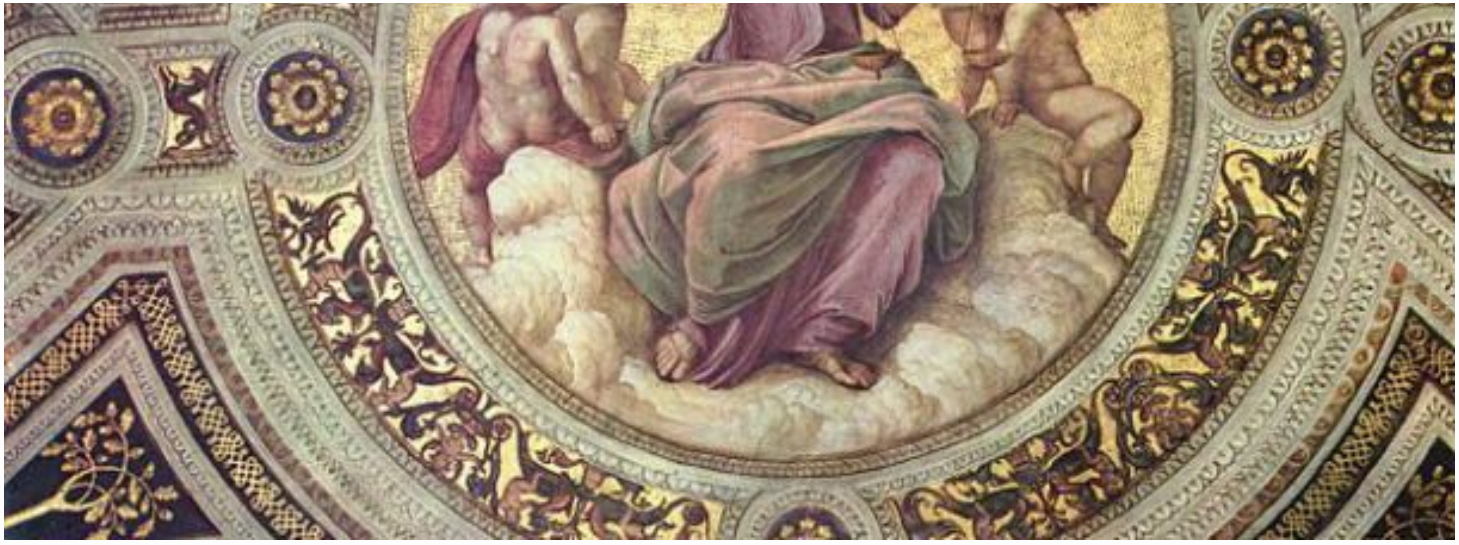
Nomocracy in Politics

Liberty, Prudence, Imperfection, and Law

“The Immunity Community,” By Allen Mendenhall

By jodinomocracy, January 24, 2015



Raphael's Lady Justice from the Stanza della Segnatura, Vatican City

The doctrine of sovereign immunity derives from the English notion that "the king can do no wrong" and hence cannot be sued without his consent. The purpose of this doctrine was, in England, from at least the Middle Ages until eighteenth century, to bar certain lawsuits against the monarch and his or her ministers and servants. With the rise of the English Parliament after the death of Elizabeth I, government officers and politicians sought to gain the power of immunity that the monarch and his or her agents had enjoyed.

In practice, however, English subjects were not totally deprived of remedies against the monarch or the government. The doctrine of sovereign immunity was not an absolute prohibition on actions against the crown or against other branches of government;[1] subjects could avail themselves of petitions of right or writs of mandamus, for instance, and monarchs fearful

of losing the support of the people would often consent to be sued.

It was not until the monarchy had been demonstrably weakened that the doctrine of sovereign immunity began to be espoused with added urgency and enforced with added zeal. In the late eighteenth century, Sir William Blackstone intoned in his *Commentaries on the Laws of England* that the king "is not only incapable of *doing* wrong, but ever of *thinking* wrong: he can never mean to do an improper thing: in him is no folly of weakness." These lines convert sovereign *immunity* into sovereign *infallibility*, a more ominous yet more dubious pretension.

Once the monarchy had been abolished altogether, the idea that the sovereign had to consent to be sued no longer held credence. As Louis L. Jaffe explains, "Because the King had been abolished, the courts concluded that where in the past the procedure had been by petition of right there was now no one authorized to consent to suit! If there was any successor to the King qua sovereign it was the legislature," which, having many members subject to differing constituencies, was not as accountable as the monarch had been to the parties seeking to sue.[2]

The principle of sovereign immunity carried over from England to the United States, where most states have enshrined in their constitution an absolute bar against suing the State or its agencies and officers whose actions fall within the scope of official duties. The Eleventh Amendment to the US Constitution likewise states that "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." This provision, which applies only in federal courts and which does not on its face prohibit a lawsuit against a state by a citizen of that same state, was adopted in response to the ruling in *Chisholm v. Georgia* (1793), a case that held sovereign immunity to have been abrogated and that vested in federal courts the authority to preside over disputes between private citizens and state governments.

