

# State Sovereign Immunity After the Revolution

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*The Supreme Court’s 1996 decision in Seminole Tribe v. Florida opened an era of dramatic expansion of states’ sovereign immunity from suits by private parties. Nationalist Justices vigorously contested that expansion, vowing that they would never accept Seminole Tribe’s legitimacy or accord it stare decisis effect. In 2020, however, the unanimous decision in Allen v. Cooper did accept Seminole Tribe’s vision of state immunity, apparently ending the Court’s longstanding and bitter division on this issue. This Article assesses Seminole Tribe as a revolution in legal doctrine that established a new paradigm of state immunity law, analogous to the scientific upheavals that Thomas Kuhn examined in The Structure of Scientific Revolutions. It considers how the state immunity revolution came to an end, continuing threats to the Seminole Tribe paradigm posed by recent decisions like Torres v. Texas Department of Public Safety, and what the Court’s continuing debates about state immunity can tell us about the doctrine of stare decisis and the stability of legal paradigms. The most important lesson is that stare decisis may be insufficient to maintain a legal paradigm without acceptance of a precedent’s underlying rationale. The Article also examines the sorts of “normal science” puzzles that courts will have to grapple with, even if Seminole Tribe’s paradigm proves enduring.*

I. STATE SOVEREIGN IMMUNITY IN AMERICAN HISTORY AND LAW.....	704
A. <i>Chisholm</i> , the Eleventh Amendment, and <i>Hans</i> .....	705
B. Abrogation and the Rehnquist/Roberts Court .....	714
C. <i>Seminole Tribe</i> as Paradigm .....	722
II. THE NORMALIZATION OF STATE SOVEREIGN IMMUNITY LAW .....	729
A. Revolution’s End? .....	730
B. Waiver in the Plan of the Convention .....	735
C. Stare Decisis and the Stability of Legal Paradigms .....	742
D. Pragmatic Equilibrium and the Remedial Ecosystem .....	745
III. SOVEREIGN IMMUNITY AND NORMAL SCIENCE.....	750

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A. Who Is the State?.....	751
B. As-Applied Abrogation.....	756
C. Immunity in Takings Cases.....	760
D. Suits by the United States—and Its Proxies.....	762
CONCLUSION.....	767

A revolution is never truly over until the losers give up. In the mid-1990s, the Rehnquist Court began an important sequence of decisions expanding and strengthening the sovereign immunity that states enjoy when sued by private litigants. These decisions, beginning with *Seminole Tribe v. Florida*,<sup>1</sup> limited Congress’s ability to subject states to damages suits for violations of a wide range of federal laws, extending from civil rights to intellectual property to environmental law. Although the Court’s state sovereign immunity cases may be viewed as a technical subset of a broader movement to revitalize constitutional limits on national authority,<sup>2</sup> the Court decided considerably more immunity cases than, say, Commerce Clause cases, and the immunity holdings went further doctrinally than did decisions limiting national authority in other ways.<sup>3</sup> Commentators lambasted the Rehnquist Court’s state sovereign immunity rulings,<sup>4</sup> and the Court’s more liberal, nationalist wing not only dissented but promised to maintain that dissent in perpetuity.<sup>5</sup>

We are now over a quarter century past *Seminole Tribe*, and things seem different. Four years ago, in *Allen v. Cooper*,<sup>6</sup> the Court’s most nationalist

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1. 517 U.S. 44, 72–73 (1996) (striking down Congress’s effort to subject states to suit under the Indian Gaming Regulatory Act).

2. See generally Richard H. Fallon, Jr., *The “Conservative” Paths of the Rehnquist Court’s Federalism Decisions*, 69 U. CHI. L. REV. 429 (2002) (documenting the Rehnquist Court’s federalism revival along three lines of doctrine, including state sovereign immunity); Ernest A. Young, *The Rehnquist Court’s Two Federalisms*, 83 TEXAS L. REV. 1 (2004) (exploring the competing visions of federalism on the Rehnquist Court).

3. See, e.g., Ernest A. Young, *State Sovereign Immunity and the Future of Federalism*, 1999 SUP. CT. REV. 1, 1 (noting that “the Court’s most persistent and aggressive efforts [to reinvigorate constitutional federalism] have focused on the arcane doctrine of state sovereign immunity”).

4. See, e.g., Vicki C. Jackson, *Principle and Compromise in Constitutional Adjudication: The Eleventh Amendment and State Sovereign Immunity*, 75 NOTRE DAME L. REV. 953, 953 (2000) (“The Court’s Eleventh Amendment and sovereign immunity case law deserves the condemnation and resistance of scholars.”); JOHN T. NOONAN, JR., *NARROWING THE NATION’S POWER: THE SUPREME COURT SIDES WITH THE STATES* 96 (2002) (criticizing the Rehnquist Court’s immunity jurisprudence for overly limiting national power); Daniel J. Meltzer, *The Seminole Decision and State Sovereign Immunity*, 1996 SUP. CT. REV. 1, 20–23 (admonishing the Court (and particularly “its prominent textualists”) for its reasoning in *Seminole Tribe*).

5. See, e.g., *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 97 (2000) (Stevens, J., dissenting in part and concurring in part) (“Despite my respect for *stare decisis*, I am unwilling to accept *Seminole Tribe* as controlling precedent.”); Allison Orr Larsen, *Perpetual Dissents*, 15 GEO. MASON L. REV. 447, 454 (2008) (discussing the state sovereign immunity cases as an example of “perpetual dissents”).

6. 140 S. Ct. 994 (2020).

judges ended their perpetual dissent and accepted *Seminole Tribe* as binding precedent.<sup>7</sup> The Justices still disagree about state sovereign immunity in various ways, but these disagreements lack the ideological and absolutist tone of the earlier conflict.<sup>8</sup> And although the Court's immunity jurisprudence once had few academic defenders, prominent voices now increasingly defend that jurisprudence's theoretical and historical underpinnings.<sup>9</sup> One might say that the revolution is over and state sovereign immunity won.

