

Articles

Sovereign and State: A Democratic Theory of Sovereign Immunity

Corey Brettschneider* & David McNamee**

Sovereign immunity is an old idea, rooted in monarchy: the king cannot be sued without consent in his own courts. The American Constitution, by contrast, is committed to popular sovereignty and democratic self-rule. It is hardly surprising, then, that sovereign immunity doctrine comes riddled with confusion when awkwardly transplanted to a democratic context. But scholars have so far overlooked a cure for these confusions—to revisit the fundamental question of sovereignty in a democracy. In this Article, we aim to reconcile the doctrine of sovereign immunity with the Constitution’s core commitment to democracy. On our view, a state is rightly immune from suit when it acts as the democratic sovereign. This includes the authority to make what we will call “sovereign mistakes.” For a plaintiff to raid the treasury to pay for losses stemming from public policy decisions, even in error, vitiates the sovereign power of the purse. But a necessary condition for democratic legitimacy is that the sovereign must respect citizens’ fundamental constitutional rights. And so when the state violates these rights, it no longer acts as the democratic sovereign, and it does not enjoy immunity from suit. The mantle of democratic sovereignty passes to the citizen–plaintiff instead. Part I considers and rejects the all-or-nothing approaches to sovereign immunity doctrine that dominate the literature. Part II then develops our democratic alternative. Parts III and IV apply this democratic principle of sovereign immunity to breathe new life into the doctrine—providing a normative justification for immunity where it lies while also carving out its limits.

INTRODUCTION.....	1230
I. EXISTING DEFENSES OF SOVEREIGN IMMUNITY DOCTRINE	1241
A. The Flaws of Originalist Theories and Their Textualist Critics	1241
B. The Problematic State Dignity Principle	1247
II. DEMOCRATIC AUTHORITY AND SOVEREIGN IMMUNITY	1252
A. The Substance and Procedure of Democracy	1252

* Professor of Political Science, Brown University; Visiting Professor, Fall 2014, University of Chicago Law School. The authors would like to thank Steven Calabresi, Richard Fallon, Abner Greene, Aziz Huq, Alison LaCroix, Thomas Lee, Ethan Leib, Nick McClean, Eric Posner, and Ben Zipursky for their thoughtful comments. Larry Lessig read an early draft, and his suggestions considerably improved the piece.

** Ph.D. Candidate, Politics, Princeton University; J.D. Yale Law School.

B.	State Action and Democratic Sovereignty	1253
1.	<i>Sovereign Mistakes and Pure Private Rights</i>	1254
2.	<i>Fundamental Democratic Rights</i>	1256
C.	Identifying Fundamental Democratic Rights	1258
D.	<i>Hans</i> and the Principle of Democratic Sovereignty	1262
III.	IMMUNITY FOR DEMOCRATIC SELF-GOVERNMENT: THE	
	SOVEREIGN SPENDING POWER	1266
A.	The State–Sovereign Distinction	1266
1.	<i>Proper Pleading: Injunctions Under Ex parte Young</i>	
	<i>and Damages Under § 1983</i>	1267
2.	<i>The Theory of Sovereign Mistake in Federal Sovereign</i>	
	<i>Immunity</i>	1270
B.	Prospectivity Under <i>Edelman</i> and the Sovereign Spending	
	Power	1273
C.	Abrogation Violating Democratic Sovereignty	1279
D.	Waiver as a Sovereign Function	1282
IV.	DEMOCRATIC RIGHTS AND THE LIMITS OF SOVEREIGN IMMUNITY .	1285
A.	Abrogation to Preserve Democratic Sovereignty.....	1285
B.	Congressional Power to Protect Fundamental Rights	1289
V.	OBJECTIONS AND RESPONSES.....	1293
	CONCLUSION	1296

Introduction

Few areas of doctrine have sown as much confusion over the past two centuries as the Supreme Court’s sovereign immunity jurisprudence.¹ And today it appears to occupy a kind of twilight zone in constitutional theory. Its defenders, who tend towards conservative originalism, invoke a broad principle of sovereign dignity that finds no home in the constitutional text.² Its liberal detractors, who favor expansive interpretations of rights and powers under the Constitution, instead call for a narrow reading of the Eleventh Amendment in isolation.³ We argue that much of this confusion stems from a failure to appreciate the theoretical question at the core of the doctrine: how can we reconcile it with democracy?

What does it mean to say that the sovereign is immune from suit in a system of popular sovereignty? The answer to this question cannot rest in some excursion to the doctrine’s historical and monarchical roots. But neither can it be wholesale rejection of the doctrine—a system of popular sovereignty is not a system that lacks sovereignty altogether. To solve this apparent morass, we offer a *democratic* account of sovereignty, one that

1. See generally RICHARD H. FALLON, JR. ET AL., HART & WECHSLER’S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 841–43 (6th ed. 2009) (recounting the evolving doctrine of sovereign immunity in early Supreme Court decisions and British common law).

2. See *infra* notes 9–11 and accompanying text.

3. See *infra* notes 12–24 and accompanying text.

both registers the importance of collective decision making and respects the fundamental rights of citizens. We therefore tie the seemingly confused doctrine of sovereign immunity to the more generalized democratic ambitions of the Constitution as a whole. We begin with the fundamental question at the heart of sovereign immunity: when may citizens sue a democratic state? Consider the following cases:

- A prison guard sexually assaults an inmate, who then sues the federal government as his employer.⁴
- A state college bookstore receives preferential transfers from a debtor who has filed for bankruptcy, and the court-appointed trustee sues to recover them to distribute them fairly.⁵
- A federal statute requires states to negotiate with Native American tribes over the operation of gaming facilities.⁶ One tribe sues the State of Florida for breach of this duty, seeking to compel negotiations.⁷
- After finding a pattern of racial segregation, a federal court orders the Governor of Michigan to fund remedial education programs as part of the desegregation decree.⁸

These cases trace just a few of the many wrinkles in the law of sovereign immunity. They turn on subtle conceptual and doctrinal distinctions. Yet the dominant theories of sovereign immunity cannot adequately distinguish them. These theoretical approaches either offer a blanket defense of the doctrine or reject sovereign immunity altogether.

In particular, “monarchical” defenses of sovereign immunity see the state as a sovereign monarch, above the people and incapable of error. The traditional monarchical view is therefore one of the sovereign as immune from suit.⁹ Indeed, in this Article we contend that critics of the Court’s

4. *Millbrook v. United States*, 133 S. Ct. 1441, 1444–46 (2013) (holding that the Federal Tort Claims Act waives federal sovereign immunity for intentional torts committed by law enforcement officers within the scope of their employment).

5. *Cent. Va. Cmty. Coll. v. Katz*, 546 U.S. 356, 369–73 (2006) (concluding that the Bankruptcy Clause waives sovereign immunity for state creditors in in rem bankruptcy proceedings).

6. *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 47 (1996).

7. *Id.* at 51–52, 72–73 (rejecting Congress’s power to abrogate state sovereign immunity under the Commerce Clause).

8. *Millikin v. Bradley (Millikin II)*, 433 U.S. 267, 289–90 (1977) (holding that the Eleventh Amendment does not bar such prospective relief, despite its impact on the state’s treasury). *But cf. Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 107 (1984) (stating that the “general criterion for determining when a suit is in fact against the sovereign” and therefore barred “is the effect of the relief sought”).

9. *See Alden v. Maine*, 527 U.S. 706, 715 (1999) (“When the Constitution was ratified, it was well established in English law that the Crown could not be sued without consent in its own courts.”). In *Alden*, Justice Kennedy connects residual state sovereign immunity to Justice

sovereign immunity doctrine are correct to claim that both the jurisprudence of sovereign immunity in constitutional law and the theoretical literature on the topic, which attempts to defend the doctrine, have an unjustifiably anti-democratic character. These defenses have come in two distinctly unacceptable forms. On the first, originalists have argued that the Constitution incorporates a prior doctrine of sovereign immunity present in English common law.¹⁰ On the second, in contrast, proponents of the doctrine have suggested that it perpetuates a respect for the “state’s dignity,” which they claim is inherent in the very concept of the state.¹¹ We argue here that neither of these views is democratic. Any contemporary defense of sovereign immunity in America must, unlike these two views, make sense of the doctrine as a distinctly democratic practice.

Some democrats, however, tend to reject the monarchical view and with it the entire doctrine of sovereign immunity.¹² On one version of the view of sovereign immunity, the people as a whole are sovereign, and thus all have a right to sue the state.¹³ According to what we will call the “populist” view of sovereign immunity, the doctrine should be scrapped altogether as a vestige of monarchy, incompatible with the values of a

Iredell’s influential dissent in *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419 (1793), and its exposition of English Practice. *Alden*, 527 U.S. at 715–16, 720–21, 734. Indeed, Justice Kennedy goes on to quote Blackstone on “the prerogatives of the Crown” and to unpack the close and necessary relationship understood to exist between sovereignty and immunity from suit: “And, first, the law ascribes to the king the attribute of sovereignty, or pre-eminence Hence it is, that no suit or action can be brought against the king, even in civil matters, because no court can have jurisdiction over him. For all jurisdiction implies superiority of power” *Id.* at 715 (quoting 1 WILLIAM BLACKSTONE, COMMENTARIES *241–42). Justice Holmes makes the same Blackstonian conflation between state and sovereign because the state is the source of law for the underlying action: “A sovereign is exempt from suit, not because of any formal conception or obsolete theory, but on the logical and practical ground that there can be no legal right as against the authority that makes the law on which the right depends.” *Kawananakoa v. Polybank*, 205 U.S. 349, 353 (1907).

10. See, e.g., *Alden*, 527 U.S. at 715–16 (drawing on English common law sources, such as Blackstone); *Nevada v. Hall*, 440 U.S. 410, 414–16 (1979) (explaining sovereign immunity’s origins in the English feudal system and noting that “[t]he immunity of a truly independent sovereign from suit in its own courts has been enjoyed as a matter of absolute right for centuries”); *infra* subpart I(A).

11. See, e.g., Judith Resnik & Julie Chi-hye Suk, *Adding Insult to Injury: Questioning the Role of Dignity in Conceptions of Sovereignty*, 55 STAN. L. REV. 1921, 1923–26 (2003) (discussing the role that dignity plays in the doctrine of sovereign immunity); *infra* subpart I(B).

12. See, e.g., Erwin Chemerinsky, *Against Sovereign Immunity*, 53 STAN. L. REV. 1201, 1202 (2001) (“The United States was founded on a rejection of a monarchy American government is based on the fundamental recognition that the government . . . can do wrong Sovereign immunity undermines that basic notion.”).

13. See, e.g., Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 YALE L.J. 1425, 1427 (1987) (arguing that “true sovereignty in our system lies only in the People of the United States” and that “whenever a government entity transgresses the limits of its delegation . . . it ceases to act in the name of the sovereign, and surrenders any derivative ‘sovereign’ immunity it might otherwise possess”).

democratic republic.¹⁴ According to this argument, the monarchical state was sovereign because the king was an infallible entity above the people.¹⁵ In virtue of this infallibility, he could not be sued for wrongdoing.¹⁶ When sovereignty lies with the people, however, many argue that the people should be free to sue a state that wrongs them.¹⁷ It is necessary that they retain this right in order to ensure that no state entity is seen as above the people.¹⁸ On such democratic theories, sovereign immunity, including the Eleventh Amendment guarantee, is a mere vestige of monarchy that should be abandoned.¹⁹

Textualists adopt yet another absolute approach, rejecting a century's worth of doctrinal development²⁰ as inconsistent with the text, structure, and history of the Constitution. They observe that the text of the Eleventh Amendment does not shield states from suits by their own citizens.²¹ And they urge that this text merely limits federal courts' diversity jurisdiction, which is based on the status of the parties.²² This leaves Article III's

14. Chemerinsky, *supra* note 12, at 1202 (“A doctrine derived from the premise that ‘the King can do no wrong’ deserves no place in American law. The United States was founded on a rejection of a monarchy and of royal prerogatives.”). This view dates back to *Chisholm*, where the Court heard, in original jurisdiction, an assumpsit action by a South Carolinian against the State of Georgia. 2 U.S. (2 Dall.) at 420. In his opinion, Chief Justice Jay stressed that “the sovereignties in Europe, and particularly in England, exist on feudal principles. That system considers the Prince as the sovereign, and the people as his subjects.” *Id.* at 471 (emphasis omitted). Because the King was the source of all law, no judgment of any court could bind him. But, by contrast, “[n]o such ideas obtain here; at the Revolution, the sovereignty devolved on the people; and they are truly the sovereigns of the country.” *Id.* To bar the door to federal courts based on a false theory of state sovereignty “would contradict and do violence to the great and leading principles of a free and equal national government, one of the great objects of which is, to ensure justice to all.” *Id.* at 477.

15. *Cf.* Chemerinsky, *supra* note 12, at 1201 n.1 (discussing the possible meanings of “the King can do no wrong”).

16. *Id.* at 1201.

17. *See, e.g.,* Amar, *supra* note 13, at 1427 (arguing that in many cases only governmental liability can assure that victims of unconstitutional acts by government entities are made whole).

18. *See id.* at 1435 (arguing that governments could be sovereign if they act within the limitations of their charters, but true sovereignty resides in the people themselves).

19. *See id.* at 1475 (arguing that the Eleventh Amendment was not “meant to enshrine the general immunity of state ‘sovereigns’ from private suits in federal courts”).

20. The noteworthy landmark is *Hans v. Louisiana*, 134 U.S. 1 (1890), which held that a broad principle of sovereign immunity bars a citizen's claim under the Contracts Clause against his own state. *Id.* at 20–21.

21. The text of the amendment states: “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. CONST. amend. XI.

22. *See Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 101 (1996) (Souter, J., dissenting) (“The adoption of the Eleventh Amendment soon changed the result in *Chisholm*, not by mentioning sovereign immunity, but by eliminating citizen-state diversity jurisdiction over cases with state defendants.”); *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 301 (1985) (Brennan, J., dissenting) (asserting that the purpose of the Eleventh Amendment was to reestablish

subject matter jurisdiction untouched so that any citizen claiming a federal right may sue a state in federal court.²³ On this account, sovereign immunity is merely a creature of federal common law that can be easily displaced by federal statute.²⁴ But, despite these objections from text and history, the Court has repeatedly invoked sovereign immunity as a structural principle that is deeply embedded in the Constitution, on par with federalism and the separation of powers.²⁵

In this Article, we reject the all-or-nothing approach that is common to both monarchists and populists, as well as the skepticism of textualists who resist sovereign immunity as a constitutional principle. In contrast to these three dominant views, we look to democratic theory to propose a principled basis for why and when the state qua state must enjoy *some* immunity from suit. In enforcing the law and administering government, its agents commit innumerable acts that would otherwise be private torts—trespass, battery, etc. We invoke democratic theory to suggest why such actions should often be regarded as sovereign and why immunity is often required in these instances by democratic legitimacy. But at the same time, citizens must sometimes be able to hale a state into court without its consent. If not, then states could violate their constitutional and federal rights with impunity. The Supreme Court’s jurisprudence has rightly eschewed all-or-nothing thinking on the question of sovereign immunity.²⁶

sovereign immunity in “state-law causes of action based on the state-citizen and state-alien diversity clauses”).

23. See, e.g., *Seminole Tribe*, 517 U.S. at 100 (Souter, J., dissenting) (arguing that the Eleventh Amendment has no relevance where federal jurisdiction is based on the existence of a federal question). The definitive and original articulation of this view by the Court’s liberal dissenters is in *Atascadero*, 473 U.S. at 234, 290 (Brennan, J., dissenting). Justice Brennan’s dissent draws from a substantial well of scholarship. *Id.* at 258 n.11; cf. Amar, *supra* note 13, at 1510–11 (discussing the theory that state courts should be given unreviewable power to hold federal conduct unconstitutional—that the “role of states is solely to provide victims of constitutional wrongs with the chance to have their federal rights defined and fully protected in federal court”). Liberal dissenters on the Court have continued to invoke this theory. See *Coleman v. Court of Appeals of Md.*, 132 S. Ct. 1327, 1339 n.1 (2012) (Ginsburg, J., dissenting). But sovereign immunity doctrine may have achieved some measure of settlement with the newest additions to the Court’s liberal wing. In *Coleman*, Justices Sotomayor and Kagan joined Justice Ginsburg’s principal dissent, except with respect to the first footnote—which endorsed this broad critique of sovereign immunity. *Id.* at 1339 & n.1. Such a signal from the two most recent liberal appointees may suggest that the Court’s significant sovereign immunity precedents are here to stay.

24. See AKHIL REED AMAR, *AMERICA’S CONSTITUTION: A BIOGRAPHY* 332–36 (2005) (suggesting that states’ immunity has no constitutional basis and is instead part of the federal common law); Vicki C. Jackson, *The Supreme Court, the Eleventh Amendment, and State Sovereign Immunity*, 98 *YALE L.J.* 1, 78–79 (1988) (arguing that neither the text nor the framers’ intent support sovereign immunity as a constitutional requirement).

25. E.g., *Alden v. Maine*, 527 U.S. 706, 714–15 (1999); *Seminole Tribe*, 517 U.S. at 54; *Hans*, 134 U.S. at 10–16.

26. See, e.g., *Seminole Tribe*, 517 U.S. at 54–57 (noting the balance between the Eleventh Amendment’s grant of state sovereign immunity and Congress’s power to abrogate it).

Our account is a constructive one,²⁷ identifying the core principle that animates sovereign immunity doctrine and promises to cure its confusions. On our democratic conception of sovereignty, immunity extends as far as (but no further than) democratic legitimacy warrants. Otherwise, many legitimate democratic decisions cannot take effect. But the mantle of democratic sovereignty requires that a state pursue the public good, obey the rule of law, and respect its citizens' fundamental democratic rights. Its decisions must be both *by* the people and *for* the people. When a state's actions fail to meet these conditions, it does not act as a democratic sovereign, and so the democratic conception of sovereign immunity will provide no shelter.

We argue that sovereign immunity jurisprudence can be made defensible and coherent by clarifying and theorizing the meaning of sovereignty in a democracy. Our account explains and justifies the importance and the scope of sovereign immunity in a democracy—delineating the boundaries of democratic sovereignty, properly understood. When a democratic state rightly exercises its sovereign authority, it is immune from suit. Otherwise, any collective self-government would prove impossible, bled to death by a thousand cuts. But the extent of democratic sovereignty is not an all-or-nothing proposition. It depends, in part, on observing citizens' fundamental democratic rights.

Specifically, we propose and develop a distinction between “state action” and “sovereign action.” We argue that the state acts in accordance with its status as a sovereign when two criteria are met. First, the state must act “for the people” within a framework that respects the rights of citizens and in which its powers are limited so as to meet this need. Second, the state must act “by the people” by deriving its power from the consent of the governed through their representatives. While some government action meets these two criteria, some does not. The question of immunity, we argue, should hinge on whether the state is acting as a sovereign or merely as a government entity. Where the two criteria are met, the government acts in the instant as a state but not a sovereign, and thus receives no

27. In other words, we attempt to articulate a principle that both “fits” and “justifies” the existing body of legal materials as a coherent whole. These include not only the text, structure, and history of the Constitution but also the decades of case law that have developed its meaning. This pursuit of coherence in the law will invariably identify some interpretations as mistaken. But the wholesale rejection of a century's worth of Eleventh Amendment doctrine, as advocated by the textualists, comes at great cost to the integrity of our constitutional law. Our account avoids this costly slash-and-burn approach by identifying a normatively attractive defense of the sovereign immunity principle, rooted in democratic political theory. For further description of the philosophical underpinnings of “constructive interpretation,” see RONALD DWORKIN, *LAW'S EMPIRE* 52–53 (1986), which elaborates on constructive interpretation as “a matter of imposing purpose on an object or practice in order to make of it the best possible example of the form or genre to which it is taken to belong.” For a discussion of Dworkin's related “moral reading” of the United States Constitution, see generally RONALD DWORKIN, *FREEDOM'S LAW: THE MORAL READING OF THE CONSTITUTION* (1996) [hereinafter DWORKIN, *FREEDOM'S LAW*].

immunity.²⁸ But when the state acts qua sovereign, it rightfully is immune from suit.

We argue that it is sovereign action that triggers immunity. When the sovereign state makes policy (and when its agents implement those policies), democratic legitimacy confers a power to act in ways that extend beyond what a private citizen may do. In particular, we define the category of “sovereign mistakes” as actions that (1) are committed by the sovereign, (2) do not constitute fundamental rights violations,²⁹ but (3) nonetheless cause harm that would give rise to liability if they were committed by a private actor. When the state acts as sovereign, it enjoys sovereign immunity—and that means it is not liable for sovereign mistakes.

For instance, the state can tax an individual within its legitimate powers, while an individual who coercively extracts payment for services or protection commits extortion and racketeering. Furthermore, these powers include the legitimate authority to make mistakes. A state may squander its resources on a “bridge to nowhere,” undertake ill-advised military adventures, or implement a flawed stimulus package. So long as the state acts within its sovereign powers, there is no civil liability for any injury that results. Importantly, however, what we call legitimate “sovereign mistakes” do not extend to violations of fundamental democratic rights, such as those protected in the Constitution. In order to satisfy the conditions of democratic legitimacy and for democratic sovereignty to obtain, a state must respect those rights.³⁰ The structure of the Fourteenth

28. We do not suggest that the state as a whole loses its sovereignty but rather that the particular action loses its sovereign character.

29. As we will discuss, the second element is logically entailed by the first. A state cannot act as a legitimate democratic sovereign when it violates fundamental rights.

