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States as Nations: Dignity in Cross-Doctrinal Perspective

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STATES AS NATIONS: DIGNITY IN CROSS-DOCTRINAL PERSPECTIVE

*Peter J. Smith**

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INTRODUCTION

JUSTICE William J. Brennan, Jr. was fond of describing the Constitution as “a charter of human rights and human dignity.”¹ It was, in his view, “a bold commitment by a people to the ideal of dignity protected through law.”² Throughout his tenure on the United States Supreme Court, Justice Brennan attempted to translate this vision into doctrinal reality. What is perhaps most striking about his jurisprudential oeuvre is how human dignity served as a unifying theme in his opinions across otherwise disparate areas of the law.³

To describe his quest to elevate human dignity in the Court’s decisionmaking as striking, however, is not to say that it has been enduring. With the ascendancy of the Burger and Rehnquist Courts, human dignity has become a value most often invoked defiantly in dissent.⁴ This is not to suggest that the Burger and Rehnquist

¹ William J. Brennan, Jr., *My Life on the Court*, in *Reason & Passion: Justice Brennan’s Enduring Influence* 17, 18 (E. Joshua Rosenkranz & Bernard Schwartz eds., 1997).

² *Id.*

³ See, e.g., *Colorado v. Connelly*, 474 U.S. 1050, 1053 (1986) (Brennan & Stevens, JJ., mem.), granting cert. to 702 P.2d 722 (Colo. 1985) (“[A] truly free society is one in which every citizen—guilty or innocent—is treated fairly and accorded dignity and respect by the State.”); *Roberts v. U.S. Jaycees*, 468 U.S. 609, 625 (1984) (finding in the context of equal protection that sex discrimination “both deprives persons of their individual dignity and denies society the benefits of wide participation in political, economic, and cultural life”); *Goldberg v. Kelly*, 397 U.S. 254, 264–65 (1970) (holding under the doctrine of procedural due process that “[f]rom its founding the Nation’s basic commitment has been to foster the dignity and well-being of all persons within its borders”); *Schmerber v. California*, 384 U.S. 757, 767 (1966) (“The overriding function of the Fourth Amendment is to protect personal privacy and dignity against unwarranted intrusion by the State.”).

⁴ See, e.g., *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 672 (1995) (O’Connor, J., dissenting) (“[S]tate-compelled, state-monitored collection and testing of urine, while perhaps not the most intrusive of searches, is still ‘particularly destructive of privacy and offensive to personal dignity.’”) (quoting *Treasury Employees v. Von Raab*, 489 U.S. 656, 680 (1989) (Scalia, J., dissenting)); *Campbell v. Wood*, 511 U.S. 1119, 1122

Courts were (or are) callous; but, at least as a descriptive matter, for a number of years dignity became a seldom-expressed value in constitutional decisionmaking.

Dignity is once again in vogue at the Court, but it is probably fair to say that Justice Brennan would not approve. The Court's recent focus has been not on *human* dignity, but on the dignity of the *states*. In a series of recent decisions expanding the states' immunity from suits by individuals seeking monetary relief,⁵ the Court has explained that the "preeminent purpose of state sovereign immunity is to accord States the dignity that is consistent with their status as sovereign entities."⁶ One is tempted, of course, to treat

(1994) (Blackmun, J., dissenting), denying cert. to 18 F.3d 662 (9th Cir. 1994) ("[P]artial or complete decapitation of the person, as blood sprays uncontrollably, obviously violates human dignity."); *Walton v. Arizona*, 497 U.S. 639, 675 (1990) (Brennan, J., dissenting) ("[T]he death penalty is wholly inconsistent with the constitutional principle of human dignity . . ."), overruled by *Ring v. Arizona*, 122 S. Ct. 2428 (2002); *Cruzan v. Mo. Dep't of Health*, 497 U.S. 261, 302 (1990) (Brennan, J., dissenting) ("Nancy Cruzan is entitled to choose to die with dignity."); *Webster v. Reprod. Health Serv.*, 492 U.S. 490, 548–49 (1989) (Blackmun, J., dissenting) ("[F]ew decisions are 'more basic to individual dignity and autonomy' . . . than the right to make the uniquely personal, intimate, and self-defining decision whether to end a pregnancy.") (quoting *Thornburgh v. American College of Obstetricians and Gynecologists*, 476 U.S. 747, 772 (1986)); *United States v. Raddatz*, 447 U.S. 667, 697 (1980) (Marshall, J., dissenting) ("[T]he requirement that a finder of facts must hear the testimony offered by those whose liberty is at stake derives from deep-seated notions of fairness and human dignity."); *Meachum v. Fano*, 427 U.S. 215, 232 (1976) (Stevens, J., dissenting) ("The restraints and the punishment which a criminal conviction entails do not place the citizen beyond the ethical tradition that accords respect to the dignity and intrinsic worth of every individual.") (quoting *United States ex rel. Miller v. Twomey*, 479 F.2d 701, 712 (7th Cir. 1973)).

⁵In light of the Court's discussion in recent state sovereign immunity cases, it is perhaps no longer appropriate to describe the states' immunity as Eleventh Amendment immunity. See *Fed. Mar. Comm'n v. S.C. State Ports Auth.*, 535 U.S. 743, ___, 122 S. Ct. 1864, 1871 (2002) ("[T]he Eleventh Amendment does not define the scope of the States' sovereign immunity; it is but one particular exemplification of that immunity."); *Alden v. Maine*, 527 U.S. 706, 713 (1999) ("The phrase ["Eleventh Amendment immunity"] is convenient shorthand but something of a misnomer, for the sovereign immunity of the States neither derives from, nor is limited by, the terms of the Eleventh Amendment. Rather, as the Constitution's structure, its history, and the authoritative interpretations by this Court make clear, the States' immunity from suit is a fundamental aspect of the sovereignty which the States enjoyed before the ratification of the Constitution, and which they retain today (either literally or by virtue of their admission into the Union upon an equal footing with the other States) except as altered by the plan of the Convention or certain constitutional Amendments.").

⁶*S.C. State Ports Auth.*, 122 S. Ct. at 1874.

such language simply as what it appears to be: a rhetorical device intended to underscore a substantive justification for the decisions reached by the Court. Indeed, this not-so-subtle anthropomorphization of the states has raised only a few scholarly eyebrows,⁷ and has (at least until now) typically been somewhat cavalierly dismissed as a rhetorical flourish without substantive content or implication.⁸

But with each state sovereign immunity decision, it becomes more difficult to dismiss the language of state dignity as mere rhetoric. In the Court's most recent word on the subject—*Federal Maritime Commission v. South Carolina State Ports Authority*,⁹ which held that state sovereign immunity bars an independent federal agency from adjudicating a private party's complaint against a nonconsenting state—the Court rejected the United States' argument that the state's financial integrity was not threatened by the adjudication in question. The Court asserted that “the primary function of sovereign immunity is not to protect State treasuries, . . . but to afford the States the dignity and respect due sovereign entities.”¹⁰

⁷ See, e.g., Ann Althouse, *On Dignity and Deference: The Supreme Court's New Federalism*, 68 U. Cin. L. Rev. 245, 246 (2000) (arguing that the dignity rationale elevates form over substance in the state sovereign immunity doctrine); Evan H. Caminker, *Judicial Solicitude for State Dignity*, 574 Annals Am. Acad. Pol. & Soc. Sci. 81 (2001) (offering an expressivist account of the Court's dignity rationale); Daniel A. Farber, *Pledging A New Allegiance: An Essay on Sovereignty and the New Federalism*, 75 Notre Dame L. Rev. 1133, 1136 (2000) (explaining the implications of a doctrine premised on state dignity); Suzanna Sherry, *States Are People Too*, 75 Notre Dame L. Rev. 1121, 1127, 1129 (2000) (analogizing the Court's dignity rationale to late-nineteenth-century attempts to personify corporations).

⁸ See, e.g., *Puerto Rico Aqueduct and Sewer Auth. v. Metcalf & Eddy*, 506 U.S. 139, 151 (1993) (Stevens, J., dissenting) (calling the dignity rationale “embarrassingly insufficient”) [hereinafter PRASA]; Farber, *supra* note 7, at 1144 n.60 (“Living as I do in a state where the current governor is best known nationally for his earlier career as a boa-wearing professional wrestler, perhaps it is not surprising that the idea of inherent state dignity does not strongly resonate for me.”); Sherry, *supra* note 7, at 1127 (“Not since extending the language of the Fourteenth Amendment to corporations has the Court so anthropomorphized an abstract entity.”).

⁹ 122 S. Ct. 1864, 1874 (2002).

¹⁰ *Id.* at 1879; see also *id.* at 1877 (“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.” (citation omitted) (quoting *Alden*, 527 U.S. at 750–51)).

Much of the recent commentary about the Court's state sovereign immunity cases has been critical.¹¹ But even those commentators who have defended the Court's "federalism revival"¹² in general,¹³ and its sovereign immunity decisions in particular,¹⁴ have not attempted to defend the Court's increasingly odd focus on the dignitary interests of the states. Why, then, does the Court continue not only to invoke the arguably oxymoronic concept of state dignity, but also to rely on the states' dignity as the "central,"¹⁵ "pre-eminent,"¹⁶ and "primary"¹⁷ justification for its expansion of the states' immunity from suit?

This Article suggests a tentative answer to this puzzle, although that answer plainly falls short of justifying the Court's current state sovereign immunity doctrine. The concept of state dignity may

¹¹ See, e.g., Erwin Chemerinsky, *Against Sovereign Immunity*, 53 *Stan. L. Rev.* 1201 (2001) (arguing that sovereign immunity is an anachronistic doctrine inconsistent with the principles of the American legal system); William A. Fletcher, *The Eleventh Amendment: Unfinished Business*, 75 *Notre Dame L. Rev.* 843 (2000) (arguing that the Court has not translated the Constitution into a workable federal structure); Vicki C. Jackson, *Principle and Compromise in Constitutional Adjudication: The Eleventh Amendment and State Sovereign Immunity*, 75 *Notre Dame L. Rev.* 953 (2000) (arguing that the Court's sovereign immunity case law "deserves the condemnation and resistance of scholars"); Daniel J. Meltzer, *State Sovereign Immunity: Five Authors in Search of a Theory*, 75 *Notre Dame L. Rev.* 1011 (2000) (arguing that state sovereign immunity decisions fail to promote any coherent conception of state autonomy); Ernest A. Young, *State Sovereign Immunity and the Future of Federalism*, 1999 *Sup. Ct. Rev.* 1 (arguing that state sovereign immunity is a poor way to protect state sovereignty).

¹² Richard H. Fallon, Jr., *The "Conservative" Paths of the Rehnquist Court's Federalism Decisions*, 69 *U. Chi. L. Rev.* 429, 431 (2002).

¹³ See, e.g., Lynn A. Baker & Ernest A. Young, *Federalism and the Double Standard of Judicial Review*, 51 *Duke L.J.* 75, 135 (2001) ("We are cognizant, of course, of the danger of equating the rights of individuals and the rights of states. Indeed, we would be the first to concede that states' rights have no independent value; their worth derives entirely from their utility in enhancing the freedom and welfare of individuals.").

¹⁴ See Alfred Hill, *In Defense of Our Law of Sovereign Immunity*, 42 *B.C. L. Rev.* 485, 495 n.33 (2001) ("From time to time the Court has adverted to sovereign immunity as serving to protect the 'dignity' of the states. It should not be assumed that such rhetoric is the basis of the immunity Sovereign immunity is based upon raw power, which in the case of the United States is distributed by the Constitution; 'dignity' has nothing to do with it. The Founding Fathers were not beguiled by such a notion.").

¹⁵ *S.C. State Ports Auth.*, 122 S. Ct. at 1877.

¹⁶ *Id.* at 1874.

¹⁷ *Id.* at 1879.

sound strange to the ears of a domestic public-law scholar, but the concept in fact has a well-established historical pedigree and well-established meaning in the law-of-nations doctrine of foreign state sovereign immunity. In focusing on state dignity in its state sovereign immunity cases, the Court has invited attention to this related, but distinct, line of cases.

The Court has long held that U.S. courts will not entertain a private suit against a foreign nation absent clear authorization from Congress. This rule is premised on the theory that all sovereign nations are of equal status, or “dignity.” Each nation is wholly sovereign within its borders, according to this theory, and the submission of one sovereign state to the authority and jurisdiction of another would be inconsistent with the “equal rights” and “absolute independence” of the former.¹⁸ Recognition of the equal “dignity”—that is, the equal rank and importance—of the foreign sovereign thus depends on the forum nation’s courts’ declining to assert jurisdiction over the foreign nation. Because absolute adherence to this rule, however, would effectively diminish the sovereignty of the forum nation by preventing it from exercising absolute authority within its borders, the Court has long recognized the power of Congress to override the presumptive immunity of the foreign sovereign. The Court will exercise jurisdiction over a foreign sovereign, however, only if it is clear that Congress intended to abrogate the foreign state’s immunity.

In referring to a foreign state’s dignity in the context of foreign state sovereign immunity, the Court has sought to underscore two important points. First, the sovereign nations of the world enjoy equal status on the world stage; it would be necessarily inconsistent with that equality of status for one nation to assert sovereign authority over another nation. Second, there is a particular imperative of judicial non-intervention in matters of international relations, which are more appropriately left to the political branches. Because entertaining a suit against a foreign state could have profound (and negative) consequences for foreign relations, the Court has long required that such an assertion of jurisdiction be clearly authorized by Congress.

¹⁸ *The Schooner Exchange v. McFaddon*, 11 U.S. (7 Cranch) 116, 136–37 (1812).

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When the Court invokes the concept of state dignity in the state sovereign immunity cases, therefore, it does not write on a clean slate; to the contrary, the concept has an established meaning, with established implications, in the doctrine of foreign state sovereign immunity. By invoking state dignity to support its view of state sovereign immunity, the Court thus appears to have drawn on foreign state sovereign immunity doctrine. There is, of course, no way to know for sure what the Court actually intends when it invokes the concept in its state sovereign immunity decisions, and it is fruitless—not to mention arguably inappropriate—to attempt to psychoanalyze the Justices to determine what exactly they mean when they refer to “state dignity.” But by relying on a concept with an established doctrinal meaning, the Court naturally invites an assessment whether the concept is apposite in the context in which the Court has invoked it.

What is the import of the Court’s recent reliance on state dignity in its decisions concerning the domestic-law doctrine of state sovereign immunity? More important, does it make sense for the Court to describe state dignity as the *central* justification for state sovereign immunity doctrine? This Article offers two principal observations. First, there is a serious question whether the concept of sovereign dignity has any application in the context of state sovereign immunity. Second, assuming that the concept is apposite, the doctrinal consequence ought to be that Congress has authority to abrogate the states’ immunity

When the Court refers to state dignity in a foreign state sovereign immunity case, it refers to the status relationship among wholly sovereign nations. The question in those cases is whether it is consistent with the inherent equality—the equal status or “dignity”—of sovereigns for one to subject the other to jurisdiction in its courts. At first blush, there is nothing particularly striking about invoking a concept drawn from the doctrine of foreign state sovereign immunity in the obviously related context of state sovereign immunity. Indeed, the Court has long borrowed principles from international law in other contexts that implicate the relations among the states. But although the relationship among the *several states* resembles the relationship among *sovereign nations*, it is another thing altogether to suggest that the states stand in the same relation *to the federal government* as does a foreign nation. Whatever one

can say about the extent of the powers retained by the states, they plainly are not fully sovereign nations within the meaning of international law.

Yet in invoking the law-of-nations concept of state dignity to defeat attempts by Congress to subject the states to suit for violations of federal law, the Court has effectively suggested that the states stand in relation to the federal government as does a foreign nation. In other words, the Court has suggested that the states' status with respect to the federal government is effectively the same as the relationship of, say, France to the federal government.

This is a dubious premise. Even assuming that the Court's analogy is appropriate, the logical doctrinal consequence of borrowing the notion of state dignity from foreign state sovereign immunity doctrine would be that Congress enjoys the power to subject the states to suit, at least in federal court. The foreign state sovereign immunity cases make clear that Congress, even if not the courts acting *sua sponte*, has authority to override the presumptive immunity of foreign states in U.S. courts. Sovereign dignity and the essential independence and equality of sovereign nations may be enough to create a strong presumption of immunity, but ultimately Congress retains authority to abrogate that immunity.

Under current state sovereign immunity doctrine, however, Congress can abrogate the states' immunity *only* when it acts to enforce the Fourteenth Amendment, and the Court has construed even that authority increasingly narrowly. The ironic result of the Court's apparent attempt to import the language of customary international law decisions to the federalism debate, therefore, is that the Court now provides *more* protection to American states than it does to foreign states. Under current doctrine, the equal status of a wholly sovereign nation does not shield it from amenability to suit when Congress so decrees, but the status of the several states, which plainly are not wholly sovereign nations, erects a virtually absolute bar to Congress's authority to subject them to suit.¹⁹

¹⁹ See, e.g., *Bd. of Trs. of the Univ. of Ala. v. Garrett*, 531 U.S. 356, 365 (2001) (construing narrowly Congress's power to enforce the Fourteenth Amendment); *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 47 (1996) (holding that Congress lacks the authority to abrogate the states' Eleventh Amendment immunity pursuant to its Article I powers).

Of course, our federal system is unique, and analogies drawn from doctrines governing the relations among sovereign nations may simply be inapposite. In our constitutional system, it is plain that the states retain some attributes of sovereignty, and the Court is charged with the difficult task of determining precisely which attributes. Even if the states are not wholly sovereign entities, perhaps it is as reasonable to say that immunity from suit is one of the sovereign prerogatives that the states retained when they joined the Union as it is to say that, for example, the power to tax is one such retained prerogative.

But far from justifying the Court's recent decisions, this point ultimately demonstrates the tenuousness of the Court's dignity rationale. According to the Court, the task in the state sovereign immunity cases is to determine what attributes of sovereignty the states retained at the ratification. But even if one thinks—as the Court suggests by relying on the state-dignity rationale—that the states *retained* the immunity of wholly sovereign nations from suit before other sovereign's courts, that immunity presumably would be only as potent as that enjoyed by wholly sovereign nations. Congress, however, has authority to abrogate *that* immunity with a clear statement of intent. It is difficult to see how the states could have retained a power that they—like even wholly sovereign nations—never enjoyed in the first place.

Moreover, if analogies drawn from the law governing the relations among sovereign nations are inapposite in our federal system, it is perplexing that the Court has chosen to rely on the notion of state dignity to support this doctrine of federalism. As matters currently stand, the Court appears to have made an assertion about state dignity that bears no relationship to the doctrinal and historical meaning of that term. Further, if state dignity does not mean in this context what it means in the context from which it was drawn, then the Court has some obligation to explain precisely why it should mean something different here. The Court's attempts thus far, however, have been inadequate.

The Court's recent attention to state sovereign immunity has been accompanied by a rich scholarly literature that exhaustively

details the relevant constitutional history and doctrinal debates.²⁰ Those accounts, however, generally have not made a serious effort to assess the Court's reliance on the notion of state dignity. Part I accordingly begins with an overview of the recent ascendancy of state dignity as an apparent basis for decision in state sovereign immunity cases. The Article continues, in Part II, with an overview of the doctrine from which the notion of state dignity derives: foreign state sovereign immunity under the law of nations. That survey, especially when viewed in conjunction with the overview in Part III of mid-nineteenth- and early-twentieth-century state sovereign immunity decisions, demonstrates that the Court's most recent doctrinal and rhetorical experiment is not without some precedential pedigree; it suggests that it would be more accurate to say that the current Court's efforts represent a renaissance for the language of state dignity.

Part IV considers the implications for state sovereign immunity doctrine of the Court's implicit reliance on foreign state sovereign immunity cases. The Article concludes that the Court has been "jurisprudentially ambivalent." In invoking the dignity of the states, the Court has suggested both that the states ought to be treated as fully sovereign nations—a debatable proposition, at best—and that the states ought to be treated *better* than fully sovereign nations—certainly an odd proposition, given the undisputed constitutional limitations on the sovereign authority of the states.

²⁰ In addition to those articles cited *supra* note 11, see, e.g., Akhil Reed Amar, Of Sovereignty and Federalism, 96 Yale L.J. 1425 (1987); Martha A. Field, The Eleventh Amendment and Other Sovereign Immunity Doctrines: Congressional Imposition of Suit Upon the States, 126 U. Pa. L. Rev. 1203 (1978); 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 (1983); John J. Gibbons, The Eleventh Amendment and State Sovereign Immunity: A Reinterpretation, 83 Colum. L. Rev. 1889 (1983); Vicki C. Jackson, The Supreme Court, the Eleventh Amendment, and State Sovereign Immunity, 98 Yale L.J. 1 (1988); Lawrence C. Marshall, Fighting the Words of the Eleventh Amendment, 102 Harv. L. Rev. 1342 (1989); Calvin R. Massey, State Sovereignty and the Tenth and Eleventh Amendments, 56 U. Chi. L. Rev. 61 (1989); Caleb Nelson, Sovereign Immunity as a Doctrine of Personal Jurisdiction, 115 Harv. L. Rev. 1559 (2002).

I. STATE DIGNITY IN RECENT STATE SOVEREIGN IMMUNITY CASES

A. Identifying the Symptoms

Judge William Fletcher recently observed that the Eleventh Amendment, despite being ratified over 200 years ago, did not forcefully appear on the judicial and academic radar screen until the 1970s. In the last thirty years, the Supreme Court has decided more cases involving the Eleventh Amendment than it did in the preceding 170-odd years.²¹ The last seven years have marked even more dramatic doctrinal change. In that time, the Court has held that Congress lacks authority under Article I to abrogate the states' immunity from suit both in federal court²² and in state court.²³ The Court also has significantly narrowed Congress's authority to abrogate the states' immunity pursuant to its power to enforce the Fourteenth Amendment.²⁴ It is during this period that the Court has increasingly relied on the states' dignitary interests to justify expansion of the doctrine.

To be sure, as discussed below, the references to state dignity have not been without precedent, even within the context of state sovereign immunity. But they have increased in frequency and import in recent years, and the Court has used such references to mark a new front in the battle over the appropriate balance between state and federal power. The first modern reference to state dignity in a state sovereign immunity case was in 1993, in *Puerto Rico Aqueduct and Sewer Authority v. Metcalf & Eddy, Inc.* ("PRASA").²⁵ PRASA held that a district court order denying a claim of Eleventh Amendment immunity is immediately appealable under the collateral order doctrine.²⁶ Whether such an order

²¹ See Fletcher, *supra* note 11, at 844.

²² See *Seminole Tribe*, 517 U.S. at 72–73.

²³ See *Alden v. Maine*, 527 U.S. 706, 754 (1999).

²⁴ See *Board of Trustees of the University of Alabama*, 531 U.S. at 374; *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 91 (2000); see also *City of Boerne v. Flores*, 521 U.S. 507, 536 (1997) (holding that in passing the Religious Freedom Restoration Act, Congress exceeded its authority under the Enforcement Clause of the Fourteenth Amendment by violating the principles of federalism and the separation of powers).

²⁵ 506 U.S. 139 (1993).

²⁶ *Id.* at 147. The collateral order doctrine is a judicially created exception to 28 U.S.C. § 1291 (2001), which generally permits appeals only from "final decisions of the district courts." In *Cohen v. Beneficial Industrial Loan Corp.*, the Court held that an order that is not the complete and final judgment in a case within the meaning of

would “not make any step toward final disposition of the merits of the case,” and whether it would be “too late effectively to review” the order after final judgment, turned on the nature of Eleventh Amendment immunity.²⁷ If the Eleventh Amendment merely immunizes states from liability for damages, then an interlocutory order denying a claim of immunity would not be appealable; a state could appeal from an adverse final judgment and raise the Eleventh Amendment as a grounds for reversal.²⁸ If, on the other hand, the Eleventh Amendment confers immunity from *suit*, then its value would “for the most part [be] lost as litigation proceeds past motion practice.”²⁹

The Court concluded that the Eleventh Amendment provides immunity from suit, which would effectively be worthless if the state had to wait for a final judgment to appeal the denial of immunity. The Court rejected the plaintiff’s claim to the contrary, noting that, in the words of a nineteenth-century decision concerning the scope of Eleventh Amendment immunity, “[t]he 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.”³⁰ The Court explained that “[t]he Amendment is rooted in a recognition that the States, although a union, maintain certain attributes of sovereignty,” and thus that it “accords the States the respect owed them as members of the federation.”³¹

If the Court had stopped there, its reference to state dignity, although perhaps a bit foreign to the ears of most modern watchers

Section 1291 will nevertheless be immediately appealable if it “fall[s] in that small class which finally determine claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated.” 337 U.S. 541, 546 (1949).

²⁷ *PRASA*, 506 U.S. at 143 (quoting *Cohen*, 337 U.S. at 546).

²⁸ See, e.g., *Van Cauwenberghe v. Biard*, 486 U.S. 517, 526–27 (1988).

²⁹ *PRASA*, 506 U.S. at 145; cf. *Mitchell v. Forsyth*, 472 U.S. 511, 530 (1985) (holding that an order denying qualified immunity is an appealable collateral order).

³⁰ *PRASA*, 506 U.S. at 146 (emphasis added) (quoting *In re Ayers*, 123 U.S. 443, 505 (1887)). *In re Ayers* held that a suit seeking to restrain the Attorney General of Virginia from bringing suits to recover taxes from persons who had previously paid with a state bond issue was, in effect, a suit against the state and thus barred by the Eleventh Amendment. 123 U.S. at 507. See *infra* notes 277–86 and accompanying text.

³¹ *PRASA*, 506 U.S. at 146.

of the Court, would have seemed entirely innocuous. Indeed, the Court's entire point—perhaps debatable,³² but certainly not unreasonable³³—was that it was the very act of being subjected to a suit for damages that was barred by the Eleventh Amendment. But the Court had more to say about the states' dignity: "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.*"³⁴ Whatever one thinks of the actual holding in the case with respect to the collateral order doctrine,³⁵ the Court's insistence that the "ultimate justification" of sovereign immunity is to vindicate "the States' dignitary interests"³⁶ was surely surprising to most commentators. Indeed, although Justice Stevens' dissent focused mostly on a quibble with the majority over whether Eleventh Amendment immunity truly was analogous to an official's qualified immunity,³⁷ he felt compelled to add that

³² See *id.* at 150 (Stevens, J., dissenting) ("[A] defense based on the Eleventh Amendment, even when the Amendment is read at its broadest, does not contend that the State or state entity is shielded from liability for its conduct, but only that the federal courts are without jurisdiction over claims against the State or state entity. Nothing in the Eleventh Amendment bars [a] respondent from seeking recovery in a different forum.") (citation omitted). But cf. *Alden v. Maine*, 527 U.S. 706, 712 (1999) (holding that Congress lacks authority under Article I to subject a state to suit in its own courts without its consent).

³³ See *PRASA*, 506 U.S. at 145 (noting that "the value to the States of their Eleventh Amendment immunity, like the benefit conferred by qualified immunity to individual officers, is for the most part lost as litigation proceeds past motion practice"); *id.* at 147–48 (Blackmun, J., concurring) (stating that "I continue to believe that the Court's interpretation of the Eleventh Amendment as embodying a broad principle of state immunity from suit in federal court simply cannot be reconciled with the federal system envisioned by our Basic Document and its Amendments," but "a district court's denial of a claim of immunity [in the narrow class of cases that fall] under the Eleventh Amendment should be appealable immediately") (citation omitted).

³⁴ *Id.* at 146 (emphasis added).

³⁵ See, e.g., *id.* at 148 (Blackmun, J., concurring) ("Whether the assertion of an Eleventh Amendment claim is well founded—a matter not before us in this case—is a question separate from the question whether the Eleventh Amendment interests are 'too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated.'") (citation omitted) (quoting *Cohen v. Beneficial Life Industrial Loan Corp.*, 337 U.S. 541, 546 (1949)).

³⁶ *Id.* at 146.

³⁷ See *id.* at 149–50 (Stevens, J., dissenting).

he found the Court's dignity rationale "embarrassingly insufficient."³⁸

The Court elaborated on *PRASA*'s reference to state dignity in its decision in *Hess v. Port Authority Trans-Hudson Corp.*, in which it described the protection of state dignity as one of the two principal justifications for the Eleventh Amendment.³⁹ In that case, the Court held that the Port Authority—a bi-state railway authorized by Congress under the Interstate Compact Clause⁴⁰—was not entitled to Eleventh Amendment protection.⁴¹ The Court reasoned that neither of the "Eleventh Amendment's twin reasons" argued in favor of immunity.⁴² First, because pursuant to the particular arrangement among New York, New Jersey, and Congress the "[d]ebts and other obligations of the Port Authority are not liabilities of the two founding States, and the States do not appropriate funds to the Authority,"⁴³ permitting suit would not threaten the solvency of the states.⁴⁴ Second, "[s]uit in federal court is not an affront to the dignity of a Compact Clause entity, for the federal court, in relation to such an enterprise, is hardly the instrument of a distant, disconnected sovereign."⁴⁵ To the contrary, "the federal court is ordained by one of the entity's founders."⁴⁶

The rhetoric of state dignity did not have a profound effect on the substance of the doctrine, however, until the Court's decision in *Seminole Tribe of Florida v. Florida*.⁴⁷ The Court held in *Seminole Tribe* that Congress lacks authority under Article I to abrogate the states' Eleventh Amendment immunity from suit in federal court.⁴⁸ In so concluding, the Court expressly overruled *Pennsyl-*

³⁸ Id. at 151 (Stevens, J., dissenting).

³⁹ 513 U.S. 30, 39–40 (1994).

⁴⁰ U.S. Const. art. I, § 10, cl. 3.

⁴¹ *Hess*, 513 U.S. at 32–33.

⁴² Id. at 47.

⁴³ Id. at 37.

⁴⁴ Id. at 48–50.

⁴⁵ Id. at 41 (emphasis added); see also id. at 47 (finding "[n]o genuine threat to the dignity of New York or New Jersey" in allowing the claims to proceed); id. at 52 (stating that permitting the suit "does not touch the concerns—the States' solvency and dignity—that underpin the Eleventh Amendment").

⁴⁶ Id. at 41.

⁴⁷ 517 U.S. 44 (1996).

⁴⁸ *Seminole Tribe* involved a suit by an Indian tribe to compel the State of Florida to negotiate in good faith with the tribe over the formation of a compact to permit gam-

vania v. Union Gas Co.,⁴⁹ in which a plurality of the Court had recognized Congress's power to abrogate the states' Eleventh Amendment immunity pursuant to the Interstate Commerce Clause.⁵⁰ The tribe argued that "one consideration weighing in favor of finding the power to abrogate here is that the Act authorizes only prospective injunctive relief rather than retroactive monetary relief."⁵¹ Previous case law had established that, when the state is the real party in interest, a suit within the scope of the Eleventh Amendment is barred regardless of the character of the relief sought.⁵² There nevertheless was some merit to the tribe's contention. In light of the Court's prior decisions establishing that the Eleventh Amendment was not a complete bar to the exercise of subject matter jurisdiction over cases involving states,⁵³ Congress arguably had authority under the Necessary and Proper Clause⁵⁴ to provide a remedy for state transgressions of validly imposed federal law; surely the character and scope of that remedy were rele-

ing activities on tribal land. *Id.* at 51–52. The tribe sued under a provision of the Indian Gaming Regulatory Act, 25 U.S.C. §§ 2702–2721 (2000), that purported to abrogate the states' immunity from suit. See 25 U.S.C. § 2710(d)(7) (2000).

⁴⁹ 491 U.S. 1 (1989).

⁵⁰ U.S. Const. art. I, § 8, cl. 3.

⁵¹ *Seminole Tribe*, 517 U.S. at 58.

⁵² In *Cory v. White*, for example, the Court had explained that "[i]t 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." 457 U.S. 85, 90 (1982). The proposition is not, however, quite as novel as the Court suggested. Indeed, under the doctrine of *Ex Parte Young*, 209 U.S. 123 (1908), a suit against a state official seeking prospective injunctive relief to "end a continuing violation of federal law" is not barred by the Eleventh Amendment. *Green v. Mansour*, 474 U.S. 64, 68 (1985); see also *Edelman v. Jordan*, 415 U.S. 651, 665–66 (1974) (holding that *Young* applies only to actions for prospective injunctive relief). See generally Laurence H. Tribe, *American Constitutional Law* § 3-27, at 555–66 (3d ed. 2000) (providing an overview of the relevant caselaw).