This Article takes stock of our state sovereign immunity jurisprudence as it enters its post-revolutionary phase. I adopt, as a suggestive analogy, Thomas Kuhn's well-known account of scientific revolutions.<sup>10</sup> Professor Kuhn argued that science does not progress solely by incremental accretion but through periodic revolutions that establish a new "paradigm" for scientific research going forward. Periods of crisis and revolution thus alternate with periods of "normal science," during which scientists work within the established paradigm to play out that paradigm's implications and solve "puzzles" arising within it.<sup>11</sup>

I make no strong claims here about the relation between science and law; Professor Kuhn's account is useful just to the extent that it helps point toward interesting questions about the development of legal doctrine in my area of interest. One might choose a different framework and still wind up in much the same place. Kuhn offers, for instance, a distinction between two modes of inquiry and problem-solving not dissimilar to Bruce Ackerman's influential distinction between "higher lawmaking" during "constitutional moments" and "ordinary lawmaking" in other times.<sup>12</sup> But where Professor Ackerman focuses on *lawmaking*, Kuhn's scientists discover and apply principles of science that they do not make—even though one of Kuhn's primary contributions is to show that scientists have more agency in this

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7. *See id.* at 1009 (Breyer, J., concurring in the judgment) (admitting, in an opinion joined by Justice Ginsburg, that "my longstanding view has not carried the day . . . I concur in the judgment").

8. *See, e.g.,* PennEast Pipeline Co. v. New Jersey, 141 S. Ct. 2244, 2263 (2021) (splitting 5–4 over whether sovereign immunity bars a private entity exercising the delegated eminent domain power of the United States from suing a state, with conservative and liberal Justices on both sides).

9. *See, e.g.,* William Baude & Stephen E. Sachs, *The Misunderstood Eleventh Amendment*, 169 U. PA. L. REV. 609, 613 (2021) (asserting that "the Supreme Court has arrived at mostly right answers in its sovereign immunity cases, most of the time," even if those correct answers were "wrongly defended").

10. THOMAS S. KUHN, *THE STRUCTURE OF SCIENTIFIC REVOLUTIONS* (2d ed. 1970).

11. *Id.* at 6–7, 10–11.

12. *See, e.g.,* 3 BRUCE ACKERMAN, *WE THE PEOPLE: THE CIVIL RIGHTS REVOLUTION* 43 (2014) (characterizing "normal politics" as times in which political actors "adapt[] the basic values of the regime to meet the demands of a changing world" but "no major political force is interested in challenging fundamental premises").

process than is commonly thought.<sup>13</sup> Judges likewise seek to understand and apply a constitution that they do not themselves make, but they generally do this by constructing constitutional theories and doctrinal frameworks that make sense of the preexisting Constitution in a particular way.<sup>14</sup> This Article presupposes that one can distinguish between instances in which courts create a new framework—or “paradigm,” as Kuhn would say—and those in which courts pursue a kind of “normal science” by applying that framework to particular cases and resolving open questions within the paradigm’s governing principles.

I argue here that the Rehnquist Court’s state sovereign immunity jurisprudence, articulated in *Seminole Tribe* and its progeny and continued (mostly) by the Roberts Court, represents a particular paradigm for thinking about remedies against state governments. One could question whether *Seminole Tribe* was, in fact, revolutionary and how far the movement to strengthen state immunities went. In truth, the Court took its most important step toward the modern jurisprudence in its 1890 decision in *Hans v. Louisiana*,<sup>15</sup> which held that state sovereign immunity is not limited to cases covered by the text of the Eleventh Amendment and, in particular, extends to suits raising a federal question.<sup>16</sup> But the Rehnquist Court aggressively built on *Hans*’s legacy, in particular by rendering state immunities off-limits to congressional abrogation except when Congress acts to enforce the Reconstruction Amendments.<sup>17</sup> Moreover, *Seminole Tribe* occupies a central place in the Court’s broader project of reviving a strong, judicially enforceable idea of state sovereignty as a constitutional limit on national power.<sup>18</sup> My discussion here will focus on *Seminole Tribe* as a doctrinal framework governing state sovereign immunity cases, but it is worth keeping its role within this broader federalism paradigm in mind.

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13. See, e.g., THOMAS S. KUHN, Objectivity, Value Judgment, and Theory Choice, Machette Lecture at Furman University (Nov. 30, 1973), in THE ESSENTIAL TENSION 320, 321–23 (1977) (discussing how scientists choose between competing theories).

14. See generally, RICHARD H. FALLON, JR., IMPLEMENTING THE CONSTITUTION 5–7 (2001) (asserting that “[t]he Court devises and then implements strategies for enforcing constitutional values”); Akhil Reed Amar, *Foreword: The Document and the Doctrine*, 114 HARV. L. REV. 26 (2000) (analyzing the distinctions between the “documentarian” and “doctrinalist” modes of constitutional interpretation); see also Ronald Dworkin, *Hard Cases*, 88 HARV. L. REV. 1057, 1060 (1975) (proposing that, even in “hard cases,” judicial decisions “are and should be generated by principle not policy”); Ernest A. Young, *Making Federalism Doctrine: Fidelity, Institutional Competence, and Compensating Adjustments*, 46 WM. & MARY L. REV. 1733, 1744 (2005) (noting how “a choice among doctrinal options” does not exclusively turn on “the activity of interpretation,” but may also “be made on other grounds” such as “independent moral principles”).

15. 134 U.S. 1 (1890).

16. *Id.* at 10–12.

17. Compare *Seminole Tribe v. Florida*, 517 U.S. 44, 73 (1996) (holding that Congress cannot abrogate state immunity when exercising its Article I powers), with *Fitzpatrick v. Bitzer*, 427 U.S. 445, 456 (1976) (permitting abrogation under the Reconstruction Amendments).