30. This proposition is essential to a wide range of democratic theories. Substantive accounts of democracy often directly tie rights protections to democratic legitimacy. *See, e.g.*, COREY BRETTSCHEIDER, *DEMOCRATIC RIGHTS* 26–27 (2007) (arguing that while “[d]emocratic theory traditionally has emphasized the importance of procedure in contrast to individual rights,” other rights protections such as “equality of interests, political autonomy, and reciprocity provide an underlying justification of democratic procedure and are rightly regarded as the core values of democracy”); DWORKIN, *FREEDOM’S LAW*, *supra* note 27, at 15 (arguing for a reinterpretation of the traditional belief that democracy must be compromised in order to protect values like individual rights); JAMES E. FLEMING, *SECURING CONSTITUTIONAL DEMOCRACY* 3 (2006) (developing a theory that “firmly connects privacy or autonomy to the substance and structures of constitutional democracy”). Dualist conceptions of democracy, found in Bruce Ackerman’s theory of constitutional moments and implicit in a number of originalist accounts, also insist on protecting certain entrenched constitutional rights as a condition of democratic legitimacy. 1 BRUCE ACKERMAN, *WE THE PEOPLE: FOUNDATIONS* 6–15 (1991); *see also* KEITH E. WHITTINGTON, *CONSTITUTIONAL INTERPRETATION* 135–42 (1999) (discussing democratic dualism and the tendency of political agents to “emerge at particular historic moments to deliberate on constitutional issues and to provide binding expressions of their will, which are to serve as fundamental law in the future when the sovereign is absent”). Even procedural accounts of democracy, such as John Hart Ely’s defense of judicial review, identify procedural rights such as the freedom of speech as a necessary condition for democracy. *See* JOHN HART ELY, *DEMOCRACY AND DISTRUST* 105 (1980) (arguing that rights such as the freedom of speech must

Amendment guarantees the right of the individual to be free from illegitimate state action in areas such as privacy, criminal justice, and equal protection. State actions that violate these rights can never be sovereign actions. This means that a state action that violates Fourteenth Amendment rights should be subject to suit, and the state can never be immune from such claims.

Our view, in contrast to populist and monarchist approaches to sovereign immunity, is “democratic.” It recognizes both the by the people and for the people elements of democracy. The by the people element of democracy is recognized through immunities in instances of “legitimate mistakes” and common law rights that derive from the state itself. Specifically, we argue that the ideal of rule “by the people” refers to the collective ability of citizens to make laws on matters of fiscal policy. To retain this ability, states must have the “power of the purse,” not only formally but also actually. Retention of the power of the purse requires immunity from suits that could bankrupt or imperil states from pursuing ends decided upon by the people.³¹ But the power to enact law is always limited in a democratic account of sovereignty by recognition that this power does not extend to violations of basic individual rights in matters like due process or equal protection. This rights-based, for the people element of democracy entails denying the state immunity in cases of fundamental rights violations, which fail to satisfy the conditions of democratic legitimacy and negates democratic sovereignty. No democratic sovereign can violate fundamental rights, and we argue that tort law remains an important way to address rights violations that go beyond the sovereign capacity of state governments.

Our key contribution is to frame inquiries into sovereign immunity as ones about fundamental democratic rights. Sovereign immunity is nothing more than the power to make a sovereign mistake without impeding other sovereign functions, in the way that liability undermines the sovereign power of the purse. We argue that, in a democracy, the presence of this power—and of democratic sovereignty generally—depends on whether a state has violated its citizens’ fundamental democratic rights. When this breach of democratic sovereignty occurs, the state is not immune, and the mantle of democratic sovereignty passes to the citizen–plaintiff instead.

This concept of a “fundamental democratic right” operates with a very specific meaning in our theory. These rights are the substantive requirements necessary for democratic legitimacy, the minimum in order to

be zealously protected because “they are critical to the functioning of an open and effective democratic process”).

31. Cf. Thomas H. Lee, *International Law and Institutions and the American Constitution in War and Peace*, 31 BERKELEY J. INT’L L. 291, 305–06 (2013) (discussing civil liability for sovereign debt as “infring[ing] upon the fiscal autonomy of debtor states”).

justify the coercive power of the state to free and equal citizens. We cannot provide an exhaustive catalogue of which rights count as fundamental in this way. Rather, our claim is that this inquiry is essential to understanding both the concept and the doctrine of sovereign immunity.

The Fourteenth Amendment serves as a broad (but not perfect³²) guide to the meaning of fundamental democratic rights. It enshrines the core democratic ideal of free and equal citizenship into law. The Court's doctrine of "selective incorporation" of the Bill of Rights under the Due Process Clause of the Fourteenth Amendment inquires into "whether a right is among those 'fundamental principles of liberty and justice which lie at the base of all our civil and political institutions.'"³³ In addition, the Fourteenth Amendment guarantees "the equal protection of the laws" and provides for the protection of other unenumerated freedoms as instances of basic "liberty" through substantive due process.³⁴ Using these textual and doctrinal sources as a starting point, we understand the concept of fundamental democratic rights to include, for example, the rights against racial discrimination³⁵ and cruel and unusual punishment,³⁶ as well as the rights to the freedom of political speech³⁷ and to criminal counsel for indigent defendants.³⁸ Ultimately, however, our approach requires both a positive review of constitutional law and a normative assessment "of the very essence of a scheme of ordered liberty."³⁹

We follow the post-*Lochner*-era Court's distinction between market rights and personal liberty, where only the latter are fundamental to democracy. In our view the Court was right to reject the early-twentieth-century notion that economic matters should be walled off by the Constitution from the intervention of the democratic people, working

32. We acknowledge that some other provisions might also house fundamental democratic rights. We are not formalist about the concept. Rather we think we must engage in an inquiry into the importance of such a right in particular instances. See *infra* text accompanying notes 262–69.

33. *Duncan v. Louisiana*, 391 U.S. 145, 148 (1968) (quoting *Powell v. Alabama*, 287 U.S. 45, 67 (1932)). For discussion of several doctrinal approaches the Court has taken to cognize fundamental rights (and skepticism that it uniformly applies strict scrutiny to protect them), see generally Adam Winkler, *Fundamentally Wrong About Fundamental Rights*, 23 CONST. COMMENT. 227 (2006).

34. U.S. CONST. amend. XIV, § 1. Examples of well-established unenumerated rights protections abound. See, e.g., *Lawrence v. Texas*, 539 U.S. 558 (2003) (intimate sexual relationships); *Eisenstadt v. Baird*, 405 U.S. 438 (1972) (procreative freedom); *Griswold v. Connecticut*, 381 U.S. 479 (1965) (marital privacy); *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449 (1958) (association).

35. E.g., *Brown v. Bd. of Educ.*, 347 U.S. 483, 495 (1954).

36. E.g., *Roper v. Simmons*, 543 U.S. 551, 560 (2005); *Robinson v. California*, 370 U.S. 660, 667 (1962).

37. E.g., *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 300–01 (1964).

38. E.g., *Gideon v. Wainwright*, 372 U.S. 335, 344–45 (1963).

39. *Palko v. Connecticut*, 302 U.S. 319, 325 (1937).

through Congress, the President, and state legislatures. Congress's power to regulate matters, such as labor relations, minimum wage legislation, and workers' rights generally, were necessary in a legitimate democratic nation attentive to the basic interests of its members. On our view this rejection of the notion that economic regulation is a limit on liberty has a direct implication for the issue of sovereign immunity. Just as the government should have the power to regulate the economy, so too should it have the power to be free from suits where that power causes economic harm not linked to the fundamental rights of democratic citizens. Such violations might be called "rights" by plaintiffs, but they are the result of a state with the power to modify the common law and regulate the structure of economic activity. Economic costs caused by government regulation (and the resulting benefits of protecting citizens' welfare) will likely happen at both the federal and state level. Progressive interventions into the economy took and take place both within the states and at the level of congressional legislation.⁴⁰ In this Article we defend the notion of immunity as a kind of government power at both levels of government. We reject the notion of *Lochner*-era rights and the claim that citizen-plaintiffs have the right to sue in all economic matters. To the contrary, the power of the sovereign to intervene in the economic domain extends to its powers to make mistakes in economic matters and to be free from suit without its consent.

But although we draw on the post-*Lochner* distinction between private market rights and other fundamental rights, we do not slavishly follow the Court's existing precedents—rather, it ultimately depends on a normative argument of political theory.⁴¹ In other areas, we criticize the Court for its unduly narrow conception of rights, as in *Board of Trustees of the University of Alabama v. Garrett*.⁴² In these cases, Congress has an important role to play in articulating the substance of fundamental democratic rights.

Having clarified our meaning of fundamental democratic rights, we should also note that this is not the place for a full-fledged defense of this particular conception. One of us has done that in another place.⁴³ Rather, we stipulate that many of these rights are fundamental in order to highlight our main point: that sovereign immunity in a democracy depends on whether these fundamental rights are respected. Our argument is not meant to do anything more than reframe debates over sovereign immunity in this way. By focusing on this link between fundamental rights and democratic

40. See WILLIAM J. NOVAK, *THE PEOPLE'S WELFARE* ch. 3 (1996) (examining the development of economic regulation at both levels of government in the nineteenth century); CASS R. SUNSTEIN, *THE SECOND BILL OF RIGHTS* 67–73 (2004) (discussing the New Deal vision of positive economic and social rights).

41. See *infra* notes 313–28 and accompanying text.

42. 531 U.S. 356 (2001); see also *infra* notes 292–308 and accompanying text.

43. BRETTSCHEIDER, *supra* note 30.

sovereignty, it also clarifies a number of doctrinal confusions. Some might be daunted by our approach, as it places questions of immunity in the contested realm of constitutional values and rights. But on our review of the doctrine, this ship has long sailed already. Most importantly, our approach is conceptually the only way to grasp the issue of whether the state acts or does not act as sovereign. This term is one grounded in political theory—and this theorizing cannot and should not be avoided.

Our account explains and justifies the idea of sovereign immunity within a constitutional democracy. But, just as importantly, it also sheds light on the contours of the Court's sovereign immunity jurisprudence. It illuminates the doctrine of abrogation⁴⁴ by refocusing the question on the conditions of democratic legitimacy and Congress's role in protecting fundamental rights. It enriches our understanding of the doctrine of waiver by introducing a parallel consideration alongside the "federalism costs" of implied waiver: a presumption in favor of democratic legitimacy. And it defends the much-maligned "fiction" of *Ex parte Young*⁴⁵ and *Edelman v. Jordan*,⁴⁶ locating it at the center of a democratic conception of sovereign immunity. We offer a democratic conception of sovereign immunity that pulls these areas of the doctrine together. With this unified account of democratic sovereignty, we can resolve difficult and disparate questions of federal and state power and immunity for federal officers at the same time. In sum, the state is authorized to make mistakes when it acts as the democratic sovereign. Its sovereign power of the purse gives rise to immunity from suits that would raid the public fisc. But this immunity does not extend to instances when the state violates fundamental rights because observing these rights is a necessary requirement for legitimate democratic sovereignty. Indeed, our view suggests that states must compensate the victims of fundamental rights violations—not simply as a matter of corrective justice but also to maintain their standing as legitimate democratic sovereigns. These insights lend clarity to a wide variety of doctrinal areas. The theory is both a normatively appealing account of democracy and one with explanatory force.

We begin by examining flawed monarchical conceptions of sovereign immunity and then go on to propose an alternative conception grounded in democratic authority. We proceed to examine why our democratic model of sovereign immunity can explain the key distinction between the way the Court has treated the waiver of sovereign immunity under the Fourteenth

44. See generally *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 65–66 (1996) (rejecting Congressional power to abrogate sovereign immunity under the Commerce Clause); *Fitzpatrick v. Bitzer*, 427 U.S. 445, 456 (1976) (upholding this power under the Fourteenth Amendment).

45. 209 U.S. 123 (1908).

46. 415 U.S. 651 (1974); see *infra* subparts III(A)–(B). Akhil Amar, for example, criticizes the "various doctrinal gymnastics and legal fictions" of *Young* and *Edelman* for their "obvious lack of principle." Amar, *supra* note 13, at 1478–80.

Amendment and the way it has treated sovereign immunity under other provisions of the Constitution, such as the Commerce Clause and the Indian Commerce Clause. Finally, we examine the relationship between our theory and current constitutional law, making some suggestions for reform but leaving intact many of its basic premises.

I. Existing Defenses of Sovereign Immunity Doctrine

This Part reviews the prevailing theories that judges and scholars have invoked to justify sovereign immunity as it has developed. We conclude that these approaches violate core principles of self-government and in some cases retain vestiges of monarchism. Originalism fails because it cannot deliver sufficient textual and historical evidence. The dignitary view falters because it abandons the Constitution's core commitment to democratic self-government.

A. *The Flaws of Originalist Theories and Their Textualist Critics*

Much of the scholarship over the past thirty years has debated the existence of a freestanding principle of sovereign immunity extending beyond the text of the Eleventh Amendment. Of course, its forty-three words make no mention of a state's immunity from *its own* citizens.⁴⁷ Rather, originalists argue that the Eleventh Amendment simply reaffirms a principle of sovereign immunity that was already hardwired into the original Constitution as ratified.⁴⁸ Such an argument would inoculate originalists against the charge that the doctrine of sovereign immunity is anti-democratic because the principle would then enjoy the highest democratic pedigree. If sovereign immunity is a deep structural feature of the Constitution, then it is the supreme law of the land ratified by the people themselves.⁴⁹

Originalists seek to uncover the original public meaning of the Constitution with close study of its text, structure, and history.⁵⁰ Sovereign immunity flows, they suggest, from the notion of federalism inherent in the

47. U.S. CONST. amend. XI.

48. See *Seminole Tribe*, 517 U.S. at 54 (arguing that the correct understanding of the Eleventh Amendment is that it confirms the presupposition of sovereign immunity found in the Constitution).

49. See *supra* note 25 and accompanying text.

50. See AMAR, *supra* note 24, at 465–70 (explaining the relationship between originalism and a textualist understanding of the Constitution); ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 119, 139 (1997) (discussing the originalist approach to interpretation and the accompanying considerations, canons, and presumptions therein); WHITTINGTON, *supra* note 30, at 3 (advocating originalism as the method best suited to interpret Constitutional text). For an account attempting to reconcile this originalist methodology with living constitutionalism, see generally JACK M. BALKIN, LIVING ORIGINALISM (2011).

Tenth Amendment, as well as the very structure of the Constitution itself.⁵¹ Most importantly, the originalist defense of blanket sovereign immunity looks to preconstitutional history, emphasizing the English maxim that the King could not be sued in his own courts.⁵² The founders, they argue, meant to incorporate this common law notion, translating it into a broader principle that states are immune from suit without their consent.⁵³ But this move is too quick: we have already seen that it defies the Constitution's core commitment to popular sovereignty to countenance such raw monarchism. We must instead consider how the notion that a sovereign cannot be sued in its own courts translates into the context of a constitutional democracy.

The originalist case then turns to the history of the Eleventh Amendment and its enactment. This history, they argue, merely illustrates an attempt to correct a misunderstanding of sovereign immunity's centrality to American constitutional law.⁵⁴ The 1793 case of *Chisholm v. Georgia*⁵⁵ was in many ways the Court's original "blockbuster" decision. The executor of a South Carolinian merchant's estate brought an assumpsit action against the State of Georgia, attempting to recover for breach of a contract over war supplies.⁵⁶ Georgia refused to appear, arguing in its answer that the Court lacked jurisdiction under Article III.⁵⁷ As a sovereign state, it argued that it was immune from being haled into court by a mere citizen.⁵⁸ The Supreme Court's decision in *Chisholm* rejected this sweeping conception of sovereign immunity.⁵⁹ Four Justices, in seriatim opinions, stressed that the language of Article III symmetrically permitted states to sue citizens of other states and vice versa.⁶⁰ Justice Wilson emphasized that Georgia's claim of sovereign immunity reached for a relic of the King's courts—one that was incompatible with the republican commitment to

51. In *Alden v. Maine*, the Court notes the founding-era "postulate that States of the Union, still possessing attributes of sovereignty, shall be immune from suits, without their consent, save where there has been a surrender of this immunity in the plan of the convention." 527 U.S. 706, 729 (1999) (quoting *Principality of Monaco v. Mississippi*, 292 U.S. 313, 322–23 (1934)) (internal quotation marks omitted). Justice Kennedy's opinion observes that this logic of reserved sovereign immunity does not depend on the text of the Eleventh Amendment or even "the scope of the judicial power established by Article III." *Id.* at 730. Rather, state sovereign immunity rests on a "separate and distinct structural principle" that "inheres in the system of federalism established by the Constitution." *Id.*

52. See *supra* notes 9–10 and accompanying text.

53. *Hans v. Louisiana*, 134 U.S. 1, 15–16 (1890).

54. SCALIA, *supra* note 50, at 78 n.25.

55. 2 U.S. (2 Dall.) 419 (1793).

56. *Id.* at 420.

57. *Id.* at 419.

58. *Id.* at 420.

59. *Id.* at 425–26.

60. *Id.* at 450–51 (opinion of Blair, J.); *id.* at 456–57 (opinion of Wilson, J.); *id.* at 466–67 (opinion of Cushing, J.); *id.* at 475–76 (opinion of Jay, C.J.).

popular sovereignty.⁶¹ And Chief Justice Jay decried sovereign immunity as a “feudal” concept of old Europe that “considers the Prince as the sovereign, and the people as his subjects.”⁶² But after the American Revolution, “sovereignty devolved on the people, and they are truly the sovereigns of the country,” able to hold the states to account for their wrongs.⁶³

Only Justice Iredell dissented, arguing that first principles would not permit “a compulsory suit for the recovery of money against a state.”⁶⁴ No sovereign state could be sued without its consent.⁶⁵ In response to what the Court would later call “a shock of surprise,” the Eleventh Amendment was quickly presented and ratified.⁶⁶ This immediate wave of criticism from state legislatures and the public included the concern that such suits could bankrupt states.⁶⁷ The Amendment’s text explicitly protects states against lawsuits by citizens of other states, but more significant to the originalist case is the background principle of state sovereign immunity that the Amendment affirms. On the originalist conception, the Eleventh Amendment was not new law but merely an instance in which the American public corrected a decision in which the Supreme Court had mistakenly strayed from the Constitution.⁶⁸

Undoubtedly, originalists are correct that the founding generation was well acquainted with the concept of sovereign immunity, from Blackstone and beyond. As Hamilton noted in Federalist 81: “It is inherent in the nature of sovereignty not to be amenable to the suit of an individual without its consent.”⁶⁹ Hamilton further assured Antifederalist skeptics of the proposed Constitution that its system of federal courts would not jeopardize states’ sovereign policy-making power at the behest of private creditors.⁷⁰ Ratification would not serve as a blanket waiver of sovereign immunity: “[T]here is no color to pretend that the State governments would, by the adoption of that plan, be divested of the privilege of paying their own debts in their own way, free from every constraint but that which flows from the

61. *Id.* at 458 (opinion of Wilson, J.).

62. *Id.* at 471 (opinion of Jay, J.) (emphasis omitted).

63. *Id.*

64. *Id.* at 434 (opinion of Iredell, J.).

65. *Id.* at 434–35.

66. *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 69 (1996) (quoting *Principality of Monaco v. Mississippi*, 292 U.S. 313, 325 (1934)) (internal quotation marks omitted).

67. William P. Marshall, *The Diversity Theory of the Eleventh Amendment: A Critical Evaluation*, 102 HARV. L. REV. 1372, 1381 (1989); John V. Orth, *State Debts & Federal Jurisdiction*, 7 DUKE J. CONST. L. & PUB. POL’Y (SPECIAL ISSUE) 1, 3 (2012).

68. *Hans v. Louisiana*, 134 U.S. 1, 11, 14–16 (1890).

69. THE FEDERALIST NO. 81, at 486 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (emphasis omitted).

70. *Id.* at 487.

obligations of good faith.”⁷¹ The originalist case in favor of *some* residual sovereign immunity is then fairly strong. Article III’s initial text left open the possibility of private creditors suing other states in federal court. The swift reaction against *Chisholm* closed this gap, and it points to the existence of a background principle of sovereign immunity.

But neither the facts of *Chisholm* nor Hamilton’s imagined scenario speaks to two critical questions: may a citizen (1) sue her own state or (2) file a *federal* cause of action against a state in federal court without that state’s consent? A century later, in *Hans v. Louisiana*,⁷² the Court expanded the principle of sovereign immunity to bar both of these kinds of suits against states.⁷³ In 1879, with Reconstruction waning and many Southern states in financial turmoil, Louisiana passed a constitutional amendment repudiating debt owed under a series of bonds that were to come due the next year.⁷⁴ The plaintiff, a citizen of Louisiana, sued the state in federal court, claiming that this breach violated the Contracts Clause.⁷⁵ Relying on these originalist sources and the enactment history of the Eleventh Amendment, the Court articulated an expansive conception of sovereign immunity. After recounting this historical evidence, Justice Bradley boldly claimed that “[i]t is not necessary that we should enter upon an examination of the reason or expediency of the rule which exempts a sovereign State from prosecution in a court of justice at the suit of individuals. . . . It is enough for us to declare its existence.”⁷⁶ But can originalism deliver the textual and historical evidence to establish this broad conception of state sovereign immunity?

Many scholars are skeptical that it can. For the purposes of this particular disagreement, we will label these critics “textualists.” They argue for a narrow reading of the Eleventh Amendment, and they deny that state

71. *Id.*

72. 134 U.S. 1 (1890). For an illuminating discussion of the historical background of *Hans*, see generally Orth, *supra* note 67.

73. *Hans*, 134 U.S. at 20–21.

74. *Id.* at 1–3.

75. *Id.* On our view, *Hans* was correctly decided, although the correct reasoning is somewhat obscured in the opinion. The case was properly dismissed but not because the doctrine of sovereign immunity imposes a blanket jurisdictional bar against even constitutional claims; rather, the plaintiff’s complaint failed to state a cause of action because the Contracts Clause does not apply to sovereign debt. See *infra* notes 162–75 and accompanying text.

