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Historical Approach to the Doctrine of Sovereign Immunity*

George W. Pugh†

Generations have genuflected before the divine altar of sovereign immunity, and as a result, countless litigants have been stunned by the rigorous application of the dead but lethal residuum of an outmoded doctrine.¹ "The king can do no wrong" is a maxim familiar to layman and lawyer alike. Legal historians have struck at the very bases of this unwanted and unjust concept,² and legislatures have gradually relinquished the state's claim to irresponsibility.

Much has been done in recent years towards the effective elimination of the bar of sovereign immunity. Numerous congressional acts now permit relief in specific and ever-widening areas of litigation, and the Federal Tort Claims Act of 1946³ is a high point in the fight for responsible government. Nevertheless, much remains to be done. This is abundantly clear in the field of procedural law, for here the technical tangles of procedural "niceties" remain to perplex and confound the citizen seeking justice from his government. The hodge-podge sporadic renunciation of governmental immunity has resulted in much injustice,

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1. Even where the Constitution itself prohibited certain acts by the government against its citizens, the doctrine of sovereign immunity has at times intervened to prevent actual protection. Although the Fifth Amendment provides that no "private property" shall "be taken for public use without just compensation," it was not until the Court of Claims was established in 1855 (Act of Feb. 24, 1855, c. 122, 10 Stat. 612) that effective legal procedures were established to put teeth into the constitutional prohibition. See Borchard, *Government Liability in Tort*, 34 *Yale L.J.* 1, 28 (1924).

2. Pollock and Maitland, *The History of English Law Before the Time of Edward I*, 515-518 (2 ed. 1899); Watkins, *The State as a Party Litigant* 1-13, 192-207 (1927); Borchard, *Governmental Responsibility in Tort*, 36 *Yale L.J.* 1 (1926).

3. Act of Aug. 2, 1946, c. 753, 60 Stat. 843, 28 U.S.C. § 1346(b) (1948).

and the attorney preparing to sue his government is faced with a maze of procedural problems. This article will analyze the historical basis for the use of the doctrine by federal courts.⁴

Obscurity and uncertainty must characterize any discussion of the historical bases of the doctrine of sovereign immunity.⁵ Legal historians now deprecate any attempt to enshroud the doctrine with the aura of Roman antiquity,⁶ and it is to early England that one must look for historical "clarification." Opinions differ as to the exact origins of the concept. It is known that the petition of right developed during the reign of Edward I, and it has been argued that prior to the reign of Edward I, the king was subject to suit in his own courts,⁷ but in their authoritative work on early England, Pollock and Maitland state as a simple fact that even at that time, the king was free from suit and prosecution in his own courts.⁸ These authorities hasten to point out,

4. For more generalized discussions of the doctrine of sovereign immunity, see: Robinson, *Public Authorities and Legal Liability* (1925); Watkins, *op. cit. supra* note 2; Borchard, *Government Liability in Tort*, 34 *Yale L.J.* 1, 129 (1924), 229 (1925); Borchard, *Governmental Responsibility in Tort*, 36 *Yale L.J.* 1 (1926), 757, 1039 (1927).

5. This obscurity has even characterized the opinions of the United States Supreme Court in this field. As was pointed out by Mr. Borchard, *Government Liability in Tort*, 34 *Yale L.J.* 1 (1924): "When Justice Miller of the United States Supreme Court remarked in *Gibbons v. United States* [75 U.S. 269, 276 (1868)] that 'no government has ever held itself liable to individuals for the misfeasance, laches or unauthorized exercise of power by its officers or agents,' his horizon was extremely limited, for he overlooked the fact that practically every country of western Europe has long admitted such liability."

6. "There is reason to doubt, however, if a contemporary interpretation of Roman law would have justified the conclusion that even in legal theory the head of the state was exempt from legal responsibility; there is still stronger evidence to show that even if such a position were held by the head of the Roman state, the principles of law on which this position was founded received a different interpretation in England, when the position of the king is considered." Watkins, *op. cit. supra* note 2, at 1.

7. See Barry, *The King Can Do No Wrong*, 11 *Va. L. Rev.* 349, 352 (1925), in which an able discussion of the conflicting views is given.

See also the excellent discussion found in Watkins, *op. cit. supra* note 2, at 4-12, in which the author points out that Bracton said that the king was himself subject to the law, but stated that there was no remedy against the king, except by petition, unless "gross violations" of the law were committed, in which case the people need not wait for the ultimate judgment of God, but might themselves have judgment upon him, and might take action in the "court of the king himself."

In the famous case, *Chisholm v. Georgia*, 2 U.S. 419, 459 (1793), discussed *infra*, p. 483, Justice Wilson stated as a fact that prior to the time of Edward I, the king could be sued as a matter of right in his own courts.

