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DIGNITY: THE NEW FRONTIER OF STATE SOVEREIGNTY

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I. Introduction

Few constitutional doctrines have had as turbulent a history as state sovereign immunity.¹ Sovereign immunity, the right of a sovereign to refuse to appear as a defendant in court,² has been described at various times as an assumed part of civilized nations,³ a common law doctrine that Congress may abrogate,⁴ a constitutional doctrine grounded in the Eleventh Amendment,⁵ and a constitutional doctrine inhering in the structure of the original Constitution.⁶ The U.S. Supreme Court's decisions on sovereign immunity have been overruled by subsequent decisions⁷ and by constitutional

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1. See Scott Dodson, *Vectoral Federalism*, 20 GA. ST. U. L. REV. 393, 393-95 & 395 n.8 (2003) (citing authorities calling the doctrine "erratic" and "protean") [hereinafter Dodson, *Vectoral Federalism*]; Scott Dodson, *The Metes and Bounds of State Sovereign Immunity*, 29 HASTINGS CONST. L.Q. 721, 723 (2002) (characterizing it as a "bizarre quagmire") [hereinafter Dodson, *Metes and Bounds*].

2. See *Hans v. Louisiana*, 134 U.S. 1, 13 (1890).

3. See *Beers v. Arkansas*, 61 U.S. (20 How.) 527, 529 (1857) ("It is an established principle of jurisprudence in all civilized nations that the sovereign cannot be sued in its own courts, or in any other, without its consent and permission . . .").

4. See *Pennsylvania v. Union Gas Co.*, 491 U.S. 1, 17-23 (1989), *overruled by Seminole Tribe v. Florida*, 517 U.S. 44 (1996).

5. See *Seminole Tribe v. Florida*, 517 U.S. 44, 54 (1996).

6. See *Alden v. Maine*, 527 U.S. 706 (1999).

7. *Union Gas Co.*, 491 U.S. 1, *overruled by Seminole Tribe*, 517 U.S. 44.

amendment.⁸ There can be no gainsaying that the doctrine has lacked stability and coherence.

Perhaps because of this instability the Court has, until recently, avoided a full explanation of the reason for immunizing states from certain suits.⁹ But in the 2002 decision *Federal Maritime Commission v. South Carolina State Ports Authority*,¹⁰ Justice Thomas, joined by Chief Justice Rehnquist and Justices Scalia, Kennedy, and O'Connor, made explicit what the Court had only suggested in previous decisions:¹¹

The preeminent purpose of state sovereign immunity is to accord States the dignity that is consistent with their status as sovereign entities. "The founding generation thought it 'neither becoming nor convenient that the several States of the Union, invested with that large residuum of sovereignty which had not been delegated to the United States, should be summoned as defendants to answer the complaints of private persons.'"¹²

Though this forceful pronouncement has clarity, a sorely needed attribute for this particular doctrine, the dignity rationale itself lacks substantial justification and is untethered to any limiting principles save those locked inside the minds of five Justices. Given that, where does this "dignity rationale" for state sovereign immunity logically lead? How far might it be expanded? Does dignity help unify or confound a more coherent view of state sovereign immunity? Will its sudden acceptance in the sovereign immunity jurisprudence lead to application in other state sovereignty doctrines? This Article hazards answers to these and other questions.

8. The Eleventh Amendment overruled *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419 (1793).

9. See *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 257 (1985) (Brennan, J., dissenting) (stating that "the doctrine lacks . . . a clear rationale"); *United States v. Lee*, 106 U.S. 196, 207 (1882) (asserting that "the principle has never been discussed or the reasons for it given, but it has always been treated as an established doctrine").

10. 535 U.S. 743 (2002).

11. See *infra* Part II.E.

12. *Fed. Mar. Comm'n*, 535 U.S. at 760 (quoting *Alden v. Maine*, 527 U.S. 706, 748 (1989)) (citation omitted); *accord id.* at 752 (explaining that the sovereign states "did not consent to become mere appendages of the Federal Government"); *id.* at 760 ("Simply put, if the Framers thought it an impermissible affront to a State's dignity to be required to answer the complaints of private parties in federal courts, we cannot imagine that they would have found it acceptable to compel a State to do exactly the same thing before the administrative tribunal of an agency, such as the FMC. . . . The affront to a State's dignity does not lessen when an adjudication takes place in an administrative tribunal as opposed to an Article III court. In both instances, a State is required to defend itself in an adversarial proceeding against a private party before an impartial federal officer.") (citations omitted).

The Court's intensifying focus on dignity before *Federal Maritime* had not gone unnoticed.¹³ Commentators have explored where the Court unearthed the idea of state dignity,¹⁴ why the Court is employing it,¹⁵ and, if it is to be used, what form it should take.¹⁶ This Article concerns not so much the where, why, or how of the dignity rationale,¹⁷ but rather *what effects* that rationale has on existing doctrine. As demonstrated below, those effects are monumental: for better or for worse, the dignity rationale not only changes the state sovereign immunity landscape, but also has widespread implications for the revival of state regulatory immunity and support for the anticommandeering doctrine.

Part II of this Article surveys the development of the dignity rationale in state sovereign immunity jurisprudence and concludes that the dignity rationale lacks solid grounding principles. Part III analyzes what effects the sudden acceptance of the dignity rationale may have on state sovereign immunity and reasons that the dignity rationale's abdication of textual faithfulness has at least the potential for a flexibility beneficial to doctrinal coherence. Finally, Part IV takes a preliminary look at the future of state sovereignty doctrines as informed by the adoption of the dignity rationale and predicts that these related doctrines may be profoundly affected by the dignity rationale.

13. See, e.g., Ann Althouse, *On Dignity and Deference: The Supreme Court's New Federalism*, 68 U. CIN. L. REV. 245 (2000); Evan H. Caminker, *Judicial Solicitude for State Dignity*, 574 ANNALS AM. ACAD. POL. & SOC. SCI. 81 (2001) [hereinafter Caminker, *Judicial Solicitude*]; Daniel A. Farber, *Pledging a New Allegiance: An Essay on Sovereignty and the New Federalism*, 75 NOTRE DAME L. REV. 1133 (2000); Judith Resnik & Julie Chi-hye Suk, *Adding Insult to Injury: Questioning the Role of Dignity in Conceptions of Sovereignty*, 55 STAN. L. REV. 1921 (2003); Suzanna Sherry, *States Are People Too*, 75 NOTRE DAME L. REV. 1121 (2000); Peter J. Smith, *States as Nations: Dignity in Cross-Doctrinal Perspective*, 89 VA. L. REV. 1 (2003).

14. See Smith, *supra* note 13, at 6-7 (arguing that the Court's invocation of dignity demonstrates the Court's importation of foreign sovereign immunity principles into state sovereign immunity doctrine).

15. See Caminker, *Judicial Solicitude*, *supra* note 13, at 83 (suggesting that the notion might be merely "rhetorical window dressing"); *id.* at 84-91 (suggesting that dignity might be an intrinsic or instrumental expressive norm).

16. See Resnik & Suk, *supra* note 13, at 1954-55 (suggesting that sovereign dignity has a role in institutional structure, but not as a source for civil immunity).

17. As Professor Smith admits, the "where" or "why" questions may be quite difficult to answer. See Smith, *supra* note 13, at 32 (asserting that "the Court's current view of the origins of the doctrine of state sovereign immunity . . . is . . . generally ambivalent and cryptically expressed"); *id.* at 77-78 ("It is, of course, impossible to know precisely what the Court intends when it relies on the concept of state dignity in the state sovereign immunity cases.").

II. Development of the Dignity Rationale

Although only recently assuming a predominant stature, dignity has played a role in sovereign immunity throughout its history. This Part recounts the development of the dignity rationale.

A. Origins

Some have suggested that, in logical terms, the availability of sovereign immunity depends on at least two factors: the source of law and the forum. The absolute font of the law cannot logically be compelled by the law against his will, so the argument goes, for as creator, his refusal to abide by the law creates a legal exception for himself.¹⁸ Likewise, if the font of justice refuses to be sued in his own courts, regardless of the source of the substantive law, he creates an exception from suit for himself in that particular forum.¹⁹

Others have suggested that sovereign immunity may be justified by normative considerations focusing on the nature of the parties and the remedy sought. Sovereign immunity might be desirable, for example, to free a ruler from the nuisances of litigation or to protect his dignity as a sovereign.²⁰ Unlike the logical rationales, the practical justifications are subject to far more malleable standards.

18. See *Kawananakoa v. Polyblank*, 205 U.S. 349, 353 (1907) ("A sovereign is exempt from suit, not because of any formal conception or obsolete theory, but on the logical and practical ground that there can be no legal right as against the authority that makes the law on which the right depends."); THOMAS HOBBES, *LEVIATHAN* 184 (Richard Tuck ed., Cambridge University Press 1991) (1651) ("The Sovereign of a Common-wealth, be it an Assembly or one Man, is not Subject to the Civil Lawes. For having power to make, and repeal Lawes, he may when he pleaseth, free himselfe from that subjection, by repealing those Lawes that trouble him, and making of new; and consequently he was free before."). But see *Seminole Tribe v. Florida*, 517 U.S. 44, 97-98 (1996) (Stevens, J., dissenting) (criticizing this logic).

19. See *Nevada v. Hall*, 440 U.S. 410, 415 (1979).

20. See *United States v. Lee*, 106 U.S. 196, 226 (1882) (Gray, J., dissenting) (defending sovereign immunity for the United States as "essential to the common defence and general welfare"); *Briggs v. Light-Boats*, 93 Mass. (11 Allen) 157, 162 (1865) ("[T]he broader reason is, that it would be inconsistent with the very idea of supreme executive power, and would endanger the performance of the public duties of the sovereign, to subject him to repeated suits as a matter of right, at the will of any citizen, and to submit to the judicial tribunals the control and disposition of his public property, his instruments and means of carrying on the government in war and peace, and the money in his treasury.").

In Britain,²¹ because the king was supreme, sovereign immunity derived foremost from the two logical justifications. As the font of the law, the king could do no wrong,²² and, as the highest authority of justice, he could not be ordered by the courts against his will.²³ Lower governmental bodies and officers were not entitled to the same immunity.²⁴

When he so chose, the king found room to temper his immunity. Under the Saxons, the king opened his court to all plaintiffs to pursue various remedial writs, even against the king himself.²⁵ In cases of suits on a debt owed by the crown, the subject could not sue but could petition for redress.²⁶ Although the

21. It is unnecessary to review the ancient history of sovereign immunity, which has its origins in medieval times. See CLYDE E. JACOBS, ELEVENTH AMENDMENT AND SOVEREIGN IMMUNITY 5 (1972) ("At least as early as the thirteenth century, during the reign of Henry III (1216-1272), it was recognized that the king could not be sued in his own courts."); Louis Jaffe, *Suits Against Governments and Officers: Sovereign Immunity*, 77 HARV. L. REV. 1, 2 (1963) ("By the time of Bracton (1268) it was settled doctrine that the King could not be sued *eo nomine* in his own courts.").

22. See 1 WILLIAM BLACKSTONE, COMMENTARIES *244-*46. It has been argued that this axiom originally meant that the sovereign was *not permitted* to do wrong, rather than was not held accountable for acts otherwise deemed wrongful. See David E. Engdahl, *Immunity and Accountability for Positive Governmental Wrongs*, 44 U. COLO. L. REV. 1, 3 (1972); Jaffe, *supra* note 21, at 4. Others have suggested that the phrase meant that the wrongful acts of the crown would be attributed to the king's subordinates and not to the king. See Carlos Manuel Vázquez, *Eleventh Amendment Schizophrenia*, 75 NOTRE DAME L. REV. 859, 866 (2000). Still others have reconciled it with the petition of right mentioned below. See John J. Gibbons, *The Eleventh Amendment and State Sovereign Immunity: A Reinterpretation*, 83 COLUM. L. REV. 1889, 1896 (1983) ("Thus, the true meaning of the English expression 'the king can do no wrong' was that the king would do no wrong, for if he did, the petition of right would set wrongs right.").

23. See *Seminole Tribe*, 517 U.S. at 103 (Souter, J., dissenting) ("[T]he King or Crown, as the font of justice, is not subject to suit in its own courts."); *Hall*, 440 U.S. at 414-15 (explaining sovereign immunity on the basis that no tribunal could be higher than the King); 1 BLACKSTONE, *supra* note 22, *241-*42 ("[T]he law ascribes to the king the attribute of sovereignty, or pre-eminence. . . . Hence it is, that no suit or action can be brought against the king, even in civil matters, because no court can have jurisdiction over him. For all jurisdiction implies superiority of power . . .").

24. See Gibbons, *supra* note 22, at 1895-97; Jaffe, *supra* note 21, at 1.

25. See *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419, 460 (1793); *Banker's Case*, 14 Howell's State Trials 1 (1700); Jaffe, *supra* note 21, at 2-5.

26. See *Chisholm*, 2 U.S. (2 Dall.) at 440 (Iredell, J., dissenting) ("[I]n cases of debts owing by the crown, the subject's remedy was by Petition . . ."); *id.* at 445 (Iredell, J., dissenting) ("Thus, it appears, that in England even in case of a private debt contracted by the King, in his own person, there is no remedy but by petition, which must receive his express sanction, otherwise there can be no proceeding upon it.").

crown's submission to the petition was a matter of grace,²⁷ the crown, for practical reasons, rarely refused a valid petition.²⁸

There lingered, however, a concern for sovereign dignity outside of the logical justifications.²⁹ According to Blackstone,

[I]t is necessary to distinguish the prince from his subjects The law therefore ascribes to the king . . . certain attributes of a great and transcendent nature; by which the people are led to consider him in the light of a superior being, and to pay him that awful respect, which may enable him with greater ease to carry on the business of government. This is what I understand by the royal dignity³⁰

The form of the petition of right, a petition that the king could deny at whim (in theory, if not in practice), conveyed somewhat more respect and deference to the sovereign than a compulsory lawsuit in court.³¹ Under British rule, then, sovereign dignity played only the role of undercurrent, certainly not the primary consideration the Supreme Court has adopted for the American states.

B. Independence and the Articles of Confederation

The colonists rejected the underlying principles of the logical justifications when they declared their independence. The Declaration of Independence

27. See 1 BLACKSTONE, *supra* note 22, at *243 (“[I]f any person has, in point of property, a just demand upon the king, he must petition him in his court of chancery, where his chancellor will administer right as a matter of grace, though not upon compulsion.”); see also 3 *id.* at *256-*57.

28. See *United States v. Lee*, 106 U.S. 196, 205 (1882) (noting that the petition of right “has been as efficient in securing the rights of suitors against the crown in all cases appropriate to judicial proceedings, as that which the law affords to the subjects of the King in legal controversies among themselves”); *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803) (“In Great Britain the king himself is sued in the respectful form of a petition, and he never fails to comply with the judgment of his court.”); *Chisholm*, 2 U.S. (2 Dall.) at 460 (“True it is, that now in England the King must be sued in his Courts by Petition; but even now, the difference is only in the form, not in the thing. The judgments or decrees of those Courts will substantially be the same upon a precatory as upon a mandatory process.”); *Gibbons*, *supra* note 22, at 1896 (“[B]y the eighteenth century, the petition of right, the writ by which suit could be brought against the monarch, was entertained routinely, and thus had become for all practical purposes nondiscretionary.”).

29. See *Seminole Tribe v. Florida*, 517 U.S. 44, 96 (1996) (Stevens, J., dissenting) (opining that in England “it might have been unseemly to allow a commoner to hale the monarch into court”).

30. 1 BLACKSTONE, *supra* note 22, at *241.

31. See *Chisholm*, 2 U.S. (2 Dall.) at 452 (“When sovereigns are sued in their own Courts, such a method [as the petition] may have been established as the most respectful form of demand”).

itself denied the absolute sovereignty of the government and placed the legitimate exercise of government power in the "consent of the governed."³² Independence undermined the logical justifications for sovereign immunity in the new states.³³

What logic does not require, tradition may support, and despite their break from British rule, the colonists returned to British models when they considered the genesis of American government.³⁴ They did not adopt the British traditions wholesale, however,³⁵ so it is important to look at the transition from British rule to independence critically. Under British notions of sovereign immunity, only the king was protected, not his subjects or the local charters.³⁶ As expected, those charters that mentioned suits against the colonial governors or corporate bodies permitted suits by private individuals.³⁷

32. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

33. See *Clinton v. Jones*, 520 U.S. 681, 697 n.24 (1997) ("Although we have adopted the related doctrine of sovereign immunity, the common-law fiction that [the King can do no wrong] was rejected at the birth of the Republic.") (citation omitted).

34. *United States v. Lee*, 106 U.S. 196, 205 (1882) (surmising that the doctrine "is derived from the laws and practices of our English ancestors").

35. See, e.g., *Van Ness v. Pacard*, 27 U.S. (2 Pet.) 137, 144 (1829) ("The common law of England is not to be taken in all respects to be that of America. Our ancestors brought with them its general principles, and claimed it as their birthright; but they brought with them and adopted only that portion which was applicable to their situation."); Akhil Reed Amar, *Foreword: The Document and the Doctrine, The Supreme Court 1999 Term*, 114 HARV. L. REV. 26, 115 (2000) (explaining that the Framers broke with English tradition in a variety of ways, including English understanding of sovereignty).

36. See *supra* text accompanying note 24.

37. The first Massachusetts Charter established an executive council that could be sued in "all Manner of Courts and Places that now are, or hereafter shall be, within this our Realme and elsewhere, as well temporal as spiritual, in all Manner of Suits and Matters whatsoever, and of what Nature or Kinde soever such Suite or Action be or shall be." THE CHARTER OF NEW ENGLAND (1620), reprinted in 5 SOURCES AND DOCUMENTS OF UNITED STATES CONSTITUTIONS 16, 19 (William F. Swindler ed., 1975) [hereinafter SOURCES]. The First Charter of Massachusetts Bay, Connecticut's Charter of 1662, the Rhode Island Charter of 1663, and Georgia's Charter of 1732 followed with similar authorizations of suits against their Governors and corporate bodies. See CHARTER OF MASSACHUSETTS BAY (1629), reprinted in 5 SOURCES, *supra*, at 32, 36; CHARTER OF 1662, reprinted in 2 SOURCES, *supra*, at 131; CHARTER OF RHODE ISLAND AND PROVIDENCE PLANTATIONS (1663), reprinted in 8 SOURCES, *supra*, at 362, 363; CHARTER OF 1732, reprinted in 2 SOURCES, *supra*, at 433, 434. New Hampshire's Charter of 1689 provided jurisdiction over suits between parties "or between us and any of our subjects there." CUTT'S COMMISSION, reprinted in 6 SOURCES, *supra*, at 321, 324. The charters of Virginia, New York, Maryland, and Pennsylvania were silent with respect to suits against officials or corporate bodies. See CHARTER OF 1606, reprinted in 10 SOURCES, *supra*, at 17; CHARTER OF JUNE 20, 1632, reprinted in 4 SOURCES, *supra*, at 350; CHARTER OF 1681, reprinted in 8 SOURCES, *supra*, at 243; DUKE OF YORK'S CHARTER (1683), reprinted in 7 SOURCES, *supra*, at 161.