76. *Hans*, 134 U.S. at 9, 21. One might think that such an examination is precisely the duty of a judge in adjudication: publicly justifying the application of law to a particular case. See OWEN FISS, *THE LAW AS IT COULD BE* 11–12 (2003) (discussing the structure of judicial power and judges’ obligation to give public reasons for their decision); STEPHEN MACEDO, *LIBERAL VIRTUES: CITIZENSHIP, VIRTUE, AND COMMUNITY IN LIBERAL CONSTITUTIONALISM* 162 (1990) (articulating the duty of public justification in the judiciary and other democratic institutions). But at the end of his opinion in *Hans*, Justice Bradley offers a justification for sovereign immunity that points to the same guiding principle that we offer: democracy. *Hans*, 134 U.S. at 21; see *infra* text accompanying notes 157–60.

sovereign immunity enjoys constitutional stature as a background legal principle.⁷⁷ First, the textualists point to the narrow language of the Eleventh Amendment—not only that its words do not cover suits between citizens and their own states but also that it offers a mere rule of construction.⁷⁸ The Amendment proclaims that “[t]he Judicial power of the United States,” laid out in Article III, “shall not be construed to extend” to suits against states.⁷⁹ This language is far more modest than the initial drafts making the rounds after *Chisholm* came down, which stated that “no state shall be liable to be made a party defendant.”⁸⁰

The importance of this distinction becomes clear in the textualists’ second argument: that the Eleventh Amendment only curbs the federal courts’ diversity jurisdiction, leaving open any suit against a state for violating federal law. Article III, Section Two divides federal jurisdiction into nine categories of “cases” and “controversies” over which “[t]he judicial power shall extend.”⁸¹ The first three depend on the subject matter of a particular case—including, most importantly, cases “arising under” the Constitution, federal laws, and treaties.⁸² The remaining categories are triggered by the status of the parties in controversy.⁸³ Together, these categories form what we often refer to as “diversity jurisdiction,” over cases where federal courts provide the best forum *despite the absence of a question of federal law*.⁸⁴ At the time of ratification, this list included “Controversies . . . between a State and Citizens of another State.”⁸⁵ The

77. For prominent examples of this view, see *Alden v. Maine*, 527 U.S. 706, 762–64 (1999) (Souter, J., dissenting); *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 78, 93 (1996) (Stevens, J., dissenting); *Atascadero State Hosp., v. Scanlon*, 473 U.S. 234, 247, 258–59 (1985) (Brennan, J., dissenting); Amar, *supra* note 13, at 1475; William A. Fletcher, *A Historical Interpretation of the Eleventh Amendment: A Narrow Construction of an Affirmative Grant of Jurisdiction Rather than a Prohibition Against Jurisdiction*, 35 STAN. L. REV. 1033, 1034 (1983); John J. Gibbons, *The Eleventh Amendment and State Sovereign Immunity: A Reinterpretation*, 83 COLUM. L. REV. 1889, 1894 (1983); Jackson, *supra* note 24, at 5. For a different, more structural form of skepticism about “the traditional trappings of sovereignty and separate spheres,” Heather K. Gerken, *Federalism as the New Nationalism: An Overview*, 123 YALE L.J. 1889, 1889 (2014). See generally Alison L. LaCroix, *The Shadow Powers of Article I*, 123 YALE L.J. 2044 (2014).

78. Amar, *supra* note 13, at 1475; Gibbons, *supra* note 77, at 1894; Jackson, *supra* note 24, at 3, 8–13; see also John F. Manning, *The Eleventh Amendment and the Reading of Precise Constitutional Texts*, 113 YALE L.J. 1663, 1748–50 (2004) (suggesting that Article V’s supermajoritarian thresholds require a narrow reading of the Eleventh Amendment).

79. U.S. CONST. amend. XI.

80. Amar, *supra* note 13, at 1481–82.

81. U.S. CONST. art. III, § 2, cl. 1. For further discussion on Article III jurisdiction, see generally Akhil Reed Amar, *A Neo-Federalist View of Article III: Separating the Two Tiers of Federal Jurisdiction*, 65 B.U. L. REV. 205 (1985).

82. U.S. CONST. art. III, § 2, cl. 1.

83. *Id.*

84. James M. Underwood, *The Late Great Diversity Jurisdiction*, 57 CASE W. RES. L. REV. 179, 179 (2006).

85. U.S. CONST. art. III, § 2, cl. 1.

Chisholm Court read this provision to permit a suit by a private creditor against a state, and the Eleventh Amendment effectively overturned that construction.⁸⁶ But recall that *Chisholm* only involved a question of pure state law: a common law action of assumpsit for breach of contract.⁸⁷ The Eleventh Amendment's alteration to the second half of Article III diversity jurisdiction left open the judicial power to hear cases arising under federal law—including cases where states are the defendant.

Third, textualists do acknowledge that some form of the principle of state sovereign immunity exists. But they insist that it is a common law doctrine, rather than a feature of the Constitution—more like the principles of equity than structural principles such as federalism or the separation of powers.⁸⁸ As a result, Congress may freely displace this common law doctrine by statute, and a plaintiff may pierce the veil of sovereign immunity by invoking the Constitution or a federal law.⁸⁹

These textualist objections raise considerable uncertainty about the originalists' case for the broad sovereign immunity found under our current doctrine. Textualists have effectively beaten the originalists at their own game, explaining the historical evidence and providing a more sophisticated reading of the text and structure of the document. The original meaning of the Constitution and the enactment history of the Eleventh Amendment will not, by themselves, establish a basis for the expansion of sovereign immunity under *Hans*.

But the failure of the originalist case does not necessarily mean that the textualist skeptics win the day. Suppose that there really did exist some broad principle of sovereign immunity embedded as a deep constitutional principle. Then the skeptical case against current doctrine would falter

86. Moreover, its language closely tracks the language of Article III. *Compare* U.S. CONST. amend. XI (“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.”), *with* U.S. CONST. art. III, § 2, cl. 1 (“The judicial Power shall extend . . . to Controversies . . . between a State and Citizens of another State . . .”).

87. *See supra* note 56 and accompanying text. Following this point, Amar argues that the problem with *Chisholm* is that the majority opinion decides the underlying contract claim by drawing on general federal common law. Amar, *supra* note 13, at 1470. Much later, the Court would expressly invalidate this form of judge-made law as anathema to the proper constitutional balance between the structural principle federalism and the supremacy of federal law. *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 77–78 (1938). Georgia's claimed immunity was then a function of state common law, which could not trump the Constitution or some hypothetical federal statute.

88. *See Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 100–02 (1996) (Souter, J., dissenting) (asserting that the majority's reliance on the Eleventh Amendment is only relevant if the Court adopts the court-made, common law construction developed in *Hans*, as a reliance on the actual Amendment is incorrect).

89. *See id.* at 100 (noting how the Eleventh Amendment does not bar congressional authority when it is treated as a common law doctrine). *But see* Jackson, *supra* note 24, at 40–44 (critiquing the argument that states can be subject to federal adjudication because Congress can abrogate immunity).

because, by hypothesis, there is some other basis for constitutional sovereign immunity besides the historical materials. In other words, notwithstanding the textualist arguments that we must read the Eleventh Amendment narrowly, some freestanding justification may support constitutional sovereign immunity. After all, the principle that the *federal* government enjoys sovereign immunity is nowhere mentioned in the Constitution, either. The task, then, is to identify and articulate a principle that can justify the doctrine and reconcile it with the Constitution as a whole.⁹⁰ We should not turn our back on a century of doctrine until we conclude that no such principle exists.

B. The Problematic State Dignity Principle

Canvassing the Court's majority opinions since the beginning of the "federalism revolution" in the 1990s,⁹¹ we find that the Justices often defend sovereign immunity (and its expansion) in terms of the dignity of the states. In the rest of this subpart we reject the "state dignity view" as it has been invoked in doctrine by originalist and non-originalist proponents. If sovereign immunity jurisprudence is to be saved in some form, we argue, it must be based on a principle other than state dignity.

The state dignity view of sovereign immunity holds that there is something intrinsic to a state that entails immunity from lawsuits brought by individuals. As we have suggested, we can see why this might be thought to be true on *some* conceptions of the relationship between states and individuals. In a monarchy, for instance, to sue the king without his consent would be to challenge the monarch's absolute authority and thus the entire basis of monarchical government. On this conception, the dignity of the sovereign would preclude unconsented private suits against the state. But as a defense of sovereign immunity doctrine the state dignity view goes beyond claims about the dignity of any particular kind of state or under any particular political theory. Instead, its proponents suggest that states generally have an inherent dignity that must be respected by protecting them from lawsuits. For a private individual to hale a state into court without its consent—in any context—is to treat the sovereign like a common person. And, for any state, that is to suffer an unconscionable indignity.

90. See *supra* text accompanying note 28.

91. See, e.g., *Alden v. Maine*, 527 U.S. 706, 715 (1999) ("The generation that designed and adopted our federal system considered immunity from private suits central to sovereign dignity."); *Seminole Tribe*, 517 U.S. at 58 (asserting that the Eleventh Amendment exists, in part, to avoid the "indignity" of subjecting a state to the judicial process by the actions of private parties (quoting *P.R. Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 146 (1993)) (internal quotation marks omitted)).

We can see this view on full display in Justice Kennedy's majority opinion in *Alden v. Maine*.⁹² Employees of the State of Maine sought to enforce federal overtime regulations in state court,⁹³ but the Court found their efforts to be an impermissible affront to the state's dignity.⁹⁴ States, Justice Kennedy insisted, "are not relegated to the role of mere provinces or political corporations, but retain the dignity, though not the full authority, of sovereignty."⁹⁵ The founding generation "considered immunity from private suits central to sovereign dignity."⁹⁶ In other words, states are subject to valid federal law under the Supremacy Clause. But even where their authority is vacant, the inherent dignity that states retain shields them from any accountability—either in federal *or* state court. "Private suits against nonconsenting States . . . present 'the indignity of subjecting a State to the coercive process of judicial tribunals at the instance of private parties,' regardless of the forum."⁹⁷ In *Federal Maritime Commission v. South Carolina State Ports Authority*,⁹⁸ Justice Thomas declared that "[t]he preeminent purpose of state sovereign immunity is to accord States the dignity that is consistent with their status as sovereign entities."⁹⁹ Beyond protecting state treasuries, state sovereign immunity exists primarily to protect states from the indignity of being haled into court to account for its wrongs.¹⁰⁰ For it is "neither becoming nor convenient that the several States of the Union, invested with that large residuum of sovereignty which had not been delegated to the United States, should be summoned as defendants to answer the complaints of private persons."¹⁰¹ As a result, the Court extended the dignity rationale so far as to protect South Carolina from having to appear before a federal administrative hearing.¹⁰²

92. 527 U.S. 706, 711 (1999).

93. *Id.* at 711–12. The Court held in *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985), that Congress possessed the power under Article I to regulate the wages and hours of state employees. *Id.* at 530–31. Its subsequent ruling in *Seminole Tribe* (rejecting Article I abrogation power) leaves plaintiffs no venue other than state court to vindicate these rights. 517 U.S. at 47.

94. *Alden*, 527 U.S. at 712.

95. *Id.* at 715.

96. *Id.*

97. *Id.* at 749 (quoting *In re Ayres*, 123 U.S. 443, 505 (1887)) (citations omitted).

98. 535 U.S. 743 (2002).

99. *Id.* at 747, 760 (emphasis added).

100. *Id.*

101. *Id.* (quoting *Ayres*, 123 U.S. at 505) (internal quotation marks omitted).

102. *Id.* at 769. Curiously, the literature defending the Court's sovereign dignity theory is far thinner and more hesitant than one might expect, given the fervor with which five justices have advanced it. The most vigorous scholarly defense can be found in Scott Dodson, *Dignity: The New Frontier of State Sovereignty*, 56 OKLA. L. REV. 777 (2003), which argues that because the state dignity rationale lacks grounding in the Constitution the Court has the ability to create a more coherent state sovereign immunity doctrine using the dignity rationale to do so. *Id.* at 831; see also Evan H. Caminker, *Judicial Solicitude for State Dignity*, 574 ANNALS AM. ACAD. POL. & SOC. SCI. 81, 82 (2001) (exploring the possibility that the Court's references to state dignity are

There are a number of problems with inherent state dignity as a rationale for sovereign immunity. First, even if we grant, at face value, that inherent state dignity exists and that it requires immunity from suit, this justification fails to explain a number of key features of sovereign immunity jurisprudence.¹⁰³ As we will discuss later in Part IV, the doctrine of *Ex parte Young* permits individual plaintiffs to seek injunctive relief against state officials for ongoing violations of their federal rights. But *Edelman v. Jordan*, its predecessors, and its progeny make clear that this relief cannot extend to monetary damages,¹⁰⁴ retrospective relief,¹⁰⁵ or their functional equivalents.¹⁰⁶ It is not obvious why a damages award would offend a state's sovereign dignity, while an injunction commanding the state to perform certain conduct does not.¹⁰⁷ Additionally, Congress's enforcement powers under the Reconstruction Amendments enable it to abrogate state sovereign immunity in order to protect citizens' constitutional rights.¹⁰⁸ In effect, if the inherent state dignity view is correct, then Congress may strip states of that very dignity under certain conditions. It can forcibly subject states to the ignominy of a private lawsuit, like a child forced to play nicely under the watchful and chastening eye of his mother.

For that matter, a broad swathe of remedies for constitutional violations would seem to disparage states' inherent dignity. Congress may force certain states to preclear changes to their election procedures.¹⁰⁹ The Supreme Court may order a state to fundamentally rework its entire prison system.¹¹⁰ States may not even enjoy the quiet dignity of choosing their

not just "rhetorical flourishes" but rather are a reflection of the concern for "expressive harms"); Peter J. Smith, *States as Nations: Dignity in Cross-Doctrinal Perspective*, 89 VA. L. REV. 1, 7 (2003) (questioning whether sovereign dignity has any application to state sovereign immunity and suggesting that Congress should have the authority to abrogate the states' immunity).

103. See Daniel J. Meltzer, Essay, *State Sovereign Immunity: Five Authors in Search of a Theory*, 75 NOTRE DAME L. REV. 1011, 1038–41 (2000) (questioning broad notions of state dignity and noting that the federal government still has the power to impose unwanted duties on the states and to block the states' regulatory authority through preemption).

104. *Ford Motor Co. v. Dep't of Treasury*, 323 U.S. 459, 464 (1945).

105. *Edelman v. Jordan*, 415 U.S. 651, 659 (1974).

106. *Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261, 281 (1997).

107. Our view, by contrast, does explain this key feature of sovereign immunity jurisprudence. See *infra* Part IV.

108. *Fitzpatrick v. Bitzer*, 427 U.S. 445, 455–56 (1976).

109. Section Five of the Voting Rights Act of 1965 imposes these preclearance requirements, which the Court has repeatedly upheld as an appropriate exercise of Section Two of the Fifteenth Amendment. *City of Rome v. United States*, 446 U.S. 156, 162–66, 173 (1980); *South Carolina v. Katzenbach*, 383 U.S. 301, 308 (1966). The Court's recent decision in *Shelby County v. Holder*, 133 S. Ct. 2612 (2013), strikes down the formula determining which states are subject to preclearance (Section Four of the Voting Rights Act) but leaves preclearance power itself intact. *Id.* at 2631.

110. See *Brown v. Plata*, 131 S. Ct. 1910, 1947 (2011) (finding that the relief of reducing the prison population ordered by the lower courts was constitutionally required). The dissent characterized the order as "perhaps the most radical injunction issued by a court in our Nation's history: an order requiring California to release the staggering number of 46,000 convicted

own religion!¹¹¹ And they must put up with waves upon waves of dissenting speech that criticizes the government.¹¹² It is no answer to say that state dignity does not extend so far as to countenance constitutional violations. For such “dignity” would no longer be inherent, and conditional dignity makes for a curious bird.

Additionally, the link between state dignity and immunity from suit lacks a compelling theory. The justices often recite the disgraceful ordeal of being haled into court by a private citizen,¹¹³ as though the state were some scofflaw recently rounded up or a prisoner in an orange jumpsuit and chains. But it is unclear why adjudication would at all demean the dignity of a democratic state. Indeed, an adversarial proceeding before an impartial decision maker provides a way to hold states accountable to the rule of law while allowing them the opportunity to explain and justify their actions.¹¹⁴

But the most significant problem with the state dignity view is its central premise that some inherent property of state dignity exists at all. There is nothing inherent in a state as such that makes it deserving of dignity. Indeed, many state regimes have committed evils that make them worthy of neither respect nor dignity. What dignity can a state command, for example, as an authoritarian dictatorship that violates human rights? Thus, in order to avoid the normatively indefensible attribution of dignity to states per se, any good theory of sovereign immunity must feature a distinction. It must distinguish between the mere recognition of a state as an empirically constituted entity and the normative evaluation that a state possesses a particular kind of sovereignty that entitles it to respect or dignity. Perhaps unsurprisingly, a theory of sovereign immunity must include a theory of sovereignty. The doctrine, after all, is one of sovereign immunity not state immunity. In particular we distinguish between the multiplicity of state actions and those state actions that respect the limits of sovereignty.

Democratic self-government is the core commitment of our Constitution. We therefore should develop a democratic account of sovereignty and of sovereign immunity. Simply put, democratic sovereignty requires that government *of* the people (coercive state action) must be both *by* the people (involving their participation in its procedures) and *for* the people

criminals.” *Id.* at 1950 (Scalia, J., dissenting). Note that Justice Kennedy, one of the fiercest proponents of the state dignity view, is the author of the majority opinion. *Id.* at 1922 (majority opinion).

111. *See, e.g.*, *Everson v. Bd. of Educ.*, 330 U.S. 1, 15 (1947) (explaining that the Establishment Clause prohibits a state from “set[ting] up a church”).

112. *See, e.g.*, *Cohen v. California*, 403 U.S. 15, 26 (1971) (protecting profane political speech).

113. *See supra* notes 92–101 and accompanying text.

114. *See Resnik & Suk, supra* note 11, at 1928 (“[R]equiring sovereigns to account for actions through orderly dialogue between individuals, entities, and governments ought not be understood to be an insult to status.”).

(promoting the common good and respecting substantive democratic rights). It then follows that state action is *not* sovereign action unless it satisfies both the procedural and the substantive conditions of democratic legitimacy.

When the state acts as sovereign, it will sometimes make mistakes, even very costly ones. The state may even intentionally commit private wrongs, such as breaching a contract. Democratic sovereignty requires that states be immune from liability for these actions unless they consent to be sued. Otherwise, rather than serve the public good through a process of collective decision making, the treasury would serve to remedy private grievances instead. A thicket of potential liability would arrest state action entirely. Such sovereign actions (as opposed to all actions by the state) are rightly protected by immunity from suit. It is not the state as such that deserves dignity but rather a respect for a notion that some government actions are authorized by the people.

But the state does not always act as sovereign. Some actions of the state are not only mistaken, they violate a constitutionally protected individual right, such as the guarantees of due process or equal protection enshrined in the Fourteenth Amendment. Violations of fundamental constitutional rights, we argue, are not sovereign actions, although they are state actions and thus should not trigger sovereign immunity. In fact, in such actions the sovereignty rests with the individual enforcing the Constitution. The Fourteenth Amendment recognizes the people's sovereignty by limiting government and ensuring that states respect citizens' fundamental rights. Lawsuits against the states that violate these rights are fundamental to the meaning of sovereignty after the passage of the Fourteenth Amendment.

It should be clear now how our view contrasts with the state dignity approach to sovereign immunity. While that approach cannot explain differences in immunities in cases that involve constitutional rights violations and other private wrongs, the democratic view we have sketched makes that distinction fundamental. But the democratic view also contrasts greatly with the populist understanding of sovereign immunity. The populist understanding outlined by the Court in *Chisholm* claims that states should never be immune from suit. The problem with this view, however, is that it fails to recognize the multiplicity of fundamental ways in which the state, even the democratic state, is different than the citizenry.

To illustrate this distinction, consider the following two scenarios. If my neighbor takes my money and buys a TV, that neighbor commits the crime of larceny as well as the private tort of conversion. But if the state taxes me and buys a monitor for the local stadium, it performs a fundamental sovereign function. As these examples illustrate, the state can exercise legitimate coercion where individuals cannot. We will argue too

that, when fundamental rights are not at issue, the state is also immune from liability stemming from other private wrongs.

In the next Part, we will attempt to carve out such an account, which avoids the pitfalls of both a monarchist defense of sovereign immunity and a conflation of states and sovereigns.

II. Democratic Authority and Sovereign Immunity

A. *The Substance and Procedure of Democracy*

Our aim in this subpart is to provide a democratic alternative to the overly statist conceptions of sovereign immunity discussed in the previous Part as well as to the populist rejection of sovereign immunity. On our view, in the American constitutional regime, any discussion of sovereignty must begin with an account not of the state as such but with the notion that the *people* are sovereign. In particular, democratic sovereignty has two features, which one of us has outlined in a previous book and that can be applied to the case of American democracy.¹¹⁵

First, in a democracy the sovereignty of the people has a procedural element of rule *by* the people. Law is authorized by the people acting through their representatives.¹¹⁶ This component of democratic sovereignty courses throughout the text and structure of the American Constitution—empowering the elected branches of the federal government under Articles I and II, securing participation at the state level through the Tenth Amendment and the Republican Guarantee Clause, and expanding and protecting the right to vote through a number of provisions.¹¹⁷

Second, in a democracy the sovereignty of the people entails the respect for citizens' fundamental rights.¹¹⁸ Part of what it means to respect

115. See generally BRETTSCHEIDER, *supra* note 30.

116. See JEREMY WALDRON, *LAW AND DISAGREEMENT* 156 (1999) (“[A]ll (adult, sane) individuals have the right to participate, either directly or through elected and accountable representatives, in making laws and other decisions about the structure of their society.”).

117. See U.S. CONST. amend. XIV (guaranteeing equal protection in the right to vote); U.S. CONST. amend. XV (forbidding voting restrictions based on race); U.S. CONST. amend. XIX (forbidding voting restrictions based on sex); U.S. CONST. amend. XXIV (prohibiting poll taxes); U.S. CONST. amend. XXVI (forbidding voting restrictions based on age for citizens eighteen or older). Akhil Amar discusses the connections between these provisions in AMAR, *supra* note 24, at chs. 10–12. For an illuminating tour of the procedural nature of the U.S. Constitution, see generally ELY, *supra* note 30, at 88–101.

118. See DWORKIN, *FREEDOM'S LAW*, *supra* note 27, at 2–12 (offering a substantive account of democracy and arguing that the Bill of Rights commits the U.S. to respecting individual rights such as freedoms of speech and religion); CHRISTOPHER L. EISGRUBER, *CONSTITUTIONAL SELF-GOVERNMENT* 82 (2001) (noting the theory that “democracy presupposes that individuals enjoy an attractive . . . package of rights—rights that enable them to participate effectively in political life, or that guarantee them the benefits they would have enjoyed in some ideal, consensual, but practically unrealizable polity”); JÜRGEN HABERMAS, *BETWEEN FACTS AND NORMS: CONTRIBUTIONS TO A DISCOURSE THEORY OF LAW AND DEMOCRACY* 120–23 (William Rehg

the people as a collective is to recognize that each individual's sovereignty must be respected. This entails a variety of substantive rights at both the state and federal level that are essential to democracy. The Fourteenth Amendment in particular guarantees that while sovereignty leads in part to the authorization of democratic lawmaking, it is also limited when it comes to a variety of entitlements including equal protection and substantive due process.

It is thus characteristic of a regime that respects democratic sovereignty that it wield democratic authority to act coercively but that such power must also be limited, both by an account of rights and by an account of power which is derived from a democratic process. Thus, the democratic state, subject to certain conditions, has a kind of authority over individual citizens. This authority is subject to certain limits, of the sort we have just laid out, and thus its authority is only legitimate when it acts within certain bounds.