⁵³ See *Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 675–76 (1999) (noting that states can consent to suit in federal court); cf. *Nelson*, *supra* note 20, at 1615–17 (arguing that in cases covered by the text of the Eleventh Amendment, the states cannot consent to suit in federal court, but that in cases not covered by the text of the Amendment, states enjoy "personal jurisdiction"-type immunity and "therefore can consent to suits").

⁵⁴ U.S. Const. art. I, § 8, cl. 18 ("The Congress shall have Power . . . To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.").

vant considerations in deciding whether in fact it was “necessary and proper.”⁵⁵

The Court, however, concluded that if the “relief sought . . . is irrelevant to the question whether the suit is barred by the Eleventh Amendment,” then “it follows *a fortiori* . . . that the type of relief sought is irrelevant to whether Congress has power to *abrogate* States’ immunity.”⁵⁶ In support for this conclusion, the Court followed *Hess* and *PRASA*, observing that the “Eleventh Amendment does not exist solely in order to ‘preven[t] federal-court judgments that must be paid out of a State’s treasury’; it also serves to avoid ‘the indignity of subjecting a State to the coercive process of judicial tribunals at the instance of private parties.’”⁵⁷ Once again, therefore, the Court invoked the states’ dignitary interests to justify the states’ broad immunity from suit; but in *Seminole Tribe*, unlike *PRASA* and *Hess*, the Court relied on the states’ dignitary interests to justify a broad expansion of the doctrine.

The Court again cited the states’ dignitary interests as a basis for decision in *Idaho v. Coeur d’Alene Tribe of Idaho*.⁵⁸ The case involved a dispute between an Indian tribe and the state of Idaho over ownership of the banks and submerged lands of Lake Coeur d’Alene.⁵⁹ The tribe filed suit in federal court seeking both a declaration that its ownership of the land to the south of the lake extended to the disputed areas and an injunction preventing state officials from regulating the lands or otherwise violating the tribe’s right of quiet enjoyment.⁶⁰ The tribe’s claims of ownership were based on federal law—specifically, the tribe claimed a “beneficial

⁵⁵ The Necessary and Proper Clause permits Congress “to avail itself of experience, to exercise its reason, and to accommodate its legislation to circumstances.” *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 415–16 (1819); see also *id.* at 421 (“Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional.”); cf. Nelson, *supra* note 20, at 1629 (arguing that “the Necessary and Proper Clause might well be thought to give Congress the requisite authority to abrogate the states’ traditional exemptions from suit”).

⁵⁶ *Seminole Tribe*, 517 U.S. at 58 (emphasis added).

⁵⁷ *Id.* (alteration in original) (quoting *Hess*, 513 U.S. at 48, and *PRASA*, 506 U.S. at 146).

⁵⁸ 521 U.S. 261 (1997).

⁵⁹ *Id.* at 264.

⁶⁰ *Id.*

interest, subject to the trusteeship of the United States, in the beds and banks of all navigable watercourses and waters . . . within the original boundaries of the Coeur d'Alene Reservation, as defined by" an 1873 Executive Order.⁶¹

The tribe contended that because the suit sought only prospective injunctive relief to remedy an ongoing violation of federal law, the doctrine of *Ex Parte Young*⁶² was applicable and thus that the Eleventh Amendment did not bar the suit.⁶³ The Court, however, disagreed. The Court observed that the Eleventh Amendment would bar a quiet title suit against the state in federal court.⁶⁴ Because the "declaratory and injunctive relief the Tribe seeks is close to the functional equivalent of quiet title in that substantially all benefits of ownership and control would shift from the State to the Tribe,"⁶⁵ the Court reasoned that the suit, even though against state officials, should be barred, as well.⁶⁶

Given the Court's prior precedent, this holding seemed perfectly reasonable.⁶⁷ Indeed, although the tribe's allegations placed the suit neatly within the letter of the *Ex Parte Young* doctrine as interpreted by the Court,⁶⁸ it is difficult to conceive of a remedy that would have more directly affected the state's sovereign interests than a request permanently to divest the state of some of its territory. But as in *PRASA* and *Seminole Tribe*, the Court did not rest solely on such functional considerations. Instead, the Court explained that "the immunity is designed to protect" the "*dignity and respect* afforded a State,"⁶⁹ and thus that the "*dignity and status of*

⁶¹ Id. (citing Exec. Order of Nov. 8, 1873, reprinted in 1 C. Kappler, *Indian Affairs: Laws and Treaties* 837 (1904)).

⁶² 209 U.S. 123 (1908); see discussion infra notes 278, 285–86 and accompanying text.

⁶³ *Coeur d'Alene Tribe*, 521 U.S. at 281.

⁶⁴ Id. at 281–82 (citing *Tindal v. Wesley*, 167 U.S. 204, 223 (1897)).

⁶⁵ Id. at 282.

⁶⁶ Id. at 282–88.

⁶⁷ See Tribe, supra note 52, § 3-27, at 565 (discussing *Coeur d'Alene Tribe*'s "seemingly sensible result").

⁶⁸ As Justice Souter noted in dissent:

a federal court has jurisdiction in an individual's action against state officers so long as two conditions are met. The plaintiff must allege that the officers are acting in violation of federal law, and must seek prospective relief to address an ongoing violation, not compensation or other retrospective relief for violations past. The Tribe's claim satisfies each condition.

Coeur d'Alene Tribe, 521 U.S. at 298–99 (Souter, J., dissenting) (citations omitted).

⁶⁹ Id. at 268 (emphasis added).

its statehood allow Idaho to rely on its Eleventh Amendment immunity and to insist upon responding to these claims in its own courts, which are open to hear and determine the case.”⁷⁰ The Court also expressed concern that permitting the suit to proceed would cause “*offense* to Idaho’s sovereign authority and its standing in the Union,”⁷¹ and Justice Kennedy, in a portion of the opinion joined only by Chief Justice Rehnquist, defended “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.”⁷²

State dignity played an even more prominent role in the Court’s decision in *Alden v. Maine*.⁷³ *Alden* involved a suit by employees of the state of Maine alleging violation of the overtime provisions of the Fair Labor Standards Act of 1938.⁷⁴ The employees originally filed the suit in federal court, but the district court dismissed it after the Supreme Court decided *Seminole Tribe*. The employees refiled the action in Maine state court, pursuant to the Act’s provision creating concurrent state and federal court jurisdiction.⁷⁵ The Supreme Court held that the states enjoy a constitutionally infeasible immunity from suit in their own courts without their consent.⁷⁶

The Court’s decision in *Alden* is striking in several respects—perhaps most significantly in its utter disavowal of the text of the Eleventh Amendment as the source of a constitutional principle of state sovereign immunity. For present purposes, it suffices to note the Court’s continued—and increasingly emphatic—insistence that the states’ dignitary interests are a central justification for the

⁷⁰ Id. at 287–88 (emphasis added).

⁷¹ Id. at 282 (emphasis added).

⁷² Id. at 277 (emphasis added). Justice O’Connor, in an opinion joined by Justices Scalia and Thomas, concurred in part and in the judgment, but disagreed with Justice Kennedy’s assertion that “federal courts determining whether to exercise jurisdiction over any suit against a state officer must engage in a case-specific analysis of a number of concerns.” Id. at 291 (O’Connor, J., concurring in part and concurring in the judgment). Justice O’Connor concluded that Justice Kennedy’s approach “unnecessarily recharacterizes and narrows much of our *Young* jurisprudence.” Id. (O’Connor, J., concurring in part and concurring in the judgment).

⁷³ 527 U.S. 706 (1999).

⁷⁴ 52 Stat. 1060 (1938) (codified as amended at 29 U.S.C. §§ 201–219 (2000)).

⁷⁵ *Alden*, 527 U.S. at 711–12.

⁷⁶ Id. at 712, 759–60.

states' immunity from suit. The Court began its discussion by explaining that "[t]he generation that designed and adopted our federal system considered immunity from private suits central to sovereign *dignity*."⁷⁷ Accordingly, the federal system "preserves the sovereign status of the States" by "reserv[ing] to them a substantial portion of the Nation's primary sovereignty, together with the *dignity* and essential attributes inhering in that status."⁷⁸ The Court's decision refers to state dignity, or the imperative of demonstrating "respect" or "esteem" for the states, on five other occasions in the opinion.⁷⁹

To be sure, the Court did attempt in *Alden* to support its extra-textual conclusion with reference to policy and constitutional history and structure. In particular, the Court sought to justify its conclusion that Congress cannot authorize private suits for damages against states by invoking the need to protect the states' fiscal integrity⁸⁰ and preserve political accountability.⁸¹ The persuasiveness

⁷⁷ Id. at 715 (emphasis added).

⁷⁸ Id. at 714 (emphasis added). The Court stated that the other principal means by which the Constitution preserves the "sovereign status of the States" is by creating "a system in which the State and Federal Governments would exercise concurrent authority over the people." Id. (quoting *Printz v. United States*, 521 U.S. 898, 919–20 (1997) (discussing *The Federalist* No. 15, at 109 (Alexander Hamilton) (Clinton Rossiter ed., 1961))).

⁷⁹ See id. at 715 (finding that the states "are not relegated to the role of mere provinces or political corporations, but retain the *dignity*, though not the full authority, of sovereignty") (emphasis added); id. at 748–49 ("The principle of sovereign immunity preserved by constitutional design 'thus accords the States the *respect* owed them as members of the federation.'" (emphasis added) (quoting *PRASA*, 506 U.S. at 146); id. at 749 ("recognizing 'the *dignity and respect* afforded a State, which the immunity is designed to protect'" (emphasis added) (quoting *Coeur d'Alene Tribe*, 521 U.S. at 268); id. at 749 ("Private suits against nonconsenting States . . . present 'the *indignity* of subjecting a State to the coercive process of judicial tribunals at the instance of private parties,' regardless of the forum.") (emphasis added) (quoting *In re Ayers*, 123 U.S. 443, 505 (1887)); id. at 758 ("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.") (emphasis added).

⁸⁰ The Court argued that—

[p]rivate suits against nonconsenting States—especially suits for money damages—may threaten the financial integrity of the States. . . . [A]n unlimited congressional power to authorize suits in state court to levy upon the treasuries of the States for compensatory damages, attorney's fees, and even punitive damages could create staggering burdens, giving Congress a power and a leverage over the States that is not contemplated by our constitutional design.

of these rationales can be debated,⁸² but the Court's mere attempt in *Alden* to assert them distinguishes that decision from the Court's latest word on state sovereign immunity. In *Federal Maritime Commission v. South Carolina State Ports Authority*,⁸³ the Court apparently did not see the need to provide any justification other than the states' dignitary interests for the broad immunity that it has extrapolated from the constitutional structure.⁸⁴ The case involved an administrative complaint filed with the Federal Maritime Commission against South Carolina's port authority by the owner of a cruise ship. The complainant alleged that the state violated federal law in denying its ship a berth in the Port of Charleston and sought injunctive relief and statutory reparations.⁸⁵ Although only the United States, in light of established Eleventh Amendment doctrine, would have the authority to enforce a reparations order against the state,⁸⁶ the Court held that state sovereign immunity barred the agency from adjudicating the claim.⁸⁷

Id. at 750; see also id. at 750–51 (“A general federal power to authorize private suits for money damages would place unwarranted strain on the States’ ability to govern in accordance with the will of their citizens.”).

⁸¹ See id. at 751 (“When the Federal Government asserts authority over a State’s most fundamental political processes, it strikes at the heart of the political accountability so essential to our liberty and republican form of government.”).

⁸² See id. at 803 (Souter, J., dissenting) (“The ‘judgment creditor’ in question is not a dunning bill collector, but a citizen whose federal rights have been violated . . .”); id. (Souter, J., dissenting) (“So long as the citizens’ will, expressed through state legislation, does not violate valid federal law, the strain will not be felt; and to the extent that state action does violate federal law, the will of the citizens of the United States already trumps that of the citizens of the State . . .”).

⁸³ 122 S. Ct. 1864 (2002).

⁸⁴ To be fair, the Court may simply have felt secure in relying on its prior justifications in *Seminole Tribe* and *Alden*. But given the consistent refusal of four Justices to accept those decisions as binding precedent, one would expect the Court to offer as many substantive justifications for its decisions as possible. See, e.g., *Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 699 (1999) (Breyer, J., dissenting) (“I am not yet ready to adhere to the proposition of law set forth in *Seminole Tribe*.”); *Alden*, 527 U.S. at 814 (Souter, J., dissenting) (“I expect the Court’s late essay into immunity doctrine will prove the equal of its earlier experiment in *laissez-faire*, the one being as unrealistic as the other, as indefensible, and probably as fleeting.”)

⁸⁵ See *S.C. State Ports Auth.*, 122 S. Ct. at 1868–69.

⁸⁶ Because the Federal Maritime Commission’s orders are not self-executing, an administrative order can be enforced only by a federal district court. See id. at 1875 (citing 46 U.S.C. §§ 1712(e), 1713(c)–(d) (1994)). Under current doctrine, such a suit by a private party—effectively, a suit against a state in federal court to recover mone-

The Court's analysis of the question presented proceeded in three steps. First, the Court dispensed with the contention that the Eleventh Amendment limits only the "judicial"—Article III—power, by reaffirming its prior conclusion that "the sovereign immunity enjoyed by the States extends beyond the literal text of the Eleventh Amendment."⁸⁸ Second, given the "numerous common features shared by administrative adjudications and judicial proceedings,"⁸⁹ the Court concluded that federal agency adjudications were "the type of proceedings from which the Framers would have thought the States possessed immunity when they agreed to enter the Union."⁹⁰ Third, the Court considered the "affront to a State's dignity . . . when an adjudication takes place in an administrative tribunal as opposed to an Article III court,"⁹¹ and concluded that it was at least as great as when Congress attempts to subject a state to suit in federal court.

To be sure, the Court's first two rationales—loosely speaking, precedent and original intent—are conventional bases for constitutional decisionmaking. But given the consistent refusal of four Justices either to accept recent decisions as binding precedent⁹² or to recognize the historical accuracy of the Court's interpretation of the Framers' intent,⁹³ one might have expected the Court to be eager to demonstrate the correctness of its view of constitutional history and structure.

The facts of the case actually put the Court in somewhat of a doctrinal bind. The United States conceded that orders of the Commis-

tary damages—would be barred by the Eleventh Amendment. A suit by the United States to enforce the order, however, would not be barred by the Eleventh Amendment, which does not extend to suits by the United States. See, e.g., *Alden*, 527 U.S. at 755.

⁸⁷ *S.C. State Ports Auth.*, 122 S. Ct. at 1867–68.

⁸⁸ *Id.* at 1871.

⁸⁹ *Id.* at 1872.

⁹⁰ *Id.*

⁹¹ *Id.* at 1874.

⁹² See, e.g., *Alden*, 527 U.S. at 814 (Souter, Stevens, Ginsburg, & Breyer, JJ., dissenting); *Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 699 (1999) (Breyer, Stevens, Souter, & Ginsburg, JJ., dissenting).

⁹³ See, e.g., *S.C. State Ports Auth.*, 122 S. Ct. at 1880 (Stevens, J., dissenting) (challenging the Court's interpretation of the history of the ratification of the Eleventh Amendment); *Alden*, 527 U.S. at 814 (Souter, J., dissenting) (arguing that the Court's "conception of state sovereign immunity . . . is true neither to history nor to the structure of the Constitution").

sion were not self-executing, and that, because of existing Eleventh Amendment doctrine, they could be enforced only by the United States.⁹⁴ Existing doctrine permits suits by the United States against a state in federal court,⁹⁵ and the Court had already explained in *Alden* that suits by the United States against a state satisfy concerns about political accountability.⁹⁶ Thus, concerns about protecting the states' fiscal integrity and ensuring political accountability did not appear to be powerfully present in the case.

Presumably, that is where the rationale of state dignity comes in. In response to the United States' contention that South Carolina's fiscal integrity was not threatened by the adjudication before the Commission, the Court asserted: "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."⁹⁷ Similarly, in response to the United States' argument that the Commission should, at a minimum, not be precluded from considering a private party's request for non-monetary relief, the Court explained that "the primary function of sovereign immunity is not to protect State treasuries, but to afford the States the dignity and respect due sovereign entities."⁹⁸

But the Court did not simply invoke state dignity defensively. Quite to the contrary, the Court dedicated an entire section of its opinion to a discussion of state dignity and the adverse effect that permitting the adjudication to proceed would have had on that dignity. The Court explained that the "preeminent purpose of state sovereign immunity is to accord States the dignity that is consistent with their status as sovereign entities."⁹⁹ Alluding to the Court's

⁹⁴ See *supra* note 86.

⁹⁵ Such suits are not barred by either the Eleventh Amendment or any other extra-textual source of state sovereign immunity. See, e.g., *Alden*, 527 U.S. at 755.

⁹⁶ See *id.* at 756 ("Suits brought by the United States itself require the exercise of political responsibility for each suit prosecuted against a State, a control which is absent from a broad delegation to private persons to sue nonconsenting States.").

⁹⁷ *S.C. State Ports Auth.*, 122 S. Ct. at 1877 (citation omitted) (quoting *Alden*, 527 U.S. at 750–51, and *PRASA*, 506 U.S. at 146).

⁹⁸ *Id.* at 1879 (citation omitted).

⁹⁹ *Id.* at 1874.

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prior conclusions about the states' dignity in *Seminole Tribe* and *Coeur d'Alene Tribe*, the Court then reasoned:

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 [Federal Maritime Commission]. . . . 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.¹⁰⁰

Responding to such an assertion is difficult; indeed, measuring the "affront" of a given action to a state's "dignity" is an imprecise science (to say the least).¹⁰¹ One might wonder, for example, how to measure the validity of Justice Thomas's assertion, in an aside that surely was the subject of much grumbling among federal administrative law judges, that

[o]ne, 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.¹⁰²

Justice Stevens was left to complain again in dissent that "the 'dignity' rationale is 'embarrassingly insufficient,' in part because 'Chief Justice Marshall early on laid to rest the view that the purpose of the Eleventh Amendment was to protect a State's dignity.'"¹⁰³

¹⁰⁰ Id. (citations omitted).

¹⁰¹ See Meltzer, *supra* note 11, at 1039 (recognizing that "[a]ppeals to dignity are somewhat evanescent").

¹⁰² *S.C. State Ports Auth.*, 122 S. Ct. at 1874 n.11.

¹⁰³ Id. at 1880 (Stevens, J., dissenting) (quoting *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 406–07 (1821)). Justice Stevens also relied on an impressive recent piece of scholarship by Professor Caleb Nelson. See id. at 1880–81 (Stevens, J., dissenting) (citing Nelson, *supra* note 20, at 1565–66). I discuss Professor Nelson's work *infra* at notes 414–17 and accompanying text.

B. Diagnosing the Problem

As Justice Stevens's comment suggests, the current Court has not invented the dignity rationale. But to the extent that the term has a historical pedigree, one must wonder why the Court has recently revived it. Not even those relatively few commentators who have defended the Court's recent state sovereign immunity decisions have been eager to defend the dignity rationale.¹⁰⁴ Indeed, at least viewed in isolation, it seems intuitively silly at best and downright strange at worst. So why has the Court not only persisted in its invocation of state dignity, but also made the concept increasingly central to the rationale of its decisions?

Only a few commentators have hazarded an answer. Some have summarily dismissed the references to state dignity as inappropriate anthropomorphizations devoid of any substantive or functional content.¹⁰⁵ Others have noted that although the language of dignity appears to be shorthand for the relatively uncontroversial proposition that the states clearly have some special status under the Constitution, "broad notions of state dignity are difficult to square with accepted features of constitutional tradition."¹⁰⁶

¹⁰⁴ See Hill, *supra* note 14.

¹⁰⁵ See, e.g., Michael C. Dorf, *The Supreme Court, 1997 Term—Foreword: 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."); Henry Paul Monaghan, *The Supreme Court, 1995 Term—Comment: The Sovereign Immunity "Exception,"* 110 *Harv. L. Rev.* 102, 132 (1996) ("The idea that a state, an utterly abstract entity, has feelings about being sued by a private party when 'its' highest officials are regularly so sued surely strains credulity."); Sherry, *supra* note 7, at 1127 ("Not since extending the language of the Fourteenth Amendment to corporations has the Court so anthropomorphized an abstract entity."); *id.* (arguing that Justice Kennedy's imagery in *Alden* of the federal government's purported power over the states brings to mind "an independent toddler dragged along by a determined parent"); cf. Caminker, *supra* note 7, at 82 ("It is tempting to dismiss these articulations as mere rhetorical flourishes, window dressing on federalism walls constructed from other methodological building blocks.").

¹⁰⁶ Meltzer, *supra* note 11, at 1040. Professor Daniel Meltzer explains:

Foremost among these are the power of another sovereign (the federal government) to impose unwanted duties . . . on the states, and the power of that other sovereign to strip states of their regulatory authority via federal preemption. State dignity is also compromised by all of the alternative means of judicial enforcement of federal duties that the [*Alden*] majority mentions as valid (perhaps most notably, by state subjection to injunctions entered nominally against

Professor Evan Caminker has offered a more thorough—and persuasive, if tentative—account of the Court’s recent solicitude for state dignity.¹⁰⁷ Professor Caminker has taken a preliminary stab at exploring whether the “Court’s phraseology has independent justificatory significance.”¹⁰⁸ Noting that “the Court’s references to dignitary interests and injuries do not appear in casual and isolated snippets but, rather, are characterized as an affirmative rationale for state sovereign immunity,”¹⁰⁹ he proposes that “the Court’s focus on state dignity reflects an alternative approach to constitutional interpretation, one focusing on ‘expressive harms’ wrought by governmental conduct.”¹¹⁰ Under this account, the Court’s invocation of state dignity has “expressive significance by articulating and reinforcing norms that are constitutive of a society’s very identity and self-understanding.”¹¹¹ Viewed as such, “the Court’s jurisprudence is nonconsequentialist: it protects the dignity

state officials), and by the manifold prohibitions and duties set forth in Article I Section 10, in Article IV, and in Amendments 13–15, 19, 24 and 26 to the Constitution. . . . [T]he notion that state dignity demands some form of sovereign immunity from federal regulation falling within those enumerated powers is anything but axiomatic.

Id. at 1040–41. Professor Daniel Farber has suggested that “the perceived mandate to protect the ‘dignity’ of the states from being sullied by certain kinds of litigation stems from their unique role in republican self-government.” Farber, *supra* note 7, at 1136. Recognition of that role, he argues, “has real doctrinal consequences rather than being merely a rhetorical flourish.” *Id.* at 1137. Professor Ann Althouse has made a related argument. She distinguishes between “normative federalism,” under which “the states are accorded autonomy because of the good to be achieved through separate functioning,” and the “states’ rights model” of federalism, which holds that states “can claim their autonomy as a matter of right.” Althouse, *supra* note 7, at 246. Although, in her view, there are compelling reasons to enforce a doctrine of normative federalism, the Court’s—

insistence on ‘dignity’ for the states sounds like what *Younger [v. Harris]*, 401 U.S. 37 (1971), explicitly disclaimed: “blind deference to ‘States Rights.’” . . . ‘Dignity’ connotes worthiness, the idea that honor and esteem are deserved. To find dignity inherent in the state’s mere status as a state and then to design doctrine to express honor and esteem toward the state is, I think[,] to embrace the states’ rights model. The normative model would stop to ask *what* the state deserves and why.

Id. at 250–51 (footnote omitted).

¹⁰⁷ See Caminker, *supra* note 7.

¹⁰⁸ *Id.* at 83.

¹⁰⁹ *Id.*

¹¹⁰ *Id.* at 82.

¹¹¹ *Id.* at 84.

of states because this affirmation of the fundamental structural commitments embedded in our constitutional system of governance matters for its own sake, not as a means to achieving some other end.”¹¹²

After constructing this expressivist account, however, Professor Caminker recognizes that it is ultimately “unpersuasive” because it “fails to take account of countervailing expressive norms that the protection of state sovereign immunity itself violates, and it reflects an anachronistic view of [the] states’ role in our federalist system.”¹¹³ He accordingly speculates whether the Court is “employing expressive reasoning *instrumentally* to inculcate values to induce attitudinal or behavioral change.”¹¹⁴ There are “immediate and appreciable cost[s],” however, to such a judicial approach—specifically, “individuals are denied compensation for injuries caused by state misconduct.”¹¹⁵ These costs, combined with the empirical and normative concerns associated with any instrumental justification for a

¹¹² Id. at 85. Professor Evan Caminker recognizes that “[t]aken at face value, the Court’s discussions of state dignity suggest that the states themselves suffer a cognizable expressive harm when their rightful dignitary status is impugned by private suits.” Id. But such a characterization, he acknowledges, would be “surely silly. Unlike persons, states have no feelings of dignity to be protected.” Id. Instead, a “far more plausible characterization of the Court’s language does not similarly depend on pretending that states have human qualities; rather, it holds that disrespectful treatment of states should not be tolerated because it contravenes the proper understanding of our governmental regime.” Id.

¹¹³ Id. at 86 (emphasis omitted). For example, Professor Caminker notes that “the particular language with which the Court proclaims the states’ entitlement to dignified treatment appears to exalt states as having a status superior to individuals,” a view “at odds with our foundational notion of popular sovereignty . . .” Id. Similarly, “in the specific context of sovereign immunity, the prioritization of states’ dignitary interests over individuals’ competing interest in compensation for injuries caused by state wrongdoing arguably expresses a message that individuals are subordinate to states rather than the other way around.” Id.

¹¹⁴ Id. at 89 (emphasis added). On this account:

[j]udicial protection and exaltation of state dignity will encourage people to internalize, as a political norm, the importance of having strong and vibrant states exercising significant governmental authority. This norm-internalization will help lead to an actual revival of such state power, thus securing the . . . advantages of decentralization within the federal structure.

Id. at 89–90; see also Adam B. Cox, Expressivism in Federalism: A New Defense of the Anti-Commandeering Rule?, 33 Loy. L.A. L. Rev. 1309 (2000) (defending the anti-commandeering rule as outlined in *New York v. United States*, 505 U.S. 144 (1992), and *Printz v. United States*, 521 U.S. 898 (1997), on expressivist grounds).

¹¹⁵ Caminker, *supra* note 7, at 91.

jurisprudential change,¹¹⁶ lead Professor Caminker to conclude that “immunity doctrine cannot be persuasively justified on this instrumentalist ground.”¹¹⁷

Much can be said for the expressivist account as a plausible descriptive explanation of the Court’s focus on state dignity.¹¹⁸ Indeed, given the seemingly oxymoronic concept of state dignity, one is tempted to find some justification for the Court’s continued reliance on it. This Article does not dispute the validity, as a descriptive matter, of the expressivist account. Instead, it suggests that, wholly aside from any expressive rationale for the Court’s invocation of state dignity, in focusing on state dignity the Court is engaged in a much more conventional judicial enterprise, albeit one that the Court has conducted below the radar screen.

In stressing the dignity of the states, the Court appears to have drawn on a related, but distinct, line of cases: those concerned with the immunity of foreign states under the law of nations.¹¹⁹ To be sure, it is true, as the current Court’s majority has insisted, that the Court in the late nineteenth century referred to state dignity in its decisions addressing the scope of state immunity from suit.¹²⁰ It is

¹¹⁶ Professor Caminker notes that it is doubtful that the Court could correctly predict how people “will perceive and internalize judicial protection of states from private damages claims,” and that, in any event, “one might worry about the practical—and even expressive!—implications of having courts intentionally engage in social engineering.” *Id.* at 90–91.

¹¹⁷ *Id.* at 91.

¹¹⁸ But cf. Matthew D. Adler & Seth F. Kreimer, *The New Etiquette of Federalism*, 1998 *Sup. Ct. Rev.* 71, 142 (“[A]n intrinsic, expressive theory of federalism doctrine, to be plausible, must presuppose some objective semantic rules for attaching ‘meanings’ to acts of federal legislation. But we know of no such rules independent of the federalism values at stake in this area Because the anticommandeering doctrines cannot . . . be otherwise justified on federalism grounds, the expressive story fails as well.”).

¹¹⁹ One commentator recently came close to suggesting this connection between state sovereign immunity doctrine and the law of nations. See Thomas H. Lee, *Making Sense of the Eleventh Amendment: International Law and State Sovereignty*, 96 *Nw. U. L. Rev.* 1027 (2002). Professor Thomas Lee argues that the text of the Eleventh Amendment incorporates the law-of-nations rule of foreign state sovereign immunity. See *infra* notes 158–62. Professor Lee does not, however, attempt to assess how the Court’s current theory of state dignity conforms to this view of the Eleventh Amendment, or even to suggest that the Court’s current reliance on the notion of state dignity is in fact an attempt to rely on principles of the law of nations. Instead, Professor Lee’s article is concerned principally with understanding the meaning of the text of the Eleventh Amendment and its Framers’ intent.

¹²⁰ See *infra* notes 275–86 and accompanying text.

equally true, as Justice Stevens has observed in dissent, that Chief Justice Marshall long ago dismissed the rationale as a justification for the doctrine of (American) state sovereign immunity.¹²¹ But the discussion that follows of these earlier state sovereign immunity decisions clearly demonstrates that the rationale of state dignity has its roots beyond its immediate context.

Before discussing those state sovereign immunity decisions, however, this Article turns to a consideration of the cases from which the notion of state dignity appears to derive: cases concerning the law of nations and the immunity of one nation in the courts of another. The concept of state dignity is not alien to the jurisprudence of foreign state sovereign immunity. To the contrary, as explained below, the decisions applying the law of nations often refer to state dignity to underscore the importance of courts recognizing the equal status of the sovereign nations whose interests collide in a judicial forum. The language of state dignity, although at first blush an inappropriate anthropomorphization, thus makes some sense in this context.

II. DOCTRINAL ORIGINS OF STATE DIGNITY

A. The Origins of Sovereign Immunity in American Jurisprudence

To appreciate the significance of the Court's invocation of state dignity in its state sovereign immunity cases, it is essential to understand the context from which that concept derives. As explained in detail below, that context is the doctrine of foreign state sovereign immunity. As a preliminary matter, however, it is important to distinguish between two related yet distinct doctrines addressing the immunity of sovereign states from suit. The first—the English common-law doctrine of sovereign immunity—in fact “comprises two distinct rules.”¹²² One, which limited the substantive reach of the law, held that “the King or the Crown, as the font of the law, is not bound by the law's provisions.”¹²³ This rule rested on the notion that, in Black-

¹²¹ See *infra* notes 254–60 and accompanying text (discussing *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264 (1821)).

¹²² *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 102 (1996) (Souter, J., dissenting); see also Louis L. Jaffe, *Suits Against Governments and Officers: Sovereign Immunity*, 77 Harv. L. Rev. 1, 4 (1963) (“[T]he immunity of the sovereign from suit (sovereign immunity) and his capacity to violate or not violate the law (‘the King can do no wrong’) are distinct and independent concepts . . .”).

¹²³ *Seminole Tribe*, 517 U.S. at 102–03 (Souter, J., dissenting).

stone's words, "the king himself can do no wrong."¹²⁴ Although this maxim suggests that the King is above the law—and, indeed, that is the meaning the maxim came to enjoy—it "originally meant precisely the contrary to what it later came to mean."¹²⁵ According to Professor Louis Jaffe, the phrase originally meant that "the king must not, was not allowed, not entitled, to do wrong."¹²⁶ As it evolved, however, "the king can do no wrong" took on the meaning that the King was "not only incapable of doing wrong, but even of thinking wrong; he can never mean to do an improper thing."¹²⁷ The fiction that the King can do no wrong is, of course, entirely foreign in a system of popular sovereignty,¹²⁸ and accordingly was received quite hostilely in early post-ratification decisions.¹²⁹

The other rule of the English common law was that "the King or Crown, as the font of justice, is not subject to suit in its own courts."¹³⁰ This doctrine, which was jurisdictional in nature, "had its origins in the feudal system."¹³¹ Under that system, "no lord could be sued by a vassal in his own court, but each petty lord was subject to suit in the courts of a higher lord. Since the King was at the apex of the feudal pyramid, there was no higher court in which he could be sued."¹³² Ac-

¹²⁴ 1 William Blackstone, Commentaries *244.

¹²⁵ Jaffe, *supra* note 122, at 4.

¹²⁶ *Id.* (quoting Ludwik Ehrlich, No. XII: Proceedings Against the Crown (1216–1377), in 6 Oxford Studies Soc. & Legal Hist. 42 (Paul Vinogradoff ed., 1921)); see also 1 Blackstone, *supra* note 124, at *246 ("[T]he prerogative of the crown extends not to do any injury.").

¹²⁷ 1 Blackstone, *supra* note 124, at *246 (emphasis omitted).