Independence, however, brought to the states the potential for full sovereignty. The people recalled their sovereignty and granted it to the state legislatures through their new constitutions.³⁸ In the process, the people could have granted their states the same sovereign immunity as provided for the king. They did not.

American leaders were but men, servants of the people and entitled to dignity and respect not from titles or privileges, but from their own inherent worth.³⁹ Accordingly, the first state constitutions exhibited the same tendency for permitting suits against the state as did the British charters. Connecticut and Rhode Island simply adopted their existing charters as state constitutions, each of which permitted state suability.⁴⁰ For those states that did not adopt an express declaration of their own suability, most adopted protective bills of rights, which were designed to ensure governmental accountability to the citizenry and provided that remedies be afforded for injuries.⁴¹

That some states adopted provisions of suability may suggest that the states recognized that they possessed sovereign immunity but voluntarily waived it, much as the king did through the petition of right. The states would have no need to adopt express provisions if they had no immunity in the first place. If that is what happened, however, it certainly contradicts the dignity rationale. Unlike the king's petition of right, which grew out of custom and practical concerns and was designed with the appropriate respect for sovereign dignity, there is no indication that the states adopted similar mechanisms for suability grounded in the same concerns or that fostered the same kind of dignity or respect. Throwing state suits indiscriminately in with the rest of the lawsuits hardly seems founded on concerns for state dignity.

Perhaps more telling than the applicable textual references of the time⁴² was what was brewing in the minds of the recently liberated and prospective rulers of a fledgling nation. The new Americans rejected that last remnant of British kingliness, royal dignity. While "it might have been unseemly to allow a commoner to hale the monarch into court" in Britain, the revolutionaries were building the fundamental principle that the people are more sovereign than the

38. See GORDON S. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC 1776-1787*, at 352-60 (1969).

39. See *id.* at 66-67.

40. See CONSTITUTIONAL ORDINANCE OF 1776, reprinted in 2 SOURCES, *supra* note 37, at 143; *Background Note: Rhode Island Constitutions*, 8 SOURCES, *supra* note 37, at 351-52.

41. See Gibbons, *supra* note 22, at 1898.

42. The Articles of Confederation shed little extra light on the subject of state suability, except to provide that disputes between states and disputes regarding the private ownership of land granted by two different states could be appealed to the national Congress. See ARTICLES OF CONFEDERATION art. 9 (U.S. 1778).

government.⁴³ They feared that where a state assumed a “supercilious preeminence above the people [with] haughty notions of state independence, state sovereignty and state supremacy . . . man is degraded from the prime rank, which he ought to hold in human affairs”⁴⁴ Sovereign dignity was rejected by the radical Whig notions held by the revolutionaries⁴⁵ and became even more antithetical to Americans as they viewed their own state governments with growing suspicion and mistrust.⁴⁶

Although the visionaries of the New World rejected the underpinnings of royal dignity,⁴⁷ sovereign immunity, in some form, persisted. In *Nathan v.*

43. *Seminole Tribe v. Florida*, 517 U.S. 44, 96 (1996) (Stevens, J., dissenting); *accord* *United States v. Lee*, 106 U.S. 196, 208-09 (1882); THE FEDERALIST NO. 22, at 152 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (stating that the people are “that pure, original fountain of all legitimate authority”); THE FEDERALIST NO. 46, at 294 (James Madison) (Clinton Rossiter ed., 1961) (“The federal and State Governments are in fact but different agents and trustees of the people [T]he ultimate authority, wherever the derivative may be found, resides in the people alone”); THE FEDERALIST NO. 49, at 313 (James Madison) (Clinton Rossiter ed., 1961) (“[T]he people are the only legitimate fountain of power”).

44. *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419, 461 (1793).

45. See, e.g., *Alden v. Maine*, 527 U.S. 706, 802 (1999) (Souter, J., dissenting) (“[Royal dignity is] inimical to [republicanism], which rests on the understanding . . . that the government is not above [the people] but of [and subject to] them.”); Caminker, *Judicial Solicitude*, *supra* note 13, at 86-87; Smith, *supra* note 13, at 29.

46. See WOOD, *supra* note 38, at 404-10, 463-65; THE FEDERALIST NO. 15, at 73-74 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (lambasting the states for their foibles, ineptitude, and recalcitrance).

47. See *Lee*, 106 U.S. at 208-09. According to the *Lee* Court,

Notwithstanding the progress which has been made since the days of the Stuarts in stripping the crown of its powers and prerogatives, it remains true to-day that the monarch is looked upon with too much reverence to be subjected to the demands of the law as ordinary persons are, and the king-loving nation would be shocked at the spectacle of their Queen being turned out of her pleasure-garden by a writ of ejectment against the gardener. The crown remains the fountain of honor, and the surroundings which give dignity and majesty to its possessor are cherished and enforced all the more strictly because of the loss of real power in the government.

It is not to be expected, therefore, that the courts will permit their process to disturb the possession of the crown by acting on its officers or agents.

Under our system the *people*, who are there called *subjects*, are the sovereign. Their rights, whether collective or individual, are not bound to give way to a sentiment of loyalty to the person of a monarch. The citizen here knows no person, however near to those in power, or however powerful himself, to whom he need yield the rights which the law secures to him when it is well administered. When he, in one of the courts of competent jurisdiction, has established his right to property, there is no reason why deference to any person, natural or artificial, not even the United States, should prevent him from using the means which the law gives him for the protection and enforcement of that right.

Virginia,⁴⁸ a private individual obtained a writ of attachment against the Commonwealth of Virginia and sued in Pennsylvania state court for enforcement.⁴⁹ The Pennsylvania court dismissed the suit without opinion, but a note appended to the dismissal revealed that

[t]he true ground of this decision is, that a sovereign state is not suable in the municipal courts of another jurisdiction, and a foreign attachment is but a mode of compelling an appearance. Whilst the states have surrendered certain powers to the general government, they have not divested themselves of the attribute of state sovereignty.⁵⁰

With the logical grounds compelling state sovereignty and the royal-dignity ground of British hierarchy rejected, this remaining attachment to sovereign immunity is quite curious. It may have been founded on blind adherence to British tradition, on imported values from the laws of nations,⁵¹ on practical considerations, or on the belief that the citizens of Virginia elected to retain sovereign immunity for their state.⁵² Whatever limited dignity Nathan may represent, if any, it is certainly insufficient to overcome the weight of contemporary evidence rejecting sovereign dignity.

C. State Sovereign Immunity and the Constitution

Although the degree of sovereign immunity that the states enjoyed prior to the Constitution is unclear, ratification of the Constitution fixed sovereign immunity for the states. Determining exactly what the Constitution fixed, however, is a difficult question. The answer starts with Article III of the Constitution, which extends federal "judicial Power" to controversies

Id.

48. 1 U.S. (1 Dall.) 81n.* (Pa. 1781).

49. *Id.* at 81n*.

50. William A. Fletcher, *A Historical Interpretation of the Eleventh Amendment: A Narrow Construction of an Affirmative Grant of Jurisdiction Rather Than a Prohibition Against Jurisdiction*, 35 STAN. L. REV. 1033, 1075 (1983) [hereinafter Fletcher, *Historical Interpretation*].

51. See Caleb Nelson, *Sovereign Immunity as a Doctrine of Personal Jurisdiction*, 115 HARV. L. REV. 1559, 1577-79 (2002); James E. Pfander, *Rethinking the Supreme Court's Original Jurisdiction in State-Party Cases*, 82 CAL. L. REV. 555, 586-87 (1994).

52. *Lee*, 106 U.S. at 206 ("As no person in this government exercises supreme executive power, or performs the public duties of a sovereign, it is difficult to see on what solid foundation of principle the exemption from liability to suit rests. It seems most probable that it has been adopted in our courts as a part of the general doctrine of publicists, that the supreme power in every State, wherever it may reside, shall not be compelled, by process of courts of its own creation, to defend itself from assaults in those courts.").

"between a State and Citizens of another State."⁵³ By its terms, the Diversity Clause does not differentiate between a plaintiff state and a defendant state, lending support to the majority of the founding era luminaries' interpretation of the clause as expressly permitting private suits against consenting states.⁵⁴

State dignity and respect became a battle cry for Article III dissidents. Brutus, a leading Antifederalist, called Article III "improper, because it subjects a state to answer in a court of law, to the suit of an individual. This is humiliating and degrading to a government, and, what I believe, the supreme authority of no state ever submitted to."⁵⁵ The Federal Farmer questioned the propriety of Article III so "humbl[ing] a state, as to bring it to answer to an individual in a court of law."⁵⁶ In Virginia, George Mason maligned the Constitution for enabling

claim[s] against this state [to] be tried before the federal court. Is not this disgraceful? Is this state to be brought to the bar of justice like a delinquent individual? Is the sovereignty of the state to be arraigned like a culprit, or private offender? Will the states undergo this mortification?⁵⁷

State respect and dignity became a tidal wave that only a few radical nationalists stood against.⁵⁸ Some attempted to ameliorate the state

53. U.S. CONST. art. III, § 2, cl. 1. The full text of the Section states:

The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; — to all Cases affecting Ambassadors, other public ministers and Consuls; — to all Cases of admiralty and maritime Jurisdiction; — to Controversies to which the United States shall be a Party; — to Controversies between two or more States; — between a State and Citizens of another State; — between Citizens of different States; — between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

Id.

54. See Dodson, *Metes and Bounds*, *supra* note 1, at 728 n.33 (citing statements).

55. 2 THE COMPLETE ANTI-FEDERALIST 429 (Brutus) (Storing ed., 1981).

56. 14 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 41-42 (Federal Farmer) (John P. Kaminski & Gaspare J. Saladino eds., 1983) [hereinafter DOCUMENTARY HISTORY].

57. 3 JONATHAN ELLIOT, THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 526-27 (George Mason) (2d ed. 1836) [hereinafter ELLIOT'S DEBATES].

58. See *id.* at 207 (Edmund Randolph) ("I admire that part [of the Constitution] which forces Virginia to pay her debts."); 2 *id.* at 491 (James Wilson) ("When a citizen has a controversy with another state, there ought to be a tribunal where both parties may stand on a just and equal footing."). Not all anti-Federalists criticized Article III on dignity grounds.

sentimentalists by asserting that sovereign dignity would exempt states from Article III suits.⁵⁹ Without any apparent resolution to the question of whether notions of state dignity would overcome the text of Article III, the states adopted and ratified the Constitution.

The vehemence with which ratification debaters advocated state dignity supports a reading of the Constitution that, where appropriate, respects state dignity.⁶⁰ One rationale for naming the state first in the Diversity Clause might have been respect for state dignity.⁶¹ Indeed, Article III bestows the Supreme Court with original jurisdiction to hear controversies involving a state or an ambassador⁶² to “match[] the dignity of the parties to the status of the court.”⁶³

Despite the propriety of interpreting the Constitution with a healthy respect for state dignity, its language, structure, and historical record indicate that the push for recognition of state dignity did not succeed in express constitutionalization.⁶⁴ In stark contrast to the Articles of Confederation,⁶⁵ the

Concern for the integrity of vulnerable state treasuries was also an important factor. See Fletcher, *Historical Interpretation*, *supra* note 50, at 1047-48.

59. See, e.g., THE FEDERALIST NO. 39, at 245 (James Madison) (Clinton Rossiter ed., 1961) (asserting that the states retained a “residuary and inviolable sovereignty”); THE FEDERALIST NO. 81, at 487 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (“It is inherent in the nature of sovereignty not to be amenable to the suit of an individual *without its consent*.”).

60. Others have reached similar conclusions. See Resnik & Suk, *supra* note 13, at 1954-55.

61. Though I have found no preratification evidence of this justification for the ordering, Justice John Blair surmised it in his opinion in *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419, 450-51 (1793), in which he opined that “probably the State was first named, in respect to the dignity of a State”).

62. See U.S. CONST. art. III, § 2, cl. 2 (“In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction.”).

63. *California v. Arizona*, 440 U.S. 59, 66 (1979); accord THE FEDERALIST NO. 81, *supra* note 59, at 487 (“In cases in which a State might happen to be a party, it would ill suit its dignity to be turned over to an inferior tribunal.”). Of course, Congress has decided whether this original jurisdiction is exclusive or nonexclusive. See 28 U.S.C. § 1251 (2000) (conferring exclusive original jurisdiction over controversies between two or more states but nonexclusive original jurisdiction over other controversies); cf. *United States v. Texas*, 143 U.S. 621, 643 (1892) (“Such exclusive jurisdiction was given to this court, because it best comported with the dignity of a State, that a case in which it was a party should be determined in the highest, rather than in a subordinate judicial tribunal of the nation.”). For commentary on the Original Jurisdiction Clause’s embodiment of respect for state dignity, see Daniel J. Meltzer, *The History and Structure of Article III*, 138 U. PA. L. REV. 1569, 1598 (1990).

64. The Constitution certainly left intact a “residuary and inviolable” state sovereignty over matters not withheld from them by the Constitution or given to the federal government. THE FEDERALIST NO. 39, *supra* note 59, at 245. “Residuary” effects — that is, what the Constitution did *not* affect — are not the same as affirmative inroads into or defenses to federal power.

65. See *infra* text accompanying notes 90-91.

Constitution does not even mention state “sovereignty,”⁶⁶ the purported source of state dignity, much less state dignity itself.⁶⁷ The very limited nature of federal powers leaves a wide range of sovereign authority for the states, and the Constitution clearly assumes the continued existence of the states as quasi-independent governments.⁶⁸ However, the most that can be inferred from this structure is that the Constitution prohibits any federal intrusion into state affairs that destroys the governmental character of the states.⁶⁹ The Constitution’s implicit recognition of residual and perpetual state sovereignty does not translate to an expansive extratextual limitation on the ability of the federal power to subject the states to its will.

This recognition is not without historical reason, particularly with respect to suits against states. The Framers knew that a crucial failure of the Articles of Confederation was the inability to force the states to abide by national obligations set by Congress for the safety of the nation.⁷⁰ The Treaty of Paris, for example, which ended the war for independence, “imposed two obligations on the British: to evacuate all military posts within American territory, and to leave behind all slaves.”⁷¹ Further, the treaty imposed one principal obligation

66. See Frank B. Cross, *The Folly of Federalism*, 24 CARDOZO L. REV. 1, 3 (2002) (“The Constitution nowhere contains direct language referring to state authority as sovereign in any way.”); Vicki C. Jackson, *Federalism and the Uses and Limits of Law: Printz and Principle?*, 111 HARV. L. REV. 2180, 2215 (1998) (observing that states’ rights do not clearly appear in the Constitution’s text); Jean Yarbrough, *Federalism and Rights in the American Founding*, in *FEDERALISM AND RIGHTS* 57, 64 (Ellis Katz & G. Alan Tarr eds., 1996) (explaining that the Constitution does not empower states with anything “inviolable” and instead constrains state power).

67. Perhaps the soundest affirmative evidence of the rejection of British notions of dignity is the prohibition on titles of nobility. See U.S. CONST. art. I, § 9, cl. 8 (“No Title of Nobility shall be granted by the United States . . .”).

68. See Dodson, *Vectorial Federalism*, *supra* note 1, at 402-04.

69. See *Metcalf & Eddy v. Mitchell*, 269 U.S. 514, 523 (1926) (observing that “neither government may destroy the other nor curtail in any substantial manner the exercise of its powers”); *Texas v. White*, 74 U.S. (7 Wall.) 700, 725 (1868), *overruled in part by Morgan v. United States*, 113 U.S. 476 (1885) (“[T]he preservation of the States, and the maintenance of their governments, are as much within the design and care of the Constitution as the preservation of the Union and the maintenance of the National government. The Constitution, in all its provisions, looks to an indestructible Union, composed of indestructible States [with separate and independent existence.]”); *Lane County v. Oregon*, 74 U.S. (7 Wall.) 71, 77 (1868) (“[T]he people of each State compose a State, having its own government, and endowed with all the functions essential to separate and independent existence. . . . [I]n many articles of the Constitution the necessary existence of the States, and, within their proper spheres, the independent authority of the States, is distinctly recognized.”).

70. See THE FEDERALIST NO. 15, *supra* note 46, at 73-80.

71. *Gibbons*, *supra* note 22, at 1900.

on the United States: to honor all debts owed to British creditors.⁷² The northern states honored their debts for the most part, but the impoverished southern states resisted.⁷³ At the same time, the British manumitted thousands of blacks when evacuating the Atlantic posts and refused to evacuate the northern posts.⁷⁴ The continued recalcitrance of the southern states provided an excuse for the British to maintain the northern posts, a source of embarrassment for the new nation.⁷⁵

It was widely recognized that the stalemate needed a national solution unavailable under the rather toothless Articles.⁷⁶ In the Pennsylvania ratifying convention, James Wilson defended Article III of the Constitution as necessary to enforce the Treaty of Paris against the petulant southern states.⁷⁷ In the New York debates, Alexander Hamilton used the anti-Federalists' ideas against them by arguing that the state violations of the treaty offended the dignity of the United States.⁷⁸ In North Carolina, James Iredell stated that without Article III, Congress could not "compel the observance of treaties that they make."⁷⁹ And in Virginia, Edmund Randolph worried that continued state resistance to treaty obligations would lead to war.⁸⁰ Given this evidence, it is extremely unlikely that respect for state dignity rose to the level of an inherent limitation on Article III suits against states.

Whether these arguments persuaded the states is another matter. One can infer, however, that at least some of the states ratified the Constitution

72. *See id.* at 1901.

73. *See id.*

74. *See id.* at 1900.

75. *See id.* at 1902.

76. *See id.*

77. *See* 2 ELLIOT'S DEBATES, *supra* note 57, at 490 (James Wilson) (stating that Article III would enable enforcement of the Treaty of Paris against the states and "show the world that we make the faith of treaties a constitutional part of the character of the United States; that we secure its performance no longer nominally, for the judges of the United States will be enabled to carry it into effect, let the legislatures of the different states do what they may").

78. *See* THE FEDERALIST NO. 15, *supra* note 46, at 156 ("Are we even in a condition to remonstrate with dignity? The just imputations on our own faith, in respect to the same treaty, ought to be removed.").

79. 4 ELLIOT'S DEBATES, *supra* note 57, at 146 (James Iredell).

80. 3 *id.* at 573 (Edmund Randolph) ("If a government refuses to do justice to individuals, war is the consequence."); *see also* 14 DOCUMENTARY HISTORY, *supra* note 56, at 204 (Timothy Pickering) ("[I]t seems to be a wise provision, which puts it in the power of such foreigners & citizens to resort to a court where they may reasonably expect to obtain *impartial* justice. . . . With respect to *foreigners*, all the states form but *one nation*. This *nation* is responsible for the conduct of all its members towards foreign nations, their citizens & subjects; and therefore ought to possess the power of doing justice to the latter. Without this power, a single state, or one of its citizens, might embroil the whole union in a foreign war.").

believing that state dignity and respect did not exempt them from suits under Article III. Immediately after ratification, New York proposed an amendment to the First Congress, which stated that "nothing in the Constitution now under consideration contained, is to be construed to authorize any suit to be brought against any state, in any manner whatever."⁸¹ Virginia and North Carolina proposed amendments which would have eliminated both diversity and federal question jurisdiction.⁸² Rhode Island proposed an amendment to eliminate state-citizen jurisdiction, specifically suits concerning payment of state-issued public securities.⁸³ Massachusetts proposed an amendment objecting to "the states [being] made subject to the action of an individual."⁸⁴ Had these states believed they were exempt from individual suits under the Constitution, there would have been no reason for them to propose such amendments.