8. Pollock and Maitland, *op. cit. supra* note 2, at 515-518. It is here suggested that if Henry III had been capable of being sued "he would have passed his life as defendant."

however, that this was in no way due to a feeling that the king was above the law, for ample authority sustains the proposition that the converse was the prevailing attitude.⁹ The king could not "be compelled to answer in his court, but this is true of every petty lord of every petty manor; that there happens to be in this world no court above his is, we may say, an accident."¹⁰ Thus the king's immunity was personal to himself, and arose from the practical needs and peculiarities of the feudal system, rather than from any conception that the king is superior to the law.

It is not clear at exactly what point the personal immunity of the king was transformed into its present day counterpart—the immunity of the Crown. It seems, however, that this change was accomplished during the rise of the nation state.¹¹ Thus what was once the mere personal immunity of an individual was finally merged with the whole concept of sovereignty; and the theory of the divine right of kings lent support to the proposition that the king was above the law—that he was in fact the law-giver appointed by God, and therefore could not be subjected to the

9. In Bracton there is a blending of the two views of the king's position. He is deemed to be beneath the law, but from the standpoint of the theologian, he is deemed the Vicar of God and therefore not subject to the control of man. Blachly and Oatman, *Approaches to Governmental Liability in Tort: A Comparative Study*, 9 *Law and Contemp. Prob.* 181, 182 (1942).

In *The King Can Do No Wrong*, 11 *Va. L. Rev.* 349, 352 (1925), Barry points to the following statement which appeared in the Year Book during the reign of Henry VI:

"La ley est le plus haut inheritance que le roy ad; car par la ley il mem, et touts ses sujets sont rules, et si la ley ne fuit, nul Roi, ny nul inheritance sera."

10. Pollock and Maitland, *op. cit. supra* note 2, at 515.

11. "How then, from the position of personal exemption, was the idea of state exemption derived? The following is offered as a reasonable hypothesis. With the downfall of the feudal system and the growth of the idea of the modern state, the old restraints upon the king vanished. The king himself became the state. The king retained the powers he had held before by virtue of his position at the apex of the feudal pyramid; he then became the head of the Church also, and combined Divine attributes with temporal authority. At about this time doctrines of sovereignty appeared. Bodin, generalizing from the facts of his day, offered an explanation of existing facts in scientific form. He made the 'Sovereignty of the ruler the essence of the State.' 'The personality of the corporate body is concentrated in and absorbed by the personality of its monarchical head,' after which 'we are plunged into talk about kings who do not die, who are never under age, who are ubiquitous, who do no wrong, and (says Blackstone) think no wrong; and such talk has not been innocuous.'" Watkins, *op. cit. supra* note 2, at 11.

See also Laski, *Responsibility of the State in England*, 32 *Harv. L. Rev.* 447 (1919).

indignity of suit by his subjects.¹² To Bracton the maxim "the king can do no wrong" meant simply that the king was not privileged to do wrong,¹³ but to Blackstone the phrase was not so restricted; and in his Commentaries the following is to be found:¹⁴

"Besides the attribute of sovereignty, the law also ascribes to the king in his political capacity absolute perfection. The king can do no wrong: . . .

"The king, moreover, is not only incapable of *doing wrong*, but even of *thinking wrong*: he can never mean to do an improper thing: in him is no folly or weakness."

Thus the doctrine developed, humble in its origins, but lethal in its final implications. Fortunately, however, the rigors of the doctrine were tempered by the genius of the English *homo politicus*, and gradually increasing relief was granted by the development of procedures for suits against the Crown.¹⁵ The petition of right is by far the most famous of such procedures, and dates back to the reign of Edward I.¹⁶ Unfortunately, however, the petition of right did not extend to the field of torts, and in this area the wronged citizen had to rely upon the ingenuity of the English legal mind. As the concept of governmental function expanded, English courts permitted suit against the government official or employee who had actually committed the wrong

12. "Bodin (1576) and Hobbes (1651) with Machiavelli (1513) are probably the fathers, though not without some earlier philosophical authority, of the modern notion that the sovereign (king) is above the law, that sovereignty is 'the absolute and perpetual power of a commonwealth,' that the sovereignty is the 'supreme power over citizens and subjects unrestrained by the laws,' that the chief function of sovereignty was the creation of law and that as the creator of law, the sovereign was not bound by the law. Bodin did not conceive the State itself as sovereign, but only one element in it, the king. Law is the 'command of a sovereign using his sovereign power.'" Borchard, *Governmental Responsibility in Tort*, 36 *Yale L.J.* 757, 785 (1927).

13. See discussion in Borchard, *Governmental Responsibility in Tort*, 36 *Yale L.J.* 1, 22 (1926).

14. 1 *Bl. Comm.* 246.

15. See generally, Watkins, *op. cit. supra* note 2, at 1-49.

16. For a discussion of the petition of right see Borchard, *Governmental Responsibility in Tort*, 36 *Yale L.J.* 1, 23 (1926); Watkins, *op. cit. supra* note 2, at 16-31.