¹²⁸ See, e.g., The Declaration of Independence para. 2 (U.S. 1776) ("The history of the present King of Great Britain is a history of repeated injuries and usurpations, all having in direct object the establishment of an absolute Tyranny over these States."); *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 now wrong] was rejected at the birth of the Republic."); *Nevada v. Hall*, 440 U.S. 410, 415 (1979) ("We must, of course, reject the fiction. It was rejected by the colonists when they declared their independence from the Crown . . ."); *Langford v. United States*, 101 U.S. 341, 343 (1879) ("We do not understand that either in reference to the government of the United States, or of the several States, or of any of their officers, the English maxim [the King can do no wrong] has an existence in this country.").

¹²⁹ The most important of these early decisions was *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419, 458, 471–72 (1793); see discussion *infra* notes 221–53 and accompanying text.

¹³⁰ *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 103 (1996) (Souter, J., dissenting).

¹³¹ *Hall*, 440 U.S. at 414.

¹³² *Id.* at 414–15 (citing 1 Sir Frederick Pollock & Frederic William Maitland, *The History of English Law: Before The Time of Edward I*, at 518 (2d ed. 1899) (noting

cordingly, this rule, which was well established in England as early as the thirteenth century,¹³³ barred individuals from bringing suit against a sovereign in its own courts.¹³⁴ This Article refers to this doctrine as “English common-law sovereign immunity.”

A distinct, albeit related, doctrine—also part of the legal consciousness at the time of the Framing—accorded sovereign nations immunity in the courts of *other* sovereigns. “This source of sovereign immunity owed less to the common law than to the law of nations.”¹³⁵ Under an interpretation of the law of nations that has changed little since the Revolutionary period, courts of one nation generally refused to entertain actions against *other* sovereign nations. This doctrine was based on the “perfect equality[] and entire independence of all distinct states.”¹³⁶ Given this parity of status, it was thought that disputes between sovereigns should be resolved through diplomatic relations,¹³⁷ or through war,¹³⁸ rather than by

that the fact “that there happens to be in this world no court above [the King’s] court is, we may say, an accident.”)

¹³³ See Clyde E. Jacobs, *The Eleventh Amendment and Sovereign Immunity* 5 (1972); Jaffe, *supra* note 122, at 2.

¹³⁴ As Professor Louis Jaffe persuasively demonstrated, however, in England the doctrine that the “King cannot be sued without his consent . . . has not meant that the subject was without remedy.” Jaffe, *supra* note 122, at 1. He explained:

From time immemorial many claims affecting the Crown could be pursued in the regular courts if they did not take the form of a suit against the Crown. And when it was necessary to sue the Crown *eo nomine* consent apparently was given as of course. . . . Where the doctrine was in form applicable the subject had to proceed by petition of right, a cumbersome, dilatory remedy to be sure, but nevertheless a remedy. If the subject was the victim of illegal official action, in many cases he could sue the King’s officers for damages. And the writs of certiorari, mandamus, quo warranto, and habeas corpus ran against many official boards and commissions

Id.

¹³⁵ James E. Pfander, *Rethinking the Supreme Court’s Original Jurisdiction in State-Party Cases*, 82 Cal. L. Rev. 555, 582 (1994).

¹³⁶ 1 James Kent, *Commentaries on American Law* 21 (Oliver Wendell Holmes, Jr. ed., 12th ed., Boston, Little, Brown & Co. 1878).

¹³⁷ Under the doctrine of espousal, the remedy of an individual aggrieved by the act of a foreign state was to appeal to his own government to seek redress through diplomatic channels. See *Ware v. Hylton*, 3 U.S. (3 Dall.) 199, 259–60 (1796) (Iredell, J., concurring).

¹³⁸ See *The Schooner Exchange v. McFaddon*, 11 U.S. (7 Cranch) 116, 135–46 (1812); see also discussion *infra* notes 176–202 and accompanying text. Early commentators on the law of nations sometimes justified this doctrine by reference to the distinction between the sovereign as an entity (or, in the case of a monarchy, a person) and the individuals who were citizens or subjects of the sovereign. For example, Emmerich de Vattel, the leading treatise writer on the law of nations in the

forcing one sovereign to submit to the commands of another sovereign's courts. This Article refers to this strand of sovereign immunity doctrine as "foreign state sovereign immunity."¹³⁹

The current doctrinal debate over the appropriate status of state sovereign immunity in our constitutional system has tended to focus, at least ostensibly, on English common-law sovereign immunity. As Professor James Pfander has explained, "[t]wo schools of thought prevail regarding the history of sovereign immunity in the period preceding the framing and ratification of the Constitution."¹⁴⁰ One school believes that the states inherited common-law sovereign immunity—which they hold to be a "fundamental precept of Anglo-American law"—following the Declaration of Independence, and that the "framers reaffirmed their immunity during the constitutional ratification debates."¹⁴¹ The other school emphasizes that "even in Great Britain, the doctrine did not establish a

Emmerich de Vattel, the leading treatise writer on the law of nations in the eighteenth century, explained that "[n]o individual, though ever so free and independent, can be placed in competition with the sovereign; this would be to put a single person alone upon an equality with an united multitude of his equals." 2 Emmerich de Vattel, *The Law of Nations or Principles of the Law of Nature, Applied to the Conduct and Affairs of Nations and Sovereigns* § 35, at 209 (Northampton, Mass., Simeon Butler 4th Am. ed. 1820) (1758); see Lee, *supra* note 119, at 1033. Accordingly, an individual of one sovereign could not force another sovereign to be subject to suit.

¹³⁹ Professor James Pfander refers to it as "law-of-nations" immunity. Pfander, *supra* note 135, at 559; see also Alfred Hayes, *Private Claims Against Foreign Sovereigns*, 38 *Harv. L. Rev.* 599, 599 (1925) ("[I]mmunity of a foreign sovereign is not identical with immunity of the local sovereign."); Antonin Scalia, *Sovereign Immunity and Nonstatutory Review of Federal Administrative Action: Some Conclusions from the Public-Lands Cases*, 68 *Mich. L. Rev.* 867, 886 (1970) (distinguishing between "the principles governing the amenability of a state to suit before its own courts and those governing its amenability to suit before the courts of another sovereign"). I have chosen the term "foreign state sovereign immunity" because application of the doctrine necessarily requires two sovereigns: the forum sovereign and the foreign sovereign who is sued in the forum sovereign's courts. English common-law sovereign immunity, in contrast, only contemplates one sovereign: the one that is immune from suit in its own courts.

¹⁴⁰ Pfander, *supra* note 135, at 578.

¹⁴¹ *Id.* at 578–79 (citing *Hans v. Louisiana*, 134 U.S. 1, 11–15 (1890)); see, e.g., Alden v. Maine, 527 U.S. 706, 715–16 (1999) ("When the Constitution was ratified, it was well established in English law that the Crown could not be sued without consent in its own courts Although the American people had rejected other aspects of English political theory, the doctrine that a sovereign could not be sued without its consent was universal in the States when the Constitution was drafted and ratified.").

complete bar to relief against either the crown or its officers,”¹⁴² and maintains that “Americans had substituted the sovereignty of the people for the sovereignty of the crown and had secured limitations on governmental power through adoption of written constitutions.”¹⁴³ Whatever the merits of these competing views, the principal point of dispute has tended to be the degree to which, or whether, the constitutional structure incorporated English common-law sovereign immunity.

Regardless of the Court’s current view of the origins of the doctrine of state sovereign immunity—a view that is, as explained below, generally ambivalent and cryptically expressed—it makes some sense to distinguish between those cases that involve the circumstances specific to English common-law sovereign immunity and those that involve the circumstances specific to foreign state sovereign immunity. Because the former generally applied only when the sovereign was sued in its own courts, English common-law sovereign immunity is the logical doctrinal ancestor when an individual sues a state in the state’s own courts¹⁴⁴—at least when a state is sued under a cause of action created by its own laws.¹⁴⁵ Foreign state sovereign immunity, on the other hand, is the logical doctrinal source when a state is sued in federal court—a court of “another” sovereign.¹⁴⁶

¹⁴² Pfander, *supra* note 135, at 580 (citing Jaffe, *supra* note 122, at 16–18).

¹⁴³ *Id.* (citing John J. Gibbons, *The Eleventh Amendment and State Sovereign Immunity: A Reinterpretation*, 83 *Colum. L. Rev.* 1889, 1896–99 (1983), and Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 *Yale L.J.* 1425, 1438–51 (1987)); see, e.g., *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 102–04 (1996) (Souter, J., dissenting) (discussing English common-law sovereign immunity and then arguing that “[w]hatever the scope of sovereign immunity might have been in the Colonies, however, or during the period of Confederation, the proposal to establish a National Government under the Constitution drafted in 1787 presented a prospect unknown to the common law prior to the American experience”).

¹⁴⁴ See, e.g., *Alden*, 527 U.S. at 715–16, 733–35, 741–42 (discussing English common law).

¹⁴⁵ Cf. *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.”). Justice Holmes’s formulation of sovereign immunity is discussed *infra* notes 315–20 and accompanying text.

¹⁴⁶ See, e.g., *Seminole Tribe*, 517 U.S. at 69 (invoking “the much more fundamental jurisprudence in all civilized nations”) (quoting *Hans v. Louisiana*, 134 U.S. 1, 17 (1890)); see also Scalia, *supra* note 139.

This is not to suggest that either doctrine has any place in American constitutional jurisprudence. Indeed, the main jurisprudential debate in current state sovereign immunity decisions is over the extent to which the states obtained (or retained) immunity from suit upon ratification of the Constitution. Moreover, the relevance of the two doctrines of sovereign immunity is complicated by the fact that states are not wholly sovereign entities. Thus, it is strained to suggest that, with respect to the several states, the courts of the United States are the courts of “another” sovereign. But understanding the source of immunity that the states enjoy under current doctrine is essential to assessing that doctrine.

There is some disagreement about the doctrinal origins of the states’ immunity from suit. As suggested above and explained in greater detail below, the current debates on the Court tend to focus, at least explicitly, on the English common law. Moreover, the early post-ratification practice suggests that the Court saw little place for the law-of-nations doctrine of foreign state sovereign immunity in cases involving suits against the several states, although the early Court was not particularly receptive to claims based on the English common law, either.

But several commentators have argued that the states, at one time or another, enjoyed foreign state sovereign immunity. For example, Professors James Pfander and Caleb Nelson¹⁴⁷ have separately argued that the pre-ratification case of *Nathan v. Virginia*¹⁴⁸ demonstrates that the states enjoyed foreign state sovereign immunity in the courts of other states under the Articles of Confederation.¹⁴⁹ In that case, the Pennsylvania Court of Common Pleas

¹⁴⁷ Professor Nelson actually suggests that it is not entirely clear that the Framers consistently distinguished between what is referred to here as “English common-law sovereign immunity” and “foreign state sovereign immunity,” but suggests that the distinction is not particularly important, because “in America, sovereign immunity operated through the same mechanism in both contexts.” Nelson, *supra* note 20, at 1574–75 n.70.

¹⁴⁸ 1 U.S. (1 Dall.) 77 (Pa. C.P. 1781).

¹⁴⁹ See Nelson, *supra* note 20, at 1578–79; *id.* at 1577 (“[T]here was broad consensus about the states’ immunity from suit under the Articles.”); *id.* at 1575 (arguing that the dominant view among the Framers before ratification was that “courts could not adjudicate plaintiffs’ claims against a sovereign unless the sovereign voluntarily appeared or otherwise consented to suit, because there was no other way to bring the sovereign within a court’s power and because a court could not proceed to judgment against defendants who were not at least constructively before it”); Pfander, *supra*

dismissed an action brought against the Commonwealth of Virginia by Simon Nathan to recover a debt that the Commonwealth allegedly owed him. Nathan sought a writ to attach some military uniforms that belonged to Virginia but were in Philadelphia. After receiving a request from Virginia, the Supreme Executive Council of Pennsylvania ordered the sheriff not to return the writ to the court. During argument before the court, William Bradford, Pennsylvania's Attorney General, argued that the action should be dismissed, and the Court agreed.¹⁵⁰ Subsequent accounts of the case reveal Bradford's argument that subjecting Virginia to suit would violate the immunity of the state under the law of nations, and that the court accepted that view.¹⁵¹

That the states may have enjoyed foreign state sovereign immunity in each other's courts *before* ratification, however, does not answer whether they enjoyed it *after* ratification. Professor Pfander argues that although, in light of the decision in *Nathan*, "the framers of the Constitution considered [law-of-nations] sovereign immunity a substantial hurdle to securing state compliance with the plan of the convention,"¹⁵² they addressed this concern by abrogating the states' immunity through inclusion of the Original Jurisdiction Clause in Article III.¹⁵³ Professor Nelson argues that whether the Framers thought that the states enjoyed law-of-nations immunity after the ratification is a close question. Instead, he offers a novel and sophisticated account under which the federal courts lack subject matter jurisdiction over suits within the literal text of

note 135, at 586–87 (citing contemporaneous accounts and asserting that "[t]he disposition of *Nathan* in favor of law-of-nations immunity deserves to be viewed as a decisive rejection of state suability in the courts of other states").

¹⁵⁰ See *Nathan*, 1 U.S. (1 Dall.) at 78 n.(a).

¹⁵¹ See *id.* (account of Alexander Dallas); Nelson, *supra* note 20, at 1579–80 n.95 (quoting Letter from Joseph Reed to Virginia Delegates (July 10, 1781), in 3 *The Papers of James Madison* 187 n.2 (William T. Hutchinson & William M.E. Rachal eds., 1963)). Alexander Hamilton also apparently believed that the states' immunity from suit derived from the law of nations. See *The Federalist* No. 81, at 487–88 (Alexander Hamilton) (Clinton Rossiter ed., 1961); Nelson, *supra* note 20, at 1577–78; Pfander, *supra* note 135, at 581 n.99. The Supreme Court has since held that the Constitution does not prevent one state from entertaining a suit against another state. See *Nevada v. Hall*, 440 U.S. 410, 421, 426–27 (1979); discussion *infra* notes 259–62 and accompanying text.

¹⁵² Pfander, *supra* note 135, at 587.

¹⁵³ See U.S. Const. art. III, § 2; Pfander, *supra* note 135, at 560.

the Eleventh Amendment, and the states enjoy a “personal jurisdiction” type of sovereign immunity in other suits against them.¹⁵⁴

In contrast, then-Professor Antonin Scalia, who also recognized the difference between what he called “‘domestic’ and ‘foreign’ sovereign immunity,”¹⁵⁵ argued (albeit rather cursorily)¹⁵⁶ that the states continue to enjoy the latter as a matter of constitutional law. According to then-Professor Scalia, “[t]he eleventh amendment to the Constitution embodies only that ‘foreign’ immunity, protecting the states from being sued before federal tribunals by citizens of other states or nations.”¹⁵⁷ Professor Thomas Lee recently provided a more comprehensive justification for this account of the Eleventh Amendment. Professor Lee argues that the literal text of the Eleventh Amendment is best explained as an attempt to “incorporate into the Constitution, in recognition of the sovereign equality of the States, the classical international law rule that only states have rights against other states.”¹⁵⁸ Under this view, “[t]he Amendment is essentially just a negative formulation of the affirmative international rule, namely, a foreign citizen may not sue a sovereign state.”¹⁵⁹ That international rule, Professor Lee explains, was intended to protect sovereign dignity.

[Because the] atomized individual was . . . a nonentity with no rights or duties so far as the law of nations was concerned, . . . to recognize the rights of a citizen or subject of one state against a foreign state . . . would imply that a fraction of the sovereignty of one state was equal to the full sovereignty of another.¹⁶⁰

This would “belittle the sovereign dignity of the latter state” by “impeaching the irreducible equality and dignity” of that state in the society of nations.¹⁶¹

¹⁵⁴ See Nelson, *supra* note 20, at 1566.

¹⁵⁵ Scalia, *supra* note 139, at 886.

¹⁵⁶ Then-Professor Scalia made his observations about the states’ sovereign immunity in an article addressing judicial review of federal administrative action. Thus, he discussed the states only briefly, by way of analogy. See *id.* at 886–88.

¹⁵⁷ *Id.* at 886. For further consideration of then-Professor Scalia’s argument, see *infra* notes 413–17 and accompanying text.

¹⁵⁸ Lee, *supra* note 119, at 1028.

¹⁵⁹ *Id.*

¹⁶⁰ *Id.* at 1033.

¹⁶¹ *Id.* (discussing Vattel, *supra* note 138, at 208–09).

Professor Lee's cogent article may well "mak[e] sense of the Eleventh Amendment," but it does not attempt to assess how the current Court's particular theory of state dignity conforms to this view of the Eleventh Amendment, or even suggest that the Court's current reliance on the notion of state dignity is in fact an attempt to rely on principles of the law of nations. To be sure, as demonstrated below, identifying customary international law as the doctrinal source of the notion of state dignity is an important first step in understanding and assessing the Court's current reliance on the concept. But the real work of this project is to determine the implications for current state sovereign immunity doctrine of the Court's apparent invocation of the principles of customary international law, which Professor Lee has not attempted.¹⁶²

For the purposes of this Article, the important point is that English common-law sovereign immunity and foreign state sovereign immunity historically had specific contexts for application. To help demonstrate that proposition, this Article turns to a consideration of the Court's treatment of the doctrine of foreign state sovereign immunity. It is in that doctrine that the concept of state dignity is of paramount importance.

B. State Dignity and Foreign State Sovereign Immunity

1. The Law of Nations

As explained above, the doctrine of foreign state sovereign immunity is part of the law of nations. The author of the most frequently cited eighteenth-century treatise on the law of nations, Emmerich de Vattel, defined the law of nations as "[c]ertain max-

¹⁶² Professor Lee does offer two brief concluding thoughts about the implications of his view of the Eleventh Amendment for current doctrine. Lee, *supra* note 119, at 1096. First, he argues that because the law of nations recognized a right to sue a state for a violation of "fundamental law," a U.S. citizen should be permitted to sue a state for any constitutional violation, not just a violation of the Fourteenth Amendment. *Id.* Second, he concludes that, contrary to the Court's decision in *Monaco v. Mississippi*, 292 U.S. 313 (1934), a foreign state should be permitted to sue a state in federal court. *Id.* at 1096. Professor Lee does briefly criticize the Court for invoking a "boundless principle of dignity," noting that "the international law theory" relies on a notion of dignity "that is based on the private citizens who constitute the State, not a dignity that is separate from and superior to its citizens." *Id.* at 1096-97. He does not, however, attempt further to analyze the implications of the Court's reliance on the notion of state dignity.

ims and *customs*, consecrated by long use, and observed by nations in their mutual intercourse with each other.”¹⁶³ Although today the law of nations is known as “customary international law,”¹⁶⁴ its definition has changed very little.¹⁶⁵ As Professor Brad Clark has explained, in the late eighteenth century and early nineteenth century the “law of nations was not ‘law’ as we usually think of it today—that is, a sovereign command Rather, . . . the law of nations was an identifiable body of rules and customs developed and refined by a variety of nations over hundreds and, in some cases, thousands of years.”¹⁶⁶

At least in theory, the law of nations did not represent the decisions or interpretations of law of any one sovereign. Instead, “it existed by common practice and consent among a number of sovereigns.”¹⁶⁷ In Blackstone’s words, because “none of [the individual nations of the world] will acknowledge a superiority in the other, [the law of nations] cannot be dictated by any.”¹⁶⁸ Sovereign nations followed the law of nations’ customary rules not out of legal compulsion, but in order to “foster peaceful coexistence and to facilitate mutually beneficial transactions among their citizens. In essence, the law of nations operated as a set of background rules that courts applied in the absence of any binding sovereign command to the contrary.”¹⁶⁹ When the United States declared and achieved independence, it embraced the law of nations as did other sovereign nations in the world.¹⁷⁰

¹⁶³ Emmerich de Vattel, *The Law of Nations* § 25, at 62 (Joseph Chitty ed., Phila., T. & J.W. Johnson & Co. 1859) (1758) (emphasis in original).

¹⁶⁴ Restatement (Third) of the Foreign Relations Law of the United States § 102 (1987).

¹⁶⁵ *Id.* § 101 (defining international law as a set of “rules and principles of general application dealing with the conduct of states and of international organizations and with their relations *inter se*, as well as with some of their relations with persons, whether natural or juridical”). Of course the content of those rules and principles has changed substantially over time.

¹⁶⁶ Bradford R. Clark, *Federal Common Law: A Structural Reinterpretation*, 144 U. Pa. L. Rev. 1245, 1279 (1996).

¹⁶⁷ William A. Fletcher, *The General Common Law and Section 34 of the Judiciary Act of 1789: The Example of Marine Insurance*, 97 Harv. L. Rev. 1513, 1517 (1984).

¹⁶⁸ 1 Blackstone, *supra* note 124, at *43.

¹⁶⁹ Clark, *supra* note 166, at 1280.

¹⁷⁰ Shortly after the ratification and during the same year that he argued *Chisholm v. Georgia* for the plaintiff, Attorney General Edmund Randolph advised the Secretary of State that “[t]he law of nations, although not specially adopted by the constitution

In the early days of the Republic, the law of nations supplied background customs and norms in three principal substantive areas:¹⁷¹ commercial law (“law merchant”),¹⁷² admiralty law (“law maritime”),¹⁷³ and the law governing the rights and obligations of sovereign states (dealing with such sensitive matters of foreign relations as war, neutrality, and immunity for other nations’ ambassadors).¹⁷⁴ Given the obvious importance of these matters, particularly to a young nation eager to be accepted by the community of nations, U.S. courts recognized and generally enforced the law of nations in cases before them.¹⁷⁵

or any municipal act, is essentially a part of the law of the land. Its obligation commences and runs with the existence of a nation . . .” 1 Op. Att’y Gen. 26, 27 (1792). On the force of the law of nations in the United States, see generally *The Paquete Habana*, 175 U.S. 677, 700 (1900) (“International law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction, as often as questions of right depending upon it are duly presented for their determination. For this purpose, where there is no treaty, and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations . . .”).

¹⁷¹ See generally Clark, *supra* note 166, at 1279–84 (explaining the mechanics of the law of nations as it was historically applied in three principle categories).

¹⁷² Clark, *supra* note 166, at 1281. The law merchant was a body of uniform rules designed to promote trade among nations. See 1 Blackstone, *supra* note 124, at *75; see also *Swift v. Tyson*, 41 U.S. (16 Pet.) 1, 18–19 (1842) (relying on the law of nations in formulating federal common law for commercial transactions).

¹⁷³ As Professor Brad Clark noted:

Like the law merchant, the law maritime fostered trade among nations. But the law maritime also served to maintain peace and harmony among nations. Failure to resolve admiralty and maritime disputes satisfactorily could create tensions among nations and even lead to war. Thus, nations had a strong incentive to adhere to accepted rules and customs.

Clark, *supra* note 166, at 1281 n.168 (citing W. Mitchell, *Essay on the Early History of the Law Merchant* 39–78 (1904)).

¹⁷⁴ See *Thirty Hogsheads of Sugar v. Boyle*, 13 U.S. (9 Cranch) 191, 198 (1815) (“The law of nations is the great source from which we derive those rules, respecting belligerent and neutral rights, which are recognized by all civilized and commercial states throughout Europe and America.”). For the argument that judicial decisions in the three principal areas of the law of nations do not constitute impermissible “federal judge-made law,” but rather are “consistent with, and frequently required by, the constitutional structure,” see Clark, *supra* note 166, at 1251.

¹⁷⁵ See *Ware v. Hylton*, 3 U.S. (3 Dall.) 199, 281 (1796) (Wilson, J.) (“When the United States declared their independence, they were bound to receive the law of nations, in its modern state of purity and refinement.”) (emphasis omitted).

2. The Schooner Exchange v. McFaddon

Early judicial decisions in several of the substantive areas embraced by the law of nations are replete with references to sovereign dignity. The classic and foundational example is the Supreme Court's decision in *The Schooner Exchange v. McFaddon*.¹⁷⁶ The case involved a claim by two American citizens, John McFaddon and William Greetham, that they were the rightful owners of the Exchange, a boat that they alleged was forcibly taken from them by persons acting under the orders of Napoleon, then the Emperor of France, and refitted as an armed public vessel of France.¹⁷⁷ When the ship, after "encounter[ing] great stress of weather upon the high seas," landed in the port of Philadelphia, McFaddon and Greetham filed a libel action in federal district court, attaching the vessel and seeking its return.¹⁷⁸ Neither the French captain nor any other French official appeared in court to defend the claim; instead, France protested the libel action through diplomatic channels. In response, the U.S. Attorney for the District of Pennsylvania, on instructions of the "executive department of the government of the United States," appeared to urge the court to dismiss the libel.¹⁷⁹

The district court dismissed the action, but the circuit court reversed.¹⁸⁰ As Professor Clark notes, "[i]t is difficult to overstate the importance of this case at the time At the time of the circuit court's decision, the United States was on the brink of war with England and could hardly afford war with France as well."¹⁸¹ It is also not difficult to see how resolution of the case would directly affect relations with France. Chief Justice Marshall described the question presented as "whether an American citizen can assert, in an American court, a title to an armed [French] national vessel, found within the waters of the United States."¹⁸²

To answer that question, Chief Justice Marshall drew on background principles of the law of nations.¹⁸³ He started by noting the

¹⁷⁶ 11 U.S. (7 Cranch) 116 (1812).

¹⁷⁷ *Id.* at 117.

¹⁷⁸ *Id.* at 118.

¹⁷⁹ *Id.* at 117–19.

¹⁸⁰ *Id.* at 119–20.

¹⁸¹ Clark, *supra* note 166, at 1307.

¹⁸² *The Schooner Exchange*, 11 U.S. (7 Cranch) at 135.

¹⁸³ See *id.* at 136 (discussing the "usages and received obligations of the civilized world").

tension between the “exclusive and absolute” jurisdiction of a “nation within its own territory,” on the one hand, and the need for “relaxation” of that power in order to promote “intercourse with each other [and] . . . an interchange of those good offices which humanity dictates and its wants require,” on the other.¹⁸⁴ The Chief Justice explained that this tension—between the “equal rights and equal independence” of distinct sovereignties and the “common interest impelling them to mutual intercourse”¹⁸⁵—has “given rise to a class of cases in which every sovereign is understood to waive the exercise of a part of that complete exclusive territorial jurisdiction, which has been stated to be the attribute of every nation.”¹⁸⁶

By “[waiving] . . . territorial jurisdiction,” Chief Justice Marshall meant that the forum sovereign would, in cases in which a foreign sovereign or one of its officers was hauled before one of the forum’s courts, decline to assert authority over the foreign sovereign. This practice was the necessary corollary of the “perfect equality and absolute independence of sovereigns”:

One sovereign being in no respect amenable to another; and being bound by obligations of the highest character not to degrade the *dignity of his nation*, by placing himself or its sovereign rights within the jurisdiction of another, can be supposed to enter a foreign territory only under an express license, or in the confidence that the immunities belonging to his independent sovereign station, though not expressly stipulated, are reserved by implication, and will be extended to him.¹⁸⁷

Under the principles of the law of nations, the Court reasoned, the same result must obtain when the “person of the sovereign” (in the case of monarchs and emperors), the minister of a sovereign (that is, an ambassador), or the public armed ship of a friendly sovereign entered the territory of another sovereign. In each case, Chief Justice Marshall explained, assertion of jurisdiction would be incompatible with the “dignity” of the foreign sovereign.¹⁸⁸ Accordingly,

¹⁸⁴ Id.

¹⁸⁵ Id. at 136–37.

¹⁸⁶ Id. at 137.

¹⁸⁷ Id. (emphasis added).

¹⁸⁸ Under the law of nations, the “person of the sovereign” was immune from “arrest or detention within a foreign territory” because “[a] foreign sovereign is not under-

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the Court held, as a “principle of public law,” that “national ships of war, entering the port of a friendly power open for their reception, are to be considered as exempted by the consent of that power from its jurisdiction,”¹⁸⁹ and ordered the libel dismissed.

It is clear from this recital that the Court’s references to sovereign “dignity” were intended to underscore the status of the foreign sovereign in relation to the status of the forum sovereign. It would undermine the absolute independence of one sovereign to submit to the authority and jurisdiction of a another sovereign; such submission would necessarily entail some diminution of the

stood as intending to subject himself to a jurisdiction incompatible with *his dignity, and the dignity of his nation*, and it is to avoid this subjection that the license [to enter the foreign state’s territory] has been obtained.” *Id.* at 137–38 (emphasis added). The law of nations granted immunity to foreign ministers for the same reason:

The assent of the sovereign to the very important and extensive exemptions from territorial jurisdiction which are admitted to attach to foreign ministers, is implied from the considerations that, without such exemption, every sovereign would hazard his own *dignity* by employing a public minister abroad A sovereign committing the interests of his nation with a foreign power, to the care of a person whom he has selected for that purpose, cannot intend to subject his minister in any degree to that power; and therefore, a consent to receive him, implies a consent that he shall possess those privileges which his principal intended he should retain—privileges which are essential to the *dignity* of his sovereign, and to the duties he is bound to perform.

Id. at 138–39 (emphasis added). The same considerations mandated a background principle in favor of immunity for public armed ships. Such a ship—

constitutes a part of the military force of her nation; acts under the immediate and direct command of the sovereign; is employed by him in national objects. He has many and powerful motives for preventing those objects from being defeated by the interference of a foreign state. Such interference cannot take place without affecting his power and his *dignity*. The implied license therefore under which such vessel enters a friendly port, may reasonably be construed, and it seems to the Court, ought to be construed, as containing an exemption from the jurisdiction of the sovereign, within whose territory she claims the rights of hospitality.

Id. at 144 (emphasis added).

¹⁸⁹ *Id.* at 145–46. The Court elaborated:

[T]he Exchange, being a public armed ship, in the service of a foreign sovereign, with whom the government of the United States is at peace, and having entered an American port open for her reception, on the terms on which ships of war are generally permitted to enter the ports of a friendly power, must be considered as having come into the American territory, under an implied promise, that while necessarily within it, and demeaning herself in a friendly manner, she should be exempt from the jurisdiction of the country.

Id. at 147.

foreign state's own sovereign authority.¹⁹⁰ Such a state of affairs would be highly problematic, given the "equal rights and equal independence" of the two sovereigns.¹⁹¹ The use of the term "dignity" to illustrate this point is not anomalous. "Dignity" connotes, among other things, "true worth, excellence"; "[h]onourable or high estate; degree of estimation, rank"; and "[e]levated manner; fit stateliness";¹⁹² a nineteenth-century dictionary also mentions "[h]eight; importance; [and] rank."¹⁹³ Recognition of the equal dignity—that is, the equal rank and importance—of the foreign sovereign depended on the forum nation's courts declining to assert jurisdiction over the foreign nation.¹⁹⁴

¹⁹⁰ The Court accordingly has referred to sovereign dignity in cases involving the assertion of jurisdiction over foreign ambassadors, who are, after all, merely representatives of the sovereign. See *Respublica v. De Longchamps*, 1 U.S. (1 Dall.) 111, 116–17 (1784) (explaining that under the law of nations, "[t]he person of a public minister is sacred and inviolable" because if "his freedom of conduct is taken away, the business of his sovereign cannot be transacted, and his dignity and grandeur will be tarnished"). See generally *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304, 335 (1816) (noting that cases affecting ambassadors "affect not only our internal policy, but our foreign relations").

¹⁹¹ *The Schooner Exchange*, 11 U.S. (7 Cranch) at 136.

¹⁹² The New Shorter Oxford English Dictionary 671 (1993); see also Merriam Webster's Collegiate Dictionary 323 (10th ed. 1993) (defining "dignity" as, inter alia, "the quality or state of being worthy, honored or esteemed," and "high rank, office, or position"). According to a contemporaneous dictionary, the term "dignity" had much the same meaning in the late eighteenth and early nineteenth centuries that it has today. See 2 Samuel Johnson, *A Dictionary of the English Language* (London, Longman Hurst, Rees & Orme, 9th ed. 1805) (unpaginated) (defining dignity as "rank of elevation," "[g]randeur of mien; elevation of aspect," and "[a]dvancement; preferment; high place").

¹⁹³ The Century Dictionary and Cyclopedia 1615–16 (New York, Century Co. 1899).