18. Young, *Two Federalisms*, *supra* note 2, at 154.

In *Allen*, all the Justices purported to accept the legitimacy of *Seminole Tribe*'s and *Hans*'s core holding—that is, that states possess an immunity from private-damages suits that is both broader than the Eleventh Amendment's text and constitutional in stature.<sup>19</sup> *Allen* represented a remarkable consolidation of the Rehnquist Court's state sovereign immunity jurisprudence, given the persistent refusal of the *Seminole Tribe* dissenters to accord it stare decisis effect.<sup>20</sup> The immunity cases thus provide a case study of how a legal revolution may be brought to an end. If these cases are any guide, then the consolidation of a legal paradigm may depend both on the ability of its proponents to acknowledge limits on its scope *and* on the willingness of its opponents to acquiesce to its legitimacy and binding force.

Two cases decided immediately after *Allen*, however, suggest that the state sovereign immunity revolution may not be entirely settled. In *PennEast Pipeline Company v. New Jersey*<sup>21</sup> and *Torres v. Texas Department of Public Safety*,<sup>22</sup> narrow majorities of the Court considerably expanded an exception to state sovereign immunity for statutes enacted pursuant to certain of Congress's enumerated powers. In the case of these powers—which now include bankruptcy, federal eminent domain, and war powers—the States are said to have waived their immunity “in the plan of the Convention.”<sup>23</sup> The trouble is that plan-of-the-Convention waiver is, in both principle and effect, virtually indistinguishable from the sort of legislative abrogation that the Court rejected in *Seminole Tribe*. This line of cases, which has no obvious end in sight, thus threatens to reopen the basic question about state immunity and federal legislative powers that *Seminole Tribe* tried to put to rest.<sup>24</sup>

The plan-of-the-Convention waiver cases thus illustrate a basic difficulty in establishing stable legal paradigms. Although Professor Kuhn invoked the common law role of precedent as an analogy supporting his theory,<sup>25</sup> that role may also point toward an important difference between science and law. Lawyers and judges—presumably unlike scientists—may accept a legal paradigm *not* because they believe it to be correct but simply

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19. *Allen v. Cooper*, 140 S. Ct. 994, 1000 (2020); *see id.* at 1009 (Breyer, J., concurring in the judgment) (accepting the majority's view despite prior dissents).

20. *See infra* subpart II(A).

21. 141 S. Ct. 2244 (2021).

22. 142 S. Ct. 2455 (2022).

23. *See Cent. Va. Cmty. Coll. v. Katz*, 546 U.S. 356, 379 (2006) (relying on the same theory prior to *Allen* with respect to the bankruptcy power); *PennEast*, 141 S. Ct. at 2257–59 (eminent domain powers); *Torres*, 142 S. Ct. at 2460 (war powers).

24. *See* Anthony J. Bellia Jr. & Bradford R. Clark, *State Sovereign Immunity and the New Structuralism*, 65 WM. & MARY L. REV. 485, 542 (2024) (arguing that this “approach . . . has no logical stopping point”).

25. Leah Trueblood & Peter Hatfield, *Precedent and Paradigm: Thomas Kuhn on Science and the Common Law*, in *PHILOSOPHICAL FOUNDATIONS OF PRECEDENT* 89, 89 (Timothy Endicott et al. eds., 2023).

as a matter of stare decisis. Adherence to a prior decision based on stare decisis need not entail any commitment to the underlying rationale of those decisions, and the law reports are full of decisions refusing to overrule a prior precedent but likewise refusing to extend its rationale to cases not squarely governed by the earlier result.<sup>26</sup> If a legal precedent lacks ongoing generative force, it may not be a paradigm at all in Professor Kuhn's sense. And if the law continues to develop around such a precedent in response to a different set of rationales, the precedent may become more and more out-of-step. Stare decisis without "buy-in" may not be enough, in other words, to ensure the stability of legal paradigms. If that is true, then it may help us understand why precedents sometimes fail.

For now, however, it is unclear that the plan-of-the-Convention waiver cases will fatally undermine *Seminole Tribe's* paradigm of state sovereign immunity. Thus far, the incursion on state immunity is more theoretically important than practically significant. Our law of remedies against state and local governments seems to have reached a pragmatic equilibrium that roughly balances the competing imperatives of state solvency and accountability—despite making very little textual, historical, or conceptual sense. Even as the Court settles (some of) its differences, my students rebel at being asked to accept the "fiction" that a suit against a government officer is *not* one against a state,<sup>27</sup> fine distinctions between prospective and retrospective relief,<sup>28</sup> or the suability of municipalities that are treated as political subdivisions of the state for all purposes besides immunity.<sup>29</sup> But all these fictions and distinctions, I submit, come together to create a "rough justice" that protects the states from existential financial threats while holding them accountable for most day-to-day violations of citizens' rights and empowering courts to require prospective compliance with federal law.<sup>30</sup> Our legal system has never attempted a coherent codification of immunity law; instead, it has built on common law and equitable concepts and adapted them to the needs of a far different republic than the English regime in which they originated. Our own regime has been profoundly shaped, moreover, by uniquely American imperatives growing out of the Revolution, Reconstruction, and a modern statutory world of robust individual rights

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26. See, e.g., *Ziglar v. Abbasi*, 582 U.S. 120, 133–34 (2017) (refusing to extend the implied *Bivens* right of action for constitutional violations by federal officers to a case outside *Bivens's* original ambit).

27. *Ex parte Young*, 209 U.S. 123, 168 (1908).

28. *Edelman v. Jordan*, 415 U.S. 651, 664 (1974).

29. *Lincoln County v. Luning*, 133 U.S. 529, 530–31 (1890).

30. 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, 602–03 (2012).

against government. The result is complex, path-dependent, somewhat contradictory—and basically workable.