B. State Action and Democratic Sovereignty

It is helpful to distinguish, following the notions of rule by and for the people, between sovereign and non-sovereign acts of government. More specifically, when the state coerces its citizens, it does so legitimately and within its authority when legislative acts are passed by representatives of the people. Some of these acts might remain sovereign but still might be mistaken. For example, a state may choose to cut spending during an economic recession, substantially increasing unemployment levels. These policy decisions may well be mistaken or even negligent—courses of action that a reasonable policymaker would not have taken. And they may cause considerable injury to private individuals. But these decisions, made on behalf of all the people, violate no fundamental rights. They do not undermine citizens' free and equal status or flout the substantive requirements of democratic legitimacy. In contrast, some government actions violate constitutional rights. In these cases, the government acts in a way that exceeds its sovereign authority. As one of us has argued elsewhere, such acts are rightly struck down by the Supreme Court both on constitutional grounds and on grounds of democratic sovereignty.¹¹⁹ Such acts of government undermine the basis of its very legitimacy. We link the two prongs of our view of sovereign immunity to the procedural and substantive aspects of democratic sovereignty in the next two subsections. First, where the state commits a sovereign mistake, on our theory it is immune from private suit. Its actions are legitimately authorized by the procedures of democracy. Second, when a state violates a fundamental

trans., 1996) (identifying citizens' fused roles as authors and addressees of the law as a source of their rights).

119. BRETTSCHEIDER, *supra* note 30, at 1–3.

democratic right, the suit must go through—because in that instance, sovereignty resides with the citizen–plaintiff instead.

1. Sovereign Mistakes and Pure Private Rights.—To understand sovereign immunity in a democracy, we should appeal directly to an account of democratic sovereignty. On our view, the overarching premise of modern sovereign immunity jurisprudence is correct. For private wrongs where no fundamental right is at stake, sovereign states should be constitutionally immune from suit without their consent. These cases are those in which the state acts wrongly but legitimately—as a democratic sovereign, both *by* and *for* the people. It acts *by* the people by enacting the will of the people through legislation, albeit enacting policy that might be mistaken. It also respects the *for* the people aspect of democracy by not violating basic rights. Just as budgetary or other legislative mistakes are legitimate instances of authorized law, mistakes that result in lawsuits also should be “forgiven” by immunity as long as they do not violate any basic constitutional rights. Otherwise, a democratic state could not exercise its sovereign authority in a wide range of pressing policy issues—not without the risk of opening up the public treasury to private litigation.

In such instances, there is reason for the state to be treated differently than a private actor. It is part of the essential nature of an account of democratic authority that the state is empowered to force citizens to act against their will and that it might at times do so mistakenly. But because of the authority vested in a democratic state, it cannot be the case that all such instances are ripe for rectification. Just as the citizen who suffers as a result of a poor economic decision must accept that the action was legitimate, so too the citizen who suffers as a result of a state mistake that does not implicate a basic right must recognize that they have no claim. In both cases, the state acts within its authority and thus legitimately.

State actors commit what we would otherwise categorize as torts on countless occasions every day. But so long as their actions are sovereign, subject to the constraints of democratic legitimacy, then the state cannot be held liable for any resulting harm. Such private wrongs are simply sovereign mistakes, and they are legitimate.

For example, if she has a warrant and probable cause, an agent of the state may forcibly enter your home (trespass to land), threaten you with physical harm (assault), search your person by touching you without consent (battery), remove certain personal property (trespass to chattels), place you under arrest, and detain you. And even if you are completely innocent and never charged with a crime, you cannot recover for any of these wrongs unless the mistakes were unreasonable. Sovereign immunity creates a zone of discretion where a state can err and violate its citizens’ private rights—such as common law actions in tort, contract, and property. Otherwise, the state could not act without encountering a thicket of liability.

But suppose that the officer committed those actions *without* a warrant and probable cause. One theory of recovery might simply be under the common law of torts. The officer could not claim immunity because her actions were unreasonable, unconstitutional, and therefore beyond her authority. Another promising theory would demand compensation for violating your constitutional rights—either through an implied cause of action under the Fourth Amendment¹²⁰ or a § 1983 suit.¹²¹ Either way, whether she committed those intentional torts is not in issue. (She did, beyond question.) What matters is whether she acted *reasonably* because that is the trigger for the relevant substantive right under the Fourth Amendment.¹²² Similarly, a state may commit a property tort, such as a postal truck backing into your car. And unless the state has waived its immunity,¹²³ you will not be able to recover in an ordinary court. But, crucially, a state may not deprive you of your property without due process of law because that is a fundamental democratic right grounded in the Constitution.¹²⁴

A state and its laws are the source of all private rights. Under the police powers that flow from democratic sovereignty, the state determines the metes and bounds of its citizens' rights of contract, tort, and property. It cannot, therefore, be sued for violating these rights without its consent. The democratic conception of sovereign immunity will not permit it. By contrast, a state cannot violate its citizens' fundamental democratic rights and retain its democratic sovereignty. There can be no immunity for such a violation.

The relationship between budgetary matters and sovereign immunity is no mere analogy. Suits against states impose a significant risk on the public coffers.¹²⁵ Moreover, such suits cut at the tax base available to provide for

120. *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 389 (1971). For other causes of action implied under the Constitution, see cases cited *infra* note 285. Note that our view would require *Bivens* actions for *every* fundamental right violation—not just for that limited list. Additionally, alongside these claims, a federal court would have supplemental jurisdiction over an ordinary state law claim. *United Mine Workers v. Gibbs*, 383 U.S. 715, 721, 729 (1966).

121. *Monroe v. Pape*, 365 U.S. 167, 171–72 (1961).

122. *Whren v. United States*, 517 U.S. 806, 809, 813–14 (1996).

123. For further discussion of waiver, see *infra* subpart III(D).

124. See, e.g., *Goldberg v. Kelly*, 397 U.S. 254, 261 (1970) (finding a right to a pre-termination hearing for welfare benefits under the Due Process Clause). Note that “deprivation” requires more than negligence and that postdeprivation process will satisfy the Constitution in many instances. *Parratt v. Taylor*, 451 U.S. 527, 538, 543–44 (1981).

125. For a harrowing description of the potential danger in the context of the Great Recession and dauntingly unfunded pensions, see generally Ernest A. Young, *Its Hour Come Round at Last? State Sovereign Immunity and the Great State Debt Crisis of the Early Twenty-First Century*, 35 HARV. J.L. & PUB. POL’Y 593 (2012). Young surveys the historical foundations of sovereign immunity doctrine, concluding that much of its development was influenced by the context of state debt crises after the Revolutionary and Civil Wars. *Id.* at 597–601. For further discussion of the dismal status of the financial condition of many states, see generally MICHAEL S. GREVE, AM.

the public welfare. Indeed, given that it is the states and not the federal government that provide for basic welfare in the contemporary American polity, these suits endanger the ability of the government to provide for the common welfare. Just as taxation and spending are core parts of rule by the people, so too is the ability to make mistakes that will not undermine, through tort, the ability of the state to pursue its core obligation to provide for the general welfare.

The core democratic principle behind sovereign immunity goes to the heart of the state's ability to control its own budgetary matters, which are central to a government's ability to function. Denying that ability is not the denial of any ordinary function. Thus, allowing the federal government to order that states be subject to suit goes well beyond any of the mere instances of "commandeering" that the Supreme Court has previously rejected. The legislative mandate in *New York v. United States*¹²⁶ and the requirements on state law enforcement officers in *Printz v. United States*¹²⁷ were limited in scope and concerned ordinary functions like environmental regulation and law enforcement.¹²⁸ But sovereign immunity preserves some of a state's most important government functions by protecting states' control over their own budgetary decisions. Imagine, for instance, a federal order to not tax or to limit state spending. Such requirement would undermine the state's ability to function as a sovereign government entity. Similarly, abrogating state sovereign immunity for private wrongs—forcing a wave of litigation that could imperil a state's budget and paralyze its efforts to serve the general welfare—would also undermine a core sovereign function.

2. *Fundamental Democratic Rights.*—However, some lawsuits concern instances in which state actions are not just wrong but also in violation of the fundamental rights of citizens. In these cases the state's coercion is illegitimate. While such actions are state actions, meaning that they are performed by the state and its agents, they are not sovereign actions because they fail the conditions of democratic legitimacy. Such actions violate the *for the people* aspect of democratic sovereignty. Unlike the legitimate mistakes categorized in the previous section, which rightly retain sovereign authority, these mistakes are of a different kind. No democratic state, regardless of the process that has led to its decision, can legitimately violate the fundamental rights of citizens. These violations are not—and cannot be—the actions of a democratic sovereign, and so sovereign immunity will

ENTER. INST., BAILOUTS OR BANKRUPTCY: ARE STATES TOO BIG TO FAIL? (2011), available at <http://www.aei.org/wp-content/uploads/2011/10/LO-2011-03-No-1-g.pdf>, archived at <http://perma.cc/KNF5-RAXY>.

126. 505 U.S. 144 (1992).

127. 521 U.S. 898 (1997).

128. *Printz*, 521 U.S. at 902; *New York*, 505 U.S. at 149.

not shield the state from liability. In these cases, citizens may assert their constitutional rights and hold the state accountable for exceeding its sovereign authority. In other words, when fundamental constitutional rights are at stake, democratic sovereignty aligns with the citizen *against* the state.

We can think of fundamental rights and sovereign immunity as inversely related. When citizens retain rights, they can assert them against the state without the impediment of sovereign immunity. A citizen's rights claim is itself an assertion of the sovereignty of the people over and against a state that is meant to be subservient to these rights. On the other hand, there are times when citizens transfer authority to the state and thus lack rights as individuals. Just as these instances of transfer give up some individual authority to the state, so too is transferred sovereignty of action. When the state acts legitimately under democratic authority, it cannot be sued even when it makes mistakes. We might then think of the relationship as consisting of the following corollaries¹²⁹:

Right → No Immunity
 No Power → No Immunity
 No Right + Power → Immunity

When the state violates a fundamental individual right or acts beyond its enumerated powers, it exceeds its sovereignty and loses immunity. In all other cases, when the state acts within its enumerated powers and respects individual rights, it is rightly immune from suit due to its democratic sovereign authority.

On our account, an individual right entails that the state cannot rightfully intervene and, moreover, that the individual is entitled to compensation in the case of state intervention. But the absence of a right allows for the possibility that the state has a legitimate power to act with

129. This set of corollary relationships is inspired by Wesley Newcomb Hohfeld's famous conceptual analysis of rights. WESLEY NEWCOMB HOHFELD, *FUNDAMENTAL LEGAL CONCEPTIONS AS APPLIED IN JUDICIAL REASONING* 11–13 (David Campbell & Phillip Thomas eds., Dartmouth Publ'g Co. 2001) (1919). In particular, Hohfeldian right claims encompass *all* rights rather than the fundamental democratic rights that are the object of our analysis. *Id.* at 53. We will turn to the problem of distinguishing ordinary private rights from fundamental rights (a necessary requirement for democratic legitimacy) in the next subpart. For Hohfeld, "rights" correlate with "duties," which imply the absence of a "privilege." *Id.* at 13–14. If you have a right to X, then someone owes you a duty to X, which means they lack a privilege to not X. *Id.* A similar corollary relationship exists between "powers," "liabilities," and "immunities." *Id.* at 12. For a full discussion of the history and philosophy associated with rights, see generally Lief Wenar, *The Nature of Rights*, 33 *PHIL. & PUB. AFF.* 223 (2005); *Rights*, *STANFORD ENCYCLOPEDIA PHIL.* (July 2, 2011), <http://plato.stanford.edu/archives/fall2011/entries/rights/>, archived at <http://perma.cc/VY7Z-4W67>. For our purposes, the Hohfeldian typology simply illustrates the conceptual interrelatedness of fundamental rights and sovereign immunity—that sovereign immunity extends only so far as the democratic sovereign respects fundamental rights.

democratic authority, and in such cases the individual has given up the right to sue, along with the transfer of power implied by democratic legitimacy.

The arguments that we have raised concerning federal usurpation of state authority do not hold when it comes to torts that implicate fundamental constitutional rights. The structure of the Fourteenth Amendment is such that individual entitlements to these rights are guaranteed regardless of the level of government. The federal government, when it waives or abrogates immunity in these cases, is merely following its constitutional duty to protect these rights at all levels of government. It acts on behalf of the individual against state or federal government actions that stray from sovereign authority. The states themselves also possess a co-extensive duty to remedy fundamental rights violations. Compensating victims takes on a special urgency, as it is necessary for states to restore their good standing as legitimate democratic sovereigns.¹³⁰

An account of democratic sovereign immunity therefore recognizes that the state can exceed its sovereign authority and therefore is rightly subject to suit in instances of constitutional rights violations. Moreover, it recognizes that the state sometimes acts wrongly but in a particular way which is within the limits of legitimacy and its sovereign authority. In such instances, the democratic state rightly retains immunity as a result of its power in ways that it does not when it violates a right.

C. *Identifying Fundamental Democratic Rights*

Of course, the question remains as to how to draw the line between lawsuits in defense of rights that are fundamental to the sovereignty of the people and lawsuits that merely identify mistakes made by the government. Much of the rest of this Article will be devoted to addressing this question. We do, however, want to reject a way of thinking about rights that would be in tension with the very distinction between sovereign rights and mistakes. Some might argue that all tort suits are about rights basic to sovereignty. Such arguments would most likely come from a libertarian camp that would see any economic harm as a fundamental rights violation. Property-rights libertarians thus might reject the distinction between suits involving fundamental rights and those involving private wrongs or sovereign mistakes.

In our constitutional tradition, however, the extreme libertarian line has been rejected after *West Coast Hotel v. Parrish*.¹³¹ While personal liberties in areas such as privacy, equal protection, or matters related to imprisonment are regarded as basic constitutional rights, attempts to turn all economic interests into rights have been rejected along with *Lochner*-era

130. See *infra* notes 193–95 and accompanying text.

131. 300 U.S. 379 (1937).

jurisprudence. Modern constitutional law rejects the notion that all economic harm is a rights violation. We largely draw on and endorse that view throughout the rest of the Article.¹³²

The libertarian political theory of *Lochner v. New York*¹³³ and other cases of its era is committed to a central notion: that states must protect private market rights in order to be legitimate. The traditional common law rights of contract, property, and tort give structure to a system of voluntary market exchange—reflecting and preserving a prepolitical right to natural liberty. Any interference by the government outside these well-carved channels of common law rules should be met with heightened scrutiny, for they risk violating citizens' fundamental rights. Courts must strike down broad regulation as unconstitutional even when those laws are duly passed through a democratic process. Indeed, they do so to preserve democracy, for these laws violate the necessary requirements for democratic legitimacy. *Lochner*-era courts understood the promise of the Fourteenth Amendment to protect free and equal citizens primarily in their capacity as market participants, free to contract their labor and exchange their property without impediment by the state.

In *Lochner*, the Court struck down a New York maximum hour law for bakers, finding that the statute's aims veered too far from states' traditional police powers to justify violating the "right to purchase or to sell labor."¹³⁴ Such a stretch of regulatory power to violate a fundamental right deprived the bakers (and their employers) of their liberty and property interests without due process of law. Similarly, in *Ives v. South Buffalo Railway Co.*,¹³⁵ the New York Court of Appeals extended this substantive due process logic beyond contract and property into the common law of torts.¹³⁶ The court held that New York's workers' compensation law violated the due process clauses of both the New York and federal constitutions by holding employers liable without fault.¹³⁷ Judge Werner argued that the Constitution was enacted with traditional negligence doctrines that would prevent a defendant from being held liable without a showing of fault.¹³⁸ These common law doctrines gave rise to a vested property interest, and New York's strict liability insurance scheme violated this right without due

132. For a full substantive argument, see BRETTSCHEIDER, *supra* note 30, at ch. 6. Chapter 6 of that book argues that the contractualist project of mutually justifying fair terms for a system of social cooperation requires basic guarantees of each citizen's welfare.

133. 198 U.S. 45, 53 (1905). While there have been some recent efforts to revive *Lochner*'s reputation, DAVID E. BERNSTEIN, *REHABILITATING LOCHNER* (2011), its anticanonical stature has endured.

134. *Lochner*, 198 U.S. at 53.

135. 94 N.E. 431 (N.Y. 1911).

136. *Id.* at 444.

137. *Id.* at 439–41.

138. *Id.* at 439.

process of law.¹³⁹ In other words, citizens' fundamental constitutional rights to market freedom entitle them to the traditional common law rules of property, contract, and tort that provide security for those rights.¹⁴⁰ Any attempt by the state to significantly alter those rights is democratically illegitimate because it disrupts that fundamental freedom.

But, as the Court has articulated since 1937, the Constitution recognizes government's sovereign power to regulate economic activity and even adjust the market allocation of rights and goods. Article I, Section Eight gives Congress broad powers over areas in which individual states are incompetent to act, and the states also enjoy extensive police powers to pursue the public welfare.¹⁴¹ This is not simply a matter of historical precedent or doctrinal contingency but the product of a normative argument about what rights are fundamental to democracy. As we have suggested, the powers of democratic sovereignty are not limitless—they do not extend to violations of the fundamental rights that are necessary for democratic legitimacy.¹⁴² Such fundamental rights include the freedom of speech, equal protection, liberty of conscience, and autonomy in intimate relationships.¹⁴³ Respecting these substantive commitments is a necessary requirement for a state to recognize its citizens' free and equal status, to legitimately exercise democratic power in their name. But the market rights of the *Lochner*-era cases do not register this same fundamental status. No one is entitled to any particular arrangement of the contract, property, and tort rules that shape market transactions, just as no one is entitled to the pre-tax income from the fruits of her labor.¹⁴⁴ The reason is that markets cannot function or even exist without some prior (chronologically and conceptually) system of cooperation, such as a state. The question of democratic legitimacy, then, is how that system of cooperation can be justifiable to its participants. The claim that market rights or common law rules are fundamental is mistaken because it puts the cart before the horse.

The Court during the New Deal period recognized the need for government to operate in the economic realm unencumbered by crippling

139. *Id.* at 441.

140. *But see* N.Y. Cent. R.R. Co. v. White, 243 U.S. 188, 197–98 (1917). There, the Court recognized: “The close relation of the rules governing responsibility as between employer and employee to the fundamental rights of liberty and property.” *Id.* But it insisted that “those rules, as guides of conduct, are not beyond alteration by legislation in the public interest. No person has a vested interest in any rule of law entitling him to insist that it shall remain unchanged for his benefit.” *Id.* at 198. Ultimately, this understanding of the common law as subject to legislative revision prevailed alongside the New Deal's progressive reforms. Richard A. Epstein, *A Common Law for Labor Relations: A Critique of the New Deal Labor Legislation*, 92 YALE L.J. 1357, 1357 (1983).

141. U.S. CONST. art. I, § 8; U.S. CONST. amend. X.

142. *See supra* notes 33–34 and accompanying text.

143. *See supra* notes 35–38 and accompanying text.

144. LIAM MURPHY & THOMAS NAGEL, *THE MYTH OF OWNERSHIP* 9 (2002).

property rights jurisprudence.¹⁴⁵ We think the rejection of *Lochner*-like market rights as fundamental to democracy has a clear implication for sovereign immunity doctrine. Purely economic harms caused by government action are not, by themselves, basic rights violations. Indeed, when the state acts in its sovereign capacity to regulate and give structure to important social institutions like the market, it is natural to expect that some private actors may be worse off as a result. The owner of a hotel may have to pay his workers a minimum wage,¹⁴⁶ and he may also be unable to exclude guests based on their race.¹⁴⁷ A bondholder may lose money when an energy crisis drives a state to subsidize public transit with toll revenue (repealing a statutory covenant to the contrary).¹⁴⁸ Such economic harms might even run afoul of the common law of tort or contract, but they are the inevitable consequence of a state given the power to intervene in the economy and the power to revise the common law through legislation. Many of these instances are thus legitimate costs of allowing government intervention into the economy in order to better the lives of democratic citizens. But if these damages stem from mistakes that are a result of legitimate government functions, it follows that the state should be entitled to immunity when its agents are negligent or break contracts in pursuing the general welfare. In other words the sovereign mistake is the inevitable result of government powers of intervention into the economy. Just as these powers are not themselves rights violations, neither should their consequences be viewed as violations. A state should not be forced to answer the purely private claims of a plaintiff seeking to raid the public treasury in compensation for the results of actions that have been duly authorized by the democratic sovereign. Such instances are sovereign mistakes and should be protected by sovereign immunity. Taking democracy seriously demands no less.

Some readers who are sympathetic to a libertarian vision of the Constitution may not be persuaded by our argument that a particular arrangement of market rights cannot be a fundamental requirement of democratic legitimacy. Indeed, this should come as little surprise, as there

145. See SUNSTEIN, *supra* note 40, at 3 (exploring the rejection of private property rights during the New Deal era). Indeed, we believe that there is a deep connection between the government's sovereign power to regulate the national economy—along with the immunity accompanying that power—and the best conception of the fundamental democratic rights of free and equal citizenship.

146. *W. Coast Hotel Co. v. Parrish*, 300 U.S. 379, 388, 400 (1937).

147. *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 243 (1964).

148. *But see* *U.S. Trust v. New Jersey*, 431 U.S. 1, 13–14, 32 (1977) (invalidating such a repeal under the Contracts Clause). We endorse Justice Brennan's dissenting opinion, which has important implications for the democratic theory underlying sovereign immunity doctrine. See *supra* notes 174–78 and accompanying text.

is substantial disagreement about fundamental rights.¹⁴⁹ And, although settled precedents and court doctrine may cabin this disagreement somewhat, we do not hold the view that the Supreme Court has the final word on what the Constitution means.¹⁵⁰ But our theory of democratic sovereign immunity does not depend on any claim about which rights in particular are fundamental to democracy.