The First Congress did not consider any of these proposals. During the first session, South Carolina Representative Thomas Tudor Tucker proposed an amendment that would have eliminated the Diversity Clause from Article III; however, the amendment was not referred to the House floor.⁸⁵ Instead, Congress enacted the Judiciary Act of 1789, which provided for circuit court jurisdiction over cases in which "an alien is a party"⁸⁶ and gave the Supreme Court exclusive jurisdiction over civil actions "where a state is a party, except between a state and its citizens, and except also between a state and citizens of other states, or aliens, in which latter case it shall have original but not exclusive jurisdiction."⁸⁷

Congress adopted other amendments, however, and one pertains to state sovereign immunity. The Tenth Amendment reserves to the states or the people those "powers not delegated" to the federal government.⁸⁸ Though seemingly an innocuous tautology,⁸⁹ one might still argue that the reservation

81. 2 ELLIOT'S DEBATES, *supra* note 57, at 409.

82. 3 *id.* at 660-61 (Va.); 4 *id.* at 246 (N.C.).

83. William A. Fletcher, *The Diversity Explanation of the Eleventh Amendment: A Reply to Critics*, 56 U. CHI. L. REV. 1261, 1267 & n.28 (1989).

84. Fletcher, *Historical Interpretation*, *supra* note 50, at 1052 (alteration in original).

85. 1 ANNALS OF CONG. 791 (Joseph Gales ed., 1789).

86. Judiciary Act of 1789 § 11, 1 Stat. 73, 78.

87. *Id.* § 13, 1 Stat. at 80.

88. U.S. CONST. amend. X.

89. See *United States v. Darby*, 312 U.S. 100, 124 (1941) ("The amendment states but a truism that all is retained which has not been surrendered. There is nothing in the history of its adoption to suggest that it was more than declaratory of the relationship between the national and state governments as it had been established by the Constitution before the amendment . . ."). But see *EEOC v. Wyoming*, 460 U.S. 226, 270-74 (1983) (Powell, J., dissenting) (arguing that the Framers originally intended the enumerated powers to be constrained by principles of state sovereignty).

of powers is the reservation of *sovereign* powers which necessarily includes attendant rights and attributes of sovereignty, including sovereign dignity.

The history of the Tenth Amendment belies that theory. Its predecessor in the Articles of Confederation clarified that “[e]ach state retains its sovereignty, freedom, and independence, and every power, jurisdiction and right which is not by this confederation expressly delegated to the United States in Congress assembled.”⁹⁰ By contrast, the Tenth Amendment reserves only “powers” to the states (and even then to be shared by the people); state sovereignty, freedom, independence, jurisdiction, and rights failed to make the cut.⁹¹ The Tenth Amendment, therefore, cannot alone support state sovereign immunity or sovereign dignity.⁹²

The historical record suggests that state sovereign dignity was a topic of fervent debate and that it was accepted to some degree. The same record also indicates, however, that such acceptance did not lead to the adoption of an implied constitutional limitation on Article III based on state dignity.

D. Chisholm and the Eleventh Amendment

The controversy surrounding the meaning of state dignity and Article III rose to the Supreme Court quickly. In 1793, the Court decided *Chisholm v. Georgia*,⁹³ an original suit in assumpsit in the Supreme Court under state common law brought by a citizen of South Carolina to recover a debt against the State of Georgia.⁹⁴ The suit clearly fell within the literal language of that section of Article III establishing federal court jurisdiction over controversies between a state and citizens of another state. Nevertheless, Georgia argued that the Court lacked jurisdiction over it as a sovereign state.⁹⁵

Georgia did not deign to send a lawyer to argue its case. Chisholm, however, sent Edmund Randolph, U.S. Attorney General and drafter of Article III, who argued along the same lines he had argued in the ratification debates:

90. ARTICLES OF CONFEDERATION art. 2 (U.S. 1780).

91. U.S. CONST. amend. X (“The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.”).

92. The Justices agree that state sovereign immunity is not rooted in the Tenth Amendment. See *Fed. Mar. Comm’n v. S.C. State Ports Auth.*, 535 U.S. 743, 767 n.18 (2002) (“The principle of state sovereign immunity enshrined in our constitutional framework, however, is not rooted in the Tenth Amendment.”); *Alden v. Maine*, 527 U.S. 706, 761 (1999) (Souter, J., dissenting) (“There is no evidence that the Tenth Amendment constitutionalized a concept of sovereign immunity as inherent in the notion of statehood.”).

93. 2 U.S. (2 Dall.) 419 (1793).

94. *Id.* at 420.

95. See Smith, *supra* note 13, at 52 & n.222.

immunity was contrary to popular sovereignty⁹⁶ and would breed war.⁹⁷ Randolph also stated, in a new (and perhaps necessary) response to the dignity proponents, that a suit in federal court was not a degradation of sovereignty because the federal government was of a higher authority than the state.⁹⁸

The Court agreed with Randolph. Justice Blair, looking to the Constitution's text, inferred its acceptance of state sovereign dignity,⁹⁹ but rejected the notion that dignity limited the plain language of Article III.¹⁰⁰ He also noted that the Constitution's purpose was to unify the nation, and immunity from foreign plaintiffs would, by permitting a state to "withhold[] justice," enable it "to embroil the whole confederacy in disputes of another nature."¹⁰¹ Blair concluded that states gave up immunity to suits in federal courts by ratifying the Constitution.¹⁰²

Justice Wilson attacked the underlying principles supporting British sovereign immunity. The king could not be sued because he was the supreme power, and submission to jurisdiction implies inferiority.¹⁰³ In America,

96. *Chisholm*, 2 U.S. (2 Dall.) at 422-23.

97. *Id.* at 423-24 ("If a State shall injure an individual of another State, the latter must protect him by a remonstrance. What if this be ineffectual? To stop there would cancel his allegiance; one State cannot sue another for such a cause; acquiescence is not to be believed. The crest of war is next raised; the Federal head cannot remain unmoved amidst these shocks to the public harmony. Ought then a necessity to be created for drawing out the general force on an occasion to replete with horror? Is not an adjustment by a judicial form far preferable? Are not peace and concord among the States two of the great ends of the Constitution?").

98. *See id.* at 425 ("I hold it, therefore, to be no degradation of sovereignty, in the States, to submit to the Supreme Judiciary of the United States. At the same time, by way of anticipating an objection, I assert, that it will not follow, from these premises, that the United States themselves may be sued. For the head of a confederacy is not within the reach of the judicial authorities of its inferior members. It is exempted by its peculiar pre-eminencies.").

99. *See id.* at 450-51 (opining that "probably the State was first named [in the Diversity Clause], in respect to the dignity of a State"); *id.* at 453 (suggesting that entering default judgment against a state would be "too incompatible with the dignity of a State").

100. *See id.* ("But that very dignity seems to have been thought a sufficient reason for confining the sense to the case where a State is plaintiff. It is, however, a sufficient answer to say, that our Constitution most certainly contemplates, in another branch [sic] of the cases enumerated, the maintaining a jurisdiction against a State, as Defendant; this is unequivocally asserted when the judicial power of the United States is extended to controversies between two or more States; for there, a State must, of necessity, be a Defendant. It is extended also, to controversies between a State and foreign States . . .").

101. *Id.* at 451.

102. *See id.* at 452 ("[I]f sovereignty be an exemption from suit in any other than the sovereign's own Courts, it follows that when a State, by adopting the Constitution, has agreed to be amenable to the judicial power of the United States, she has, in that respect, given up her right of sovereignty.").

103. *See id.* at 458.

however, the people are supreme.¹⁰⁴ Though “certainly respectable,”¹⁰⁵ the states are inferior to their citizens;¹⁰⁶ thus, granting a state immunity from private suit would actually insult the superior party.¹⁰⁷

Justice Cushing stuck closely to the Constitution, noting that if state sovereignty was the source for immunity from suit, then the clause authorizing jurisdiction over suits between states was anomalous.¹⁰⁸ Cushing also grounded his conclusion on practical concerns of union stability and fairness.¹⁰⁹ Regarding the concerns that suit would diminish sovereignty, Cushing responded that the Constitution diminishes state sovereignty in numerous ways.¹¹⁰

104. *See id.* at 457 (“[T]he Supreme Power resides in the body of the people.”).

105. *Id.* at 453.

106. *See id.* at 455 (“A State; useful and valuable as the contrivance is, is the inferior contrivance of man; and from his native dignity derives all its acquired importance.”).

107. *See id.* at 456 (“A State, like a merchant, makes a contract. A dishonest State, like a dishonest merchant, wilfully refuses to discharge it: The latter is amenable to a Court of Justice: Upon general principles of right, shall the former when summoned to answer the fair demands of its creditor, be permitted, proteus-like, to assume a new appearance, and to insult him and justice, be declaring I am a Sovereign State? Surely not.”).

108. *See id.* at 467 (“It may be suggested that [Article III] could not be intended to subject a State to be a Defendant, because it would effect the sovereignty of States. If that be the case, what shall we do with the immediate preceding clause; ‘controversies between two or more States,’ where a State must of necessity be Defendant? . . . For if the judicial power extends to a controversy between one of the United States and a foreign State, as the clause expresses, one of them must be Defendant. And then, what becomes of the sovereignty of States as far as suing affects it?”).

109. *See id.* at 467-68 (“One design of the general Government was . . . with safety, by the States separately. Incident to these powers, and for preventing controversies between foreign powers or citizens from rising to extremities and to an appeal to the sword, a national tribunal was necessary, amicably to decide them, and thus ward off such fatal, public calamity. . . . As controversies between State and State, and between a State and citizens of another State, might tend gradually to involve States in war and bloodshed, a disinterested civil tribunal was intended to be instituted to decide such controversies, and preserve peace and friendship. Further; if a State is entitled to Justice in the Federal Court, against a citizen of another State, why not such citizen against the State, when the same language equally comprehends both? The rights of individuals and the justice due to them, are as dear and precious as those of States. Indeed the latter are founded upon the former; and the great end and object of them must be to secure and support the rights of individuals, or else vain is Government.”); *id.* at 469 (“As to reasons for citizens suing a different State, which do not hold equally good for suing the United States; one may be, that as controversies between a State and citizens of another State, might have a tendency to involve both States in contest, and perhaps in war, a common umpire to decide such controversies, may have a tendency to prevent the mischief.”).

110. *See id.* at 468.

Justice Jay, like Wilson, acknowledged the primacy of sovereignty in the people, rather than in the states,¹¹¹ in distinction from Britain.¹¹² Jay also reasoned that the clear jurisdiction over state-state suits implied that no indignity obtained to the status of defendant.¹¹³ Jurisdiction was also fair because if one state could sue citizens of another state, those citizens should be able to sue back.¹¹⁴

Justice James Iredell dissented on statutory grounds. He conceded that Congress could subject the states to suit by statute if it wished to do so;¹¹⁵ however, he concluded that Congress had not chosen to do so with the Judiciary Act,¹¹⁶ the jurisdictional statute implementing Article III and limiting

111. *See id.* at 470-71.

112. *See id.* at 471 ("That [English] system contemplates [the King] as being the fountain of honor and authority; and from his grace and grant derives all franchises, immunities and privileges; it is easy to perceive that such a sovereign could not be amenable to a Court of Justice, or subjected to judicial controul and actual constraint. It was of necessity, therefore, that suability became incompatible with such sovereignty. Besides, the Prince having all the Executive powers, the judgment of the Courts would, in fact, be only monitory, not mandatory to him No such ideas obtain here; at the Revolution, the sovereignty devolved on the people; and they are truly the sovereigns of the country"); *id.* at 472 ("Their Princes have personal powers, dignities, and pre-eminences, our rulers have none but official; nor do they partake in the sovereignty otherwise, or in any other capacity, than as private citizens.").

113. *Id.* at 473 ("As one State may sue another State in this Court, it is plain that no degradation to a State is thought to accompany her appearance in this Court."). Jay further reasoned that jurisdiction over state-state suits was necessary to stave off physical hostilities. *See id.* at 474 ("Each State was obliged to acquiesce in the measure of justice which another State might yield to her, or to her citizens; and that even in cases where State considerations were not always favorable to the most exact measure. There was danger that from this source animosities would in time result; and as the transition from animosities to hostilities was frequent in the history of independent States, a common tribunal for the termination of controversies became desirable, from motives both of justice and of policy."); *id.* at 475 (explaining that jurisdiction extended "because domestic tranquillity requires, that the contentions of States should be peaceably terminated by a common judicatory; and, because, in a free country justice ought not to depend on the will of either of the litigants").

114. *Id.* at 477 ("It would be strange, indeed, that the joint and equal sovereigns of this country, should, in the very Constitution by which they professed to establish justice, so far deviate from the plain path of equality and impartiality, as to give to the collective citizens of one State, a right of suing individual citizens of another State, and yet deny to those citizens a right of suing them.").

115. *See id.* at 435-36 (Iredell, J., dissenting) ("[T]he general Government has a Judicial Authority in regard to such subjects of controversy, and the Legislature of the United States may pass all laws necessary to give such Judicial Authority its proper effect. So far as States under the Constitution can be made legally liable to this authority, so far to be sure they are subordinate to the authority of the United States, and their individual sovereignty is in this respect limited.").

116. *Id.* at 436 (Iredell, J., dissenting).

jurisdiction to that "agreeable to the principles and usages of law."¹¹⁷ To determine whether this category excluded suits against states, Iredell returned to the common law derived from England.¹¹⁸ He recognized that English common law prohibited seeking a remedy against the sovereign,¹¹⁹ and, after an extensive analysis of the English common law tradition of sovereign immunity, he inferred that the American states inherited this relic.¹²⁰ For Iredell, state sovereign immunity was alive and incorporated — or, at least, left unabridged — by the Judiciary Act, and therefore Georgia was not amenable to suit notwithstanding the constitutional question.¹²¹ In a final statement, which he admitted to be dictum,¹²² Iredell commented:

[M]y present opinion is strongly against any construction of [the Constitution], which will admit, under any circumstances, a compulsive suit against a State for the recovery of money. I think every word in the Constitution may have its full effect without involving this consequence, and that nothing but express words, or an insurmountable implication (neither of which I consider, can be found in this case) would authorize the deduction of so high a power.¹²³

It is curious that Justice Iredell did not rely on the dignity rationale, for it would have supported his statutory argument. The Judiciary Act also gave the Supreme Court nonexclusive jurisdiction over cases between states and

117. See *id.* at 434 (Iredell, J., dissenting). It was not until sometime later that the Court held the Original Jurisdiction Clause to be self-executing. See *Florida v. Georgia*, 58 U.S. (17 How.) 478, 492 (1855); see also *Durousseau v. United States*, 10 U.S. (6 Cranch) 307, 313-14 (1810).

118. See *Chisholm*, 2 U.S. (2 Dall.) at 435 (Iredell, J., dissenting) (describing the common law as "a law which I presume is the ground-work of the laws in every State in the Union, and which I consider, so far as it is applicable to the peculiar circumstances of the country, and where no special act of Legislation controuls it, to be in force in each State, as it existed in England, (unaltered by any statute) at the time of the first settlement of the country").

119. See *id.* (Iredell, J., dissenting).

120. See *id.* at 437-49 (Iredell, J., dissenting).

121. See *id.* at 449 (Iredell, J., dissenting) ("My opinion being, that even if the Constitution would admit of the exercise of such a power, a new law is necessary for the purpose, since no part of the existing law applies, this alone is sufficient to justify my determination in the present case.").

122. *Id.* at 450 (Iredell, J., dissenting) ("This opinion I hold, however, with all the reserve proper for one, which, according to my sentiments in this case, may be deemed in some measure extra-judicial.").

123. *Id.* at 449-50 (Iredell, J., dissenting). For a Federalist interpretation of this statement, see John V. Orth, *The Truth About Justice Iredell's Dissent in Chisholm v. Georgia (1793)*, 73 N.C. L. REV. 255 (1994).

individuals but exclusive jurisdiction over all other cases involving states.¹²⁴ If dignity were the primary basis for immunity, then the Act is coherent only if it does not contemplate private suits against states. For if state-state suits are permitted only in the highly dignified Supreme Court because only the Supreme Court should be permitted to pronounce judgment against a state, why leave to the lower courts suits between states and individuals, which would permit lower courts to pronounce judgment against a state and in favor of an individual? Surely the latter would offend a state's dignity far more than the former. Construing the Act as contemplating only suits in which a state was a *plaintiff* resolves the paradox. That Justice Iredell did not make this argument suggests that even he did not consider the dignity rationale of primary importance.

Chisholm was not met with much applause. The day after the Court issued its decision, Massachusetts Representative Theodore Sedgwick proposed a constitutional amendment.¹²⁵ Another resolution was introduced the following day, which read nearly identically to the current version.¹²⁶

Congress recessed without acting on the proposals; however, in the interim, Massachusetts and Virginia called for a constitutional convention to consider the suability of states in federal court.¹²⁷ By the time the Third Congress convened in December, the push for a new convention was before the legislatures of New Hampshire, Connecticut, Maryland, North Carolina, South Carolina, Pennsylvania, and Delaware.¹²⁸

On January 2, 1794, after Congress reconvened, the Eleventh Amendment¹²⁹ was introduced in the Senate.¹³⁰ Senator Gallatin moved to amend the resolution to exempt "cases arising under treaties made under the authority of the United States."¹³¹ The Senate rejected the proposal and

124. Judiciary Act of 1789 § 13, 1 Stat. 80, 80 ("[T]he Supreme Court shall have exclusive jurisdiction of all controversies of a civil nature, where a state is a party, except between a state and its citizens; and except also between a state and citizens of other states, or aliens, in which latter case it shall have original but not exclusive jurisdiction.").

125. 1 CHARLES WARREN, *THE SUPREME COURT IN UNITED STATES HISTORY* 101 (rev. ed. 1937) (The amendment provided that "no State shall be liable to be made a party defendant in any of the Judicial Courts established or to be established under the authority of the United States, at the suit of any person or persons, citizens or foreigners, or of any body politic or corporate whether within or without the United States.").

126. 3 *ANNALS OF CONG.* 651-52 (1793).

127. Resolves of Mass. 28 (Sept. 27, 1793); 1793 Va. Acts ch. 52.

128. See JACOBS, *supra* note 21, at 65-66.

129. U.S. CONST. amend. XI ("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.").

130. 4 *ANNALS OF CONG.* 25 (1794).