Even if conflict over the basic principles of *Hans* and *Seminole Tribe* has ended, however, many important puzzles remain. I canvass several such issues as examples of the normal science we should expect to see under *Seminole Tribe*'s paradigm. One concerns what entities may assert the state's sovereign immunity. The Court has never had a particularly determinate test for discerning which entities are "arms of the state" for immunity purposes, and an increasingly complex institutional environment of privatization and quasi-public entities makes that question more pressing.<sup>31</sup> A second puzzle arises out of the Court's 2006 decision in *United States v. Georgia*,<sup>32</sup> which opened the door for many plaintiffs to take advantage of federal statutes purporting to abrogate state sovereign immunity so long as they can allege not only a statutory violation but also an actual constitutional violation as well.<sup>33</sup> The Court's holding in *Georgia* could significantly limit the impact of the Court's precedents narrowing Congress's power to abrogate state immunity, yet that potential is largely unrealized for reasons that remain somewhat mysterious. Third, the Court suggested years ago that the Fifth Amendment's designation of a compensatory remedy for takings might override state immunity of its own force,<sup>34</sup> but every circuit court of appeals to consider the issue has held to the contrary.<sup>35</sup> The Court's recent takings decision in *Knick v. Township of Scott*,<sup>36</sup> however, may undermine that conclusion.<sup>37</sup> Finally, *PennEast* took the unusual step of allowing a private entity to invoke the United States' ability to sidestep states' immunity defenses when it sues as a plaintiff.<sup>38</sup> In so doing, the Court may (or may not) have given new life to longstanding efforts to circumvent state immunities through broad delegations of the United States' right to sue to private plaintiffs.<sup>39</sup> All of these unresolved questions suggest that the normal science of state sovereign immunity is likely to be interesting and contested, even if we must now accept *Hans* and *Seminole Tribe* as fixtures of the landscape.

Part I of this Article surveys the historical and doctrinal development of our law of state sovereign immunity. Collecting this material in one place may be one of this Article's more useful contributions. This account will also

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31. See *infra* subpart III(A).

32. 546 U.S. 151 (2006).

33. *Id.* at 159.

34. *First Eng. Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304, 316 n.9 (1987).

35. See *infra* note 416 and accompanying text.

36. 139 S. Ct. 2162 (2019).

37. See *infra* subpart III(C).

38. *PennEast Pipeline Co. v. New Jersey*, 141 S. Ct. 2244, 2255–56 (2021).

39. E.g., Jonathan R. Siegel, *The Hidden Source of Congress's Power to Abrogate State Sovereign Immunity*, 73 TEXAS L. REV. 539, 569–70 (1995).

help identify, with somewhat more precision, the contours of the *Seminole Tribe* paradigm.

Part II considers how the Rehnquist Court's state sovereign immunity revolution ended and whether the new paradigm is likely to be stable. It makes two more general contributions to thinking about legal paradigms. First, the Court's recent plan-of-the-Convention waiver cases demonstrate that the nationalist Justices' acquiescence to *Seminole Tribe*'s status as binding precedent does *not* necessarily commit them to accepting the generative force of the paradigm's central principles for future cases. This may render the paradigm unstable. The second point cuts the opposite way, however. *Seminole Tribe*—with its attendant limitations, exceptions, and workarounds—does seem to have reached a pragmatic equilibrium by balancing public interests served by immunity with the need to hold government accountable for violations of law. This rough justice may contribute to the paradigm's stability even as its intellectual coherence erodes.

Part III turns to normal science. I identify four pressing questions within the *Seminole Tribe* paradigm: Which institutions can claim the protection of state immunity? How should case-by-case abrogation operate under *United States v. Georgia* (and why haven't lower courts utilized it more)? How should state sovereign immunity interact in takings cases with the Fifth Amendment's guarantee of a compensatory remedy? And to what extent can the United States pass its unique right to ignore state sovereign immunity when it sues as a plaintiff on to private attorneys general seeking to enforce federal statutes? These questions are important in their own right, and they illustrate the sorts of questions likely to arise within a stable paradigm of remedies against state governments. How these matters—and questions like them—are answered will make the difference as to whether *Seminole Tribe* can provide a fair and functional regime of public law remedies.

### I. State Sovereign Immunity in American History and Law

The wonder of sovereign immunity, like many doctrines of federal courts law, is how it brings profoundly practical considerations into direct contact with principles deeply grounded in both history and political theory. If I slip and fall while attending a basketball game at the University of North Carolina's Dean Smith Center, for example, I am likely to find any tort suit I might file against the University blocked by principles of state immunity.<sup>40</sup> Those principles will be directly traceable to ideas about unitary sovereignty propounded by Jean Bodin and Thomas Hobbes in the sixteenth and

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40. See, e.g., *Laxey v. Louisiana Bd. of Trs.*, 22 F.3d 621, 622–23 (5th Cir. 1994) (finding, amidst a plethora of sports puns, that state sovereign immunity blocked a tort suit against a state university).



seventeenth centuries,<sup>41</sup> refracted through American historical crises over the states' Revolutionary War debts and post-Reconstruction bond defaults.<sup>42</sup> One cannot make sense of current debates about state sovereign immunity without surveying the principles giving rise to that doctrine, as well as the cases that integrated it into American constitutional law.

A. Chisholm, *the Eleventh Amendment*, and Hans

The American colonists sparred with the British over sovereignty in the years preceding the Revolution. Although the colonists argued that the British Empire was a nascent federal system that should accord practical autonomy to the North American colonies,<sup>43</sup> they were unwilling to break entirely with longstanding notions of unitary sovereignty. That doctrine held that “there must reside somewhere in every political unit a single, undivided, final power, higher in legal authority than any other power, subject to no law, a law unto itself.”<sup>44</sup> This doctrine translated into “two distinct rules” of immunity: “The one rule holds that the King or the Crown, as the font of law, is not bound by the law’s provisions; the other provides that the King or Crown, as the font of justice, is not subject to suit in its own courts.”<sup>45</sup> The first of these rules—“limit[ing] the reach of substantive law”—has not prospered in our democracy, but the second—limiting “the jurisdiction of the courts”—continues to play a crucial role in American jurisprudence.<sup>46</sup>

The principle of governmental immunity, however, has required considerable adaptation in America on account of our nation’s structure of limited and divided powers and the existence of individual rights that trump government action.<sup>47</sup> The Articles of Confederation firmly designated state governments as the relevant sovereign, providing that “[e]ach state retains its

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41. JEAN BODIN, *SIX BOOKS OF THE COMMONWEALTH*, bk. 1, ch. 10 (1576), as reprinted in *ON SOVEREIGNTY* 46, 52–53 (Julian H. Franklin, ed. & trans., Cambridge Univ. Press 1992); THOMAS HOBBS, *LEVIATHAN*, pt. II, ch. 29, at 150–51 (Nelle Fuller ed., Encyclopedia Britannica, Inc. 1952) (1651).