¹⁹⁴ To be sure, in the early cases the Court often used the term "dignity" to describe an attribute of an *individual* sovereign, such as a king or emperor. One could plausibly argue, therefore, that the term, which was used in that context to refer to the "quality of being worthy or honourable," The New Shorter Oxford English Dictionary 671 (1993), is inapposite when referring to an incorporeal sovereign entity. Indeed, many casual readers of the Court's recent state sovereign immunity decisions likely have had precisely that reaction, and the dissenting Justices have often made that point. See, e.g., *Fed. Mar. Comm'n v. S.C. State Ports Auth.*, 122 S. Ct. 1864, 1881 (2002) (Stevens, J., dissenting) ("The reasons why the majority in *Chisholm* concluded that the 'dignity' interests underlying the sovereign immunity of English Monarchs had not been inherited by the original 13 States remain valid today."); *Alden v. Maine*, 527 U.S. 706, 802–03 (1999) (Souter, J., dissenting) (criticizing the Court for "assum[ing] that this 'dignity' is a quality easily translated from the person of the King to the participatory abstraction of a republican State").

To be sure, to deny the forum nation jurisdiction over a foreign state when an official or instrumentality of the latter enters the former's territory is to permit some diminution of the *forum nation's* sovereignty. The Court in *The Schooner Exchange* addressed that problem by finding, in the absence of a legislative indication to the contrary, an implied exemption for the foreign sovereign from the forum sovereign's jurisdiction. But precisely because of the need to preserve the equal status of the forum sovereign, the Court made clear that this immunity is merely a background principle of the law of nations, subject to abrogation by an explicit act of Con-

This critique is valid as far as it goes; Justice Souter surely is correct to argue that the notion of "royal dignity," which (according to Blackstone) served to "distinguish the prince from his subjects" and signified the monarch's "great and transcendent nature," is wholly "inimical to the republican conception, which rests on the understanding of its citizens precisely that the government is not above them, but of them, its actions being governed by law just like their own." *Id.* at 802 (Souter, J., dissenting) (quoting 1 Blackstone, *supra* note 124, at *241). But Chief Justice Marshall (and subsequent voices on the Court) did not purport to limit the notion of sovereign dignity to monarchs. See, e.g., *Ex parte Republic of Peru*, 318 U.S. 578, 586–87 (1943) ("This case involves the dignity and rights of a friendly sovereign state . . ."); *United States v. Diekelman*, 92 U.S. 520, 524 (1875) ("One nation treats with the citizens of another only through their government. A sovereign cannot be sued in his own courts without his consent. His own dignity, as well as the dignity of the nation he represents, prevents his appearance to answer a suit against him in the courts of another sovereignty, except in performance of his obligations, by treaty or otherwise, voluntarily assumed."). In *The Schooner Exchange* itself, the Court spoke of the "dignity and the independence of a nation," and the Court has often referred to the sovereign dignity of the United States, which surely does not vest sovereign authority in any one individual. 11 U.S. (7 Cranch) at 145 (emphasis added); see, e.g., *United States v. Bank of N.Y. & Trust Co.*, 296 U.S. 463, 480–81 (1936); *Patterson v. Bark Eudora*, 190 U.S. 169, 178 (1903); *De Lima v. Bidwell*, 182 U.S. 1, 220 (1901) (McKenna, J., dissenting) ("All powers of government, placed in harmony under the Constitution; the rights and liberties of every citizen secured—put to no hazard of loss or impairment; the power of the nation also secured in its great station, enabled to move with strength and dignity and effect among the other nations of the earth to such purpose as it may undertake or to such destiny as it may be called."). Similarly, when Secretary of State Thomas Jefferson famously sought an advisory opinion from the Supreme Court on various matters arising under "the laws of nature and nations," Letter from Thomas Jefferson, Secretary of State, to Chief Justice Jay and Associate Justices (July 18, 1793), *in* 3 *The Correspondence and Public Papers of John Jay* 486, 486 (Henry P. Johnston ed., Burt Franklin 1970) (1890–93), the Justices responded by acknowledging the importance of the questions "to the preservation of the rights, peace, and *dignity* of the United States," but declined to decide them because of the separation of powers. Letter from Chief Justice Jay and Associate Justices to President Washington (Aug. 8, 1793), *in* 3 *The Correspondence and Public Papers of John Jay*, *supra*, at 488, 488–89 (emphasis added).

gress. As Chief Justice Marshall explained, “[w]ithout doubt, the sovereign of the place is capable of destroying this implication”¹⁹⁵ But, because in the arena of foreign relations the courts’ role is necessarily limited,¹⁹⁶ the Court made clear that it would not lightly infer congressional intent to extend jurisdiction over foreign nations: “until such power be exerted in a manner not to be misunderstood, the sovereign cannot be considered as having imparted to the ordinary tribunals a jurisdiction, which it would be a breach of faith to exercise.”¹⁹⁷

In other words, Congress has power to override a background principle of the law of nations; but given the judiciary’s limited role in foreign relations and the damage to harmonious relations that likely would result from a judicial declaration that a foreign nation is amenable to suit, the courts will refrain from questioning the immunity of foreign nations without a clear statement from Congress. Chief Justice Marshall explained that this principle of judicial non-intervention in matters of foreign affairs recognizes the—

general inability of the judicial power to enforce its decisions in cases of this description, from the consideration, that the sovereign power of the nation is alone competent to avenge wrongs committed by a sovereign, that the questions to which such

¹⁹⁵ *The Schooner Exchange*, 11 U.S. (7 Cranch) at 146.

¹⁹⁶ The Constitution vests control over foreign relations in Congress and the President, not the courts. See *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 427–28 (1964); *United States v. Belmont*, 301 U.S. 324, 330 (1937) (“Governmental power over internal affairs is distributed between the national government and the several states. Governmental power over external affairs is not distributed, but is vested exclusively in the national government.”); *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 320–22 (1936). Congress has the power, among other things, to “declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water,” U.S. Const. art. I, § 8, cl. 11; to “raise and support Armies,” id. art. I, § 8, cl. 12; to “provide and maintain a Navy,” id. art. I, § 8, cl. 13; to “regulate commerce with foreign Nations,” id. art. I, § 8, cl. 3; and to “lay and collect . . . Duties, Imports and Excises,” id. art. I, § 8, cl. 1. The President “shall be Commander in Chief of the Army and Navy of the United States,” id. art. II, § 2, cl. 1, and has the power (subject to Senate confirmation) to “make Treaties” and “nominate . . . [and] appoint Ambassadors [and] other public Ministers and Consuls,” id. art. II, § 2, cl. 2. This constitutional allocation of authority is intended in part to ensure that the courts do not “imperil the amicable relations between governments and vex the peace of nations.” *Oetjen v. Central Leather Co.*, 246 U.S. 297, 304 (1918).

¹⁹⁷ *The Schooner Exchange*, 11 U.S. (7 Cranch) at 146.

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wrongs give birth are rather questions of policy than of law, that they are for diplomatic, rather than legal discussion¹⁹⁸

The courts' refusal to entertain a suit against a foreign sovereign absent an explicit conferral of jurisdiction from Congress is one manifestation of the "political question" doctrine.¹⁹⁹

¹⁹⁸ *Id.*

¹⁹⁹ As Professor Laurence Tribe has explained, the political question "doctrine" is really a collection of distinct theories about the role of the Court "with regard to the other branches of the government." Tribe, *supra* note 52, § 3-13, at 366. Under the "doctrine," the Court declines to adjudicate a matter that is more properly left for decision by the political branches. According to Justice Brennan:

It is apparent that several formulations which vary slightly according to the settings in which the questions arise may describe a political question, although each has one or more elements which identify it as essentially a function of the separation of powers. Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

Baker v. Carr, 369 U.S. 186, 217 (1962).

The Court has long treated many questions implicating U.S. relations with foreign nations as akin to political questions, not amenable to judicial resolution, at least absent authorization from Congress. See, e.g., *United States v. Palmer*, 16 U.S. (3 Wheat.) 610, 634 (1818) (noting that when a foreign nation is in the midst of civil war, questions regarding which faction constitutes the nation's legitimate government "are generally rather political than legal in their character. They belong more properly to those . . . who can place the nation in such a position with respect to foreign powers as to their own judgment shall appear wise; to whom are entrusted all its foreign relations . . ."); *The Nereide*, 13 U.S. (9 Cranch) 388, 422 (1815) (stating that when and how to retaliate against a foreign nation "is for the consideration of the government not of its Courts"); *Armitz Brown v. United States*, 12 U.S. (8 Cranch) 110, 128-29 (1814) ("When war breaks out, the question, what shall be done with enemy property in our country, is a question rather of policy than of law. The rule which we apply to the property of our enemy, will be applied by him to the property of our citizens. Like all other questions of policy it is proper for the consideration of a department which can modify it at will; and for the consideration of a department which can pursue only the law as it is written. It is proper for the consideration of the legislature, not of the executive or judiciary.").

The act of state doctrine, which holds that because "[e]very sovereign state is bound to respect the independence of every other sovereign State, . . . the courts of one country will not sit in judgment on the acts of the government of another done within its own territory," is another variant of the political question doctrine in the context of

This principle of *judicial* nonintervention in cases involving foreign states' sovereign immunity sheds light on the Court's references to sovereign dignity. Because Congress (the "sovereign power of the nation") has authority to open the courts to suits against foreign nations, it follows that sovereign dignity (in the meaning of the law of nations) is not necessarily (or at least not impermissibly) offended by suit in another sovereign's courts. Rather, the Court made a slightly more subtle point: The "perfect equality and absolute independence of sovereigns"—that is to say, the equal dignity of distinct sovereignties—requires that an assertion of jurisdiction by one sovereign over another be made by the "sovereign power of the nation [that] is alone competent" to do so.²⁰⁰ In the United States, because such power does not rest in the courts, but rather is vested in the political branches,²⁰¹ it would be inconsistent with the sovereign status of a foreign state—and thus

foreign relations. *Underhill v. Hernandez*, 168 U.S. 250, 252 (1897); see *id.* ("Redress of grievances by reason of such acts must be obtained through the means open to be availed of by sovereign powers as between themselves."); see also *First Nat'l City Bank v. Banco Nacional de Cuba*, 406 U.S. 759, 762 (1972) (plurality opinion) (stating that both the act of state and foreign state sovereign immunity doctrines are "judicially created to effectuate general notions of comity among nations and among the respective branches of the Federal Government"); *Banco Nacional de Cuba v. Sabatino*, 376 U.S. 398, 423 (1964) ("[The act of state doctrine] arises out of the basic relationships between branches of government in a system of separation of powers The doctrine as formulated in past decisions expresses the strong sense of the Judicial Branch that its engagement in the task of passing on the validity of foreign acts of state may hinder rather than further this country's pursuit of goals both for itself and for the community of nations as a whole in the international sphere.").

²⁰⁰ *The Schooner Exchange*, 11 U.S. (7 Cranch) at 137, 146.

²⁰¹ In *The Schooner Exchange*, Attorney General Pinkney, appearing for the United States, urged that "the executive department . . . alone represents the sovereignty of the nation in its intercourse with other nations." *Id.* at 132. In *Armitz Brown*, however, the Court suggested that the exercise of sovereign prerogatives "is proper for the consideration of the legislature, not of the executive or judiciary." 12 U.S. (8 Cranch) at 129. The Court today finds the question a bit more complicated. Compare *Banco Nacional de Cuba*, 406 U.S. at 768 (plurality opinion) (concluding that "where the Executive Branch, charged as it is with primary responsibility for the conduct of foreign affairs, expressly represents to the Court that application of the act of state doctrine would not advance the interests of American foreign policy, that doctrine should not be applied by the courts"), with *id.* at 787–88 (Brennan, J., dissenting) (arguing that a statement from the Executive Branch is insufficient to confer jurisdiction over a foreign state for an act of that state within its territory).

degrading to its dignity—for a court to assert jurisdiction over it without permission from Congress.²⁰²

3. The Schooner Exchange's *Legacy*

The Court has consistently adhered to *The Schooner Exchange* Court's understanding of the meaning of sovereign dignity in the foreign state sovereign immunity context.²⁰³ Moreover, although the Court in *The Schooner Exchange* announced a cautious rule of construction for deciding whether Congress has intended to confer jurisdiction over foreign states,²⁰⁴ its suggestion that Congress possesses the power to override the law of nations (as long as it speaks unmistakably) has been confirmed by an unbroken line of subsequent precedent.²⁰⁵ Of particular importance here, the Court has

²⁰² The Court has suggested that to do so would also be degrading to the political branches of the United States. See *United States v. Lee*, 106 U.S. 196, 209 (1882) (“[T]he judicial department of this government follows the action of the political branch, and will not embarrass the latter by assuming an antagonistic jurisdiction.”).

²⁰³ See, e.g., *Ex parte Republic of Peru*, 318 U.S. 578, 588 (1943) (“[T]he judicial seizure of a vessel of a friendly foreign state is so serious a challenge to its dignity, and may so affect our friendly relations with it, that courts are required to accept and follow the executive determination that the vessel is immune.”); *The Santissima Trinidad*, 20 U.S. (7 Wheat.) 283, 354 (1822) (noting the “general proposition” that “all persons and property within the territorial jurisdiction of a sovereign, are amenable to the jurisdiction of himself or his Courts: and that the exceptions to this rule are such only as by common usage, and public policy, have been allowed, in order to preserve the peace and harmony of nations, and to regulate their intercourse in a manner best suited to their dignity and rights”); *L’Invincible*, 14 U.S. (1 Wheat.) 238, 256 (1816) (holding that if a district court could exercise jurisdiction over libel claim for seized French private armed ship, “it would have detracted from the *dignity* and equality of sovereign states, by reducing one to the condition of a suitor in the courts of another”) (emphasis added).

²⁰⁴ In *Murray v. The Schooner Charming Betsy*, Chief Justice Marshall first announced the basic principle that “an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains.” 6 U.S. (2 Cranch) 64, 118 (1804). See generally Ralph G. Steinhardt, *The Role of International Law As a Canon of Domestic Statutory Construction*, 43 *Vand. L. Rev.* 1103, 1135–52 (1990) (describing *The Schooner Charming Betsy* and the important implications of its holding). In *The Schooner Exchange*, the Court applied this canon of construction to a foreign state’s sovereign immunity under the law of nations. See 11 U.S. (7 Cranch) at 135–36.

²⁰⁵ See, e.g., *Republic of Argentina v. Weltover*, 504 U.S. 607, 610–11 (1992); *Argentine Republic v. Amerasia Shipping Corp.*, 488 U.S. 428, 433–34 (1989); *Verlinden B.V. v. Cent. Bank of Nig.*, 461 U.S. 480, 486, 493–98 (1983) (holding that Congress had authority to pass the Foreign Sovereign Immunities Act of 1976: “[F]oreign sovereign immunity is a matter of grace and comity on the part of the United States,

recognized Congress's authority to abrogate foreign states' law-of-nations sovereign immunity.

Although the Court acknowledged at least as long ago as *The Schooner Exchange* that Congress possesses authority to subject foreign states to suit in courts in the United States, Congress did not exercise that power until 1976. Indeed, until at least the early twentieth century, Congress's silence led to the general conclusion that the sovereign immunity of foreign states was without exception. As trade and other commercial activities increased after the turn of the century—both among states and between states and private parties—however, persons aggrieved by the conduct of foreign states began to argue that those states should not enjoy immunity for that activity.²⁰⁶ In 1926, the Supreme Court rejected this argument, reaffirming that, in the absence of a contrary indication from Congress, a foreign state and its property are immune from

and not a restriction imposed by the Constitution.”); *Berizzi Bros. Co. v. The Pesaro*, 271 U.S. 562, 574 (1926) (“The decision in *The Exchange* . . . cannot be taken as excluding merchant ships held and used by a government from the principles there announced. On the contrary, if such ships come within those principles, they must be held to have the same immunity as war ships, *in the absence of a treaty or statute of the United States evincing a different purpose.*”) (emphasis added); *The Marianna Flora*, 24 U.S. (11 Wheat.) 1, 40 (1826) (stating that although congressional departures from the law of nations may adversely affect foreign relations, “whatever may be the responsibility incurred by the nation to foreign powers, in executing such laws, there can be no doubt, that Courts of justice are bound to obey and administer them”); *La Amistad de Rues*, 18 U.S. 385, 389–91 (1820) (noting that the “general law of nations” provides that “whenever a capture is made by any belligerent in violation of our neutrality, if the prize come voluntarily within our jurisdiction, it shall be restored to the original owners Until Congress shall choose to prescribe a different rule, this Court will, in cases of this nature, confine itself to the exercise of the simple authority to decree restitution, and decline all inquires into question of damages for asserted wrongs”); see also Louis Henkin, *International Law As Law in the United States*, 82 Mich. L. Rev. 1555, 1568 (1984) (“[E]very State has the power—I do not say the legal right—to denounce or breach its treaties, or to violate obligations of customary international law. The Constitution does not allude to such power, but it is inconceivable that the Constitution intended to make it impossible or impermissible—unconstitutional—for the United States to violate a treaty or other international obligation.”).

²⁰⁶ See Restatement (Third) of the Foreign Relations Law of the United States ch. 5, subch. A, Intro. Note, at 391 (1987). Most of the arguments for an exception to the general rule of immunity were based on the assertion that “immunity deprived private parties that dealt with a state of their judicial remedies, and gave states an unfair advantage in competition with private commercial enterprise.” *Id.*

the jurisdiction of U.S. courts in all cases.²⁰⁷ During that same year, however, some European and other nations signed an international agreement declaring that state-owned merchant vessels, and the nations that owned them, were subject to suit under the same rules of liability as similarly situated private parties.²⁰⁸

After the Second World War demonstrated some of the defects of a system built on the absolute immunity of sovereign states, momentum developed to apply a “restrictive” principle of immunity, which would deny immunity at least for suits arising out of commercial transactions.²⁰⁹ In the 1950s, the U.S. Department of State adopted the restrictive theory of foreign state sovereign immunity, and made “suggestions” of immunity to U.S. courts based on that theory.²¹⁰ In order to provide clearer standards for the rec-

²⁰⁷ See *Berizzi Brothers*, 271 U.S. at 576. *Berizzi Brothers* involved the question “whether a ship owned and possessed by a foreign government, and operated by it in the carriage of merchandise for hire, is immune from arrest under process based on a libel *in rem* by a private suitor in a federal district court exercising admiralty jurisdiction.” *Id.* at 570. The Court noted that *The Schooner Exchange* had involved an armed vessel of a foreign nation, as opposed to a commercial vessel, but concluded that—

the principles are applicable alike to all ships held and used by a government for a public purpose, and that when, for the purpose of advancing the trade of its people or providing revenue for its treasury, a government acquires, mans and operates ships in the carrying trade, they are public ships in the same sense that war ships are.

Id. at 574. The Court made clear, however, that it would reach a different conclusion if there were “a treaty or statute of the United States evincing a different purpose.” *Id.*

²⁰⁸ See Convention for the Verification of Certain Rules Relating to the Immunity of State-owned Vessels, April 10, 1926, art. I, 176 L.N.T.S. 199; Restatement (Third) of the Foreign Relations Law of the United States ch. 5, subch. A, Intro. Note at 391 (1987) (citing 2 Hackworth Digest of International Law 463 (1941)).

²⁰⁹ See Restatement (Third) of the Foreign Relations Law of the United States ch. 5, subch. A, Intro. Note, at 391–92 (1987).

²¹⁰ The Executive Branch’s practice of urging the courts to grant immunity to foreign sovereigns began at least as early as *The Schooner Exchange*, in which the Attorney General urged the Court to recognize France’s immunity. See *The Schooner Exchange*, 11 U.S. (7 Cranch) at 117–18. In 1943, the Court ruled in *Ex Parte Republic of Peru*, 318 U.S. 578 (1943), that “courts are required to accept and follow” such a suggestion of immunity by the Executive, to avoid “embarrass[ing] the latter by assuming an antagonistic jurisdiction.” *Id.* at 588 (quoting *United States v. Lee*, 106 U.S. 196, 209 (1882)); see also *Republic of Mexico v. Hoffman*, 324 U.S. 30, 35 (1945) (“[It is a] guiding principle in determining [a court’s] . . . jurisdiction . . . that the courts should not so act as to embarrass the executive arm.”). In 1952, Jack B. Tate, the Acting Legal Adviser of the Department of State, set forth the Department’s adoption of the

ognition of foreign state sovereign immunity,²¹¹ Congress in 1976 passed the Foreign Sovereign Immunities Act, which codified the restrictive theory of immunity.²¹²

The Act confers jurisdiction on the federal district courts over civil actions against foreign states,²¹³ and abrogates immunity under various circumstances, including when the challenged conduct is “commercial” rather than public.²¹⁴ The Act is vague on certain important points—including what constitutes commercial activity²¹⁵—but for our purposes the particulars of practice under the Act are less crucial than the principle demonstrated by the Act: Congress can—at least as a matter of U.S. law²¹⁶—regulate and abrogate the immunity to which foreign states are otherwise entitled in U.S. courts, their sovereign dignity notwithstanding. The Supreme Court expressly held as much when it upheld the constitutionality of the Act.²¹⁷

restrictive theory of immunity in a letter to the Acting Attorney General. See *Alfred Dunhill of London, Inc. v. Republic of Cuba*, 425 U.S. 682, 711–15 (1976) (quoting Jack B. Tate, *Changed Policy Concerning the Granting of Sovereign Immunity to Foreign Governments*, 26 Dep’t St. Bull. 984, 985 (1952)). The quoted statement, which came to be known as the “Tate Letter,” served as the basis for suggestions of immunity until the 1970s. See Mark W. Janis, *An Introduction to International Law* 353 (2d ed. 1993).

²¹¹ See 28 U.S.C. § 1602 (2000) (“Claims of foreign states to immunity should henceforth be decided by courts of the United States and of the States in conformity with the principles set forth in this chapter.”).

²¹² Pub. L. No. 94-583, 90 Stat. 2891 (codified as amended at 28 U.S.C. §§ 1330, 1332(a), 1391(f), 1441(d), 1602–1611 (2000)).

²¹³ 28 U.S.C. § 1330 (2000).

²¹⁴ 28 U.S.C. § 1605(a)(2) (2000). The Act makes immunity the default, subject to the exceptions identified in the Act. See 28 U.S.C. § 1604 (2000) (“Subject to existing international agreements to which the United States is a party at the time of enactment of this Act a foreign state shall be immune from the jurisdiction of the courts of the United States and of the States except as provided [in the Act].”).

²¹⁵ See 28 U.S.C. § 1603(d) (2000) (“A ‘commercial activity’ means either a regular course of commercial conduct or a particular commercial transaction or act. The commercial character of an activity shall be determined by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose.”).

²¹⁶ It is an open question whether international law—in the sense of a body of laws to which all sovereign nations are subject—permits one nation to abrogate the immunity of another nation. The Foreign Sovereign Immunities Act—like the decision in *The Schooner Exchange*—must be viewed ultimately as U.S. law, albeit the United States’ interpretation of international law.

²¹⁷ See *Verlinden B.V. v. Cent. Bank of Nigeria*, 461 U.S. 480, 491–97 (1983). Professor James Pfander and then-Professor Antonin Scalia have suggested that, under the

III. DOCTRINAL INTERMINGLING

The concept of state dignity thus has a well-established meaning in the context of foreign state sovereign immunity. The Court's recent reliance on state dignity as a basis for decision in its state sovereign immunity cases can plausibly be seen as drawing on the foreign state sovereign immunity cases. In fact, the Court's recent state sovereign immunity cases are not novel in their references to state dignity, although their suggestion that the states' dignity is the *primary* justification for the states' broad immunity is new. During the mid-nineteenth and early twentieth centuries, the Court periodically referred to the states' dignity in state sovereign immunity cases. In addition, in that period the Court occasionally made explicit, albeit cryptic, references in its state sovereign immunity decisions to customary international law. A review of the cases reveals that reliance on the state dignity rationale has tended to coincide with broader efforts by the Court to restrict federal power in the

American conception of the law of nations at the time of the framing, a sovereign's immunity from suit in another sovereign's courts was not defeasible by the forum sovereign. See Pfander, *supra* note 135, at 582 n.102; Scalia, *supra* note 139, at 886. Both draw this conclusion from *Nathan v. Virginia*, 1 U.S. (1 Dall.) 77 (Pa. C.P. 1781).

As the discussion above makes clear, *The Schooner Exchange* and its progeny appear to refute this claim. See 11 U.S. (7 Cranch) at 146 ("Without doubt, the sovereign of the place is capable of destroying this implication [of immunity]."); see also *supra* notes 176–202 and accompanying text. Regardless of the understanding of the law of nations elsewhere, the U.S. courts' interpretation of the law of nations has been consistently clear on the authority of the legislature to permit suits in its own courts against foreign sovereigns. See Clark, *supra* note 166, at 1283 ("Because the law of nations did not appear to consist of sovereign commands, the courts of one sovereign had no authority to bind those of another as to the proper content of that law. Rather, the courts of each sovereign considered themselves free to exercise independent judgment in cases arising under the law of nations."). As explained above, although it surely is correct that courts would not entertain an action by an individual against a foreign sovereign without a clear statement from the legislature abrogating immunity, the U.S. courts' interpretation of the law of nations is quite clear on the authority of the legislature to permit such suits. Professor Pfander presumably would have no quibble with the bottom line—that Congress can subject the states to suit in federal court—because he concludes that the Original Jurisdiction Clause of the Constitution, U.S. Const. art. III, § 2, cl. 2, amounted to a constitutional abrogation of the states' law-of-nations immunity. See Pfander, *supra* note 135, at 558–62. Justice Scalia, however, has argued that the states' law-of-nations immunity survived the framing. See *Blatchford v. Native Vill. of Noatak*, 501 U.S. 775, 779 (1991) ("[T]he States entered the federal system with their sovereignty intact . . ."). This makes his (I think erroneous) view about the absolute nature of law-of-nations immunity all the more problematic. See *infra* notes 403–04 and accompanying text.

name of state autonomy; the current focus on state dignity is consistent with that trend.

A. The Early Cases: Evaluating the Pathology

The case most consistently cited by the modern Court for the proposition that “[t]he 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” is *In re Ayers*,²¹⁸ which the Court decided in 1887. Judicial invocations of state dignity in this context in fact date back at least to 1857, when the Court decided *Beers v. Arkansas*.²¹⁹ But for the first sixty-five years after the ratification, the Court either eschewed or affirmatively rejected arguments based on state dignity in its state sovereign immunity decisions.

1. Chisholm v. Georgia

Any consideration of the doctrine of state sovereign immunity must begin with the Supreme Court’s decision in *Chisholm v. Georgia*.²²⁰ The suit arose out of a contract for war supplies between a South Carolina merchant and the State of Georgia. The merchant’s executor sued Georgia in the United States Supreme Court, invoking Article III’s grant of original jurisdiction to that Court over “Controversies . . . between a State and Citizens of another State.”²²¹ Georgia “presented to the Court a written remonstrance and protestation . . . against the exercise of jurisdiction in the cause,” but “declined taking any part in arguing the question” before the Court.²²² Accordingly, the Court heard only from Edmund Randolph, one of the Framers of the Constitution, the Attorney General of the United States, and counsel for the plaintiff. Because of Randolph’s role in the framing—and because the ink on the

²¹⁸ 123 U.S. 443, 505 (1887) (emphasis added).

²¹⁹ 61 U.S. (20 How.) 527, 529 (1857).

²²⁰ 2 U.S. (2 Dall.) 419 (1793).

²²¹ U.S. Const. art. III, § 2 cl. 1; *Chisholm*, 2 U.S. (2 Dall.) at 450 (opinion of Blair, J.).

²²² *Chisholm*, 2 U.S. (2 Dall.) at 419. The remonstrance was actually a resolution that the Georgia House of Representatives passed after Chisholm filed his suit in the Supreme Court. See 5 Documentary History of the Supreme Court 132 (Maeva Marcus ed., 1994).

Constitution had not yet dried when the Court heard argument in *Chisholm*—his argument to the Court merits thorough consideration here.

Randolph’s argument that a state was subject to a damages action in federal court turned principally on the language of Article III,²²³ which appeared plainly to embrace disputes to which a state was a party. But for support, Randolph relied on “the relation in which the States stand to the Federal Government,”²²⁴ on the “law of nations, on the subject of suing sovereigns,”²²⁵ and on the fact that there would not be any “embarrassment attending the mode of executing a decree against a State.”²²⁶ In other words, Randolph argued that the novel American theory of sovereignty left no place for “sovereign immunity”; that, in any event, the practice in other nations was to permit certain suits against the sovereign; and that the nature of the Union depended on the states heeding the judgments of the Supreme Court.

As to the first point, Randolph maintained that the states simply did not enjoy the status of full sovereigns. Under the Constitution, power was derived from the people: the “States are in fact assemblages of these individuals who are liable to process. The limitations, which the Federal Government is admitted to impose upon their powers, are diminutions of sovereignty, at least equal to the making of them defendants.”²²⁷ As to the second point, Randolph insisted that the practices in other nations demonstrated two things. First, sovereign nations were not subject to suit in their own courts without their consent;²²⁸ but the only relevant entity with the status of “nation” (and thus sovereign immunity) was the United States—the “head of [the] confederacy”—as opposed to the states—its “inferior members.”²²⁹ Accordingly, the United States

²²³ Article III, § 2 provides in relevant part:

The judicial Power shall extend . . . to Controversies between two or more States; – between a State and Citizens of another State; . . . and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

U.S. Const. art. III, § 2, cl. 1.

²²⁴ *Chisholm*, 2 U.S. (2 Dall.) at 423.

²²⁵ *Id.*

²²⁶ *Id.*

²²⁷ *Id.*

²²⁸ *Id.* at 425.

²²⁹ *Id.*

could not involuntarily be subjected to suit in its own courts.²³⁰ Second, Randolph argued that the appropriate analogy for suits against the states was the practice in other nations that took the form of union or confederation, and that in those systems, the courts of the union generally could hear disputes against its members.²³¹

As Professor Laurence Tribe has noted, the “precise holding of *Chisholm* is obscured by the fact that each Justice in the majority wrote his own opinion.”²³² Chief Justice Jay and Justices Blair, Cushing, and Wilson agreed that Georgia was amenable to suit. Justice Iredell dissented, ostensibly on the ground that the Judiciary Act of 1789 did not authorize the Supreme Court to hear such suits.²³³ The four Justices in the majority relied chiefly on the plain language of Article III and Section 13 of the Judiciary Act of 1789.²³⁴ The Justices rejected Georgia’s apparent argument that the

²³⁰ Id. Randolph acknowledged the English common-law practices of “petitions of right, *monstrans de droit*, and . . . process in the Exchequer,” but explained that these devices were “widely remote from an *involuntary* subjection” to suit. Id. (second emphasis added).

²³¹ Id. at 424–25 (describing practice in the “Germanic Empire,” where “both the Imperial Chamber, and the Aulic Council hear and determine the complaints of individuals against the Princes”) (emphasis omitted). It is clear from Randolph’s argument here that, in referring to the “law of nations,” he was describing not what we today call customary international law but rather the domestic law of other nations. As to that issue, Randolph noted that there was some question “whether one Prince found within the territory of another, may be sued for a contract,” but asserted that “where the effects, or property, of one Prince are rested in the dominions of another, the proprietor Prince may be summoned before a tribunal of that other.” Id. at 425 (emphasis omitted). In any event, Randolph argued that although “each State has its separate territory, in one sense, the whole is that of the United States, in another. The jurisdiction of this Court reaches to Georgia, as well as to Philadelphia.” Id. (emphasis omitted).

²³² Tribe, *supra* note 52, § 3-25, at 521.

²³³ Justice Iredell’s principal argument was that Congress gave the Supreme Court remedial powers according to “the principles and usages of law,” and that common-law sovereign immunity was one such general principle of law. *Chisholm*, 2 U.S. (2 Dall.) at 434–36 (opinion of Iredell, J.). Justice Iredell did, however, opine, in what he readily confessed was dicta, that the Constitution did not authorize Congress to abrogate the states’ sovereign immunity. Id. at 449–50.

²³⁴ Section 13 provided:

[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.

Judiciary Act, ch. 20, § 13, 1 Stat. 73, 80 (1789).

Court should read those provisions narrowly to accommodate the state's sovereignty, concluding instead that, whatever immunity from suit full sovereign nations enjoy, the constitutional plan necessarily deprived the American states of sovereignty in the customary sense of that word under the law of nations.

