that the Court’s claims of sovereignty, dignity, and sovereign dignity are good for us, our self-understanding, and our political whither. Daniel Farber objects that the Court calls for “veneration” of the states as a matter of “faith.”<sup>215</sup>

---

<sup>213</sup> James Boyd White, *Meaning What You Say*, in *LAW IN THE LIBERAL ARTS* 109, 127–33 (Austin Sarat ed., 2004).

<sup>214</sup> See *supra* text accompanying notes 210–11.

<sup>215</sup> Daniel A. Farber, *Pledging a New Allegiance: An Essay on Sovereignty and the New Federalism*, 75 *NOTRE DAME L. REV.* 1133, 1144 (2000) (“In the end, the Court seems left

Overreaction is no help. It is enough to say that the Court has exaggerated, in distorted and untenable ways, the states in relation to their creators.

The Rehnquist Court has averred, per Justice Kennedy in *Alden*, that the states “retain the dignity, though not the full authority, of sovereignty.”<sup>216</sup> *Authority* is an appealing alternative focus, need, and aspiration of a self-governing people. The Rehnquist Court, fixed as it was on sovereignty as such, did not explain what constitutes political *authority*.<sup>217</sup> I would suggest that a focus on what gives rise to—and what undercuts—genuine political and legal authority would redirect the jurisprudence of (sovereign) immunity to its proper concerns rooted in justice and the rule of law.

To all this we should add that, with respect to the Court’s honorable wish to implement the Constitution’s distributions of power (call it “federalism,” if you like), neither sovereignty nor dignity, nor even the Eleventh Amendment particularly, is helpful, let alone necessary. If the Court is working to ensure the vitality of the states as distinct centers of government, if ours is not to be one national government in fifty-some departments, what the states need is real governing work to do and a measure of autonomy in which to do it.<sup>218</sup> This, the Court *should* be after; at the very least, the text of the Tenth Amendment calls for such an arrangement. That text, not the bloated and bloating notions of sovereignty and dignity we have been considering, nor imprecise notions of devolution and subsidiarity that are alien to our particular constitutional structure and tradition should serve as the Court’s principal guides in this area.

I observed at the beginning that lawyers are always turning to texts, and just now I commended the text of the Tenth Amendment to the Court. But what of the Eleventh Amendment? Unless and until it is amended, the Court should give effect to it according to its terms, which are

---

only with its faith in the innate sovereign dignity of state governments. This veneration of state governments—rather than history, precedent, or policy—is the mainstay of the New Federalism. The inherent dignity of state governments is not an intuitive truth for all of us. But apparently it is an intuitive matter—more than that, a matter of faith—for five Justices.”).

<sup>216</sup> *Alden v. Maine*, 527 U.S. 706, 715 (1999).

<sup>217</sup> On authority, rather than sovereignty, as an aim and necessary condition of just law and politics, see Brennan, *Locating Authority*, *supra* note 74.

<sup>218</sup> See Ernest A. Young, *The Rehnquist Court’s Two Federalisms*, 83 TEX. L. REV. 1, 13–15 (2004) (arguing for state “autonomy” instead of state “sovereignty”); see also Andrzej Rapaczynski, *From Sovereignty to Process: The Jurisprudence of Federalism After Garcia*, 1985 SUP. CT. REV. 341, 400 (“[T]he model of participatory government, which goes back as far as Aristotle, views political activity not as instrumental toward achieving a proportionate share in the distribution of available resources, to be used in a variety of private pursuits, but rather as a good in itself, something essentially implicated in the very concept of human freedom.”).

jurisdictional. This would require overruling *Hans* and its progeny, something there is, I suggest, more than ample reason to do.<sup>219</sup> But saying this, I do not by misadventure commend to the Court a naïve textualism. The Court's conservatives' willingness to look beyond text to the principles that control—to unwritten law, we might call it—has common sense, not to mention our long constitutional tradition, to recommend it; it's just most unfortunate that the five took the implausible cause of sovereignty as the one in which to try applying the best methods of our legal tradition. Cultures in crisis, as ours is, sometimes try to make of their exemplary written texts fortresses of paper; the inadequacy of parchment barriers inevitably pokes through, but not always successfully. People engaged in intelligent and disciplined self-government create texts as aids to such self-government, not as substitutes for the same. What is written down is not the law, it is what those who have office to say what the law is turn to when called upon to speak the law to a world that is being created. The temptation to sovereignize the partial, if succumbed to, leads to empty but poisonous idols. Joseph Vining writes:

There is doubtless a terrible tension in what both lawyers and theologians do, given what tools and methods are put at their disposal for doing it. The tension is the tension, indeed terror of responsibility in the face of the unknown and not the certainly knowable. Lawyers and theologians reach for the sovereign, look to the sovereign, speak for the sovereign, something or someone to pay serious attention to, or, to use the liturgical term, to praise. They turn to texts. But the texts to which they turn are selected and are old, necessarily from the past, requiring translation over time and between languages and places, year to year, decade to decade.<sup>220</sup>

In an earlier work, Vining explained:

Talk of rights and rules of a static kind, projecting an image of law standing off by itself, obscures the focus that legal rules have in fact, always a decision that must be made, at the edge of lives that have not been lived before, in a world that has not been seen before.<sup>221</sup>

But all of this depends—does it not?—on *who* “we” are. If we or some of us were mere objects, we or they would make a suitable field for

---

<sup>219</sup> See also *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 77–78 (1938) (suggesting “injustice,” “confusion” and “unconstitutionality” as justifications for overruling established court doctrine); cf. Suzanna Sherry, *The Eleventh Amendment and Stare Decisis: Overruling Hans v. Louisiana*, 57 U. CHI. L. REV. 1260, 1271 (1990) (“[D]epartures from stare decisis are justified either where changed circumstances have so undermined the prior case as to deprive it of its legitimacy, or where later cases have revealed glaring inconsistencies in the law.”).

<sup>220</sup> Vining, *supra* note 179, at 1050.

<sup>221</sup> VINING, *AUTHORITATIVE*, *supra* note 179, at 218.

manipulation by pseudo sovereigns and petit potentates emboldened and licensed by would-be mortal gods, using the sovereign rules of a sovereign reigning over a sovereign state. My analysis from the beginning to this point has assumed that we, all of us, are not mere objects, but human persons whose job it is, if you will, to implement the natural law. Yes, we can misbehave and behave aimlessly, but it is our very dignity to be able as intelligent persons, unlike brute beasts and inanimate objects, to say about what we choose and pursue that it is good, good for us and those who are the same as we in being human. It is good for us to develop our human capacities, and for this, order and the government that can arrange it are necessary. Our rational subjectivity thus requires us to commit to creation of and participation in institutions of self-government and relations of justice. No instrument of self-government we create will be perfect, so we will need to be committed to its monitoring and improvement. Sometimes government will become so bad that we will be obligated to throw it off by revolution; but otherwise, notwithstanding its imperfections, our duty will be to sustain and improve it, voting bums out of office when we can.<sup>222</sup> We ourselves, perhaps through representatives but not through something from beyond us, must govern.<sup>223</sup>

To state or national sovereignty Justice Wilson counter-posed the sovereignty of the people; but, though closer to the truth, even Justice Wilson's view seems, to me, to work a corrupting influence on our self-understanding. If sovereignty is an absolute and separate power, "obviously the power and independence of the people are not supreme *separately from and above the people themselves*. Of the people as well as of the body politic," Maritain continues, "we have to say, not that they are sovereign, but that they have a natural right to *full autonomy*, or to self-government."<sup>224</sup> But this "natural right" is not the end of it.

Judge Noonan, in his study of America's experiment in religious liberty, concluded that for the wars of religion and principled violation of conscience, America has found, in its commitment of Free Exercise, a "sovereign remedy."<sup>225</sup> That remedy is sovereign because it allows us human subjects to meet our indefeasible duty to inform conscience and

---

222 See STONER, *supra* note 138, at 36 ("Instead of saying that obedience is mandated only in that regime whose laws conform to a universal standard of goodness, [Lord Coke's view] makes obedience to a particular government the first instance of a man's obedience to law.").

223 For an account that brings together, in a way consistent with the argument advanced here, the elements of sovereignty, authority, democracy, and law, see YVES R. SIMON, *PHILOSOPHY OF DEMOCRATIC GOVERNMENT* 144–94 (1993).

224 MARITAIN, *supra* note 72, at 25.

225 See JOHN T. NOONAN, JR., *THE LUSTRE OF OUR COUNTRY* 2 (1998).

freely follow the will of the sovereign God.<sup>226</sup> The question is broader than religion and its free exercise, however. We must resist the Court's and others' claims on behalf of false sovereigns, not because we ourselves are individual sovereigns or because together we constitute a corporate sovereign, but because, with respect to seeking and instantiating the good, personal and common both, we operate under an obligation that is nothing short of sovereign. The natural law that gives birth to this right of ours to self-government is itself our intelligent participation as human subjects in the Eternal Law, the mind of the sovereign God sweetly disposing all things to their proper ends.

I understand that what I have just said about *who we are* presupposes metaphysical claims that are excluded by many people's ontological inventories. However, in proceeding from the sovereignty of God, I am at least, I submit, on firmer (and higher?) ground than if I were to proceed, as the Supreme Court does, from the sovereign dignity of, say, the State of Idaho.

One can hope that Chief Justice Roberts and Justice Alito—practicing Catholics, both of them—will agree, for the common good of all.<sup>227</sup>

---

226 See *id.* at 2, 68; see also Patrick McKinley Brennan, *Free Exercise! Following Conscience, Developing Doctrine, and Opening Politics*, 74 NOTRE DAME L. REV. 933 (1999) (reviewing NOONAN, *supra* note 225).

227 Catholic social thought of the last hundred years has been concerned to deny or limit claims of sovereignty; the Catholic model is one of plural social authorities in healthy competition with one another under a state limited by and guided by the principle of subsidiarity (as understood in the papal encyclicals), (e.g., family, churches, schools, etc.). See Russell Hittinger, *Social Pluralism and Subsidiarity in Catholic Social Doctrine*, 7 PROVIDENCE 52, 54 (2002).