In *United States v. O'Keefe*, 78 U.S. 178 (1870), the Supreme Court was presented with the following question: Does a United States citizen have the *right* to sue the Crown in the courts of Great Britain to recover proceeds of captured or abandoned property? Unless the answer to this question was in the affirmative, a British subject could not under the statute maintain a similar action against the United States in the Court of Claims. The court found that in such cases the petition of right was granted as a matter of routine, and refused only in extraordinary situations, and that therefore within the meaning of the statute, there was the *right* to maintain the action.

complained of. Since in theory the king could do no wrong, it would be impossible for him to authorize a wrongful act, and therefore any wrongful command issued by him was to be considered as non-existent, and provided no defense for the dutiful subject.¹⁷

Even in England, however, the picture has by now completely altered, for by the Crown Proceedings Act of 1947,¹⁸ the subject has been given the *right* to institute civil proceedings against the Crown, and this is true in tort as well as contract.¹⁹ Rules as to master-servant liability are now generally applicable to the Crown,²⁰ and proceedings against his Majesty by way of petition of right and *monstrans de droit* were abolished.²¹ Several books are to be found which give a detailed appraisal of the various provisions of the statute,²² and it is not within the purview of this article to offer such an analysis. But it is important to note that the *English themselves have abandoned their traditional system*²³ and have attempted to formulate an integrated statute which will be more in keeping with the needs of *modern* society. A similar re-appraisal is undoubtedly necessary in our own country.

Since the days of the Declaration of Independence, the keystone of American political thought has been responsible government, and the entire history of the American Revolution would seem to negate the applicability in this country of the English maxim that the king can do no wrong. Such has been in fact the holding of the United States Supreme Court,²⁴ but the threads of English precedent are nevertheless visible in American decisions. Despite the absence of historical and philo-

17. For a discussion of liability of officers in England see Watkins, *op. cit. supra* note 2, at 39-49.

The doctrine of respondeat superior does not apply. Morgan, *Introductory Chapter on Remedies Against the Crown*, in Robinson, *Public Authorities and Legal Liability* xii et seq. (1925).

18. 10 & 11 Geo. VI, c. 44.

19. Bridges, *The Crown Proceedings Act*, 67 *Law Notes* 18 (1948).

20. Smith, Bickford, *The Crown Proceedings Act*, 67 *Law Notes* 18 (1948).

21. *Id.* at 25.

22. Bell, *Crown Proceedings* (1948); Smith, Bickford, *The Crown Proceedings Act* (1947, 1948); Williams, *Crown Proceedings* (1948). See also *Statutes of the Realm*, 66 *Law Notes* 241 (1947); Bridges, *The Crown Proceedings Act*, 67 *Law Notes* 18 (1948); Chapman, *Book Review*, 66 *L.Q. Rev.* 540 (1950).

23. In his book review, Mr. Chapman commented that "The passing of the old system will not, itself, elicit a tear from anyone. . . ." 66 *L.Q. Rev.* 540, 541 (1950).

24. *Langford v. United States*, 101 U.S. 341 (1879). See discussion of this case, *infra* p. 489.

sophical justification, the doctrine of sovereign immunity is today a part of American legal dogma. Common sense alone would indicate that the adoption of such a theory in a democratic state must of necessity give rise to much confusion and unjustified rationalization, and this brief historical survey will illustrate the validity of this common sense forecast. The adoption of the doctrine in this country is to be explained by the thought habits of common law lawyers, and by the very natural desires of state governments to avoid payment of their vast debts.

Blackstone and Coke were read and reread by the American lawyer, and the Revolution did not sever the tie of the colonists with the common law.²⁵ Even during the Revolution itself, a Pennsylvania admiralty court denied jurisdiction in a libel action against a ship of war.²⁶

When the Constitutional fathers met in Philadelphia, they quite naturally brought with them their predilections for the concepts of the common law. Of course there was no necessity that the doctrine of sovereign immunity be carried over into the law of the United States, and indeed consistency and logic would seem to have demanded its elimination. The Constitution is not clear on the question of suits against the government, but a literal interpretation of Article III would seem to permit such suits.²⁷

The states owed huge debts, contracted in the prosecution of the war, and were much concerned that federal courts might force the payment of these obligations.²⁸ The phrase in Article III, Section 2, that the "judicial Power shall extend . . . to Controversies . . . between a State and Citizens of another State" was for this reason the center of much heated discussion, but such men as Hamilton, Madison, and Marshall assured the states that this in no way meant that a state should be subject to suit at the hands of a citizen. Their reasoning appears forced and illogical, but was apparently what the states wanted to hear. In *The Federalist* Hamilton took pains to allay the fears of the states:

25. The first edition of Blackstone was published during the period 1765-1769, and an American reprint appeared in Philadelphia in 1771. Burke is said to have remarked in a speech in 1775 that nearly as many Commentaries had been sold in America as in England. It was estimated that nearly 2,500 copies had been sold in the colonies by the time of the Declaration of Independence. See the discussion of the effect of Blackstone on colonial thought, Barker, *Essays on Government* 127 et seq. (1945).

26. *Pierre de Moitez v. The South Carolina*, Bee 422 (1781).