42. *E.g.*, JOHN V. ORTH, *THE JUDICIAL POWER OF THE UNITED STATES: THE ELEVENTH AMENDMENT IN AMERICAN HISTORY* 7–10 (1987).

43. ALISON L. LACROIX, *THE IDEOLOGICAL ORIGINS OF AMERICAN FEDERALISM* 113, 120, 127 (2010).

44. BERNARD BAILYN, *THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION* 198 (1967); *see also* GORDON S. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC 1776–1787*, at 344–54 (1969) (discussing the founding generation’s adaptation of English ideas of sovereignty).

45. *Seminole Tribe v. Florida*, 517 U.S. 44, 102–03 (1996) (Souter, J., dissenting) (citing Louis L. Jaffe, *Suits Against Governments and Officers: Sovereign Immunity*, 77 *HARV. L. REV.* 1, 3–4 (1963)).

46. *Id.* at 103; *see, e.g.*, *United States v. Lee*, 106 U.S. (16 Otto) 196, 204–08 (1882) (discussing the continued force of sovereign immunity in American law).

47. *See, e.g.*, *Seminole Tribe*, 517 U.S. at 95–98 (Stevens, J., dissenting) (arguing that traditional monarchist arguments for sovereign immunity do not apply in America; “[i]n this country the sovereignty of the individual States is subordinate both to the citizenry of each State and to the supreme law of the federal sovereign”).

sovereignty, freedom and independence.”<sup>48</sup> But the 1789 Constitution required considerably more theoretical gymnastics. James Wilson, the leading Federalist theorist on questions of sovereignty, thus insisted that the supreme power “resides in the PEOPLE, as the fountain of government,” who could then “distribute one portion of power to the more contracted circle called State governments; they can also furnish another proportion to the government of the United States.”<sup>49</sup> Or, as Justice Anthony Kennedy put it in 1995, “[t]he Framers split the atom of sovereignty.”<sup>50</sup>

Sovereign immunity entered into the Founding-era debate by way of Antifederalist concerns about Article III’s provision for federal court jurisdiction over “controversies . . . between a State and Citizens of another State” and “between a State . . . and foreign States, Citizens or Subjects.”<sup>51</sup> The fear was that these provisions—generally denominated the “Citizen-State Diversity Clauses”—would not only create federal jurisdiction but also override the states’ traditional immunity from suit.<sup>52</sup> That fear took on particular urgency in light of considerable outstanding debts that state governments owed both to creditors for Revolutionary War expenditures, as well as potential suits by persons disputing land titles under state law and by British citizens under the peace treaty of 1783.<sup>53</sup> Federalists responded to these concerns primarily by denying that Article III would do anything of the kind.<sup>54</sup>

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48. ARTICLES OF CONFEDERATION of 1781, art. II; *see also* Caleb Nelson, *Sovereign Immunity as a Doctrine of Personal Jurisdiction*, 115 HARV. L. REV. 1559, 1577 (2002) (citing historical evidence that the Articles created a “confederate republic” of “sovereign and independent States” (quoting E. DE VATTEL, *THE LAW OF NATIONS*, bk. I, § 10, at 12 (James Brown Scott, ed., Charles G. Fenwick trans., Carnegie Inst. of Wash. 1916) (1758))).

49. James Wilson, *quoted in* PENNSYLVANIA AND THE FEDERAL CONSTITUTION 1787–1788, at 302, 316 (John Bach McMaster & Frederick D. Stone eds., 1888); *see also* FORREST McDONALD, *NOVUS ORDO SECLORUM: THE INTELLECTUAL ORIGINS OF THE CONSTITUTION* 278 (1985) (discussing the Federalists’ view).

50. *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 838 (1995) (Kennedy, J., concurring).

51. U.S. CONST. art. III, § 2.

52. *Seminole Tribe*, 517 U.S. at 142–43 (Souter, J., dissenting); 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, 1047–54 (1983); Nelson, *Sovereign Immunity*, *supra* note 48, at 1580.

53. William A. Fletcher, *The Diversity Explanation of the Eleventh Amendment: A Reply to Critics*, 56 U. CHI. L. REV. 1261, 1271 (1989); *see also* CLYDE E. JACOBS, *THE ELEVENTH AMENDMENT AND SOVEREIGN IMMUNITY* 43–64 (1972) (discussing early suits brought against state governments to collect on such debts).

54. The exception was Edmund Randolph, who argued that the Constitution would “render valid and effective existing claims” against the States and that this was a feature, not a bug, in the new Constitution. 3 JONATHAN ELLIOT, *THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION* 573 (2d ed. 1836). But “James Madison, John Marshall, and Alexander Hamilton all appear to have believed that the common-law immunity from suit would survive the ratification of Article III, so as to be at a State’s disposal when jurisdiction

Alexander Hamilton, for example, articulated a strong vision of state sovereign immunity in Federalist No. 81:

It is inherent in the nature of sovereignty, not to be amenable to the suit of an individual *without its consent*. This is the general sense and the general practice of mankind; and the exemption, as one of the attributes of sovereignty, is now enjoyed by the government of every state in the union. Unless therefore, there is a surrender of this immunity in the plan of the convention, it will remain with the states, and the danger intimated must be merely ideal.<sup>55</sup>

Hamilton thus assured the Antifederalists that “there is no colour 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.”<sup>56</sup> These Federalists insisted that “while Article III extended the federal government’s judicial power to various categories of ‘Cases’ and ‘Controversies,’ background rules of law kept individuals from making an unconsenting state party to a ‘Case’ or ‘Controversy’ in the first place.”<sup>57</sup>

Not long after ratification, however, the Supreme Court’s first landmark decision shattered this apparent consensus. *Chisholm v. Georgia*<sup>58</sup> was a lawsuit brought by Alexander Chisholm, the executor of the estate of Robert Farquhar, a deceased South Carolina merchant.<sup>59</sup> Chisholm sought to recover a debt for war materiel that Farquhar had provided to Georgia during the Revolutionary War.<sup>60</sup> Both Chisholm and Farquhar were South Carolinians, and so the case fell within Article III by virtue of the Citizen-State Diversity Clause.<sup>61</sup> Georgia refused to appear, protesting that it was immune from suit, but the Supreme Court held that it had jurisdiction.<sup>62</sup> Writing *seriatim*, four