131. 4 *id.* at 30.

ratified the Amendment 23-2.¹³² The Amendment moved to the House, which ratified it 81-9 on March 4, 1794.¹³³

Much has been written on the proper interpretation of the Eleventh Amendment.¹³⁴ Even those who would construe the Amendment broadly acknowledge that "the intentions of the Framers and Ratifiers were ambiguous."¹³⁵ For my purposes, I point out only that the amendment seems to have very little to do with dignity. It does not mention state dignity or even sovereignty. Its distinction between in-state citizens and out-of-state citizens, if a true distinction at all,¹³⁶ was most likely fashioned out of fiscal concerns,¹³⁷ rather than state dignity. The division between foreign citizens and foreign nations, if a true distinction,¹³⁸ could be supported by dignity — it is more degrading for a state to be sued by an individual than by a foreign sovereign — but is more likely supported by the practicalities of the historical context.¹³⁹

Had the drafters meant to codify a protection of state dignity or sovereignty, one would expect to see clearer indications — and far broader language — in the Amendment. For example, the Eleventh Amendment could have read simply: "No State shall be forced to appear, without its consent, as a defendant in any controversy brought by an individual."¹⁴⁰ However, the Eleventh Amendment is not worded so broadly. Rather, the drafters specifically delineated the parameters of the Amendment by restricting only "[t]he Judicial

132. *Id.*

133. 4 *id.* at 476-78.

134. *Compare* *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 301 (1985) (Brennan, J., dissenting) (promoting the diversity theory), *and* Fletcher, *Historical Interpretation*, *supra* note 50, at 1060 (same), *and* Gibbons, *supra* note 22 (same), *with* Lawrence C. Marshall, *Fighting the Words of the Eleventh Amendment*, 102 HARV. L. REV. 1342 (1989) (reading the Amendment literally).

135. *Welch v. Tex. Dep't of Highways & Pub. Transp.*, 483 U.S. 468, 484 (1987).

136. *See* *Hans v. Louisiana*, 134 U.S. 1 (1890) (extending immunity to suits brought by citizens of the same state).

137. The states were far more concerned about suits by out-of-state creditors than in-state creditors. *See* Marshall, *supra* note 134, at 1363-66.

138. *See* *Principality of Monaco v. Mississippi*, 292 U.S. 313 (1934) (extending immunity to suits brought by foreign nations).

139. State bonds were held by citizens, not foreign nations. *See* Marshall, *supra* note 134, at 1359-60.

140. Reportedly, the first proposed draft of the Eleventh Amendment stated: "That no state shall be liable to be made a party defendant in any of the judicial courts, established, or which shall be established under the authority of the United States, at the suit of any person or persons whether a citizen or citizens, or a foreigner or foreigners, of any body politic or corporate, whether within or without the United States." Fletcher, *Historical Interpretation*, *supra* note 50, at 1058-59.

power of the United States” over a suit “in law or equity” when brought against a state “by Citizens of another State, or by Citizens or Subjects of any Foreign State.”¹⁴¹ No index of intent, such as “Out of respect for State Sovereignty,” leads off the Amendment. Moreover, there is no room for state waiver of immunity in the Eleventh Amendment, even though waiver comports with notions of sovereign dignity.¹⁴² Had the Eleventh Amendment been designed to erect a broad description of state sovereignty or dignity, the phrasing, though seemingly carefully chosen, would have marked the nadir of legislative draftsmanship.

The *Chisholm* opinions, the narrow but precise wording of the Eleventh Amendment, and the historical context in which it was drafted, make it unlikely that the Amendment was designed to represent a broad protection for state sovereign dignity. Nevertheless, the dignity rationale has found a home by creeping into the opinions of the Supreme Court.

E. Subsequent Supreme Court Decisions

The Court has only recently embraced a firm recognition of the inherent dignity attending state sovereignty.¹⁴³ Perhaps the first intonation of the dignity rationale appeared in *United States v. Bright*,¹⁴⁴ in which Justice Bushrod Washington, riding circuit, considered whether the Eleventh Amendment barred an admiralty proceeding in rem against a state. He noted the “delicate” issue of a private suit against a state, but stated that because the Eleventh Amendment did not speak to admiralty and because in rem proceedings were less “delicate,” the court had jurisdiction.¹⁴⁵

Chief Justice John Marshall quickly rejected Justice Washington’s sentiments. In *Cohens v. Virginia*,¹⁴⁶ the Court held that the appeal of a state court decision in favor of a plaintiff-state under federal question jurisdiction was neither prohibited by the Eleventh Amendment nor exempt from Article III.¹⁴⁷ In holding the Eleventh Amendment no bar to the appeal, the Court recalled portions of the *Chisholm* reasoning:

That [the Amendment’s] motive was not to maintain the sovereignty of a State from the degradation supposed to attend a

141. U.S. CONST. amend. XI.

142. See *infra* text accompanying note 274.

143. For a detailed look at varying notions of “dignity” in Supreme Court jurisprudence not limited to dignity of the states, see Resnik & Suk, *supra* note 13, at 1933-41.

144. 24 F. Cas. 1232 (C.C.D. Pa. 1809) (No. 14467), *overruled by In re New York*, 256 U.S. 490, 500 (1921).

145. *Id.* at 1236.

146. 19 U.S. (6 Wheat.) 264 (1821).

147. *Id.* at 417-18.

compulsory appearance before the tribunal of the nation, may be inferred from the terms of the amendment. It does not comprehend controversies between two or more States, or between a State and a foreign State. The jurisdiction of the Court still extends to these cases: and in these a State may still be sued. We must ascribe the amendment, then, to some other cause than the dignity of a State.¹⁴⁸

For more than half a century after *Cohens* the dignity rationale lay decidedly dormant. Through Reconstruction, the Court consistently applied the Eleventh Amendment narrowly and faithfully to Marshall's view.¹⁴⁹ However, the changing historical times of the Civil War and Reconstruction eras convinced the Court to adopt a different view of the Eleventh Amendment.

In 1887, *In re Ayers*,¹⁵⁰ one of a number of post-Reconstruction southern bond cases that threatened the financial integrity of the recovering southern states,¹⁵¹ queried whether a federal court could hold a state officer in contempt. The Court stated, directly counter to *Cohens*:

The very object and purpose of the 11th Amendment were to prevent the indignity of subjecting a State to the coercive process of judicial tribunals at the instance of private parties. It was thought to be neither becoming nor convenient that the several States of the Union, invested with that large residuum of sovereignty which had not been delegated to the United States, should be summoned as defendants to answer the complaints of private persons, whether citizens of other States or aliens, or that the course of their public policy and the administration of their public affairs should be subject to and controlled by the mandates of judicial tribunals without their consent, and in favor of individual interests.¹⁵²

148. *Id.* at 406.

149. Edward A. Purcell, Jr., *The Particularly Dubious Case of Hans v. Louisiana: An Essay on Law, Race, History, and "Federal Courts,"* 81 N.C. L. REV. 1927, 1940-41 (2003).

150. 123 U.S. 443 (1887).

151. The Civil War, the loss of slave labor, and the depression of the 1870s forced the southern states into the position of being unable to repay antebellum bond obligations exceeding \$150 million. Purcell, *supra* note 149, at 1945-46. Facing financial calamity but empowered by post-Reconstruction political clout, the southern states set a determined course to unilaterally repudiate their bond obligations. *Id.* at 1946.

152. *Ayers*, 123 U.S. at 505.

Ayers and *Cohens* collided a few years later in *South Dakota v. North Carolina*,¹⁵³ in which the Court decided that a state could sue another state for a debt originally owed a private individual.¹⁵⁴ Despite noting the risk of subjecting state treasuries to money judgments,¹⁵⁵ the Court held the Eleventh Amendment inapposite¹⁵⁶ and quoted the antidignity language from *Cohens*.¹⁵⁷ In dissent, Justice White quoted the dignity language from *Ayers*¹⁵⁸ and argued that the Eleventh Amendment was designed to withdraw all jurisdiction over suits by individuals against states and that an individual should not be able to circumvent that state protection simply by selling the debt to a state.¹⁵⁹

South Dakota failed to put the issue of state dignity to rest. In *Ex parte Young*,¹⁶⁰ the Court upheld, in the face of an Eleventh Amendment challenge, a federal court order enjoining a state officer from attempting to enforce an unconstitutional state law.¹⁶¹ The Court did not rest on the English maxim that only the sovereign, not his officers, are entitled to immunity.¹⁶² Instead, the Court reasoned that an unconstitutional state law or mandate is without state authority, and thus the officer acts without state sanction.¹⁶³ The officer is therefore stripped of state authority and acts in his own capacity, without the protection of state immunity.¹⁶⁴

153. 192 U.S. 286 (1904).

154. *Id.* at 312.

155. *Id.* at 319-20 (“[A] treasury, not fenced round or shielded by fixed and established modes and rules of administration, but which could be subjected to any number or description of demands, asserted and sustained through the undefined and undefinable discretion of the courts, would constitute a feeble and inadequate provision for the great and inevitable necessities of the nation.”).

156. *Id.* at 315 (“It will be perceived that this amendment only granted to a State immunity from suit by an individual, and did not affect the jurisdiction over controversies between two or more States.”).

157. *Id.* at 315-16 (quoting *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 406 (1821)).

158. *Id.* at 342-43 (White, J., dissenting) (quoting *In re Ayers*, 123 U.S. 443, 504-05 (1887)).

159. *Id.* at 329-30 (White, J., dissenting).

160. 209 U.S. 123 (1908).

161. *Id.* at 159-60, 168.

162. See *Gibbons*, *supra* note 22, at 1895-96, for a discussion of sovereign immunity in colonial America.

163. *Young*, 209 U.S. at 159 (“The act to be enforced is alleged to be unconstitutional, and if it be so, the use of the name of the State to enforce an unconstitutional act to the injury of complainants is a proceeding without the authority of and one which does not affect the State in its sovereign or governmental capacity. It is simply an illegal act upon the part of a state official in attempting by the use of the name of the State to enforce a legislative enactment which is void because unconstitutional.”).

164. *Id.* at 159-60 (“If the act which the state Attorney General seeks to enforce be a violation of the Federal Constitution, the officer in proceeding under such enactment comes into conflict with the superior authority of that Constitution, and he is in that case stripped of his

Justice Harlan dissented, largely in the name of state dignity and in reliance on *Ayers*.¹⁶⁵ He charged that the Court's new exception

would work a radical change in our governmental system. It would inaugurate a new era in the American judicial system and in the relations of the National and state governments. It would enable the subordinate Federal courts to supervise and control the official action of the States as if they were "dependencies" or provinces. It would place the States of the Union in a condition of inferiority never dreamed of when the Constitution was adopted or when the Eleventh Amendment was made a part of the Supreme Law of the Land.¹⁶⁶

Justice Harlan noted that states are equally obligated to safeguard federal rights, and that proper respect for states required that assumption.¹⁶⁷ He was not particularly perturbed by the possibility that the Supreme Court could hear an appeal from a state-court suit involving a state, as was the issue in *Cohens*; rather, he worried that adjudication in lower federal courts in the first instance maligned the dignity and respect for the states.¹⁶⁸ But with a minority of votes, neither Justice Harlan's dissent nor the sentiment of *Ayers* carried the day.

The *Cohens* view of state dignity prevailed until 1979, when the Court decided *Nevada v. Hall*.¹⁶⁹ *Hall* held that a state's sovereign immunity from a

official or representative character and is subjected in his person to the consequences of his individual conduct. The State has no power to impart to him any immunity from responsibility to the supreme authority of the United States.").

165. *Id.* at 186-90 (Harlan, J., dissenting) (declaring that "the decision in the *Ayers* case determines this case for the petitioner").

166. *Id.* at 175 (Harlan, J., dissenting).

167. *Id.* at 176 (Harlan, J., dissenting) ("Too little consequence has been attached to the fact that the courts of the States are under an obligation equally strong with that resting upon the courts of the Union to respect and enforce the provisions of the Federal Constitution as the Supreme Law of the Land, and to guard rights secured or guaranteed by that instrument. We must assume — a decent respect for the States requires us to assume — that the state courts will enforce every right secured by the Constitution.").

168. *Id.* at 179 (Harlan, J., dissenting) ("That course would have served to determine every question of constitutional law raised by the suit in the Federal court in an orderly way without trampling upon the State . . . Instead of adopting that course — so manifestly consistent with the dignity and authority of both the Federal and state judicial tribunals — the Federal court practically closed the state courts against the State itself when it adjudged that the Attorney General [was in contempt]."); *id.* at 182-83 (Harlan, J., dissenting) ("Surely, the right of a State to invoke the jurisdiction of its own courts is not less than the right of individuals to invoke the jurisdiction of a Federal court. The preservation of the dignity and sovereignty of the States, within the limits of their constitutional powers, is of the last importance, and vital to the preservation of our system of government.").

169. 440 U.S. 410 (1979).

suit brought by an individual in another state's courts is a matter of comity, not constitutional mandate.¹⁷⁰ "Nevada argue[d] that the Constitution implicitly establishes a Union in which the States are not free to treat each other as unfriendly sovereigns, but must respect the sovereignty of one another."¹⁷¹ However, in the absence of a specific constitutional limitation on state sovereignty, the Court refused to impose a limitation.¹⁷² Such a suit, explained the Court, "necessarily implicates the power and authority of a second sovereign."¹⁷³ The forum sovereign's acceptance of the second sovereign's claim of immunity, therefore, rests entirely within its own power, either by contractual arrangement or "in the voluntary decision of the second to respect the dignity of the first as a matter of comity."¹⁷⁴ In dissent, Justice Blackmun chided the majority for failing to give due deference to the sovereignty of a state.¹⁷⁵ *Hall* did not focus on the issue of state sovereign dignity but did implicitly call into question the triumph of *Cohens* over *Ayers* in *South Dakota* and set the stage for a rematch.

In 1993, the Court decided *Puerto Rico Aqueduct & Sewer Authority v. Metcalf & Eddy, Inc.*,¹⁷⁶ and held the denial of a claim to state sovereign immunity immediately appealable.¹⁷⁷ The Court revived the dignity language of *Ayers*¹⁷⁸ and stated that immunity "accords the States the respect owed them as members of the federation. . . . [I]ts ultimate justification is the importance of ensuring that the States' dignitary interests can be fully vindicated."¹⁷⁹ Justice Stevens dissented, finding the dignity rationale "embarrassingly insufficient"¹⁸⁰

170. *Id.* at 425 ("But these provisions do not imply that any one State's immunity from suit in the courts of another State is anything other than a matter of comity.").

171. *Id.* at 424-25.

172. *Id.* at 425-26.

173. *Id.* at 416.

174. *Id.*

175. *Id.* at 427 (Blackmun, J., dissenting) ("[W]hat we have always thought of as a 'sovereign State' is now to be treated in the courts of a sister State, once jurisdiction is obtained, just as any other litigant.").

176. 506 U.S. 139 (1993).

177. *Id.* at 147 ("We hold that States and state entities that claim to be 'arms of the State' may take advantage of the collateral order doctrine to appeal a district court order denying a claim of Eleventh Amendment immunity.").

178. *Id.* at 146 ("The very object and purpose of the 11th Amendment were to prevent the indignity of subjecting a State to the coercive process of judicial tribunals at the instance of private parties.") (quoting *In re Ayers*, 123 U.S. 443, 505 (1887)).

179. *Id.*

180. *Id.* at 151 (Stevens, J., dissenting).

to overcome the costs of piecemeal adjudications,¹⁸¹ but did not elaborate on his characterization of the dignity rationale.

Metcalf & Eddy is the modern vindication of *Ayers* over *Cohens*, and the Court has not looked back since. In almost every major state sovereign immunity case since *Metcalf & Eddy*, the Court has invoked the dignity rationale, though never, until 2002, making it the focus. In *Hess v. Port Authority Trans-Hudson Corp.*,¹⁸² for example, the Court deliberately considered the effect on state dignity a private suit brought against the Port Authority — a bistate railway authorized by Congress under the Interstate Compact Clause.¹⁸³ In *Seminole Tribe v. Florida*,¹⁸⁴ the Court relied in part on the “indignity of subjecting a State to the coercive process of judicial tribunals at the instance of private parties”¹⁸⁵ in holding Congress powerless under Article I to create federal private causes of action against states.¹⁸⁶ In *Idaho v. Coeur d’Alene Tribe*,¹⁸⁷ the Court reaffirmed that the Eleventh Amendment protects a state from suits instituted by Indian tribes¹⁸⁸ and stated that “the dignity and respect afforded a State, which the immunity is designed to protect, are placed in jeopardy whether or not the suit is based on diversity jurisdiction.”¹⁸⁹ And in *Alden v. Maine*,¹⁹⁰ the Court held that Congress could not abrogate state sovereign immunity in state court, in part because such a ruling would impinge upon the states’ retained sovereign dignity to be compelled to appear in its own courts at the behest of an individual.¹⁹¹

181. *Id.* at 152 (Stevens, J., dissenting) (“The cost to the courts and the parties of permitting piecemeal litigation of this sort clearly outweighs whatever benefit to their ‘dignity’ States or state entities might derive by having their Eleventh Amendment claims subject to immediate appellate review.”).

182. 513 U.S. 30 (1994).

183. *Id.* at 46-50; *accord id.* at 41-42 (stating that because the states agreed to share power with Congress in entering bistate compacts, no state dignity or integrity is questioned by a private suit against the bistate entity); *id.* at 47 (“We have already pointed out that federal courts are not alien to a bistate entity Congress participated in creating. Nor is it disrespectful to one State to call upon the Compact Clause entity to answer complaints in federal court.”). Although the Court maintained that the principal impetus for Eleventh Amendment immunity is protection of the state treasury, *id.* at 48, the Court made clear that it also, and almost equally, endorsed *Metcalf & Eddy*’s dignity rationale, *id.* at 52.

184. 517 U.S. 44 (1996).

185. *Id.* at 58 (quoting *Metcalf & Eddy*, 506 U.S. at 146).

186. *Id.* at 72-73; *see* 25 U.S.C. § 2710(d) (2000).

187. 521 U.S. 261 (1997).

188. *Id.* at 267-70.

189. *Id.* at 268; *accord id.* at 277 (“The course of our case law indicates the wisdom and necessity of considering, when determining the applicability of the Eleventh Amendment, the real affront to a State of allowing a suit to proceed.”).

190. 527 U.S. 706 (1999).

191. *Id.* at 714 (stating that the Constitution “reserves to [the states] a substantial portion of

In 2002, however, the Court adopted the dignity rationale as the principal justification for state sovereign immunity. In *Federal Maritime Commission v. South Carolina State Ports Authority*, the Court held that sovereign immunity barred a federal administrative proceeding brought by a private party against a state.¹⁹² The Court said that “[s]tates, upon ratification of the Constitution, did not consent to become mere appendages of the Federal Government. Rather, they entered the Union ‘with their sovereignty intact.’”¹⁹³ An integral component of that sovereignty is the immunity from compulsory private suits,¹⁹⁴ which the states did not surrender in ratifying the Constitution,¹⁹⁵ and which is the principal justification for state sovereign immunity:

The preeminent purpose of state sovereign immunity is to accord States the dignity that is consistent with their status as sovereign entities. “The founding generation thought it ‘neither becoming nor convenient that the several States of the Union, invested with that large residuum of sovereignty which had not been delegated to the United States, should be summoned as defendants to answer the complaints of private persons.’”¹⁹⁶

The Court reversed the priorities of *Hess* and sharply distinguished between the primary rationale, dignity, and the secondary rationale, fiscal protection.¹⁹⁷ Dignity alone, claimed the Court, directed that states be permitted to assert

the Nation’s primary sovereignty, together with the dignity and essential attributes inhering in that status”); *id.* at 715 (“The generation that designed and adopted our federal system considered immunity from private suits central to sovereign dignity.”); *id.* at 749-50 (discussing the indignity of coercing unwilling states to appear before an judicial tribunal); *id.* at 758 (“When Congress legislates in matters affecting the States, it may not treat these sovereign entities as mere prefectures or corporations. Congress must accord States the esteem due to them as joint participants in a federal system, one beginning with the premise of sovereignty in both the central Government and the separate States.”).