27. See Watkins, *op. cit. supra* note 2, at 52.

28. *Ibid.*

"It is inherent in the nature of sovereignty, not to be amenable to the suit of an individual *without its consent*. This is the general sense, and the general practice of mankind; and the exemption, as one of the attributes of sovereignty, is now enjoyed by the Government of every State in the Union. Unless, therefore, there is a surrender of this immunity in the plan of the Convention, it will remain with the States, and the danger intimated must be merely ideal. . . . there is no color to pretend that the State Governments would by the adoption of that plan, be divested of the privilege of paying their own debts in their own way, free from every constraint but that which flows from the obligations of good faith. The contracts between a nation and individuals are only binding on the conscience of the sovereign, and have no pretensions to a compulsive force. They confer no right of action, independent of the sovereign will. To what purpose would it be to authorize suits against States for the debts they owe? How could recoveries be enforced? It is evident, it could not be done, without waging war against the contracting State: and to ascribe to the Federal Courts, by mere implication, and in destruction of a pre-existing right of the State Governments, a power which would involve such a consequence, would be altogether forced and unwarrantable."²⁹

In their arguments for the ratification of the Constitution by Virginia, Madison and Marshall gave similar interpretations of the famous clause in Article III. Madison argued:

"Its jurisdiction in controversies between a state and citizens of another state is much objected to, and perhaps without reason. It is not in the power of individuals to call any state into court. The only operation it can have, is that, if a state should wish to bring a suit against a citizen, it must be brought before the federal court. This will give satisfaction to individuals, as it will prevent citizens, on whom a state may have a claim, being dissatisfied with the state courts. It is a case which cannot often happen, and if it should be found improper, it will be altered. But it may be attended with good effects.

". . . It appears to me that this can have no operation but this—to give a citizen a right to be heard in the federal

29. The Federalist, No. 81, at 567 (Dawson ed. 1873).

courts; and if a state should condescend to be a party, this court may take cognizance of it."³⁰

In a like vein Marshall expressed views later reiterated from the bench,³¹ now endowed with the force of judicial precedent:

"With respect to disputes between *a state and the citizens of another state*, its jurisdiction has been decried with unusual vehemence. I hope that no gentleman will think that a state will be called at the bar of the federal court. Is there no such case at present? Are there not many cases in which the legislature of Virginia is a party, and yet the state is not sued? It is not rational to suppose that the sovereign power should be dragged before a court. The intent is, to enable states to recover claims of individuals residing in other states. I contend this construction is warranted by the words. But, say they, there will be partiality in it if a state cannot be defendant—if an individual cannot proceed to obtain judgment against a state, though he may be sued by a state. It is necessary to be so, and cannot be avoided. I see a difficulty in making a state defendant, which does not prevent its being plaintiff. If this be only what cannot be avoided, why object to the system on that account? If an individual has a just claim against any particular state, is it to be presumed that, on application to its legislature, he will not obtain satisfaction? But how could a state recover any claim from a citizen of another state, without the establishment of these tribunals?"³²

Although the confident interpretations of Hamilton, Madison and Marshall may have coincided with what the states wanted to hear, their views were very early rejected by the Supreme Court, for in 1793 the famous case of *Chisholm v. Georgia*³³ held that the citizen of one state had the right to sue another state in *assumpsit*. Each of the justices rendered a separate opinion, but only one dissented from the holding of the court.

Mr. Justice Wilson's opinion is by far the most interesting, and presents an eloquent and persuasive denunciation of governmental immunity and the whole concept of sovereignty. He takes the position that the only place in the Constitution where the

30. 3 Elliot's Debates on the Federal Constitution 533.

31. *Cohens v. Virginia*, 19 U.S. 264 (1821); *United States v. Clarke*, 33 U.S. 436 (1834).

32. 3 Elliot's Debates on the Federal Constitution 555-556.

33. 2 U.S. 419 (1793).

word sovereignty might properly have been used is with respect to the people of the United States and notes that even then the "ostentatious declaration" was omitted. He does not specifically state his views as to whether or not the United States might also be sued, but certainly the whole tenor of his opinion would lead to that conclusion. Mr. Justice Blair denied the relevance of European structures, for he pointed out that the likeness that existed was not sufficiently great to justify analogical application, and that they are "completely destitute of any binding authority here." Both Mr. Justice Cushing and Mr. Chief Justice Jay raised the question of the right of a citizen to maintain a suit against the United States itself, but neither attempted to answer the *quaere*, although each recognized, in passing, that from a legal standpoint a distinction might be drawn between the two situations. The Chief Justice, however, made it abundantly clear that he felt it *desirable* that governments be made responsible before courts in such matters:

"I wish the state of society was so far improved, and the science of government advanced to such a degree of perfection, as that the whole nation could, in the peaceable course of law, be compelled to do justice, and be sued by individual citizens. Whether that is, or is not, now the case, ought not to be thus collaterally and incidentally decided: I leave it a question."³⁴

It is to be lamented that even after a hundred and fifty years, the hopes of men like Jay have not been fully realized.³⁵

Only one justice dissented from the decision of *Chisholm v. Georgia*. Mr. Justice Iredell gave a scholarly commentary on English practice, and detailed the development of the doctrine in England discussing the writs available to English subjects. In a purely historical critique, buttressed by congressional failure to indicate a change in the common law of England, he opined that the State of Georgia had an immunity similar to that of the English crown.