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would depend on diversity.” *Seminole Tribe*, 517 U.S. at 143–44 (Souter, J., dissenting) (first citing ELLIOT, *supra*, at 533 (James Madison), 556 (John Marshall); and then citing THE FEDERALIST NO. 81, at 548–49 (Alexander Hamilton) (Jacob E. Cooke ed., 1961)); see also DAVID P. CURRIE, THE CONSTITUTION IN THE SUPREME COURT: THE FIRST HUNDRED YEARS 1789–1888, at 18 (1985) (noting that “Madison and Marshall flatly told the Virginia ratifying convention that article III would not subject unwilling states to suits by individuals”).

55. THE FEDERALIST NO. 81, *supra* note 54, at 548–49; see also Nelson, *Sovereign Immunity*, *supra* note 48, at 1577–79 (marshalling evidence that Hamilton’s views were widely shared).

56. THE FEDERALIST NO. 81, *supra* note 54, at 549.

57. Nelson, *Sovereign Immunity*, *supra* note 48, at 1587; see also *id.* at 1594 (noting that this was the understanding of several state ratifying conventions).

58. 2 U.S. (2 Dall.) 419 (1793).

59. JACOBS, *supra* note 53, at 47.

60. Doyle Mathis, *Chisholm v. Georgia: Background and Settlement*, 54 J. AM. HIST. 19, 20–21 (1967).

61. Bradford R. Clark, *The Eleventh Amendment and the Nature of the Union*, 123 HARV. L. REV. 1817, 1878–79 (2010).

62. CURRIE, *supra* note 54, at 14; JACOBS, *supra* note 53, at 48. Mr. Farquhar had originally filed the case in the U.S. Circuit Court in Georgia, but Justice Iredell, sitting on circuit, dismissed the case in part on the ground that the Supreme Court’s jurisdiction over suits involving a state was

of the Court's five Justices rejected sovereign immunity as not only counter to the plain text of Article III but also contrary to principles of republican government, American federalism, and "general jurisprudence."<sup>63</sup> Justice Iredell dissented, emphasizing that Congress had enacted no statute authorizing any federal court to exercise jurisdiction against a state defendant and expressing doubt that it could constitutionally do so.<sup>64</sup>

*Chisholm* went over badly.<sup>65</sup> Many state legislatures adopted resolutions calling on Congress to act; Virginia, for example, urged it "to obtain such amendments in the constitution of the United States, as will remove or explain any clause or article of the said constitution, which can be construed to imply or justify a decision, that a state is compellable to answer in any suit, by an individual or individuals, in any court of the United States."<sup>66</sup> Within two years, Congress proposed and the states ratified one of the Constitution's "most baffling provisions."<sup>67</sup>

The Eleventh Amendment provides as follows:

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.<sup>68</sup>

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exclusive. James Iredell's Circuit Court Opinion (Oct. 21, 1791), in 5 THE DOCUMENTARY HISTORY OF THE SUPREME COURT OF THE UNITED STATES 1789-1800, at 148, 153-54 (Maeva Marcus ed., 1994) [hereinafter DOCUMENTARY HISTORY]. Following Iredell's recommendation, Farquhar's estate re-filed the case in the original jurisdiction of the Supreme Court. Kurt T. Lash, *Leaving the Chisholm Trail: The Eleventh Amendment and the Background Principle of Strict Construction*, 50 WM. & MARY L. REV. 1577, 1629-31 (2009).

63. See *Chisholm*, 2 U.S. (2 Dall.) at 450-51 (opinion of Blair, J.) (relying on the text of Article III); *id.* at 453-58 (opinion of Wilson, J.) (discussing "general jurisprudence"); *id.* at 471-73 (opinion of Jay, C.J.) (discussing nature of sovereignty in a republican government). See generally CURRIE, *supra* note 54, at 14-16 (summarizing the opinions); Lash, *supra* note 62, at 1632-35 (same).

64. *Chisholm*, 2 U.S. (2 Dall.) at 433-34, 449 (opinion of Iredell, J.); see also Clark, *supra* note 61, at 1883-85 (discussing Iredell's dissent and accompanying memorandum).

65. See Fletcher, *Historical Interpretation*, *supra* note 52, at 1058 ("The reaction to *Chisholm* was immediate and hostile."); Lash, *supra* note 62, at 1649 ("Although some supported the majority's decision, the reaction in the main was broadly, and strongly, negative."); see also *Hans v. Louisiana*, 134 U.S. 1, 11 (1890) (averring that *Chisholm* "created such a shock of surprise throughout the country that, at the first meeting of Congress thereafter, the Eleventh Amendment to the Constitution was almost unanimously proposed, and was in due course adopted by the legislatures of the States").

66. JOURNAL OF THE HOUSE OF DELEGATES OF THE COMMONWEALTH OF VIRGINIA 99 (Oct. 1793), as reprinted in DOCUMENTARY HISTORY, *supra* note 62, at 338-39; see also Bellia & Clark, *supra* note 24, at 527 n.181 ("Five States adopted similar resolutions and three more were in the process of doing so when Congress proposed the Eleventh Amendment."); Nelson, *Sovereign Immunity*, *supra* note 48, at 1599-1601 (surveying state reactions to *Chisholm*).

67. Fletcher, *Historical Interpretation*, *supra* note 52, at 1033.

68. U.S. CONST. amend. XI.

This text has generally been interpreted in either of two ways. The plain meaning reading “strips the federal courts of jurisdiction in any case in which a state defendant is sued by a citizen not its own, even if jurisdiction might otherwise rest on the existence of a federal question in the suit.”<sup>69</sup> Alternatively, the diversity reading reads the amendment as “simply repeal[ing] the Citizen-State Diversity Clauses of Article III for all cases in which the State appears as a defendant.”<sup>70</sup> On this reading, a federal question or some other non-diversity ground of jurisdiction would still suffice to permit suit against a state in federal court.