For example, Justice Wilson, in a strongly pronationalist opinion, expressly declared that the immunity of sovereigns under the law of nations was inapposite because the American states were not co-equal sovereigns with the United States or with other nations of the world: "As to the purposes of the Union, . . . Georgia is NOT a sovereign State";²³⁵ therefore, "[f]rom the law of nations little or no illustration of this subject can be expected. By that law the several States and Governments spread over our globe, are considered as forming a *society*, not a NATION."²³⁶ Justice Blair made the same point in his separate opinion.²³⁷ And although Justice Iredell thought that the "Conventional Law of Nations" was applicable to the case as a background principle, he found Randolph's comparisons to the practices in other confederations inapposite,

The majority Justices rejected Georgia's apparent argument that the language of Article III and the Judiciary Act should be construed to confer jurisdiction only when a state was a plaintiff, and not when a state was a defendant. See *Chisholm*, 2 U.S. (2 Dall.) at 450 (opinion of Blair, J.) ("A dispute between A. and B. is surely a dispute between B. and A. Both cases, I have no doubt, were intended . . ."); id. at 466 (opinion of Wilson, J.) ("Causes, and not parties to causes, are weighed by justice, in her equal scales: On the former solely, her attention is fixed: To the latter, she is, as she is painted, blind.") (emphasis omitted); id. at 467 (opinion of Cushing, J.) ("It may be suggested that it 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?") (emphasis omitted); id. at 476 (opinion of Jay, C.J.) ("If the Constitution really meant to extend these powers only to those controversies in which a State might be Plaintiff, to the exclusion of those in which citizens had demands against a State, it is inconceivable that it should have attempted to convey that meaning in words, not only so incompetent, but also repugnant to it . . .") (emphasis omitted).

²³⁵ *Chisholm*, 2 U.S. (2 Dall.) at 457 (opinion of Wilson, J.).

²³⁶ Id. at 453 (opinion of Wilson, J.).

²³⁷ See id. at 452 (opinion of Blair, J.) ("When sovereigns are sued in their own Courts, such a method [that is, proceeding by petition only upon consent of the sovereign] may have been established as the most respectful form of demand; but we are not now in a State-Court; and if 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.") (emphasis omitted).

reasoning that “unquestionably the people of the United States had a right to form what kind of union, and upon what terms they pleased, without reference to any former examples.”²³⁸ He accordingly did not rest his conclusion that Georgia was not amenable to suit on principles of customary international law.

To the extent that dignity was a relevant consideration in the decision, the Justices seemed principally concerned with the dignity of the people. Justice Wilson, for example, elaborated on his view of the novel American idea of popular sovereignty by explaining that “[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.”²³⁹ Chief Justice Jay made a similar point, “It is remarkable that in establishing [the Constitution], the people exercised their own rights, and their own proper sovereignty, and conscious of the plenitude of it, they declared with becoming dignity, ‘We the people of the United States, do ordain and establish this Constitution.’”²⁴⁰

This is not to say that the notion of state dignity was entirely foreign to the Court. Justice Blair acknowledged, for example, that securing the state’s appearance before the Court was a delicate matter, and he observed that “[a] judgment by default, in the present stage of the business, and writ of enquiry of damages, would be too precipitate in any case, and too incompatible with the *dignity* of a State in this.”²⁴¹ But other than Justice Blair’s understandable concern that Georgia have an adequate opportunity to defend

²³⁸ Id. at 449 (opinion of Iredell, J.). Justices Blair and Cushing agreed with this interpretive approach. See id. at 450 (opinion of Blair, J.) (“The Constitution of the United States is the only fountain from which I shall draw.”) (emphasis omitted); id. at 466 (opinion of Cushing, J.) (“The point turns not upon the law or practice of England . . . nor upon the law of any other country whatever; but upon the Constitution established by the people of the United States.”) (emphasis omitted).

²³⁹ Id. at 455 (opinion of Wilson, J.) (emphasis omitted); see also id. at 456 (opinion of Wilson, J.) (“If the dignity of each [man] *singly* is undiminished; the dignity of all *jointly* must be unimpaired. 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, by declaring *I am a SOVEREIGN State?* Surely not.”).

²⁴⁰ Id. at 470–71 (opinion of Jay, C.J.) (emphasis omitted).

²⁴¹ Id. at 452–53 (opinion of Blair, J.) (emphasis added). He thought it better first to “warn the State of the meditated consequence of a refusal to appear.” Id. at 453 (opinion of Blair, J.).

the merits of the suit, the Justices were not particularly receptive to the position of the Georgia legislature that only immunity from Chisholm's suit was consistent with the state's sovereign dignity.²⁴²

The majority Justices' hostility to Georgia's argument stemmed from their views on the contrast between the American and English conceptions of sovereignty. Justice Wilson described the feudal origins of the English common-law doctrine of sovereign immunity, which vested in the King "jurisdiction over others," but "excluded all others from jurisdiction over him. With regard to him, there was no superior power; and, consequently, on feudal principles, no right of jurisdiction."²⁴³ Justice Wilson recognized that this doctrine, which relied for its force on the notion that the King enjoyed complete "superiority of power,"²⁴⁴ was a particularly unappealing analogy for a doctrine in the United States—

Suffice it, at present to say, that another principle, very different in its nature and operations, forms, in my judgment, the basis of sound and genuine jurisprudence; laws derived from the pure source of equality and justice must be founded on the CONSENT of those, whose obedience they require. The sovereign, when traced to his source, must be found in the man.²⁴⁵

²⁴² See, e.g., *id.* at 450–51 (opinion of Blair, J.) (responding to argument that the "dignity of a State" requires interpretation of the federal courts' jurisdictional grant over controversies between a state and citizens of another state to be limited to cases in which the state is a plaintiff); *id.* at 472 (opinion of Jay, C.J.) ("Will it be said, that the fifty odd thousand citizens in *Delaware* being associated under a State Government, stand in a rank superior to the forty odd thousand of *Philadelphia*, associated under their charter, that although it may become the latter to meet an individual on an equal footing in a Court of Justice, yet that such a procedure would not comport with the *dignity* of the former?") (emphasis added); see also *id.* at 423 (statement of E. Randolph) (responding to argument that executing a decree against the state would result in "embarrassment"); *id.* at 425 (statement of E. Randolph) (denying that there would be any "degradation" of Georgia's sovereignty to "submit to the Supreme Judiciary of the United States") (emphasis omitted).

²⁴³ *Id.* at 458 (opinion of Wilson, J.). As Justice Iredell explained, a remedy was available against the King only upon his permission, "[t]he remedy, in the language of Blackstone, being a matter of grace, and not on compulsion." *Id.* at 444 (opinion of Iredell, J.) (emphasis omitted).

²⁴⁴ *Id.* at 458 (opinion of Wilson, J.).

²⁴⁵ *Id.* (opinion of Wilson, J.); see also *id.* at 471 (opinion of Jay, C.J.) (emphasis omitted) ("No such ideas obtain here; at the Revolution, the sovereignty devolved on the people . . .").

Chief Justice Jay echoed this conception of government power, noting that whereas in Europe the “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.”²⁴⁶ To the *Chisholm* Justices, the concept of state sovereign dignity was alien to the founding principle of popular sovereignty.

It is now familiar—and undisputed—history that the *Chisholm* decision prompted the proposal and ratification of the Eleventh Amendment.²⁴⁷ But that simple statement of historical fact is perhaps the only point of agreement between the Supreme Court’s current majority of five on state sovereign immunity matters and

²⁴⁶ *Id.* at 472 (opinion of Jay, C.J.) (emphasis omitted). Chief Justice Jay’s observation is particularly significant, for our purposes, for its use of the term “dignities” in its specific legal sense. “A dignity, in the English law, is the right to bear a title of nobility or honor.” Stewart Rapalje & Robert L. Lawrence, *A Dictionary of American and English Law* 388 (N.J., Frederick D. Linn & Co. 1883). “Dignities are either for life, such as knighthood, or of inheritance, such as baronetcies and ordinary peerages.” *Id.* “Dignities” are “a species of incorporeal hereditaments, in which a person may have a property or estate.” Alexander M. Burrill, *A New Law Dictionary & Glossary* 377 (N.Y., John S. Voorhies 1850). Such titles are flatly inconsistent with the American conception of sovereignty, and they accordingly are expressly prohibited by the Constitution. See U.S. Const. art. I, § 9, cl. 8 (“No Title of Nobility shall be granted by the United States; And no Person holding any Office of Profit or Trust under them, shall, without the Consent of the Congress, accept of any present, Emolument, Office, or Title, of any kind whatever, from any King, Prince, or foreign State.”); *id.* art. I, § 10, cl. 1 (“No State shall . . . grant any Title of Nobility.”); see also John Bouvier, *Law Dictionary* 531 (Philadelphia, J.B. Lippincott & Co. 1886) (“Dignities. In English Law. Titles of honor. They are considered as incorporeal hereditaments. The genius of our government forbids their admission into the republic.”).

The Court recognized this particular meaning of the term in other early decisions. See, e.g., *Cassell v. Carroll*, 24 U.S. (11 Wheat.) 134, 153–56 n.(a) (1826) (“[T]he king cannot devise the lands and revenues allotted for the support of his royal dignity Anciently, when the king made a duke, and gave possessions to him, they were so annexed to the dignity as not to be transferrable without a preceding act of Parliament. . . . [I]f the king creates a duke, and gives him 20 pounds a year for the maintenance of his dignity, he cannot give it to another, because it is not incident to his dignity. Many things, of a special nature, are unalienable. Dignities are so, because they are personal, and in the blood.”).

²⁴⁷ See, e.g., *Hans v. Louisiana*, 134 U.S. 1, 11 (1890) (“[*Chisholm*] created such a shock of surprise throughout the country that, at the first meeting of Congress thereafter, the Eleventh Amendment to the Constitution was almost unanimously proposed, and was in due course adopted by the legislatures of the States.”); William A. Fletcher, *The Diversity Explanation of the Eleventh Amendment: A Reply to Critics*, 56 U. Chi. L. Rev. 1261, 1264–75 (1989); Nelson, *supra* note 20, at 1602–08.

its four dissenters. Indeed, much of the current debate on the Court about state sovereign immunity doctrine is over the correctness of the *Chisholm* Justices' conceptions of the nature of sovereignty and their interpretations of the Framers' original intent with respect to the issue.²⁴⁸ This Article is less concerned with the correctness of *Chisholm*,²⁴⁹ however, than with what its five opinions reveal about the two distinct doctrines of sovereign immunity.

The discussion above reveals that all five of the *Chisholm* Justices apparently believed that the principle of sovereign immunity that Georgia advocated derived from the English common-law rule, with which they were clearly familiar.²⁵⁰ They were quick to discount any arguments drawn from the law of nations. Indeed, given the view held by the four majority Justices of the states' surrender of sovereignty at the founding, it is unsurprising that they thought that the answer could draw no help from the law of nations, which confers immunity only if the sovereign that is sued is "equal in respect to" the sovereign in whose courts the action was brought.²⁵¹ Even Justice Iredell, who acknowledged that the "Conventional Law of Nations" might be relevant to the interpretive

²⁴⁸ Compare *Fed. Mar. Comm'n v. S.C. State Ports Auth.*, 122 S. Ct. 1864, 1870 (2002) ("We have since acknowledged that the *Chisholm* decision was erroneous."), and *Alden v. Maine*, 527 U.S. 706, 721 (1999) (describing as "unsupportable" the argument that "the *Chisholm* decision was a correct interpretation of the constitutional design and that the Eleventh Amendment represented a deviation from the original understanding"), with *id.* at 790 (Souter, J., dissenting) ("The significance of *Chisholm* is its indication that in 1788 and 1791 it was not generally assumed (indeed, hardly assumed at all) that a State's sovereign immunity from suit in its own courts was an inherent, and not merely a common law, advantage.").

²⁴⁹ Professor Akhil Reed Amar has persuasively argued that the *Chisholm* Court's only error was in concluding that a cause of action in assumpsit could properly lie against the state:

Having established the Court's power to entertain the case (and the suability of Georgia in a *jurisdictional* sense), the majority proceeded to opine that a cause of action in assumpsit would properly lie (and that the state was properly suable in the *substantive* sense) notwithstanding any immunity from assumpsit liability under state law. Under the common law of Georgia and, apparently, every other state, no cause of action lay for a breach of contract by the state itself. At common law, such contracts, though perhaps morally binding, were not legally enforceable.

Amar, *supra* note 20, at 1469.

²⁵⁰ See *Chisholm*, 2 U.S. (2 Dall.) at 458, 460 (opinion of Wilson, J.); *id.* at 437–44 (opinion of Iredell, J.); *id.* at 471 (opinion of Jay, C.J.).

²⁵¹ Kent, *supra* note 136, at 21.

task confronting the Court,²⁵² limited his argument in favor of the existence of immunity to “principles and usages of law” inherited from English common-law sovereign immunity.²⁵³

2. *The Marshall Court*

After the ratification of the Eleventh Amendment, the Marshall Court tended to dispense with references to the English common law, relying instead on the language and purpose of the Amendment, as well as the constitutional structure, in deciding the scope of the states’ immunity from suit. And although the Court did not typically discuss the law of nations as a source of the states’ immunity from suit, the Court effectively rejected such a claim by insisting that the states’ relationship to the United States was different than that of a foreign state to the United States.

For example, in *Cohens v. Virginia*,²⁵⁴ which addressed (among other things) whether the Eleventh Amendment bars jurisdiction of the Supreme Court to review the disposition of a federal ques-

²⁵² *Chisholm*, 2 U.S. (2 Dall.) at 449.

²⁵³ *Id.* at 434. Justice Iredell reasoned:

The only principles of law . . . that can be regarded, are those common to all the States. I know of none such . . . but those that are derived from what is properly termed ‘the common law,’ 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 [sic] 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. . . . No other part of the common law of England, it appears to me, can have any reference to this subject, but that part of it which prescribes remedies against the crown.

Chisholm, 2 U.S. (2 Dall.) at 435 (emphasis omitted). Professor Lee has argued that Justice Iredell understood instinctively and maintained consistently that the best way to protect this special status—the sovereign dignity of the States—was to forge an absolute identity between the sovereignty of the States and the more general, inviolable principle of sovereignty as it was understood in the laws and political theories of nations. Lee, *supra* note 119, at 1082. I do not dispute Professor Lee’s conclusion that Justice Iredell’s “life project” was to resist “any encroachment on formal legal distinctions that accorded special respect for sovereign states, foreign or domestic,” and that “he sought to design the doctrine in a way that brooked no distinction between the two types of sovereigns.” *Id.* at 1082–83. But to say that Justice Iredell found an *analogy* to the prerogatives of sovereignty under the law of nations helpful in the task of creating protections for state autonomy is not to say that he believed that the states actually *were* wholly independent sovereigns within the meaning of international law. See discussion *infra* notes 390–417 and accompanying text. 19 U.S. (6 Wheat.) 264 (1821).

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tion by a state court in a suit initiated by the state, Virginia relied on the “general proposition, that a sovereign independent State is not suable, except by its own consent.”²⁵⁵ Chief Justice Marshall rejected Virginia’s reference to background principles by noting that the Constitution, particularly the Supremacy Clause,²⁵⁶ “marks, with lines too strong to be mistaken, the characteristic distinction between the government of the Union, and those of the States. The general government, though limited as to its objects, is supreme with respect to those objects.”²⁵⁷

The Court then concluded that the Eleventh Amendment did not preclude its review of the state court’s resolution of a federal question. Virginia argued that exercising jurisdiction would be inconsistent with the state’s dignity, but the Court rejected that view of the Amendment—

That [the Eleventh Amendment’s] motive was not to maintain the sovereignty of a State from the degradation supposed to attend a 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.²⁵⁸

The Eleventh Amendment, the Court explained, was proposed and ratified to maintain the financial integrity of the states—

It is a part of our history, that, at the adoption of the constitution, all the States were greatly indebted; and the apprehension that these debts might be prosecuted in the federal Courts, formed a very serious objection to that instrument. Suits were instituted; and the Court maintained its jurisdiction. The alarm was general; and, to quiet the apprehensions that were so extensively entertained, this amendment was proposed in Congress, and adopted

²⁵⁵ Id. at 380.

²⁵⁶ U.S. Const. art. VI, § 2.

²⁵⁷ *Cohens*, 19 U.S. (6 Wheat.) at 381; see also id. at 414 (“These States are constituent parts of the United States. They are members of one great empire—for some purposes sovereign, for some purposes subordinate.”).

²⁵⁸ Id. at 406 (emphasis added).

by the State legislatures Those who were inhibited from commencing a suit against a State, or from prosecuting one which might be commenced before the adoption of the amendment, were persons who might probably be its creditors.²⁵⁹

In the Court's view, whatever immunity the states might have enjoyed before the ratification of the Constitution had been displaced by the limited scheme of immunity suggested by the terms of the Eleventh Amendment.

The Court's treatment of Virginia's arguments makes clear, moreover, that the Court did not believe that after the ratification the states enjoyed any of the immunity that the law of nations reserved for full sovereigns. This view is particularly notable in light of the oft-cited pre-ratification state court decision in *Nathan v. Virginia*, which appeared to hold that the states (again, before the ratification) enjoyed law-of-nations immunity in the courts of other (sovereign) states.²⁶⁰ Furthermore, Chief Justice Marshall's subsequent opinion in *Osborn v. Bank of the United States*²⁶¹ demonstrates the Court's belief that the Eleventh Amendment—or the Constitution itself, as modified by the Eleventh Amendment—

²⁵⁹ *Id.* In the Court's view, this reading of the Eleventh Amendment answered the question why jurisdiction remained over controversies between states and sister states or foreign states. "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." *Id.* at 406–07. Although virtually all of Chief Justice Marshall's pronouncements have tended to take on the character of gospel, it is worth noting that the Court's entire discussion of the Eleventh Amendment in *Cohens* is arguably dicta, in light of its subsequent conclusion that because the suit was between Virginia and one of its *own* citizens, it did not fall within the plain language of the Amendment. See *id.* at 412; cf. *Hans v. Louisiana*, 134 U.S. 1 (1890) (holding that the Eleventh Amendment bars suits against a state brought by a citizen of that state). In classic Marshall fashion, the Court in *Cohens* ultimately affirmed the decision of the Virginia Supreme Court, which sustained Virginia's authority to punish a person for selling lottery tickets in Virginia even though Congress had authorized their sale in the District of Columbia, but not before expounding on the Court's powers of review. See *Cohens*, 19 U.S. at 444–47.

²⁶⁰ *Nathan v. Virginia*, 1 Dall. 77 n.(a) (Pa. C.P. 1781); see discussion *supra* notes 148–51 and accompanying text.

²⁶¹ 22 U.S. (9 Wheat.) 738 (1824).

displaced the English common law as a source of immunity from suit.²⁶²

B. Echoes of the Law of Nations

Notwithstanding the relative clarity of *Cohens* and *Osborn* with respect to the place of the law of nations in state sovereign immunity jurisprudence, the Court in the mid-nineteenth century suggested for the first time that the states' Eleventh Amendment immunity from suit had roots in the law of nations after all. From the mid-nineteenth century until the Court's decision in *Monaco v. Mississippi*²⁶³ in 1934, the Court often appeared to draw as much on the doctrine of foreign state sovereign immunity in announcing the states' constitutional immunities from suit as it did on the doctrine of English common-law sovereign immunity. And the Court's principal means of invoking the law of nations was rhetorical—by referring to the imperative to protect the “dignity” of the states.

In *Beers v. Arkansas*, for example, a holder of bonds issued by Arkansas sued in state court to recover interest on the bonds.²⁶⁴ After the suit was filed, the state by statute added a condition to an earlier statutory waiver of immunity from suits to collect on the bonds.²⁶⁵ The plaintiff failed to comply with the condition, and the state court dismissed the action.²⁶⁶ The plaintiff claimed in the Su-

²⁶² In *Osborn*, the Court was confronted with the question whether a suit against an officer of a state was a suit against the state within the meaning of the Eleventh Amendment. *Id.* at 851. In holding that the Court's jurisdiction turned solely on whether the state was a party of record, the Court stated—

If this question were to be determined on the authority of English decisions, it is believed that no case can be adduced, where any person has been considered as a party, who is not made so in the record. But the Court will not review those decisions, because it is thought a question growing out of the constitution of the United States, requires rather an attentive consideration of the words of that instrument, than of the decisions of analogous questions by the Courts of any other country.

Id. at 851. The Court thus rejected the suggestion that the American doctrine of state sovereign immunity had incorporated, at least in full, the doctrine as it existed under the English common law. The Court subsequently departed from *Osborn*'s “party of record” rule in *In re Ayers*, 123 U.S. 443, 447 (1887), as discussed *infra* notes 277–86 and accompanying text.

²⁶³ 292 U.S. 313 (1934).

²⁶⁴ 61 U.S. (20 How.) 527, 527–28 (1857).

²⁶⁵ *Id.* at 528.

²⁶⁶ *Id.* at 528–29.

preme Court that the state's limitation of its prior waiver of sovereign immunity violated the Contracts Clause of the Constitution.²⁶⁷

The Court, in an opinion by Chief Justice Taney, held that the state can control the conditions on which it waives immunity. The Court could have rested on the ground that, because in an action based on state law in the state's own courts the state can assert *absolute* immunity, the state a fortiori can effect a *partial* waiver.²⁶⁸ But the Court painted with a broader brush, explaining that—

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 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.²⁶⁹

The *Beers* Court's reference to the law of nations²⁷⁰ is striking not simply because it appeared to depart from the early post-ratification view of the origin of the states' immunity from suit. Putting aside for a moment the Court's implication that Arkansas is sufficiently sovereign to be considered a "state" under customary international law, the logical source of Arkansas's immunity in the suit would have been the English common law. Because *Beers* involved a suit

²⁶⁷ U.S. Const. art. I, § 10, cl. 1 ("No State shall . . . pass any . . . Law impairing the Obligation of Contracts . . ."); *Beers*, 61 U.S. (20 How.) at 529.

²⁶⁸ This would have been a particularly straightforward rationale in light of the Court's conclusion that "[t]here is evidently nothing in the decision, nor in the act of the Assembly under which it was made, which in any degree impairs the obligation of the contract." *Beers*, 61 U.S. (20 How.) at 530.

²⁶⁹ *Id.* at 529 (emphasis added).

²⁷⁰ There is no doubt that the Court intended to invoke the law of nations, as opposed to the English common law. Not only did the Court use the familiar reference to the law of "all civilized nations," *id.* at 559; see, e.g., *The Schooner Exchange v. McFaddon*, 11 U.S. (7 Cranch) 116, 137 (1812) (describing "the immunity which all civilized nations allow to foreign ministers"), but the Court also suggested that the states' immunity extends to suits brought in the *other* sovereign's courts. *Id.* This was the domain of the law of nations. See *supra* note 18 and accompanying text.

in the defendant state's *own* courts, the law of nations was simply inapposite.²⁷¹

But viewed in context, the Court's reference to the law of nations is not particularly surprising. In 1857, the nation was on the brink of Civil War, in part because of profound disagreements over the degree to which the states retained sovereign authority within their borders.²⁷² Given the general receptivity during this period of the Court to states' rights arguments, its implicit suggestion in *Beers* that the states are the natural heirs of the law of "all civilized nations" is hardly surprising.²⁷³

Indeed, the ebb and flow of references to state dignity in state sovereign immunity cases correlates relatively neatly with shifting views about the appropriate balance between federal and state power.²⁷⁴ Accordingly, in the late nineteenth century, when the Court began to grapple with the implications for federal power of an increasingly national economy,²⁷⁵ the Court continued to invoke the dignity rationale in expanding the states' immunity from suit.²⁷⁶ *In*

²⁷¹ See supra note 18 and accompanying text.

²⁷² Indeed, in the same term that it decided *Beers*, the Court issued its now-infamous decision in *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857), which helped to precipitate the Civil War. See Don E. Fehrenbacher, *The Dred Scott Case: Its Significance in American Law and Politics 192-94, 206-08* (1978); Carl B. Swisher, Roger B. Taney 495-523 (1935).

²⁷³ See also *Nichols v. United States*, 74 U.S. (7 Wall.) 122, 126 (1868) ("Every government has an inherent right to protect itself against suits The principle is fundamental, [and] applies to every sovereign power").

²⁷⁴ See generally Lawrence Lessig, *Translating Federalism: United States v. Lopez*, 1995 Sup. Ct. Rev. 125 (tracking changing judicial interpretations of constitutional federalism over time to better understand changing views of the proper balance between federal and state power).

²⁷⁵ Compare *United States v. E.C. Knight Co.*, 156 U.S. 1, 12-13 (1895) (holding that Congress lacks authority under the Commerce Clause to regulate "manufacturing"), with *Houston, E. & W. Tex. Ry. v. United States*, 234 U.S. 342, 353-54 (1914) (holding that Congress had authority to empower the Interstate Commerce Commission to set rates on an intrastate rail route).

²⁷⁶ In *United States v. Lee*, 106 U.S. 196 (1882), the Supreme Court appeared (for the time being) to revert to the Marshall Court's understanding that both common-law and law-of-nations notions of sovereign immunity were foreign to our constitutional structure. The case involved a suit by descendants of General Robert E. Lee against two federal officers to recover possession of the former Lee estate, which the federal government had taken and used as a national cemetery. *Id.* at 197-99. As this recital reveals, *Lee* did not involve a suit against a state, but rather raised a question about the scope of the immunity of the United States and its officers. The Court's view of the place of sovereign dignity in defining that immunity is nonetheless revealing.

re Ayers,²⁷⁷ which the current Court has repeatedly cited as support for its dignity rationale, was one in a series of cases leading up to *Ex Parte Young*²⁷⁸ in which the Court sought to balance federalism interests with the interest in ensuring that state violations of constitutional rights do not go without a remedy.²⁷⁹ *Ayers* was a suit by holders of interest coupons on bonds issued by Virginia who were concerned that certain actions of the state's Attorney General would render their coupons worthless.²⁸⁰ They sued the Attorney

The Court noted that any sovereign immunity of the government is "derived from the laws and practices of our English ancestors." *Id.* at 205. Like the Marshall (and *Chisholm*) Court before it, however, the Court disavowed any place for such practices here, because of the "vast difference in the essential character of the two governments as regards the source and the depositories of power." *Id.* at 208. The Court then rejected the United States' claim that its sovereign dignity mandated dismissal of the suit. The Court first rejected the argument to the extent that it relied on the notion of *royal* dignity. See *id.* (noting that in England "the monarch is looked upon with too much reverence to be subjected to the demands of the law as ordinary persons are," because 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"). The Court responded that "[u]nder our system the people, who are [in England] called subjects, are the sovereign 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." *Id.* (emphasis omitted). Nor was the law-of-nations doctrine of foreign state sovereign immunity applicable; that doctrine requires a *foreign* sovereign, and, in any event, leaves interactions with such a foreign state to the political branches. *Id.* at 209. Accordingly, the Court could not say "that [the dignity of] the government is degraded by appearing as a defendant in the courts of its own creation," where "it is constantly appearing as a party in such courts, and submitting its rights as against the citizen to their judgment." *Id.* at 206. Because "[n]o officer of the law may set that law at defiance with impunity," the Court permitted the suit against the officer to proceed. *Id.* at 220. In dissent, Justice Gray invoked the law of nations, relying on the "fundamental maxim, that the sovereign cannot be sued." *Id.* at 226 (Gray, J., dissenting); see *id.* at 227 (Gray, J., dissenting) ("The principle is fundamental, applies to every sovereign power, and, but for the protection which it affords, the government would be unable to perform the various duties for which it was created.") (quoting *Nichols v. United States*, 74 U.S. (7 Wall.) 122, 126 (1868)).

²⁷⁷ 123 U.S. 443 (1887).

²⁷⁸ 209 U.S. 123 (1908).

²⁷⁹ See Tribe, *supra* note 52, § 3-27, at 555-56.

²⁸⁰ See *Ayers*, 123 U.S. at 446-50. The state, concerned about counterfeit interest coupons, had passed a statute that required persons seeking to use such state bond coupons to pay taxes to "prove affirmatively that the coupons tendered by them are the State's coupons and not counterfeit and spurious coupons, the burden of proving the same being placed upon the tax-payer and the coupon being taken to be *prima facie* spurious and counterfeit." *Id.* at 447-48. Another statute required that such persons "shall produce the bond from which the coupon so tendered by him was cut." *Id.*

General to enjoin him from taking such actions, alleging that his action would violate the Contracts Clause.²⁸¹ The principal question before the Supreme Court was whether the suit, which was filed against an officer of the state, should be considered a suit against the state itself.

The Court held that Virginia was the real party in interest, and thus that the suit was barred by the Eleventh Amendment.²⁸² The Court reasoned that “[w]hether [Virginia] is the actual party, in the sense of the prohibition of the Constitution, must be determined by a consideration of the nature of the case as presented on the whole record.”²⁸³ Because the “relief sought is against the defendants, not in their individual, but in their representative capacity as officers of the State of Virginia,” the Court concluded that the state was the real party in interest.²⁸⁴ The Court stated, in language that has become vogue at the current Court—

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.²⁸⁵

at 448. The Attorney General was alleged to be preparing to file suits against persons who had paid taxes with coupons without complying with the statutes, in order to condemn such coupons as spurious. *Id.* at 449–50.

²⁸¹ U.S. Const. art. I, § 10, cl. 1; see *Ayers*, 123 U.S. at 450 (discussing the plaintiffs’ argument that a refusal to recognize state-issued bond coupons as valid payment of property taxes violates the Contracts Clause).

²⁸² *Ayers*, 123 U.S. at 507–08.

²⁸³ *Id.* at 492.

²⁸⁴ *Id.* at 497.

²⁸⁵ *Id.* at 505 (emphasis added). The Court continued—

To secure the manifest purposes of the constitutional exemption guaranteed by the 11th Amendment requires that it should be interpreted, not literally and too narrowly, but fairly, and with such breadth and largeness as effectually to ac-

The Court's reference to the state's dignity plainly was intended to underscore the importance of ensuring that the Eleventh Amendment is not evaded by suits that are filed against officers but that nonetheless are, in effect, against the state. Because the relief that the plaintiffs sought in every meaningful sense would run against the state, the Court concluded that the suit was barred.²⁸⁶

comply with the substance of its purpose. In this spirit it must be held to cover, not only suits brought against a State by name, but those also against its officers, agents, and representatives, where the State, though not named as such, is, nevertheless, the only real party against which alone in fact the relief is asked, and against which the judgment or decree effectively operates.

Id. at 505–06. The Court insisted, however, that suits against state officers in their official capacities do not violate the Eleventh Amendment. See id. at 506 (“But this is not intended in any way to impinge upon the principle which justifies suits against individual defendants . . .”). This doctrine remained in flux until the Court's decision in *Ex Parte Young*, 209 U.S. 123 (1908).

²⁸⁶ Cf. *PRASA*, 506 U.S. 139, 146 (1993); see also discussion supra notes 25–46 and accompanying text. When the Court finally held in *Ex Parte Young*, 209 U.S. 123 (1908), that the Eleventh Amendment did not bar suits to enjoin state officers from violating federal law, Justice Harlan invoked the notion of state dignity in dissent. In a reversal of his position in *Ayers*, see *Ayers*, 123 U.S. at 515–16 (Harlan, J., dissenting), Justice Harlan protested that “[t]he 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.” *Ex Parte Young*, 209 U.S. at 182–83 (emphasis added). It is important, however, to appreciate the context in which Justice Harlan invoked such language. The doctrinal battle in *Ayers* and *Young* was as much about substantive due process as it was about federalism; the majority in *Young* sought to subject states to suit in large part as a means of ensuring that challenges to state economic regulation could be heard by the courts. For Justice Harlan, shielding the states from suit was a means of limiting the force of that (ultimately misguided) doctrine. See Sherry, supra note 7, at 1129–30.

Similarly, Professor Sherry suggests that Justice Bradley saw the expansion of state immunity in *Hans v. Louisiana*, 134 U.S. 1 (1890) (discussed infra notes 287–89 and accompanying text), as a way to stem the tide of decisions seemingly granting “personhood” to corporations and permitting them to challenge otherwise valid state economic regulations under the Fourteenth Amendment. Sherry, supra note 7, at 1128–29. Today, however, “the personifiers have switched sides. It is Justice Bradley's opinion in *Hans* that gives the most comfort to those who would protect the states from assaults on their dignity.” Id. at 1130.

Nevertheless, although the Court's trend during the late nineteenth and early twentieth centuries was to suggest that state sovereign immunity had roots in the law of nations, *Young* itself represented a significant detour from that approach. Indeed, the Court's decision in *Young* is in many ways the doctrinal heir to the English common-law rule of state sovereign immunity. *Young*'s rule echoes “the venerable common-law practice of permitting suit against officers of the Crown despite the King's immunity from suit.” Tribe, supra note 52, at 557; see Jaffe, supra note 122, at 9.