As has been pointed out by the Supreme Court in subsequent decisions³⁶ (in which the doctrine of sovereign immunity has been recognized), the analogy to English practice is totally

34. *Id.* at 478.

35. See the very critical opinion of Judge Frank in *Hammond-Knowlton v. United States*, 121 F. 2d 192 (2d cir. 1941).

36. *Langford v. United States*, 101 U.S. 341 (1879); *United States v. Lee*, 106 U.S. 196 (1882). Cf. *United States v. Shaw*, 309 U.S. 495 (1940).

unwarranted. *The maxim that the king can do no wrong has been squarely rejected by our highest court.*³⁷ We have no king, and there is none in the executive department (as in England) with authority to waive the application of the doctrine. Our basic governmental philosophy is totally opposed to that which would logically give rise to such undemocratic dogma. There is nothing in the Constitution which compels such a result, and much therein which would indicate the opposite conclusion. If there be a justification for governmental immunity in this country, it is not to be found in English precedent. Mr. Justice Iredell's dissent, based as it is on the historic immunity of the British crown, is completely inimical to the *modus vivendi* of the growth and development of American political philosophy.³⁸

The impact of the decision of *Chisholm v. Georgia* was immediate. The states owed vast debts as a result of the cost of prosecuting the Revolution, and they were much concerned that federal judgments might force the immediate payment of these obligations. The Eleventh Amendment was immediately proposed and ratified.³⁹ Thereafter a state could no longer be sued in federal court by the citizens of another state. This was not, however, a repudiation of the *rationale* of *Chisholm v. Georgia*,⁴⁰ for the states were concerned with finance—not legal theory. They very simply did not want to be sued for the payment of state obligations. Although the amendment did not by its terms apply to suits against the federal government, its indirect effect was to stay the hands of the court in future cases concerned with the problem of sovereign immunity.⁴¹

It was not until 1821 that the court again considered the doctrine of sovereign immunity, and by that time the change in judicial personnel and the indirect impact of the Eleventh Amendment had taken its toll. In *Cohens v. Virginia*⁴² Chief Justice Marshall reaffirmed in dictum the position that he had taken in debate before the Virginia Convention. The Chief

37. *Langford v. United States*, 101 U.S. 341 (1879).

38. Laski, *Responsibility of the State in England*, 32 *Harv. L. Rev.* 447 (1919).

39. "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State."

40. *Watkins*, *op. cit.* supra note 2, at 53, 54.

41. *Cohens v. Virginia*, 19 U.S. 264 (1821).

42. *Ibid.*

Justice did not attempt, however, to justify the principle on legal, logical, or historical grounds, but simply stated in passing:

"The universally received opinion is, that no suit can be commenced or prosecuted against the United States; that the judiciary act does not authorize such suits."⁴³

In 1834 Marshall again asserted the non-suability of the federal government:

"As the United States are not suable of common right, the party who institutes such suit must bring his case within the authority of some act of congress, or the court cannot exercise jurisdiction over it."⁴⁴

In 1846, the court denied jurisdiction of a federal court to enjoin the United States from collecting a judgment previously rendered in its favor,⁴⁵ and in the same year it denied the authority of a state court to attach money in the hands of a ship's purser due as wages to sailors of the famous battleship *Constitution*.⁴⁶

In 1850 the court confidently stated:

"No maxim is thought to be better established or more universally assented to, than that which ordains that a sovereign, or a government representing the sovereign, cannot ex delicto be amenable to its own creatures or agents employed under its own authority for the fulfilment merely of its own legitimate ends."⁴⁷

These statements are typical of the opinions rendered prior to the end of the Civil War.⁴⁸ Excepting the opinion of *Chisholm*

43. *Id.* at 411-412.

44. *United States v. Clarke*, 33 U.S. 436, 443 (1834).

45. *United States v. McLemore*, 45 U.S. 286, 288 (1846), wherein the Court said, "There was no jurisdiction of this case in the Circuit Court, as the government is not liable to be sued, except with its own consent, given by law. Nor can a decree or judgment be entered against the government for costs."

46. *Buchanan v. Alexander*, 45 U.S. 20 (1846).

47. *Hill v. United States*, 50 U.S. 386, 389 (1850).

48. See *Reeside v. Walker*, 52 U.S. 272 (1850); *Florida v. Georgia*, 58 U.S. 478 (1854); *Beers v. Arkansas*, 61 U.S. 527, 529 (1857), wherein the Court stated, "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."

v. Georgia (which denied the immunity of the State of Georgia), no case had ever discussed the justification or desirability of the application of the concept. In the years following the Civil War, the court suddenly made an *ex post facto* consideration of its adoption of the doctrine, and the rationalizations that resulted were conflicting and confused—agreeing only in their conclusion that the federal government is immune from suit, unless it has given its express consent by congressional act.

