HOWARD J. TRIENENS VISITING SCHOLAR PROGRAM

IS JUSTICE IRRELEVANT?

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About 2,500 years ago, Socrates participated in a discussion of the idea of justice. Among those who took part in the dialogue were Cephalus, a serene and elderly gentleman of considerable means, and Thrasygamachus, a younger and more belligerent antagonist of Socrates. Their conversation did not produce a clear and unequivocal definition of the concept, but it did identify two rather different ways of thinking about justice. On the one hand, Cephalus suggested that justice consisted of speaking the truth and paying one's debts. On the other hand, Thrasygamachus proclaimed that justice is nothing more than “the interest of the stronger.” Presumably, in Cephalus’s opinion, a ruler as well as a citizen should tell the truth and pay his debts, whereas for Thrasygamachus even false propaganda and the appropriation of private property would be just whenever the ruler is strong enough to impose his will on his subjects. The question I propose to address is whether either of these definitions of justice—or perhaps another description of the concept—has any relevance to the doctrine of sovereign immunity as it is applied by the federal judiciary.

I begin by noting that the word “justice” is not defined in any federal statute of which I am aware. The importance of the concept is nevertheless suggested by its identification as the second of the six purposes that motivated the establishment of the Constitution of the United States. It is always worth remembering that the first sentence in our Constitution reads as follows:

We the People of the United States, in Order to form a more perfect Union,

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2 Thrasygamachus said that “justice or right is simply what is in the interest of the stronger party.” Id. at 77 (footnote omitted).
establish Justice, insure domestic Tranquility, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America.\(^3\)

Notably, the Preamble does not merely state an intent to create procedures for the resolution of private disputes or to establish administrative machinery for answering disputed questions of law or fact. Rather, its abstract reference to justice—like its reference to “domestic tranquility,” the “general welfare,” and “the blessings of liberty”—unquestionably refers to a substantive idea or ideal, rather than to governmental machinery.

That idea may have broader and more profound content than the mundane notion that people should pay their debts and tell the truth, and surely the Framers did not intend to adopt Thrasybulus’s suggestion that the interest of the stronger should provide the best guidepost for resolving disputes. Nevertheless, for our purposes this afternoon, I shall assume that federal officials interpreting the Constitution should accept either Cephalus’s or Thrasybulus’s definition of justice if the concept has any relevance to their work.

Although neither Cephalus nor Thrasybulus was cited by the litigants or the Court, the conflict between their respective ideas of justice was squarely presented in the first important case to be decided by the United States Supreme Court: *Chisholm v. Georgia*.\(^4\) The transaction that gave rise to the litigation occurred in 1777, when the Executive Council of Georgia authorized the purchase of over $169,000 worth of supplies for American troops quartered near Savannah.\(^5\) The South Carolina merchant who made the sale died before collecting the purchase price but his executor—a man named Chisholm—endeavored to collect the account receivable from the State of Georgia.\(^6\) The claim was not finally settled until 1847,\(^7\) but I shall comment on only one chapter in the long and interesting history of that dispute. The question presented to the Supreme Court was whether a federal court had jurisdiction over a suit brought by a South Carolina resident against the sovereign State of Georgia.\(^8\)

By a vote of four to one the five Justices of the Supreme Court held that the state was subject to suit in a federal forum.\(^9\) The result was explained in separate opinions by each of the members of the Court, in

\(^3\) U.S. CONST. pmbl.
\(^4\) 2 U.S. (2 Dall.) 419 (1793).
\(^6\) Id. at 21-22.
\(^7\) Id. at 29.
\(^8\) See, e.g., Chisholm, 2 U.S. at 453 (Wilson, J.).
\(^9\) Id. at 450-51, 466, 469, 479 (Blair, Wilson & Cushing, JJ., and Jay, C.J., respectively, voting that a state is subject to suit in a federal forum); id. at 449-50 (Iredell, J., dissenting).
which they discussed history, the plan and language of the Constitution and, at least in Justice Wilson’s opinion, an idea of justice not so different from Cephalus’s. Justice Wilson’s view of justice is reflected in two passages from his opinion:

