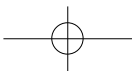
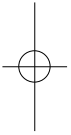


SOVEREIGN IMMUNITY OR THE RULE OF LAW



**SOVEREIGN IMMUNITY OR
THE RULE OF LAW**

The New Federalism's Choice

Donald L. Doernberg

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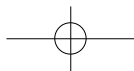
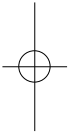
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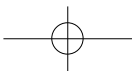
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*To Douglas L. Hurley
Friend of a lifetime*





CONTENTS

Foreword	ix
Acknowledgments	xi
Introduction	1
Chapter 1 Sovereignty	13
A. Jean Bodin	13
B. Thomas Hobbes	23
C. Robert Filmer	30
D. Samuel Pufendorf	36
E. John Locke	45
F. The Framers of the Constitution of the United States	63
Chapter 2 Sovereign Immunity	71
A. The English Approach	71
B. The American Approach	78
1. The Immunity of Government Entities	81
a. The Immunity of the United States	81
b. The Immunity of the States Under State Law	83
c. The Immunity of the States Under Federal Law	85
2. The Immunity of Officials	119
3. Sovereign Immunity and Government Dignity	124
Chapter 3 The New Federalism	129
A. Withdrawal of Federal Judicial Power: Abstention	132
1. <i>Pullman</i> Abstention	132
2. <i>Burford</i> Abstention	136
3. <i>Thibodaux</i> Abstention	138
4. <i>Younger</i> Abstention	139

viii CONTENTS

B. Withdrawal of Federal Judicial Power: The Eleventh Amendment	147
C. Withdrawal of Congressional Power: The Fourteenth Amendment Cases	150
D. Withdrawal of Congressional Power: The Commerce Clause Cases	160
E. Withdrawal of Congressional Power: Congress's Inability to Compel States to Implement Federal Programs	167
F. Conclusion	176
Chapter 4 The Rule of Law	179
A. Introduction	179
B. The Formalist View	183
C. The Substantive View	190
D. The Rule of Law in Anglo-American Constitutive Documents	197
E. The Rule of Law in Contemporary America	200
Chapter 5 Irreconcilable Differences	209
Table of Authorities	221
Constitutional Provisions	221
Statutes	222
Rules	224
Cases	224
Books	232
Articles	235
Other Authorities	241
Index	243

Foreword

Anyone who studies Federal Courts knows that the Supreme Court has undertaken a massive redistribution of power in the United States over the past three decades. Under the rubric of “federalism,” the Court has systematically shifted power away from the federal government to the states, doing so largely (though certainly not entirely) through procedural doctrines. Some constitutional text underlies parts of what the Court has done, but much of it finds no constitutional anchor at all.

This is not a book about whether the new balance between federal and state power that the Court is striking is good or bad. It may be either. It may even be both. That is a discussion for the pundits and the constitutional authors of the future. This volume does, however, address the dominant theory that the Supreme Court trumpets as justifying its federalism rulings: sovereign immunity. Often, as in the Eleventh Amendment cases, the Court explicitly discusses sovereign immunity. Even where it does not, however, the concept lurks in the background. For example, in recent cases limiting Congress’s power under the Commerce Clause and the Fourteenth Amendment, the Court has stressed the states’ independence from federal legislative interference. That is sovereign immunity by another name, and it is well to remember Shakespeare’s “What’s in a name?” Irrespective of the label, sovereign immunity smells as . . . well, however it smells, which admittedly depends heavily on the perspective of the individual.

This book grows out of my inability to accept the idea that within a society based on law, not force, any wrongdoer should be exempt from the law. It is one thing to say that certain laws do not apply in certain situations or to certain actors *ab initio*. It is a far different thing to say, as the Supreme Court repeatedly does, that when there are laws that do apply by their terms—particularly constitutional principles that can apply only to government and its officials—the targets of those laws are not accountable to them, and the victims of unlawful official behavior have no effective recourse under the law. The ancient saw *ubi jus, ibi remedium* promises that where there is a right, there is a remedy. Anglo-American law has operated under that principle for centuries. Great Britain still does. In the United States, one must now modify that statement: *ubi jus, ibi remedium regimen exceptum*. In that context,

x FOREWORD

one must question what it means to say that rights exist or that true limitations on government power *vis-à-vis* individuals exist. In some sense, this book seeks to explore whether we live under a constitution or an illusion, and it flows in part from the current Supreme Court majority's inability or unwillingness to appreciate that repetition does not establish validity.

Acknowledgments

Somewhere there may be writers of single-author works who genuinely work alone, with the result that the product is theirs, first to last. I am not one of them. The responsibility for the product is mine, first to last, but I (gratefully) lack the hubris to think that I did it alone. My wife Cynthia A. Pope is constantly supportive in ways that defy adequate description. The least of it is her welcome editorial contributions, and they are considerable. Beyond that, she tolerates my bizarre schedule and work habits and has far more faith in me than I do. That is a gift of inestimable value, and I am conscious of it every single day. Our children Doug and Emily also support me in very important ways, although I have not yet conscripted them as editors. My working on a project like this invariably impinges on their world; they nonetheless seem to derive pleasure and pride in whatever I am able to achieve, and that is very warming.

I was fortunate to hold the James D. Hopkins Professorship at Pace University School of Law from 2001 to 2003, and I want to express my gratitude to Dean David Cohen for that honor and for his constant support of this project.

My colleagues Professors Barbara Black, Steve Goldberg, and Michelle Simon (now serving as Associate Dean, but she is expected to recover) have also been generous with their time, serving as sounding boards (and sometimes voltage regulators) and offering suggestions and new perspectives. They exemplify, in every respect, the best that the academy has to offer, and my work would not be nearly so much fun without their friendship.

One of the very best things about teaching is the number of intelligent, dedicated and talented young students whom one meets. I have been extraordinarily fortunate to work with research assistants Sarah Courtman, Michael Frankel, Oren Gelber, Adam Hasson, Jennifer LoPresti, Siobhan Molt, Michael Schwarz, Tamia Simonis, John Tenaglia, Edward Vale, Margaret Walker, Elizabeth Wheeler and Holly Young, all present or past students at Pace Law School. None of them fully accepts the magnitude of the contributions they make, including analysis, research, editing, arguing, proofreading and, most important being friends who respect me enough to tell me when I am once again headed off on the wrong track.

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I met Doug Hurley on Monday, September 17, 1962, as we were beginning college. In the intervening forty-two years we have shared every important event—good and bad—in each other’s lives. Many people have role models for one part of their lives or another—as parents or with respect to careers, for example. Doug is my role model for the best that it can mean to be a human being.

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