

Constitutional Adjudication and Democracy Democracy, Popular Sovereignty, and the Courts

Sovereign Immunity, Federalism, and Enforcement of Individual Rights

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Courts may obviously act as either friend or foe of “democracy;” judicial decisions that sustain the flow of information and assure access to the ballot box help to sustain democratic principles, and decisions that thwart laws intended to protect individual rights may have the opposite effect. My primary concern is with the latter. In the paragraphs which follow I raise questions about constitutional doctrine established by the United States Supreme Court which elevates principles of sovereign immunity and federalism while subordinating individual rights, especially those derived from federal statutes or treaties. While the problems I describe result from unique aspects of U.S. history, they reflect a broader concern with court-imposed restrictions upon the realization of individual rights.

A constitutional democracy inevitably raises questions about the interplay between elected representatives and the courts. I begin with a baseline expectation that judges have authority to keep actions of legislators and the executive within constitutional boundaries.¹ One step removed from that principle is the corollary that courts provide remedies to individuals whose rights have been violated by government officials.² In the United States, however, while the Supreme Court Justices identified these principles at an early stage in our history, subsequent decisions have moved in the opposite direction. In particular, doctrines of sovereign immunity and federalism have been used to constrain access to meaningful remedies. This problem is most acute in the context of “positive rights” defined by statute or treaty.

The doctrine of sovereign immunity limits the extent to which individuals may successfully sue states for compensatory damages. That doctrine predates the United States Constitution, and reflects an anachronistic concept that sovereigns can “do no wrong.” In a democratic context, the doctrine clashes with the concept of popular sovereignty and the idea that government officials remain subject to ultimate control by the public. While elected representatives may have primary responsibility to legislate remedies for those who have been harmed, courts have an obligation (at least in the constitutional context) to imply remedies when such legislation is lacking.³ When the United States Supreme Court Justices construed

¹ *Marbury v. Madison*, 5 U.S. 137 (1803).

² *Id.* Although recognized in principled terms from an early stage in United States history, implementation of this second principle did not really take hold until the middle part of the twentieth century. See *Monell v. Department of Social Services*, 436 U.S. 658 (1978).

³ See, e.g., *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971).

federal statutes authorizing individual actions to enforce the Fourteenth Amendment, however, they concluded that Congress had not authorized suit against states that would conflict with traditional conceptions of sovereign immunity.⁴ Presumably, it is up to Congress to address that defect, and to enact new legislation specifically authorizing suits against states that violate constitutional rights.

If that were the end of the story, it would not be of particular interest at an international conference on constitutional law. Two other parts to the story, however, create complications that lead to questions about what is happening in other nations, and experiences that may be compared to those in the United States. The first involves the distinction between negative and positive rights. This distinction has been at the center of international debate for generations. In the United States, special constitutional status has been reserved for negative constraints upon the government. That status is derived from constitutional text. The First Amendment begins with the phrase: “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press . . .” The Fourteenth Amendment provides that: “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 laws.”

Within the United States, positive rights derived from statutory law, for example, the right of access to food, shelter, health care or employment, lack comparable status. While some have tried to explain the rationale for giving higher status to “negative rights” compared to “positive rights,” those efforts are ultimately difficult if not impossible to defend with arguments about whether the right in question is “fundamental.” It makes more sense, however, to understand the distinction in terms of constitutional structure, focusing in particular on the role of the courts. Judges can enforce negative rights by restraining the government. They are not well equipped, however, to develop standards for enforcing positive rights to personal well-being; that role is better played by the legislature, free from close judicial scrutiny and subject only to minimal standards of fundamental fairness.

A second reason why protection of positive rights has limited status in the United States is linked to traditional divisions of responsibility reflected by the doctrine of federalism. American colonies operated with assumptions that providing health care and welfare relief were obligations of local communities. As time passed, states, rather than the federal government, were assumed to have responsibility for providing citizens with an education. Sovereignty of the national government was limited by the text of the Constitution to topics involving commerce, national defense, and related responsibilities. This federal division of responsibility limited the extent to which “positive” welfare rights were perceived as protected by the national constitution.