A State, like a merchant, makes a contract. A dishonest State, like a dishonest merchant, willfully 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. Before a claim, so contrary, in its first appearance, to the general principles of right and equality, be sustained by a just and impartial tribunal, the person, natural or artificial, entitled to make such claim, should certainly be well known and authenticated. Who, or what, is a sovereignty? What is his or its sovereignty? On this subject, the errors and the mazes are endless and inexplicable.10

Then, after reviewing precedents for suits against the sovereign— including an action by the son of Christopher Columbus against King Ferdinand and the English practice prior to the reign of Edward I11—Justice Wilson considered the Preamble to the Constitution:

Another declared object is, “to establish justice.” This points, in a particular manner, to the Judicial authority. And when we view this object in conjunction with the declaration, “that no State shall pass a law impairing the obligation of contracts;” we shall probably think, that this object points, in a particular manner, to the jurisdiction of the Court over the several States. What good purpose could this Constitutional provision secure, if a State might pass a law impairing the obligation of its own contracts; and be amenable, for such a violation of right, to no controlling [sic] judiciary power? We have seen, that on the principles of general jurisprudence, a State, for the breach of a contract, may be liable for damages.12

The specific holding in Chisholm was reversed by the ratification of the Eleventh Amendment two years later in 1795. In due course, the Supreme Court embraced the doctrine of sovereign immunity and, with it, a vision of justice more akin to that of Thrasyvoulos. Its reasons for doing so, however, have never been entirely clear. Originally, the only reason given was tradition: the fact that sovereign immunity had “always been treated as an established doctrine.”13 Later, in an opinion written in 1940, the Court gave this explanation for what it characterized

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10 Id. at 456 (Wilson, J.).
11 Id. at 459-60 (Wilson, J.).
12 Id. at 465 (Wilson, J.).
13 The first recognition of the general doctrine by this court is to be found in the case of Cohen v. Virginia, [19 U.S. (6 Wheat.)] 264 [(1821)].

The terms in which Mr. Chief Justice Marshall there gives assent to the principle does not add much to its force. “The counsel for the defendant,” he says, “has laid down the general proposition that a sovereign independent State is not liable except by its own consent.” This general proposition, he adds, will not be controverted.

And while the exemption of the United States and of the several States from being subjected as defendants to ordinary actions in the courts has since that time been repeatedly as-
as "the postulate that without specific statutory consent, no suit may be brought against the United States": 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 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 [to sue the federal government], it is liberally construed.14

More recently, the Court has pointed out that the so-called "impregnable legal citadel" had its origins in the English feudal system. Describing those origins, Pollock and Maitland noted that 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. The King's immunity rested primarily on the structure of the feudal system and secondarily on a fiction that the King could do no wrong.15

Blackstone's commentaries did refer to the fiction that the King could do no wrong.16 Nevertheless, I think it is somewhat misleading to suggest that the immunity doctrine rests on this basis when it has been obvious for centuries that English monarchs were capable of wrongdoing. The real fiction behind the doctrine is not that the King could do no wrong, but rather the 16th Century tenet that the remedy for any regal wrongdoing was a matter reserved for still higher authority. Consistent with their belief in the divine source of their right to occupy the throne, English monarchs believed that they were answerable only to God for their sins.17 Thus, for example, in his dramatic history of King Richard

16 1 WILLIAM BLACKSTONE, COMMENTARIES *239 ("The King, moreover, is not only incapable of doing wrong, but ever of thinking wrong: he can never mean to do an improper thing: in him is no folly or weakness.").
17 The explanation for Queen Elizabeth I's reluctance to punish Mary for plotting to usurp her throne illustrates the point:

For the Queen, rebellion against a prince's divinely constituted authority represented the pinnacle of human wickedness, the ultimate sinful deed, which put its perpetrators beyond redemption. As a monarch she felt strongly that there could be no deviation from orthodox political theory, which propounded that, since princes had been sent by God to rule nations, obedience to one's sovereign was a subject's sacred duty. "Let every soul submit himself unto the authority of the higher powers," admonished one tract on the subject, written some fifty years before the Queen's accession. "There is no power but of God; the powers that be are ordained of God. Whosoever therefore resisteth the power, resisteth the ordinance of God." None was exempt from this obligation, which lay on all individuals within a Christian society, and there were no circumstances in which a withdrawal of allegiance could be legitimate. Even if a prince was
II, Shakespeare illustrated this orthodox view when he had the Bishop of Carlisle describe how the Lord would react to Henry's usurpation of the throne.\textsuperscript{18} The availability of a divine remedy against a wrongdoing sovereign may well justify civil immunity in a jurisdiction where the King is pictured as the vicar of God, but in a country such as ours, where the Constitution has erected a wall that separates church from state, the divine remedy theory leaves much unanswered. In short, this type of religious or historical explanation for the doctrine of sovereign immunity is no more relevant than the mistaken notion that the King can do no wrong.

It is interesting to note that the Court nevertheless offered a remarkably similar justification for the doctrine in *Hans v. Louisiana*:\textsuperscript{19}

It is not necessary that we should enter upon an examination of the reason or expediency of the rule which exempts a sovereign State from prosecution in a court of justice at the suit of individuals. This is fully discussed by writers on public law. It is enough for us to declare its existence. The legislative department of a State represents its polity and its will; and is called upon by the highest demands of natural and political law to preserve justice and judgment, and to hold inviolate the public obligations. Any departure from this rule, except for reasons most cogent, (of which the legislature, and not the courts, is the judge,) never fails in the end to incur the odium of the world, and to bring lasting injury upon the State itself. But to deprive the legislature of the power of judging what the honor and safety of the State may require, even at the expense of a temporary failure to discharge the public debts, would be attended with greater evils than such

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\textsuperscript{18} My Lord of Hereford here, whom you call king, Is a foul traitor to proud Hereford's king: And if you crown him, let me prophesy: The blood of English shall manure the ground, And future ages grieve for this foul act; Peace shall go sleep with Turks and infidels, And in this seat of peace tumultuous wars Shall kin with kin and kind with kind confound; Disorder, horror, fear, and mutiny Shall here inhabit, and this land be call'd The field of Golgotha and dead men's skulls.

\textsuperscript{19} 134 U.S. 1 (1890).

\textsuperscript{18} My Lord of Hereford here, whom you call king,
failure can cause.\textsuperscript{20} This rationale, of course, ultimately operates as an endorsement of the Thrasymachus definition of justice because it identifies the interest of the state as the justification for the doctrine.

As an alternative explanation of the immunity doctrine, some have argued that it rests on nothing more mysterious than the sovereign's right to determine what suits may be brought in the sovereign's own courts. Thus, Justice Holmes stated that 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."\textsuperscript{21} I have at least two difficulties with this statement as an explanation of the sovereign immunity defense. First, it is nothing more than a restatement of the obvious proposition that a citizen may not sue the sovereign unless the sovereign has violated the citizen's legal rights. It cannot explain application of the immunity defense in cases like \textit{Chisholm}, in which it is assumed that the plaintiff's rights have in fact been violated—and those cases are, of course, the only ones in which the immunity defense is needed. Second, Holmes's statement does not purport to explain why a general grant of jurisdiction to federal courts should not be treated as an adequate expression of the sovereign's consent to suits against itself as well as to suits against ordinary litigants.

In all events, whatever the source of the doctrine may be,\textsuperscript{22} and despite the periodic and uniformly critical comment on the doctrine by respected scholars,\textsuperscript{23} the doctrine is unquestionably alive and well today. Indeed, three recent applications of the doctrine would be excellent candidates for inclusion in a case book for a course on justice led by Thrasymachus.

In \textit{United States v. James},\textsuperscript{24} by a six to three vote, the Supreme Court held that the federal government was immune from liability not only for property damage associated with flood control projects, but also for personal injuries caused by gross negligence in its operation of waters used for recreational purposes such as fishing, swimming and water-ski-

\textsuperscript{20} \textit{Id.} at 21.

\textsuperscript{21} Kawananakoa v. Polyblank, 205 U.S. 349, 353 (1907).

\textsuperscript{22} This failure to specify the basis for the sovereign immunity doctrine with any clarity can be seen as a particularly vivid expression of Thrasymachusian justice. Not only is the state freed from accountability for its actions, but it is also freed from the need to justify its own lack of accountability with any degree of conviction. At bottom, that the state's interests are served is presumed to be sufficient reason.