D. Hans and the Principle of Democratic Sovereignty

We can see this distinction between pure private rights and fundamental democratic rights by examining *Hans v. Louisiana*, the seminal case for modern sovereign immunity doctrine, and situating it in the context of the jurisprudence of the post-New Deal era.¹⁵¹ After Reconstruction and the immense toll of the Civil War, a number of Southern states were in danger of default and even insolvency.¹⁵² In 1874, Louisiana passed a constitutional amendment repudiating debt owed on certain bonds that were soon to come due.¹⁵³ Hans, a bondholder from Louisiana, sued to recover his debt, claiming that the amendment violated the Contracts Clause of the federal Constitution.¹⁵⁴ The Court upheld the dismissal of the plaintiff's claim, articulating a broad structural principle of sovereign immunity beyond the text of the Eleventh Amendment.¹⁵⁵

Hans might seem to pose a problem for our view, as a case in which the sovereign immunity principle defeats a claim of constitutional right. Democratic sovereignty does not extend, we have suggested, to state actions that violate fundamental constitutional rights because these rights are a necessary requirement for democratic legitimacy.¹⁵⁶ We argue that *Hans* was correctly decided, however, because such an expansive Contracts Clause claim is implausible as a fundamental democratic right. As we have suggested, the libertarian premises of *Lochnerism*—that all economic harm triggers a fundamental rights violation and that citizens may hold states hostage to the inherited rules of the English common law—find no basis in constitutional law or political theory.¹⁵⁷ The *Hans* opinion is hardly a

149. See Jeremy Waldron, *The Core of the Case Against Judicial Review*, 115 YALE L.J. 1346, 1366–69 (2006) (discussing the plausibility of the assumption that even a society that takes rights seriously will feature substantial disagreement about the content of those rights).

150. Compare the substantial body of “popular constitutionalist” literature, for example LARRY D. KRAMER, *THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW* 8 (2004).

151. See, e.g., FALLON, JR. ET AL., *supra* note 1, at 878–85 (discussing the importance and impact of the *Hans* case on sovereign immunity doctrine).

152. *Id.* at 881; Orth, *supra* note 67, at 7.

153. *Hans v. Louisiana*, 134 U.S. 1, 1–2 (1890).

154. *Id.* at 3.

155. *Id.* at 15–21.

156. See *supra* section II(B)(2).

157. See *supra* subpart II(C).

sweeping rejection of *Lochner*-era jurisprudence,¹⁵⁸ but it stands for two key propositions: first, that sovereign immunity shields state action when fundamental rights are not at stake and, second, that there is no fundamental right against interference with government contracts.¹⁵⁹ Indeed, the core logic of the opinion is that a democratic principle of sovereign immunity requires a narrow reading of the Contracts Clause so that it does not apply to government contracts.¹⁶⁰

Many scholars and jurists have focused on Justice Bradley's language suggesting that federal courts lack jurisdiction to hear *any* suit against a nonconsenting state.¹⁶¹ This is too broad an interpretation of the sovereign immunity principle, and it misreads the holding in *Hans*. Rather than imposing a blanket jurisdictional bar against any suit where a state is the defendant, the sovereign immunity principle decides this case *on the merits*. The Court implicitly recognizes that if a fundamental right were at issue, the suit could go through. It is therefore at pains to explain why there is no such right to sue a state for violating its contractual agreements. The Court concludes that the Contracts Clause simply does not apply to government contracts,¹⁶² whose "obligations . . . cannot be made the subjects of judicial

158. In *Hans*, the Court stated:

While the State cannot be compelled by suit to perform its contracts, any attempt on its part to violate property or rights acquired under its contracts, may be judicially resisted, and any law impairing the obligation of contracts under which such property or rights are held is void and powerless to affect their enjoyment.

134 U.S. at 20–21.

159. *Id.* at 13.

160. *See id.* at 10, 13 ("It is inherent in the nature of sovereignty not to be amenable to the suit of an individual *without its consent*." (quoting THE FEDERALIST NO. 81, at 846 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (internal quotation marks omitted)).

161. For example, in *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996), the court cited *Hans* for the twin propositions

that each State is a sovereign entity in our federal system; and second, that "[i]t is inherent in the nature of sovereignty not to be amenable to the suit of an individual without its consent . . ." For over a century we have reaffirmed that federal jurisdiction over suits against unconsenting States "was not contemplated by the Constitution when establishing the judicial power of the United States."

Id. at 54 (quoting *Hans*, 134 U.S. at 13, 15) (citations omitted).

162. There is considerable historical evidence that the founding generation was primarily concerned with state interference with *private* contracts. In his dissent in *U.S. Trust Co. v. New Jersey*, 431 U.S. 1 (1977), Justice Brennan cites a number of prominent scholars for the proposition that "the Framers of our Constitution conceived of the Contract Clause primarily as protection for economic transactions entered into by purely private parties, rather than obligations involving the State itself." *Id.* at 45 (Brennan, J., dissenting) (citing GERALD GUNTHER, CASES AND MATERIALS ON CONSTITUTIONAL LAW 604 (9th ed. 1975); 2 BERNARD SCHWARTZ, A COMMENTARY ON THE CONSTITUTION OF THE UNITED STATES: THE RIGHTS OF PROPERTY 274 (1965); BENJAMIN FLETCHER WRIGHT, JR., THE CONTRACT CLAUSE OF THE CONSTITUTION 15–16 (1938). Admittedly, this interpretation runs counter to a number of landmark decisions, dating back to *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87, 137–39 (1810). But Justice Brennan persuasively synthesizes the founding-era history with the modern constitutional context of the post-New Deal

cognizance unless the state consents to be sued.”¹⁶³ As a result, the case was properly dismissed for *failure to state a cause of action*,¹⁶⁴ much the same as if Hans had claimed that his neighbor’s dog had violated the Contracts Clause. A sovereign state cannot be sued for defaulting on its contracts with private parties—which is to say that no such fundamental right protecting government contracts exists. Importantly, we see in Justice Bradley’s opinion that the ultimate justification for this reading of the Contracts Clause is an account of democratic sovereignty. For a “legislative department of a state represents its polity and its will,” and even though states should generally honor their private obligations to citizens, “to deprive the legislature of the power of judging what the honor and safety of the state may require, even at the expense of a temporary failure to discharge the public debts, would be attended with greater evils than such failure can cause.”¹⁶⁵

The Court implicitly assumes that there are fundamental rights under the Contracts Clause protecting private contracts and that those claims would therefore evade immunity.¹⁶⁶ For reasons discussed in the previous subpart, we would deny that the right to contract is a fundamental right of citizenship, whether it is with the government or a private party. But the important point for our purposes is that the extent of sovereign immunity depends on whether the right in question is fundamental to democracy—and if it is not, then sovereign democratic action is immune from suit.

Perhaps the best way to appreciate this reading of *Hans* is to re-examine its claim—a damages action for default on a government contract—in light of the Court’s post-*Lochner* jurisprudence. After *Hans*, few suits against states involving government contracts would reach the Court. But a noteworthy exception is *United States Trust Co. v. New Jersey*.¹⁶⁷ New Jersey and New York had previously passed laws preventing Port Authority toll revenue from funding passenger service, in order to reassure bondholders.¹⁶⁸ But in the wake of the energy crisis, in the 1970s, New Jersey repealed this law in order to keep its public transportation system functioning.¹⁶⁹ The bondholders sued under the Contracts Clause, and the Court found in their favor.¹⁷⁰ But Justice

era. He anchors this synthesis with an attractive account of the core constitutional value of democratic accountability. See *infra* notes 171–75 and accompanying text.

163. *Hans*, 134 U.S. at 20.

164. *Id.* at 20–21; see also *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 299–300 (1985) (Brennan, J., dissenting) (affirming this reading of *Hans*).

165. *Hans*, 134 U.S. at 21.

166. *Id.* at 9–11.

167. 431 U.S. 1 (1977).

168. *Id.* at 3.

169. *Id.* at 13–14.

170. *Id.* at 3, 32.

Brennan's dissent explains why the democratic sovereignty principle exempts government contracts from the protections of the Contracts Clause. This provision cannot "bind[] a State to contracts limiting the authority of successor legislatures to enact laws in furtherance of the health, safety, and similar collective interests of the polity."¹⁷¹ The "lawful exercises of a State's police powers stand paramount to private rights held under contract,"¹⁷² and to suggest otherwise raises the specter of *Lochner*. By turning government contracts into "a constitutional safe haven for property rights," the decision "substantially distorts modern constitutional jurisprudence governing regulation of private economic interests."¹⁷³ Brennan chides the majority for failing to appreciate the "serious and growing environmental, energy, and transportation problems" facing the state¹⁷⁴ or the democratic force of its efforts to solve these problems:

One of the fundamental premises of our popular democracy is that each generation of representatives can and will remain responsive to the needs and desires of those whom they represent. Crucial to this end is the assurance that new legislators will not automatically be bound by the policies and undertakings of earlier days.¹⁷⁵

Constitutionally entrenching previous policies through binding government contracts eviscerates democratic accountability by breaking this representative link. The democratic sovereign, when it acts as sovereign and respects its citizens' fundamental rights, cannot be sued for altering the arrangement of pure private market rights.

Although *United States Trust* focuses on the Contracts Clause, it also suggests a principled defense of our view of sovereign immunity. Brennan elaborates nicely why government contracts cannot bind future actions of the state lest they erode the state's basic sovereign functions. But more generally the case demonstrates why, absent a fundamental right, the state should be immune from lawsuits that eviscerate its core sovereign functions.

In sum, we have proposed a democratic way of understanding sovereign immunity within the general contours of democratic authority. In a democracy, citizens grant the state the power to act, even in ways that may at times be contrary to the common good. At the same time, citizens

171. *Id.* at 33 (Brennan, J., dissenting).

172. *Id.*

173. *Id.*

174. *Id.* at 38.

175. *Id.* at 45; *see also supra* note 162. For further discussion of the state's inalienable sovereign functions, see *Stone v. Mississippi*, 101 U.S. 814 (1879). The Court held that even though the state issued a charter for a corporation to conduct a lottery, and that corporation paid substantial consideration into the state treasury, the charter did not constitute a binding contract. *Id.* at 817, 821. Mississippi could not contract away its sovereign police powers, and its citizens retained the sovereign power to amend their constitution to ban lotteries. *Id.* at 820–21.

ensure that there are limits to this authority with respect to basic rights. Yet when the state acts within its power and does not violate basic rights, it retains the latitude to act wrongly and the right not to be sued for its mistaken actions. Prerogatives that would otherwise be retained by the people are, in such instances, transferred to the state.

We have so far provided broad contours for understanding sovereign immunity in a democratic regime. The challenge in discerning when the state should be immune from suit is to parse out the set of basic rights that when violated are state but not sovereign actions. A respect for rights is precisely what distinguishes a democratic account of authority from a monarchical account. A respect for sovereign actions of the state is what distinguishes a democratic from a populist account of sovereign immunity.

In the following Parts, we go on to examine these areas in greater depth. We argue that the structure of sovereign immunity means that the state can never be immune when rights are at stake. The state that violates rights does not act as a “sovereign,” although it can act as a non-sovereign state. This is essentially the theory behind the *ultra vires* doctrine announced in *Ex parte Young*. We argue that the logic of the state–sovereign distinction extends to allow abrogation of immunity in legislation passed with Congress’s enforcement powers under the Reconstruction Amendments, powers that should be read more expansively than they often are. We then argue in the subsequent Part that, in contrast to rights violations in which the state is not sovereign and thus cannot claim immunity, the government often acts in a sovereign way that is merely mistaken and does not violate constitutional rights. In such cases, the state has acted wrongly yet legitimately, and it is thus immune from suit.

III. Immunity for Democratic Self-Government: The Sovereign Spending Power

A. *The State–Sovereign Distinction*

In this subpart we develop the state–sovereign distinction and show its relevance for two crucial areas of law. First, we demonstrate how it explains the much-maligned fiction of *Ex parte Young*—that proper pleading requires that plaintiffs name state officials rather than the government. The structure of pleading has symbolic value. Citizens may seek to enjoin state officers from prospectively violating federal law. And when fundamental democratic rights are at stake, a citizen–plaintiff alleges that the agent of the state acts without its sovereign authority. In these cases, the government should be ultimately and substantively responsible for making the plaintiff whole, even when the state is not named as a party. The practice of indemnification fits this theory. But when state officials make a sovereign mistake—where there is no fundamental rights violation—this allegation fails, and the state treasury is immune from this

purely private claim. Second, we show that the deep logic of *Young* is present in two classic cases of federal sovereign immunity.

1. *Proper Pleading: Injunctions Under Ex parte Young and Damages Under § 1983.*—*Ex parte Young* carves out an exception to sovereign immunity that is often thought to be incoherent.¹⁷⁶ According to the doctrine announced there, state officials cannot claim immunity from an injunction that seeks to prevent ongoing rights violations.¹⁷⁷ The fiction of *Young* is that when state officials are sued, they are sued as individuals not officials.¹⁷⁸ This distinction is often criticized because it tries to avoid the issue of sovereign immunity with mere semantics about pleading.¹⁷⁹ The actions for which injunctions are sought under *Ex parte Young* are not about actions that officials pursue in their personal capacities but rather actions they pursue as state officials.¹⁸⁰ As critics point out, however, in reality it is the state that is sued no matter what is contended in the pleadings.¹⁸¹

On our view, however, the *Ex parte Young* doctrine gets at a crucial conceptual distinction in democratic theory. Namely, it rests on a premise that not all *state* acts are *sovereign* acts.¹⁸² The reason why plaintiffs must sue state officials rather than the government itself goes to the very essence of their claims. In other words, a complaint of this kind must necessarily allege that while the official has acted on behalf of the state, he or she acts without the authority of the sovereign. In instances where a suit is allowed to go through, and there is no sovereign immunity, it is the plaintiff that is the sovereign citizen and the state official that has acted without authority. But in instances of a sovereign mistake, the official has acted with the authority of the democratic sovereign. At this stage of pleading, there is merely an accusation that the state official has acted without sovereign authority.

176. See, e.g., Amar, *supra* note 13, at 1478–80 (describing the Court’s Eleventh Amendment case law as “incoherent” due to the “legal fiction” codified in *Young* and the case law that followed).

177. *Ex parte Young*, 209 U.S. 123, 159–60 (1908).

178. *Id.* at 155–56, 159–60.

179. *Id.* at 155–56, 159–60; FALLON, JR. ET AL., *supra* note 1, at 892 (stating that “the doctrine and rationale of *Ex Parte Young* require plaintiffs to sue state officials, not the state in its own name, in order to avoid the Eleventh Amendment’s prohibitions”). Akhil Amar characterizes *Ex parte Young* as a legal fiction that permits citizens to sue a state by “pretending to sue a state official” and engaging in legal gymnastics. Amar, *supra* note 13, at 1478–79.

180. *Young*, 209 U.S. at 157.

181. See, e.g., Amar, *supra* note 13, at 1479 (“The fiction that such suits are merely brought against individuals . . . is transparent. The ‘state’ itself, after all, is an artificial juridical person and can act only through state officials. If these women and men are enjoined in their official capacities then, as a practical matter, the state itself is enjoined.”).

182. See *Young*, 209 U.S. at 159–60 (distinguishing between acts by state officials and acts imbued with the power of the state’s sovereign governmental capacity).

Indeed, the distinction between the “government” and the “sovereign” is fundamental in the history of liberal democratic theory. Jean-Jacques Rousseau famously relied on the distinction as the basis for his theory of legitimacy. On Rousseau’s account, a state acting in accordance with a “general will” will always respect individual rights.¹⁸³ In contrast to this ideal, actual governments often stray from legitimate action. They violate rights in the pursuit of public policy goals they find laudable. They also violate rights in the pursuit of the self-interested officials that run the government. But it is crucial then to distinguish between government action done in the name of the state and government action that is legitimate.

Ex parte Young should be understood as making a similar distinction between state and sovereign. It recognizes that officials make all sorts of mistakes in the name of the state government, including violations of federal rights.¹⁸⁴ It recognizes, moreover, that there have to be mechanisms in place to stop these officials from straying from sovereign action.¹⁸⁵ The most direct and important way to avoid such state, non-sovereign action is to allow injunctions against state officials.¹⁸⁶ The fiction recognizes that the reason for not making states immune from injunctions is to avoid suggesting that these actions are rightful actions performed on behalf of the sovereign.¹⁸⁷

As a result, the state–sovereign distinction captures the key democratic insight of *Young*. When a state official violates the Constitution, he commits state action for the purposes of the Fourteenth Amendment.¹⁸⁸ But

183. JEAN-JACQUES ROUSSEAU, *THE SOCIAL CONTRACT* 74 (Betty Radice & Robert Baldick eds., Penguin Books 1968) (1762); see also JOSHUA COHEN, *ROUSSEAU: A FREE COMMUNITY OF EQUALS* 146 (2010) (“[T]he existence of a general will implies the existence of rights, for it implies a shared recognition of the requirement that those interests be protected. Fundamental rights are, so to speak, implicit in the ideal of a society of the general will . . .”). See generally Corey Brettschneider, *Rights Within the Social Contract: Rousseau on Punishment*, in *LAW AS PUNISHMENT/LAW AS REGULATION* 50 (Austin Sarat et al., eds. 2011) (analyzing Rousseau’s theory of punishment and the social contract, including the rights of criminals).

184. See *Young*, 209 U.S. at 159 (recognizing that a state official may “attempt[] . . . [to] use the name of the State to enforce a legislative enactment which is void because [it is] unconstitutional”).

185. See *id.* (explaining that an injunction prohibits an official from doing an act which he has no legal right to do).

186. On several occasions, the Court “has held that mandamus actions are not barred by sovereign immunity” at the federal level, perhaps for similar reasons. For further discussion, see FALLON, JR. ET AL., *supra* note 1, at 854–55.

187. See *Young*, 209 U.S. at 60 (explaining that an official acting in violation of the constitution is “stripped of his official or representative character” and “[t]he State has no power to impart to him any immunity from responsibility to the supreme authority of the United States”).

188. See *Home Tel. & Tel. Co. v. City of L.A.*, 227 U.S. 278, 286–87 (1913) (“[T]he . . . Amendment . . . [is] addressed . . . to the States, but also to every person whether natural or juridical who is the repository of state power. By this construction the reach of the Amendment is shown to be coextensive with any exercise by a State of power, in whatever form exerted.”).

he does *not* act as the democratic sovereign, and sovereign immunity will not shield his action. Rather, democratic sovereignty lies with the citizen–plaintiff vindicating her constitutional rights. This is no fiction—it goes to the very root of a democratic conception of sovereignty.

Citizens do not sue the state for these violations: as a matter of proper pleading, they must sue the officers themselves.¹⁸⁹ This is not so shocking, as in the end they are one and the same—a state can only act through its agents. Plaintiffs may sue officers in their personal capacity to seek damages, and they may sue officers in their official capacity to seek an injunction under *Young*. As the Court explains in *Kentucky v. Graham*:¹⁹⁰ “Personal-capacity suits seek to impose personal liability upon a government official for actions he takes under color of state law. Official-capacity suits, in contrast, ‘generally represent only another way of pleading an action against an entity of which an officer is an agent.’”¹⁹¹ Looking past the formalities of pleading, the state itself is the “real party in interest” in official-capacity suits.¹⁹² But the state does not enjoy immunity when it does not act, through its agents, as the sovereign.

As we will discuss in the next subpart, this insight helps explain why the *Hans* “exception” permits official-capacity suits for prospective injunctions but not retroactive relief—unless the federal right in question is a fundamental constitutional right. Additionally, officers sued in their personal capacity will, in almost all cases, be contractually indemnified by the state for any damages award. A recent study by Joanna Schwartz concludes that “[p]olice officers are virtually always indemnified,” with state governments paying approximately 99.98% of the dollars that plaintiffs recovered in lawsuits alleging civil rights violations by law enforcement.¹⁹³ As a result, the coupling of § 1983, *Ex parte Young*, and the practice of indemnification ensures that states do in fact pay damages when they commit constitutional torts—just as our theory suggests they should. When states commit constitutional wrongs, they do not act as democratic sovereigns, and sovereign immunity will not shield their

189. *Alabama v. Pugh*, 438 U.S. 781, 781–82 (1978) (per curiam).

190. 473 U.S. 159 (1985).

191. *Id.* at 165–66 (citation omitted) (quoting *Monell v. Dep’t of Soc. Servs.*, 436 U.S. 658, 690 n.55 (1978)); *accord Hafer v. Melo*, 502 U.S. 21, 27 (1991) (explaining the distinction between personal-capacity suits and official-capacity suits).

192. *Graham*, 473 U.S. at 166.

193. Joanna C. Schwartz, *Police Indemnification*, 89 N.Y.U. L. REV. 885, 890 (2014). Officers rarely and minimally contributed to judgments against them, even when they were sanctioned by the state and when government policy nominally precluded indemnification. *Id.* at 890. For a similar conclusion, see John C. Jeffries, Jr., *In Praise of the Eleventh Amendment and Section 1983*, 84 VA. L. REV. 47, 49–50 (1998). *But see* PETER H. SCHUCK, *SUING GOVERNMENT* 85 (1983) (concluding that indemnification of government agencies is “neither certain nor universal”).

treasuries from what justice requires.¹⁹⁴ Our account explains why these de facto money damages paid out of state coffers, which would otherwise violate the principle of democratic sovereignty, are instead required by it. Indeed, we can explain why *each* of those three elements—the *Ex parte Young* fiction, § 1983 liability, and widespread indemnification—is not merely coincidental. Rather, they flow from a unified account of democratic sovereignty. The fiction of *Ex parte Young* is necessary to recognize the conceptual gap between state action and sovereign action. Liability under § 1983, like congressional abrogation of state sovereign immunity, is an instance of Congress pursuing its duty to enforce the guarantees of the Fourteenth Amendment. And state indemnification for officer suits is required by a similar duty incumbent upon states—a backstop to ensure that the victims of fundamental rights violations receive compensation, even when the officers who commit those violations do not have deep pockets. This compensation is necessary in order to restore the conditions of states' democratic sovereignty.¹⁹⁵

2. *The Theory of Sovereign Mistake in Federal Sovereign Immunity.*—
To further understand the state–sovereign distinction and the idea of

194. One complication here is that § 1983 serves as a cause of action for statutory violations as well as constitutional torts. *Maine v. Thiboutot*, 448 U.S. 1, 4 (1980). But the subsequent doctrine has made it far more difficult to pursue these statutory claims than their constitutional cousins. See, e.g., *Blessing v. Freestone*, 520 U.S. 329, 333 (1997) (denying a § 1983 cause of action to enforce agency compliance with Title IV-D of the Social Security Act); *Middlesex Cnty. Sewerage Auth. v. Nat'l Sea Clammers Ass'n*, 453 U.S. 1, 20 (1981) (finding that the specific statutory remedies under the Federal Water Pollution Control Act and Marine Protection, Research, and Sanctuaries Act of 1972 displaced the cause of action under § 1983). Additionally, this doctrine has caused significant confusion. See, e.g., George D. Brown, *Whither Thiboutot? Section 1983, Private Enforcement, and the Damages Dilemma*, 33 DEPAUL L. REV. 31, 33 (1983) (indicating that the contradicting decisions in this area of jurisprudence have created inconsistent rulings in the lower courts). One possible compromise might mirror our interpretation of *Ex parte Young*—permitting prospective injunctions, but not money damages, for statutory suits. See *supra* notes 177, 185–87 and accompanying text.