The diversity reading is often attributed to dissenting opinions by Justice Brennan and academic work in the late 1970s and 1980s,<sup>71</sup> but its support reaches back much further.<sup>72</sup> For some time virtually all commentators—and, apparently, all the Justices of the Supreme Court<sup>73</sup>—accepted the diversity reading,<sup>74</sup> although the plain-meaning theory has made something of a comeback in the work of Professors Baude and Sachs.<sup>75</sup>

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69. *Seminole Tribe v. Florida*, 517 U.S. 44, 110 (1996) (Souter, J., dissenting). *See also* Lawrence C. Marshall, Commentary, *Fighting the Words of the Eleventh Amendment*, 102 HARV. L. REV. 1342, 1356–71 (1989) (advocating this reading).

70. *Seminole Tribe*, 517 U.S. at 109–10 (Souter, J., dissenting). Some copies of the Constitution, which have attempted to interlineate the amendments into the original text, thus reflect the impact of the Eleventh Amendment simply by striking through the Citizen-State Diversity Clauses in Article III. That presentation introduces a minor error, in that the amendment’s text plainly covers only lawsuits “commenced or prosecuted *against*” a state—leaving jurisdiction available when the state is a plaintiff.

71. *E.g.*, RICHARD H. FALLON, JR., JOHN F. MANNING, DANIEL J. MELTZER & DAVID L. SHAPIRO, HART AND WECHSLER’S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 915–17 (7th ed. 2015) [hereinafter HART & WECHSLER] (discussing *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 247 (1985) (Brennan, J., dissenting)); *Welch v. Tex. Dep’t of Highways and Pub. Transp.*, 483 U.S. 468, 496–97 (1987) (Brennan, J., dissenting); Martha A. Field, *The Eleventh Amendment and Other Sovereign Immunity Doctrines: Part One*, 126 U. PA. L. REV. 515, 539 (1978); Fletcher, *Historical Interpretation*, *supra* note 52, at 1060–61.

72. *See, e.g.*, *Osborn v. Bank of the United States*, 22 U.S. (9 Wheat.) 738, 857–58 (1824) (observing that the Eleventh Amendment “has its full effect, if the constitution be construed as it would have been construed, had the jurisdiction of the Court never been extended to suits brought against a State, by the citizens of another State, or by aliens”). *But see* Baude & Sachs, *supra* note 9, at 640–41 (disputing this reading of *Osborn*).

73. *See, e.g.*, *Franchise Tax Bd. V. Hyatt*, 139 S. Ct. 1485, 1496 (2019) (recognizing that “the terms of [the Eleventh] Amendment address only ‘the specific provisions of the Constitution that had raised concerns during the ratification debates and formed the basis of the *Chisholm* decision’” (quoting *Alden v. Maine*, 527 U.S. 706, 723 (1999))); *Seminole Tribe*, 517 U.S. at 54 (conceding that “the text of the Amendment would appear to restrict only the Article III diversity jurisdiction of the federal courts”). *But see Welch*, 483 U.S. at 484–85, 485 n.17 (plurality opinion) (criticizing the diversity reading).

74. *See, e.g.*, Vicki C. Jackson, *The Supreme Court, the Eleventh Amendment, and State Sovereign Immunity*, 98 YALE L.J. 1, 44 n.179 (1988) (observing that the literature “is remarkably consistent in its evaluation of the historical evidence and text of the amendment as not supporting a broad rule of constitutional immunity”); Nelson, *Sovereign Immunity*, *supra* note 48, at 1615–16, 1616 n. 259 (endorsing the diversity reading).

75. *See* Baude & Sachs, *supra* note 9, at 612 (“The Eleventh Amendment means what it says.”).

Proponents of the diversity reading have emphasized the absence of any practical reason to distinguish between federal question suits brought by in-staters and out-of-staters as well as the inconsistency of the plain meaning reading with the Supreme Court's longstanding practice.<sup>76</sup> The real trouble in state sovereign immunity law, however, is that it tends to ignore *either* reading of the text.

"Under either reading of the Amendment," William Fletcher has observed, "the text does not bar a suit by any plaintiff except an out-of-state or foreign citizen, does not bar a suit not brought in law or equity, and does not bar any suit brought in state court."<sup>77</sup> But the Court has construed the states' immunity far more broadly. The key departure came over a century ago in *Hans v. Louisiana*. *Hans* arose out of another great state debt crisis, engendered by efforts by southern states to jump-start their war-torn economies through public spending and the repudiation, after Reconstruction's end, of those governments' bond obligations by white supremacist "Redeemer" governments.<sup>78</sup> When Louisiana repudiated its bonds, the bondholders—whom Professor Orth described as "evidently men with excellent legal advice and considerable political influence"—undertook a number of innovative strategies to get the delinquent state into federal court.<sup>79</sup> They sought to compel the state auditor to pay interest on the bonds,<sup>80</sup> persuaded the states of New Hampshire and New York to sue *parens patriae* to collect debts owed to their citizens,<sup>81</sup> and—in *Hans*—launched a federal question suit by an *in-stater* asserting that Louisiana had unconstitutionally impaired the obligation of the bond contracts.<sup>82</sup> All these efforts failed.<sup>83</sup>

The central argument in *Hans* was that the plaintiff, "being a citizen of Louisiana, is not embarrassed by the obstacle of the Eleventh Amendment"

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76. *Seminole Tribe v. Florida*, 517 U.S. 44, 112–14 (1996) (Souter, J., dissenting); see also Fletcher, *Diversity*, *supra* note 53, at 1274–75, 1279–83 (explaining why framers of the Eleventh Amendment would have had no reason to foreclose federal question suits by out-of-staters but not in-staters); Jackson, *Supreme Court*, *supra* note 74, at 13–39 (discussing the Supreme Court's exercise of appellate jurisdiction over private suits against state governments originating in state court).