192. 535 U.S. 743, 760 (2002).

193. *Id.* at 751 (quoting *Blatchford v. Native Vill. of Noatak*, 501 U.S. 775, 779 (1991)).

194. *Id.*

195. *Id.* at 752 (“Nevertheless, the Convention did not disturb States’ immunity from private suits, thus firmly enshrining this principle in our constitutional framework.”).

196. *Id.* at 760 (quoting *Alden v. Maine*, 527 U.S. 706, 748 (1999)) (citation omitted).

197. *Id.* at 765 (“While state sovereign immunity serves the important function of shielding state treasuries and thus preserving ‘the States’ ability to govern in accordance with the will of their citizens,’ the doctrine’s central purpose is to ‘accord the States the respect owed them as’ joint sovereigns.”) (quoting *Alden*, 527 U.S. at 750-51; *Puerto Rico Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 146 (1993)) (citation omitted); *see also id.* at 769 (“As we have previously noted, however, the primary function of sovereign immunity is not to protect state treasuries, but to afford the States the dignity and respect due sovereign entities.”) (citation omitted).

immunity in federal agency proceedings.¹⁹⁸ Justice Stevens' dissent, which denigrated the dignity rationale as insufficient and laid to rest by *Cohens*,¹⁹⁹ fell on deaf ears. The dignity rationale that began with *Ayers* is now firmly entrenched in the justification for state sovereign immunity, and *Cohens* holds no sway. The Court in *Federal Maritime* called the protection of state dignity the Eleventh Amendment's "central purpose,"²⁰⁰ and on that basis expanded the immunity doctrine to new boundaries.

F. Some Conclusions Regarding the Development of the Dignity Rationale

The development of the dignity rationale demonstrates that its dominance, aside from the unique times of the post-Reconstruction bond wars, is a recent phenomenon. Until Reconstruction, the *Cohens* view rejecting a state dignity basis for Eleventh Amendment immunity prevailed. Though *Ayers* championed the dignity rationale in 1887, it cited no legal support for the rationale, and its omission of *Cohens* is conspicuous. A few years after *Ayers*, the dignity rationale was quickly reduced to dissent by *South Dakota* and *Young*. The rationale lay dormant for a century until it was resurrected with renewed force by the Rehnquist Court.²⁰¹

The development also indicates that the rationale is a judicial creation, rather than a legal postulate settled by history or constitutional text or structure. Revolutionaries rejected traditional English notions of sovereign dignity in 1776. They declined to weave state dignity into the Constitution of 1787. State dignity furnished no apparent support for the framing of the Eleventh Amendment. Neither text nor history nor precedent justifies broad notions of a state dignity capable of supporting sovereign immunity.

198. *Id.* at 760 ("Simply put, if the Framers thought it an impermissible affront to a State's dignity to be required to answer the complaints of private parties in federal courts, we cannot imagine that they would have found it acceptable to compel a State to do exactly the same thing before the administrative tribunal of an agency, such as the FMC. The affront to a State's dignity does not lessen when an adjudication takes place in an administrative tribunal as opposed to an Article III court.") (citation omitted); *cf. id.* at 760 n.11 ("One, in fact, could argue that allowing a private party to haul a State in front of such an administrative tribunal constitutes a greater insult to a State's dignity than requiring a State to appear in an Article III court presided over by a judge with life tenure nominated by the President of the United States and confirmed by the United States Senate.").

199. *Id.* at 770-72 (Stevens, J., dissenting).

200. *Id.* at 765.

201. Perhaps the most remarkable feature of the development of the dignity rationale in the Court and its culmination in *Federal Maritime* is that *Hans v. Louisiana*, 134 U.S. 1 (1890), the seminal case expanding the Eleventh Amendment beyond its text, makes no mention of state dignity, respect, or sovereignty, despite being decided only three years after *In re Ayers*, 123 U.S. 443 (1887).

Because of the Court's failure to provide an explanation or grounding for the dignity rationale, *Federal Maritime's* adoption of it as a justification for the similarly untethered doctrine of state sovereignty is quite unsatisfying. Indeed, by jumping back from the narrow text of the Eleventh Amendment to the less certain "structure of the Constitution" to the completely unreferenced concept of state dignity, *Federal Maritime* has drastically expanded the applicability of state sovereign immunity and fashioned a powerful weapon to buttress other state sovereignty doctrines.

Alarmingly, the Court has proceeded without so much as pausing to determine if its adoption of the dignity rationale furthers traditional normative values of federalism.²⁰² Federalism is justified to the extent it furthers diversity, expertise, and localism, on the premise that these values in turn further protection of liberty and democracy.²⁰³ Neither dignity nor state sovereign immunity furthers any of these values. As I have argued elsewhere, these values are adequately and appropriately safeguarded by the constitutional system of dual government and the limited enumeration of federal power.²⁰⁴ Dignity adds little support and actually adds the disruption of a boundless and immutable state power.

202. See, e.g., Michael C. Dorf, *Forward: The Limits of Socratic Deliberation*, 112 HARV. L. REV. 4, 61 (1998) ("[T]he Court appears to be much more concerned about preserving the dignity of the states — as if they were natural persons that could experience hurt feelings beyond those of their residents — than in pursuing decentralization and the other policy goals that federalism serves.") (citation omitted).

203. See Dodson, *Vectorial Federalism*, *supra* note 1, at 399-401. That is not to say that decisions upholding federalism for federalism's sake have no inherent value *per se*. See, e.g., *Coleman v. Thompson*, 501 U.S. 722, 759 (1991) (Blackmun, J., dissenting) ("Federalism, however, has no inherent normative value: It does not, as the majority appears to assume, blindly protect the interests of States from any incursion by the federal courts. Rather, federalism secures to citizens the liberties that derive from the diffusion of sovereign power."). Court opinions vindicating federalism may have the expressivist value of a legitimizing effect. Cf. Caminker, *Judicial Solicitude*, *supra* note 13 (suggesting that the Court may be using the dignity rationale as an expressivist norm). The Court does not appear to be using the dignity rationale as an expressivist justification to legitimize federalism for federalism's sake, but quite the opposite; the Court justifies its sovereign immunity federalism decisions as protecting the dignity of the states. See *supra* text accompanying note 12.

204. See Dodson, *Vectorial Federalism*, *supra* note 1, at 399-422. Recently, Professor Todd Pettys has persuasively argued that dignity may help maintain that level of state autonomy necessary for market-driven normative federalism to flourish, especially with respect to the anticommandeering doctrine. See Todd E. Pettys, *Competing for the People's Affection: Federalism's Forgotten Marketplace*, 56 VAND. L. REV. 329, 370 (2003). I am not, however, convinced that the dignity rationale is *necessary* to maintain that level of state autonomy. Moreover, dignity, to the extent it immunizes states from the truth-seeking forums of the courts in the Eleventh Amendment context, may ultimately obscure facts that the people would need to best participate in their government-choosing role.

Finally, there is an obvious paradox in immunizing states from suit based on dignity. Even accepting that states possess some sovereign dignity entitling them to respect or deference, shouldn't that respect or deference diminish when the state purportedly violates individual rights? Immunity ultimately shields states from the negative publicity attending the indignity of *their own actions*, not just the indignity of suit by a private individual. An immunity inspired by state dignity should lessen when the state acts in ways inconsistent with that dignity.

Very little supports *Federal Maritime's* embrace of the dignity rationale. Its connection to the Constitution is tenuous at best; its historical support, sorely lacking; its faithfulness to precedent, strained; its protection of federalism values, questionable; and its very logic, twisted. But despite all of its flaws, could the dignity rationale at least succeed as a doctrinal adhesive, something sorely needed for the Court's state sovereign immunity jurisprudence? Oddly, the answer is yes.

III. The Dignity Rationale and State Sovereign Immunity Jurisprudence

Accepting the Court's premise that dignity is an inherent part of the state sovereignty left intact by the Constitution helps reconcile what scholars have identified as two distinct theories behind state sovereign immunity: a sovereignty strain, which views the states as possessing real sovereign attributes with effects independent of any normative analysis; and a practical strain, which looks to the necessity of state suits in the context of other enforcement mechanisms.²⁰⁵ The dignity rationale originates in the sovereignty strain and thus is presumed to be inviolable. However, this is merely a presumption that can be overcome by compelling federal interests. For all its flaws, the dignity rationale helps explain a great deal about the Court's state sovereign immunity jurisprudence. The following subsections explain how, piece by piece.

A. The Status of the Plaintiff

States are not immune from suits brought by sister states²⁰⁶ or the federal government.²⁰⁷ By contrast, dignity immunizes suits brought by individual citizens. One obvious reason for the distinction is that the text of Article III expressly contemplates federal jurisdiction over the former but only implicitly

205. See, e.g., Althouse, *supra* note 13, at 246; Vázquez, *supra* note 22, at 859-60.

206. See *South Dakota v. North Carolina*, 192 U.S. 286, 318 (1904); *Rhode Island v. Massachusetts*, 37 U.S. (12 Pet.) 657 (1838).

207. See *United States v. Mississippi*, 380 U.S. 128 (1965); *United States v. Texas*, 143 U.S. 621 (1892).

over the latter.²⁰⁸ Perhaps more importantly, however — because the textual justification is weak and because the immunity doctrine has moved away from textual references in any case — the dignity rationale also explains the distinction.

As Justice White wrote in dissent in *South Dakota*, state sovereign dignity still exists and may be infringed by any suit brought against a state.²⁰⁹ That is consistent with the default immunity rule that the dignity rationale prohibits suits against states.

But dignity is impinged less by suits brought by the superior sovereign federal government or a co-equal sovereign sister state than by suits brought by individuals.²¹⁰ One might argue that the Framers' Whiggish notions of popular sovereignty suggest the opposite; but an appropriate rejoinder is, I think, that even under Whig philosophy, small numbers of individuals have superior sovereignty to their elected representatives but not to the state itself, which is actually the collective will of the people in their sovereign capacity.²¹¹ The state governments, then, have dignity not because they are governments per se, but because they represent the ultimate sovereign will of the state citizenry. In the context of a civil suit against the state by an individual, the ultimate sovereign will feel the coercive effect of the suit. Just as the shareholders of a privately-held company may be offended by public or private criticism of their company, the people of a state may feel the indignity of their state being hauled into court at the insistence of a single individual, who may even be from a different state. Suits brought by individuals, then, have a far greater dignity hurdle to surmount than suits brought by another sovereign.²¹²

Consideration of the second half of the equation leads to the reasonable conclusion that federal interests are not strong enough to overcome the indignity of an individual suit but are strong enough to overcome the indignity of a sovereign suit. One countervailing interest is the need to promote internal harmony. The clashing of sovereign interests in a federal system lacking an available forum for peaceful resolution may result in disunion and retribution.²¹³

208. See U.S. CONST. art. III, § 2, cl. 1.

209. See *South Dakota*, 192 U.S. at 342-43 (White, J., dissenting).

210. See Caminker, *Judicial Solicitude*, *supra* note 13, at 84 (“[A] superior or at least coequal sovereign pose[s] less of an affront to states than suits by private persons . . .”).

211. *But see* *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419, 472-73 (1792) (arguing that the collective citizenry is not superior to the individual).

212. This is especially true when the other sovereign is the collective will of the national populace. See *M'Culloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 403-05 (1819).

213. See *South Dakota*, 192 U.S. at 318 (asserting that the federal forum serves as an important and impartial arbiter for suits between states); *United States v. Texas*, 143 U.S. 621, 644-45 (1892) (“[The Framers] could not have overlooked the possibility that controversies, capable of judicial solution, might arise between the United States and some of the States, and

The threat to national harmony is less forceful in suits brought by an individual against a state. In other words, telling an individual he is out of luck is less damaging to national unity than telling the United States or another state the same thing.

A second countervailing interest is the need to ensure that private interests do not bankrupt governmental interests. Drawing the line at suits between sovereigns ensures that only controversies significant enough to be at a sovereign level are permitted. If an individual position is itself substantial enough, the sovereign can take over and bring suit in the name of the sovereign interest, though a sovereign bringing suit merely for private interests may still be barred.²¹⁴

that the permanence of the Union might be endangered if to some tribunal was not entrusted the power to determine them according to the recognized principles of law. And to what tribunal could a trust so momentous be more appropriately committed than to that which the people of the United States, in order to form a more perfect Union, establish justice and insure domestic tranquillity, have constituted with authority to speak for all the people and all the States, upon questions before it to which the judicial power of the nation extends?"); *id.* at 639-40 ("The necessity for the creation of some tribunal for the settlement of [State v. State] controversies that might arise, under the new government to be formed, must, therefore, have been perceived by the framers of the Constitution, and, consequently, among the controversies to which the judicial power of the United States was extended by the Constitution, we find those between two or more States."); *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 406-07 (1821) ("There was not much reason to fear that foreign or sister States would be creditors to any considerable amount, and there was reason to retain the jurisdiction of the Court in those cases, because it might be essential to the preservation of peace. The amendment, therefore, extended to suits commenced or prosecuted by individuals, but not to those brought by States."); *see also* *Pennsylvania v. Union Gas Co.*, 491 U.S. 1, 33 (1989) (Scalia, J., dissenting) ("The inherent necessity of a tribunal for peaceful resolution of disputes between the Union and the individual States, and between the individual States themselves, is incomparably greater, in my view, than the need for a tribunal to resolve disputes on federal questions between individuals and the States."), *overruled on other grounds by* *Seminole Tribe v. Florida*, 517 U.S. 44 (1996); *Principality of Monaco v. Mississippi*, 292 U.S. 313, 328 (1934) (explaining that State v. State suits involve "a distinct and essential principle of the constitutional plan which provided means for the judicial settlement of controversies between States of the Union"); *id.* ("The establishment of a permanent tribunal with adequate authority to determine controversies between the States, in place of an inadequate scheme of arbitration, was essential to the peace of the Union."); *id.* at 329; *THE FEDERALIST* NO. 80, at 445 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

214. *See* *Hawaii v. Standard Oil Co.*, 405 U.S. 251, 258-59 (1972); *see also* *Maryland v. Louisiana*, 451 U.S. 725, 745 n.21 (1981) ("[A]n original action between two States only violates the Eleventh Amendment if the plaintiff State is actually suing to recover for injuries to specific individuals."). Interestingly, in *South Dakota*, an individual gave plaintiff-South Dakota his North Carolina bonds because he feared his suit would be barred by sovereign immunity. *See* ROBERT F. DURDEN, *RECONSTRUCTION BONDS AND TWENTIETH-CENTURY POLITICS* 31-32, 52 (1962).

Whether the line should be drawn between individual and sovereign plaintiffs, it can certainly be argued consistently with the dignity rationale, that the line is reasonable. Such a distinction runs into problems, however, in suits brought by other sovereigns.

*Principality of Monaco v. Mississippi*²¹⁵ and *Blatchford v. Native Village of Noatak*²¹⁶ held states immune from suits by foreign states²¹⁷ and Indian tribes,²¹⁸ respectively. Those cases rested on the conclusion that the states did not consent to such suits in ratifying the Constitution because these sovereigns fell outside of the constitutional plan.²¹⁹

These cases need rethinking in light of the dignity rationale. Mutuality of concession is not a factor for the dignity rationale. More importantly, these sovereign plaintiffs have sufficient stature that their status as plaintiffs would mean less indignity to a defendant-state than a suit by an individual. Also, important national interests are implicated when a state invokes immunity in its own courts from suit by a foreign sovereign. Foreign and Indian affairs are a principal province of the national government, and the need for national uniformity and diplomacy is an important national interest. If the Court pursues its dignity rationale, it owes an explanation for the results in these two cases.²²⁰

B. The Source of Law

State immunity from private suits under state law makes some sense under the dignity rationale because the sovereign's right to either invoke or waive immunity through its own laws is in full respect of its own dignity. Suits under federal law, on the other hand, are different because they implicate the will of a superior sovereign.

215. 292 U.S. 313 (1934).

216. 501 U.S. 775 (1991).

217. *Monaco*, 292 U.S. at 330 ("The foreign State lies outside the structure of the Union. The waiver or consent, on the part of a State, which inheres in the acceptance of the constitutional plan, runs to the other States who have likewise accepted that plan, and to the United States as the sovereign which the Constitution creates. We perceive no ground upon which it can be said that any waiver or consent by a State of the Union has run in favor of a foreign State.").

218. *Blatchford*, 501 U.S. at 782 ("What makes the States' surrender of immunity from suit by sister States plausible is the mutuality of that concession. There is no such mutuality with either foreign sovereigns or Indian tribes. . . . [I]f the convention could not surrender the tribes' immunity for the benefit of the States, we do not believe that it surrendered the States' immunity for the benefit of the tribes.") (emphasis omitted).

219. See *id.* at 781-82; *Monaco*, 292 U.S. at 330-31.

220. One rationale rather distinct from the dignity rationale may be found in international law. See, e.g., EMER DE Vattel, *LE DROIT DES GENS, OU PRINCIPES DE LA LOI NATURELLE* 486-87 (1758) (stating that foreign sovereigns are exempt from the compulsory process of another sovereign).

The effect on the dignity of the state is slightly different when an individual sues under federal, rather than state, law. States are bound by the Supremacy Clause to follow federal laws,²²¹ and an individual who sues a state for violation of federal law could make a powerful claim that a state is not entitled to the same respect or dignity when it deviates from its binding obligations. Additionally, individual suits provide a valuable mechanism for ensuring state compliance with federal law, and immunizing states from such suits could give rise to flagrant disregard for federal supremacy.

The Court has nevertheless upheld immunity in federal question cases because of the existence of other means of ensuring state compliance with federal law,²²² such as the good faith of the states to abide by the law,²²³ voluntary consent,²²⁴ induced waiver,²²⁵ the federal government's ability to sue for enforcement,²²⁶ Section 5 private enforcement of the Fourteenth Amendment,²²⁷ suits brought by other states, suits against local governments,²²⁸ and suits against state officers.²²⁹

One should be suspicious of the sufficiency of these safeguards. I question, for example, whether induced waiver really provides an appropriate vehicle for the enforcement of legal obligations. Good faith and voluntary consent suffer from irresistible economic pressures, not to mention historical failure.²³⁰ Suits

221. U.S. CONST. art. VI, § 1, cl. 2.

222. *See Alden v. Maine*, 527 U.S. 706, 755 (1999).

