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GOVERNMENT ACCOUNTABILITY

JAMES BARCLAY SMITH

THERE IS A great amount of material on this subject. Generally, it takes an unfavorable view of the so-called sovereign immunity rule. Factual niceties are cumulated with a critical analysis to dwarf by bulk and height the mass voice of many judicial opinions denying a cause of action to the individual crushed in the machinery of government. The purpose here is not to try to out-talk the recorded vocalization of "sovereign" immunity, merely to change its tune. It is hoped here to demonstrate that such relief is a fundamental right of our American scheme to which sovereign immunity is foreign and excluded. This is a serious task.

I.

A.

If one had not been born to this world, he would have no problem of living in it. However, as soon as one is born, his troubles begin. We shall have enough trouble with man's legal relations if we start observing him as an adult unit of society. Such relations exist in all situations of responsibility whether reflected in rights or duties. What they are will be found in the purposes of society. Whether one's injury entitles him to relief requires the agents of society, courts or legislators, to determine whether the purposes of society will be served better by letting the injury lie where it has fallen or by shifting it back from whence it came. When the latter, and the source is the defendant, the plaintiff will be said to have stated a cause of action. It, therefore, follows that all injury is not actionable.

B.

The vice of inference arises from phrasings such as liability and liability without fault. These always seem hitched to "negligence." Conceptualism is defeated when everyone thinks of liability as dependent upon negligence. Liability is the generic. Negligence is but

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Government Accountability

a single gauge, indexing, when relevant, an occasion for liability. Since the association of recovery with negligence is common, liability and negligence carelessly become fused. The confusion is compounded by making fault and negligence synonymous. Well-meant quests for recognition of responsibility for injury are expressed as liability without fault (without negligence). Some individuals thus become engulfed in a smog of life without risk, while our problem is one of a license to maim. Surely, there is no insurance in general law against all injury. Living among men involves risk of injury. On the other hand, we no less must make certain that one does not have to carry his own insurance against injury from every source or of all types. We do this when we shift the burden or responsibility back from whence it came. When we do, we relieve the injured person of the risk and place it, for its deterrent effect or otherwise, upon the source, because so doing is believed best to serve the public interest, or policy, or purposes of our scheme of popular government.¹

We are a law-abiding people under ordered government. We posit both a politics and an economics of individualism. Ordered government means that a program of reason replaces violence and anarchy and the rule of law provides solution of disputes under the aegis of the state. The state declares the legal consequences of certain facts and it does this as the degree of public concern barometers the policy under the circumstances. We stratify in categories of crimes and delicts impacts causing bodily injury, and for commercial loss we speak of the integrity of contract.² These in turn are articulated in legal actions as the occasion arises.

It is said that a body politic is a social compact by which the whole people covenants with each citizen, and each citizen with the whole people that all shall be governed by certain laws for the common good. This was so as we undertook, through state and federal constitutions, to give practical effect to such as we deemed necessary for the common good and security of life and property. The governments, so organized, are themselves agents of the common sovereignty; and, within this constitutionally authorized jurisdiction and for practical purposes, acts as if sovereign. Standards or laws are found from and in the purpose of these governments. They are determined by customary force or initiated by positive declaration. A diversified articulation is found in the agencies of government, in the courts and

¹ Rylands v. Fletcher, L.R. 3 H.L. 330 (1868), affirming L.R. 1 Ex. 265 (1866), is but a symptom of this phenomenon. It is not the source.
commissions; *i.e.*, by judicial and non-judicial tribunals. Both administer law.

C:

The universal judicial phrasing relating to governmentally asserted restraints is that regulation is the exception and freedom from regulation is the rule. This is the corollary of our fundamental, bifurcated individualism. Our implicit assumption is of a dynamic society going decently about its own business. This comprehends the individual, similarly, with an inherent energy and free choice, expressing a natural propriety and deference which reflect the established customs and morality. As we scurry about in self-selected courses, collision is inevitable, consequential and self-borne. Because some will lag, or because orientation in common good requires, we must stimulate or restrain free choice. Here is the usual contradiction in the claim of unrestrained individualism. It is not as much as an expression of individual liberty as it is an unreasonable restriction upon the liberty of others. Highway rules must be provided to avoid the collision. Bumps of one type must be self-absorbed. That is the risk of normal living in society. But in other types the injury is caused by the other fellow breaking lane. By making him repair the injury, he is taught caution and compelled to replace the divot. By shifting the burden from where it falls, back to where it came from, a general discipline is achieved by the adversary action. The nostalgic phrasing to so use your own that you do not injure another justifies the government in regulating the conduct of one citizen toward the other within the public policy. If the defendant had intended, but failed, to keep his own lane instead of preempting the plaintiff's he still would have been liable. This would also be true where, free wheeling instead of recognizing plaintiff's right of normal clearance, he failed to exercise the expected self-restraint. This causes our *sic utere tuo ut alienum non laedas* to be translated as negligence, and the comfortable conclusion that liability is measured by fault, meaning negligence; and the generalized non sequitur that if no negligence or fault, then no liability. But there are three situations of injury in causal relation and three results. In one there was no liability, but in the second there was; and, true enough, the test in this situation was negligence.

D:

In the third, the party causing the injury may be liable without negligence, or he may not be liable even though he is negligent.

Because most of our business of assessing responsibility involves the second, the third situation is exceptional. Easy examples demonstrate the point. We long since have ceased even to concern ourselves with the quality of a common carrier's conduct. We provided against any inclination to connive with Robin and his brother hoods, who might beset the path through the forests, for a split of swag, by making the common carrier pay for the whole cargo. By shifting the burden to the source, the public obtained generally safe carriage. But, because we felt we had to have railroads and believing investors would not come forward if they had to pay abutting owners for negligent noise and smoke and cinders, we made such injury privileged.\(^4\) The rule strives for the objective of the common good. The facts disclose whether it is served by shifting or resting the injury. In one, the situation is actionable. In the other, the injury is the risk the injured must carry, \textit{damnnum absque injuria}. The tying of fault into negligence in synonym instead of perspective inquiry into policy is an example of the misfortune of the law that ideas become encysted in phrases and thereafter for a long time cease to provoke further analysis. We must try to probe it if relief is to be found for the individual mangled by the machinery of government.\(^5\)

Who is at fault or who is to blame are common expressions for who is responsible. It naturally followed, when negligence and fault were lumped, that liability for causal injury sans negligence was said to be liability without fault. That does seem rather shocking and allows the conclusion of being extraordinary and exceptional. When we are looking for whom to blame ordinarily we ask who is at fault. When this is done, fault moves away from negligence to the generic. Liability (fault or blame) is not dependent upon negligence. Negligence is but the gauge or index of liability when the usual fact balance equates the risk. This is the risk of the normal or ordinary living pattern and so we talk about ordinary risk. This will tend to balance fairly the expectancies of decent people.

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5. Negligent injury ordinarily actionable was held immaterial on grounds of public policy when doing so would impair severely the effectiveness of Coast Guard rescue operations and the morale of the service personnel. Dougherty Co. v. United States, 207 F.2d 626 (3d Cir. 1953), \textit{cert. denied}, 347 U.S. 912 (1954). The interest in securing the individual his repair was subordinated to the interest in having the protection commonly available in this type of danger. It is so important to preserve the integrity of the judicial process that we punish perjury committed at a trial that was held in violation of the accused's rights. United States v. Remington, 208 F.2d 567 (2d Cir. 1953), \textit{cert. denied}, 347 U.S. 913 (1954). See also, Toft v. Ketchum, 18 N.J. 280, 113 A.2d 671 (1955), \textit{affirmed on rehearing}, 18 N.J. 611, 114 A.2d 863 (1955), \textit{cert. denied}, 350 U.S. 887 (1955).
E.

Two material and distinctive variants appear. If foolhardy, one thrusts or submits himself to observable likelihood of injury, he may have little sympathy when he asks fair-minded men to compel the one at the other end to make him whole by payment. He may be said to have assumed the risk. When Campo asked the court to give him relief because it relieved MacPherson, he went too far. Where the very nature of the article gives notice and warning of the consequences to be expected, the manufacturer has a right to expect that users will do everything necessary to avoid the obvious danger. He walked into it with his eyes open. But the reverse of this will occur when, although going the noiseless tenor of his way, the individual is beset by proximate threat or actual injury. This list is long. Because of the oppressive disadvantage forced upon him, he is thought of as a victim, since he ordinarily is unable to escape or defend himself. In the former, he moves out of the norm to dig up something on his own. In the latter, he remains in the norm and a hazard rises above the ordinary. The victim can neither avoid nor withstand the pressures to which he is subjected. If we feel that the resulting inequality is not to be tolerated, we probably have reached the conclusion that there is a maladministration of the law serious enough to turn the responsibility back upon the source. Fault is found from policy facts and liability results regardless of negligence. The principle is the same whether those in immediate relation are persons, or persons and the state. And it is the same whether it grows out of delictual or contractual conduct. We are not here employed with whether the common concern is so great that privilege of acceptance of the effect by the injured party is withdrawn or permitted.

The timbers of our legal structure are the fundamental principles of liberty and justice which sustain and promote our civil and political institutions. They are those which right-minded men espouse as basic to the ordered liberty of a free people under popular, representative government. They are principles of justice rooted in the tradition and

conscience of our people. Constitutional policy may be implicit as well as explicit. The implied is contained as well as the expressed. Many features posited in fundamental principles may fail of achievement in practice without a failure of our system or even a threat to it. But merely because it is possible to go on generally very well without them is no justification for continuing the error of their denial. Oversight and error are not precedents in governmental administration. The loss of bearing points is only an invitation to attain the highway when the compass point is disclosed. That will be achieved in this survey if we can reflect the accountability of government to the individual it mangles in its machinery.

II.

A.

We are observing the process of government or the administration of government, and this commonly is called Administrative Law. The persons we will contact in our search for isogonic lines will be the individual, the official, and the Government. The individual is within the process of government and gets injured by its impact upon him. The official physically confronts the individual and delivers the blow. The government put him there to act its mandates. It enacts that which he transmits or acts. Each in turn may have a cause of action against any of the others. As the government writes the standards which concern the individual and the official, only they will appear within our project as victims. The language of the court in the second Morgan case exposes our friction borders.

"The maintenance of proper standards on the part of administrative agencies in the performance of their quasi-judicial functions is of the highest importance and in no way cripples or embarrasses the exercise of their appropriate authority. On the contrary, it is in their manifest interest. For as we said at the outset, if these multiplying agencies deemed to be necessary in our complex society are to serve the purposes for which they are created and endowed with vast powers, they must accredit themselves by acting in accordance with the cherished judicial tradition embodying the basic concepts of fair play."

10. In crimes, it might be possible to parallel the government with the others on the receiving end. But that is why it characterizes their conduct as crimes and equalizes in its own protection by exacting the pound of flesh, or, in superlative degree, the whole carcass. This is not our concern here.
This casts forcefully the pattern we are observing. The government cannot do its business without the administrative commission and the individual is compelled to deal with it. Compelled, because its process mandates him, and compelled because it is commonly the sole source of his remedy under law. In the latter, dependency expresses the compulsion. The former speaks for itself. The official is not drafted, but dependency (need and public service) also brings him in. The government invests him with jurisdiction over the individual.\footnote{We never quite seem to be able to keep distinct the person from the officer.} We speak of the jurisdiction as power and duty, but it resolves into solely one of duty, \textit{i.e.}, duty to exercise wisely the power to serve the expressed public policy. It is the "duty" that defines the office. As government must use men, error is unavoidable. Our immediate concern turns to the proposition of holding the "person" for the fault of the "official" where causal injury vents itself on the individual.

B.

This is an important problem, foremost in its importance to the proper functioning of government. It is a prime exposition of the adjustment of responsibility for fault as facts change and understanding of the situation increases. Torts teachers seem satisfied to conclude that the person exercising the office is liable personally to the victim; and they pass this off rather lightly. Proximity and fault were eloquent. The victim’s plight was pathetic. It was dramatized to the Judge through the misty sovereign immunity back-drop which shrouded off the propelling force and left the official in isolated emphasis. The objective was the repair of the victim, and everyone saw the need and felt the justice of this. It had to be pinned on someone. The defendant official swung the instrument.\footnote{No one paused to note that it was the official ensign of authority, the mace of state, with which he struck.} The victim was wholly innocent. The official’s hands were bloody. The notches which escalated the public policy to liability were, therefore, two fold. In the hierarchy of officialdom, these fellows calling their procedure quasi-judicial were blots on the escutcheon of the pure judicial.\footnote{They were so contemptible that they were not worthy of contempt. People v. Swenn, 85 Colo. 337, 296 Pac. 271 (1931). The distinguished trial judge in Interstate Commerce Commission v. Brimson, 154 U.S. 447, 155 U.S. 1 (1894), found them so revolting that he denied that they even could carry the sovereign’s message to a judge.} This was a time when the law was administered through the courts. The authority exercised by the commissioner was relatively unimportant and appeared as an encroachment. Of dubious legitimacy, it seemed consistent with our basic
postulate that the deterrent resulting from shifting the risk to the putative source, at least, was not undesirable. The other features weighted the balance in favor of holding the official. A change of facts caused redistribution of this result.