195. A significant complication here is qualified immunity for officer suits under § 1983, a topic that exceeds the scope of this Article. But our argument here provides a strong case for limiting the scope of qualified immunity, which limits liability for violations of legal rules that were not “clearly established” at the time. *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). The traditional justifications for qualified immunity are to prevent unfairness to the officers and to avoid overdetering zealous law enforcement. *Scheuer v. Rhodes*, 416 U.S. 232, 239–40 (1974). But, as Schwartz notes, these justifications are much weaker against the background of near-universal indemnification. Schwartz, *supra* note 193, at 894–95. And, in any case, the doctrine of qualified immunity is a matter of statutory construction—and the democratic conception of sovereign immunity is a deeper constitutional principle that militates against it. One possibility to rescue the doctrine of qualified immunity is to pair it with a different mechanism to ensure mandatory compensation for fundamental rights violations: one based not on contractual indemnification for officers (the status quo) but rather on vicarious liability for the state on behalf of its agents. Under this scheme, qualified immunity might rightly determine whether it is fair for the officer or the state to pay, depending on whether the right was clearly established at the time. But either way, the innocent victim must be compensated for a fundamental rights violation in order to restore the conditions of democratic sovereignty.

immunity for sovereign mistakes, it is useful to compare sovereign immunity for the federal government. As the Court has long recognized, the same operative concept of sovereignty is at play at both the federal and state levels.¹⁹⁶ The analogy is complicated somewhat by the nested nature of sovereignty in a federal scheme—in the federal government’s powers stemming from various constitutional grants, states’ sovereign police powers, and in citizens’ fundamental constitutional rights. But part of the explanatory power of our account is to integrate these facets of complex sovereignty under a single, democratic account. An important aspect of that account is the notion of sovereign mistakes.

In *Larson v. Domestic & Foreign Commerce Corp.*,¹⁹⁷ a corporation sued the head of the War Assets Administration for breach of contract, claiming that the Administration refused to deliver and then resold the coal that the plaintiff had purchased.¹⁹⁸ The plaintiff sought specific performance against the agency head, enjoining him from selling or delivering the coal to any other party.¹⁹⁹ The Court held that sovereign immunity barred the suit, noting that “the sovereign can act only through agents and, when an agent’s actions are restrained, the sovereign itself may, through him, be restrained.”²⁰⁰

The corporation argued that the breach of contract was not sovereign action because it was tortious and therefore “illegal.”²⁰¹ Because illegal actions are never authorized, the agency head necessarily was acting ultra vires, and an injunction would therefore not offend the sovereign immunity principle.²⁰² The Court rejected this contention “that an officer given the power to make decisions is only given the power to make correct decisions” and that any mistake “is beyond his authority and not the action of the sovereign.”²⁰³

Instead, the Court held that a sovereign mistake, even one that violates pure private common law rights, is still sovereign action that is immune from suit.²⁰⁴ “[I]f the actions of an officer do not conflict with the terms of his valid statutory authority, then they are the actions of the sovereign, whether or not they are tortious under general law.”²⁰⁵ The only instances in which a citizen may seek an injunction against the agent of the sovereign is where the official exceeds her specific statutory authority or acts

196. *E.g.*, *United States v. Lee*, 106 U.S. 196, 204–07 (1882).

197. 337 U.S. 682 (1949).

198. *Id.* at 684.

199. *Id.*

200. *Id.* at 688–89.

201. *Id.* at 692.

202. *Id.* at 689.

203. *Id.* at 695.

204. *Id.*

205. *Id.*

unconstitutionally.²⁰⁶ In both of these types of cases, the democratic theory of sovereign immunity explains and justifies the result. When a government violates citizens' fundamental constitutional rights, it does not act as a democratic sovereign. Nor does the official act as sovereign when she violates a statutory command. In both of these cases, citizen suits reinforce democratic sovereignty rather than hinder it.

Chief Justice Vinson distinguished the result in *Larson* from *United States v. Lee*,²⁰⁷ where the heirs of Robert E. Lee's estate sued to eject federal agents from what had become Arlington National Cemetery.²⁰⁸ Although the United States intervened as the party in interest, the Court held that sovereign immunity did not bar the ejectment action because there was a colorable Takings Clause claim.²⁰⁹

On that assumption, and only on that assumption, the defendants' possession of the property was an unconstitutional use of their power and was, therefore, not validly authorized by the sovereign. For that reason, a suit for specific relief, to obtain the property, was not a suit against the sovereign and could be maintained against the defendants as individuals.²¹⁰

Indeed, in a later case, *Malone v. Bowdoin*,²¹¹ the Court found that sovereign immunity barred a virtually identical ejectment action against a federal forest service officer over land with a disputed title.²¹² What distinguishes the Court's treatment of these cases is the absence of a fundamental constitutional property right after the end of the *Lochner* era.²¹³

In sum, the much-maligned fiction whereby plaintiffs sue the officer of the state rather than the state can be explained by the state-sovereign distinction. This rule of pleading expresses the idea that the official, while still acting for the state, does not act for the sovereign. Thus, in such suits the sovereignty rests with the citizen that is suing not the state official. But in cases of sovereign mistake—such as in *Larson*, where the official violated a mere common law rule rather than a fundamental democratic right—this allegation fails. In these cases, the state acts as sovereign and it enjoys immunity from suit.

206. *Id.* at 701–02.

207. 106 U.S. 196 (1882).

208. *Id.* at 197.

209. *Id.* at 197, 218–19.

210. *Larson*, 337 U.S. at 697.

211. 369 U.S. 643 (1962).

212. *Id.* at 643–45.

213. *See infra* notes 226–47 and accompanying text.

B. Prospectivity Under Edelman and the Sovereign Spending Power

The state–sovereign distinction can also help illuminate why the *Ex parte Young* exception to sovereign immunity does not apply to retrospective suits for money damages in cases that do not involve violations of fundamental individual rights. *Edelman v. Jordan* distinguishes between prospective injunctive relief and retroactive awards equivalent to damages.²¹⁴ While a purely negative injunction requiring a state official to cease illegal conduct is clearly allowable under *Young* and does not trigger sovereign immunity, relief that requires expenditures is barred. In *Edelman*, the plaintiffs sought an injunction requiring the state to provide a retroactive award for previous underpayment under the disability provisions of the Social Security Act.²¹⁵ Although *Ex parte Young* permits prospective injunctions against ongoing violations of federal law, the Court held that this requirement to dip into the state treasury to compensate for past harms exceeded the *Young* exception in violation of sovereign immunity.²¹⁶

States commit a variety of harms that can give rise to lawsuits looking not for injunctions to prevent ongoing harms but rather recovery from past injuries. Such retrospective harms are not covered by the *Ex parte Young* exception. The distinction between no immunity for prospective injunctions and retrospective immunity for money damages might be thought part of the Court’s incoherence on the sovereign immunity question. Indeed, we do not believe any of the other theories advanced on behalf of sovereign immunity can account for it. But the democratic theory of sovereign immunity can explain this essential part of the doctrine.

According to the state–sovereign distinction, there is an important difference between prospective injunctions and backward-looking compensation—the equivalent of money damages. The risk that the state will continue the ongoing violation of a federal right is significant enough that, in the name of sovereignty and federal supremacy, state officials can be enjoined. But in retrospect the lack of time pressure allows us to make a more fine-grained distinction between different types of state action. Namely, not all state action that is mistaken violates sovereignty. Recall our earlier point about tax squandering. Imagine that the state uses its resources to build a bridge to nowhere that serves no one’s interest. The decision to build the bridge was a mistake and is recognized as such by the polity and the legislature that funded it. But is it a violation of sovereignty? We think it is not. The state ceases to be a sovereign when it fails to abide by a set of democratic procedures or when it violates fundamental rights.

214. 415 U.S. 651, 666–69 (1974).

215. *Id.* at 653–56.

216. *Id.* at 664–68.

The example in consideration involves neither such failure. Accordingly, we would label it a “sovereign mistake.”

In suits for retroactive relief, the state might be at fault, but when the state acts as sovereign it should retain its immunity for the same reasons it does in the budget case. The state is not any kind of actor, and its mistakes are not any kind of mistake. When it acts in a way that is indeed sovereign, it is authorized by the people to do so and thus should be protected in its basic capacities to spend and serve the public good. Retroactive relief—a court order to spend monies from the public treasury as compensation, such as the back pay sought in *Edelman*—threatens those basic sovereign capacities.

Still, this explanation of the distinction is incomplete. And, indeed, the Court’s treatment of what remedies count as prospective has generated considerable confusion.²¹⁷ In *Milliken II*,²¹⁸ the Court approved of a desegregation decree requiring Detroit to implement remedial education programs to compensate for years of racially segregated schools.²¹⁹ And in *Hutto v. Finney*,²²⁰ the Court permitted a substantial award of attorneys’ fees along with a series of injunctions to restructure Arkansas’s prison system according to the Eighth Amendment.²²¹ Don’t these remedies raid the treasury in exactly the same way as *Edelman*?²²² But our democratic account of sovereign immunity can explain this feature of the doctrine as well.

Our view reconciles and synthesizes three insights, which together explain the results in this messy area of doctrine. First, begin with the idea that federal rights—whether statutory or constitutional—are the supreme law of the land, and federal courts must vindicate them. This is the central premise of *Young*.²²³ But second, as we have shown, the sovereign function of a state includes its integrity in its ability to spend money on public goods. And just as retrospective damages can imperil that sovereign function, so too can prospective requirements to spend money. In short, the power of the purse is a sovereign function that must be preserved, regardless of whatever the court chooses to call it. Third and finally, as in the case of money damages, sovereignty does not include immunity for cases that

217. See, e.g., FALLON, JR. ET AL., *supra* note 1, at 895–96 (discussing the distinction’s “elusiveness”).

218. 433 U.S. 267 (1977).

219. *Id.* at 269, 286–88.

220. 437 U.S. 678 (1978).

221. *Id.* at 680–81, 685.

222. For discussion of this issue, see *Papasan v. Allain*, 478 U.S. 265, 278–81 (1986) and *infra* notes 240–47 and accompanying text.

223. See, e.g., *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 105 (1984) (“[T]he *Young* doctrine has been accepted as necessary to permit the federal courts to vindicate federal rights and hold state officials responsible to ‘the supreme authority of the United States.’” (quoting *Ex Parte Young*, 209 U.S. 123, 160 (1908))).

involve payments for constitutional injuries in matters of basic democratic rights (as distinct from ordinary statutory rights).²²⁴ Taking these insights together, we can distinguish four kinds of cases broken down by two cross-cutting distinctions. In some cases, fundamental constitutional rights—necessary requirements for legitimate democratic sovereignty—are at stake, while other federal statutory rights are not so fundamental. The other distinction occurs at the level of remedy. Some relief requires spending monies from the public coffers, including both damages and retroactive orders for expenditures. By contrast, other forms of relief are only prospective and require no expenditures, such as a purely negative injunction.

In short, our theory of democratic sovereignty explains what many believe unexplainable. Our account offers a way to see why there is never state sovereign immunity in cases involving injunctions where no money is at stake. Simply put, in these cases there is no sovereign function threatened by these suits. They merely involve compliance with federal law with no loss to a state's ability to act in the future according to how its people decide together. In our terms these are not instances of sovereign mistakes because no sovereign function is imperiled. The state is straying from acting as it is obligated to act as a matter of sovereign law either because it is violating a fundamental right or flouting federal law.

By contrast, in cases that involve either money damages or injunctions that cost the state money, there is a sovereign function that is threatened—the sovereign power of the purse. As Justice Brennan argued in *United States Trust*, these cases endanger states' future ability to pursue basic policy goals requiring revenue.²²⁵ In order to preserve these functions, we should therefore recognize in these cases that although the state has acted wrongly, it has still acted as sovereign. It has made a sovereign mistake.

But cases involving fundamental right violations are different. There is never an entitlement of a sovereign state to violate fundamental rights. Such cases involve the state straying from its sovereign power. They are not instances of sovereign mistake. Indeed, in such cases the state loses its sovereignty, and democratic sovereignty is best understood as lying instead with the citizen bringing the suit. This is why it is essential that there not be sovereign immunity in the face of suits involving basic rights, whether the issue is a supposed prospective injunction or claim for retrospective relief.

A democratic theory of sovereign immunity explains the Court's results in decisions across all of these categories, as shown in the table below. *Young* permits all forms of negative prospective injunctions against

224. We leave open the conceptual possibility that a statutory right could reflect a fundamental necessary requirement for democratic legitimacy or that it could reflect Congress's interpretation and enforcement of a constitutional guarantee. *See infra* note 298.

225. *See supra* notes 174–78 and accompanying text.

ongoing violations of federal rights, whether they are fundamental or ordinary statutory rights. These measures ensure federal supremacy and do not implicate states' sovereign spending power. And the *Young-Edelman* doctrine also permits relief requiring expenditures (such as through indemnification and § 1983 suits) in cases where the state has violated fundamental constitutional rights. In other words, *Milliken* and *Hutto* are unlike *Edelman*, a mere statutory case, because fundamental constitutional rights against racial discrimination and cruel and unusual punishment are at stake.²²⁶ When states violate constitutional rights, they do not act as democratic sovereigns, and they do not enjoy the budgetary protection that sovereign immunity affords. It is only in the final of the four categories—relief for ordinary federal rights that requires expenditures—that *Edelman* bars the remedy because it implicates democratic sovereignty.

226. Compare *Milliken v. Bradley* (*Milliken II*), 433 U.S. 267, 289–90 & n.22 (1977) (holding that a decree requiring state officials to eliminate a de jure segregated school system fit squarely in the prospective-compliance exception to *Edelman* due to the continuing effects of the district's unconstitutional conduct), and *Hutto*, 437 U.S. at 680, 690–92 (determining that imposing a fine was appropriate and ancillary to the Court's power to impose injunctive relief in spite of the state's Eleventh Amendment protection in a suit alleging cruel and unusual punishment), with *Edelman v. Jordan*, 415 U.S. 651, 675–78 (1974) (recognizing that the Eleventh Amendment granted the State immunity from retroactive monetary relief where the underlying suit was based on a violation of the Social Security Act).

Immunity for Rights and Remedies under *Young–Edelman*

	Fundamental Right	No Fundamental Right
Remedy Requires Spending	<p><i>No Immunity:</i></p> <ul style="list-style-type: none"> ▪ § 1983 damages plus indemnification²²⁷ ▪ Retroactive relief for past segregation²²⁸ ▪ Attorneys’ fees for Eighth Amendment violation²²⁹ 	<p><i>Immunity:</i></p> <ul style="list-style-type: none"> ▪ Retroactive relief under statutory entitlement²³⁰ ▪ Damages for common law claim²³¹ ▪ “Backdoor” injunction requiring spending²³²
Injunction with No Spending Required	<p><i>No Immunity:</i></p> <ul style="list-style-type: none"> ▪ Officer suit enjoining enforcement of unconstitutional law²³³ 	<p><i>No Immunity:</i></p> <ul style="list-style-type: none"> ▪ Injunction against imminent enforcement violating federal statutory right²³⁴

We can see these distinctions at work in the table above. When a fundamental constitutional right such as equal protection is at stake, a citizen–plaintiff can obtain a prospective injunction against the ongoing violation, as in *Young*. But, because the state action in this case is not sovereign, the state cannot invoke its sovereign responsibility to protect the treasury. Therefore, a citizen–plaintiff in a constitutional rights case can also obtain relief that requires the state to spend money. This can take the form of a structural injunction²³⁵ in the form of a desegregation decree, or indemnification in a § 1983 suit.²³⁶ But when other federal statutory rights that are not fundamental to democracy are at stake, the state does still have a legitimate claim to manage the public purse and shield it from private litigation. Of course, the state must not violate the supreme federal law, but

227. See *supra* section III(A)(1).

228. See *supra* notes 218–19 and accompanying text.

229. See *supra* notes 220–21 and accompanying text.

230. See *supra* subpart III(B).

231. See *infra* notes 240–47 and accompanying text.

232. See *infra* note 239 and accompanying text.

233. *Roe v. Wade*, 410 U.S. 113, 120 (1973).

234. See *infra* notes 237–38 and accompanying text.

235. See generally OWEN M. FISS, *THE CIVIL RIGHTS INJUNCTION* 7 (1978) (defining “structural injunction” as one “seek[ing] to effectuate the reorganization of an ongoing social institution”).

236. See *supra* notes 193–94 and accompanying text.

prospective injunctions are sufficient to end these violations and secure federal supremacy. This was the case in *Verizon v. Public Services Commission of Maryland*,²³⁷ when the Court upheld a request for an injunction preventing a state agency from issuing an order contrary to the federal Telecommunications Act.²³⁸ This distinction between prospective injunctions and retroactive relief is not arbitrary or formalistic—an injunction cannot go so far as to reach the state treasury through the back door.²³⁹

The democratic theory of sovereign immunity offers a sophisticated conception of democratic sovereignty, one that explains these cases that are difficult to reconcile under a more formalistic approach. The best illustration can be found in *Papasan v. Allain*.²⁴⁰ A class of schoolchildren and school officials challenged Mississippi's distribution of education funding on two different theories.²⁴¹ First, they argued that the maldistribution of funds violated the Equal Protection Clause.²⁴² Second, they claimed that the state had violated its fiduciary duties stemming from a perpetual trust created by federal land grants for the benefit of public schools.²⁴³ The Court held that the sovereign immunity doctrine barred this second, federal common law claim because relief would necessarily require expenditures from the state treasury.²⁴⁴ But it did not bar the constitutional claim under the Equal Protection Clause.²⁴⁵ The Court's explicit reasoning turned solely on the distinction between prospectivity and retroactivity: "[T]he essence of the equal protection allegation is the present disparity in the distribution of the benefits of state-held assets and not the past actions of the State."²⁴⁶ But an important consideration that better explains the result, we believe, is that only the constitutional claim invoked a fundamental right—just as was the case in *Milliken*.²⁴⁷

Our theory captures these distinctions in ways that other views fail to grasp. Textualist skeptics cannot distinguish constitutional from statutory

237. 535 U.S. 635 (2002).

238. *Id.* at 648.

239. *See Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261, 287–88 (1997) (finding that, should the Court decide against state sovereignty, the effect on the state's sovereign interest in the disputed lands would be as intrusive as a retroactive levy on state funds, and therefore the exception to *Young* did not apply); *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 58 (1996) (recognizing that the Eleventh Amendment has the effect of, in part, preventing state treasuries from being used to pay federal court judgments).

240. 478 U.S. 265 (1986).

241. *Id.* at 274.

242. *Id.* at 282–83.

243. *Id.* at 279.

244. *Id.* at 281.

245. *Id.* at 282.

246. *Id.*

247. *See supra* note 226 and accompanying text.

cases, preferring to jettison sovereign immunity as a constitutional principle altogether. And proponents of federalism fail to see that the core property of democratic sovereignty is the power to spend and set the contours of private law. As a result, injunctions forcing compliance with federal law do not offend democratic sovereignty.

C. *Abrogation Violating Democratic Sovereignty*

The democratic theory of sovereignty has both normative and explanatory power, especially in the area of Congress's power to abrogate sovereign immunity. Under the doctrine of abrogation, Congress may, by statute, forcibly subject states to suit in federal court even without their waiver or consent.²⁴⁸ This statutory end run around the general principle of sovereign immunity has puzzled some critics: if immunity really is a constitutional requirement, then how can Congress override this guarantee by mere legislation?²⁴⁹ But a democratic account of sovereign immunity makes the extent of the abrogation power perfectly clear. Congress has the power to abrogate a state's claimed immunity if and only if the state is not acting as sovereign—if it violates the necessary requirements for democratic legitimacy.

This account explains the logic of the Court's jurisprudence, which distinguishes between constitutional abrogation when Congress invokes its enforcement powers under the Reconstruction Amendments²⁵⁰ and unconstitutional abrogation when Congress acts under Article I provisions, such as the Commerce Clause.²⁵¹ As we understand this distinction, the jurisprudence dictates that when fundamental rights are at stake, the Court does not recognize state sovereign immunity. We will argue in the next Part that this is consistent with the state-sovereign distinction because a state that violates fundamental rights is not a democratic sovereign. But when the state merely makes a mistake it retains both its sovereignty and its immunity.

Consider, for instance, the core precedent of *Seminole Tribe of Florida v. Florida*.²⁵² The Seminole Tribe sued Florida under a federal statute requiring states to negotiate in good faith with tribes over the operation of gaming facilities.²⁵³ Let us stipulate for the purpose of argument that the state did breach its statutory duties. The question, however, is what kind of a wrong the state committed. In particular, was it the kind of wrong that

248. *Fitzpatrick v. Bitzer*, 427 U.S. 445, 456 (1976). But this waiver must be in express terms. *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 241 (1985).

249. *E.g.*, Jeffries, *supra* note 193, at 48.

250. *Fitzpatrick*, 427 U.S. at 455–56.

251. *Seminole Tribe of Fla. V. Florida*, 517 U.S. 44, 72–73 (1996).

252. 517 U.S. 44 (1996).

253. *Id.* at 47.

implicates fundamental rights or the necessary requirements for democratic legitimacy? We think that although there was a wrong in this case, it was not of the kind of fundamental right protected by the Constitution. Indeed, the right in question is not one of individual citizenship but rather is economic in nature, an instrument of Congress's regulatory ambitions. Using the abrogation power to enforce this right merely allows private litigants to raid state treasuries and alter state policy through the federal courts.²⁵⁴ Of course, states may not ignore federal law with impunity, as it is supreme under the Constitution. But in our federal system, the states may also exercise democratic sovereignty. And when they do so—when their actions are both *by* and *for* the people—sovereign states must enjoy some zone of discretion immune from private suits.²⁵⁵ Otherwise, states could never escape the shadow of liability, paralyzed in their sovereign responsibility to pursue the public welfare. The claim in *Seminole Tribe* does not implicate the kind of wrong that strips a state of its democratic sovereignty, such that it should be subject to money damages. Failing to negotiate with the Seminole Tribe only caused economic injury. This kind of mistake is a mistake of a democratic sovereign.²⁵⁶

In *College Savings Bank v. Florida Prepaid Postsecondary Education Expense Board*,²⁵⁷ a private bank in Princeton, New Jersey, sued an entity of the Florida government for patent infringement.²⁵⁸ Congress had expressly abrogated sovereign immunity from patent infringement claims as an instrument in enforcing its regulatory scheme.²⁵⁹ Again, even if we stipulate a legal wrong, there is no right violation here other than pure economic harm. No fundamental right of democratic citizenship is at stake.