In 1865 the highest court of Massachusetts made an exhaustive study of the whole concept.⁴⁹ Justice Gray gave a learned and scholarly review of the English historical background, and noted that earlier books had based their conclusion upon the theory that the king could not by his own writ command himself, but then stated what he considered to be the broader reason—“that it would be inconsistent with the very idea of supreme executive power, and would endanger the performance of the public duties of the sovereign, to subject him to repeated suits as a matter of right, at the will of any citizen, and to submit to judicial tribunals the control and disposition of his public property, his instruments and means of carrying on the government in war and peace, and the money in his treasury.”

Some seventy-five years after the decision of *Chisholm v. Georgia*, the Supreme Court attempted a rational justification of the immunity doctrine. In 1868 and 1869 three cases were decided which taken together place the justification of the doctrine of sovereign immunity on the ambiguous phrase “policy imposed by necessity.”

“Every government has an inherent right to protect itself against suits, and if, in the liberality of legislation, they are permitted, it is only on such terms and conditions as are prescribed by statute. 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. It would be impossible for it to collect revenue for its support, without infinite embarrassments and delays, if it was subject to civil processes the same as a private person.” *Nichols v. United States*.⁵⁰

“It is a familiar doctrine of the common law, that the sovereign cannot be sued in his own courts without his con-

49. *Briggs v. Light-Boats*, 11 Allen 157 (Mass. 1865).

50. 74 U.S. 122, 126 (1868).

sent. The doctrine rests upon reasons of public policy; the inconvenience and danger which would follow from any different rule. It is obvious that the public service would be hindered, and the public safety endangered, if the supreme authority could be subjected to suit at the instance of every citizen, and consequently controlled in the use and disposition of the means required for the proper administration of the government. The exemption from direct suit is, therefore, without exception." *The Siren*.⁵¹

"No government⁵² has ever held itself liable to individuals for the misfeasance, laches or unauthorized exercise of power by its officers and agents.

* * *

"The general principle which we have already stated as applicable to all governments, forbids, on a policy imposed by necessity, that they should hold themselves liable for unauthorized wrongs inflicted by their officers on the citizen, though occurring while engaged in the discharge of official duties." *Gibbons v. United States*.⁵³

This "necessity" justification is comforting only in so far as it reflects a judicial attempt to analyze the basis of a doctrine that it had so long ago accepted. The reasoning of the court is not sound. Other countries have accepted financial responsibility, with no apparent loss of efficient or effective governmental service.⁵⁴ Even in this country, congressional acts have by now largely emasculated the concept of sovereign immunity, and who would argue that the effective control of our federal government has diminished! If necessity were in fact the justification, then its application should be limited to the narrow area of actual need.⁵⁵ Why is it "necessary" that our government be legally free from contracts solemnly entered into by it with private citizens? Congress has long ago conceded responsibility in such fields, despite judicial statements that sovereign immunity is derived from a "policy imposed by necessity."

51. 74 U.S. 152, 153-154 (1868).

52. Professor Borchard stated that the justice's "horizon was extremely limited, for he overlooked the fact that practically every country of western Europe has long admitted such liability." *Government Liability in Tort*, 34 *Yale L.J.* 1, 2 (1924).

53. 75 U.S. 269, 275 (1868).

54. See note 52 *supra*.

55. See Block, *Suits Against Government Officers and the Sovereign Immunity Doctrine*, 59 *Harv. L. Rev.* 1060 (1946).

Finally in 1879, it was expressly urged upon the court that the English maxim that the king can do no wrong is applicable in this country, and the court clearly and affirmatively rejected the notion.⁵⁶ Pointing out that the President is the only individual to whom the doctrine could possibly be applicable, the court noted that the Constitution itself recognized that he could do wrong and provided for impeachment procedures.

"It is to be observed that the English maxim does not declare that the government, or those who administer it, can do no wrong; for it is a part of the principle itself that wrong may be done by the governing power, for which the ministry, for the time being, is held responsible; and the ministers personally, like our President, may be impeached; or, if the wrong amounts to a crime, they may be indicted and tried at law for the offence.

"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 has an existence in this country."⁵⁷

Here at long last is a *complete judicial refutation* of the applicability of English precedent on the issue of the doctrine of sovereign immunity. If theoretical justification were to be found, the court would have to look to other quarters.

In *United States v. Lee*⁵⁸ the court admitted that the doctrine had been accepted in this country without discussion. The court attempted to determine the reasons behind the doctrine, and upon consideration it rejected in turn each of the prior attempts at justification, and itself put forward a new explanation. It rejected as inapplicable the suggestion that this country might base its acceptance of the doctrine on the hypothesis that in England the king could not send writs to himself to command the king to appear in the king's court, for it says that here process runs in the name of the President, and could be served on the Attorney General. That it would be degrading for the government to appear as defendant before the courts of its creation was likewise rejected, for the government is constantly appearing before those courts, "and submitting its rights as against the citizen to their judgment." The reasoning of Justice

56. *Langford v. United States*, 101 U.S. 341 (1879).