Before the turn of the century the complexity of government had advanced to the point where the commission no longer could be thought of as nominal and a nuisance. Now, all courts refer spontaneously to the commission as "necessary." Their major role in the administration of government is expressed with full force and declaratory purpose. These commissions contain an ultimate fact which is the catalytic agent to redistribute the liability previously cast upon the official. The ultimate fact is that an office, once negligible and nominal to the business of government, now is on as high a plane of importance as that of the judge. Thus, the rule which describes the liability of the judge will give the same result with the commissioner. The value of this analysis is that it is unnecessary to say that the early view of officer liability was an anamorphosis. The great point is that we have a different case and the common rule produces the right result, namely, the judge liability result and for the same reason. This assures consistency in a science of law and not just a convenience served by chance of disfavor. When the reason appears, parallel action must follow in application. An examination of the judge rule is necessary.

III.

A.

The phenomenon we are observing arises from the mangling of the individual by the faulty operation of a machine of government. When the operator was a commissioner, functioning in a lower stratum of government order, we healed the injured individual with

15. We may have occasion, as we go along, to note such addenda as negligence in ministerial action and willfulness in discretionary action of the non-judicial official.

16. "All must recognize the fact that the full information necessary as a basis of intelligent legislation by Congress from time to time upon the subject of interstate commerce cannot be obtained, nor can the rules established for the regulation of such commerce be efficiently enforced, otherwise than through the instrumentality of an administrative body, representing the whole country, always watchful of the general interests, and charged with the duty not only of obtaining the required information, but of compelling by all lawful methods obedience to such rules." Interstate Commerce Commission v. Brimson, 154 U.S. 447, 474 (1894).

17. It is not necessary to deny our ancestry to conclude that Grandpa need not bring in the "kitchen wood" before breakfast can be prepared on the electric range, but it still is necessary to "fire the stove" before the food can be cooked. We need not deny the existence of the Potomac to conclude that there must be a bath tub in the White House. While the president still must bathe, he no longer depends upon the creek. The principle prevails, but the place of its application has shifted. We practice life differently as we learn more about health and immunization.

golden salve from commissioner’s pocket. However, when applying public policy to himself, it always, or for so long that it is immaterial here, has been clear to the judge that the victim of the faulty operation of his machine must find cure elsewhere or go without. This was not a matter of foot work or any benefit-of-clergy privilege for wrong doing, but was a fundamentally sound application of principle. The purpose of government would fail because the connecting link between law making and law receiving or the protection of even-handed justice would be corroded. The court being the equator, the equation would burst. “... [J]udges of courts... are not liable... for their judicial acts, even when such acts are in excess of their jurisdiction, and are alleged to have been done maliciously or corruptly.”

Judges in the regular judicial hierarchy, acting within the judicial function, always have had immunity because

“liability to answer to everyone who might feel himself aggrieved by the action of the judge, would be inconsistent with the possession of this freedom [to act on his own convictions without fear of personal consequences] and would destroy that independence without which no judiciary can be either respectable or useful... it would establish the weakness of judicial authority in degrading responsibility.”

We wanted to see a right in the individual to recover, but the view of judge immunity, because necessary to the strength and independence of the judiciary, was more compelling.

This was not a promotional program of sadistic urges in judges toward their customers. The obligation to do justice is integral with governance. The court is an instrument of government and the judge works for the government. The obligation to do justice is owed to it, and for its breach he is responsible in the form of impeachment proceeding and removal, and liable to criminal prosecution.

B.

It seems the commissioner succeeded in sloughing his tail and crawling up the bank a long time before he was observed sitting on the same relative plain on which the judge sits. While we do not think of him as having a smooth bench to sit on, we, long since, have


21. This left the remedy handle of his “right” beyond his reach for the moment.

felt the tendency to confine within narrow limits the liability of public officers. The necessity of attracting capable men, able to make decisions without fear of personal liability and without being harassed by lawsuits, has been thought to outweigh any interest that might exist in allowing the individual relief against the official for bad official action. This policy has dictated that public officers shall not be liable for acts done in an official capacity.23 The general level appears cast by Cooper v. O'Connor.24 As the commission is termed quasi-judicial perhaps this rule is quasi cy pres.25 But against a plaintiff's contention that he acted without the scope of authority, wantonly, maliciously, and unlawfully to his damage, the commissioner was cleared as if he were a judge. The court held the presence of malice or other bad motives is not sufficient to impose civil liability upon the commissioner acting within the scope of his authority.26 When Gregoire sued the Attorney General27 for damages alleging malice, lack of reasonable cause, etc., the court, speaking through Judge L. Hand, held that an allegation of malice would not make actionable, conduct that otherwise was within an officer's jurisdiction. It may seem "monstrous," said the court, to hold that an officer can with immunity "vent his spleen" on others, but officers should not be subjected to "the dread of retaliation" for doing their duty.28

IV.
A.

It was the obvious merit of the victim which composed the hard-cases-make-bad-law complex of making the commissioner guar-

25. The commissioner still wears the tonsure, not the coif.
26. The defendants were the comptroller of the currency, the receiver of the Commercial National Bank of the District of Columbia, the general counsel for the division of insolvent banks of the Treasury Department, the deputy comptroller of the currency of the United States, the United States attorney, and a special agent for the Bureau of Investigation.
27. Gregoire v. Biddle, 177 F.2d 579 (1949), cert. denied, 339 U.S. 949 (1950). An alien was held in custody by the Attorney General from 1942 to 1946. Gregoire was a "native" of Metz, Lorraine. Metz was German at his birth, French during World War II. Biddle held him as an "alien enemy." Three courts refused to release him, a fourth found him to be a Frenchman and did release him.
28. In Papagianakis v. The Samos, 186 F.2d 257 (4th Cir. 1950), cert. denied, 341 U.S. 921 (1951), the court holds that not only judicial or quasi-judicial, but executive officers exercising discretion may not be sued. See Matson v. Margiotti, 371 Pa. 188, 88 A.2d 892 (1952).
antee the perfection of government out of his own pocket. The view was distorted by the shadow of "you cannot sue the sovereign" across the highway of just relief. If that is real and persisting, so far, all that we have succeeded in doing is taking our victim for a ride along a dead-end street. It is as if, when sense is restored to one arm of government, it is lost in the other. Only when sensory response can be had in both will tonicity be restored to a healthy body politic. Happily, it seems there are cumulative, restorative stimulants. When applied with conscious awareness of the facts, they will dissolve the road block on the highway of public policy to just relief. Two things are indisputable. The victim must be compensated. The commissioner must be emancipated.

It would seem to follow that the owner of the mangling machine who put the force in motion must respond. He knew what would happen, he persists, and he has the continuing benefit. The only doubt that could be raised comes from the general public interest as distinguished from the special public interest. If government accountability would threaten the existence of the government or stifle its utility, then public policy would require its arbitrary insulation. This is about as realistic as to say that each of us must stop breathing for fear that so much air will be used up that there will not be enough left for the others to breathe.

B.

As we continue, the first principle of our scheme of government must be constant. The sovereign will, constitutionally stipulated, cannot be contradicted by any one department or any combination of them. As explained in Marbury v. Madison,29 these departments function only when they serve and not when they corrupt. Since they compose the government, they serve when they accord the public policy, expressed in setting up American governments, that "all shall be governed by certain laws for the common good."30 This has many spigots from which flow the good of government as it serves the popular sovereign.31 It is misleading to follow the frequent phrasing of the "facets of government" as if it were just an ornament. It

29. 5 U.S. (1 Cr.) 137 (1803).
30. Munn v. Illinois, 94 U.S. 113, 124 (1877). "A body politic, as so aptly defined in the preamble of the Constitution of Massachusetts, 'is a social compact by which the whole people covenants with each citizen, and each citizen with the whole people, that all shall be governed by certain laws for the common good.'"
31. It includes the primary sense of law, namely, notice or warning which is implemented specially in such clauses as ex post facto or bill of attainder. This is the due process of law.
is not an ornament but a servant. When it serves well it is good to think of it as a jewel, but the flashing, shiny surface blinds and hypnotizes to the loss of introspective reason. There are two legal personalities, the sovereign and its agent or the "government". In applying the great principles of government, Illinois was dealing with an aggressor against society in Munn and Scott. Its government acting for the common good could abate the nuisance. We are dealing with the reverse, the victim of wrongful government action. If we undertook a good faith government which must mean a responsible government, we should examine the fiction which helped to switch the victim's case to a side track.

About the only thing we invented with this government was organization by a written constitution. And even it had novelty only in the new use.\(^{32}\) We long had been aware of what we wanted. Of course, the problem was how to reach and control a government serving truths held to be self-evident. To do this our founding fathers planned a "new government, laying its foundation on such principles and organizing its powers in such form, as to them shall seem most likely to effect their Safety and Happiness."\(^{33}\) Safety, happiness, good faith, justice, and general welfare sound of no privilege to the new form of administration to mutilate the individual with impunity.

C.

The cause of action we are watching may have been the genesis of the fundamental constitutional function. The sovereign constantly speaks expressing the general will through the written word so that the judiciary applies the rule of law when the legislature's enactment is presented in a case or controversy. The government, not the sovereign, is sued when it perverts what the sovereign approves or protects. Our common or general sovereignty is hypostatized in the "government for administration." The former states the extent and limits of the latter's agency by means of constitutions. There is no mystery in this. The mystery is how a court can come up with the idea that a statute "will be stricken down as a perversion of the sovereign power."\(^{34}\) Obviously, as sovereignty is power beyond dispute, whatever it directed would describe the law to be enforced by its judicial agency. What the court

\(^{32}\) This is its strength. There is no theoretical spangle to garnish an uncured theory. It is the meat of history cured in the fires of hope and freedom.

\(^{33}\) Declaration of Independence. July 4, 1776.

fails to understand is that it was the agency of government that was perverted because it acted in contradiction and excess of the limit set by the sovereign through its constitution. The sovereign stretched the line on which the individual hung his case against the government.\textsuperscript{35} This “happy little blurb” of the Supreme Court of Pennsylvania will serve as a convenient medium through which to decorticate the “can’t sue the sovereign rule.”

D.

This national scheme was conceived in common language which abolished privilege of class and person by recognizing the self-evident equality of creation and rights of life, liberty, and property. The travail of the centuries to achieve popular sovereignty is assumed. The tradition is galvanized in language which states: “That to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed . . .”\textsuperscript{36} As the crown moved from the king to the people, the personality of government became more distinct from the sovereign and found its jurisdiction in an agency of consent. The protection against license by individuals and by governments was sought in ordered government under the law in the representative republic.\textsuperscript{37} These precepts of popular sovereignty and representative government, held in juxtaposition by a constitution, “are supposed to have been long and well established.”\textsuperscript{38}

Where there is sovereign action, there is no illegality. There can be no conflict.\textsuperscript{39} His conduct expresses his will and his will is law. As it is lawful, there can be no fault in him and injury which results to the individual is \textit{damnum sine injuria esse potest}.\textsuperscript{40}

We reach James Stuart through the Tudors. Vested with a heritage combining every source of government power, he was nourished

\textsuperscript{35} When the government acting through the legislature stays within its jurisdiction, its order is as if it were sovereign for then it enacts the sovereign’s will—valid as to the individual even if it says “off with his head.”

\textsuperscript{36} Declaration of Independence. July 4, 1776.

\textsuperscript{37} Along here, the democracy of natural law proved to be a little too much choice and too little duty.

\textsuperscript{38} “That the people had an original right to establish, for their future government, such principles as, in their opinion, shall most conduce to their own happiness, is the basis on which the whole American fabric has been erected. The exercise of this original right is a very great exertion; nor can it nor ought it to be frequently repeated. The principles, therefore, so established, are deemed fundamental. And as the authority from which they proceed is supreme, and can seldom act, they are designed to be permanent. This original and supreme will organizes the government, and assigns to different departments their respective powers.” It established “certain limits not to be transcended by those departments.” Marbury v. Madison, 5 U.S. (1 Cr.) 137, 176 (1803).

\textsuperscript{39} It comes to us as self-sufficient that le roi le veut.