⁴ See *Will v. Michigan Department of State Police*, 491 U.S. 58 (1989).

In the twenty-first century, however, much has changed. The link between commerce and civil rights is now well understood; in protecting interstate commerce, Congress has authority to prevent discrimination based upon age or disability, and to assure that fair employment laws are enforced throughout the nation. Congress also plays a predominant role in providing welfare assistance, housing and employment, and may soon take over even more of that responsibility in the health care context. The United States Supreme Court, however, has ruled that, absent constraints based upon federal spending, Congress cannot enforce these laws by arming individuals with claims for monetary damages against states that fail to comply.⁵ The Justices base their rulings on a doctrine of sovereign immunity which, although not specifically referred to within the text of the United States Constitution, is nevertheless implied by “the presupposition of our constitutional structure.”⁶

A minority of the Justices and many scholars have explained at length that the Supreme Court majority misconstrued the meaning of the Eleventh Amendment and related historical conceptions of sovereignty. The design of the Constitution, specifically reflected in the Supremacy Clause, makes the central government sovereign with respect to powers conferred upon the national government. The text of the Eleventh Amendment appears consistent with that traditional understanding of sovereignty; it applies only to suits against states brought by persons from other states, understood in short hand as cases of diversity jurisdiction. The text of that Amendment has no application to cases brought to enforce federal rights by citizens of a state against their own state government, and it would be inconsistent with traditional conceptions of sovereignty to extend immunity to states in such cases because doing so undermines the sovereignty of the national government. Nevertheless, that’s the conclusion reached by the Supreme Court.

A primary problem resulting from this interpretation is that basic rights founded on federal legislation are often not enforceable against the states. This is especially significant in the context of employment rights authorized by the Commerce Clause of the Constitution, but unenforceable by private individuals who are employed by state governments. Furthermore, because this restriction is derived from a Supreme Court interpretation of the Constitution, Congress and the people they represent are powerless to change the rule short of an amendment to the Constitution. The Supreme Court majority valued federalism over individual statutory rights when they reached this decision.⁷ In doing so, they undermined national sovereignty and principles of democracy.

⁵See, e.g., *Board of Trustees of the Univ. of Ala. v. Garrett*, 531 U.S. 356 (2001) (barring private enforcement of the Americans with Disabilities Act); *Kimel v. Florida Bd. of Regents*, 528 U.S. 62 (2000) (denying rights to recover monetary damages for violations of the Age Discrimination in Employment Act).

⁶ *Blatchford v. Native Village of Noatak*, 501 U.S. 775, 779 (1991) (finding 11th Amendment constraints on suits by Indian tribes against states).

⁷ In other contexts, I have argued that the Privileges or Immunities Clause of the Fourteenth Amendment encompasses statutory rights, and should be enforceable against the state (overriding Eleventh Amendment

Issues of sovereignty, federalism and individual rights are also of interest in analogous contexts involving executive authority to enforce rights derived from international treaties. In 2006, the United States Supreme Court ruled that, in the absence of specific congressional action, the President lacks power to enforce an international treaty obligation to inform foreign consulates when citizens of another nation are subjected to criminal prosecution.⁸ Again, a majority of the Supreme Court Justices in this country have viewed their role in terms of restricting, rather than safeguarding, the rights of individuals.

My underlying question: When courts exercise constitutional authority, are they most likely to help or hinder those who bring claims against the government? What are the implications for constitutional democracies?

restrictions), on that basis. See, e.g., William J. Rich, "Taking 'Privileges or Immunities' Seriously: A Call to Expand the Constitutional Canon," 87 Minn. L. R. 153 (2002).

⁸ *Medellin v. Texas*, 128 S. Ct. 1346 (2008).