57. *Id.* at 343.

58. 106 U.S. 196 (1882).

Gray in *Briggs v. Light-Boats*⁵⁹ was discredited by the majority opinion, for it noted that "no person in the government exercises supreme executive power, or performs the duties of a sovereign." By implication the "necessity" justification was also discarded, for in the *Lee* case the court gave this explanation of the doctrine's acceptance:

"It seems most probable that it has been adopted in our courts as a part of the general doctrine of publicists, that the supreme power in every State, wherever it may reside, shall not be compelled, by process of courts of its own creation, to defend itself from assaults in those courts."⁶⁰

The court itself did not appear to accept this as a *justification*—but only offered it as an *explanation* of a course of conduct previously followed by the court. It states that the people are sovereign, and seems to have much sympathy with the views expressed by Mr. Justice Wilson in *Chisholm v. Georgia*. And the *Lee* case reflects a judicial desire to limit the application of the immunity doctrine.⁶¹

But the period of restriction was short-lived, for Mr. Justice Holmes, a strong protagonist, was appointed to the Supreme Court and took with him fixed ideas of Austinian jurisprudence. In colorful language he twice defended the doctrine of sovereign immunity on logical grounds, calling to his aid the wisdom of Bodin and Hobbes. In *Kawananakoa v. Polyblank*⁶² Justice Holmes stated:

"Some doubts have been expressed as to the source of the immunity of a sovereign power from suit without its own permission, but the answer has been public property since before the days of Hobbes. (Leviathan, c. 26, 2.) A sovereign

59. 11 Allen 157 (Mass. 1865), discussed supra p. 487.

60. 106 U.S. 196, 206 (1882).

61. For another instance of a restrictive attitude towards the immunity doctrine, see *The Bank of The United States v. The Planters Bank of Georgia*, 22 U.S. 904 (1824), wherein Chief Justice Marshall held that when a government becomes a partner in a trading company, it divests itself of its sovereign character insofar as the transactions of the company are concerned, and does not communicate to the company its privileges and prerogatives. (Followed in *Briscoe v. Bank of Kentucky*, 36 U.S. 256 [1837].) See also *The Davis*, 77 U.S. 15 (1869), wherein Justice Miller held that a lien existed against personal property of the United States for salvage services rendered, even though the same could not be enforced against the government itself. He reasoned that since it was in the possession of a carrier under contract with the government, it was not actually in the *possession* of the government, and therefore process could be carried out against the property.

62. 205 U.S. 349, 353 (1907).

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. '*Car on peut bien recevoir loy d'autrui, mais il est impossible par nature de se donner loy.*' Bodin, *Republique*, 1, c. 8. Ed. 1629, p. 132. Sir John Eliot, *De Jure Maiestatis*, c. 3. *Nemo suo statuto ligatur necessitative.* Baldus., *De Leg. et Const., Digna Vox* (2d ed., 1496, fol. 51b. Ed. 1539, fol. 61)."

And again in *The Western Star*,⁶³ he wrote:

"The United States has not consented to be sued for torts, and therefore it cannot be said that in a legal sense the United States has been guilty of a tort. For a tort is a tort in a legal sense only because the law has made it so."

Justice Holmes' position has been roundly criticized.⁶⁴ Even the internal validity of his reasoning has not been immune from attack, for there appears to be a certain internal inconsistency. He of course admits that the sovereign is *not immune* when it has consented to be sued, but then states confidently what he puts forth as universal truth—"there can be no legal right as against the authority that makes the law on which the right depends."

Justice Holmes of course admits that the sovereign is not immune from suit when it has consented to be sued. But what is created when the sovereign so consents? Is not a *right* thereby created? Is it not a *legal right*? If so, whom is it against? Is it not in fact a "legal right as against the authority that makes the law on which the right depends"? Yet Justice Holmes states as a universal rule that on a "logical" ground, there can be no such right.

It is further stated that on a "practical" ground, there *can be no such right*. Familiar with the protection afforded by the Tucker Act,⁶⁵ practical businessmen of today would be amazed if informed by their attorney that a contract with the government afforded them no *rights*.

63. 257 U.S. 419, 433 (1922).

64. See the excellent discussion in Borchard, *Governmental Responsibility in Tort*, V, 36 *Yale L.J.* 757 et seq. (1927), in which an excellent analysis of the Holmes approach is given, along with generous citation of authorities.

See also Laski, *Responsibility of the State in England*, 32 *Harv. L. Rev.* 447, 464 et seq. (1919).

65. 28 U.S.C. § 1346(a)(2) (1948).

But it is not the purpose of this paper to make a philosophical critique of Holmes or his reasoning. It is, however, important to note that his conclusions are underpinned by certain basic assumptions which may or may not be in harmony with what present day Americans expect (and demand) of their government. His discussion assumes as granted an Austinian concept of law. But it has been well stated that:⁶⁶

“. . . an Austinian state is incompatible with the substance of democracy. For the latter implies responsibility by its very definition; and the Austinian system is, at bottom, simply a method by which the fallibility of men is concealed imposingly from the public view.”