\textsuperscript{40} See Barron v. Baltimore, 32 U.S. (7 Pet.) 243 (1833).
by an environment of absolutism expressed by Louis XIV—L’etat, c’est moi. The central point in the belief of James I, the point around which all his actions revolve, was his belief in the divine right of kings. In his mind, the king was something more than a mere mortal ruler, he was divinely appointed of God; resistance to whom was a hardly less heinous sin than rebellion against the only superior a king should own. The contest between James and the Commons was begun at the very outset of his reign by his attempt to interfere with the election of the members to his parliament. Claiming progress in the recognition of the individual, the first parliament under James set forth “that our privileges and liberties are of right and due inheritance no less than our very lands and goods.” The Stuart’s disregard of these claims culminated in the Petition of Rights of 1628. Great as this landmark is in the gestation of American constitutions, it failed of obligation to the Crown. The Stuart held himself so far removed by Divine Providence above his subjects that he could not be held bound by any promises or contracts made with them. Remonstrance swelled to tumultuousness in the session of 1629. Command to adjourn was delayed behind locked doors for passage of resolutions of remonstrance. After it was adjourned by force, Charles demonstrated that the king was sovereign for the eleven years of extreme tyranny which followed. With Richelieu as a line backer, the Stuarts prevailed until 1688. The second James recovered the fumbles and regained the old pedestal in his four years as the sovereign state. By this time, it is little wonder that obligatory promise was sought as an operative curb on the Crown. In the meantime, there was a problem of reality. Necessity is the mother of ideas and something more important than life is a mighty stimulant. The political principle implicit pervades the process of law.

E.

Every modern book we pick up is stuffed with a mysticism veiled in allegory about phrasings of the king can do no wrong, the king will do no wrong, and the king cannot command himself to appear in his own courts. Of course, true virtue is without sin; and, where it exists, there can be no sin. Such a person is incapable of sin and will not commit sin. But this does not exclude charity. Sovereignty

41. It is against this, later, that natural law rendered its great service in the tradition to popular sovereignty.

42. Our later language of contract seems more natural than “natural law.” See note 30 supra. With our tradition in 1776 of sovereignty from the Crown to popular sovereignty, the idea of consent and delegation speak a new foundation of power. See note 33 supra.
served as the symbol of perfection. The sovereign’s choice was law. There was no ex post facto clause of limitation. It was a continuing discretion. Again, as injury resulting from that choice could not be an injury contrary to law, no actionable conduct was involved. As the injuring was privileged, the injury was not actionable. As the sovereign’s laws would express the relations of his subjects, they did not bind him. It was not that he could not go into his courts, but that, if he did, there would be no court but himself. The decisional power of the sovereign would absorb the representative. However, the king could run his business, his governing, any way he wanted to. He could provide direct grace or indirect grace. On the first, discretion was reserved, the representative court which took power only from him, obviously, could not rise above him to command his appearance to answer contrary to law or his prerogative. However, he could make provision for relief by delegating a stake to be attached as merit might appear from injury. Some explanation for the mass of literature in protest upon the subject arises from a refusal to recognize the conceptual uniqueness of the English institution, the king, the sovereign, and the crown, in its immutable invulnerability. Our problem is tough enough without tilting against theories of state and people, of corporate fiction, confusion of master and servant relations, and whether there is law if there is no remedy. They lived with a fact, albeit, with some reverence to it. No one need deny that when the king stepped on the individual’s foot and broke it that pain was caused. And it does not prove anything to say that a victim of cancer is sick even though medical science does not know how to cure him. We may think of both as cruel, but the pragmatism of it is that they both stay uncured. It is proper and necessary to search for a compensatory

43. Perfectum est cui nihil deest secundum suae perfectionis vel naturae modum.

44. Because he could not be distained for refusing to obey his own orders, his own court orders, the barons sought to impose compulsory jurisdiction. Clause 49 of the Articles of the Barons was designed to effect this submission. McKenzie, Magna Carta. (2d ed. 1914) n. 49 at 492. It did not work. Cf., note 41 supra.

45. Law schools, now, decide law school problems under the chancellor of the university; but, if the chancellor sits in, what the law school wants will be important only in so far as it is reflected in what the chancellor decides.

46. The student may face the dilemma of choice between studying or going to the show, but subject to his own conscience, his discretion is uncontrolled. He may lose his head in over devotion to the second. Charles I lost his. The accounting comes later and independently.

47. The reverse of this is expressed, now, in some degree, in our direct and indirect contempt proceedings.

48. Stoppage thereof by loquendum est cum rege was familiar to Bracton.

49. Edward I recognized relief securing vested lands, in some revenue adjustments, and personal items seized by the sheriff.
cure for the foot, and we hope to find it. The point is that the King was privileged. The law must find other affinity.

F.

Something was done for our victim. The birth of our system of popular sovereignty and organized government was not a parthenogenesis. England did achieve division between the unsuitable sovereign and government as far as was possible. Everything that could be done was done to make government responsible for the mangling of the victim in its machinery. It gives us the idea of form in the division of process, the two progenitors for normal gestation. Our trouble arose from not following through in principle when we achieved clearance in form. Two cases, in 1679 and 1765, are perhaps the most important in constitutional concept whether in England or America. They made government the process of law. They eliminated rule by the arrogance of the moment for purposes of state. They suggest the permanent governmental structure and the division of authority in a responsible government instituted "to secure these rights" which ended the privilege of the government to injure the citizen. While the sovereign still kept his subjects, the new order of the citizen and his government evolved. The first case, in 1679, anticipates by ten years the English Bill of Rights which fixes the obligation of the government to the people as the subject is emancipated from the Stuart. The second one, in 1765, anticipates about ten years the Declaration of Independence which assumes the tradition of sovereignty finally fixed through experience of the states in the federal constitution.

The immunity of the sovereign applied to his minister when he exercised in his own name the authority vested in him by the king. That gulf could not be bridged. The court did the next best thing in the Case of Earl Danby. The proposition is founded that no servant of the crown could avoid legal liability by pleading obedience to the command of the sovereign. This moves forward to attach liability, for conduct actionable at common law, to an officer of the government in Entick v. Carrington. The established principles of law declare the legal consequences between the official and the individual. His injuring conduct thus is declared to be illegal, and this

50. They had been trying without success to pluck other little gems from his prerogative such as purveyances, impressions, etc., beginning with the Great Charter.
51. This is where the argument arose that there was a mistaken application of the law of master and servant; but the sovereign just was not in master and servant stratum.
52. 11 St. Tr. 599 (1679).
53. 19 St. Tr. 1030, 95 Eng. Rep. 807 (1765).
aborts the claim of immunity. In the Entick case, the court declared illegal the issue by a secretary of state of a general warrant which had authorized the seizure by a messenger of the king of all the papers in the possession of a citizen against whom no charge had been brought. Opposed were the purpose of state and the pre-established principle of law. The argument that a power, considered to be in the interest of the government but contrary to the general law should prevail, was rejected. The result is demonstrative. The mangling by the official is a legal wrong. There is actionable conduct. The distinction between injuring by the government and by others was repudiated. The law is extended to include the transaction, and immunity ended. A cure was achieved, and the injury no longer is without remedy. The highest agency next to the sovereign was held responsible and made to repair.

G.

Following the revolution of 1688, the emphasis on the distinction between crown and king often is referred to as a confusing contradiction. As we moved through the Tudors to the Stuart, the king became sovereign and constituted the crown. In body and personality, he was the sovereign state. The concept and the symbol were preserved. The term, "the Government," began to appear. The sovereign remained in place and so became the government, or conversely. The king was of the same tissue, and, although stripped of the political management, it was necessary that his body or person continue to be held inviolate. The sovereign was not displaced when the person of the king took abode apart. The reigning power, now called the crown, continued sovereign. For the same reason as before, accountability could not advance from the official. There was no fundamental organizational change.

V.

A.

In America there was a change. Formation of most of our colonies was pressured during the Stuarts, a pressure made possible by a trinity of fusion of the man, the king, and the sovereign. Distance and the indifference of the Georges gave leash to political expansion of

54. It is commonly heard phrasing, now, the prime minister speaks of the government, and the monarch speaks of my government. This both clears the function and the prestige of the ancient symbolisms. It saves face for everyone and does not confound the political action so long as there is no attempt to translate the "my" from pride and prestige back to an executive possessory.
self-serving natural law concepts whose leverage pried loose the grip of the king upon sovereignty and gave the bargaining party, to the extent that it entered, the Bill of Rights. When George III began to talk like the James boys, the people of the colonies already had "the separate and equal station to which the Laws of Nature and Nature's God entitled them" because "they are endowed by their creator with certain unalienable rights." When this found fruition in distribution and constitutional fixation, we had a very different thing than that which under the crown took political function by simply squeezing the person of the king out of the cyst of the sovereignty of government. We pulled sovereignty out of government. England left it there. They held a symbolism in the king. We eradicated the king and supplied the gap of symbolism in constitutional function. While the conception was a process of long travail, the new government was born of evulsion; and the mutation was complete.

B.

It is this point that our practice later overlooks. When we get around to the problem of our victim of government illegality, our precedent seeking methods betray us. Precedent using was a stabilizing function, but we missed the switch and ran into a dead-end track. It was splendid to hitch Earl Danby onto Entick v. Carrington, but in following the legalism, we by-passed the politicalism. Those cases are as sound now as then, and they grant the relief we are seeking for our victim. They went to the highest reachable rung of government. When we pulled the king-sovereign-crown off the top and put in the foundation, our government or state became the suable defendant in our basic cases. Of course, treating the administrative device, our government, the same as King James is wrong, and "it undoubtedly runs counter to modern democratic notions of moral responsibility of the State." It justifies the astonishment of Street, our English friend. It discloses why the statement, "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 against the authority which makes the law on which the right belongs" is

55. See Smith, Jurisprudence and Constitutional Canon, 28 VA. L. Rev. 129 (1941).
57. Common law legalistic ritual.
59. "Why this English theory of Sovereign immunity, an immunity originally personal to the King, came to be applied in the United States is one of the mysteries of evolution." STREET, GOVERNMENTAL LIABILITY 8 (1953).
both right and wrong. Our government is not the creator, but the created. Our popular sovereignty has a common interest at stake, to protect the individual by the government,\(^61\) and to protect the individual from the government. The sovereign's will can be served only by allowing the individual to vindicate a right against the government in its courts and not by denying it. The consent is congenital and implicit. This is the whole foundation for the justiciable issue on constitutionality. It is the hub of our system of government.\(^62\) That it would be the regular and due process of the law removed the terror, otherwise common, that the unholy trinity of the hydraheaded king-sovereign-crown again could appear. It was not ligan with our government as the buoy. It was banished. The suable defendant advances to the contour of government. The sovereign remains immune, but the verminous crown-cell which short circuited relief is aborted. The party at fault is disclosed in causal chain as the responsible defendant, our good-faith government.

When the United States went into business, almost the first problem which came before its courts is the one we are pursuing. Just looking at what then was done, the action discloses that it finally had harnessed government accountability. States came to the federal court against individuals; states accepted without question suability by individuals; and, when they disdained, as sovereigns, such liability, they were held in firm accountability, indisputably bound.\(^63\)

C.

The earliest general discussion of the American principles is had in these cases. *Chisholm v. Georgia*\(^64\) is a tremendous document.

The case is too simply stated. An action was brought in a federal court against a state by an individual of another state. The state defendant refused to appear on the merits claiming no liability to such an action because it was a sovereign state. With great thoroughness, Mr. Justice Iredell dissenting, pointed out that "[t]he

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61. See note 30 supra.
62. See note 55 supra.
63. Georgia v. Brailsford, 3 U.S. (3 Dall.) 1 (1794); Chisholm v. Georgia, 2 U.S. (2 Dall.) 419 (1793); Oswald v. New York, 2 U.S. (2 Dall.) 415 (1793); Georgia v. Brailsford, 2 U.S. (2 Dall.) 402 (1792); Vanstophorst v. Maryland, 2 U.S. (2 Dall.) 401 (1791).
64. 2 U.S. (2 Dall.) 419 (1793). With due respect to all concerned, if one will take the time for the soul trying labor of really studying this case, doubt will arise as to whether most of our interpreters of this and some other problems of this government ever have really studied it. The labor is an invitation to use digest conclusions as it is "just an old case anyhow" and the result is so simply stated that the occasion to study it does not appear. The results look as if the study started with castigations of later fashioning. See note 57 supra.
suability of a state without its consent, was a thing unknown to the law . . . . It was fully shown by an exhaustive examination of the old law by Mr. Justice Iredell . . . ; and it has been conceded in every case since, where the question has, in any way been presented . . . ." 65

The record is a very different story. The case was submitted and decided in full recognition that ours was new law and a new state; that our state serves the sovereign people and is not the king-sovereign-crown of the old law. Set up to establish justice, the remedy is reciprocal between government and the individual and includes any fault or obligation which government may incur. The rights of individuals and the justice due to them, are as dear and precious as the rights of the governments. Indeed, the latter are founded upon the former; and the great end and object of them must be to secure and support the rights of individuals, or else vain is government. (As we go along, it should be kept in mind that the crown was immune whether the suit was delictual or contractual.) The justices who spoke for the court served in the Constitutional Convention or participated in the Federalist. 66 The able presentation of the dissent fixes the attention of the court to the issue, and gives force to its judgment. The majority opinion discloses that the purpose of our scheme of government was to blast the "old law" immunity. The new order was clear—suability. 67 Justice is not measured by numbers or by position. It is measured by law and law appraises the consequence of fault. The refusal to admit the wrong does not disprove the cause of action. 68 As both parties appear in the court of their common sovereign, there can be no degrading, as would have happened to the sovereign-crown if it were compelled to submit to a subject's judgment. Government could commit fault; and, if so, the injured individual could sue for compensation. 69

65. Hans v. Louisiana, 134 U.S. 1, 16 (1890). See note 57 supra.
66. It is also true that Mr. Justice Iredell was no boy.
67. The social compact concept abhorred the breach of obligation by government as a violation of natural right. A popular government must translate its responsibility in good faith. We raised ours to establish justice. The popular sovereign's courts have jurisdiction to hold government accountable in fault.
68. All defendants deny liability.
69. Even Mr. Justice Iredell admits that there could be a right against the government, as he approves the case of Vanstophorst v. Maryland, 2 U.S. (2 Dall.) 401 (1791). In a like vein, the common assumption of federal jurisdiction of states as the established norm is disclosed in the routine review of state courts by the Supreme Court of the United States followed without question in seventeen cases. It was not until 1816, in Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304 (1816), that federal jurisdiction was questioned by State rights with the resulting declaration that the federal judicial power, like the other great federal powers, was supreme. See also, Ableman v. Booth, 62 U.S. (21 How.) 506 (1859) and Cohens v. Virginia, 19 U.S. (6 Wheat.) 264 (1821).
VI.