223. *See id.* ("We are unwilling to assume the States will refuse to honor the Constitution or obey the binding laws of the United States.").

224. *See id.* ("Many States, on their own initiative, have enacted statutes consenting to a wide variety of suits."); *Great N. Life Ins. Co. v. Read*, 322 U.S. 47, 53 (1944) (proclaiming that immunity is "mitigated by a sense of justice which has continually expanded by consent the suability of the sovereign").

225. *See Alden*, 527 U.S. at 755.

226. *See id.*

227. *See Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976).

228. *See Mt. Healthy City Bd. of Educ. v. Doyle*, 429 U.S. 274, 280 (1977); *Lincoln County v. Luning*, 133 U.S. 529 (1890).

229. *See Alden*, 527 U.S. at 755-57; *Seminole Tribe v. Florida*, 517 U.S. 44, 71 n.14 (1996).

230. It was the southern states' refusal to abide by treaties and the Articles of Confederation that led to the scrapping of the Articles in favor of the Constitution. *See supra* text accompanying notes 70-80; *cf. THE FEDERALIST* NO. 15, *supra* note 46, at 110 ("There was a time when we were told that breaches by the States of the regulations of the federal authority were not to be expected; that a sense of common interest would preside over the conduct of the respective members, and would beget a full compliance with all the constitutional requisitions of the Union. This language, at the present day, would appear as wild as a great part of what we now hear from the same quarter will be thought, when we shall have received further lessons from that best oracle of wisdom, experience. It at all times betrayed an ignorance of the true springs by which human conduct is actuated, and belied the original inducements to the establishment of civil power. Why has government been instituted at all? Because the passions

brought by the federal government or sister states are available, but limited resources and attenuated interest prevent many private wrongs from being remedied.²³¹ Section 5 enforcement under the Fourteenth Amendment is limited in subject matter.²³² Suits against substate entities are irrelevant when the federal violation was by a state. And suits against state officers are available only for prospective injunctive relief, a remedy which may insufficiently compensate the victim and insufficiently deter violations of federal law.²³³ To make matters worse, the Court has exhibited an unabashed willingness to winnow these alternative enforcement mechanisms.²³⁴

The dignity rationale can justify immunity from federal question lawsuits on the simple ground that dignity is impermissibly impaired regardless of the strength of other mechanisms to ensure compliance with federal law and despite the decreased indignity to the state. Though this rationale is facially weak, it could be strengthened by a showing that the alternative mechanisms for enforcement really do help to ensure compliance with federal law. If, on the

of men will not conform to the dictates of reason and justice without constraint.”).

231. See, e.g., Vázquez, *supra* note 22, at 888 (arguing that governmental agencies have neither the resources nor the motivation to combat state infractions at a level equal to that of individual plaintiffs). On the flip side, governmental responsibility may help ensure that the states are not subjected to the more frivolous claims.

232. See U.S. CONST. amend. XIV, § 5 (“The Congress shall have the power to enforce, by appropriate legislation, the provisions of *this article*.”) (emphasis added).

233. See Daniel J. Meltzer, *State Sovereign Immunity: Five Authors in Search of a Theory*, 75 NOTRE DAME L. REV. 1011, 1016 (2000) (“[M]any violations do not arise from ongoing practices subject to injunctive orders, while in other cases . . . the employer may come into compliance so as to make injunctive relief inappropriate. In those cases, a rule that only injunctions may be obtained is tantamount to a rule that no relief is available. Even where ongoing practices exist, merely enjoining their continuation fails to compensate for harm suffered, and may not by itself provide adequate incentives for reasonably complete and prompt compliance.”); Vázquez, *supra* note 22, at 875 (predicting “numerous, albeit temporary, violations of federal law”).

234. See, e.g., *Bd. of Trs. of the Univ. of Ala. v. Garrett*, 531 U.S. 356, 369-72 (2001) (requiring Congress to show past constitutional violations by the states); *Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 680 (1999) (eliminating implied waiver); *Idaho v. Coeur d’Alene Tribe*, 521 U.S. 251, 287 (1997) (refusing to permit *Ex parte Young* suits for a de facto quiet title to land because “Idaho’s sovereign interest in its lands and waters would be affected in a degree fully as intrusive as almost any conceivable retroactive levy upon funds in its Treasury”); *Seminole Tribe*, 517 U.S. at 74 (“[W]here Congress has prescribed a detailed remedial scheme for the enforcement against a State of a statutorily created right, a court should hesitate before casting aside those limitations and permitting an action against a state officer based upon *Ex parte Young*.”); *Lake Country Estates, Inc. v. Tahoe Reg’l Planning Agency*, 440 U.S. 391, 401 (1979) (suggesting that sovereign immunity may protect county officials if the judgment would run against the state treasury).

other hand, the alternative mechanisms are poor enforcers, the dignity rationale may demand reevaluation of immunity under federal law.

In any case, the Court has held that Congress *can* abrogate state sovereign immunity in at least one instance of federal law. Section 5 of the Fourteenth Amendment²³⁵ authorizes Congress to subject the states to private suit for the purpose of enforcing the mandates of that Amendment.²³⁶ The Fourteenth Amendment does so, according to the Court, because it specifically contemplates direct congressional regulation of the states²³⁷ and dramatically altered the federal-state balance of power in favor of the federal government.²³⁸ In other words, the constitutional prerogative of the federal government to enforce compliance with the Constitution is at its zenith under the Fourteenth Amendment, while state dignity is minimal because the rights to be protected are constitutional²³⁹ and were agreed upon by the states at the Amendment's ratification.²⁴⁰ The Fourteenth Amendment simply tips the balance of federal power over the dignity-based state immunity.

C. *The Effect of the Forum*

Accepting the Court's determination that dignity immunizes states from certain suits in federal court, those same suits should fail in other forums as well, simply on the ground that the national judicial forum best furthers national interests and best comports with the dignity of the state defendant.²⁴¹ Indeed,

235. U.S. CONST. amend. XIV, § 5 ("The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.").

236. See *Fitzpatrick v. Bitzer*, 427 U.S. 445, 456 (1976).

237. *Id.* at 453; accord *Seminole Tribe*, 517 U.S. at 59 ("We noted that § 1 of the Fourteenth Amendment contained prohibitions expressly directed at the States and that § 5 of the Amendment expressly provided that 'The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.'" (quoting U.S. CONST. amend. XIV, § 5); *Ex parte Virginia*, 100 U.S. 339, 345 (1879) (stating that the Amendment's provisions are "limitations of the power of the States and enlargements of the power of Congress").

238. *Fitzpatrick*, 427 U.S. at 455; accord *Seminole Tribe*, 517 U.S. at 59 (explaining that the Fourteenth Amendment "fundamentally altered the balance of state and federal power struck by the Constitution").

239. See Caminker, *Judicial Solicitude*, *supra* note 13, at 84.

240. *Ex Parte Virginia*, 100 U.S. at 346 ("The prohibitions of the Fourteenth Amendment are directed to the States, and they are to a degree restrictions of State power. . . . Such enforcement is no invasion of State sovereignty. No law can be, which the people of the States have, by the Constitution of the United States, empowered Congress to enact.").

241. Although the Eleventh Amendment by its terms only restricts the power of the federal judiciary to hear certain suits against states, the Amendment has not been construed as a limitation on state sovereign immunity in other forums. See U.S. CONST. amend. XI; *Fed. Mar. Comm'n v. S.C. State Ports Auth.*, 535 U.S. 743, 760 (2002) (holding that state sovereign immunity shields states from federal administrative proceedings); *Alden v. Maine*, 527 U.S. 706, 713 (1999) ("[T]he sovereign immunity of the States neither derives from, nor is limited

subjecting a nonconsenting state to suit in its own courts may offend its dignity to an even greater extent because it coerces the state, if necessary, to sanction itself.²⁴² Likewise, forcing a nonconsenting state to appear in a federal administrative proceeding may be a more serious affront than a suit before Article III judges confirmed for life.²⁴³ Accordingly, it is consistent with the dignity rationale to uphold state sovereign immunity in federal court, in a state's own courts, and before federal agencies.

More complicated is a suit against a state in a different state's courts. The Court has held that a state's sovereign immunity from a suit brought by an individual in another state's courts is a matter of comity, not constitutional mandate.²⁴⁴ The dignity rationale may counsel a different result.²⁴⁵

The indignity of being forced to appear as a defendant in federal courts,²⁴⁶ a state's own courts,²⁴⁷ and federal adjudicative tribunals²⁴⁸ is no less profound in a sister state's courts. The state is being haled unwillingly by a private individual before a foreign tribunal.²⁴⁹ That the tribunal happens to sit in a sister state does not make the coercion any less ignominious.

Nor is there a strong link between eliminating immunity and protecting the peace of the union. In fact, the absence of immunity here may beget particularly

by, the terms of the Eleventh Amendment.”).

242. See *Alden*, 527 U.S. at 749 (“In some ways, of course, a congressional power to authorize private suits against nonconsenting States in their own courts would be even more offensive to state sovereignty than a power to authorize the suits in a federal forum. . . . A power to press a State's own courts into federal service to coerce the other branches of the State, furthermore, is the power first to turn the State against itself and ultimately to commandeer the entire political machinery of the State against its will and at the behest of individuals. Such plenary federal control of state governmental processes denigrates the separate sovereignty of the States.”) (citations omitted).

243. *Fed. Mar. Comm'n*, 535 U.S. at 760 n.11 (“One, in fact, could argue that allowing a private party to haul a State in front of such an administrative tribunal constitutes a greater insult to a State's dignity than requiring a State to appear in an Article III court presided over by a judge with life tenure nominated by the President of the United States and confirmed by the United States Senate.”).

244. See *Nevada v. Hall*, 440 U.S. 410, 425 (1979) (“But these provisions do not imply that any one State's immunity from suit in the courts of another State is anything other than a matter of comity.”).

245. But see *Franchise Tax Bd. v. Hyatt*, 538 U.S. 488, 489 (2003) (declining to reconsider *Hall*); *Alden*, 527 U.S. at 749 (distinguishing *Hall*).

246. See *In re Ayers*, 123 U.S. 443 (1887).

247. See *Alden*, 527 U.S. 706.

248. See *Fed. Mar. Comm'n*, 535 U.S. 743.

249. In this respect, the inability of a state to assert immunity in another state's court is in considerable tension with a state's right to assert immunity in federal court. See Smith, *supra* note 13, at 101 (“Under current doctrine, the states have more authority with respect to each other than the federal government has with respect to the states.”).

hostile relationships between states. The defendant state might withdraw its money from the forum state's banks to impair the forum state's attempt to effect a money judgment, or it might readjust its own court procedures with respect to the forum state in tit-for-tat retaliation.²⁵⁰ Federal jurisdiction over conflicts between states permits an ostensibly impartial resolution. State jurisdiction over a conflict involving another state does not present the same aura of impartiality. If the dignity rationale is to prevail, it may require immunity in other states' courts.²⁵¹

D. The Status of the Defendant

Sovereign immunity does not protect substate entities such as cities, counties, or local school boards.²⁵² This is in accord with the dignity rationale. Though the Eleventh Amendment speaks only to protecting states, the Court has based

250. Cf. *Nevada v. Hall*, 440 U.S. 410, 417 n.12 (1979) (noting these possibilities); *id.* at 427 (Blackmun, J., dissenting) ("I suspect that the Court has opened the door to avenues of liability and interstate retaliation that will prove unsettling and upsetting for our federal system."); *id.* at 429 (Blackmun, J., dissenting) ("States in all likelihood will retaliate against one another for respectively abolishing the 'sovereign immunity' doctrine. States' legal officers will be required to defend suits in all other States. States probably will decide to modify their tax-collection and revenue systems in order to avoid the collection of judgments. . . . Under the Court's decision, Nevada will have strong incentive to withdraw those balances and place them in Nevada banks so as to insulate itself from California judgments."); *id.* at 443 (Rehnquist, J., dissenting) ("This decision cannot help but induce some 'Balkanization' in state relationships as States try to isolate assets from foreign judgments and generally reduce their contacts with other jurisdictions. That will work to the detriment of smaller States — like Nevada — who are more dependent on the facilities of a dominant neighbor — in this case, California.").

251. Historical statements suggest founding era support for immunity in a sister state's courts. See 3 ELLIOT'S DEBATES, *supra* note 57, at 549 (Edmund Pendleton) (noting "[t]he impossibility of calling a sovereign state before the jurisdiction of another sovereign state"); 4 THE DOCUMENTARY HISTORY OF THE SUPREME COURT OF THE UNITED STATES 130 (Maeva Marcus ed., 1992) (Edmund Randolph) ("[A]s far as a particular state can be a party defendant, a sister state cannot be her judge. Were the states of America unconfederated, they would be as free from mutual controul as other disjoined nations. Nor does the federal compact narrow this exemption; but confirms it, by establishing a common arbiter in the federal judiciary, whose constitutional authority may administer redress."). In addition, the preratification case of *Nathan v. Virginia*, 1 U.S. (1 Dall.) 81 n.* (Pa. 1781), suggests the same. *Nathan*, 1 U.S. at 80 nn.(a) & 1 ("The true ground of this decision is, that a sovereign state is not suable in the municipal courts of another jurisdiction, and a foreign attachment is but a mode of compelling an appearance. Whilst the states have surrendered certain powers to the general government, they have not divested themselves of the attribute of state sovereignty.").

252. See *Mount Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 280-81 (1977) (public school boards); *Moor v. County of Alameda*, 411 U.S. 693, 717-21 (1973) (counties); *Workman v. New York*, 179 U.S. 522 (1900) (cities); *Lincoln County v. Luning*, 133 U.S. 529 (1890) (counties). The Court recently reaffirmed that substate entities are not entitled to sovereign immunity. See *Jinks v. Richland County*, 538 U.S. 456 (2003).

its decisions on extratextual reasons. In *Lincoln County v. Luning*,²⁵³ for example, the Court held that counties are not immune from suits because of a long historical practice of private individuals suing counties.²⁵⁴ Moreover, substate entities have long been characterized as more akin to corporations than governmental bodies.²⁵⁵ The exclusion of substate entities from immunity protection stems from the characterizing of substate entities as lacking sufficient sovereign dignity.²⁵⁶

But what if the defendant is the governor of the state or some other state officer?²⁵⁷ The first case to discuss this problem was the original dignity-rationale case, *In re Ayers*, which essentially suggested that an officer could be sued in his individual capacity for actions prohibited by federal law because actions unauthorized under federal law — and therefore unauthorized under state law — must be personal actions.²⁵⁸ Separating the official from the state makes application of the dignity rationale easy, and necessary, for the *In re Ayers* Court. It also comports with English law, which held that the king could never authorize illegal conduct, and therefore, an official's illegal acts were not attributed to the king,²⁵⁹ but were the official's own illegal acts, subjecting the official to individual liability.²⁶⁰ The dignity rationale justifies suing an official

253. 133 U.S. 529 (1890).

254. *Id.* at 530 (citing the number of suits against counties in the previous thirty years). The Court decided *Luning* on the same day that it did *Hans v. Louisiana*, 134 U.S. 1 (1890), so it is no wonder that the text of the Eleventh Amendment was not dispositive.

255. See 1 STEWART SYD, TREATISE ON THE LAW OF CORPORATIONS 28 (1793) (treating private and public corporations as two branches of the same subject). In *Chisholm v. Georgia*, Chief Justice Jay assumed the proposition that cities lacked the sovereign attributes that Georgia claimed. See *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 417, 472-73 (1793).

256. See Fletcher, *Historical Interpretation*, *supra* note 50, at 1106.

257. See Althouse, *supra* note 13, at 265 (asking how the dignity rationale can be reconciled with *Ex parte Young*).

258. *In re Ayers*, 123 U.S. 443, 507 (1887) ("Nor need it be apprehended that the construction of the 11th Amendment, applied in this case, will in anywise embarrass or obstruct the execution of the laws of the United States, in cases where officers of a State are guilty of acting in violation of them under color of its authority. . . . If, therefore, an individual, acting under the assumed authority of a State, as one of its officers, and under color of its laws, comes into conflict with the superior authority of a valid law of the United States, he is stripped of his representative character, and subjected in his person to the consequences of his individual conduct. The State has no power to impart to him any immunity from responsibility to the supreme authority of the United States.").

259. See 1 BLACKSTONE, *supra* note 22, at *244. "If the king really had given such [illegal] commands or instructions, he must have been deceived." 6 WILLIAM HOLDSWORTH, A HISTORY OF ENGLISH LAW 101 (1903).

260. See 3 HOLDSWORTH, *supra* note 259, at 388; *Sands v. Child*, 3 Lev. 351, 352, 83 Eng. Rep. 725, 726 (K.B. 1693) ("[F]or the warrant of no man, not even of the King himself, can excuse the doing of an illegal act . . .").

in his individual capacity because the official has no inherent dignity himself. Further, because an official's unauthorized conduct divorces him from the state, the suit does not run against the state, which would subject the state to the indignity of suit.

Things are more complicated when an officer is sued in his *official* capacity, which necessarily links the official to state actions. In *Ex parte Young*, the Court considered whether it had jurisdiction over a state officer for contempt of a federal court order enjoining him from attempting to enforce an unconstitutional state law.²⁶¹ Young argued that the suit was really against the state and barred by the Eleventh Amendment.²⁶² Young had a point; the Court had previously held that official actions are actions of the state sufficient to implicate the Fourteenth Amendment.²⁶³ But the Court's reasoning in *Ex parte Young* tracked *In re Ayers*:

The act to be enforced is alleged to be unconstitutional, and if it be so, the use of the name of the State to enforce an unconstitutional act to the injury of complainants is a proceeding without the authority of and one which does not affect the State in its sovereign or governmental capacity. It is simply an illegal act upon the part of a state official in attempting by the use of the name of the State to enforce a legislative enactment which is void because unconstitutional. If the act which the state Attorney General seeks to enforce be a violation of the Federal Constitution, the officer in proceeding under such enactment comes into conflict with the superior authority of that Constitution, and he is in that case stripped of his official or representative character and is subjected in his person to the consequences of his individual conduct. The State has no power to impart to him any immunity from responsibility to the supreme authority of the United States.²⁶⁴

Young "carv[ed] out a necessary exception to Eleventh Amendment immunity,"²⁶⁵ because some remedy was needed to assure the enforcement of federal law.²⁶⁶ *Young* does not, however, answer the question of how an

261. *Ex parte Young*, 209 U.S. 123 (1908).

262. *Id.* at 132.

263. *See Ex parte Virginia*, 100 U.S. 339, 347 (1879) ("Whoever, by virtue of public position under a State government, deprives another of property, life, or liberty, without due process of law, or denies or takes away the equal protection of the laws, violates the constitutional inhibition; and as he acts in the name and for the State, and is clothed with the State's power, his act is that of the State.").

264. *Young*, 209 U.S. at 159-60.

265. *P.R. Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 146 (1993).