Three years after the Court decided *Ayers*, the Court held in *Hans v. Louisiana*²⁸⁷ that the Eleventh Amendment, notwithstanding its plain language, barred a suit against a state by its own citizens. The decision is second only to *Chisholm* in the amount of debate that it has produced.²⁸⁸ For present purposes, however, it suffices to note that this decision, in which the Court renounced reliance on the text of the Eleventh Amendment as its principal means of giving content to state sovereign immunity doctrine, invoked Chief Justice Taney's reference in *Beers* to the immunity enjoyed by sovereign states under the law of nations.²⁸⁹

In *Ex Parte New York*,²⁹⁰ which extended the Eleventh Amendment bar to suits in admiralty, the Court used language similarly consistent with foreign state sovereign immunity: "That a State may not be sued without its consent is a *fundamental rule of jurisprudence*."²⁹¹ Likewise, in the Court's decision in *Monaco v. Mississippi*,²⁹² which held that notwithstanding the language of Article III and the Eleventh Amendment the states are immune from suits by

²⁸⁷ 134 U.S. 1, 15 (1890).

²⁸⁸ Compare *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 68–70 (1996) ("[The dissent's] undocumented and highly speculative extralegal explanation of the decision in *Hans* is a disservice to the Court's traditional method of adjudication *Hans*—with a much closer vantage point than the dissent—recognized that the decision in *Chisholm* was contrary to the well-understood meaning of the Constitution."), with *id.* at 117 (Souter, J., dissenting) ("A critical examination of [*Hans*] will show that it was wrongly decided, as virtually every recent commentator has concluded. It follows that the Court's further step today of constitutionalizing *Hans*'s rule against abrogation by Congress compounds and immensely magnifies the century-old mistake of *Hans* itself and takes its place with other historic examples of textually untethered elevations of judicially derived rules to the status of inviolable constitutional law.").

²⁸⁹ *Hans*, 134 U.S. at 17 ("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") (quoting *Beers v. Arkansas*, 61 U.S. (20 How.) 527, 529 (1857)). As Professor Thomas Lee has observed, the *Hans* Court's solicitude for state autonomy, like the reaction to *Chisholm*, might be explained by the fact that "the southern States confronted daunting war debts in the wake of another rebellion, though of different cause and result." Lee, *supra* note 119, at 1043 (citing Benjamin Fletcher Wright, Jr., *The Contract Clause of the Constitution* 94 (1938)).

²⁹⁰ 256 U.S. 490 (1921).

²⁹¹ *Id.* at 497 (emphasis added). As in *Beers*, the Court invoked the law of nations in a second, implicit way—by suggesting that the states "enjoy the prerogatives of sovereignty to the extent of being exempt from litigation at the suit of individuals in *all other judicial tribunals*." *Id.* at 503 (emphasis added); see *supra* note 270 and accompanying text.

²⁹² 292 U.S. 313, 330 (1934).

foreign states,²⁹³ the Court's rationale was based in part on a suggestion that states enjoy a sovereignty comparable to that of foreign nations. Because under the law of nations foreign states enjoy immunity from suit by American states in U.S. courts, the Court asserted that the American states should enjoy a reciprocal privilege.²⁹⁴ Such reciprocity would make sense only upon the assumption that the states are akin, for purposes of immunity, to fully sovereign nations. The Court's reference to the immunity of foreign states was, to be fair, merely one fleeting reference in a decision that relied principally on the "postulate" that "[the] States of the Union, still possessing attributes of sovereignty, shall be immune from suits, without their consent, save where there has been 'a surrender of this immunity in the plan of the convention.'"²⁹⁵ But it was consistent with the Court's approach, since *Beers*, of invoking principles of foreign state sovereign immunity from the law of nations to justify the immunity of the several states.

This forceful defense of state sovereignty in *Monaco* should come as no surprise. The Court issued the decision in 1934, when the federal government was asserting its powers in bold new ways and the Court was defiantly resisting those efforts.²⁹⁶ A mere three

²⁹³ Article III extends jurisdiction to "Controversies . . . between a State, or the Citizens thereof, and foreign States, Citizens or Subjects." U.S. Const. art. III, § 2, cl. 1. Although the text of the Eleventh Amendment divests federal court jurisdiction over suits against states commenced or prosecuted by "Citizens or Subjects of any Foreign State," it does not purport to bar jurisdiction over suits by foreign states themselves. See 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 or Subjects of any Foreign State."). For an argument that *Monaco* was incorrectly decided, see Lee, *supra* note 119, at 1088–92.

²⁹⁴ *Monaco*, 292 U.S. at 330. To be sure, the Court did recognize the difference between the states' peculiar form of quasi-sovereignty and the sovereignty of foreign states. The Court suggested that the federal government's primacy in international relations argues in favor of state immunity from suits by foreign states, on the theory that "a controversy growing out of the action of a State, which involves a matter of national concern and which is said to affect injuriously the interests of a foreign State, or a dispute arising from conflicting claims of a State of the Union and a foreign State as to territorial boundaries," ought to be addressed by action of the federal government alone. *Id.* at 331. But the Court's suggestion of reciprocal privileges between American states and foreign states belies this concession.

²⁹⁵ *Id.* at 322–23 (quoting *The Federalist* No. 81 (Alexander Hamilton)) (footnote omitted).

²⁹⁶ See *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 521, 551 (1935) (invalidating the National Industrial Recovery Act of 1933); *R.R. Ret. Bd. v.*

years later, however, the Court had accepted an expansive view of federal power and the concomitant limits that such a view implied for state autonomy.²⁹⁷ It should also come as no surprise that the Court's reliance on the customary international law doctrine of foreign state sovereign immunity—and, more specifically, the Court's invocations of state dignity—waned in state sovereign immunity cases in the sixty years following *Monaco*.²⁹⁸ During the years of the Warren Court, the Court rarely made arguments based on dignity in the cause of states' rights.²⁹⁹

Alton R.R., 295 U.S. 330, 340, 374 (1935) (invalidating the Railroad Retirement Act of 1934).

²⁹⁷ See *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 30–38 (1937) (holding the National Labor Relations Act constitutional); *Charles C. Steward Mach. Co. v. Davis*, 301 U.S. 548, 583, 585, 593 (1937) (upholding a national employment tax in the Social Security Act).

²⁹⁸ Indeed, even shortly after deciding *Monaco*, the Court began to retreat from the notion that state dignity required judicial protection. In *United States v. California*, 297 U.S. 175 (1936), for example, the Court upheld Congress's power to authorize the United States to recover a penalty from a state for violation, in its capacity as the operator of a railroad, of the Federal Safety Appliance Act. The Court stated—

The suggestion that it should be assumed that Congress did not intend to subject a sovereign state to the inconvenience and loss of *dignity* involved in a trial in a district court is not persuasive when weighed against the complete appropriateness of the court and venue selected for the trial of issues growing out of the particular activity in which the state has chosen to engage.

Id. at 188–89 (emphasis added). And in *Steward Machine Co. v. Davis*, 301 U.S. 548 (1937), in which the Court held that Social Security Act provisions imposing a tax on employers did not exceed Congress's power or violate state autonomy, even Justice Sutherland's dissent suggested that state dignity was not a relevant concern. He argued—

By these various provisions of the act, the federal agencies are authorized to supervise and hamper the administrative powers of the state to a degree which not only does not comport with the *dignity of a quasi-sovereign state—a matter with which we are not judicially concerned*—but which denies to it that supremacy and freedom from external interference in respect of its affairs which the Constitution contemplates—a matter of very definite judicial concern.

Id. at 613–14 (Sutherland, J., dissenting) (emphasis added). Justice McReynolds did invoke the dignity of the states, but his claim fell on deaf ears. See id. at 606 (McReynolds, J., dissenting) (“If the time shall ever arrive when, for an object appealing, however strongly, to our sympathies, the *dignity of the States* shall bow to the dictation of Congress by conforming their legislation thereto, when the power and majesty and honor of those who created shall become subordinate to the thing of their creation, I but feebly utter my apprehensions when I express my firm conviction that we shall see ‘the beginning of the end.’”) (emphasis added) (quoting 5 James D. Richardson, *Messages and Papers of the Presidents* 247–51 (1897)).

²⁹⁹ Indeed, when the Warren Court did ascribe dignity to a sovereign, it tended to be with a very different connotation. In *Mesarosh v. United States*, 352 U.S. 1, 4 (1956),

C. Nevada v. Hall: Setting the Record Straight?

During the 1970s and early 1980s, the Court was divided over the appropriate balance between the interest in protecting states from costly suits³⁰⁰ and the need to ensure state compliance with federal law.³⁰¹ As a result, state sovereign immunity doctrine experienced some growing pains. In this period, however, the Court rarely suggested—through rhetorical clues or otherwise—that the states’ immunity from suit (whether constitutionally indefeasible or subject to abrogation by Congress) had its origins in the law-of-nations doctrine of foreign state sovereign immunity. Indeed, in *Nevada v. Hall*,³⁰² the Court explicitly recognized the distinction between English common-law immunity and foreign state sovereign immunity. *Hall* involved a tort suit in California state court by a California

an appeal from a criminal conviction in federal court, the Solicitor General of the United States informed the Court that a government witness apparently had given false testimony. The Court reversed the conviction and remanded for a new trial, declaring that “[t]he dignity of the United States Government will not permit the conviction of any person on tainted testimony.” *Id.* at 9; cf. *Craig v. Missouri*, 29 U.S. (4 Pet.) 410, 436–37 (1830) (holding that a state could not enforce a promissory note against a citizen because the state statute on which it was based purported to authorize the state to “emit bills of credit” in violation of the Constitution: “In the argument, we have been reminded by one side of the dignity of a sovereign state; of the humiliation of her submitting herself to this tribunal; of the dangers which may result from inflicting a wound on that dignity: by the other, of the still superior dignity of the people of the United States; who have spoken their will, in terms which we cannot misunderstand.”).

³⁰⁰ See, e.g., *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 238–40 (1985) (applying a strict clear statement rule); *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 106 (1984) (holding that the Eleventh Amendment bars federal courts from enjoining state officers from violating state law); *Edelman v. Jordan*, 415 U.S. 651, 673 (1974) (holding that state participation in a federal program was not sufficient to signify state consent to suit in federal court); *Employees of Dep’t of Pub. Health & Welfare v. Dep’t of Pub. Health & Welfare*, 411 U.S. 279, 284–85 (1973) (holding that the Court will not presume congressional intent to abrogate the states’ Eleventh Amendment immunity without a clear statement).

³⁰¹ See, e.g., *Pennsylvania v. Union Gas Co.*, 491 U.S. 1, 13–14 (1989) (plurality opinion) (holding that Congress has authority under the Commerce Clause to abrogate the states’ Eleventh Amendment immunity); *Fitzpatrick v. Bitzer*, 427 U.S. 445, 456 (1976) (holding that Congress has authority under Section 5 of the Fourteenth Amendment to abrogate state sovereign immunity to ensure compliance with the Amendment); *Employees*, 411 U.S. at 283 (recognizing Congress’s power to bring “the States to heel, in the sense of lifting their immunity from suit in a federal court”).

³⁰² 440 U.S. 410, 414 (1979).

citizen against the State of Nevada under California law.³⁰³ Nevada claimed that it was entitled to immunity from suit in the courts of another state, but the Supreme Court rejected Nevada's argument.³⁰⁴

The Court explained that "[t]he doctrine of sovereign immunity is an amalgam of two quite different concepts, one applicable to suits in the sovereign's own courts and the other to suits in the courts of another sovereign."³⁰⁵ The former doctrine had its roots in the English common law and "rested primarily on the structure of the feudal system and secondarily on a fiction that the King could do no wrong."³⁰⁶ That doctrine did not apply to the case at bar, however, because Nevada, to the extent that it was a full sovereign within the meaning of the doctrine, was being sued in another sovereign's courts. A claim of immunity under those circumstances, the Court explained, could be answered only by reference to the "common usage among nations in which every sovereign was understood to have waived its exclusive territorial jurisdiction over visiting sovereigns, or their representatives, in certain classes of cases."³⁰⁷ Even "if California and Nevada were independent and completely sovereign nations"—a proposition that the Court refused to accept³⁰⁸—California would enjoy the power to subject Nevada to suit in its own courts, just as Congress has authority to subject foreign states to suit in the courts of the United States.³⁰⁹ This is because any decision of one sovereign to grant immunity in its courts to another sovereign ultimately is a "voluntary decision of the [former] to respect the dignity of the [latter] as a matter of comity."³¹⁰

³⁰³ Id. at 411–12.

³⁰⁴ Id. at 426–27.

³⁰⁵ Id. at 414.

³⁰⁶ Id. at 414–15; see *supra* notes 122–34 and accompanying text.

³⁰⁷ Id. at 417 (citing *The Schooner Exchange v. McFaddon*, 11 U.S. (7 Cranch) 116, 136 (1812)).

³⁰⁸ Id.; see *id.* at 425 (discussing constitutional provisions that place "specific limitation[s] on the sovereignty of the several States," and that "[c]ollectively . . . demonstrate that ours is not a union of 50 wholly independent sovereigns"); see also *infra* notes 311–13 and accompanying text.

³⁰⁹ See *Hall*, 440 U.S. at 417 (citing *The Schooner Exchange*); *id.* at 417 n.13 (drawing an analogy to the rule of restrictive immunity under the law of nations).

³¹⁰ Id. at 416.

In concluding that California could authorize a suit against Nevada in California courts, the Court explicitly relied on Chief Justice Marshall's interpretation of the law of nations in *The Schooner Exchange*.³¹¹ As explained in greater detail below, however, the Court did not suggest that customary international law norms applied of their own force to the relations among the several states. Instead, the Court borrowed the notion of comity from international law because the relationship among the states, which are equal in status in most constitutionally relevant ways, resembles the relationship among co-equal sovereigns on the world stage.³¹²

As demonstrated below, the relationship between the states and the federal government differs in important ways from the relationship among sovereign nations. It is perhaps for this reason that the Court's state sovereign immunity cases since *Hall* have not read that decision to suggest that the states' immunity derives from the law of nations; instead, the Court has steadfastly insisted that the states' immunity derives from the English common law, and has even cited *Hall* for that proposition.³¹³

In his dissent in *Alden*, Justice Souter recognized the Court's "occasional seduction" with what he called the "natural law view," but insisted that the Court had consistently adhered to the English common-law approach.³¹⁴ By "natural law view," Justice Souter was

³¹¹ *Id.* at 417.

³¹² See *id.* at 417 & nn.12–13.

³¹³ See, e.g., *Alden v. Maine*, 527 U.S. 706, 715–16 (1999) ("Although the American people had rejected *other* aspects of English political theory, the doctrine that a sovereign could not be sued without its consent was universal in the States when the Constitution was drafted and ratified.") (emphasis added); cf. *id.* at 715 ("When the Constitution was ratified, it was well established in English law that the Crown could not be sued without consent in its own courts.") (citing *Hall*, 440 U.S. at 414). The Court had an opportunity during the October 2002 Term to revisit the decision in *Hall*. See *Cal. Franchise Tax Bd. v. Hyatt*, No. 35549, 2002 LEXIS 57 (Nev. Apr. 4, 2002), cert. granted, 123 S. Ct. 409 (2002) (No. 02-42).

³¹⁴ *Alden*, 527 U.S. at 795 n.30 (Souter, J., dissenting) (citing *Beers v. Arkansas*, 61 U.S. (20 How.) 527, 529 (1857)); *Nichols v. United States*, 74 U.S. (7 Wall.) 122, 126 (1868); *Hans v. Louisiana*, 134 U.S. 1, 13, 17 (1890); *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 69 (1996)); see also *Seminole Tribe*, 517 U.S. at 130 n.26 (Souter, J., dissenting) (acknowledging that the Court's reference to *Hans's* reliance on the "jurisprudence in all civilized nations" could be taken as an abandonment of the "common-law roots" of the doctrine of state sovereign immunity, but arguing that *Hans* itself was, at bottom, based on the common-law view of immunity) (citations omitted).

referring to Justice Holmes's famous description of sovereign immunity, under which immunity may be invoked "only by the sovereign that is the source of the right upon which suit is brought."³¹⁵ Justice Holmes believed that sovereign dignity was an empty notion,³¹⁶ and his general approach to the issue of sovereign immunity was one of skepticism. But his reconceptualization of sovereign immunity has much to commend it; among other things, it is (unlike the Court's current approach)³¹⁷ perfectly consistent with popular sovereignty,³¹⁸ and it accounts for the consistent approach

³¹⁵ *Alden*, 527 U.S. at 796 (Souter, J., dissenting) (citing *Kawananakoa v. Polybank*, 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.").

³¹⁶ See, e.g., *Missouri v. Illinois*, 202 U.S. 598, 599–600 (1906) (Holmes, J.). In that case, Missouri sued Illinois under the Supreme Court's original jurisdiction to restrain the discharge of sewage from Chicago into an artificial canal that ran into the Mississippi. *Id.* After the suit was dismissed, Illinois sought costs. *Id.* Missouri challenged the authority of the court to grant such costs, but Justice Holmes tersely dismissed the state's assertion: "[I]t is said that it is inconsistent with the *dignity* of a sovereign State to ask for costs So far as the *dignity* of the State is concerned, that is its own affair." *Id.* at 599 (emphasis added).

³¹⁷ See Meltzer, *supra* note 11, at 1044 (noting that the majority in *Alden* "makes no reference to the sovereignty of the people as a whole").

³¹⁸ If the citizens of a state believe that the state's resources are better spent on, say, education than on paying judgments in lawsuits arising under the state's own laws, there is no reason why they cannot permit the state to declare its immunity from suit. And if the perception grows that the state government is acting "above the law," there is nothing to prevent the citizens from urging their representatives to waive the government's immunity from suit. Justice Holmes's view is not particularly problematic even when a non-citizen has a grievance with the state. A non-citizen deals with the state on the terms announced by the state, and if he dislikes those terms (for example, immunity from suit for failure to pay interest on a bond), he can decline to contract. And if the out-of-state citizen's claim is under a *different* source of law—for instance, a claim that the state violated the Constitution—then Justice Holmes's theory of immunity would not bar the claim.

Professor Caleb Nelson makes a related argument. See Nelson, *supra* note 20, at 1584. He maintains that although "sovereignty rests ultimately in the people and not in any government . . . , this fact does not compel the conclusion that governments must be amenable to suit by individuals." *Id.* He explains:

Under the theory of popular sovereignty, after all, individuals who sue a state are not really seeking *the government's* money or resources; instead, they are seeking money or resources that the people as a whole have gathered for use in carrying out the people's business. Suits against a state need not be regarded as suits against an impersonal (and therefore nonsovereign) government, but can instead be seen as suits against the sovereign people of the state in their collective capacity.

under the law of nations of permitting the sovereign authority of one nation—at least with a clear statement—to subject a foreign sovereign to suit in its own courts.³¹⁹ Whether one accepts Justice Holmes’s formulation or the more conventional formulation in the cases arising under customary international law,³²⁰ Justice Souter’s point was that the Court has, despite periodic indications to the contrary, not seriously attempted to dispute that the English common law serves as the foundation of its current state sovereign immunity doctrine.³²¹

IV. JURISPRUDENTIAL AMBIVALENCE

But although the Court has not explicitly disagreed with the view that its modern state sovereign immunity decisions derive from the

Id. Professor Nelson’s argument encounters difficulties, however, when the individual who sues the state does so under a cause of action created by the United States to enforce an obligation imposed by the United States—or, in Professor Nelson’s formulation, “the sovereign people of the [United States] in their collective capacity”—on the state. Id.

³¹⁹ Justice Holmes’s view is consistent with the law-of-nations approach first announced in this country in *The Schooner Exchange*. As explained above, that case acknowledged the power of Congress (as the repository of sovereign authority) to subject foreign states to suit in our courts. See supra notes 176–205 and accompanying text; see also *The Schooner Exchange v. McFaddon*, 11 U.S. (7 Cranch) 116, 146 (1812). When Congress exercises that power, the foreign state is not “the source of the right upon which suit is brought.” *Alden*, 527 U.S. at 796 (Souter, J., dissenting) (citing *Kawananakoa*, 205 U.S. at 353).

³²⁰ See, e.g., *The Schooner Exchange*, 11 U.S. (7 Cranch) at 137 (“One sovereign being in no respect amenable to another; and being bound by obligations of the highest character not to degrade the *dignity of his nation*, by placing himself or its sovereign rights within the jurisdiction of another, can be supposed to enter a foreign territory only under an express license, or in the confidence that the immunities belonging to his independent sovereign station, though not expressly stipulated, are reserved by implication, and will be extended to him.”) (emphasis added).

³²¹ Justice Souter argued in *Alden* that it ultimately does not matter whether the Court anchors its current doctrine in the English common law or in natural law—

There is no escape from the trap of Holmes’s logic save recourse to the argument that the doctrine of sovereign immunity is not the rationally necessary or inherent immunity of the civilians, but the historically contingent, and to a degree illogical, immunity of the common law. But if the Court admits that the source of sovereign immunity is the common law, it must also admit that the common law doctrine could be changed by Congress acting under the Commerce Clause. It is not for me to say which way the Court should turn; but in either case it is clear that *Alden*’s suit should go forward.

Alden, 527 U.S. at 798 (Souter, J., dissenting).

English common law,³²² the Court's recent elevation of state dignity as a basis for its state sovereign immunity doctrine suggests that, whatever the Court might say about the doctrine's common-law roots, it is looking elsewhere for doctrinal support. The Court's rhetorical clues suggest that it is drawing support from the doctrine of foreign state sovereign immunity and the law of nations.

To be sure, the Court has not explicitly or avowedly relied on customary international law in its state sovereign immunity decisions, and the Court has not explicitly analogized the immunity enjoyed by the (several) states to the immunity of sovereign nations in the courts of other nations. But, as explained above, "state dignity" is a legal term of art that our courts have used since the founding, and it has a particular implication in the context in which it has conventionally been used. Absent some indication from the Court that its use of the concept in the state sovereign immunity cases is intended to mean something else, it is fair to assume that the Court has borrowed the concept from its original context.

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. It is entirely possible, for example, that the

³²² See *Alden*, 527 U.S. at 715 (explaining the legacy of the English common law for the Framers) (citing 1 Blackstone, *supra* note 124, at *234–35, regarding the "prerogatives of the Crown"); *Alden*, 527 U.S. at 715–16 ("Although the American people had rejected other aspects of English political theory, the doctrine that a sovereign could not be sued without its consent was universal in the States when the Constitution was drafted and ratified."); *id.* at 733 ("Although the sovereign immunity of the States derives at least in part from the common-law tradition, the structure and history of the Constitution make clear that the immunity exists today by constitutional design."); *id.* at 734–35 ("The dissent has offered no evidence that the Founders believed sovereign immunity extended only to cases where the sovereign was the source of the right asserted. No such limitation existed on sovereign immunity in England, where sovereign immunity was predicated on a different theory altogether."); *id.* at 741–42 (describing English common-law rule, and its impact on the ratification debates); 1 Pollock & Maitland, *supra* note 132, at 518. To be fair, because *Alden* involved a suit against a state in its *own* courts, the English common law was the doctrinally appropriate source of whatever immunity the state enjoyed. But the Court has not attempted, since *Nevada v. Hall*, 440 U.S. 410, 417–18 (1979), to draw any distinction based on the court in which the state is sued. Instead, the Court has insisted that the historical origins of the doctrine are largely irrelevant, because the states' immunity is now fixed in the constitutional structure. See *Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 686 n.4 (1999) ("[S]tate sovereign immunity, unlike foreign sovereign immunity, is a *constitutional* doctrine that is meant to be both immutable by Congress and resistant to trends.").

references to state dignity are merely loose talk, rhetorical flourishes intended to underscore the fundamental point that “the states matter”—that is, that the states’ status (or “dignity”) in our constitutional system means that they cannot be treated as ordinary defendants.³²³ Professor Daniel Farber has suggested, for example, that the Court’s focus on the states’ dignity is simply a means (albeit a crude one) to underscore the states’ “unique role in republican self-government.”³²⁴ If this is the sense in which the Court has used the notion of state dignity, then it is a slender reed on which to rest current state sovereign immunity doctrine, and it is a particularly unsatisfying response to the substantial historical and textual evidence that scholars have offered to demonstrate that the states’ constitutional immunity from suit was in fact intended to be much more limited than that recognized by current doctrine.³²⁵

It is fair, for several reasons, to assume that the persistent references to state dignity in fact mean much more. First, as explained above, a historical survey of the Court’s state sovereign immunity doctrine reveals periodic waves of judicial interest in the notion of state dignity. Second, the increasing centrality of the concept of state dignity in the state sovereign immunity decisions naturally will lead commentators to question the meaning and content of the concept. Third, “state dignity” has a well-established meaning in the related context of foreign state sovereign immunity, a meaning with which one can assume the Court is familiar. Fourth and most important, the Court has said that the fundamental inquiry in the state sovereign immunity cases, as in other federalism cases, is to determine precisely what “attributes of sovereignty” the states retained at the ratification. The Court has attempted to answer this question by invoking a concept—“state dignity”—that has a well-

³²³ Indeed, other than a few cryptic references to international law in this context, the Court has not purported to rely explicitly on foreign state sovereign immunity doctrine as support for its state sovereign immunity doctrine. See *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 69 (1996) (arguing that *Hans v. Louisiana*, 134 U.S. 1 (1890), “found its roots not solely in the common law of England, but in the much more fundamental ‘jurisprudence in all civilized nations’”) (quoting *Hans*, 134 U.S. at 17) (citation omitted).

³²⁴ Farber, *supra* note 7, at 1136. Under this view, the states’ virtually categorical immunity from private suits resembles other recently identified categorical rules of federalism, such as the anti-commandeering principle. See *Printz v. United States*, 521 U.S. 898 (1997); *New York v. United States*, 505 U.S. 144 (1992).

³²⁵ See sources cited *supra* note 20.

established doctrinal meaning and that serves to delimit the “attributes of sovereignty” of *fully sovereign* nations. In light of these considerations, it is difficult to understand the Court’s reliance on state dignity as anything other than a conscious attempt to draw on the international law doctrine of foreign state sovereign immunity to support state sovereign immunity doctrine.³²⁶ At a minimum, if the Court is not attempting to invoke the doctrine of foreign state sovereign immunity, the burden is on the Court to demonstrate that “state dignity” means something different in this context than it does in the context in which it developed.

In any event, the Court’s recent elevation of the notion of state dignity as a basis for decision has made more imperative a critical assessment of the appropriateness of relying on a notion drawn from the law of nations to justify an expansive doctrine of state sovereign immunity. In addition, the centrality of the concept of state dignity to the current doctrine invites an inquiry into the doctrinal implications of importing the concept from the doctrine of foreign state sovereign immunity.

This Article has so far demonstrated that the concept of state dignity is not alien to cases governing the immunity of foreign states in U.S. courts, and that the notion of state dignity has a particular meaning in that context. As explained above,³²⁷ the Court invokes sovereign dignity in those cases to underscore two important points. First, for one sovereign to entertain a suit against another sovereign inevitably diminishes the sovereign authority of the latter, and thus (contrary to the presumptive “equal rights and equal independence” of the two sovereigns³²⁸) suggests that the latter’s status is inferior to the former’s. Second, the presumptive equal status of distinct sovereigns requires that an assertion of jurisdiction by one over another be made by the “sovereign power of the

³²⁶ Ultimately, it does not matter whether the Court has purposefully sought to import wholesale into state sovereign immunity doctrine the particular notion of state dignity that is central to foreign state sovereign immunity doctrine. If in relying on state dignity the Court means to suggest something other than what the notion has long meant in its original context, the burden is on the Court to explain what precisely the notion means in the domestic context. Until the Court suggests that an American state’s dignity is *sui generis*, it is appropriate to consider whether the customary international law notion of state dignity is apposite in the domestic context.

³²⁷ See *supra* notes 190–202 and accompanying text.

³²⁸ *The Schooner Exchange v. McFaddon*, 11 U.S. (7 Cranch) 116, 136 (1812).

nation [that] is alone competent” to do so, and not by a court that has no authority in the field of foreign relations.³²⁹

The current Court’s reliance on the notion of state dignity suggests that it, like the Court in the late nineteenth and early twentieth centuries, is borrowing from foreign state sovereign immunity doctrine. But in light of the Court’s recent elevation of state dignity as a rationale for its expansion of state sovereign immunity doctrine, one might wonder why the Court has refused to disavow the English common law as the source for its expansive view of state sovereign immunity and expressly embrace the law of nations from which the concept of sovereign dignity derives. Indeed, one would expect the Court to be eager to distance itself from a doctrine originally premised on the notion that the “King can do no wrong.”

The answer, I suggest here, is two-fold. First, although the Court’s anti-federalist majority has not been shy about promoting the view that the states retain a significant degree of sovereign authority, it would be another thing altogether to suggest that the states stand in a relationship to the federal government comparable to that enjoyed by foreign sovereign nations. Second, even assuming that the Court’s (implicit) analogy of the several states to “wholly independent sovereigns”³³⁰ is appropriate, the consequences of that analogy would directly contradict the Court’s most recent pronouncements on the scope of the states’ sovereign immunity.

A. American States as Foreign States

At first blush, there is nothing particularly striking about the Court’s apparent reliance in its state sovereign immunity doctrine on the notion of state dignity drawn from the related doctrine of foreign state sovereign immunity. Indeed, the Court has often borrowed principles of international law to govern relations among the states. For example, the Court has long borrowed principles from the law of nations to resolve disputes between states. Article III of the Constitution creates jurisdiction over disputes “between two or more States,”³³¹ and gives the Supreme Court original jurisdiction

³²⁹ *Id.* at 146.

³³⁰ *Nevada v. Hall*, 440 U.S. 410, 425 (1979).

³³¹ U.S. Const. art. III, § 2, cl. 1.

of disputes in which a “State shall be a Party.”³³² The Court has often exercised this authority to resolve disputes between states, most frequently border disputes and controversies over the apportionment of water from interstate waterways. In deciding such cases, the Court’s guiding principle has been to ensure the states’ “equality of right”³³³—“a principle inferred from the constitutional structure and borrowed from background assumptions of the law of nations.”³³⁴

The Supreme Court has explained that because the “several states are of *equal dignity and authority*, and [because] the independence of one implies the exclusion of power from all others[,] . . . the laws of one State have no operation outside of its territory, except so far as is allowed by comity.”³³⁵ Because this constitutionally compelled³³⁶ relationship among the states so closely

³³² Id. art. III, § 2, cl. 2. Alexander Hamilton argued that the reasoning behind this grant of original jurisdiction was that “[i]n 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.” The Federalist No. 81, at 487 (Alexander Hamilton) (Clinton Rossiter ed., 1961); see also *California v. Arizona*, 440 U.S. 59, 65–66 (1979) (stating that the Framers gave the Supreme Court original jurisdiction over cases involving states in order to “match[] the dignity of the parties to the status of the court”).

³³³ *Connecticut v. Massachusetts*, 282 U.S. 660, 670 (1931).

³³⁴ Clark, *supra* note 166, at 1323.

³³⁵ *Brown v. Fletcher*, 210 U.S. 82, 89 (1908) (emphasis added) (quoting *Pennoyer v. Neff*, 95 U.S. 714, 722 (1877)); see also *Kansas v. Colorado*, 206 U.S. 46, 95 (1907) (“Neither State can legislate for or impose its own policy on the other.”).

³³⁶ The Constitution’s treatment of the states as co-equals is most evident in its guarantee of equal representation in the Senate. See U.S. Const. art. I, § 3, cl. 1 (“The Senate of the United States shall be composed of two Senators from each State, chosen by the Legislature thereof, for six Years; and each Senator shall have one vote.”); id. art. V (“[N]o State, without its Consent, shall be deprived of its equal Suffrage in the Senate.”). Other constitutional provisions underscore this principle. See, e.g., id. art. IV, § 3, cl. 1 (“[N]o new State shall be formed or erected within the Jurisdiction of any other State . . .”). The Court has often recognized the constitutional equality of the states. See *Coyle v. Smith*, 221 U.S. 559, 580 (1911) (“[T]he constitutional equality of the States is essential to the harmonious operation of the scheme upon which the Republic was organized.”).