A.

The next phase of the story draws explanation from diverse sources. When judicial process was raised to judicial power in balancing departmentalization, it was achieved both as to the new government and to the federation by the general clause containing all cases arising under the constitution; and the obvious corollary, a clearing house for national questions, was supplied by constitutionally providing for the Supreme Court. There had been doubt whether to have a national judiciary. While that doubt was thus disposed of, it was not resolved by removing control of its general exercise by constitutional stipulation. The power was so provided, but the exercise was reserved. The appellate jurisdiction for federal questions and the establishment of inferior courts and their jurisdiction were withheld to legislation. Two domestic types of non-federal cases did find prefixation in federal jurisdiction, namely, suits between citizens of different states and between states and citizens of other states. By and large, all federal questions were held in state courts subject to the corrective, appellate jurisdiction of the Supreme Court. Such claims had to be pursued in the state courts and taken to the Supreme Court for review of the federal question under section 25 of the Judiciary Act of 1789.\(^70\) This was based on the established state courts, they were local courts; it gave the states the first look, and it allayed fears of state-absorption by the novel government. Reluctance to surrender control was natural. In several cases where federal jurisdiction was found necessary it was stipulated. When the dangers compelling the nation-building diminished after the war,\(^71\) jealousy of the central power increased.\(^72\) The contract clause gave pause to state defaults, but not the inclination for them.\(^73\) When *Chisholm v. Georgia* disclosed that the states had provided a means to hold themselves to performance of duty to individuals, the spirit of ninety-three jumped at the suggestion of Mr. Chief Justice Jay that they could recall the grant of federal jurisdiction by amendment if they chose. They did, post haste.\(^74\) The eleventh

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70. *Judiciary Act of 1789*, c. 20 § 25, 1 Stat. 85.
71. See note 55 *supra*.
72. Early versions of out-of-the-trenches-by-Christmas did no more good then than now.
73. *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419 (1793), recognizes the principle of fault which precludes the enumeration from being exclusory.
74. 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*—U.S. *Constr*. amend. XI. The eleventh amendment was proposed by Congress on March 4, 1794. It became effective February 7, 1795. Georgia, the ninth of the twelve necessary, did not ratify until November 29, 1794.
amendment was conceived out of resentment and alarm. States rights cries were the sounds of the hour. The federal jurisdiction was despised and feared as alien. This they wrote in selfish interest. There is no attack upon the federal structure. There is no denial of government liability for fault. There is only the hauling home of the tongs by which the victim could pick the fat from the home fires to heal his wounds. The federal judicial power "shall not be construed" to house this type of relief. The purpose was to seal that door. In so far as Hans v. Louisiana\textsuperscript{75} and Monaco v. Mississippi\textsuperscript{76} are concerned only with the eleventh amendment, they are indisputable.\textsuperscript{77} The error of Hans v. Louisiana is not in the decision of the court, but in the extracurricular expression of Mr. Justice Bradley.\textsuperscript{78} The eleventh amendment is not concerned with whether there is a cause of action against a state, but only that such a cause of action cannot come into the federal courts. Indisputably, there was such a cause of action.\textsuperscript{79} Obviously, Georgia did not consider itself King James. Indeed, it never has.\textsuperscript{80} In Hans, it is none of the court's business whether a cause of action existed against the state, but only that the federal courts had no jurisdiction of such a claim. There was no jurisdiction of the issue of right because once characterized as a suit commenced or prosecuted against a state by an individual non-resident the rug was pulled from under it. The determination of the character was the end of the jurisdiction.\textsuperscript{81} In Chisholm, the court did have jurisdiction of

\textsuperscript{75} 134 U.S. 1 (1890).
\textsuperscript{76} 292 U.S. 313 (1934).
\textsuperscript{77} Monaco v. Mississippi, supra note 76 has the national prerogative in foreign relations to buttress. That alone probably would be a sufficient independent ground under the reasoning of the case. As the separate opinion of Mr. Justice Harlan points out the diatribe at Chisholm v. Georgia, 2 U.S. (2 Dall.) 419 (1793), in Hans v. Louisiana, 134 U.S. 1 (1890), is spurious and irrelevant.
\textsuperscript{78} See note 77 supra.
\textsuperscript{79} See notes 63, 70 supra.
\textsuperscript{80} Regents v. Blanton, 49 Ga. App. 602, 176 S.E. 673 (1934). See also Low v. Towns, 8 Ga. 360 (1850). When war debts began to threaten, back-sliding was extensive. Georgia Military Institute v. Simpson, 31 Ga. 273 (1860). Low v. Towns has no difficulty in recognizing the difference in declaring judicially a plaintiff's legal right and the barrier of departmentalization to its enforcement. The same adjustment in government machinery has equal force of reason in our inquiry. Execution on judgment is a very different problem than adjudication on right.
\textsuperscript{81} "The second section of the third article of the constitution defines the extent of the judicial power of the United States. Jurisdiction is given to two classes of cases. In the first, their jurisdiction depends on the character of the cause, whoever may be the parties. . . This clause extends the jurisdiction of the court to all the cases described without making in its terms any exception whatever, and without any regard to the condition of the party. If there be any exception, it is to be implied against the express words of the article. "In the second class, the jurisdiction depends entirely on the character of the parties. . . If these be the parties, it is entirely unimportant what may be the subject of the controversy. Be it what it may, these parties have a constitutional right to come into the courts of the Union." Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 378 (1821).
the suit and it adjudicated the existence of the right. The eleventh amendment walled-off the latter issue from *Hans*.

B.

Through *Chisholm*, there was a right of action for our individual against the government of the state and he had a stage for his show. All that is objectionable in this is that the right was a state right and the forum was federal.82 Our plaintiff did not prosper. The eleventh amendment slammed the stage door in his face. The motivation of the states for this destaging constitutional maneuver led them also to the withdrawal of the local stage for such use.83 While occluded at this point, our postulate again finds sunny weather, but the highway is rough and progress often stalled by missing bridges carried off by upstream floods.

VII.

A.

We wrote things into the Constitution; and we wrote things out of the Constitution. As *Hans* was talking through its hat about *Chisholm*, what it said is not so frightening as the propaganda effect it had to corrode our cause of action. The claim of filial adhesion by Mr. Justice Bradley to King James' sovereign immunity seems like a modern Helios fanning a right-consuming coal into a spontaneous combustion; and the modern Zeus who strikes him down again is our principle of popular sovereignty. The thunderbolt used is another constitutional amendment.84 A cause of action by an individual against a state again is in the federal jurisdiction. It is broader than *Chisholm*’s type in that the plaintiff is freed of a territorial condition. It is a narrower one for two reasons, firstly, it now derives from a national source; and, secondly, its scope or content, for the same reason, is

82. *This is not exclusory of a state forum, Hollingsworth v. Virginia, 3 U.S. (3 Dall.) 378 (1798), should be given comparative study on sovereignty, government, and the suability of government confirmed in perspective in the first case under the eleventh amendment.*


84. "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law." The fourteenth amendment was submitted by Congress in June, 1866. U.S. CONST. amend. XIV, § 1. It was ratified July, 1868.
constricted to federal rights. It does not replace or constrict the other cause of action. It is simply a new and a different cause of action.

B.

To sense the operation of the new cause of action in our dual form of government (states and federal), it is necessary to retrace some of the features of its gestation and connect them with the reorganization of 1868. In the first place, the stipulation in a new constitutional provision alone would not put the new cause of action in the federal courts. The Constitution and statute law must concur to give jurisdiction to a federal trial court. The Constitution must enable Congress to invest the power, and then Congress actually must confer it to give jurisdiction. The Constitution must have given the courts capacity to take jurisdiction and the Congress must have supplied it. The general provisions of law for federal jurisdiction are based upon the principle that "the judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States . . . made under their authority." This was intended as a constitutional definition of the judicial power which Congress could confer upon courts of its creation without ousting state courts of concurrent jurisdiction. This jurisdiction over federal questions was left in the states by the judiciary act of 1789, and remained there until 1875, when the power was exercised broadly to invest the inferior federal courts, concurrently with the state courts, with original jurisdiction of all suits arising under the Constitution and laws of the United States.

C.

The folly of Fort Sumter detonated the explosive fumes which had seeped into all political tissue as Harriet's eloquence set fire to reason. The war between the states was directed at restoring the understanding that the covenant of union was immutable—to cancel the eleven secessions. It was the continuing force of cohesion against the assertion of state sovereign choice of segmentation. Though,

85. See notes 70, 71 supra.
86. "The district courts shall have original jurisdiction of all civil actions wherein the matter . . . arises under the Constitution, laws or treaties of the United States." 28 U.S.C. § 1331 (1952).
88. See note 70 supra.
90. In the Act of Feb. 13, 1801, c. 4, 2 Stat. 89 the power was recognized but the jurisdiction given was withdrawn by the Act of March 8, 1802, c. 8, 2 Stat. 132, which restored the act of 1789. See Tennessee v. Union Bank, 152 U.S. 459 (1894).
clearly there were centrifugal impulses which pulled at other areas, the great thought-welding catalytic agent was the purpose of emancipation, and attention gravitated to the primary area of its application. We know and have noted that when the union was formed, it was formed from sovereign states each a bit jealous of its own interests and fearful of the novel government arising from the union. Every force was reversed and this was expressed in the reorganization covenants of 1865, 1868, and 1870. The first finally made legal what was made only formal by the proclamation of the president. The last catches on tardily to give political voice to citizens. The big dog in the whole race, again, as in the beginning, is the sanctity of the individual, his person and his property. If these were to continue within state discretion, the travail of the horrible civil war would have been in vain. There was no expectation that the recaptured states would be happy to embrace the subject matter and the policy of emancipation. From the viewpoint of the union, recidivism by them was the expectable. The passion of the war found vehicle in the union and expressed itself against states, albeit, seceding states. When the nation was created, states feared the union—they would take care of their own inhabitants. Now, the union is the trusted intimate. The state is the government feared, and how they would take care of the subject of the emancipation! What was lost on the battle field would be recaptured by the state governments through legislation or otherwise. This is why there had to be a reorganization of our dual scheme of government. The plan was simple, namely, write a floor under state discretion and suspend it from the nation. The fourteenth amendment gave the individual a federal right that the state should not push him below the declared minimum. It is as if there was a new constitution, the position is reversed in giving an individual a federal right against his own state. To do this, it was necessary to attach allegiance to the nation, and to follow it with special and general relief. The first comes in the second privileges and immunities clause to secure that which flows to him from his new found affinity to the United States. Then comes the glorious generalization translating to the individual

91. See note 33 supra.
92. The heat of the battle field had evaporated the mist of state supremacy as to the secession.
93. See note 40 supra.
94. The thirteenth amendment was proposed and ratified in 1865. The fourteenth amendment was proposed in the following June.
95. U.S. Const. amend. XIV.
96. The nation-building fourth article privileges and immunities clause gave precedence to the forum State.
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that vast residuum which fundamental principles of ordered liberty in a free people articulate as the due or ordinary process of law. The lessons of the first privileges and immunities clause taught that the discretion of the forum state measures the federal right of the visiting individual. Here, the purpose was to make the federal floor primary and not conditional, and so the necessity of the added equal protection clause not thought necessary to the function of the parent fifth.\footnote{97} The duty of the state to level on the federal level was not left aleatory.

D.