254. Using similar reasoning, the Court also held that the litigants could not pursue a prospective injunction under *Ex parte Young* because an order to negotiate was equally violative of state sovereignty. *Id.* at 74–76; *cf.* *Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261, 281–82 (1997) (holding a tribe's request for jurisdiction over territory in dispute with the State of Idaho was barred by the Eleventh Amendment because of the "special sovereignty interests" involved in the control of land).

255. Note that the result would be different if the United States had intervened. *Compare Coeur d'Alene*, 521 U.S. at 281, 287–88 (holding the *Ex Parte Young* exception to sovereign immunity inapplicable to the Coeur d'Alene Tribe's quiet title action against the State of Idaho), *with Idaho v. United States*, 533 U.S. 262, 265 (2001) (holding that the United States, in its own quiet title action for the disputed land, held title to land in trust for the Coeur d'Alene Tribe). *See* FED. R. CIV. P. 24(b)(2) (permitting a federal governmental agency to intervene in a party's claim based on a statute or executive order). We can easily explain this facet of the doctrine: as a national institution, the Justice Department's representative claim to democratic sovereignty is superior to that of a single state.

256. In holding that sovereign immunity cannot be abrogated under Article 1, *Seminole Tribe*, 517 U.S. at 72–73, on our view, the *Seminole* Court correctly overturned *Pennsylvania v. Union Gas Co.*, in which a plurality of the court held that Congress could abrogate state sovereign immunity under Article 1, 491 U.S. 1, 5 (1989) (plurality opinion).

257. 527 U.S. 666 (1999).

258. *Id.* at 670–71.

259. *Id.* at 670.

Indeed, the argument that Congress abrogated immunity under its Fourteenth Amendment enforcement powers, preventing states from depriving the bank's property without due process, smacks of *Lochnerism*.²⁶⁰ Thus, although the state has perpetrated a kind of harm, it is not of the variety that undercuts its sovereign status. We thus think the Supreme Court was right in this case to have ruled that the patent clause does not permit the federal government to abrogate state sovereign immunity.²⁶¹

In *Central Virginia Community College v. Katz*,²⁶² the Court considered whether Congress could abrogate sovereign immunity under the bankruptcy power.²⁶³ A state bookstore had received a preferential transfer from an insolvent creditor, and the court-appointed trustee sued to recover the assets.²⁶⁴ In his opinion affirming Congress's power to abrogate, Justice Stevens attempted to distinguish *Seminole Tribe* by noting that bankruptcy actions are in rem rather than in personam.²⁶⁵ He also emphasized the particular need for a uniform and comprehensive federal bankruptcy policy, arguing that state immunity would undercut such a policy.²⁶⁶ But these distinctions are ultimately spurious. The fact that the subject of the suit is the state's property as a mere matter of pleading does not mitigate any effect on the treasury. And the need for comprehensive federal regulation underwrites virtually all of Congress's powers under Article I, Section Eight—especially the commerce power.²⁶⁷

In our view, *Katz* is wrongly decided because the rights at stake are, as in the other cases, purely private. This is a case of economic harm, not fundamental constitutional rights, and the Court could not find to the contrary without *Lochnerizing*. Sovereign states are simply not like other private creditors, and even if state immunity interferes with the efficient administration of federal policy, this is yet another instance of a sovereign mistake. Federalism, including sovereign immunity, might often result in

260. Plaintiff's parallel procedural due process claim suffered from problems similar to those noted *supra* earlier. See *supra* note 124.

261. *College Savings Bank*, 527 U.S. at 691.

262. 546 U.S. 356 (2006).

263. *Id.* at 359.

264. *Id.* at 360.

265. *Id.* at 359, 369.

266. *Id.* at 262, 375–78.

267. See Jack M. Balkin, *Commerce*, 109 MICH. L. REV. 1, 5–6 (2010) (advocating a broad conception of Congress's Commerce Clause power as it would have been understood in the eighteenth century, which incorporated a strong social construct to economic interchange and authorized Congress to regulate problems or activities that concern more than one state); Robert D. Cooter & Neil S. Siegel, *Collective Action Federalism: A General Theory of Article I, Section 8*, 63 STAN. L. REV. 115, 117–19 (2010) (arguing that Article I, Section Eight powers were written in response to the states' collective-action problem under the Articles of Confederation and therefore were intended to give Congress comprehensive federal regulatory power).

inefficiencies, but that is the cost of a system in which we have multiple levels of government. Sovereign functions will often pose constraints on efficiency, but that is the price we pay for the democratic value of federalism.

The private rights at issue in *Seminole Tribe* and *Katz* do not rise to the level of a democratic right and thus are not enough to authorize abrogating sovereign immunity. One might feel sympathy for these private actors, viewing the state as an outsized market participant that should not receive the additional protections of immunity as it engages in granting loans and deal making. But this picture is flawed for two reasons. First, inexperienced state officials might mistakenly trade away a state's future financial operating ability in negotiating with more savvy financial actors.²⁶⁸ But such mistakes could have grave consequences for the entire population of the state moving forward, and immunity helps to protect what needs to be an ongoing sovereign capacity to operate a state budget and to ensure adequate revenue flows. Second, and relatedly, what is at issue in these cases is a default rule.²⁶⁹ States have the capacity to waive their own immunity in such negotiations. Our point is rather that they should not be required to do so as a matter of federal law, as this would impede a sovereign democratic function.

These accounts of *Seminole Tribe*, *Florida Prepaid*, and *Katz* constitute the basis of the right kind of sovereign immunity, as they preserve the entitlement of the democratic polity to make certain kinds of mistakes. Not all mistakes are of a kind that should not be subject to suit, however, and thus we turn in the next subpart to instances where the harm perpetrated by the state undermines the state's status as sovereign.

D. Waiver as a Sovereign Function

When a state acts as a democratic sovereign—when it fulfills the substantive and procedural requirements of democratic legitimacy—it enjoys immunity from suit. This constitutional principle applies to federal and state governments alike, and it cannot be abrogated by a mere act of Congress. But, of course, the mere fact that a state is immune from liability for its sovereign mistakes does not mean that the state should assert that immunity in every case. Indeed, states often should and often do assume

268. For a remarkable example of one state being taken for a ride—or, at the very least, exhibiting poor judgment in a significant financial transaction—see Matt Bai, *Thrown for a Curve in Rhode Island*, N.Y. TIMES, Apr. 20, 2013, <http://www.nytimes.com/2013/04/21/business/curt-schilling-rhode-island-and-the-fall-of-38-studios.html?pagewanted=all>, archived at <http://perma.cc/T4N5-KWVE>.

269. See generally Ian Ayres & Robert Gertner, *Filling Gaps in Incomplete Contracts: An Economic Theory of Default Rules*, 99 YALE L.J. 87 (1989) (discussing various ways in which courts and legislatures should adopt default rules to apply when parties to a contract have failed to address certain issues).

responsibility for their mistakes, waiving sovereign immunity under certain defined circumstances. The key point here is that, insofar as the state acts as a democratic sovereign, the decision of whether and how to consent to private suit remains a democratic one. So long as fundamental constitutional rights are not at stake, that policy question is one for legislatures to determine.²⁷⁰

For example, the federal government has constructed a latticework of statutes that provide for liability in certain private suits under certain conditions. In 1855, Congress created the Court of Claims, replacing the cumbersome process of petitions for private bills.²⁷¹ The Tucker Act of 1887 then expanded the Court's jurisdiction to include all cases involving government contracts or for damages "not sounding in tort."²⁷² Notably, while the statute also extended jurisdiction to cover claims arising out of federal law, it expressly excluded pension cases.²⁷³ Subsequent statutes would then later fill other significant gaps. The Federal Tort Claims Act of 1946 (FTCA) waived immunity for private torts committed by the agents of the federal government.²⁷⁴ Federal district courts possessed exclusive jurisdiction, and the United States would substitute in for the defendant.²⁷⁵ Importantly, however, the FTCA created a number of significant procedures and exceptions. For a plaintiff to file suit, she must first exhaust all opportunities for administrative settlement.²⁷⁶ The statute also expressly retains immunity under a number of exceptions, including liability for official activity pursuant to some "discretionary function."²⁷⁷ It also denies plaintiffs any opportunity for punitive damages.²⁷⁸ Finally, in 1976, Congress amended the Administrative Procedure Act to permit suits against agencies or officials for relief other than money damages.²⁷⁹

270. Of course, states can also waive immunity through other mechanisms, such as through express contract or through its conduct during litigation. For further discussion, see generally Christina Bohannon, *Beyond Abrogation of Sovereign Immunity: State Waivers, Private Contracts, and Federal Incentives*, 77 N.Y.U. L. REV. 273 (2002). Note that the legislative or executive decision to waive immunity enjoys some democratic pedigree and, in our view, reflects democratic sovereignty.

271. Act of Feb. 24, 1855, ch. 122, 10 Stat. 612 (codified as amended in scattered sections of 28 U.S.C.).

272. Act of Mar. 3, 1887, ch. 359, 24 Stat. 505 (codified as amended at 28 U.S.C. §§ 1346, 1491 (2012)).

273. *Id.*

274. Federal Tort Claims Act (FTCA), Pub. L. No. 79-601, § 410, 60 Stat. 842, 843-44 (1946) (codified as amended at 28 U.S.C. §§ 1346(b)(1), 2674-2676 (2012)).

275. *Id.* § 410(a) (codified as amended at 28 U.S.C. §§ 1346(b)(1), 2674 (2012)).

276. *Id.* § 410(b), 60 Stat. at 844 (codified as amended at 28 U.S.C. §§ 2575, 2676 (2012)).

277. *Id.* § 421(a), 60 Stat. at 845 (codified as amended at 28 U.S.C. § 2680(a) (2012)).

278. *Id.* § 410(a), 60 Stat. at 843-44 (codified as amended at 28 U.S.C. §§ 1346(b)(1), 2674 (2012)).

279. Act of Oct. 21, 1976, Pub. L. No. 94-574, § 702, 90 Stat. 2721, 2721 (codified as amended at 5 U.S.C. § 702 (2012)).

Although this patchwork of statutes permits a broad range of suits against the sovereign, it also channels and constrains this liability in significant ways that depart from ordinary suits against private parties. Our account of democratic sovereignty can explain and justify these constraints in a way that sweeping critics of sovereign immunity cannot. We distinguish between sovereign mistakes, where the federal government retains its immunity, from fundamental rights violations, where it does not.

States have emulated this federal structure to a significant extent, relinquishing immunity from a wide range of private suits while carving out special constraints. Like the federal government, many states retain immunity under broad categorical exceptions, such as the discretionary function exception.²⁸⁰ Many states also preserve immunity against suits claiming punitive damages or damage totals exceeding a certain cap.²⁸¹ Plaintiffs may also often seek administrative review of official action, but these actions may face special procedural hurdles, such as shortened statutes of limitations.²⁸² Our theory can account for this system of partial waiver. Where purely private rights are at stake and a state meets the conditions of democratic legitimacy, that state enjoys immunity from suit. In the interest of fairness, the state may waive this immunity, subject to the various policy considerations that best preserve its other collective decisions. As we will see in the next Part, this is different in kind from cases where fundamental constitutional rights are on the line.

It would be therefore wrong to characterize the issue of immunity just in terms of the individual's right to sue or not. The issue is control by the state over its own budget and in its decision of how much of the public fisc to spend on these individual claims. No state chooses to never pay for any tortious action. The question is instead whether to allow states to control how much they pay. We have argued that this is a primary sovereign function of the states, essential for them to preserve their ongoing sovereignty. In the next Part, we will discuss why this same concern does not apply when the government has strayed from its sovereign function—going beyond a sovereign mistake to commit a fundamental constitutional rights violation.

280. JAIME RALL, NAT'L CONFERENCE OF STATE LEGISLATURES, WEATHER OR NOT? STATE LIABILITY AND ROAD WEATHER INFORMATION SYSTEMS 56–63 app. B (2010), available at http://www.ncsl.org/documents/transportation/Weather_or_Not_App_B_Rall_04.30.10.pdf, archived at <https://perma.cc/YQ68-KYHA?type=pdf>.

281. *Id.*

282. *E.g.*, 735 ILL. COMP. STAT. ANN. 10/8-101 (West 2010). For a more detailed discussion of the procedural hurdles to administrative review, see Daniel C. Theveny, Sr., *Sovereign Immunity in the Midwest*, COZEN O'CONNOR 2 (Jan. 13, 2006), available at <http://www.cozen.com/admin/files/publications/Sovereign%20Immunity%20in%20the%20Midwest.PDF>, archived at <http://perma.cc/FWH5-NJ8S>.

IV. Democratic Rights and the Limits of Sovereign Immunity

In the previous Part we argued that the sovereign should not be subject to suit when it violates some private rights or causes mere economic injury. In contrast, in this Part we argue that when the state violates fundamental rights, it does not act as sovereign. On our view, while the sovereign can err in some ways in the American constitutional regime, errors that violate fundamental constitutional rights are never sovereign decisions. This distinction between the sovereign and the state, we will argue, helps elucidate a defensible logic of the Court's willingness to allow abrogation of sovereign immunity in matters arising under Congress's power to enforce the Reconstruction Amendments but not in other matters.

A. *Abrogation to Preserve Democratic Sovereignty*

As currently construed, the Court's doctrine allows for abrogation of sovereign immunity by the federal government when Congress acts under its Section Five powers, a doctrine sometimes regarded as "well-recognized irony."²⁸³ On the one hand, state action is required to trigger the federal government's power to enforce the Fourteenth Amendment. But the very fact that the state has acted suggests a state interest in sovereignty. We want to contend, however, that this apparent paradox can be resolved by distinguishing between two types of state action. At times, the state acts within its sovereign powers to pursue policy goals, but at others, it acts in ways that violate fundamental rights. While the former type of state action is consistent with its legitimate authority and thus deserves immunity, the latter is incompatible with democratic sovereignty, and in these cases there should be no constitutional guarantee of immunity.

We begin with a defense of the idea that Section Five legislation should be viewed as an abrogation of state sovereign immunity. Legitimate state action, we have argued, should be authorized by the people consistent with enumerated state powers. But state power is rightly limited, not only to enumerated powers, but also by the individual rights protected under the Fifth and Fourteenth Amendments. These rights cut through the sovereign power of both the federal government and states to act.²⁸⁴ In short, there can be no legitimate authority for any government actor to violate these fundamental democratic rights. Thus, in instances in which a state actor commits such a violation, it does so not under the guise of sovereignty but with the mere power of the state apparatus. Because the action violates the

283. *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 105 (1984) (quoting *Fla. Dep't of State v. Treasure Salvors, Inc.*, 458 U.S. 670, 685 (1982) (plurality opinion)) (internal quotation marks omitted).

284. *See Bolling v. Sharpe*, 347 U.S. 497, 500 (1954) ("[I]t would be unthinkable that the same Constitution [that prohibits the states from maintaining racially segregated public schools] would impose a lesser duty on the Federal Government.").

necessary requirements for democratic legitimacy, it cannot be the act of the democratic sovereign, and it should not be protected by sovereign immunity.

A major question remains, of course, as to how these rights should be delineated. We can identify fundamental rights, in part, by looking to the Court's Fourteenth Amendment jurisprudence and its doctrines of substantive rights and individual protection. However, the legislature also plays a role through its enforcement powers in protecting individual rights. This provision of the Fourteenth Amendment gives Congress broad power to secure citizens' freedom and equality. One essential way of protecting these rights has been under § 1983, which provides citizens a cause of action against state officials when their rights have been violated.²⁸⁵ Suits of this type, for instance, might involve the alleged violations of basic rights, such as equal protection or due process. Suits under Section Five legislation have a particular kind of character. They are not challenges to the state's sovereign power but rather contentions that a particular state action lacks sovereign authority because it violates a fundamental right. Thus, such cases should not be defended against on the grounds of sovereign immunity. The supposed irony that the Court sees in such suits, namely that there is clearly state action which might be thought at the same time to trigger sovereign immunity, is in reality not an irony at all. Such action is, indeed, state action, but it is not sovereign action.

In *Fitzpatrick v. Bitzer*,²⁸⁶ the Court implicitly relied on the state-sovereign distinction in holding that Congress had the power to abrogate state sovereign immunity under Section Five. In 1972, Congress amended Title VII of the Civil Rights Act to prohibit employment discrimination by state governments.²⁸⁷ Just as the earlier provision created a cause of action against race- or sex-based discrimination in private workplaces, victims could now demand compensation from state employers as well.²⁸⁸ A class of male employees sued the State of Connecticut, claiming that its pension system discriminated against them on the basis of sex.²⁸⁹ The state invoked

285. 42 U.S.C. § 1983 (2012). Additionally, *Ex parte Young* suggests that the Constitution gives rise to a cause of action for ongoing violations of fundamental rights. For discussion, see FALLON, JR. ET AL., *supra* note 1, at 891. *But see* John Harrison, *Ex Parte Young*, 60 STAN. L. REV. 989, 990–91 (2008) (offering a dissenting view on the issue). The Court has also found implied causes of action directly under the Constitution against federal agents in a number of cases. *See* *Carlson v. Green*, 446 U.S. 14, 16, 19–20 (1980) (Eighth Amendment); *Davis v. Passman*, 442 U.S. 228, 242 (1979) (Fifth Amendment); *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 397 (1971) (Fourth Amendment). But § 1983 actions are limited: states, for example, are not “persons” for the purposes of the statute. *Will v. Mich. Dep’t of State Police*, 491 U.S. 58, 71 (1989).

286. 427 U.S. 445 (1976).

287. *Id.* at 447–49.

288. *Id.*

289. *Id.* at 448.

sovereign immunity, arguing that Congress lacked any power to force states into federal court and open their treasuries to private litigation.²⁹⁰ But Justice Rehnquist upheld Congress's abrogation power under Section Five in order to enforce the guarantees of the Fourteenth Amendment.²⁹¹ Noting the historical context of the Reconstruction Amendments, Justice Rehnquist concluded that "the Eleventh Amendment, and the principle of state sovereignty which it embodies, are necessarily limited by the enforcement provisions of § 5 of the Fourteenth Amendment[,] . . . whose other sections by their own terms embody limitations on state authority."²⁹² But twenty years later, in *Seminole Tribe*, now-Chief Justice Rehnquist would hold that Congress lacked that same abrogation power under the Indian Commerce Clause.²⁹³

One way to understand this distinction is simply chronological: because the Eleventh Amendment came after Article I, the sovereign immunity principle necessarily limits the commerce power—rather than the opposite. Therefore, the Commerce Clause cannot empower abrogation. But, by the same token, the Fourteenth Amendment limits the application of the Eleventh because it came later in time. The Court has signaled that it favors this interpretation of *Fitzpatrick*,²⁹⁴ but we find it overly formalistic and ultimately incoherent. One problem is that sovereign immunity doctrine rests on a structural principle that extends beyond the text of the Eleventh Amendment. But such an overarching principle, like the separation of powers or federalism, would be present from the beginning and not take chronological priority after Article I. Additionally, this formalistic reading fails to interpret the Constitution as a whole, over-emphasizing the practice of appending each new amendment to the end of the document.²⁹⁵

By contrast, the democratic theory of sovereignty offers a substantive explanation for the distinction between *Fitzpatrick* and *Seminole Tribe*. Congress has the power to abrogate state sovereign immunity in cases (and only those cases) where states violate citizens' fundamental rights because the state does not act as the democratic sovereign. The textual basis for this distinction is, of course, the Fourteenth Amendment, but it is not a matter of

290. *Id.* at 451.

291. *Id.* at 455–56.

292. *Id.* at 456 (citation omitted).

293. *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 53 (1996).

294. *Id.* at 65–66.

295. Many scholars criticize the Court's distinction between Article I and Section Five abrogation, suggesting that they should stand and fall together. See, e.g., John Harrison, *State Sovereign Immunity and Congress's Enforcement Powers*, 2006 SUP. CT. REV. 353, 393–400 (criticizing the Court's explanation of the distinction as "not so clear"); Daniel J. Meltzer, *The Seminole Decision and State Sovereign Immunity*, 1996 SUP. CT. REV. 1, 20–24 (criticizing the *Seminole* Court's distinction as "not well supported"). Not only does our view explain this distinction, it also offers normative justification, rooted in substantive democratic theory.

mere chronology. Rather, as Justice Rehnquist notes in *Fitzpatrick*, it is because the Civil War and the Reconstruction Amendments forged a new theory of sovereignty, federalism, and citizenship.²⁹⁶ The Fourteenth Amendment created national citizenship under the Constitution, guaranteeing those free and equal citizens certain fundamental rights. It “carved out” states’ power to violate those rights, just as it conferred congressional power to enforce them.²⁹⁷ Crucially, the Fourteenth Amendment does not eliminate state sovereignty. Rather, it insists that when a state violates a citizen’s fundamental rights, it does not act as the sovereign.

Applying the state–sovereign distinction in this way looks to the substance of the right at stake, rather than its constitutional time stamp. Typically, legislation passed pursuant to Section Five enforces fundamental rights, while the exercise of Article I power typically does not. But this need not always be the case. Suppose, for example, that Congress abrogated sovereign immunity in order to implement Article I, Section Ten’s limitations on state power, prohibiting bills of attainder, ex post facto laws, and titles of nobility. To the extent that these provisions secure fundamental democratic rights, this is a valid exercise of power. Other fundamental rights protections might even stem from the Commerce Clause.²⁹⁸

Earlier, we saw that the state–sovereign distinction helps us to understand what sort of officer suits against state officials are permissible under *Ex parte Young* and § 1983, as well as what sort of remedies are available.²⁹⁹ Plaintiffs may seek injunctive relief against any violation of federal law or the federal Constitution,³⁰⁰ so long as it does not encroach on sovereign functions like states’ spending power.³⁰¹ But when a state

296. *Fitzpatrick*, 427 U.S. at 447, 453–56.

297. *Id.* (quoting *Ex parte Virginia*, 100 U.S. 339, 346, 347–48 (1880)).