\textsuperscript{24} 478 U.S. 597 (1986).
The decision is the subject of a twenty-five page article in the Catholic University Law Review reaching this conclusion:

Sovereign immunity under section 702c is incompatible with the modern principles of justice and responsibility inherent under the FTCA. The Court’s decision in James to perpetuate sovereign immunity does violence to the congressional intent behind the FTCA. Congress should act promptly to address the public policy concerns raised by James.

In United States Department of Energy v. Ohio, again by a six to three vote, the Court held that sovereign immunity protected the federal agency from liability for water pollution caused by its operation of a uranium processing plant. As Justice White’s dissenting opinion explained, a fair reading of the citizen suit provisions of the Clean Water Act demonstrated that Congress intended to waive sovereign immunity for civil penalties under the statute. The majority’s contrary conclusion was driven by its reliance, not merely on the judge-made doctrine of sovereign immunity itself, but on a judge-made extension of the doctrine that dictates that any waiver of the immunity “must be ‘construed strictly in favor of the sovereign.’” Nowhere in the Ohio opinion, nor in the opinions that it cites, has the Court explained why it is appropriate to embellish the immunity doctrine with a rule that strictly construes statutes enacted to ameliorate the harsh consequences of the doctrine. Also unexplained is the departure from recognized canons of statutory construction that would support a liberal interpretation favoring the interests of the beneficiaries of the legislation, rather than the interests of the party responsible for drafting the statute.

In United States v. Nordic Village, Inc., the Court—this time by a seven to two majority—took yet another step down the path charted by Thrasymachus. In that case an officer of an insolvent corporation appropriated corporate funds and used them to discharge a personal tax obligation. If the recipient of the stolen property had been a private creditor rather than the federal government, the bankruptcy trustee could have recovered the funds under the preference provisions of the Bankruptcy Code. Moreover, the text of the Code plainly states that

25 Id. at 612.
29 112 S. Ct. at 1640-44 (White, J., dissenting).
30 Id. at 1633 (citations omitted).
33 Id. at 1013.
recovery against “governmental units”—a term that would seem to include the government of the United States—was also authorized. The intent to authorize such recovery was confirmed by comments in the legislative history that “the government is subject to avoidance of preferential transfers.” Nevertheless, the Court held that the government could retain its ill-gotten gains.

The majority’s conclusion was supported by what it characterized as a “plausible” reading of the statutory text, buttressed not only by the judge-made rule of strict construction of waivers of sovereign immunity, but also by still another piece of judicially-crafted armor plate—a refusal even to look at legislative history that might cast doubt on its reading of the statute. The current Court’s practice is well summarized in this illuminating paragraph:

The foregoing are assuredly not the only readings of subsection (c), but they are plausible ones—which is enough to establish that a reading imposing monetary liability on the Government is not “unambiguous” and therefore should not be adopted. Contrary to respondent’s suggestion, legislative history has no bearing on the ambiguity point. As in the Eleventh Amendment context, the “unequivocal expression” of elimination of sovereign immunity that we insist upon is an expression in statutory text. If clarity does not exist there, it cannot be supplied by a committee report.

In my dissenting opinion in the Nordic Village case, I noted that this sort of judicial lawmaking generated costs as well as tragic consequences for individual citizens engaged in litigation against the sovereign. Those consequences prompted the author of the Catholic University Law Review article about the James case to ask Congress to address the public policy concerns raised by that decision. As a member of the faculty of the Northwestern Law School who has been guaranteed tenure for a period of at least 48 hours, I am prompted to suggest that a broader inquiry into the justice of the doctrine of sovereign immunity would be appropriate. The tentacles of that judge-made doctrine deposit their seeds of injustice not only in the numerous recreational facilities that are a by-product of our flood control legislation, in the waters that are polluted by illegally-operated federal facilities, and in the rising tide of bankruptcy proceedings in all parts of the country, but also, no doubt, in numerous areas of litigation that have not yet completely surfaced.