The non-use of federal courts for federal questions was not due to a lack of awareness of their availability in congressional discretion.\footnote{98} The use of the removal device seems best to disclose the evolution. Protection of federal offices, \textit{e.g.}, revenue, from hostile forums was the basic concern in these provisions, but they extended also to private persons. The non-intercourse act of 1815 resulting from local resistance to the war of 1812 brought temporary relief to customs officers.\footnote{99} The threat of nullification gave a permanent relief provision to officers or persons on account of acts done under the customs laws.\footnote{100} The sixties brought increased use.\footnote{101} The civil rights acts originated in state courts with removal privilege.\footnote{102} Enforcement of voting rights was made removable in 1871.\footnote{103} The failure to grasp immediately the tremendous implications of this new amendment was not due only to the excitement of the times.\footnote{104} The civil rights acts moved toward it by attrition. They gave original as well as removal jurisdiction for all causes affecting persons who were denied or could not enforce in

\footnote{97} While it may be there, here, the explicit was essential to the pressing purpose, and it was not enough to abide the implicit.

\footnote{98} Minor use was made: 1789 gave use for penalties and forfeitures incurred under federal laws and alien torts in violation of international law or a treaty, Judici-ary Act of 1789, c. 20, § 9, 1 Stat. 77; patent interests, Act of April 10, 1790, c. 8, § 5, 1 Stat. 111; Act of Feb. 21, 1793, c. 11, § 5, 1 Stat. 322; Act of March 19, 1792, c. 10, § 2, 1 Stat. 244. The declaration of political mortgage by the Federalist Party (see note 70 \textit{supra}) followed the language of the Constitution, and allowed for removal and required no jurisdictional amount, Act of Feb. 13, 1801, c. 4, § 13, 2 Stat. 92. It was expunged less than thirteen months later, Act of March 8, 1802, c. 8, 2 Stat. 132.

\footnote{99} Non-Intercourse Act of 1815, c. 21, § 8, 3 Stat. 195.

\footnote{100} Act of March 2, 1833, c. 57, 4 Stat. 632.

\footnote{101} The sixties brought increased use for officers and others for acts committed during the conflict and justified under the authority of the president or congress, Act of March 3, 1863, c. 80, 12 Stat. 755. The measures of 1833 were confirmed in a series of acts from 1864 to 1865, and evolve into 28 U.S.C. § 1442(a)(1) and (a)(2) (1952).

\footnote{102} 28 U.S.C. § 1443 (1952) begins there. The original statutes referred to proceedings against federal officers or persons acting under them.

\footnote{103} Act of Feb. 28, 1871, c. 96, § 15, 16 Stat. 438.

\footnote{104} It is not realized yet. \textit{Cf.}, Brown v. Board of Education, 349 U.S. 483 (1954), and the reaction thereto.
state courts any rights given by the first act.\textsuperscript{105} In 1870, federal jurisdiction was provided for all causes, civil or criminal, arising under the act. Damages were added in 1871 and recovery could be had in the federal courts.

E.

The ebullition gained temper and color as they sought to syncretize emancipation and civil rights. The whole suddenly seemed to jell in form in the last civil rights act,\textsuperscript{106} and the reconstruction of the federal jurisdiction concept. The union sentiment consolidated in the positive purpose of making the nation's courts the primary forum for the vindication of federal rights. The judiciary act of 1875 flung open the doors and swept in the whole federal scheme by using the constitutional language, "all suits of a civil nature, at common law or in equity, arising under the Constitution or laws of the United States, or treaties made, or which shall be made, under their authority."\textsuperscript{107}

In 1787, the need of having available a power to interpret the legal interests created was appreciated. In this sense, the judiciary clause\textsuperscript{108} was drafted in terms "shall extend to" federal questions. Its extension was stipulated by constitutional provision for non-residents against a state. The eleventh amendment terminated this by stipulating that "the judicial power . . . shall not be construed to extend" to any right against a state.\textsuperscript{109} Now, that is restored.\textsuperscript{110} The fourteenth amendment speaks to the individual and directly vests him with an original federal right against the state and it speaks for the individual by imposing a duty upon the state to forbear its destruction.\textsuperscript{111} With the conscious purpose of making the provision


\textsuperscript{106} Act of March 1, 1875, c. 114, 18 Stat. 335.

\textsuperscript{107} Act of March 3, 1875, c. 137, 18 Stat. 470. There was a $500 jurisdictional amount and a provision for expulsion at any time if it appeared such suit did not really involve federally derived rights.

\textsuperscript{108} See note 87 supra.

\textsuperscript{109} See note 74 supra.

\textsuperscript{110} See note 85 supra.

\textsuperscript{111} See note 95 supra. The thirteenth amendment made certain that the proclamation of emancipation is valid. The Congress had been working on the civil rights acts but doubt arose as to their constitutionality. Two actions were taken, the Constitution is rewritten to contain them, and, after the fourteenth amendment is effective, the civil rights legislation is reenacted.
The congress enacted the means set out in the judiciary act of 1875. The individual was invited to vindicate his right directly against the state at fault, and the federal stage was provided for its expression. The porcupine that has crawled into the cast is the fetish of Ex parte Young. We should exorcise it, if we can, or at least pluck its quills so that it no longer blocks access to the party at fault.

VIII.

A.

The fourteenth amendment expressly selects the wrongdoer whose fault is denounced. It is the government of the state. It recognizes that government is a unit. That it may exert itself through various channels does not change its identity. The amendment centralized the national government in that the individual took rights directly from it, and it was made federal, as distinguished from confederate, to a much greater degree than probably could have been done at any other time. The United States did not become a municipal government. It could not treat of legal relations between individuals as such. The amendment vested an original federal right in the individual of which the state could not "deprive" him. The great and indisputable core of the whole is that, if state conduct is not involved, there just is no fourteenth amendment cause of action. Though this may shrivel the spirit of Mr. Justice Iredell, it is ineluctable. Unless we can give it rest through reason, we shall continue to have results expressed in spiritualism; for while Ex parte Young gets some of the results, it is phrased in the spirit of Mr. Justice Iredell, fluted by Mr. Justice Bradley through Hans.

That error can become accepted in repetition is mirrored in the passive adoption of a leading authority on torts in his popular book.

112. "The Congress shall have power to enforce, by appropriate legislation, the provisions of this article." U.S. Const. amend. XIV § 5. See also Article III, § 1; Article III, § 2.
114. We shall return to this. In the meantime, the background material must be noticed.
115. "State action, as that phrase is understood for the purposes of the Fourteenth Amendment, refers to exertions of state power in all forms. And when the effect of that action is to deny rights subject to the protection of the Fourteenth Amendment, it is the obligation of this Court to enforce the constitutional commands." Shelley v. Kraemer, 334 U.S. 1, 20 (1948). Hollingsworth v. Virginia, 3 U.S. (3 Dall.) 378 (1798), should be given comparative study on sovereignty, government, and the stability of government confirmed in perspective in the first case under the eleventh amendment.
"Neither the United States nor any of the several states may be sued by a private citizen without its consent, and the latter are expressly protected from suit by the Eleventh Amendment to the Federal Constitution . . . Even where the possibility of a suit against the state is authorized . . . it usually is held that the state is not liable for its torts. The immunity is said to rest upon public policy, the absurdity of a wrong committed by an entire people, the idea that whatever the state does is lawful, and the rather doubtful theory that an agent of the state is always outside of the scope of his authority when he commits a wrongful act." 117

To "honor thy father and thy mother" truly is a counsel of virtue. Mr. Justice Iredell profaned his political father ("founding fathers"), and his idolatrous approval of king-sovereign-crown has been propagandized to such an extent that the Plimsoll line of right has been submerged. To such imagery, this paper is iconoclastic.

B.

We have seen the founding principles preserving sovereign immunity, but thrusting the agent government forward to meet, in the common decency of reciprocal obligation, the recognized standards of responsibility. The states covenanted in constitutional provision for the restoration of the mauled individual by providing for suit against them in the federal courts. This did not write a rule of liability. What then, were they talking about? Unless it was understood that the fault of a state was actionable, there could have been no action to be brought anywhere, federal court or no; and certainly the states did speak of causes "between a State and Citizens of another State," and they explained it in the eleventh amendment as any "suit in law or equity, commenced or prosecuted against one . . ." of them. They did not do this in respect for King James or for George III. There is every reason to understand that they did not intend to make James' sovereign-crown the United States government when they moved, as a sovereign people (WE THE PEOPLE), to establish justice, domestic tranquility and the blessings of liberty by means of the novel government which must pay its debts and discharge its obligations for the general welfare. The amendments of 1791 confirmed that which was implicit in the original text of the Constitution, so that such should not be lost to memory. That these implied rights be made explicit was a condition of ratification. The draftsman of these amendments had

117. PROSSER, TORTS, 770, 771 (2d ed. 1955). He continues: "A public officer, of course, cannot be held liable for doing in a proper manner an act which is commanded or authorized by a valid law." Id. at 104.
vivid recollection of a recent dramatic reminder in *Entick v. Carrington.*118 We have no ergometer to measure their thought labors other than to observe the great pressures. We do have the resultant of forces. The preparation of the first ten amendments was undertaken and they were presented by the first congress as a matter of course with the further assurances that this new government should not become a sovereign-crown monster. The Bill of Rights covenanted with each individual that none shall “be deprived” of his rights.119 The matter was considered.

C.

When the states wanted to default, being held to account for injury to the individual was not pleasant. While they loosened the grip of the federal courts by the municipal device of withdrawing suit, there is no place where they say there is no cause or no fault. All that was necessary to escape accountability was to say no suit; and, as long as that failed to be recognized as unconstitutional, the goal would be served. Both fault and suit of the state were recognized at the beginning. After 1793, the entire judicial power of the United States did not extend to a suit against a state unless it gave its consent. Nowhere does the giving of consent create the right or originate the fault. The suspended right derived from fault is allowed expression only when consent is given. The right always was there, but the remedy was withheld.120 The congress of 1793, recognized that rights in the individual existed against the government of the United States.121 The laconic comment that “while the exemption of the United States and of the several States from being subjected as defendants to ordinary actions in the courts, has . . . been repeatedly asserted here, the principle has never been discussed or the reasons for it given, but

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118. 19 St. Tr. 1030, 95 Eng. Rep. 807 (1765). It involved the general warrant. John Adams thundering against the iniquitous writs of assistance, cousin to the general warrant, was heard throughout length and breadth of the colonies. Of the crown’s use of the general warrant, Lord Camden says: “And with respect to the argument of state necessity, or a distinction that has been aimed at between state offenses and others, the common law does not understand that kind of reasoning, nor do our books take notice of such distinctions.” *Id.* at 1073. No charge had been brought against the individual.

119. The guaranty of a republican form of government to the states was to make sure that if James or George III should become the chief of one state that the others would go down and kite him home.

120. “The immunity from suit belonging to a state . . . is a personal privilege which it may waive at pleasure.” *Clark v. Barnard*, 108 U.S. 436 (1883). The no remedy no right argument does not work. A statute of limitations may have the same operation.

121. When the action was brought by the government, the outstanding right of the individual could be “admitted upon trial” if it had been turned down by the auditor. See 28 U.S.C. § 2406 (1952).
it has always been treated as an established doctrine" still was possible nearly one hundred years later.\textsuperscript{122} It seems to be true that congress failed to stipulate a statutory grant of jurisdiction in the original judiciary act as is indicated in the often misquoted phrasing of Chief Justice Marshall in \textit{Cohens v. Virginia}.\textsuperscript{123} Unless there was such a cause, even though it could not get into the federal courts, there would be no occasion to talk about waiver of immunity. The Chief Justice speaks of waiver.\textsuperscript{124} In regard to State liability, he repeatedly stated that "a case arising under the Constitution or laws of the United States, is cognizable in the courts of the Union, whoever may be the parties." \textsuperscript{126} \textit{United States v. McLemore} \textsuperscript{128} and \textit{Hill v. United States} \textsuperscript{127} often are cited as upholding the plea of immunity by the United States. Whatever may have been said loosely in these opinions, there was an element of res adjudicata inherent and there was the advisory opinion in each that law, not equity, was the place for remedy.