266. *See Edelman v. Jordan*, 415 U.S. 651 (1974); *Young*, 209 U.S. 123; *see also Alden v.*

official's conduct can be "official conduct" and yet not be state action for purposes of sovereign immunity.²⁶⁷ To make matters more confusing, the Court has continued down the fictional path by, for example, restricting *Young* to prospective injunctive relief.²⁶⁸

The *Young* doctrine is in some tension with the dignity rationale. If the official action really is divorced from the state, then there is no indignity to the state regardless of the remedy sought. If, on the other hand, the official's separation from the state is incomplete and indignity still attains, even prospective injunctive relief should be barred, for the Court has repeatedly stressed that sovereign immunity is immunity from suit, regardless of the relief sought.²⁶⁹ In either case, the compensatory-injunctive relief distinction is

Maine, 527 U.S. 706, 747 (1999) ("*Ex Parte Young* is based in part on the premise that sovereign immunity bars relief against States and their officers in both state and federal courts, and that certain suits for declaratory or injunctive relief against state officers must therefore be permitted if the Constitution is to remain the supreme law of the land.") (citation omitted); *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 104-06 (1984) ("[T]he *Young* doctrine has been accepted as necessary to permit the federal courts to vindicate federal rights and hold state officials responsible . . ."); *Perez v. Ledesma*, 401 U.S. 82, 106 (1971) (Brennan, J., concurring in part, dissenting in part) ("*Ex parte Young* was the culmination of efforts by this Court to harmonize the principles of the Eleventh Amendment with the effective supremacy of rights and powers secured elsewhere in the Constitution.").

267. See *Fla. Dep't of State v. Treasure Salvors, Inc.*, 458 U.S. 670, 685 (1982) (plurality opinion) (recognizing the "irony" but avoiding explanation).

268. See *Pennhurst*, 465 U.S. at 106 ("In sum, *Edelman's* distinction between prospective and retroactive relief fulfills the underlying purpose of *Ex parte Young* while at the same time preserving to an important degree to constitutional immunity of the States."); *Edelman*, 415 U.S. 651.

269. See, e.g., *Fed. Mar. Comm'n v. S.C. State Ports Auth.*, 535 U.S. 743, 765 (2002) ("[S]overeign immunity applies regardless of whether a private plaintiff's suit is for monetary damages or some other type of relief."); *Seminole Tribe v. Florida*, 517 U.S. 44, 58 (1996) ("But we have often made it clear that the relief sought by a plaintiff suing a State is irrelevant to the question whether the suit is barred by the Eleventh Amendment."); *Hess v. Port Auth. Trans-Hudson Corp.*, 513 U.S. 30, 48 (1994) (stating that immunity is not solely to "prevent[] . . . federal-court judgments that must be paid out of a State's treasury"); *Metcalf & Eddy*, 506 U.S. at 146 ("While application of the collateral order doctrine in this type of case is justified in part by a concern that States not be unduly burdened by litigation, its ultimate justification is the importance of ensuring that the States' dignitary interests can be fully vindicated."); *Pennhurst*, 465 U.S. at 100 (affirming that the immunity bar "applies regardless of the nature of the relief sought"); *Cory v. White*, 457 U.S. 85, 90 (1982) ("It would be a novel proposition indeed that the Eleventh Amendment does not bar a suit to enjoin the State itself simply because no money judgment is sought."); *Missouri v. Fiske*, 290 U.S. 18, 27 (1933) ("Expressly applying to suits in equity as well as at law, the Amendment necessarily embraces demands for the enforcement of equitable rights and the prosecution of equitable remedies when these are asserted and prosecuted by an individual against a State.").

irrelevant.²⁷⁰

The matter need not be so black or white, however. If the Court insists on characterizing the state as having dignity, further anthropomorphizing may illustrate dignity's reconciliation with *Young*.²⁷¹ The state certainly will be embarrassed by what one of its delinquent children has done, though perhaps less embarrassed because the officer is the one named, not the state itself.²⁷² The state may take comfort in the acceptance that the state (itself a fiction, after all) is deemed unaccountable for the illegal act. Although there is a connection between the sued officer and the state in terms of state dignity, that connection is attenuated. Thus, *Young* may be reconciled with the dignity rationale because a remedy sensitive to the state's relatively minor interest in dignity is necessary to ensure compliance with federal law; thus, the officer, but not the state, appears to bear the brunt of the remedy.²⁷³ If the Court is willing to take a careful and meticulous approach, it may be able to fashion a principled rationale for the compensatory-injunctive distinction based on the dignity rationale.

E. The Consent of the State

The Court has made clear that states may waive their sovereign immunity and consent to suit.²⁷⁴ By placing the control of a state's destiny in its own hands,

270. To the extent that state dignity is implicated in an officer suit, there is arguably more indignity in the imposition of an injunction than in a money judgment. The state would suffer both the indignity of suit and the indignity of a commandeered remedy. For more on the tension between *Ex parte Young* and the anticommandeering doctrine, see *infra* text accompanying notes 327-328.

271. I realize that this anthropomorphosis may seem a bit jarring, and I share others' skepticism of attributing distinctly human qualities to governmental entities. See, e.g., Caminker, *Judicial Solicitude*, *supra* note 13, at 85 (calling the characterization "silly"). Nevertheless, my goal here is to explore what role the dignity rationale could play in uniting state sovereign immunity doctrines. Taking the personalization of dignity one step further does just that, at least with respect to *Ex parte Young*. I also think the anthropomorphosis is less jarring when the state is taken as merely representative of the sovereignty of the state citizenry, rather than as an independent and self-standing entity. See *supra* text accompanying notes 210-212.

272. See Caminker, *Judicial Solicitude*, *supra* note 13, at 84. But see *Idaho v. Coeur d'Alene Tribe*, 521 U.S. 261, 270 (1997) ("The real interests served by the Eleventh Amendment are not to be sacrificed to elementary mechanics of captions and pleading.").

273. See *Green v. Mansour*, 474 U.S. 64, 68 (1985) ("Both prospective and retrospective relief implicate Eleventh Amendment concerns, but the availability of prospective relief of the sort awarded in *Ex parte Young* gives life to the Supremacy Clause. Remedies designed to end a continuing violation of federal law are necessary to vindicate the federal interest in assuring the supremacy of that law.").

274. See *Clark v. Barnard*, 108 U.S. 436 (1887); see also *Lapides v. Bd. of Regents of the Univ. of Ga.*, 535 U.S. 613, 620 (2002) (holding that a state's voluntary removal to federal court waives Eleventh Amendment immunity); *Coeur D'Alene*, 521 U.S. at 267 ("[A] State can waive

the waiver rule coincides with state dignity. The state can hardly complain of an ignominy if it is free to object but does not do so.²⁷⁵

There are several anomalies which must be addressed, however, the first being the conflict between waiver and the characterization of sovereign immunity as a limitation on the court's subject matter jurisdiction.²⁷⁶ Though subject matter jurisdiction is not waivable,²⁷⁷ states may waive their sovereign immunity and consent to suit. The court has not clearly resolved this paradox.²⁷⁸

Perhaps the best resolution lies in rethinking the characterization of state sovereign immunity as a limitation on judicial power. If it is indeed so completely divorced from the text of the Constitution as the Court has intimated, it need not be bound by the Eleventh Amendment's reference to a limit on "the judicial Power," which by its terms would not recognize a consent-based exercise of jurisdiction.²⁷⁹ There are satisfying ways of characterizing sovereign immunity as a doctrine of personal jurisdiction, rather than subject matter jurisdiction,²⁸⁰ which also comport with the dignity rationale.²⁸¹ The Court has

its Eleventh Amendment protection and allow a federal court to hear and decide a case commenced or prosecuted against it."). Consent seems to have been a featured part of immunity since ratification. *See, e.g.*, THE FEDERALIST NO. 81, *supra* note 59, at 487 ("It is inherent in the nature of sovereignty, not to be amenable to the suit of an individual *without its consent*." (emphasis added)); 3 ELLIOT'S DEBATES, *supra* note 57, at 533 (James Madison) (stating that the Constitution "give[s] a citizen a right to be heard in the federal courts; and if a state should condescend to be a party, this court may take cognizance of it").

275. This is particularly true with regard to federal funds accepted under Spending Clause legislation. As I have noted elsewhere, Congress' attempt to purchase consent under the Spending Power is properly construed as a permissible solicitation of voluntary waiver. *See* Dodson, *Metes and Bounds*, *supra* note 1, at 723 n.18.

276. The Eleventh Amendment expressly limits "judicial Power." U.S. CONST. amend. XI. The Court has interpreted the Amendment as "partak[ing] . . . of a jurisdictional bar." *Edelman v. Jordan*, 415 U.S. 651, 678 (1974).

277. *See, e.g.*, *Owen Equip. & Erection Co. v. Kroger*, 437 U.S. 365, 377 n.21 (1978); *Sosna v. Iowa*, 419 U.S. 393, 398 (1975); *Jackson v. Ashton*, 33 U.S. (8 Pet.) 148, 149 (1834).

278. *See* *Seminole Tribe v. Florida*, 517 U.S. 44, 127-28 (1996) (Souter, J., dissenting); *Pennsylvania v. Union Gas Co.*, 491 U.S. 1, 25-29 (1989) (Stevens, J., concurring), *overruled* by *Seminole Tribe v. Florida*, 517 U.S. 44 (1996).

279. *See* *Union Gas*, 491 U.S. at 26 (Stevens, J., concurring) ("Our willingness to allow States to waive their immunity thus demonstrates that this immunity is not a product of the limitation of judicial power contained in the Eleventh Amendment.").

280. *See* *Clark v. Barnard*, 108 U.S. 436, 447 (1887) ("The immunity from suit belonging to a State . . . is a *personal privilege* which it may waive at pleasure . . .") (emphasis added); Nelson, *supra* note 51. Going too far in anthropomorphizing states for state sovereign immunity purposes, however, may spill over into other areas which are highly problematic, such as analogies to individual constitutional rights. Elsewhere I have expressed doubt about the propriety of this analogy. *See* Dodson, *Metes and Bounds*, *supra* note 1, at 749 n.144.

281. Construing sovereign immunity as something less than a limitation on judicial power has the added advantage of alleviating tension with the *Ex parte Young* doctrine, a judicially-

already experimented a bit with the nomenclature, calling it “a sovereign immunity from suit, rather than a nonwaivable limit on the Federal Judiciary’s subject-matter jurisdiction.”²⁸²

A second possible answer lies in characterizing the dignity rationale as a preconditional factor to jurisdiction. Under this theory, the jurisdictional bar arises only when a state’s dignity is impermissibly impugned. If the state consents to suit, its dignity has not been denigrated, and jurisdiction applies. Thus, the state is not waiving the court’s lack of subject matter jurisdiction; rather, it is refusing to assert the necessary predicate for the jurisdictional bar in the first place.

The waiver-consent rule helps resolve appellate review cases in light of the dignity rationale.²⁸³ All federal appellate review cases initially involved a state action. If the state was the plaintiff in the original state suit, as was the case in *Cohens v. Virginia*, it has chosen to invoke the jurisdiction of its own courts and should be held to have thereby consented to any appellate review, federal or state, whether initiated by itself or by the defendant.²⁸⁴ A state sued in its own courts can, of course, invoke immunity under *Alden*; if it fails to do so, it could be held to have waived that immunity by the time the case comes to the Supreme Court.

This waiver construction conflicts with the Court’s dictum that immunity may be invoked at any time, including on appeal,²⁸⁵ though, in light of the Court’s

created exception to sovereign immunity.

282. *Idaho v. Coeur d’Alene Tribe*, 521 U.S. 261, 267 (1997); *accord* *Wis. Dep’t of Corr. v. Scheadt*, 524 U.S. 381, 391 (1998) (asserting that whether “Eleventh Amendment immunity is a matter of subject-matter jurisdiction [is] a question we have not decided”).

283. The Court has unconvincingly attempted to reconcile federal review with waiver by conflating state judicial consent to federal review and state consent to suit. *See McKesson Corp. v. Fla. Alcohol & Tobacco Div.*, 496 U.S. 18, 30 (1990) (“[W]hen a state court takes cognizance of a case, the State assents to appellate review by this Court of the federal issues raised in the case ‘whoever may be the parties to the original suit, whether private persons, or the state itself.’”) (quoting *Charles River Bridge v. Warren Bridge*, 36 U.S. (11 Pet.) 420, 585 (1837) (Story, J., dissenting)). This approach is highly problematic on state separation of powers grounds and in tension with the Court’s own immunity-waiver jurisprudence.

284. *See Smith v. Reeves*, 178 U.S. 436, 445 (1900) (Consent to suit in state court is “subject always to the condition, arising out of the supremacy of the Constitution of the United States and the laws made in pursuance thereof, that the final judgment of the highest court of the State in any action brought against it with its consent may be reviewed or reexamined [by this Court].”).

285. *See Edelman v. Jordan*, 415 U.S. 651, 677-78 (1974) (considering the defense though raised for the first time on appeal); *Beers v. Arkansas*, 61 U.S. (20 How.) 527, 529 (1857) (“It is an established principle of jurisprudence in all civilized nations that the sovereign cannot be sued in its own courts, or in any other, without its consent and permission; but it may, if it thinks proper, waive this privilege, and permit itself to be made a defendant in a suit by individuals, or by another State. And as this permission is altogether voluntary on the part of the

more recent determination that a state's voluntary removal to federal court constitutes a waiver of its sovereign immunity, the conflict is not irreconcilable.²⁸⁶ The conflict could be resolved by pushing the state's right to renege as far back as possible without buckling completely. In other words, the state may assert immunity at any time *until* the state court of last resort issues its opinion. At that moment, the state's dignity interest is at its nadir while the federal interests are at their zenith.

The state's dignity interest in immunity from suit is minimized because it has already submitted to a few rounds of court battles with the prospect of adverse judgment. Federal appellate review, unlike state appellate review, is also somewhat more deferential because the appellate decision acts upon the lower state court judgment, rather than upon the state as a party to the litigation.²⁸⁷ In contrast, the need for impartial and uniform interpretation of federal law is paramount.²⁸⁸ Otherwise, states could obtain favorable and biased decisions from their state supreme courts construing federal law in their favor and insulate those decisions from federal court review by asserting immunity upon the individual's petition for federal review.²⁸⁹

sovereignty, it follows that it may prescribe the terms and conditions on which it consents to be sued, and the manner in which the suit shall be conducted, and may withdraw its consent whenever it may suppose that justice to the public requires it."); *see also* Christina Bohannon, *Beyond Abrogation of Sovereign Immunity: State Waivers, Private Contracts, and Federal Incentives*, 77 N.Y.U. L. REV. 273, 290-91 (2002) (arguing that, as a limit on subject matter jurisdiction, states may assert sovereign immunity for the first time even on a collateral attack to the judgment).

286. *See* *Lapides v. Bd. of Regents of Univ. of Ga.*, 535 U.S. 613 (2002). Prior to *Lapides*, scholars had noted that the Court had not been clear about when a state would have been deemed to have waived its immunity. *See* William A. Fletcher, *The Eleventh Amendment: Unfinished Business*, 75 NOTRE DAME L. REV. 843, 850 (2000).

287. *See* *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 372 (1821) (explaining that "appellate jurisdiction . . . acts, not on the State, but on its Courts").

288. *See id.* at 391 (discussing the "partiality of the State tribunals"); *id.* at 415-16 ("Thirteen independent Courts . . . of final jurisdiction over the same causes, arising upon the same laws, is a hydra in government, from which nothing but contradiction and confusion can proceed.").

289. *See id.* at 407 ("A general interest might well be felt in leaving to a State the full power of consulting its convenience in the adjustment of its debts, or of other claims upon it; but no interest could be felt in so changing the relations between the whole and its parts, as to strip the government of the means of protecting, by the instrumentality of its Courts, the constitution and laws from active violation."); *see also* *McKesson Corp. v. Fla. Alcohol & Tobacco Div.*, 496 U.S. 18, 29 (1990) ("To secure state-court compliance with, and national uniformity of, federal law, the exercise of jurisdiction by state courts over cases encompassing issues of federal law is subject to two conditions: State courts must interpret and enforce faithfully the 'supreme Law of the Land,' and their decisions are subject to review by this Court.") (citations omitted) (quoting U.S. CONST. art. VI).

F. Sovereign Immunity Conclusions

The Court's distancing of state sovereign immunity from textual anchors permits the dignity rationale to be viewed doctrinally as an immunization from suit unless other circumstances justify federal supremacy. This surprisingly simple equation is flexible enough to build a workable and (substantially) principled framework for state sovereign immunity. It will take significant care and foresight, and perhaps some retweaking of old opinions, but it can be done.

The Court must be particularly careful, however, with the dignity theory's ramifications for other state sovereignty doctrines. The dignity theory is bigger than state sovereign immunity; its effects radiate beyond the immunity doctrine.²⁹⁰ Part IV examines how the adoption of the dignity rationale may affect other state sovereignty strains.

IV. A Perspective on the Future

As I have written elsewhere at length, the several state sovereignty doctrines can be thought of as linked by a common focus. State sovereign immunity, state regulatory immunity, and the anticommandeering principle focus their energies in defense of a federal power bearing down on the state. The resolution of these vertical issues depends on the relative strengths of the federal government's power to control and of the state's power to resist.²⁹¹ In the confines of state sovereign immunity, dignity clearly buttresses the latter.

The Court's decision to move away from textual codifications of state sovereign immunity and embrace the decidedly nontextual dignity rationale means that dignity is not confined to the Eleventh Amendment. It is, according to the Court, something inherent in state sovereignty. Dignity, therefore, is not confined to state sovereign immunity.²⁹² Its adoption in that context shifts the

290. Cf. Barry Cushman, *Formalism and Realism in Commerce Clause Jurisprudence*, 67 U. CHI. L. REV. 1089, 1149 (2000) ("The doctrinal decontextualization involved in the conventional strategy of studying a *line* of doctrine from its earliest expression through its most recent is thus fundamentally misguided. . . . Such an approach too easily blinds us to the dynamics of interdoctrinal connections . . .").

291. See Dodson, *Vectorial Federalism*, *supra* note 1, at 411-22.

292. That the Court has pinpointed the one specific "indignity of subjecting a State to the coercive process of judicial tribunals at the insistence of private parties," *Alden v. Maine*, 527 U.S. 666, 749 (1999) (quoting *In re Ayers*, 123 U.S. 443, 505 (1887)), does not mean that a more generalized principle of state dignity is confined to state sovereign immunity analysis. The Court's regulatory immunity and anticommandeering doctrines exhibit similar sentiments, albeit without using the term "dignity." See, e.g., *Printz v. United States*, 521 U.S. 898, 928 (1997) (decrying federal commands "'reduc[ing] the states] to puppets of a ventriloquist Congress'" by "'dragoon[ing]'" state officials) (quoting *Brown v. EPA*, 521 F.2d 827, 839 (9th Cir. 1975)); *Nat'l League of Cities v. Usery*, 426 U.S. 833, 845 (1976) ("We have repeatedly recognized that there are attributes of sovereignty attaching to every state government which may not be

federal-state balance in the other state sovereignty doctrines as well. Armed with state dignity, the states may command greater deference and resist exercises of federal power with newfound strength. In the next few subparts, I discuss how dignity may change the future of state regulatory immunity and the anticommandeering principle.