36 See id. at 1018 n.3 (citation omitted) (Stevens, J., dissenting).
37 Id. at 1017.
38 Id. at 1016.
39 Id. at 1014-15.
40 Id. at 1016.
41 Id. (citation omitted).
42 Id. at 1021 (Stevens, J., dissenting).
43 See supra note 26 and accompanying text.
In suggesting a broader examination of the entire doctrine of sovereign immunity, I endorse the views expressed in an unusually perceptive article written by an associate professor of law at the University of Virginia in 1970. Before referring to an area in which he thought that the doctrine of federal sovereign immunity had "made its most blatant affront to the basic precepts of justice," Professor Scalia introduced his subject with the following paragraph:

It is the inherited wisdom of the American bar that responsible professional comment and criticism are the principal restraints upon judicial arbitrariness at the highest level and major influences in the continuing development of court-made law. If there is one legal development (or, perhaps more accurately, nondevelopment) found in the pages of the United States reports during the present century which would cause the most credulous observer to doubt the truth of this axiom, it is the continued good health of the doctrine of sovereign immunity. Since the end of the last century, learned members of the legal profession have been continuously attacking the roots and branches of that judicially planted growth, calling into question not only its utility but even the legitimacy of its alleged origins. Oddly enough, this criticism has had a palpable effect upon federal legislators, who, according to our agreed-upon notions of the legal process, are supposed to be moved not by learned articles but by lobbies and ballot boxes; it has also had its influence, particularly noticeable in very recent years, upon state supreme courts. But if the United States Supreme Court is to be judged by what it has done concerning the doctrine, as opposed to what it has from time to time said, criticism seems to have confirmed the Court in the error of its ways. Not only has there been no judicial elimination of the doctrine of sovereign immunity as it applied to the federal government, but recently the scope of the doctrine has in some important respects been extended beyond what it was in 1882.45

Perhaps it is too much to ask Congress to abolish the judge-made doctrine entirely, although it unquestionably has the power to do so. After all, there are certain situations in which the doctrine of sovereign immunity undeniably provides the federal government with justified protection against burdensome litigation and also limits the degree to which the judiciary can second-guess decisions made by the Executive. Moreover, particularly when the federal deficit is a matter of overriding public concern, it may well be appropriate to place reasonable limits on the government's potential liability. In my judgment, however, the legitimate interests served by the ancient doctrine of immunity can be better protected by legislative rules, or even judge-made rules, that are responsive to those specific concerns rather than by an archaic blunderbuss. For example, in Boyle v. United Technologies Corp.,46 to protect what it saw

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45 Id. at 867-68 (footnotes omitted).
as a "uniquely federal interest" in the federal procurement system, the Court established a common law "government contractor defense" shielding defense contractors from liability for design defects. As Boyle makes clear, the Court has ample power to fashion rules safeguarding specific federal interests and need not resort to such a sweeping defense as sovereign immunity.

At the very least, it seems appropriate to suggest that if an idea or ideal of justice has any relevance in our legal system, Congress should consider reversing the rule of strict construction that is supported by nothing more than irrelevant history and Thrasymachus's vision of justice as the interests of the stronger. That judge-made rule might well be replaced by a doctrine that is consistent with the advice of an Illinois lawyer who obviously favored Cephalus's concept of justice. In his State of the Union Message of 1861, Abraham Lincoln said:

It is as much the duty of Government to render prompt justice against itself, in favor of its citizens, as it is to administer the same between private individuals.

Our lawmakers and our judges should heed that advice.

47 Id. at 505-06.
48 Id. at 512.
49 My citation of Boyle for this proposition should not, of course, be construed as an endorsement of that decision. Indeed, I agree with the following comment by Professor Green and Dean Matasar: "The majority opinion in Boyle is a curious contrast of paying mechanistic homage to congressional direction while engaging in freewheeling judicial lawmaker; the contrast is difficult to reconcile." Michael D. Green & Richard A. Matasar, The Supreme Court and the Products Liability Crisis: Lessons from Boyle's Government Contract Defense, 63 S. CAL. L. REV. 637, 709 (1990). The Boyle opinion does, however, provide dramatic evidence supporting the proposition that the Court has ample power to modify its own sovereign immunity doctrine.

50 CONG. GLOBE, 37th Cong., 2d Sess., app. at 2 (1861).