Justice Holmes has himself provided the eloquent retort to his “logic” justification of the doctrine of sovereign immunity:⁶⁷

“. . . other tools are needed besides logic. . . . The life of the law has not been logic: it has been experience.”

What then is the *experience* of this country? The birth and growth of America has been a response to a demand for responsible government. As the scope of governmental activity has increased, Congress has gradually relinquished the government's claim to irresponsibility. The process has been slow and painful, and justice has in many instances been denied, but the trend is undoubtedly towards governmental acceptance of liability for the risks that its activities create. Today government is nothing so much as a giant public service corporation,⁶⁸ and there is no valid reason why citizens dealing with this colossus should do so at their peril, with no right to seek justice from their courts. Our *experience* has been that as our country has grown in this modern industrial society, governmental activities and contacts have quite naturally increased. The risks of such activity should not be borne by the citizen who by chance is injured by govern-

66. Laski, *Responsibility of the State in England*, 32 Harv. L. Rev. 447, 466 (1919). See also Borchard, *Governmental Responsibility in Tort*, V, 36 Yale L.J. 757, 758-759 (1927), who notes that he was unable to find anyone in Continental Europe who has “suggested either the axiomatic character of procedural immunity from suit or its alleged analytical explanation,” despite what Professor Borchard considers to be their “equally profound knowledge of the political and legal theories of Bodin and Hobbes.”

67. Holmes, *The Common Law* 1 (1881).

68. Laski, *Responsibility of the State in England*, 32 Harv. L. Rev. 447, 452 (1919), in which he states “The modern state is, in the American phrase, nothing so much as a great public-service corporation.” He states elsewhere (p. 451) that “Responsibility on the part of the Crown does not involve its degradation; it is nothing more than the obvious principle that in a human society acts involve consequences and consequences involve obligation.”

mental contact. Governmental liability for the risks that it itself creates is the natural concomitant of a dynamic *democratic and responsive* government. More and more often citizens of this country have hailed their government before judicial tribunals, and they have collected huge judgments for the infringement of *alleged rights*. The long arm of government has not been thereby crippled or cut off.

Subsequent decisions lack the self-assurance of Mr. Justice Holmes. The acceptance continues, but the reasons given therefor are general and uncertain. In 1939 Mr. Justice Frankfurter stated:⁶⁹

“The starting point of inquiry is the immunity from unconsented suit of the government itself. As to the states, legal responsibility was written into the Eleventh Amendment; as to the United States, it is derived by implication. *Monaco v. Mississippi*, 292 U.S. 313, 321. For present purposes it is academic to consider whether this exceptional freedom from legal responsibility rests on the theory that the United States is deemed the institutional descendant of the Crown, enjoying its immunity but not its historic prerogatives, cf. *Langford v. United States*, 101 U.S. 341, 343, or on a metaphysical doctrine ‘that there can be no legal right as against the authority that makes the law on which the right depends.’ *Kawananakoa v. Polyblank*, 205 U.S. 349, 353.”

Neither of Justice Frankfurter’s suggested justifications is satisfying, and neither appears to have the enthusiastic support of Justice Frankfurter, who characterized his discussion as “academic.” Justice Holmes’ “metaphysical” justification has already been discussed, and even Justice Frankfurter apparently admits that prior jurisprudence does not sustain his alternative suggestion.

In 1940 the court abandoned any attempt to locate precisely the origins of the concept, and decided that numerous factors had contributed to its existence.⁷⁰

“The reasons for this immunity are imbedded in our legal philosophy. They partake somewhat of dignity and decorum, somewhat of practical administration, somewhat of the political desirability of an impregnable legal citadel

69. *Keifer & Keifer v. R.F.C. and Regional Agricultural Credit Corp.*, 306 U.S. 381, 388 (1939).

70. *United States v. Shaw*, 309 U.S. 495, 501 (1940).

where government as distinct from its functionaries may operate undisturbed by the demands of litigants. A sense of justice has brought a progressive relaxation by legislative enactments of the rigor of the immunity rule. As representative governments attempt to ameliorate inequalities as necessities will permit, prerogatives of the government yield to the needs of the citizen. . . . When authority is given, it is liberally construed. As to these matters no controversy exists."

Thus the matter rests—a confused, conflicting, but tenacious acceptance of an outmoded and undemocratic dogma. Perhaps it is now too late for the court to make a *volte face*, and completely reject the doctrine—as historically, theoretically and practically unsound and undesirable. Nevertheless, corrective legislation is needed—legislation which would combine and integrate our present law, and eliminate the quirks and injustices that must characterize a hodge-podge, sporadic legislative process. Pending such legislation, the courts should by interpretation give the widest possible effect to statutes waiving sovereign immunity in various fields. The evident spirit of these laws should be carried out. Procedural anachronisms should not be employed to limit the liberal policy of such statutes. The courts might use as their guide the phrase inextricably linked with the history of English attempts to evade the tentacles of the immunity concept—"Let right be done!"