This principle is the basis of the Court’s “equal footing” doctrine—that is, the requirement that new states be admitted to the union on an “equal footing” with existing states. See, e.g., *Pollard v. Hagan*, 44 U.S. (3 How.) 212, 223 (1845) (“When Alabama was admitted into the union, on an equal footing with the original states, she succeeded to all the rights of sovereignty, jurisdiction, and eminent domain which Georgia possessed at the date of the cession . . .”).

parallels the relationships among sovereign nations,³³⁷ the Court has drawn, in resolving interstate disputes, on principles from the law of nations.³³⁸ Specifically, the Court has sought to implement, in the words of customary international law doctrine, the “absolute equality” of the states.³³⁹

It is unsurprising that the Court has looked to the law of nations to resolve disputes between states. Congress is largely divested of authority to resolve such disputes through ordinary legislation,³⁴⁰

³³⁷ See *Underhill v. Hernandez*, 168 U.S. 250, 252 (1897) (“Every sovereign State is bound to respect the independence of every other sovereign State, and the courts of one country will not sit in judgment on the acts of the government of another done within its own territory.”); *The Schooner Exchange v. McFaddon*, 11 U.S. (7 Cranch) 116, 136 (1812) (“The jurisdiction of the nation within its own territory is necessarily exclusive and absolute. . . . Any restriction upon it, deriving validity from an external source, would imply a diminution of its sovereignty to the extent of the restriction . . .”).

³³⁸ See *Kansas v. Colorado*, 185 U.S. 125, 146–47 (1902) (“Sitting, as it were, as an international, as well as a domestic tribunal, we apply Federal law, state law, and international law, as the exigencies of the particular case may demand . . .”).

³³⁹ For example, in resolving a dispute between New Jersey and Delaware over the location of the boundary between the two states in the Delaware Bay and River, the Court invoked the principle of the ‘Thalweg’—that is, the strongest current and the track used by boats in their course down the waterway—to resolve the issue. See *New Jersey v. Delaware*, 291 U.S. 361, 379 (1934). The Court thus drew the boundary through the “middle of the main channel,” not “by the geographical centre, half way between the banks.” *Id.*; see also *Louisiana v. Mississippi*, 516 U.S. 22, 24–25 (1995) (recounting the use of the rule of ‘Thalweg’ in previous boundary dispute cases between Louisiana and Mississippi).

³⁴⁰ See *Kansas v. Colorado*, 206 U.S. 46, 84 (1907) (“[E]arly drafts of the Constitution [made] . . . provision . . . that the Senate should have exclusive power to regulate the manner of deciding [certain] disputes and controversies between the States. . . . As finally adopted, the Constitution omits all provisions for the Senate taking cognizance of disputes between the States and leaves [that authority] to the Supreme Court.”). In fact, as Professor Brad Clark explains:

[T]he Constitution established two alternative and exclusive means of resolving controversies between states. First, the states themselves may voluntarily enter into an “Agreement or Compact” to resolve their differences, but only with “the Consent of Congress.” Second, the states may seek judicial resolution of their disputes by invoking the original jurisdiction of the Supreme Court.

Clark, *supra* note 166, at 1325–26. This is not to say that the Executive Branch has no role in interstate disputes. In *Florida v. Georgia*, 58 U.S. (17 How.) 478 (1854), which involved a border dispute between Florida and Georgia, the United States sought leave to intervene to protect land that had “been considered and treated heretofore as public domain of the United States.” *Id.* at 479. The states contended that permitting the United States to intervene was inconsistent with Article III’s grant of original jurisdiction over controversies in which a state is party. *Id.* at 493. The Court disagreed, noting that the intervention of the United States is not “derogatory to the *dignity* of

and the law of any one state would be an obviously inappropriate basis on which to decide a dispute *between* states. More important, as a matter of constitutional structure, the states stand as equals in their relations inter se. This, of course, is the same relationship that international law contemplates among sovereigns. Accordingly, the Court has looked to background principles of the law of nations in resolving disputes between states.³⁴¹ This does not mean, however, that the states are otherwise comparable to foreign nations. Nor do the Court's references to state dignity in this context somehow suggest that the states ought to be treated as akin to wholly independent sovereigns within the meaning of the law of nations. Instead, the Court has intended its references to the states' "equal . . . power, dignity and authority"³⁴² to demonstrate that the states enjoy equal status with respect to each other, not with respect to the United States or any other foreign nation.³⁴³

the litigating States, or any impeachment of their good faith. It merely carries into effect [the Interstate Compact Clause], which was adopted by the States for their general safety." *Id.* at 495 (emphasis added).

³⁴¹ That the Court has drawn on rules from customary international law does not mean that international law actually applies of its own force to controversies between states. Accordingly, the Court in *Kansas v. Colorado* (with self-conscious hyperbole) described its role "as it were, as an international, as well as a domestic tribunal." 206 U.S. at 48; see also *id.* at 97 ("International law is no alien in this tribunal."). It made clear, however, that the law it applied to the states' dispute was properly characterized as "interstate common law," not international law. *Id.* at 98.

³⁴² *Coyle v. Smith*, 221 U.S. 559, 566–68 (1911) (discussing the "equal footing" doctrine: "'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.>").

³⁴³ Professor Thomas Lee argues that Article III's provision of Supreme Court original jurisdiction only in cases affecting ambassadors and those in which states are parties "makes perfect sense from an international law perspective, *if one were to equate the sovereign dignity of the States with that of nation-states.*" Lee, *supra* note 119, at 1059–60. I fail to see how this conclusion follows from the premise. The Framers gave the Supreme Court original jurisdiction over cases involving states to "match[] the dignity of the parties to the status of the court." *California v. Arizona*, 440 U.S. 59, 65–66 (1979); accord *The Federalist* No. 81, at 487 (Alexander Hamilton) (Clinton Rossiter ed., 1961). In this context, it seems plain that the term dignity merely describes the special status that states enjoy in our constitutional system. Whatever one thinks about the degree to which the states retain sovereignty, they surely retain *some* privileged status in the Constitution, and easy recourse to the highest court in the land is one recognition of that status. See, e.g., U.S. Const. art. IV, § 3, cl. 1. But it is settled that it is up to Congress to decide whether to make that jurisdiction exclusive or instead to confer such jurisdiction on the lower federal courts, and the permissible manner in which Congress has exercised that power is instructive. See *Bors v. Pre-*

Before the mid-twentieth century, this theory of interstate relations that the Court borrowed from the law of nations also served as the foundation of the doctrine of personal jurisdiction. In *Pennoyer v. Neff*, the Court held that a state court could enter a binding judgment against an unconsenting nonresident defendant only if he had been served with process within the forum state.³⁴⁴ The Court based its theory of personal jurisdiction on “two well-established principles of public law respecting the jurisdiction of an independent State over persons and property.”³⁴⁵ First, “every State possesses exclusive jurisdiction and sovereignty over persons and property within its territory.”³⁴⁶ Second, “no State can exercise direct jurisdiction and authority over persons or property without its

ston, 111 U.S. 252, 256–58 (1884). Congress has conferred on the Supreme Court “original *but not exclusive* jurisdiction” of “[a]ll actions or proceedings by a State against the citizens of another State or against aliens” and “[a]ll actions or proceedings to which ambassadors, other public ministers, consuls, or vice consuls of foreign states are parties,” 28 U.S.C. § 1251(b) (2002) (emphasis added), whereas it has conferred exclusive original jurisdiction on the Supreme Court only of “controversies between two or more States,” *id.* § 1251(a). This underscores the Supreme Court’s unique role as arbiter of interstate disputes, given the equal status of the states. But it hardly suggests that the states are equal in status to *foreign nations*; indeed, it appears to suggest the opposite.

This is not to say that I necessarily disagree with Professor Lee’s conclusion that disputes among co-equal states are “analytically indistinguishable from international disputes.” Lee, *supra* note 119, at 1067. The relationship of one state to other states is indeed comparable to the relationship of one nation to another, but the important point is that these parallels do not lead to the step that the Court has taken—that the states somehow are equal in status to foreign nations. Professor Lee thus may well be correct that the drafters of the Eleventh Amendment “looked to international law for insight into how to protect the sovereign dignity of States involved in interstate and international disputes,” but that does not mean that the Eleventh Amendment elevates the status of the states to that of foreign nation. *Id.*; see also *id.* at 1031 (same); *id.* at 1030 (arguing that international law was an analogy and did not govern when states could be sued, a matter governed by domestic law).

³⁴⁴ *Pennoyer v. Neff*, 95 U.S. 714, 733 (1877).

³⁴⁵ *Id.* at 722. The Court made clear that “public law” referred to the law of nations: The several States of the Union are not, it is true, in every respect independent, many of the rights and powers which originally belonged to them being now vested in the government created by the Constitution. But, except as restrained and limited by that instrument, they possess and exercise the authority of independent States, and the principles of public law to which we have referred are applicable to them.

Id.

³⁴⁶ *Id.*

territory.”³⁴⁷ The Court acknowledged that the states are not “in every respect independent” as are sovereign states within the meaning of the law of nations.³⁴⁸ But principles drawn from the law of nations nevertheless were apposite, the Court explained, because the relationship of the states with each other was analytically indistinguishable from the relationships among sovereign nations. Because “[t]he several States are of *equal dignity and authority*[,] . . . the independence of one implies the exclusion of power from all others.”³⁴⁹

The *Pennoyer* Court’s theory of the territorial limitations on the authority of state courts has, of course, been replaced by a more expansive theory of personal jurisdiction based on the contacts of the defendant with the forum state.³⁵⁰ But the *Pennoyer* Court’s view of the necessary limitations on state authority imposed by the federal system retains some vitality in modern personal jurisdiction analysis.³⁵¹ Indeed, because it is not uncommon for several states to have equally compelling interests in providing a forum for the resolution of a single controversy, there must be some basis for determining when one of those states can assert jurisdiction over the controversy, effectively excluding the other states from doing the same.³⁵² In other words, the presumptively equal claim of several

³⁴⁷ *Id.*

³⁴⁸ *Id.*

³⁴⁹ *Id.* (emphasis added).

³⁵⁰ See *Shaffer v. Heitner*, 433 U.S. 186 (1977); *Int’l Shoe Co. v. Washington*, 326 U.S. 310 (1945).

³⁵¹ See *Burnham v. Superior Court*, 495 U.S. 604 (1990) (arguing that physical presence alone is a sufficient basis for state-court jurisdiction); *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 293–94 (1980) (“[W]e have never accepted the proposition that state lines are irrelevant for jurisdictional purposes, nor could we, and remain faithful to the principles of interstate federalism embodied in the Constitution. . . . The sovereignty of each State . . . implied a limitation on the sovereignty of all of its sister States—a limitation express or implicit in both the original scheme of the Constitution and the Fourteenth Amendment.”); *Hanson v. Denckla*, 357 U.S. 235, 251 (1958) (“[The requirement of minimum contacts is] more than a guarantee of immunity from inconvenient or distant litigation. [It is] a consequence of territorial limitations on the power of the respective States.”).

³⁵² For example, consider the facts in *World-Wide Volkswagen*. The plaintiffs, originally New York residents, purchased a car from one of the defendants in New York, decided to move to Arizona, and on the way were involved in a car accident in Oklahoma that caused their car to ignite. *World-Wide Volkswagen*, 444 U.S. at 288–89. The plaintiffs brought a products liability action, claiming that the car was defectively designed. *Id.* Arizona (the plaintiffs’ new state of residence), New York (the defendant’s

states to adjudicatory authority requires some means of limiting the authority of any one over matters in which other states have an adjudicatory interest. This state of affairs calls to mind the relationship among nations,³⁵³ and it thus is unsurprising that the *Pennoyer* Court's reasoning and rhetoric closely tracked that of Chief Justice Marshall in *The Schooner Exchange*.³⁵⁴

For the same reason, the Court invoked the notion of state dignity in addressing whether one state enjoys constitutional immunity from suit in another state's courts under the forum state's laws. As discussed above, the Court held in *Nevada v. Hall*³⁵⁵ that a state does not enjoy such immunity. In reaching that conclusion, the Court relied explicitly on the notion of comity in *The Schooner Exchange*.³⁵⁶ The Court explained that Nevada's claim of immunity could be answered only by reference to the "common usage among nations in which every sovereign was understood to have waived its exclusive territorial jurisdiction over visiting sovereigns, or their representatives, in certain classes of cases."³⁵⁷ And as the Court had made clear in *The Schooner Exchange*, under well-established principles of international law, the decision of one sovereign to grant immunity in its courts to another sovereign ultimately is a

state of residence and the site of the sale of the allegedly defective car), and Oklahoma (the site of the accident) all had an interest in the resolution of the dispute. The Court held that Oklahoma lacked jurisdiction over the New York car dealer and the regional distributor, in part because any other conclusion would provide no basis for reconciling the competing interests of these states in adjudicating the controversy. *Id.* at 293–94.

³⁵³ Indeed, the Court in *Pennoyer* also invoked principles of comity under the law of nations to support its view of the territorial limitations on the authority of state courts. 95 U.S. at 722 ("And so it is laid down by jurists, as an elementary principle, that the laws of one State have no operation outside of its territory, except so far as is allowed by comity; and that no tribunal established by it can extend its process beyond that territory so as to subject either persons or property to its decisions.").

³⁵⁴ See 11 U.S. (7 Cranch) 116 (1812). Compare *Pennoyer*, 95 U.S. at 722 ("The several States are of equal dignity and authority, and the independence of one implies the exclusion of power from all others."), with *The Schooner Exchange*, 11 U.S. (7 Cranch) at 136 ("The jurisdiction of the nation within its own territory is necessarily exclusive and absolute. It is susceptible of no limitation not imposed by itself. Any restriction upon it, deriving validity from an external source, would imply a diminution of its sovereignty to the extent of the restriction, and an investment of that sovereignty to the same extent in that power which could impose such restriction.").

³⁵⁵ 440 U.S. 410, 426–27 (1979). See *supra* notes 300–21 and accompanying text.

³⁵⁶ *Hall*, 440 U.S. at 417.

³⁵⁷ *Id.* at 416–17 (citing *The Schooner Exchange*, 11 U.S. (7 Cranch) at 136).

“voluntary decision of the [former] to respect the dignity of the [latter] as a matter of comity.”³⁵⁸

As with the federal common law of disputes between states³⁵⁹ and the (now largely defunct) territorial view of personal jurisdiction, the Court relied on principles of international law to resolve claims of interstate immunity because the relationship among the several states resembles the relationship among sovereign nations on the world stage. It is clear from the Court’s decision in *Hall*, however, that it did not view the states as sovereigns within the meaning of the law of nations. The Court premised its conclusion that Nevada did not enjoy immunity from suit in California’s courts in part on the Constitution’s “*limitation* on the sovereignty of the several States.”³⁶⁰ Because of those limitations, the Court explained, “ours is not a union of 50 wholly independent sovereigns.”³⁶¹ Customary international law norms provided a useful rule of decision not because the states were subject to international law as “wholly independent sovereign[]” nations, but rather because the states’ co-equal constitutional status—that is, the equal dignity of the states—*resembles* the relationship among wholly independent sovereign nations.

It makes sense to borrow norms of customary international law to resolve conflicts among the states because the states’ co-equal status is analytically indistinct from the relationship among sovereign nations. The three contexts discussed above—inter-state border disputes, personal jurisdiction, and inter-state immunity—implicate the states’ co-equal status, and thus are usefully and logically resolved by reference to law-of-nations notions of sovereign authority and comity.

³⁵⁸ *Id.* at 416.

³⁵⁹ See generally Clark, *supra* note 166 (noting that the structural equality of the states under the Constitution allows the Court simply to borrow the international legal doctrine of absolute equality of sovereign nations when resolving disputes between states).

³⁶⁰ *Hall*, 440 U.S. at 425 (emphasis added) (citing Fugitives Clause, U.S. Const. art. IV, § 2, cl. 2; Privileges and Immunities Clause, *id.* art. IV, § 2, cl. 1). The Court also noted that, under the Court’s interpretation of the Commerce Clause, the states lack power to impose discriminatory taxes. *Hall*, 440 U.S. at 425 (citing U.S. Const. art. I, § 8). Finally, the Court was careful to note that, as a historical matter, immunity applied to “*truly independent* sovereign[s].” *Hall*, 440 U.S. at 414 (emphasis added).

³⁶¹ *Id.* at 425.

The Court's reliance on state dignity in its state sovereign immunity decisions, however, appears to suggest that the states stand in the same relationship *to the federal government* as do foreign states. The rule of *The Schooner Exchange* is that a foreign state's equality of status on the world stage presumptively bars a suit by an individual asserting a claim against the foreign state in a U.S. court under U.S. law. By referring to the dignity of the *states* to justify the rule that the states are immune from suits by individuals asserting claims under federal law, the Court has effectively suggested that the states enjoy equality of status with the United States. In other words, the Court's implicit suggestion in relying on the states' dignity is that the states are analogous to independent sovereigns within the meaning of customary international law.

The Court's decision in *Hall* provides a useful illustration of this point. Although the Court in *Hall* discussed a state's imperative *vel non* to respect the "dignity" of a co-equal state, the Court's reasoning does not suggest that the states enjoy law-of-nations immunity from suits authorized under federal law. Indeed, it is a non sequitur to suggest that because the relationship among the several states resembles the relationship among sovereign nations, the states stand in equal dignity—in the sense of customary international law doctrine—*to the federal government*. California and Nevada may enjoy constitutional equality of status, as do France and Britain under customary international law; but both California's and Nevada's sovereignty is subordinate in constitutionally meaningful ways to the authority of the federal government. California can subject Nevada to suit in a California court for much the same reason that Britain can (if it chooses) subject France to suit in a British court. Any other rule would suggest that California and France lack sovereign authority within their own borders and over matters otherwise within the scope of their sovereign powers. There is no governing international charter that provides a Supremacy Clause upon which France can rely to defeat an assertion of jurisdiction in a British court; the Constitution envisions a similar equality of right among the several states.³⁶²

³⁶² *Hall* could be read, to be sure, to suggest (though not decide) that the states' immunity from suits in *federal* court finds its roots in the law of nations, not the English common law. The Court's discussion of that latter source of immunity is limited to "suits in the sovereign's own courts," whereas the former source of immunity is impli-

In relying on state dignity in the state sovereign immunity cases, the Court has opened another front in the continuing battle over the appropriate status of the states, the issue that most divides the current Court. Notwithstanding the risk of oversimplifying what Justice O'Connor has described as "our oldest question of constitutional law,"³⁶³ the fundamental dispute has been over the degree to which the states retained sovereignty after the ratification.³⁶⁴ As Professor Akhil Amar has described the fault line, the battle is between those who view the Constitution as a "federal compact among

cated in "suits in the courts of another sovereign." *Id.* at 414. If one views a suit against a state in a federal court as a suit in the court of "another sovereign," then the Court's decision in *Hall* appears to support the proposition that the states' immunity from suit in federal courts—that is, the states' Eleventh Amendment immunity—derives from the doctrine of foreign state sovereign immunity.

This view of *Hall*, however, appears wrong for two reasons. First, the decision makes clear that the Court did not view the states as sovereigns within the meaning of the law of nations. The Court premised its conclusion that Nevada did not enjoy immunity from suit in California's courts in part on the Constitution's "limitation on the sovereignty of the several States." *Id.* at 425 (emphasis added) (citing Fugitives Clause, U.S. Const. art. IV, § 2, cl. 2; Privileges and Immunities Clause, *id.* art. IV, § 2, cl. 1). The Court also noted that, under the Court's interpretation of the Commerce Clause, the states lack power to impose discriminatory taxes. *Id.* at 425 (citing U.S. Const. art. I, § 8). Finally, the Court was careful to note that, as a historical matter, immunity applied to "truly independent sovereign[s]." *Id.* at 414 (emphasis added). Because of these limitations, "ours is not a union of 50 wholly independent sovereigns." *Id.* at 425. Second, as discussed above, the Court's most recent cases on state sovereign immunity have steadfastly insisted that the states' immunity derives from the English common law, and have even cited *Hall* for that proposition. See, e.g., *Alden v. Maine*, 527 U.S. 706, 715–16 (1999) ("Although the American people had rejected *other* aspects of English political theory, the doctrine that a sovereign could not be sued without its consent was universal in the States when the Constitution was drafted and ratified.") (emphasis added); cf. *id.* at 715 ("When the Constitution was ratified, it was well established in English law that the Crown could not be sued without consent in its own courts.") (citing *Hall*, 440 U.S. at 414).

³⁶³ *New York v. United States*, 505 U.S. 144, 149 (1992).

³⁶⁴ Compare *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 846 (1995) (Thomas, J., dissenting) ("The ultimate source of the Constitution's authority is the consent of the people of each individual State, not the consent of the undifferentiated people of the Nation as a whole."), and *Blatchford v. Native Vill. of Noatak*, 501 U.S. 775, 779 (1991) (stating that the states entered the Union "with their sovereignty intact"), and *Gregory v. Ashcroft*, 501 U.S. 452, 457 (1991) ("[U]nder our federal system, the States possess sovereignty concurrent with that of the Federal Government, subject only to limitations imposed by the Supremacy Clause.") (quoting *Tafflin v. Levitt*, 493 U.S. 455, 458 (1990)), with *Alden*, 527 U.S. at 812 (Souter, J., dissenting) ("A State is not the sovereign when a federal claim is pressed against it . . ."), and *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 548 (1985) ("[T]he sovereignty of the States is limited by the Constitution itself.").

thirteen sovereign principals” and those who view the Constitution not as “an inter-sovereign compact or treaty, but a supreme statute deriving from the supreme sovereign legislature—the People of the nation.”³⁶⁵ The current Court has consistently divided over which view is correct.³⁶⁶ This debate has spawned a rich literature,³⁶⁷ and there is no need to dwell at length on this general question here. It is, however, worth noting that state sovereign immunity doctrine has, at least since the Court’s decision in *Chisholm v. Georgia*, been but one battle in a larger war over the status of the states.

Yet the Court’s reliance on the notion of state dignity—a concept that defines the prerogatives of sovereignty of wholly sovereign nations—is in many ways more striking than other assertions of state autonomy in the Court’s recent federalism revival. Whatever one can say about the sovereign prerogatives retained by the states at the ratification—and, indeed, there is much debate with

³⁶⁵ Amar, *supra* note 20, at 1452.

³⁶⁶ For the quintessential example of this debate, compare *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 801 (1995) (“As we have frequently noted, ‘[t]he States unquestionably do retain a significant measure of sovereign authority. They do so, however, *only to the extent that the Constitution has not divested them of their original powers and transferred those powers to the Federal Government.*’”) (quoting *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528, 549 (1985)), and *U.S. Term Limits*, 514 U.S. at 837–38 (describing “the Framers’ understanding that Members of Congress are . . . not merely delegates appointed by separate, sovereign States; they occupy offices that are integral and essential components of a single National Government”), with *id.* at 846 (Thomas, J., dissenting) (“The ultimate source of the Constitution’s authority is the consent of the people of each individual State, not the consent of the undifferentiated people of the Nation as a whole.”).

³⁶⁷ There is not enough room to chronicle here the countless worthy contributions to the literature. What follows is merely a representative sample of recent works from which I have benefitted. See, e.g., David L. Shapiro, *Federalism: A Dialogue* (1995); Matthew D. Adler & Seth F. Kreimer, *The New Etiquette of Federalism*: New York, Printz, and Yeskey, 1998 Sup. Ct. Rev. 71; Lynn A. Baker & Ernest A. Young, *Federalism and the Double Standard of Judicial Review*, 51 Duke L.J. 75, 135 (2001); Bradford R. Clark, *Separation of Powers as a Safeguard of Federalism*, 79 Tex. L. Rev. 1321 (2001); Richard H. Fallon, Jr., *The “Conservative” Paths of the Rehnquist Court’s Federalism Decisions*, 69 U. Chi. L. Rev. 429, 431 (2002); Barry Friedman, *Valuing Federalism*, 82 Minn. L. Rev. 317 (1997); Larry D. Kramer, *Putting the Politics Back into the Political Safeguards of Federalism*, 100 Colum. L. Rev. 215 (2000); Lawrence Lessig, *Translating Federalism: United States v. Lopez*, 1995 Sup. Ct. Rev. 125; Edward L. Rubin & Malcolm Feeley, *Federalism: Some Notes on a National Neurosis*, 41 UCLA L. Rev. 903 (1994).

respect to that question³⁶⁸—the states indisputably did not remain (or become) full sovereigns within the meaning of the law of nations after the ratification: “When the United States broke from Great Britain, it was not a foregone conclusion that the immunity enjoyed by sovereign nations should be accorded to each of the states. . . . [T]he [thirteen] individual states were not exactly thirteen separate countries.”³⁶⁹ The Declaration of Independence itself suggested something more in the nature of a confederation.³⁷⁰ As Professor Jack Rakove explains, under the Articles of Confederation, the states were not “nation-states in the conventional sense, fully empowered to confront the nations of Europe as equal sovereigns.”³⁷¹

³⁶⁸ Compare *Alden*, 527 U.S. at 713 (“[T]he founding document ‘specifically recognizes the States as sovereign entities.’”) (quoting *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 71 n.15 (1996)), and *Blatchford*, 501 U.S. at 779 (“[T]he States entered the federal system with their sovereignty intact . . .”), with *Alden*, 527 U.S. at 800 (Souter, J., dissenting) (“The State of Maine is not sovereign with respect to the national objectives of the FLSA.”), and *Seminole Tribe*, 517 U.S. at 150 (Souter, J., dissenting) (“[W]e surely did not mean [in *Blatchford*] that [the states] entered that system with the sovereignty they would have claimed if each State had assumed independent existence in the community of nations, for even the Articles of Confederation allowed for less than that.”), and *id.* at 153–54 (Souter, J., dissenting) (“[T]he ratification demonstrated that state governments were subject to a superior regime of law in a judicial system established, not by the State, but by the people through a specific delegation of their sovereign power to a National Government that was paramount within its delegated sphere.”).

³⁶⁹ Nelson, *supra* note 20, at 1576. But cf. Pfander, *supra* note 135, at 584 (“During the period that preceded the framing, the states regarded themselves and one another as sovereign states within the meaning of the law of nations . . .”).

³⁷⁰ See The Declaration of Independence para. 32 (U.S. 1776) (stating that the members of the Continental Congress issued the document as “Representatives of the UNITED STATES OF AMERICA, in General Congress, Assembled”).

³⁷¹ Jack N. Rakove, *The Origins of Judicial Review: A Plea for New Contexts*, 49 *Stan. L. Rev.* 1031, 1043 (1997). Under the Articles, many powers implicit in the nature of sovereignty—including the power to enter treaties and to “determin[e] on peace and war”—were committed to “[t]he United States in Congress assembled,” as opposed to the individual states. Articles of Confederation of 1776, art. IX, cl. 2; see Samuel H. Beer, *To Make a Nation: The Rediscovery of American Federalism* 192–94, 235–36 (1993) (arguing that, given the states’ lack of authority over foreign affairs, the states were not sovereign). To be sure, in practice the United States under the Articles of Confederation “was not much more than the ‘United Nations’ is in 1987: a mutual treaty conveniently dishonored on all sides.” Amar, *supra* note 20, at 1448. Indeed, Professor Gordon Wood argues that the Articles contemplated an arrangement whereby, in the words of Emmerich de Vattel, “sovereign and independent States” could “unite [to form] a perpetual confederacy” without “ceasing to be a per-

Whatever doubt there may have been of the states' sovereign status under the Articles³⁷² was eliminated upon ratification of the Constitution, when the states "ceded important portions of their sovereignty to the federal government."³⁷³ The Constitution, among other things, specifically divested the states of the traditional sovereign powers of diplomacy,³⁷⁴ power over monetary policy,³⁷⁵ and the power to impose tariffs on imports and exports,³⁷⁶ imposed upon the states affirmative obligations with respect to citizens of other states;³⁷⁷ and provided that state law would yield to federal law when the two conflict.³⁷⁸ As a result of these important restrictions on state sovereignty, "[a] State of the United States is not a state under international law."³⁷⁹ Indeed, at a minimum, to qualify as a "state" under the meaning of international law, the entity must

fect State." Gordon S. Wood, *The Creation of the American Republic, 1776–1787*, at 354–55 (1969) (quoting Vattel, *supra* note 163, at 12).

³⁷² Notwithstanding such doubts about the degree to which the states were sovereign before the ratification, several commentators have argued that the states had sovereign immunity under the Articles. See, e.g., Nelson, *supra* note 20, at 1577–78; Pfander, *supra* note 135, at 584; see also *supra* notes 147–51 and accompanying text.

³⁷³ Bradford R. Clark, *Federal Common Law: A Structural Reinterpretation*, 144 U. Pa. L. Rev. 1245, 1325 (1996).

³⁷⁴ U.S. Const. art. I, § 10, cl. 1 ("No State shall enter into any Treaty, Alliance, or Confederation; [or] grant Letters of Marque and Reprisal . . ."); *id.* art. I, § 10, cl. 3 ("No State shall, without the Consent of Congress, lay any Duty of Tonnage, keep Troops, or Ships of War in time of Peace, enter into any Agreement or Compact with another State, or with a foreign Power, or engage in War, unless actually invaded, or in such imminent Danger as will not admit of delay.").

³⁷⁵ *Id.* art. I, § 10, cl. 1 ("No State shall . . . coin Money; emit Bills of Credit; make any Thing but gold and silver Coin a Tender in Payment of Debts . . .").

³⁷⁶ *Id.* art. I, § 10, cl. 2 ("No State shall, without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports . . .").

³⁷⁷ See, e.g., *id.* art. IV, § 2, cl. 1 ("The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.").

³⁷⁸ *Id.* art. VI, cl. 2 ("This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."). A number of Amendments to the Constitution, of course, also limited the sovereignty of the states. E.g., *id.* amends. XIII–XV, XIX, XXIV, XXVI.

³⁷⁹ Restatement (Third) of the Foreign Relations Law of the United States § 201 cmt. g (1987). The Restatement provides in full: "A State of the United States is not a state under international law since under the Constitution of the United States foreign relations are the exclusive responsibility of the Federal Government." *Id.*

“engage[] in, or ha[ve] the capacity to engage in, formal relations with other such entities.”³⁸⁰

Accordingly, although there is room for debate over precisely how much autonomy the states enjoy,³⁸¹ the states plainly are not fully independent sovereigns in the sense of the word under customary international law.³⁸² Indeed, even a proponent of the most extreme anti-federalist view must concede that, under our constitutional structure, the states have ceded a significant amount of power traditionally enjoyed by sovereign nations—most funda-

³⁸⁰ Id. § 201 (“Under international law, a state is an entity that has a defined territory and a permanent population, under the control of its own government, and that engages in, or has the capacity to engage in, formal relations with other such entities.”).

³⁸¹ According to Professor Daniel Meltzer, it is possible to deduce three principal views of the status that the states attained after ratification. The *nationalist view* stresses that “the separate colonies acted collectively through the Declaration of Independence and the Continental Congress” and holds that “neither before nor after Independence were the states fully sovereign in the classic sense” Meltzer, *supra* note 11, at 1042–43 n.131. The *transformative nationalist view* holds that “while the Articles of Confederation were a traditional federation that preserved state sovereignty, the Constitution represented a novel reordering of affairs, in which the sovereign people designed a new national government that was supreme over the states but whose powers were limited in important respects.” Id. Finally, the *state-oriented view* maintains that “the states not only became sovereign entities during Independence and remained so during the Confederation period, but also that they preserved their political sovereignty even when the Constitution was ratified, except insofar as they delegated limited powers to the national government.” Id. Although “[h]istory rarely falls into [such] neat models,” id. (citing Jack N. Rakove, *Making a Hash of Sovereignty Part 1*, 2 *Green Bag* 2d 35, 39 (1998)), it is fair to describe Justice Wilson’s opinion in *Chisholm* as illustrative of the nationalist view, see *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419, 453 (1793) (opinion of Wilson, J.), Chief Justice John Marshall as a proponent of the transformative nationalist view, see, e.g., *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 326–28 (1819), and at least Justices Thomas, O’Connor, and Scalia, and Chief Justice Rehnquist, as proponents of the state-oriented view, see *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 845–49 (1994) (Thomas, J., dissenting).

³⁸² See Restatement (Third) of the Foreign Relations Law of the United States § 201 cmt. g (1987) (“A State of the United States is not a state under international law since under the Constitution of the United States foreign relations are the exclusive responsibility of the Federal Government.”); see also *United States v. Curtiss-Wright*, 299 U.S. 304, 316 (1936) (“[S]ince the states severally never possessed international powers, such powers could not have been carved from the mass of state powers but obviously were transmitted to the United States from some other source.”); 2 Joseph Story, *Commentaries on the Constitution of the United States* § 626 (photo. reprint 1991) (Boston, Hilliard, Gray & Co. 1833) (“[T]he states can exercise no powers whatsoever, which exclusively spring out of the existence of the national government, which the constitution does not delegate to them. . . . No state can say, that it has reserved, what it never possessed.”); see *supra* notes 379–80 and accompanying text.

mentally, the authority to engage in relations with foreign nations.³⁸³ The Court's reliance on state dignity, therefore, has taken the Court even farther down the anti-federalist path than it has gone in other recent skirmishes over the appropriate balance between federal and state power.