298. A number of scholars have suggested that landmark legislation (much of which was passed pursuant to Congress’s Article I powers) has taken on quasi-constitutional status. See 2 BRUCE ACKERMAN, *WE THE PEOPLE: TRANSFORMATIONS* 269–70 (1998) (“[T]he transformative opinions handed down by the New Deal Court function as *amendment-analogues* that anchor constitutional meaning in the same symbolically potent way achieved by Article Five amendments.”); WILLIAM N. ESKRIDGE, JR. & JOHN FERREJOHN, *A REPUBLIC OF STATUTES* 7 (2010) (“Some of the nation’s entrenched governance structures and normative commitments are derived directly from the Constitution, but most are found in superstatutes enacted by Congress, executive-legislative partnerships, and consensus of state legislatures.”); SUNSTEIN, *supra* note 40, at 61–62 (characterizing the New Deal legislation as redefining “constitutive commitments,” defined as “constitutional rights . . . understood to be encompassed by the Constitution’s terms”). If these rights have constitutional force, one theory to justify these accounts is that these statutory guarantees satisfy substantive requirement for democratic legitimacy and therefore democratic sovereignty. Abrogation to enforce these guarantees would similarly not violate democratic sovereignty, as with any other enforcement of a fundamental right.

299. See *supra* subpart III(B).

300. See *supra* note 216 and accompanying text.

301. See *supra* notes 215–16 and accompanying text.

violates citizens' fundamental democratic rights, it no longer acts as the sovereign. To restore its sovereign status, the state must reach into its coffers to compensate the citizen–plaintiff for whatever harm that fundamental right violation has caused. It must pay damages or the equivalent in order to make the citizen–plaintiff whole. This is obviously the case when Congress abrogates states' sovereign immunity to protect fundamental democratic rights, as in *Fitzpatrick*. It is also the case for officer suits under § 1983 with the near-universal practice of indemnification—so long as the state pays, the citizen–plaintiff is sure to receive compensation from the sovereign.³⁰² A principal advantage of our account is that it illuminates these connections between otherwise disparate areas of the doctrine. What matters for sovereign immunity, unsurprisingly, is whether the state acts as the democratic sovereign. And that is ultimately a question about the substance of fundamental democratic rights.

B. *Congressional Power to Protect Fundamental Rights*

Broadly, then, our theory accounts for why we should distinguish between Eleventh Amendment cases that involve statutes designed to vindicate core constitutional rights under the Fourteenth Amendment and those that only involve torts enacted into law under the Commerce Clause. This is not to say, however, that we wish merely to endorse the current state of affairs of the Court's jurisprudence. In particular, the Court's decision in *Quern v. Jordan*³⁰³ to require explicit consent for abrogation of sovereign immunity in Fourteenth Amendment cases seems to risk incoherence in a way that its previous jurisprudence did not.³⁰⁴ When Congress acts under its Section Five power, it is by definition acting to protect a fundamental right. Thus, it need not explicitly state that it wishes to abrogate sovereign immunity, for the abrogation is inherent in its action. For the Supreme Court to require an explicit act of consensual abrogation risks misunderstanding the relationship between sovereignty and individual rights. By definition, the state cannot act in its sovereign capacity to violate fundamental democratic rights. So, to require explicit abrogation of sovereign immunity misunderstands the particular character of the Fourteenth Amendment that allows for abrogation in the first place, in a way that the Commerce Clause does not. The requirement in *Quern*, however, is largely a formal one with which Congress now often complies.³⁰⁵

302. See *supra* notes 193–95 and accompanying text.

303. 440 U.S. 332 (1979).

304. *Id.* at 345; accord *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 242–46 (1985) (holding that the Rehabilitation Act does not possess the specific congressional intent required to abrogate the Eleventh Amendment).

305. All of the significant abrogation cases following *Pennsylvania v. Union Gas Co.*, 491 U.S. 1 (1989), involve statutes with express abrogation provisions. The issue in *Seminole Tribe*

In *Tennessee v. Lane*³⁰⁶ and *Nevada v. Hibbs*,³⁰⁷ Congress explicitly recognized the need to abrogate state immunity to enforce provisions of the Americans with Disabilities Act (ADA) and the Family Medical Leave Act (FMLA). In both cases, the Court recognized that Congress was fulfilling its mandate under Section Five to defend fundamental rights to equal protection and due process. In *Lane*, a paraplegic criminal defendant had been unable to access the second floor of a state courthouse.³⁰⁸ He sued under Title II of the ADA, which requires public entities to provide accommodations for disabled individuals to participate in the public services they provide.³⁰⁹ The Court found a widespread history of state discrimination against the disabled and held that abrogation was within Congress's powers to enforce disabled citizens' fundamental right to access the courts.³¹⁰ Similarly, in *Hibbs*, the Court upheld Congress's abrogation power in the family-care provision of the FMLA.³¹¹ The Court concluded that this exercise of power was a valid response to a long history of gender discrimination and stereotyping by state governments.³¹² On our view, mistakes that violate these rights are not construed as sovereign action and should be subject to suit.

It is worth pausing here to note that none of the arguments usually offered in defense of sovereign immunity can explain these exceptions. The state dignity view cannot distinguish between violations of sovereignty such as these and other kinds of state mistakes. Thus, on that view, these decisions would be wrongly decided. Originalists, on the other hand, who see sovereign immunity as part of the originally enacted structure of the Constitution, would also be hard pressed to explain these cases. After all, there was no wide limit on state sovereignty recognized at the founding or in the Constitution. Originalists might argue that these limits were part of the meaning of the Fourteenth Amendment and thus restructured the Constitution, a view in line with our own account. But a greater challenge is to explain how the robust rights protected here are part of that original meaning.³¹³

and its progeny is whether those provisions are unconstitutional. *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 57–58 (1996).

306. 541 U.S. 509 (2004).

307. 538 U.S. 721 (2003).

308. *Lane*, 541 U.S. at 513–14.

309. *Id.* at 513, 517.

310. *Id.* at 529.

311. *Hibbs*, 538 U.S. at 725.

312. *Id.* at 725–28.

313. Many self-styled liberal originalists, such as Akhil Amar, are skeptical that sovereign immunity is a constitutional principle at all. *See supra* notes 20–24, 77–90 and accompanying text. We have labeled these scholars and jurists “textualists” for the purposes of the Eleventh Amendment. *See supra* notes 20–21, 77 and accompanying text. The difficulty with this view is that it rends a significant area of our constitutional law without first considering whether there is a

Although the opinions in *Lane* and *Hibbs* are consistent with our account, other decisions in *Kimel v. Florida Board of Regents*,³¹⁴ *Board of Trustees of the University of Alabama v. Garrett*, and *Coleman v. Court of Appeals of Maryland*³¹⁵ are in tension with it. In those cases the Court recognized that, although Congress could abrogate sovereign immunity under *Fitzpatrick*, it could only do so to enforce the particular set of rights guaranteed by Section One.³¹⁶ In *Kimel* and *Garrett*, the Court cites *City of Boerne v. Flores*,³¹⁷ arguing that discrimination based on age and disability was outside the constitutional protections enshrined in the Fourteenth Amendment.³¹⁸ The problem with these decisions lies in the Court's interpretation of its *Boerne* precedent, and unpacking the state–sovereign distinction requires a closer examination of that case and how it should be understood.

In *Boerne*, the Court struck down the Religious Freedom Restoration Act (RFRA), which attempted to force the Court to return to a strict scrutiny standard in assessing free exercise claims triggered by general legislation that adversely effected individual religious belief or practice.³¹⁹ In the controversial case *Employment Division v. Smith*,³²⁰ the Court had rejected strict scrutiny in such matters, reversing its previous approach to free exercise.³²¹ Congress then passed the RFRA in response, invoking its Section Five power to prohibit any level of government from burdening religious exercise unless it satisfied strict scrutiny, rather than the Court's more deferential *Smith* test.³²² *Boerne* concerned whether Congress could instruct the Court to return to its previous standard.³²³ The Court invalidated RFRA as it applied to state and local governments, holding that the strict scrutiny requirement was not “proportional[] or congruen[t]” to remedy this constitutional violation.³²⁴ Thus, RFRA exceeded Congress's Section Five power.³²⁵ There are two ways to understand *Boerne*. The first

limited and normatively attractive account of sovereign immunity as a constitutional principle. Our democratic theory of sovereign immunity provides just such an account.

314. 528 U.S. 62 (2000).

315. 132 S. Ct. 1327 (2012).

316. *Id.* at 1333–34; *Bd. of Tr. of the Univ. of Ala. v. Garrett*, 531 U.S. 356, 364–65 (2001); *Kimel*, 528 U.S. at 80.

317. 521 U.S. 507 (1997).

318. *Garrett*, 531 U.S. at 372–74; *Kimel*, 528 U.S. at 80–84.

319. 521 U.S. at 533–36.

320. 494 U.S. 872 (1990).

321. *Compare id.* at 888–89 (rejecting heightened scrutiny over a free exercise claim), *with* *Sherbert v. Verner*, 374 U.S. 398, 403–09 (1963) (applying heightened scrutiny to a free exercise claim).

322. *Boerne*, 521 U.S. at 512–16.

323. *Id.* at 512.

324. *Id.* at 533–36.

325. *Id.* at 536.

is a narrow reading that would suggest that, when the Court has reached the right conclusion in interpreting fundamental rights, Congress cannot instruct the Court to reverse its course in future rulings. The second, broader reading suggests that Congress cannot broaden the meaning of Section One rights even in the exercise of its own legislative power or in matters that the Court has not yet ruled on. On this broader reading, Congress has no interpretive power at all.

In *Kimel*, *Garret*, and *Coleman*, the Court took the second approach. The Court held that Congress lacked the power to abrogate state sovereign immunity.³²⁶ These rulings suggest that Congress cannot abrogate immunity to protect fundamental rights if its characterization of those rights goes beyond clearly articulated Court precedent. The problem with such an understanding is that it is judicial supremacy in the extreme.³²⁷ It seems to suggest that the Court has the sole authority to interpret the Fourteenth Amendment and that even when Congress expands the meaning of Section One in a way that the Court might later recognize as legitimate, Congress has no right to act. This is a flawed understanding of judicial authority on our view. While *Boerne* concerned issues of conflict between Congress and the Court on an issue of judicial interpretation, these rulings suggest that the Court has the sole authority to identify constitutional rights enshrined in Section One. This account of judicial supremacy disregards the notion that the Constitution's meaning generally, including Section One, exists independently of what any one actor has said about it.³²⁸ Indeed, it precludes the possibility that Congress or anyone is capable of giving a correct interpretation of the Fourteenth Amendment if the Court has not spoken first. The Court in these cases disregards what is a congressional obligation under the Constitution to interpret and defend the rights under Section One.

Such point is even more salient in the case of sovereign immunity than it would be if the matter were the constitutionality of any act of Congress that might be in tension with other rights. In particular, the line between sovereign action and state action will often be ambiguous. The question here is whether a mistake by the state is the kind of mistake that violates a fundamental right. But such discernment is precisely the kind of specific question that is left to Congress under Section Five. Both Congress and the Court have the responsibility to enforce the Fourteenth Amendment, which

326. *Coleman v. Court of Appeals of Md.*, 132 S. Ct. 1327, 1338 (2012); *Bd. of Trs. of the Univ. of Ala. v. Garrett*, 531 U.S. 356, 374 (2001); *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 91 (2000).

327. For a trenchant historical and normative critique of judicial supremacy, see generally KRAMER, *supra* note 150, at ch. 5.

328. For an elaboration of this point, see generally Corey Brettschneider, *Popular Constitutionalism and the Case for Judicial Review*, 34 POL. THEORY 516 (2006).

creates a one-way ratchet to offer citizens' fundamental rights the utmost protection.³²⁹

The case for an expansive role for Congress's Section Five power is particularly strong and important when it comes to issues of sovereign immunity. Sovereign immunity involves a loss of the private rights of individuals on grounds that they have democratically authorized the actions of the sovereign state. But we have shown that these actions do not extend to constitutional rights violations.³³⁰ In delineating the line between private suits against the government for fundamental rights violations and other private wrongs, an asymmetry develops in favor of protecting rights to ensure that the government (as opposed to the sovereign³³¹) enjoy an illegitimate advantage in these suits. Thus, we think the default in all cases should be in favor of the body that wishes to expand rather than contract rights. In the cases of sovereign immunity there is thus good reason to give Congress a one-way ratchet to up the level of rights protections in its Section Five power by abrogating sovereign immunity. The ratchet test has been rejected by the *Boerne* Court in many matters, but given the inherent loss of rights that comes with sovereign immunity, the expansion of Congress's Section Five powers in regard to abrogation of sovereign immunity is essential.

V. Objections and Responses

One objection to the argument that we have sketched so far could point to Congress's supposed discretion in deciding whether or not to use its Section Five power. It might be argued that legislation under Section Five does not establish an individual right because it is discretionary as to whether or not Congress wishes to use this power in a way that is distinct from the actual establishment of rights under the Fourteenth Amendment. Namely, in interpreting what our basic rights are under Section One, it might be argued, courts have no similar discretion. They are charged merely with articulating rights, not with creating them.³³²

We think this contention, however, suffers from a mistaken assumption of judicial supremacy and overly disanalogizes the role of courts and Congress in interpreting the Constitution. Congress's charge under Section Five is to enforce, through legislation, the rights guaranteed

329. See *Katzenbach v. Morgan*, 384 U.S. 641, 648–50 (1966) (explaining the roles of the Court and Congress in enforcing the Equal Protection Clause). For further defense of Justice Brennan's notion of a "one-way ratchet" in protection of fundamental rights, see Akhil Reed Amar, *Intratextualism*, 112 HARV. L. REV. 747, 826 (1999). For additional historical and theoretical criticism of *Boerne*, see generally Michael W. McConnell, *Institutions and Interpretation: A Critique of City of Boerne v. Flores*, 111 HARV. L. REV. 153 (1997).

330. See *supra* note 108 and accompanying text.

331. See *supra* note 187 and accompanying text.

332. We thank Professor Lawrence Lessig for pressing this point.

by Section One. This constitutes a clear constitutional obligation of Congress to act. When it fails to protect these rights by abrogating sovereign immunity, it is failing a fundamental constitutional duty. But the role is discretionary, however, in that the Constitution does not tell Congress how or when to enforce Section One rights, and it does not purport to elaborate in depth each of these rights. Congressional discretion therefore is necessary given the difficulty of discerning precisely how far to expand the meaning of Section One. But, of course, this is true of the Court's role as well. The United States Constitution does not explain that the Court, for instance, should protect the right to an abortion. Rather, as the Court's role has unfolded, it has come to establish these rights. The same is true, we argue, of the congressionally established rights under Section Five. Their establishment and definition is under the discretion of Congress.

Another objection might target our contention that federal statutes protecting fundamental democratic rights may abrogate state sovereign immunity while other federal statutes cannot. In particular an opponent of our view might attempt to use our theory against us: because federal law is democratically enacted, it should trump the presumptive sovereign immunity of states. Our opponent might argue that if a national majority wishes to create rights of actions for private parties to sue a state, a democratic theory of sovereignty should permit this result. Especially in light of the supremacy of federal law enshrined in the Constitution,³³³ federal majorities should trump the sovereignty interests of any particular state. Just as in instances where federal law preempts state law,³³⁴ so too should all federal tort statutes trump state claims to immunity.

On our view, however, even though democracy sometimes requires deference to majorities, it does not always require such deference.³³⁵ An attempt by a democratic majority at the federal level to revoke other sovereign functions would not be constitutionally legitimate. For instance, imagine a federal statute that attempted to withdraw the taxation power of the states. Such a statute would rightly be regarded as a violation of the Tenth Amendment and would exceed the powers of the federal government. Just as there would be no such power in that case, we also think the

333. U.S. CONST. art. VI, cl. 2.

334. *See, e.g.*, *Mut. Pharm. Co. v. Bartlett*, 133 S. Ct. 2466, 2470 (2013) (“Under the Supremacy Clause, state laws that require a private party to violate federal law are preempted . . .”); *Pliva, Inc. v. Mensing*, 131 S. Ct. 2567, 2577–81 (2011) (holding that Federal Drug Administration regulations preempt a conflicting duty to warn under state tort law); *cf. Wyeth v. Levine*, 555 U.S. 555, 565 (2009) (identifying the two “cornerstones of . . . pre-emption jurisprudence” as Congressional intent and “the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress” (quoting *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996)) (internal quotation marks omitted)).

335. *See supra* notes 30, 118 and accompanying text.

integrity of state budgets important enough to immunize it from liability except where fundamental democratic rights are at stake. Some functions of the state are essential to what it means to be a government. Immunity from suit is tied to the basic economic integrity and ability of the state to function and to set its own priorities. Deferring to federal law in every instance of abrogating sovereign immunity would potentially render states incapable of retaining the ability to set their own priorities and govern at all. Some of this logic protects small states from threats by corporations who seek to outmaneuver them.³³⁶

Moreover, nothing in recognizing sovereign immunity undercuts the vast other means the federal government has at its disposal for furthering its own ends. Federal courts may issue injunctions against the state officers to prevent violations of federal law, either when the remedy does not require the expenditure of funds or when a fundamental right is at stake.³³⁷ Congress may also tax citizens of any state directly and allocate the funds as it wishes.³³⁸ It can create financial incentives for states to act through the spending power.³³⁹ But as the Court has recognized, Congress cannot strip the most basic sovereign functions of states away from them. It cannot direct them where to locate their capitals.³⁴⁰ It cannot compel states to enact particular legislation on pain of assuming liability if they do not.³⁴¹ Similarly, Congress cannot take away states' basic sovereign spending power and it cannot force them to be subject to suit where fundamental democratic rights are at stake—so long as the state truly acts as the sovereign. Nothing in protecting this sovereign capacity undercuts the supremacy or vastly superior power of the federal government.

A third objection might ask why it is that immunity in these cases is limited to the states rather than to any municipality.³⁴² One response to this objection is to point to the text of the Tenth and Eleventh Amendments, which clearly provide for some sovereign powers and status to the states not provided for local and municipal government. These textual grants confer sovereign status to the states in a way that is, as we have shown, entirely derivative of popular sovereignty.³⁴³ Like the federal government, when states act in ways that are both *by* and *for* the people, they are properly

336. See *supra* note 268 and accompanying text.

337. See *supra* subpart III(B).

338. U.S. CONST. art. I, § 8, cl. 1; U.S. CONST. amend. XVI.

339. *E.g.*, *South Dakota v. Dole*, 483 U.S. 203, 211–12 (1987). Congress may not, however, employ its spending power past the point of coercion. See *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2660 (2012) (“Congress effectively engages in this impermissible compulsion when state participation in a federal spending program is coerced, so that the States’ choice whether to enact or administer a federal regulatory program is rendered illusory.”).

340. *Coyle v. Smith*, 221 U.S. 559, 562, 579 (1911).

341. *New York v. United States*, 505 U.S. 144, 188 (1992).

342. *Lincoln Cnty. v. Luning*, 133 U.S. 529, 530 (1890).

343. See *supra* notes 106–07 and accompanying text.

immune from suit—but this immunity does not extend to fundamental rights violations. In the same way that state sovereignty derives from popular sovereignty, local authority under the American system of federalism is entirely derivative of state sovereignty.³⁴⁴ As a result, there exists no blanket immunity barring plaintiffs from suing municipalities for violating state or federal law in state or federal court.

There may well be ample normative justification for this distinction. Many sovereign functions are currently provided for by the states, in particular the constitutional duty to provide for the general welfare. States in the contemporary polity have largely taken on this role in areas ranging from health care to employment benefits. Allowing them not to be sued preserves their ability to perform this sovereign function without serious incursions on their already limited tax base. Local municipalities have less of a fundamental role in these areas and thus their protection in their treasuries is less important.

But one implication of our view is that, to the extent that local governments carry out sovereign functions and promote popular sovereignty, they should be immune from suits as well. The important point is that, just as with states, nothing in the need to pursue this welfare function authorizes government at any level to violate fundamental democratic rights. Here they lose their sovereign status and become subject to suit.

Conclusion

Discussions of sovereign immunity have tended to view the practice as either a vestige of monarchy that perverts the understanding of the state as subservient to the people or as a necessary defense of the intrinsic dignity of the state. In this Article we have suggested why neither of these two views accurately accounts for the specific role of democratic authority in legitimate states. The state can at times act coercively with the authorization of the people, but we have suggested, this authorization is limited by individual rights. Under this conception, the state may at times act wrongly and yet legitimately. Drawing on this general conception of democratic legitimacy, we have argued that sovereign immunity attaches to the legitimate acts of the state, but it is rightly limited, as is legitimate action itself, by individual rights.

This theoretical account of immunity has support within the Court's own jurisprudence and helps to render coherent a series of cases often thought to be inconsistent. Namely, the Court has traditionally considered abrogation of sovereign immunity under the Fourteenth Amendment as

344. For discussion of this descriptive proposition, see Richard Briffault, *Our Localism: Part I—The Structure of Local Government Law*, 90 COLUM. L. REV. 1, 7–8 (1990) and Gerald E. Frug, *The City as a Legal Concept*, 93 HARV. L. REV. 1057, 1105–17 (1980).

valid but not abrogation under the Commerce Clause. While this jurisprudence has appeared inconsistent to many commentators, we argue that it reflects the concern to not allow for instances of democratic authority to infringe on individual rights. While the state can and does infringe on individual rights at times, it cannot do so in its sovereign capacity. Such violations are instances of state action not sovereign action. With this distinction between state and sovereign action, we have therefore accounted for the supposed irony present in Fourteenth Amendment abrogation of sovereign immunity. Some have thought that because the Fourteenth Amendment only has rights provisions triggered when the state acts, the same action could be thought to trigger sovereign immunity. But, we have argued, the type of state action triggered under the Fourteenth Amendment is not sovereign action and, thus, does not trigger sovereign immunity. What appeared to be a contradiction in the Court's jurisprudence can thus be solved by appeal to a conception of democratic legitimacy and authority. This same account of democratic sovereignty also explains the equally puzzling areas of officer suits under *Ex parte Young* and the distinction between prospective and retroactive relief under *Edelman v. Jordan*. State officials do not act in the name of the sovereign when they violate fundamental rights, and so those actions are not shielded by sovereign immunity. We argued too that what is essential in cases of fundamental rights violations is that the state is ultimately held responsible, whether through indemnification or some other means. We also argued that there is symbolic value in allowing only suits against state officials not the state itself. When a state or its agents violate fundamental rights, it has acted beyond its sovereign capacity, and its sovereign functions are not immune.

The problem of how to understand the nature of sovereignty in a democratic republic is an old one. But by revisiting this puzzle, we can explain the doctrine while providing a normatively attractive account of when and why the state should be immune from ordinary suit.