The federal courts did not have any cases on federal questions until after 1875. Their first big job was the initial analysis on the merits of the proposition of federal government immunity. In the first case of substance the action was allowed the same as it was against the state.\textsuperscript{128} As just about everything has been said of the case, this is a place to let it speak for itself. Dissenting, Mr. Justice Gray says: "The sovereign is not liable to be sued in any judicial tribunal without its consent"; as it can hold property only through its agents, a suit against them is a suit against it; and, to invade their possession, "is to invade the possession of the sovereign, and to disregard the fundamental maxim that the sovereign cannot be sued." \textsuperscript{129} From

\begin{itemize}
\item \textsuperscript{122} \textit{United States v. Lee}, 106 U.S. 196, 207 (1882). There was no discussion because Chisholm disclosed liability was commonly understood and there was no argument which could challenge it. That was true also of other clauses, i.e., full faith and credit, until some unintended twist gave a foothold. See Smith, \textit{The Constitution and the Conflict of Laws}, 27 Geo. L.J. 536 (1939).
\item \textsuperscript{123} 19 U.S. (6 Wheat.) 264 (1821). The absence of provision in the statute excuses the government from responding: "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." \textit{Id.} at 411, 412. (Italics added). "If the question cannot be brought into a court, then there is no case in law or equity and no jurisdiction is given by the words of the article." \textit{Id.} at 405.
\item \textsuperscript{124} \textit{Id.} at 308.
\item \textsuperscript{125} \textit{Id.} at 383, 392. Hans put the nip on this federal question feature of jurisdiction when the state was defendant.
\item \textsuperscript{126} 45 U.S. (4 How.) 286 (1846).
\item \textsuperscript{127} 50 U.S. (9 How.) 386 (1850).
\item \textsuperscript{128} The facts are simple enough: in ejectment, individuals seek to recover lands claimed by the government. It was brought against government agents in occupancy and control of the land. For the government, the attorney general interposed specific objection to the maintenance of the action. Judgment for the plaintiffs was upheld. \textit{Lee v. United States}, 106 U.S. 196 (1882).
\item \textsuperscript{129} \textit{Id.} at 226. This was Mr. Justice Gray's first important decision on the court. See his opinion in \textit{Briggs v. Light Boats}, 93 Mass. (11 Allen) 157 (1865).
\end{itemize}
without and from within, the proposition was forced for a decision: the possession was the possession of the government, and the government could not be sued without its consent.\textsuperscript{130} The majority of the court recognized that the government was in possession, it could be sued for wrongful possession, and it was ejected:

"as no person in this government exercises supreme executive power, or performs the public duties of a sovereign, it is difficult to see on what solid foundation of principle the exemption from liability to suit rests. It seems most probable that it has been adopted in our courts as a part of the general doctrine of publicists, that the supreme power of 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.

"On the other hand, while acceding to the general proposition that in no court can the United States be sued directly by original process as a defendant, there is abundant evidence in the decisions of this court that the doctrine, if not absolutely limited to cases in which the United States are made defendants by name, is not permitted to interfere with the judicial enforcement of the established rights of plaintiffs when the United States is not a defendant or a necessary party to a suit.

"Looking at the question upon principle, and apart from the authority of adjudged cases, we think it still clearer that this branch of the defense cannot be maintained. It seems to be opposed to all the principles upon which the rights of the citizen, when brought in collision with the acts of the government, must be determined. In such cases there is no safety for the citizen, except in the protection of the judicial tribunals, for rights which have been invaded by the officers of the government, professing to act in its name. There remains to him but the alternative of resistance, which may amount to crime."\textsuperscript{131}

The only exception to the recognition that there always is a cause where there is government fault, though accountability may be avoided, appears in \textit{The Western Maid}\textsuperscript{132} and a few other cases wherein Mr. Justice Holmes spoke for the court. His argument rests upon an absence of underlying obligation. However, this does not stand up, even for him. In \textit{United States v. Thekla},\textsuperscript{133} the cross claim against the plaintiff government was allowed. It was there all the time. The defendant could not get through the door alone; but,

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\textsuperscript{130} But even all the vigor of emphasis of which Mr. Justice Gray was capable does not depute fault of the government. It contends only that it cannot be called unwillingly to account.

\textsuperscript{131} United States v. Lee, 106 U.S. 196, 206, 207, 218, 219. See also The Davis, 77 U.S. (10 Wall.) 15 (1868); The Siren, 74 U.S. (7 Wall.) 152 (1868).

\textsuperscript{132} 257 U.S. 419 (1922).

\textsuperscript{133} 266 U.S. 328 (1924).
when the government opened it to reach him, he then could strike back with his own preexisting right, and the government must account to him. 134

IX.

A.

That ideas may be free does not mean that they must be followed. Mr. Justice Iredell 135 was sound in his dissent in Chisholm. The decision of the court was not worthy of recognition even as heresy under the King James version of sovereign-crown. The only thing (and the whole thing) the matter with this is that a new orthodoxy of political faith in American constitutional dogma replaced it. The sovereign was the people and the defendant in Entick v. Carrington and the Case of Earl Danby was the government. 136 We are not trained in code thinking. Ours is the positive thinking of societal growth—the positive thinking of the common law. The positive law, code thinking, escapes us. 137 We conceived and recognized suability of the government, but we did not spell it out; we did not spread it out in graphic form. Three situations result.

B.

Two causes of action exist against the government of the state and one against the government of the nation. The same fundamental reason underlies the due process action against the government of the state and the federal government; but one arises under the state system and the other arises under the national scheme. It, thus, may be said that the first is under state law and the other under national law. In each, the situation is epicene. Every one seems to feel that government ought to account for its fault. The few exceptions do more to prove than to dispute. Somehow, eulogy of the spirit of King James occludes the bridge to direct action. But we swim for it, and obtain

134. Accord, United States v. Louisiana, 123 U.S. 32, 35 (1887), saying, "The action before us, being one in which the United States has consented to be sued, falls within those designated, to which the judicial power extends; for, as already stated, both of the demands in controversy arise under the laws of the United States." See also, Alabama v. United States, 325 U.S. 535 (1945); Florida v. United States, 282 U.S. 194 (1931); Minnesota v. Hitchcock, 185 U.S. 373 (1902). In Ward v. Love County, 253 U.S. 17 (1920), the court assumes an inherent right under one or the other due process clause and this gives a cause of action for a tortious fault.

135. And his disciple, Mr. Justice Gray who gets called a nationalist, for whatever reason, when he takes it up in Lee, and Mr. Justice Bradley in Hans.

136. The real heresy is the dissertation of Iredell.

137. We write codes to put sense into pleading, striving to bury forms of common law actions—yet, they rule us from their graves.
by some legerdemain "an agent is not an agent" and "wrongful acts of government are not government action" (good old "king can do no wrong"). This makes us write stuff like the prolific Ex parte Young.\textsuperscript{138} The result is that for the two inherent causes on common right or due process, we have tended to paint ourselves into corners. If either government chooses, it can insulate itself from suit.\textsuperscript{139} Even when it has not done so, the cases tend to assume that it has. Then they try to get around something that isn't there. The new fourteenth amendment cause may cast out the mote. At any event, it is very real and one that cannot be barred by the defendant state. It is the second cause of action against the government of the state. We have written it by positive law into the constitution, and have articulated it through concurring federal court jurisdiction, congressionally conferred.

C.

When we were writing the constitution, of course, the question pressed as to whom the task of holding conformity therewith should be given, congress, the president, etc. We settled it in the judicial power which was extended to everything within justiciable character that arose under national law. When the war between the states turned in favor of the union, it had the problem of enforcing emancipation. Then, as yet, there is an amorphous state-of-seige device to maintain municipal discipline, which could have been used. The power to enforce emancipation could have been given to the president or done in many ways. It might have been left to government initiative to bring suit. However, traditionally, we turned to the judicial power and gave the individual a right to have federal court help to stop everything that would be a deprivation prohibited by the fourteenth amendment when done by a state. Two fundamental elements comprise this federal right in the individual to be free from the deprivation. The first is that the claim is in regard to an interest within the scope of the new amendment of 1868. The second is that the wrongdoer must be a government of state as that is understood in our federal system. If these exist, and to the extent that their application is involved, obviously, the eleventh amendment is repealed.\textsuperscript{140} It does

\textsuperscript{138} Before we mustered courage to strike the truth, Hitler got us to agree that Mussolini and Togo were tall, blond, and nordic. When he said the Norwegian was not nordic, we saw the bridge and ran for it. The stampede will start here too when we see through Ex parte Young, 209 U.S. 123 (1908).

\textsuperscript{139} The invalidity of this is a subject of separate treatment.

\textsuperscript{140} If either is missing, good old Hans v. Louisiana, 134 U.S. 1 (1890) still has a fox hole.
not follow from this that the action of the court in *Hans* was groundless.\footnote{141}

D.

We have observed that Chief Justice Marshall did not consider that the eleventh amendment immunized the government of the state from causes of action claimed to be derived from federal source. *Hans* correctly holds that it does. When *Chisholm* showed the duty to account there was no back-log of actionable, delictual fault outstanding, but whole lumber yards full of contractual causes (bonds, etc.) were floating at the states from all directions. They just did not want to be sued by an individual in a federal court—an alien court on whose throttle they had no hand. The federal covenant dealt with contracts. There is nothing in the eleventh amendment which even savors of removing or modifying the contract clause. They did not care about the character of the cause, it was the character of the party they wanted to blood-hound out of any ambush. *Hans* is right on an eleventh amendment basis. But, if the fourteenth amendment reached its objective, it is less than silly to talk of sovereign immunity. This would be no less so if the states, qua states, were sovereign. The people of the states, and so the states, covenanted to subject *states* to an individual’s action; and they moved in representative function through the congress to stage the show. Every cause within the scope of the fourteenth amendment is a character within that cast.\footnote{142} How numerous the list, or how few, is not our primary concern here, for certainly there are some. The same powers which put the state government into the federal courts to defend itself are the powers that used the eleventh amendment to relieve it of that responsibility. They again came forward in 1868 to put it back. This time, it is a new right. They gave both a cause and a designated defendant. The cause has no limitation as to quality, *i.e.*, whether delictual or contractual. It

\footnote{141}{An examination of the opinion discloses obvious extra-curricular contribution, personal to the prerogative of the justice who prepared the opinion, but wholly outside the action of the court.}

\footnote{142}{The content in terms of character of the cause must be developed elsewhere.}
was fault by the government of the state. The true mystery of constitutional life is how a court can work a conjuration for the idea that the crown-can-do-no-wrong. We entered revolution because we knew it did us wrong. We had to innovate the constitutional scheme itself because we knew that the state governments of the confederacy did do wrong. We rewrote it in 1868 because we were certain they would do wrongs, and we were determined to let the victim have his day in a federal court to call them to account.143 There has been recognition, including *Chisholm*, that actionable government conduct was not confined to contract. There can be no doubt about the inclusion of delictual fault in the fourteenth amendment. The subject matter of emancipation was not the subject matter of contract. Just as certainly as there is a Tombigbee River, there was no impelling idea or primary purpose to protect the emancipated person only from loss of contract rights.144 It was predatory treatment not impairment of contracts that was objectionable. Life, liberty, and property carry a militant concern for the person.146 Again, while the heat of the battle field may have steamed the union back together, it would not preclude the constituent governments from taking it out on the person if they regained their old sovereignty.146 Contract was the primary content of the eleventh amendment action; protection and relief from tortious conduct was the primary content of the fourteenth amendment. This was the main cause. The spur track of the civil rights action rings of the predatory.147

E.

To get into the federal court, our federal cause of action against state government must arise under the national law.148 This issue

143. It is easy, probably ordinary, to see what we want to see or to assume that we see it. The artist's visualization of the signing of the declaration of independence never has been questioned. The flag on the wall is British, but we were not there to honor King George!

If we had been willing to look at facts and had not imagined facts derived from hope, we might not have staggered so far into the industrial desert after 1929. Hope and assurances allowed us to believe the birds we saw were two chickens even after the bottom fell out of the pot.

144. Some persons within the fourteenth amendment may not have had contractual capacity. Causes in regard to them were possessory, property actions. This is where illegality questions attaching to executive emancipation arose, requiring the thirteenth amendment confirmation.

145. This does not exclude contract rights from generic property concepts. The state government already was disabled to impair the obligation of a contract.

146. See note 40 supra.


seems guided generally by three cases. Broadly, they provide that a case so arises whenever its correct decision depends upon the construction of a federal source, and it does not matter by which party the federal authority is put forward. One of the federal sources must be the foundation of the cause. In *Louisville & N. R. R. v. Mottley*, the federal jurisdiction fails because the foundation of the cause of action was the contract and its breach. The substantial question must be whether the state conduct violates the federal rule. A case so arises when either party's right depends upon the federal source.

F.

In this connection, another epicene feature appears in the cases which is complicated by the failure to distinguish the special explicit cause of action against the state and the implicit cause against the federal government. The first shades without demarcation between a procedural bar which may be inserted against the individual's right against the state and the Holmes' absence-of-cause proposition. And again without differentiation, this confusion is carried over into the cases against the federal government which are dismissed on the theory of indispensable party or because the action, in substance, is against the federal government (which, King-like, cannot be sued.)

Observing only the concept "sovereign," it is far more unthinkable to sue the everybody, of our popular sovereignty, at once, than the untouchable body of the King. There has to be some concentration of personality to a reachable person for the same reason that one cannot slander a race. Objectivity and fixation of responsibility require the pushing up, out of the nascent, of the agent government to give and take. Convenience gives conventional address to this agent, representative of state, as if it were the state. Two things,

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150. The jurisdiction is one for initial decision and must be determined before the court can continue. There is elaborate discussion of this problem in *West Coast Exploration Co. v. McKay*, 213 F.2d 582, (D.C. Cir. 1954) *cert. denied*, 347 U.S. 989 (1954).