The Court's analogy to foreign sovereign immunity therefore fails on its own terms. Although there is room for debate over precisely how much autonomy the states enjoy, they plainly are not co-equal sovereigns with the United States (or any other foreign state). The French government surely is not bound by U.S. federal law, "any Thing in [France's] Constitution or Laws . . . to the Contrary notwithstanding."³⁸⁴ Yet by drawing on the doctrine of foreign state sovereign immunity—again, implicitly through invocation of the notion of state dignity—the Court suggests that the states enjoy sovereignty as does France.³⁸⁵

³⁸³ For example, Thomas Jefferson—who rarely has been accused of being a forceful proponent of the nationalist view of federalism—considered it "indispensably necessary that with respect to everything external we be one nation firmly hooped together." Charles Warren, *The Making of the Constitution* 46 (1937) (citing a letter from Thomas Jefferson to James Madison dated Oct. 8, 1786). Madison agreed, arguing that "[i]f we are to be one nation in any respect, it clearly ought to be in respect to other nations." *The Federalist* No. 42, at 264 (James Madison) (Clinton Rossiter ed., 1961). Jefferson's and Madison's agreement is not surprising given the ultimately disastrous state of affairs under the Articles of Confederation, which effectively permitted the states "by their conduct [to] provoke war without controul." James Madison, *Notes on the Constitutional Convention* (May 29, 1787), in *1 The Records of the Federal Convention of 1787*, at 19 (Max Farrand ed., 1911).

³⁸⁴ U.S. Const. art. VI, cl. 2. Under evolving conceptions of the obligations arising under international law, there may well be substantial limits on the ability of even fully sovereign nations to take certain actions. See generally Laurence R. Helfer & Anne-Marie Slaughter, *Toward a Theory of Effective Supranational Adjudication*, 107 *Yale L.J.* 273 (1997) (exploring the effectiveness of European supranational tribunals' ability to convince domestic governments to enforce their judgments). But such principles merely define the upper limit of the prerogatives of sovereignty; they do not purport to convert entities that enjoy something *less* than complete sovereignty into sovereign nations for the purposes of international law.

³⁸⁵ The other context in which the Court has suggested that the states stand in equal dignity to the federal government is inter-governmental taxation. See *McCallen Co. v. Massachusetts*, 279 U.S. 620, 628 (1929) ("Not only may the power to tax be exercised oppressively, but for one government—state or national—to lay a tax upon the instrumentalities or securities of the other is derogatory to the latter's dignity, subversive of its powers, and repugnant to its paramount authority."); see also *id.* at 637 (Stone, J., dissenting) ("[O]nly considerations of public policy of weight, which appear to be here wholly wanting, would justify overturning a principle so long established. It has survived a great war, financed by the sale of government obligations; and it has

Reliance on “state dignity” is particularly inapposite in the context of state sovereign immunity when one considers the connotation of that term in the law-of-nations context. In the latter context, the Court refers to state dignity as a shorthand description of the relationship in which a foreign sovereign stands to the United States, and to underscore that our relations with foreign nations ought to be conducted not by courts—which do not have constitutional authority to engage in foreign relations with co-equal sovereigns—but rather by the political branches, which can deal as equals with other nations on the international stage. Neither of these rationales has any application to the relationship between the United States and the several states. As to the first—the natural corollary of the proposition that foreign states and the United States have “equal rights and equal independence”³⁸⁶—the states plainly do not stand in the same relationship to the United States as do foreign states; instead, they must yield, even in their own re-

never even been suggested that in any practical way it has impaired either the dignity or credit of the national government.”). The Court has long held that states lack authority directly to tax the federal government. See *Tribe*, *supra* note 52, at 1222. The Court has also suggested that the federal government cannot levy a tax that falls only upon the states. See *New York v. United States*, 326 U.S. 572, 575–76 (1946). This structural principle, however, is premised on the theory that the Constitution contemplates the continued existence of both the states and the federal government. Because “[a]n unlimited power to tax involves, necessarily, a power to destroy,” the constitutional structure requires a prohibition on at least some inter-governmental taxation. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 327 (1819).

In any event, the Court has suggested that the “dignity” of the United States is not impermissibly affronted by requiring it to litigate in the courts of one of the several states. In *United States v. Bank of New York & Trust Co.*, 296 U.S. 463, 470 (1936), the United States sued banks that held certain Russian insurance funds, claiming that they were the owners of the funds as a result of an assignment made by the Russian government upon its recognition by the United States. *Id.* State courts simultaneously were conducting in rem proceedings over the same funds. *Id.* The Court held that the state courts had jurisdiction to dispose of the funds, and that the United States ought to intervene in those suits: “In intervening for the presentation of its claim, the United States would be an actor—voluntarily asserting what it deemed to be its rights—and not a defendant. We cannot see that there would be impairment of any rights the United States may possess or any sacrifice to its *proper dignity as a sovereign*, if it prosecuted its claim in the appropriate forum where the funds are held.” *Id.* at 480–81 (emphasis added). If it does not offend the dignity of the United States to be forced to litigate in the state courts, it is difficult to see how it can offend the dignity of a state—which, after all, is constitutionally bound by federal law—to be forced to litigate in federal court.

³⁸⁶ *The Schooner Exchange v. McFaddon*, 11 U.S. (7 Cranch) 116, 136 (1812).

spective territories, to the federal government whenever it exercises one of its enumerated powers.³⁸⁷ As to the second, although the courts will, as a matter of comity, refrain from intervening in certain disputes involving states,³⁸⁸ the Constitution explicitly envisions an *exclusive* role for the Court as an arbiter of disputes between states.³⁸⁹

*B. Doctrinal Consequences of Viewing American States
as Foreign States*

The Court's implicit equation of the several states with foreign states in their relationship to the United States would be largely a matter of academic interest if no consequences flowed from the comparison.³⁹⁰ But there are important doctrinal consequences of the Court's importation of the principles of foreign state sovereign immunity to the jurisprudence of state sovereign immunity, although the Court has thus far demonstrated a disconcerting tendency to refuse to take the bitter with the sweet. By relying on the states' dignity—and thus by invoking the doctrine of foreign state sovereign immunity—the Court has presumably intended to bolster its arguments elsewhere³⁹¹ about the status of the states in our constitutional system. But if in fact the states ought to be treated, for purposes of immunity doctrine, as wholly independent sover-

³⁸⁷ See U.S. Const. art. VI, cl. 2.

³⁸⁸ See, e.g., *Colo. River Water Conservation Dist. v. United States*, 424 U.S. 800, 817 (1976); *Younger v. Harris*, 401 U.S. 37, 44, 45 (1971).

³⁸⁹ See U.S. Const. art. III, § 2, cl. 2; *Kansas v. Colorado*, 206 U.S. 46, 95 (1907); Pfander, *supra* note 135, at 597.

³⁹⁰ Of course, even if no doctrinal consequences flowed from the Court's invocation of state dignity, both the nonconsequentialist and the instrumental expressivist accounts of the doctrine would still be apposite. Under the nonconsequentialist view, the Court's repeated references would be intended to affirm that "the fundamental structural commitments embedded in our constitutional system of governance matters for its own sake, not as a means to achieving some other end." Caminker, *supra* note 7, at 85. Under the instrumental view, the Court hopes that

[j]udicial protection and exaltation of state dignity will encourage people to internalize, as a political norm, the importance of having strong and vibrant states exercising significant governmental authority. This norm-internalization will help lead to an actual revival of such state power, thus securing the . . . advantages of decentralization within the federal structure.

Id. at 89–90. See *supra* notes 112–17 and accompanying text.

³⁹¹ See, e.g., *Printz v. United States*, 521 U.S. 898, 935 (1997); *New York v. United States*, 505 U.S. 144, 188 (1992); *Gregory v. Ashcroft*, 501 U.S. 452, 473 (1991).

eigns—that is, as entities that possess “equal rights and equal independence” with respect to the United States—then the consequence ought to be that Congress can, with a clear statement of intent, abrogate the states’ presumptive immunity, at least in federal court.

This conclusion flows directly from the cases that the Court has echoed in invoking the status and dignity of the states. As explained above, Congress has power to override a background principle of the law of nations, and the Court has confirmed this principle in the context of foreign state sovereign immunity.³⁹² To be sure, to preserve their limited role in foreign relations and in recognition of the damage to harmonious relations that could result from a judicial declaration that a foreign nation is amenable to suit, the courts will refrain from finding that a foreign nation is subject to suit unless Congress has clearly abrogated the nation’s presumptive immunity.³⁹³ This self-imposed limitation on judicial power in the context of foreign state sovereign immunity is a means of preserving the exclusive authority of the political branches over the field of foreign relations. Of course, unlike some other political questions,³⁹⁴ the courts’ reluctance to intervene in the area of foreign state sovereign immunity does not amount to an ironclad rule of non-justiciability; the courts will entertain suits against foreign states as long as the political branches³⁹⁵ clearly have authorized it.

³⁹² See *Verlinden B.V. v. Cent. Bank of Nigeria*, 461 U.S. 480, 486, 491–98 (1983); *The Schooner Exchange v. McFaddon*, 11 U.S. (7 Cranch) 116, 146 (1812) (“Without doubt, the sovereign of the place is capable of destroying this implication . . .”).

³⁹³ *The Schooner Exchange*, 11 U.S. (7 Cranch) at 146 (“[U]ntil such power be exerted in a manner not to be misunderstood, the sovereign cannot be considered as having imparted to the ordinary tribunals a jurisdiction, which it would be a breach of faith to exercise.”); cf. *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 443 (1989) (holding that “the FSIA provides the sole basis for obtaining jurisdiction over a foreign state in the courts of this country”).

³⁹⁴ See, e.g., *Nixon v. United States*, 506 U.S. 224, 238 (1993) (holding that the Constitution commits to the Senate the power to try impeachments, and thus that an impeached federal judge’s claim that the Senate’s use of a committee to hear testimony and gather evidence in his impeachment trial was not justiciable).

³⁹⁵ Although the power to abrogate foreign states’ sovereign immunity is largely Congress’s to exercise, the Court has deferred to statements of the Executive Branch about whether the related act of state doctrine should apply in a given case. See *First Nat’l City Bank v. Banco Nacional de Cuba*, 406 U.S. 759, 768 (1972) (plurality opinion) (concluding that “where the Executive Branch, charged as it is with primary responsibility for the conduct of foreign affairs, expressly represents to the Court that

But the presumption against justiciability is strong enough, with its long historical lineage, that courts proceed with utmost caution.³⁹⁶ Once the clear statement test is satisfied, however, it is established that the courts may entertain private suits against a foreign nation.

Notwithstanding the Court's recent importation of foreign state sovereign immunity doctrine to state sovereign immunity doctrine, the Court has expressly invoked the ground of non-justiciability only once in a state sovereign immunity case. And that case—*Monaco v. Mississippi*³⁹⁷—actually involved a conflict with a *foreign* state, making judicial reluctance to intervene arguably appropriate. In suggesting that a foreign state's suit against Mississippi was not of "a justiciable character,"³⁹⁸ the Court relied on the potential that such a case could "*involve international questions in relation to which the United States has a sovereign prerogative.*"³⁹⁹ Unlike in the foreign state sovereign immunity cases, however, the Court did not hold that Congress could exercise its "sovereign prerogative" by permitting a suit by a foreign state against one of the several states. Other than this context-specific invocation of federal primacy in the field of foreign relations, the Court has steadfastly refused to acknowledge the implications of relying on the foreign state sovereign immunity cases.

Simply put, if the Court is prepared to treat the states as wholly independent sovereigns with respect to sovereign immunity, then the Court ought to be prepared to recognize Congress's power to abrogate that immunity, as it does when wholly independent sovereigns are sued in U.S. courts. This assuredly is not the current doctrine. The Court has, to the contrary, expressly held that Con-

application of the act of state doctrine would not advance the interests of American foreign policy, that doctrine should not be applied by the courts"). But see *id.* at 788–89 (Brennan, J., dissenting) (arguing that a statement from the Executive Branch is insufficient to confer jurisdiction over a foreign state for an act of that state within its territory). For more on the act of state doctrine, see *supra* note 199.

³⁹⁶ Indeed, even after Congress expressly abrogated foreign states' sovereign immunity, the Supreme Court held that because jurisdiction depends on the existence of an exception to the general rule of foreign state sovereign immunity, the court must determine whether the state is entitled to immunity even if the foreign state has not entered an appearance in the suit. See *Verlinden*, 461 U.S. at 493–94 n.20.

³⁹⁷ 292 U.S. 313 (1934).

³⁹⁸ *Id.* at 322.

³⁹⁹ *Id.* at 331 (emphasis added).

gress lacks authority under Article I to abrogate the states' immunity, either from suit in federal court⁴⁰⁰ or state court.⁴⁰¹

An analogy to foreign state sovereign immunity clearly should lead to the conclusion that Congress can subject the states to suit in federal court. In the analogy, the state stands in the position that the foreign state would, and it is clear that Congress can subject foreign states to suit in our courts. Whether Congress can subject states to suit under a federal cause of action in their *own* courts raises slightly different considerations than the question whether Congress can subject states to suit under federal law in *federal* court. If in fact the source of the states' immunity from suit is the law of nations, then Congress arguably lacks authority to subject states to suit in their own courts. By analogy, Congress surely could not authorize a suit against Spain in Spanish courts under a U.S. cause of action.⁴⁰² But this analogy proves too much. The United States stands in a vastly different relation to the several states than it does to Spain, or to any other foreign nation. Unlike Spain, the states are bound to abide by federal law, "any Thing in [their] Constitution or Laws . . . to the Contrary notwithstanding."⁴⁰³ On the Court's own terms, therefore, it should not be an affront to the states' "dignity" to be subject to suit in state court under a federal cause of action, because the states do not enjoy a status equal to the United States on the world stage.⁴⁰⁴

In effect, the Court has accorded the states *more* sovereign prerogatives than it has extended to wholly independent sovereigns. Although it has, through repeated invocations of state dignity, implicitly relied on notions of sovereignty drawn from the law of nations, the Court has in fact provided protections to the states that dramatically exceed those now available to those states that truly

⁴⁰⁰ See *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 72–73 (1996).

⁴⁰¹ See *Alden v. Maine*, 527 U.S. 706, 754 (1999).

⁴⁰² See *id.* at 735 ("[I]t strains credibility to imagine that the King could have been sued in his own court on, say, a French cause of action.").

⁴⁰³ U.S. Const. art. VI, cl. 2.

⁴⁰⁴ See, e.g., *Madisonville Traction Co. v. Saint Bernard Mining Co.*, 196 U.S. 239, 255 (1905) ("The exercise by the Circuit Courts of the United States of the jurisdiction . . . conferred upon them is pursuant to the Supreme Law of the Land, and will not, in any proper sense, entrench upon the *dignity*, authority or autonomy of the States; for each State, by accepting the Constitution, has agreed that the courts of the United States may exert whatever judicial power can be constitutionally conferred upon them.") (emphasis added).

are sovereign under customary international law. This is a peculiar place for the doctrine to rest. As discussed above, there is a strong argument that it is inappropriate to treat American states as equal in status to foreign sovereigns in the first place; it is certainly inappropriate to treat them as *superior* sovereigns.⁴⁰⁵

Yet current doctrine does just that. Consider *Nevada v. Hall* once again. Under that decision, one state has authority to subject another state to suit in the former state's courts under the former state's law. In effect, each state has power to abrogate the immunity from suit of every other state;⁴⁰⁶ and this state of affairs exists because the states' relationship among themselves resembles the relationship among sovereign nations. Congress, however, lacks similar authority to abrogate the states' immunity from suit. In

⁴⁰⁵ In fact, the Court's tendency to treat states as even more sovereign than sovereign nations is not limited to the context of state sovereign immunity. In the antitrust context, a person engaging in otherwise anticompetitive behavior is immune from liability if his actions were supervised by one of the several states and if the state had a clear intent to displace competition. See *Fed. Trade Comm'n v. Ticor Title Ins. Co.*, 504 U.S. 621, 634–35 (1992); *Patrick v. Burget*, 486 U.S. 94, 100 (1988); *Cal. Retail Liquor Dealers Ass'n v. Midcal Aluminum*, 445 U.S. 97, 105 (1980). The adequate supervision test is a corollary of the doctrine of *Parker v. Brown*, 317 U.S. 341, 350–51 (1943), which held that the federal antitrust laws apply only to action by private parties and not action by state legislatures or administrative bodies.

A person cannot avoid antitrust liability on the ground that his conduct was supervised by a *foreign* state, in contrast, unless he can demonstrate that the foreign state *actually compelled* him to take the challenged action. See *Cont'l Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 706 (1962). In other words, a United States court can grant antitrust relief against a private party if he has been merely authorized or permitted by a foreign state to take the anticompetitive action. In fairness, the Court has had some difficulty at the margins in determining when an American state has adequately supervised private action for antitrust immunity to attach. It is clear, however, that an American state need not *compel* a private party to take an anticompetitive action for that action to be immune from the federal antitrust laws. See, e.g., *S. Motor Carriers Rate Conf. v. United States*, 471 U.S. 48, 66 (1985). Therefore, a state has greater leeway to immunize certain actions from antitrust liability than does a foreign state.

⁴⁰⁶ Of course, *Hall* held precisely that states do not have "immunity" from suits under other states' laws in other states' courts. 404 U.S. 410, 425–27 (1979). But one can expect, at a minimum, that the Court would be reluctant to conclude that one state has subjected its sister states to suit absent a clear statement of intent. Cf. *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 243 (1985) (applying a strict clear statement principle to a federal-law suit against a state in federal court). Accordingly, it is fair to assume that even though the states do not enjoy *constitutionally infeasible* immunity from suit in another state's courts under the forum state's law, they are *presumptively* immune from such suits.

other words, California has authority to subject Nevada to suit in a California court under California law, but (putting aside several increasingly narrow exceptions) Congress lacks the power to subject Nevada to suit in *any* court under federal law. Under current doctrine, the states have more authority with respect to each other than the federal government has with respect to the states. This is, to say the least, a bizarre state of doctrinal affairs.

Equally bizarre, Congress has undisputed power to subject a wholly sovereign nation to suit in U.S. courts but lacks authority to subject what Justice Sutherland—certainly no great fan of federal power—called a “quasi-sovereign state” to suit.⁴⁰⁷ In fairness, one could plausibly argue that because disputes involving states arise much more frequently in our courts than disputes involving foreign nations, a rule of special deference to the states is warranted. Although there is some initial appeal to suggesting that the states ought to enjoy a more preferred status in our courts than do foreign states, this argument does not explain why the states deserve to be elevated in status with respect to the *federal government*—which is precisely what according a constitutionally indefeasible immunity from suit does. In any event, it is the Court that has anchored its doctrine to the notion of the equal dignity of sovereigns; and, as explained above, it is difficult to see how the states can be considered, for purposes of enforcement of federal law, to be of equal status to the United States.

To be sure, the Framers (to use Justice Kennedy’s elegant phrasing) “split the atom of sovereignty,”⁴⁰⁸ and in so doing limited the sovereignty not only of the states but also of the federal government. One could plausibly argue, based on this division of sovereignty, that the federal government lacks the authority to abrogate the states’ immunity from suit even though it enjoys that authority with respect to foreign nations. The argument would progress as follows: The United States retains plenary “external sovereignty,” the authority to conduct foreign affairs and relations with other sovereign nations of the world. However, “internal sovereignty,” the right to regulate conduct within the relevant territory, was di-

⁴⁰⁷ *Steward Mach. Co. v. Davis*, 301 U.S. 548, 613–14 (1937) (Sutherland, J., dissenting).

⁴⁰⁸ *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 838 (1995) (Kennedy, J., concurring).

vided among the several states and the federal government. The power at issue in foreign state sovereign immunity cases—Congress’s authority to subject foreign states to suit in U.S. courts for violations of federal or international law—is a function of external sovereignty. Because the federal government’s power over external affairs is plenary, Congress must enjoy the power to abrogate the immunity of foreign states. In contrast, the power at issue in state sovereign immunity cases—Congress’s authority to subject the states to suit for violations of federal law—is a function of internal sovereignty. To ensure that Congress does not displace the states’ constitutional role over matters internal, the Court should conclude that Congress lacks the power to abrogate the states’ immunity from suit.

There is certainly some ostensible appeal to this argument, although of course justifying it with reference to constitutional text, history, and structure is another matter altogether. There are, however, two principal problems with the argument. First, if Congress has the authority to impose substantive obligations (such as the requirement to pay a minimum wage) on the states,⁴⁰⁹ it is difficult to see why Congress should not also have the authority to create a remedy for when the state fails to fulfill its obligation. Second, and more important for our purposes, the Court has sought to justify its anti-abrogation rule by invoking the states’ dignity. As we have seen, the conventional notion of state dignity, drawn from the foreign state sovereign immunity cases, does not imply a power to resist suit when the forum sovereign has clearly authorized suit. The Court has not attempted to explain why the (several) states’ status compels an indefeasible immunity from suit.

Some of the dissenters on the current Court have recently suggested that foreign state sovereign immunity provides a useful example of how the states’ immunity ought to be handled.⁴¹⁰ They

⁴⁰⁹ See *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 555–56 (1985).

⁴¹⁰ In *College Savings Bank v. Florida Prepaid Postsecondary Education Expense Board*, Justice Stevens suggested that, given the increased role that states now play in the commercial marketplace, “[i]n future cases, it may . . . be appropriate to limit the coverage of state sovereign immunity by treating the commercial enterprises of the States like the commercial activities of foreign sovereigns under the Foreign Sovereign Immunities Act of 1976.” 527 U.S. 666, 692 (1999) (Stevens, J., dissenting). Justice Breyer made a similar point. See *id.* at 699 (Breyer, J., dissenting) (noting that Congress has declined to accord immunity to foreign states when they act as market

have not, however, suggested that the Court has in fact been picking and choosing from that doctrine, adopting the facets that support its claims about immunity—specifically, the notion that states and the United States enjoy “equal rights” and “equal independence”—and rejecting those that do not—the important consequence that Congress has authority to abrogate sovereign states’ immunity.

The Court’s response presumably would track Justice Scalia’s re-*re*port in *College Savings Bank v. Florida Prepaid Postsecondary Education Expense Board*⁴¹¹ to Justice Breyer’s suggestion that state sovereign immunity doctrine should follow the example set by Congress in the Foreign State Sovereign Immunity Act. According to Justice Scalia, such a “proposal ignores the fact that state sovereign immunity, unlike foreign sovereign immunity, is a *constitutional* doctrine that is meant to be both immutable by Congress and resistant to trends.”⁴¹² But this response attacks a straw man. If in fact (as then-Professor Scalia argued) the states *retained* law-of-nations immunity at ratification,⁴¹³ then that immunity—even as a constitutional matter—ought to be no less subject to abrogation after ratification than it was before. Otherwise, Justice Scalia is left to suggest that the immunity codified (albeit implicitly) in the Constitution is something profoundly more potent than what the states enjoyed before ratification. This turns the transfer of sovereign powers that occurred at the ratification on its head. In ratifying the

participants: “In doing so, Congress followed the modern trend, which spread rapidly after the Second World War, regarding foreign state sovereign immunity. . . . Indeed, given the widely accepted view among modern nations that when a State engages in ordinary commercial activity sovereign immunity has no significant role to play, . . . today’s holding . . . creates [a] legal anomaly.” (quotation marks and citations omitted); *id.* at 700 (Breyer, J., dissenting) (“The precedents that offer important legal support for the doctrine of sovereign immunity . . . all focus upon a critically different question, namely, whether *courts*, acting without legislative support, can abrogate state sovereign immunity, not whether Congress, acting legislatively, can do so.”). In *Kimel v. Florida Board of Regents*, Justice Stevens invoked *The Schooner Exchange* Court’s view of the defeasibility of sovereign immunity under the law of nations. 528 U.S. 62, 97 n.6 (2000) (Stevens, J., dissenting) (“Under the traditional view, the sovereign immunity defense was recognized only as a matter of comity when asserted in the courts of another sovereign, rather than as a limitation on the jurisdiction of that forum.”) (citing *The Schooner Exchange*, 11 U.S. (7 Cranch) at 136).

⁴¹¹ 527 U.S. 666 (1999).

⁴¹² *Id.* at 686 n.4.

⁴¹³ See Scalia, *supra* note 139, at 886–88.

Constitution, the states agreed to *cede* a significant degree of sovereignty to the United States. Even if we assume that the states believed that they would retain law-of-nations immunity after the ratification, it is difficult to fathom that they believed that they would be gaining a new and more potent form of immunity, one that is resistant to abrogation by another sovereign in that sovereign's courts, and one that is not even (nor ever has been) enjoyed by wholly independent sovereign nations.

To be sure, Justice Scalia may well be correct that the Framers believed that the states' pre-ratification immunity from suit derived not from the English common law, but from the law of nations. According to a persuasive recent article by Professor Caleb Nelson, the Framers, including such prominent federalists as James Madison, Alexander Hamilton, and John Marshall, believed that before the ratification the states enjoyed immunity under general principles of the law of nations.⁴¹⁴ They also generally agreed that Article III would not *itself* abrogate the "states' protections against being haled into court by individuals"; instead, they believed that "the content of those protections was not set by anything in the Constitution,"⁴¹⁵ but rather was determined by the general law of nations.⁴¹⁶ If the law of nations was understood at the time of the ratification to be subject to abrogation by the forum sovereign—as the Court in *The Schooner Exchange* clearly believed—then Justice Scalia's view is plainly wrong. And even if one assumes that the Framers did not understand law-of-nations immunity to be subject to abrogation, their decision to leave for the states only the protections afforded by the law of nations—as opposed to some broader, unchanging set of immunities frozen into the Constitution itself—means that changes in foreign state sovereign immunity under the

⁴¹⁴ Nelson, *supra* note 20, at 1574–1602 (citing *Nathan v. Virginia*, 1 Dall. 77 (Pa. C.P. 1781)).

⁴¹⁵ *Id.* at 1621.

⁴¹⁶ *Id.* at 1577–78 (citing *The Federalist* No. 81, at 487–88 (Alexander Hamilton) (Clinton Rossiter ed., 1961)); *id.* at 1592 (citing James Madison, Comments at the Debates of the Virginia Convention (June 20, 1788), in 10 *The Documentary History of the Ratification of the Constitution* 1412, 1414 (John P. Kaminski & Gaspare J. Saladino eds., 1993)); *id.* at 1593 (citing John Marshall, Comments at the Debates of the Virginia Convention (June 20, 1788), in 10 *The Documentary History of the Ratification of the Constitution* 1433 (John P. Kaminski & Gaspare J. Saladino eds., 1993)).

law of nations should directly affect the scope of the states' immunity from suit. As Professor Nelson explains, "[w]e could readily agree that Article III does not abrogate whatever protections the general law gives sovereign states, but we could maintain that those protections themselves have changed in important ways since the days of Madison and Marshall."⁴¹⁷ Under this view, as the scope of foreign state sovereign immunity has become increasingly restricted, so has the states' (background) immunity from suit.

C. Contextual Implications

These doctrinal consequences of a direct comparison to the doctrine of foreign state sovereign immunity perhaps help explain why the Court has thus far not been willing to make the comparison explicitly, but instead has relied on cryptic references to state dignity. But by making (what are in the eyes of even the most avid Court watchers) mysterious references to state dignity, the Court leaves itself open to the charge that it values the dignity of the states over the dignity of individuals. Indeed, one cannot help but be struck by the fact that in those contexts in which dignity is intuitively a singularly relevant consideration, the Court has consistently subordinated those dignity considerations to other interests.

Consider, for example, the law of procedural due process. Although the Court in its seminal decision in *Goldberg v. Kelly*⁴¹⁸ appeared to suggest that an individual's dignitary interests are an important consideration in determining whether a hearing is required when a state seeks to deprive him of an important benefit without according him an opportunity to challenge the deprivation in per-

⁴¹⁷ Nelson, *supra* note 20, at 1621.

⁴¹⁸ 397 U.S. 254 (1970). There is an extensive literature on the appropriate role of individual dignitary interests in procedural due process doctrine. See, e.g., William J. Brennan, Reason, Passion, and "The Progress of the Law," 10 *Cardozo L. Rev.* 3 (1988); Jerry L. Mashaw, *Administrative Due Process: The Quest for a Dignitary Theory*, 61 *B.U. L. Rev.* 885 (1981); Jerry L. Mashaw, *Dignitary Process: A Political Psychology of Liberal Democratic Citizenship*, 39 *U. Fla. L. Rev.* 433 (1987); William H. Simon, *The Rule of Law and the Two Realms of Welfare Administration*, 56 *Brook. L. Rev.* 777 (1990); see also Robert G. Bone, *The Process of Making Process: Court Rulemaking, Democratic Legitimacy, and Procedural Efficiency*, 87 *Geo. L.J.* 887, 939 (1999) (describing process-based metric for court rulemaking, which is based on the view that litigants have a "participation right" that "derives from the state's obligation to respect the dignity and autonomy of persons affected by adjudication").

son, the Court has since clarified that the inquiry into what process is due turns principally on the degree to which such process is necessary to reach an accurate result, regardless of the individual's dignitary and participatory interests.⁴¹⁹ Under the Court's current doctrine, therefore, a state's dignity is a "preeminent" consideration in deciding whether an individual who alleges that the state violated his federal rights can seek redress in court, but the individual's dignity is beside the point when a state deprives the individual of a valuable benefit.

This is, to say the least, an odd place for the doctrine to come to rest. In fairness, the Court has insisted that the protections it announces for state autonomy are intended ultimately for the sake of the individual;⁴²⁰ but it is difficult to take this contention seriously when the Court is dismissive of claims based on individual dignity. Whatever expressive value there may be in the Court's invocation of state dignity in its state sovereign immunity decisions surely must be balanced against the contextual implications of those invocations: The Court is at risk of announcing that it cares about states qua states, even at the expense of individual dignity.⁴²¹

CONCLUSION

This Article demonstrates that although the notion of state dignity at first seems oxymoronic, it in fact has a particular legal connotation that, in context, is perfectly sensible. In its recent state sovereign immunity decisions, however, the Court has imported

⁴¹⁹ *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976). In *Mathews*, the Court explained that the inquiry whether more process is due involves a balancing test that weighs "the private interest that will be affected by the official action"; "the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards"; and "the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail." *Id.*

⁴²⁰ See *New York v. United States*, 505 U.S. 144, 181 (1992) ("[T]he Constitution divides authority between federal and state governments for the protection of individuals."); cf. *Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 681–82 (1999) (analogizing the waiver of a state's right not to be sued to "other constitutionally protected privileges," such as the right to a jury) (emphasis omitted).

⁴²¹ Cf. Caminker, *supra* note 7, at 87 ("Dignity assumes hierarchy, and the hierarchical relationships between persons and states embedded within the doctrine of sovereign immunity runs precisely counter to the hierarchy entailed by the distinctively American principle of popular sovereignty.").

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the concept to a context in which it is largely inapposite. In the context of foreign state sovereign immunity, state “dignity” connotes a parity of status that appears to be absent in the context of state sovereign immunity. More important, the Court has refused to accept the consequences that ought to flow from its suggestion that the states stand in relation to the United States much as do foreign nations: If the states truly enjoyed equal dignity with the federal government, the latter would have authority to abrogate the immunity of the former, at least in its own courts, just as it has that power with respect to foreign nations.

Because the Court has not been willing explicitly to rely in the state sovereign immunity cases on principles of the law of nations, this account is susceptible to the critique that it constructs a straw man—the Court’s reliance on the law of nations—that it then tears down. But the idea of state dignity is not new, and it is not alien to the Court’s jurisprudence. When the Court invokes it, it is the Court that is embracing the connotations of the term, and the Court that has naturally conjured up the comparison between state sovereign immunity and foreign state sovereign immunity. Yet the Court’s assertion about state dignity ultimately bears no relationship to the doctrinal and historical meaning of that phrase, and the Court has not provided an adequate justification for why the sovereign status of the several states ought to entail broader immunity than that implied by the sovereign status of wholly sovereign nations.

To wage an important battle over the appropriate status of the states in relation to the federal government through implicit rhetorical links, moreover, demeans the arguments of history, structure, and policy that ought to animate the discussion over federalism. As long as the Court refuses explicitly to ground its state sovereign immunity doctrine in the principles of customary international law, it remains vulnerable to the charge that it values the dignity of the states over the dignity of individuals. Justice Brennan would indeed be disappointed.