Notwithstanding the complex issues of federalism at play in the *Chisholm* decision and in the Eleventh Amendment, the fact remains that the doctrine of sovereign immunity has been applied with widening scope and frequency since the states ratified the Eleventh Amendment in 1795. The US Supreme Court has contributed to the doctrine's flourishing. "The Supreme Court's acceptance of sovereign immunity as constitutional principle," explains one commentator, "depends on its determination of the intent of the Framers, which ignores a great deal of historical evidence from the time of the founding and relies primarily on a discredited account of the Eleventh Amendment first articulated in the 1890 case of *Hans v. Louisiana*."[3]

State and federal courts have now built an impregnable wall of immunity around certain state and federal officers. The sovereign immunity that is enshrined in state constitutions is, in theory, not absolute because it is

conferred only to certain agents and officers and does not prohibit lawsuits to enjoin such agents and officers from performing unconstitutional or other bad acts. In practice, however, the growth of qualified immunities, which is in keeping with the growth of government itself, has caused more and more agents of the State to cloak themselves in immunity.

Bus drivers, teachers, coroners, constables, high school coaches, doctors and nurses at university hospitals, security guards, justices of the peace, government attorneys, legislators, mayors, boards of education and health, university administrators, Indian reservations, prison guards and wardens, police officers and detectives, janitors in government facilities, licensing boards, tax assessors, librarians, railroad workers, government engineers, judges and justices, school superintendents and principals, towing companies, health inspectors, probation officers, game wardens, museum docents and curators, social workers, court clerks, dog catchers, contractors for public utilities, public notaries, tollbooth attendants, airport traffic controllers, park rangers, ambulance drivers, firefighters, telephone operators, bus drivers, subway workers, city council members, state auditors, agricultural commissioners—all have sought to establish for themselves, with mixed degrees of success, the legal invincibility that comes with being an arm of the state.

Yet the idea that “the king can do no wrong” makes no sense in a governmental system that has lacked a king from its inception. Its

application as law has left ordinary citizens with limited recourse against governments (or against people claiming governmental status for the purpose of immunity) that have committed actual wrongs. When the government, even at the state level, consists of vast bureaucracies of the kind that exist today, the doctrine of sovereign immunity becomes absurd. If it is true that in nine states and in the District of Columbia the government employs more than 20% of all workers, imagine how many people are eligible to claim immunity from liability for their tortious conduct and bad acts committed on the job.

Local news reports are full of stories about government employees invoking the doctrine of sovereign immunity; few such stories find their way into the national media. Judge Wade McCree of Michigan, for instance, recently carried out an affair with a woman who was a party in a child-support case on his docket, having sexual intercourse with her in his chambers and "sexting" her even on the day she appeared as a witness in his courtroom. Although McCree was removed from office, he was immune from civil liability. An airport in Charleston, West Virginia, is invoking the doctrine of immunity to shield itself from claims that it contributed to a chemical spill that contaminated the water supply. Officer Darren Wilson may be entitled to immunity for the shooting of Michael Brown, depending on how the facts unfold in that investigation.

The US Supreme Court once famously declared that the doctrine of

sovereign immunity "has never been discussed or the reasons for it given, but it has always been treated as an established doctrine."[4] A disestablishment is now in order. The size and scope of government is simply too massive on the state and national level to sustain this doctrine that undermines the widely held belief of the American Founders that State power must be limited and that the State itself must be held accountable for its wrongs. Friedrich Hayek pointed out that the ideal of the rule of law requires the government to "act under the same law" and to "be limited in the same manner as any private person."[5] The doctrine of sovereign immunity stands in contradistinction to this ideal: it places an increasing number of individuals above the law.

If the law is to be meaningful and just, it must apply equally to all persons and must bind those who enforce it. It must not recognize and condone privileges bestowed upon those with government connections or incentivize bad behavior within government ranks. Sovereign immunity is a problem that will only worsen if it is not addressed soon. The king *can* do wrong, and so can modern governments. It's time for these governments to be held accountable for the harms they produce and to stop hiding behind a fiction that was long ago discredited.

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Endnotes:

[1] See generally, Louis L. Jaffe, "Suits Against Governments and Officers: Sovereign Immunity," 77 Harvard Law Review 1 (1963).

[2] Jaffe at 2.

[3] Susan Randall, "Sovereign Immunity and the Uses of History," 81 Nebraska L. Rev. 1, 4 (2002-03).

[4] US v. Lee, 106 US 196, 207 (1882).

[5] F. A. Hayek, *The Constitution of Liberty*, Vol. 17 of *The Collected Works of F.A. Hayek*, ed. Ronald Hamowy (Routlege, 2011), p. 318.

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