151. The bar of indispensable party, pinpointed in *Williams v. Fanning*, 332 U.S. 490 (1947), seems now to be turning with the general drift to allow (willy-nilly) suit against the government of the United States. In *Shaughnessy v. Pedreiro*, 349 U.S. 48 (1955) "practical considerations" point out that it is unlikely that any superior would disregard a judicial decision invalidating an order; and that, even if the alien again were arrested, the first decision would have to be considered by the reviewing court. If this is not res adjudicata, it is cy pres, in any other language.

152. Within its agency, it might as well be. The term does have great pragmatism. *Hollingsworth v. Virginia*, 3 U.S. (3 Dall.) 378 (1798), should be given comparative study, on sovereignty, government, and the stability of government confirmed in perspective in the first case under the eleventh amendment.
among many others, should aid in the identity of the creature for fourteenth amendment actions against it. One long anticipates the amendment, and the other is contemporary. Neither is conclusive because the admixture is not constant. The eleventh used the word state when it wanted to get the state government off the hook. The fourteenth casts the harpoon at the state. As civil rights acts were written by the same draftsmen at the same time, their lines could aid survey. Revelation is found in tracing the fundamental process.

G.

The last mentioned mirrors the great principle of governance binding duty and right with representation and authority and making all a part of one government whose maker is the sovereign people and whose soul is the fundamental concept of a free people under popular government. Three significant cases catch its phosphorescence. They are Interstate Commerce Commission v. Brimson,\(^{153}\) San Diego Land and Town Company v. Jasper,\(^{154}\) and Regan v. Farmers' Loan and Trust Company.\(^{155}\) These and all powers and rights are made comparable in Munn v. Illinois.\(^{156}\) Our problem devolves from the vaporous conclusions stopping the individual because he cannot sue the crown. If the officer is acting within the will of the government, suit must stop either because it is a suit against the government or, perhaps, on the indispensable party label. We know that the state can be sued because the constitution tells us so; but we are not sure, from the cases, when we have the government on the line. That is what these cases give us in situations where they really had to fish or cut bait and go ashore. Brimson is a federal case, but the value of the case is to identify "government." The contest revolved about the trial court's refusal of process to bring a witness before the commission because the judge thought it was beyond the judicial power, i.e., that the commission was not acting for the government and the government was a stranger. The power of the government to give the authority to the agent

"... is beyond dispute. Upon everyone, therefore, who owes allegiance to the United States, or who is within its jurisdiction, enjoying the protection that its government affords, rests an obligation to respect the national will as thus expressed in conformity with the Constitution. As every citizen is bound to

\(^{153}\) 154 U.S. 447 (1894), 155 U.S. 1 (1894) (dissent).
\(^{154}\) 189 U.S. 439 (1903).
\(^{155}\) 154 U.S. 362 (1894).
\(^{156}\) 94 U.S. 113 (1877).
obey the law and to yield obedience to the constituted authorities acting within the law, this power conferred upon the Commission imposes upon anyone, summoned by that body to appear and to testify, the duty of appearing and testifying, and upon anyone required to produce such books, papers, tariffs, contracts, agreements, and documents, the duty of producing them, if the testimony is sought, and the books, papers, etc., called for, relate to the matter under investigation, if such matter is one which the Commission is legally entitled to investigate, and if the witness is not excused on some personal ground, from doing what the Commission requires at his hands. The propositions seem to be so clear and indisputable that any attempt to sustain them by argument would be of no value in the discussion. Whether the Commission is entitled to the evidence it seeks, and whether the refusal of the witness to testify or to produce books, papers, etc., in his possession, is or is not in violation of his duty or in derogation of the rights of the United States, seeking to execute a power expressly granted to Congress, are the distinct issues between that body and the witness. *They are issues between the United States and those who dispute the validity of an Act of Congress and seek to obstruct its enforcement.* And these issues, made in the form prescribed by an act of Congress, are so presented that the judicial power is capable of acting upon them. The question so presented is substantially, if not precisely, that which would arise if the witness was proceeded against by indictment under an act of Congress declaring it to be an offense against the United States for anyone to refuse to testify before the Commission.

The agent is the state and the state is the agent no less in the *Brimson* case.158

**H.**

In the *Reagan* case, likewise there is a full appreciation that the state is the agent.159 The case, the first important one to come up through the federal trial court, was brought to restrain the enforce-


158. They had to scrape off the foam in these cases or government would have been split up the middle by departmentalization. Those areas shade at the borders: "... There are matters involving public rights which may be presented in such form that the judicial power is capable of acting on them, and which are susceptible of judicial determination, but which Congress may or may not bring within the cognizance of the courts of the United States, as it may deem proper." *Id.* at 475. In our problem, the failure to recognize the individual's claim against the government of the state is to saw off the head from the body. We do not have courts for the sake of courts. We have courts to accomplish the purpose of government, as we have legislatures, and executives. *Cf.* *Ex parte Grossman*, 267 U.S. 87 (1925); *Michaelson v. United States*, 266 U.S. 42 (1924).

159. What is not seen is that the eleventh amendment has been repealed to the extent that the case is founded upon the fourteenth.
ment of an order of an officer, an agent of the state government. The court rejected the argument that the suit could not be brought in federal jurisdiction, but it arrived at the result over a suspension bridge. By this time, the new federal jurisdiction of 1875 is in full flower. *Swift v. Tyson* problems are having a federal field day. The progression of federal jurisdiction under the companion section reaches such excess as demonstrated by *Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co.* that it must have been the hope of everyone who had a case that did not augur as fair sailing in state courts. To this magnetism seems to have been added an attitude of hospitality by the federal court. Perhaps, *Prentis v. Atlantic Coast Line Company* discloses this best. The situation, being one in which the cause is ripe for adjudication, becomes one of strategy as to which court, state or federal, to try it. From *Prentis*, we get a summary of the development from *Reagan* to *Prentis*, in effect, that a federal claim in a state court would receive prejudiced treatment, even to the findings of fact. The state court itself was down-graded as inadequate to do justice because the federal right to be protected from deprivation depended upon pure matters of fact to such an extent that a de novo hearing of such facts in a federal court was essential to the protection of constitutional rights. *Reagan* opened the doors and the stampede to the federal court was on.

The court found difficulty in getting the door ajar. *Hans* was fresh out of the oven and this was a state and a state government could not be sued by an individual. But it is not the absence of a right against the state, it is the absence of a forum that was the trouble. Probably, this is where *Ex parte Young* got its foot caught. The court mounts the mole hill from the state's catapult. When the state

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160. 41 U.S. (16 Peters) 1 (1842).
162. 276 U.S. 518 (1928).
163. There are two flare developments from the Reagan formation, (1) fact trials de novo, and (2) abstention movements.
164. This must be said from looking at the results when it is borne in mind that the eleventh is considered unmodified in its repellent aspect. The true repeal function is unseen.
165. 211 U.S. 210 (1908).
166. "It seems to us clear that the appellees [plaintiffs] were not bound to wait for proceedings brought to enforce the rate and to punish them for departing from it. Those, we have assumed in favor of the appellants would be proceedings in court and could not be enjoined; while to confine the railroads to them for the assertion of their rights would be to deprive them of part of those rights. If the railroads were required to take no active steps until they could bring a writ of error from this court to the Supreme Court of Appeals of Virginia, after a final judgment, they would come here with the facts already found against them." Id. at 228 (Emphasis added).
government expressed its willingness to meet the plaintiff in the state court, the fat was in the fire. "Of course," it could not hold a general right to suit in its own court, so a right to sue any place becomes a right to sue every place. A quasi consent is just as good as a true one for federal jurisdiction, even if it will not do for contract.\textsuperscript{168}

I.

It took quite a while to discover that, in these generalizations, we were making the state a vassal in a manner foreign to the function of the supremacy clause. Many of these cases arose from state public utility regulation problems. Fundamentally, these are matters of municipal police power, and their effectiveness is as important to the federal plan as it is to the constituent state. The state structure is complicated and the meaning and scope of the state laws may be obscure. If one meaning is had, no federal concern attaches. If another meaning is given, a federal right arises. The breach of federal right is not disclosed until the state action is clarified. The federal right thus is appendant, not primary. These usually are equity causes. Injunction, the tool of equity, is not issued as a matter of course. It follows only when damages are found inadequate, if it does not require too much supervision to enforce, and where no other public policy intervenes. The misuse of the injunction has called for disuse of primary federal jurisdiction in this situation under the popular appellation of the abstention doctrine. Mr. Justice Stone set it up.\textsuperscript{169} The court has carried it through in \textit{Railroad Commission of Texas v. Pullman Co.},\textsuperscript{170} and \textit{Alabama Public Service Commission v. Southern Ry. Co.}\textsuperscript{171} This is not a problem of jurisdiction, but it does send the case home to the state court. It does relevel virtue on a comparative basis between the state and federal court to apply law and achieve justice.

J.

These materials invite attention to the civil rights acts. In them, the congress exercised its special power of enforcement.\textsuperscript{172} The

\textsuperscript{168} Cf., Great Northern Life Ins. Co. v. Read, 322 U.S. 47 (1944).
\textsuperscript{170} 312 U.S. 496 (1941).
\textsuperscript{171} 341 U.S. 341 (1951). Prentis was decided shortly after \textit{Ex parte Young}. It develops and applies the fundamental rule of first exhausting the administrative remedy before judicial review is sought. This is sometimes referred to weakly as the postponement of jurisdiction. It is nothing more than the universal final order rule relating the responsibility of decision or exercising primary jurisdiction into the corrective appellate process and preserving departmentalization.
\textsuperscript{172} "The Congress shall have power to enforce by appropriate legislation, the provisions of this article." U.S. CONST. amend. XIV, § 5.
acts help to identify the general cause of action, given directly to the individual and self-executing. The great action exists only against the state. It does not exist against the official or the agent. What the agent did might be state action within the primary cause but state action would not be the officer’s responsibility. This much the constitution was written to say for itself. To buttress the general cause and to establish the pro-union policy built about state discretion, the congress ran around to the other end and put the hood over the person of the official. It created two statutory causes of action against him, one penal and one civil. The state official is the victim of both. The government can act only through the agent. If the agent is paralyzed, the government is impotent. If the agent must go to jail for doing the government’s bidding and then turn over all his property to the person injured by way of insuring to the individual the virtue of the state, the individual has both a hammer-lock and a toe-hold on deprivation. If the conduct of the state was actionable under the fourteenth amendment, the individual had causes against both the state and its agent. As the action against the official is broader, the injured individual may have an action against the official when no action lies against the state. The official must be an agent when the state is liable to account to the individual. An extracurricular activity is enough to hold him liable under the civil rights acts.

K.

Three cases commonly are cited as throwing the key block on action against the state on the ground that if the deprivation of property is without state authorization there is no constitutional basis for the cause. The congress gave both a special cause of action against the official and a special passport to court. The official must act under color of state authority in doing an act which would be actionable against the state if he were executing its mandate. Thus he can be liable even though he acted in violation of the state’s mandate.  

173. See note supra.

174. The federal official may not have been given as much opportunity to destroy himself by doing his duty as the state official.


176. The statement of the Constitution cannot be strengthened by citation of “authorities.”


difference between these two positions and the distinction from the abstention problem of Alabama Public Service Commission v. Southern Ry. Co. is etched by Chief Judge Denman in Romero v. Weakley. The friction between this special, statutory, civil right acts cause of action with the customary has caused a retrenchment by interpretation in recent cases.

X.

A.

Terry v. Adams stems from the fifteenth amendment's assurance that the right of citizens of the United States to vote shall not be denied or abridged by a state on account of racial characteristics. There is some difference from the fourteenth as the fifteenth pushes the specific union-derived right through state road blocks to the ballot box. However, the answer depends upon identification of the state; and, inevitably, by osmosis if nothing more, the special draws from the general. More often, the state conduct captured by the fourteenth amendment will be affirmative and prohibitive rather than negative. Both amendments have a disengaging permissive area where distinction between contusion and pigmentation is difficult. Both have the task of finding action by government; and the great travail of the political right from the private, social fraternity's black-ball to government abridgment invites comparison of our issue with the prognosis of the fifteenth amendment and makes Terry v. Adams significant.

When its officials conduct its business as directed, the government is acting. As original rights are involved, per se, allegation that the government of the state is engaged in their deprivation raises a justiciable issue. The translation of our cause always will be under the court's supervision, thus dispelling alarm, for even the King's writ was prevented from becoming a tyrant's weapon largely by reason of the fact that it was issued under judicial control. Officials owe their duty to act immediately to the government, and that duty is to execute the will of the principal. As we come up to this through the Brimson case, it is clear that the general right of action under the fourteenth amendment depends upon the official acting within his jurisdiction

179. See note 171 supra.
180. 226 F.2d 399 (9th Cir. 1955).
182. 345 U.S. 461 (1953).
183. See discussion by Chief Judge L. Hand in East Coast Lumber Terminal v. Babylon, 174 F.2d 106 (2d Cir. 1949).
and within the mandate of the government. The public interest and the official action precept eliminate dependency upon the vicarious liability projection of private law. Colpoys v. Gates holds Cooper v. O'Connor in check. The official must act within the jurisdiction given him by his government; but the determination of that jurisdiction, like the exercise of his discretion, is part of his duty. It includes the authority to decide wrongly as well as to make correct decisions.