A. State Regulatory Immunity

The Court's "state regulatory immunity" doctrine has had a troubled existence. In *Maryland v. Wirtz*,²⁹³ the Court held that Congress could constitutionally regulate a state just as it could a private individual.²⁹⁴ That decision was overruled in part eight years later by *National League of Cities v. Usery*,²⁹⁵ which held that Congress may not regulate states when its legislation would intrude upon core state governmental functions essential to a state's separate and independent existence.²⁹⁶ Nine years later, in *Garcia v. San Antonio Metropolitan Transit Authority*,²⁹⁷ the Court reconsidered *National League of Cities* and overruled it entirely as unworkable.²⁹⁸ *Garcia* relegated protection of state sovereignty from excessive federal regulation to the structural incorporation of state interests in the procedural mechanisms of the federal government.²⁹⁹

The Court has never been clear about the constitutional source of state regulatory immunity, except to assert that it has long recognized state-sovereignty limitations on federal power.³⁰⁰ The dignity rationale might provide

impaired by Congress, not because Congress may lack an affirmative grant of legislative authority to reach the matter, but because the Constitution prohibits it from exercising the authority in that manner."), *overruled by* *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 530 (1985); *id.* at 849 ("The difference, however, is that a State . . . is itself a coordinate element in the system established by the Framers for governing our Federal Union.").

293. 392 U.S. 183 (1968), *overruled in part by* *Nat'l League of Cities v. Usery*, 426 U.S. 833 (1976).

294. *See id.* at 196-97 ("[W]hile the commerce power has limits, valid general regulations of commerce do not cease to be regulations of commerce because a State is involved. If a State is engaging in economic activities that are validly regulated by the Federal Government when engaged in by private persons, the State too may be forced to conform its activities to federal regulation.").

295. 426 U.S. 833 (1976).

296. *See id.* at 845, 852 ("We hold that insofar as the challenged amendments operate to directly displace the States' freedom to structure integral operations in areas of traditional governmental functions, they are not within the authority granted Congress by [the Commerce Clause].").

297. 469 U.S. 528 (1985).

298. *Id.* at 531.

299. *See id.* at 550-52.

300. *See Nat'l League of Cities*, 426 U.S. at 842 ("This Court has never doubted that there

a basis for an attempt to revive *National League of Cities*. In *Coyle v. Smith*,³⁰¹ the Court refused to allow Congress to condition Oklahoma's admission to the Union on the placement of its capital.³⁰² The Court recognized the inherent dignity of the states³⁰³ and held that Congress lacked the power to "deprive a new State of any of those attributes essential to its equality in dignity and power with other States."³⁰⁴ *National League of Cities* picked up on this reasoning and asserted, without articulating the precise source or characteristic, that "there are attributes of sovereignty attaching to every state government which may not be impaired by Congress."³⁰⁵ Though it did not ground its holding in the dignity rationale, that rationale certainly supports *National League of Cities*. One might reason that federal regulation of traditional state governmental functions as if the states were private individuals does violence to the states' dignity as independent sovereign entities.³⁰⁶

In addition, the Court's adoption of the dignity rationale provides a basis for revisiting *Garcia* by undermining its two principal determinations. *Garcia* overruled *National League of Cities* as unworkable³⁰⁷ and discarded it because it "doubt[ed] that courts ultimately can identify principled constitutional

are limits upon the power of Congress to override state sovereignty, even when exercising its otherwise plenary powers to tax or to regulate commerce which are conferred by Art. I of the Constitution."); *id.* at 842-43 (citing to the Tenth Amendment as "an express declaration of this limitation" but then failing to mention the Tenth Amendment or any constitutional provision thereafter).

301. 221 U.S. 559 (1911).

302. *Id.* at 574.

303. *See id.* at 566 ("But what is this power [to admit states]? It is not to admit political organizations which are less or greater, or different in dignity and power, from those political entities which constitute the Union."); *id.* at 567 ("This Union' was and is a union of States, equal in power, dignity and authority, each competent to exert that residuum of sovereignty not delegated to the United States by the Constitution itself.").

304. *Id.* at 568.

305. *Nat'l League of Cities*, 426 U.S. at 845.

306. I recognize that the idea that dignity might immunize states from certain intrusive federal regulation is in considerable tension with history. The Articles of Confederation, drafted to respect the sovereignty of the states, nevertheless permitted federal regulation and commandeering of the states and the Articles were scrapped in favor of a more nationalizing charter. *See* ARTICLES OF CONFEDERATION art. 9 (U.S. 1778). One could certainly argue (as have I) that if dignity did not immunize states from intrusive regulation under the Articles, it cannot under the Constitution. *See* Dodson, *Vectorial Federalism*, *supra* note 1, at 411-12, 436; *see also* Printz v. United States, 521 U.S. 898, 945-47 (1997) (Stevens, J., dissenting); *New York v. United States*, 505 U.S. 144, 210 (1992) (Stevens, J., dissenting). But the Court does not find that argument persuasive. *See* *Printz*, 521 U.S. at 905-19; *New York*, 505 U.S. at 163-66; *FERC v. Mississippi*, 456 U.S. 742, 791-96 (1982) (O'Connor, J., concurring in part and dissenting in part).

307. *See* *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 538-47 (1985).

limitations on the scope of Congress' Commerce Clause powers over the States merely by relying on *a priori* definitions of state sovereignty."³⁰⁸ While workability is clearly an appropriate concern, the mere fact that the *National League of Cities* standard failed does not mean that another must as well, even if both are based on the same "state sovereignty" backdrop. As I have shown above, the dignity rationale could quilt together a substantially coherent state sovereign immunity doctrine; why could it not also support a similar regulatory immunity doctrine? At the very least, the Court's acceptance of the dignity rationale signals a potential reconsideration of *Garcia*'s rejection of sovereignty-based rules.

The dignity rationale also, as a constitutional doctrine, undermines *Garcia*'s adoption of congressional deference. If the dignity rationale is something that Congress can not obliterate, the Court may well reconsider *Garcia*'s faith in congressional self-restraint, and may stress that, at the very least, the additional consideration of state dignity counsels in favor of less lax judicial scrutiny.

I need not go to great lengths to demonstrate that the adoption of the dignity rationale would lead to the resurrection of a coherent regulatory immunity doctrine. Suffice it to say that the idea is at least plausible and perhaps, to some, even enticing.³⁰⁹ The point is that dignity could drastically alter, for better or for worse, the regulatory immunity landscape.

B. Anticommandeering

The Court's "anticommandeering" doctrine, which prevents Congress from directing the states to act in a governmental capacity,³¹⁰ has led to schisms within the Court³¹¹ and academia alike.³¹² As in the Eleventh Amendment and

308. *Id.* at 548.

309. *See id.* at 580 (Rehnquist, J., dissenting); *id.* at 589 (O'Connor, J., dissenting).

310. *See Printz*, 521 U.S. at 935 (holding invalid a statute directing the activity of state and local officials); *New York*, 505 U.S. at 166 ("The allocation of power contained in the Commerce Clause . . . does not authorize Congress to regulate state governments' regulation of interstate commerce.").

311. *See Printz*, 521 U.S. at 944 (Stevens, J., dissenting) ("There is not a clause, sentence, or paragraph in the entire text of the Constitution of the United States that supports the proposition that a local police officer can ignore a command contained in a statute enacted by Congress pursuant to an express delegation of power enumerated in Article I."); *New York*, 505 U.S. at 211 (Stevens, J., dissenting) ("The Tenth Amendment surely does not impose any limit on Congress' exercise of the powers delegated to it by Article I. Nor does the structure of the constitutional order or the values of federalism mandate such a formal rule. To the contrary, the Federal Government directs state governments in many realms.") (citations omitted); *id.* at 200 (White, J., dissenting) ("I fail to understand the reasoning behind the Court's selective distinctions among the various aspects of sovereignty that may and may not be waived and do not believe these distinctions will survive close analysis in future cases.").

312. Compare Evan H. Caminker, *State Sovereignty and Subordinacy: May Congress*

National League of Cities contexts, the Court is struggling, rather unsatisfactorily, to find a sound anchor for its anticommandeering principles.³¹³ The Court is poised to accept a more concrete justification for anticommandeering, and state dignity may fit the bill nicely.

The anticommandeering doctrine empowers states to resist federal mandates directed at state governmental mechanisms. The Court has held that the federal government may direct state agencies to *consider* certain federal standards in their ratemaking functions³¹⁴ but may not direct state legislatures to *enact* affirmative legislation³¹⁵ or state officials to *execute* federal mandates.³¹⁶ Surely

Commandeer State Officers to Implement Federal Law?, 95 COLUM. L. REV. 1001, 1059-61, 1087-88 (1995) [hereinafter Caminker, *State Sovereignty*] (rejecting a constitutional anticommandeering rule), with Saikrishna Bangalore Prakash, *Field Office Federalism*, 79 VA. L. REV. 1957, 2033 (1993) (rejecting a constitutional anticommandeering rule for executives but accepting a constitutional anticommandeering rule for the legislature), and Roderick M. Hills, Jr., *The Political Economy of Cooperative Federalism: Why State Autonomy Makes Sense and 'Dual Sovereignty' Doesn't*, 96 MICH. L. REV. 813, 831-47 (1998) (arguing for a constitutional anticommandeering rule for executives).

313. See, e.g., *Printz*, 521 U.S. at 905 (admitting that “no constitutional text speak[s] to this precise question”); *id.* at 923 n.13 (“Th[e dissent’s] argument also falsely presumes that the Tenth Amendment is the exclusive textual source of protection for principles of federalism. Our system of dual sovereignty is reflected in numerous constitutional provisions . . .”). The Court has hinted that ensuring the proper allocation of political accountability is an important part of its rationale for the anticommandeering principle. See *id.* at 930 (“By forcing state governments to absorb the financial burden of implementing a federal regulatory program, Members of Congress can take credit for ‘solving’ problems without having to ask their constituents to pay for the solutions with higher federal taxes. And even when the States are not forced to absorb the costs of implementing a federal program, they are still put in the position of taking the blame for its burdensomeness and for its defects.”); *New York*, 505 U.S. at 168-69 (“But where the Federal Government directs the States to regulate, it may be state officials who will bear the brunt of public disapproval, while the federal officials who devised the regulatory program may remain insulated from the electoral ramifications of their decision. Accountability is thus diminished when, due to federal coercion, elected state officials cannot regulate in accordance with the views of the local electorate in matters not pre-empted by federal regulation.”); *FERC v. Mississippi*, 456 U.S. 742, 787 (1982) (O’Connor, J., dissenting) (“Local citizens hold their utility commissions accountable for the choices they make. Citizens, moreover, understand that legislative authority usually includes the power to decide which ideas to debate, as well as which policies to adopt. Congressional compulsion of state agencies, unlike pre-emption, blurs the lines of political accountability and leaves citizens feeling that their representatives are no longer responsive to local needs.”). But ensuring proper political accountability is a normative, not constitutional, value, and thus is unsatisfying as a constitutional justification, leaving dignity as an appropriate substitute.

314. See *FERC*, 456 U.S. at 765-66.

315. See *New York*, 505 U.S. 144.

316. See *Printz*, 521 U.S. 898.

the state dignity is impinged if the federal government orders the states to act, and they, like sulking children, must then obey under penalty of punishment.

Some have attacked the anticommandeering doctrine as being in tension with preemption. Instead of instructing the states to implement congressional policy choices, Congress can just enact federal law and displace inconsistent state law.³¹⁷ If Congress can preempt the field of regulation and preclude contrary state action, why can Congress not simply tell the states how to do it in the first place? The result is basically the same — Congress gets its way — so why should one method be constitutional and another not?

There is a difference, highlighted by the dignity rationale, between federal preemption of state regulation and federal commandeering of state mechanisms, even if the result is the same. That difference is because of the *treatment* of the states by the federal government. Preemption is much less condescending to the states than commandeering. Consider a parent who believes her son should not play football, despite his enjoyment of the game, because it is too dangerous. She could either exercise her parental prerogative to call up the coach and remove him from the team herself, or, she could direct her son to tell the coach himself that he is quitting. Under the first scenario, the son still has freedom to assert significant, if futile, dissension. Under the second, the son's own actions are being dictated to him against his wishes. Surely the latter is the more degrading.

The dignity rationale favors the ability of the states to waive the right to resist federal commands. In *New York v. United States*,³¹⁸ the Court held that the anticommandeering doctrine, as a constitutional limitation on federal power, could not be consented to by a state.³¹⁹ This stance on waiver directly conflicts with *Printz*.³²⁰ Adoption of the dignity rationale would side with *Printz* to foreclose a prohibition on state consent. Permitting states to waive state sovereign immunity comports with the dignity rationale,³²¹ and so should

317. See, e.g., Caminker, *State Sovereignty*, *supra* note 312, at 1054-55 (rejecting the action/inaction distinction).

318. 505 U.S. 144 (1992).

319. *Id.* at 182 ("Where Congress exceeds its authority relative to the States, therefore, the departure from the constitutional plan cannot be ratified by the 'consent' of state officials. . . . State officials thus cannot consent to the enlargement of the powers of Congress beyond those enumerated in the Constitution.").

320. See *Printz*, 521 U.S. at 910-11 (distinguishing historical statements supporting a commandeering power on the ground that nothing indicated that "Congress could impose these [commandeering] responsibilities *without the consent of the States*").

321. See *supra* text accompanying notes 274-289; cf. *New York*, 505 U.S. at 200 (White, J., dissenting) ("I fail to understand the reasoning behind the Court's selective distinctions among the various aspects of sovereignty that may and may not be waived and do not believe these distinctions will survive close analysis in future cases.").

consent to federal commands.³²² After all, if the dignity rationale justifies anticommandeering, prohibiting the states from consenting to a federal legislative command ironically infringes on their dignity by removing their independent and autonomous authority to do so.

If the Court imports the dignity rationale into the anticommandeering context, it should rethink its prohibition on federal commandeering of local governments. *Printz* held the anticommandeering principle applicable with equal force to state and local governments.³²³ States have sovereign dignity of a certain magnitude that local governments do not.³²⁴ There is no basis in the dignity rationale for extending state immunities from federal power to substate units.³²⁵ Subjecting local governments to federal commands not only comports with the dignity rationale, but it also appropriately aligns the anticommandeering doctrine with state sovereign immunity jurisprudence.³²⁶

There is some tension between the availability of injunctive relief against state officers under *Ex parte Young* and the prohibition on commandeering of state officers under *Printz*.³²⁷ Dignity helps reconcile the two positions. In the former, the states and their officers are given a chance to conform to binding federal law on their own, and are only directed by federal courts if they fail. Giving state officers prior opportunity to conform to binding federal law ameliorates any subsequent enforcement's affront to state dignity. The resulting failure to abide by federal law also justifies a greater need for exercise of direct federal power over the recalcitrant state officers. In the latter case, the affront to state dignity is greater because Congress takes state autonomy out of the officers' hands in the first instance.³²⁸

322. The anticommandeering cases suggest that dignity could be a justification for unconstitutional conditions under the Spending Power. When the condition is so coercive as to dip into denigration of what is really not a free choice, state dignity is impaired and the "condition" becomes a "command." At least one other commentator has noted the relationship between unconstitutional conditions and the anticommandeering doctrine, though not in the context of the dignity rationale. See Bohannon, *supra* note 285, at 323-30.

323. See *Printz*, 521 U.S. at 955 n.16 (Stevens, J., dissenting) (contesting this point).

324. See *supra* text accompanying notes 252-256.

325. See Althouse, *supra* note 13, at 262.

326. See *Printz*, 521 U.S. at 955 n.16 (Stevens, J., dissenting) (faulting the Court for creating tension with its Eleventh Amendment precedent).

327. See Althouse, *supra* note 13, at 265 ("If we were really concerned about 'commandeering' the states with lawsuits, we shouldn't tolerate the injunctions that can be had through the *Ex Parte Young* device or the lawsuits permitted when sovereign immunity is abrogated using the Fourteenth Amendment power.").

328. This reconciliation between *Ex parte Young* and anticommandeering also aligns with the Court's habeas corpus and federal review doctrines. A federal court will not review a state decision without first giving the state court the opportunity to reach the right result on its own. See *Coleman v. Thompson*, 501 U.S. 722, 731 (1991) ("This exhaustion requirement is also

The result of grafting the dignity rationale onto the anticommandeering context may be a balancing test as in the state sovereign immunity context, in spite of *Printz*'s perhaps premature disavowal of any reliance on the balancing of federalism norms.³²⁹ If the federal government can reach its desired result through methods less degrading than commandeering, such as through preemption or the spending power, then the need for a federal commandeering action cannot justify the resulting degradation of state dignity.³³⁰ The Court may find the dignity rationale an attractive way to bring principle to the anticommandeering cases.

V. Conclusion

I wholeheartedly believe the *Seminole Tribe* decision to be a colossal mistake. The Court has already embarked on that journey, however, and in this Article I demonstrate how it may try to avoid compounding its error. Because the dignity rationale lacks grounding in constitutional text, constitutional structure, history, or longstanding precedent, the Court faces an opportunity to fashion the dignity rationale as it wishes. I have suggested here that, precisely for this reason, the Court may use the dignity rationale to create a more rational and coherent state sovereign immunity doctrine. I have also suggested, however, that the embrace of the dignity rationale in the context of state sovereign immunity may have profound effects on state sovereign immunity and other state sovereignty doctrines.

grounded in principles of comity; in a federal system, the States should have the first opportunity to address and correct alleged violations of state prisoner's [sic] federal rights."); *Darr v. Burford*, 339 U.S. 200, 204 (1950) ("[I]t would be unseemly in our dual system of government for a federal district court to upset a state court conviction without an opportunity to the state courts to correct a constitutional violation . . ."), *overruled in part by* *Fay v. Noia*, 372 U.S. 391 (1963); *Robb v. Connolly*, 111 U.S. 624, 637 (1884) ("Upon the State courts, equally with the courts of the Union, rests the obligation to guard, enforce, and protect every right granted or secured by the Constitution of the United States and the laws made in pursuance thereof, whenever those rights are involved in any suit or proceeding before them If they fail therein, and withhold or deny rights, privileges, or immunities secured by the Constitution and laws of the United States, the party aggrieved may bring the case from the highest court of the State in which the question could be decided to this court for final and conclusive determination.").

329. See *Printz*, 521 U.S. at 932 ("But where, as here, it is the whole *object* of the law to direct the functioning of the state executive, and hence to compromise the structural framework of dual sovereignty, such a 'balancing' analysis is inappropriate.").

330. In this way, state dignity may be thought of as a limitation on the Necessary and Proper Clause, a formulation I have suggested elsewhere. See Dodson, *Vectorial Federalism*, *supra* note 1, at 455 nn. 306-07.

Accordingly, and above all, the Court must be deliberate and cautious. I do not profess to identify all, or even a majority of the pitfalls that may arise. I have not even addressed the obvious tension between the “constitutional” state sovereignty cases I have discussed above and “subconstitutional” abstention. My hope is that if the Court is determined to trek down this path, it does so slowly, carefully, and with the goal of doctrinal coherence.