B.

The eleventh amendment also required the identification of state government. When it first came up for consideration, it was said that the amendment applies only to suits "in which a state is a party on the record." A long list of cases establish the course of decision "as to what is to be deemed a suit against a state . . . it is now well established that the question is to be determined, not by the mere names of the titular parties, but by the nature and effect of the proceeding, as it appears from the entire record." The ferreting out of the party in interest works from the plaintiff's end too, as appears in the use of the device of assignment for collection in order to escape the eleventh amendment's individual plaintiff. The contemporary device to escape the eleventh's state was to sue the official.

"That a State cannot be sued by a citizen of another State . . . on the mere ground that the case is one arising under the Constitution or laws of the United States, is clearly established by the decision of this court in several recent cases. (Citing cases) . . . Relief was sought against state officers who professed to act in obedience to those (state) laws. This court held that the suits were virtually against the States themselves and were consequently violative of the Eleventh Amendment of the Constitution, and could not be maintained."

The court turns the page to continue in North Carolina v. Temple: "We think it perfectly clear that the suit against the auditor in this case was virtually a suit against the State of North Carolina. In this

184. 118 F.2d 16 (D.C. Cir. 1941).
186. There is a complete exposition of this function in West Coast Exploration Co. v. McKay, 213 F.2d 582 (D.C. Cir. 1954), cert. denied, 347 U.S. 989 (1954).
188. Ex parte New York, 256 U.S. 490, 500 (1921).
191. 134 U.S. 22, 30 (1890).
regard it comes within the principle of the cases . . .” which held that suits against officers who professed to act in obedience to the mandate of their government were suits against the state.\textsuperscript{193}

C.

The eleventh amendment dealt with state government. When the official acted as directed, he was the state. \textit{Hans} and \textit{Temple} are the leading authorities for this meaning. This was the scope of “state” which took its government out of the federal courts. When the purpose was to restore that jurisdiction the same term was used. The “state” taken out by the eleventh was the “state” brought back by the fourteenth. This is what makes \textit{Ex parte Young}\textsuperscript{194} the monstrosity of the age.\textsuperscript{195} The federal trial court had issued a preliminary injunction, upon the suit of railroad stockholders, restraining the railroads from complying with a state statute which reduced their rates allegedly in violation of the federal constitution; and also enjoining Young, the state attorney general, from instituting any proceeding to enforce the penalties and remedies provided by the statute or to compel obedience to it. The day after the injunction was granted, Young filed a petition for mandamus in the state court to direct the railroads to file rates conforming to the statute and the court issued the writ. The federal court then adjudged Young in contempt, and he made an original application to the Supreme Court for leave to file a petition for habeas corpus and certiorari. The Supreme Court assumed that leave should be granted, and the writs issued, if the federal court was without jurisdiction to issue the preliminary injunction. The opinion described as “the most material and important objection made to the jurisdiction of the Circuit Court” the claim that “the suit is, in effect, one against the State of Minnesota, and that the injunction issued against the Attorney General illegally prohibits state action, either civil or criminal, to enforce obedience to the statutes of the State.”\textsuperscript{196} In rejecting the claim, the opinion reviews eleventh amendment cases. It recognizes that the rule that the amendment applied only to those

\textsuperscript{192} Hans v. Louisiana, 134 U.S. 1 (1890).

\textsuperscript{193} In Hans, the case was brought on the contract clause. Despite all the additive, Mr. Justice Bradley does recognize that there is actionable fault by the state—but the state cannot be sued there. \textit{Id.} at 20.

\textsuperscript{194} 209 U.S. 123 (1908).

\textsuperscript{195} It represents legalism in the extreme. It is the artful beauty and the sophistry of “law.” It has the spirit of excelsior and the method of a Sunday driver going backwards down the hill. It does some good by way of a flying trapeze, but there is nothing but levitation to sustain the swing. It gives a kind of dark light in levoration.

\textsuperscript{196} \textit{Ex parte Young}, 209 U.S. 123 (1908).
“suits in which the State was a party of record” had been abandoned. The upshot is that suits against state officers to enjoin the enforcement of state statutes contravening the fourteenth amendment are treated as suits against the officers, not against the state, so they do not come within the eleventh amendment. The basis is stated:

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

Mr. Justice Harlan replied in dissent:

“The suit . . . was, as to the defendant Young, one against him as, and only because he was, Attorney General of Minnesota. No relief was sought against him individually but only in his capacity as Attorney General. And the manifest—indeed, the avowed and admitted, object of seeking such relief was to tie the hands of the state, so that it could not in any manner or by any mode of proceeding, in its own courts, test the validity of the statutes and order in question. It would therefore seem clear that within the true meaning of the Eleventh Amendment the suit brought in the federal court was one, in legal effect, against the state . . . .”

D.

The universal rule recognizes, as it must, that a public officer ordinarily cannot be sued when the state is the real party in interest or an indispensable party to enable the court to grant the relief sought, because that would constitute a suit against the state. It is nice to call Ex parte Young an exception to this doctrine for an officer who acts under a statute said to violate the fourteenth amendment. The injunc-

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197. Id. at 159, 160.
198. Id. at 173, 174.
tion issues because the action is not considered to be a suit against the state government. The first difficulty with this is that the fourteenth amendment did not cover relations between individuals. The second is that there is no state sovereign to be immune from fourteenth amendment actions. Two things add to explode the Young satellite. In the first place there just is no fourteenth amendment cause of action unless there is state government action. The second is that where there is a fourteenth amendment cause there is no eleventh amendment to interfere, because that barrier was pulled back enough to let the fourteenth's individual suit go through to the state. The good, if the word is not too kind, of Ex parte Young is that no one could fail to recognize that relief, somehow, must be allowed. We need no fiction, "here lies the road to Rome"—a strong, straight bridge to the State shore. In Ex parte Young, the action was against the state government. It was not within the eleventh amendment.

XI.

A.

The key to the whole difficulty may lie in another fixation. After a court has concluded adjudication and issued its declaration of the obligatory legal relations disclosed on the record, it might be functus officio. For various and good reasons, the power of execution on judgment became appendant. The problems arising on the fundamental issue of judicial review, namely, whether the federal judicial power has corrective supervision over a state government, which is not co-ordinate but subordinate in the federal system, and whether the subordinate can pass upon the validity of acts of the co-ordinate department, also arise in regard to execution on judgment. There is a very great difference between a declaration of right-duty and the

200. The civil rights acts would pick him up here, agent or no agent.
201. "Individual invasion of individual rights is not the subject-matter of the Amendment . . . until some State law has been passed, or some State action through its officers or agents has been taken, no legislation of the United States . . . can be called into activity." Civil Rights Cases, 109 U.S. 3, 13 (1883); Slaughter House Cases, 83 U.S. (16 Wall.) 36 (1872).
202. "The prohibitions of the Fourteenth Amendment are directed to the States and they are to a degree restrictions of State power. It is these which Congress is empowered to enforce against State action, however put forth, whether that action be executive, legislative, or judicial. Such enforcement is no invasion of State sovereignty. No law can be which the people of the states have by the Constitution of the United States, empowered Congress to enact." Ex parte Virginia, 100 U.S. 339, 346 (1879). The adoption of the constitution waived sovereign immunity from suit. See Monaco v. Mississippi, 292 U.S. 313 (1934).
203. See Michaelson v. United States, 266 U.S. 42 (1924).
205. The latter also is a problem within a state government.
placing of it in the hands of an executioner. The position of Mr. Justice Gray, perhaps, best explains that of Mr. Justice Iredell in *Chisholm* and Mr. Justice Bradley in *Hans* when he discusses non-suability of the state in his dissent in *Lee*. What alarms him is not that there be a declaration of right, but he cannot conceive of execution. His court, he felt, simply had no power to issue an execution in such a case. Then, since there could not be judgment without execution on judgment, there could be no judgment. This is derived from confusion of departmentalization with judicial review of the action of a constituent of the federation. Departmentalization is thought to be involved because execution would cause the executive and legislative departments to be absorbed by or at least subordinated to the judicial power. It looked as if the court found that a judgment without execution would be a legal solecism when it considered *Liberty Warehouse Co. v. Grannis*. When it was faced with the proposition that the federal system would split up through finality of constitutional questions in state declaratory judgment actions, the court confirmed judgment on a case sans execution in *Aetna Life Insurance Company v. Haworth*. In *Petition of Kariher*, the court recites many examples of common law actions in which the highest judicial tradition renders judgment without concern that it will not be followed by execution. Following *Virginia v. West Virginia*, West Virginia enacted legislation for the payment of its obligation.

B.

"Upon the whole, I am of the opinion that the Constitution warrants a suit against a state, by an individual citizen of another state."

206. See note 83 supra. While recognizing that the eleventh amendment ends the federal jurisdiction of the suit, Hollingsworth confirms the underlying principle of the cause of action against the state. Hollingsworth v. Virginia, 3 U.S. (3 Dall.) 378 (1798).

207. See notes 122, 128, 129, 130 supra.

208. Cf., "... the inability to enforce the claim against the vessel is not inconsistent with its existence." The Siren, 74 U.S. (7 Wall.) 152 (1868).

209. 273 U.S. 70, 73; (1927). "... the judicial power ... of the United States ... does not extend to the determination of abstract questions or issues framed for the purpose of invoking the advice of the court without real parties or a real case." This was so because no case was so presented "that the judicial power is capable of acting upon it[,] and pronouncing and carrying into effect a judgment between the parties."


211. 284 Pa. 455, 131 Atl. 265 (1925).

212. 246 U.S. 565 (1918).

213. W. Va. Acts ch. 10 (Ex Sess. 1919). Judgments of the Court of Claims lack execution, and are not destroyed by an absence of present appropriation. Surely, the Congress will not be made to appropriate satisfaction.

214. Mr. Justice Cushing in Chisholm v. Georgia, 2 U.S. (2 Dall.) 419, 469 (1793).
It is not dispute of this suability as a general right of action that has caused the repression. Even Mr. Justice Bradley says in *Hans* that it exists for "undoubtedly a state may be sued by its own consent." 218 Likewise, when the United States government appears, "it waives its exemption and submits to the application of the same principles by which justice is administered between private suitors." 216 Cross claims always have been allowed. These receive recent confirmation and expansion in *National City Bank v. Republic of China*,217 with a significant inroad into the immunity terminology. It is not the suability that has been denied. Horror, needlessly, has been held of that bob-tailed judgment adumbrated by a confused departmentalism.218

C.

The purpose here is not join the ululation of the multitudes at the misconceived doctrine of immunity. Moribund, it may rust away or the legislatures may move in common decency.219 The purpose here is to demonstrate the positive function and the repealing operation of the fourteenth amendment, and that *Ex parte Young* and its numerous progeny must be set aside as falsely conceived and erroneously decided. The mangled individual has a direct cause of action for the causal fault of the state government for which it must account. This is a fundamental right participle to our ordered liberty under law.

215. 134 U.S. 1, 17 (1890). See also note 193 *supra*, "Although a state may not be sued without its consent, such immunity is a privilege which may be waived, and hence, where a state voluntarily becomes a party to a case and submits its rights for judicial determination, it will be bound thereby and cannot escape the result of its voluntary act by involving the Eleventh Amendment." Gunter v. Atlantic Coast Line R.Co., 200 U.S. 273, 284 (1906).

216. The Siren, 74 U.S. (7 Wall.) 152, 159 (1868).


218. Iowa-Des Moines National Bank v. Bennett, 284 U.S. 239 (1931), held that systematic discrimination against petitioners by state officials charged with the assessment of taxes was "state action", although the state court already had considered the question and held that the acts were unauthorized and were not "state action." "When a state official, acting under color of state authority, invades, in the course of his duties, a private right secured by the federal Constitution, that right is violated, even if the state officer not only exceeded his authority, but disregarded special commands of the state law." *Id.* at 246.

"Cases discussing the question of what constitutes a suit against the State within the meaning of the Eleventh Amendment . . . have no bearing upon the power of this court to protect rights secured by the federal Constitution." *Id.* at 246, n.5.

"The prohibition of the Fourteenth Amendment, it is true, has reference exclusively to action by the State, as distinguished from action by private individuals." *Id.* at 245.

219. See Campbell v. State, 186 Misc. 586, 62 N.Y.S. 2d 638 (Ct. CL. 1946). I hope to help in that persuasion but there is no purpose here to join the multitude at the wailing wall. 43 STAT. 1112, 46 U.S.C. § 781 (1952) discloses the advance in federal legislation.