77. William A. Fletcher, *The Eleventh Amendment: Unfinished Business*, 75 NOTRE DAME L. REV. 843, 848 (2000).

78. ORTH, *supra* note 42, at 53, 59–60; ERIC FONER, RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION 1863–1877, at 541 (1988); Nicolas Barreyre, *The Politics of Economic Crises: The Panic of 1873, the End of Reconstruction, and the Realignment of American Politics*, 10 J. GILDED AGE & PROGRESSIVE ERA 403, 407 (2011); Edward A. Purcell, Jr., *The Particularly Dubious Case of Hans v. Louisiana: An Essay on Law, Race, History, and "Federal Courts,"* 81 N.C. L. REV. 1927, 1944–46 (2003); Young, *Its Hour Come Round*, *supra* note 30, at 599–600.

79. ORTH, *supra* note 42, at 63–68.

80. *Louisiana ex rel. Elliott v. Jumel*, 107 U.S. 711, 716 (1883).

81. *New Hampshire v. Louisiana*, 108 U.S. 76, 78–79 (1883).

82. *Hans v. Louisiana*, 134 U.S. 1, 3 (1890); see also ORTH, *supra* note 42, at 66–74 (describing these maneuvers).

83. ORTH, *supra* note 42, at 83.

because “that amendment only prohibits suits . . . brought by the citizens of another State, or by citizens or subjects of a foreign State.”<sup>84</sup> Writing for the majority, Justice Bradley conceded that “[i]t is true the amendment does so read and if there were no other reason or ground for abating his suit, it might be maintainable.”<sup>85</sup> That conclusion, however, would be “no less startling and unexpected than was the original decision [in *Chisholm*].”<sup>86</sup> Bradley’s basic argument—which remains the linchpin of the Court’s sovereign immunity jurisprudence to this day—was that the Eleventh Amendment was written to restore a broader, pre-existing doctrine of state sovereign immunity that *Chisholm* had purported to penetrate.<sup>87</sup> Because *Chisholm* had pierced the states’ immunity in a particular set of circumstances—state lawsuits brought by out-of-staters under the Citizen-State Diversity Clause—the amendment’s corrective was narrowly tailored to those circumstances. But the pre-existing doctrine continued to govern cases, like *Hans*, falling outside the amendment’s text.<sup>88</sup> “The truth is,” Bradley concluded, “that the cognizance of suits and actions unknown to the law, and forbidden by the

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84. 134 U.S. at 10.

85. *Id.* The Court was unanimous as to the result. Justice Harlan concurred only to say, contra the majority’s insistence that *Chisholm* was wrongly decided, “that the decision in that case was based upon a sound interpretation of the Constitution as that instrument then was.” *Id.* at 21 (Harlan, J., concurring).

86. *Id.* at 11 (majority opinion).

87. This argument came through even more clearly in Judge Edward Coke Billings’s opinion for the circuit court:

The effect of the eleventh amendment of the constitution was a construction by amendment of section 2, art. 3, of the constitution; and so far as, under that section, it had been held that the judicial power included a suit between a state and citizens of another state, when the state was defendant, that construction had been reversed. So far as relates to the class of cases to which this case belongs, viz., where a state is sued by its own citizens, the constitution had never included it, but had by implication excluded it.

*Hans v. Louisiana*, 24 F. 55, 65 (C.C.E.D. La. 1885), *aff’d*, 134 U.S. 1 (1890); *see also* Field, *supra* note 71, at 538–46 (understanding the Eleventh Amendment to simply reinstate the earlier understanding of Article III); Nelson, *Sovereign Immunity*, *supra* note 48, at 1612–13 (reading the Court’s view in both *Hans* and more recent cases as a return to Madison and Marshall’s position at the Virginia ratifying convention).

88. *Hans*, 134 U.S. at 12–15; *see also* Allen v. Cooper, 140 S. Ct. 994, 1000 (2020) (observing that “this Court has long understood [the Eleventh] Amendment to ‘stand not so much for what it says’ as for the broader ‘presupposition of our constitutional structure which it confirms’” (quoting *Blatchford v. Native Village of Noatak*, 501 U.S. 775, 779 (1991))); Alden v. Maine, 527 U.S. 706, 722 (1999) (“The text and history of the Eleventh Amendment also suggest that Congress acted not to change but to restore the original constitutional design.”); Ernest A. Young, *Is the Sky Falling on the Federal Government? State Sovereign Immunity, the Section Five Power, and the Federal Balance*, 81 TEXAS L. REV. 1551, 1553–56 (2003) (reviewing NOONAN, *supra* note 4) (arguing that this theory is mistaken but not implausible or incoherent).

law, was not contemplated by the Constitution when establishing the judicial power of the United States.”<sup>89</sup>

Subsequent decisions confirmed state sovereign immunity’s decoupling from the Constitution’s text. In 1921, the Court held that state sovereign immunity barred a suit in the federal admiralty jurisdiction, even though “[i]t is true the Amendment speaks only of suits in law or equity.”<sup>90</sup> A decade later, holders of repudiated southern bonds assigned their debt to a foreign government, knowing that the amendment only covered “citizens or subjects” of a foreign state. Nonetheless, in *Principality of Monaco v. Mississippi*,<sup>91</sup> the Court said that “[m]anifestly, we cannot . . . assume that the letter of the Eleventh Amendment exhausts the restrictions upon suits against non-consenting States. Behind the words of the constitutional provisions are postulates which limit and control.”<sup>92</sup> Much more recently, those postulates barred Indian tribes—supposedly treated as separate sovereigns—from suing a state government.<sup>93</sup> Likewise, the Court extended states’ immunity to suits in state courts and federal administrative fora, notwithstanding that neither forum exercises “the judicial power of the United States” that the Eleventh Amendment limits.<sup>94</sup> No wonder that the

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89. *Hans*, 134 U.S. at 15. Professor Nelson has argued with some force that “the Eleventh Amendment cannot plausibly be read as merely echoing the traditional framework for sovereign immunity.” Nelson, *Sovereign Immunity*, *supra* note 48, at 1614. This view, recently revived by Professors Baude and Sachs, would have state immunity operate differently in cases falling within the Amendment’s textual prohibition. *Id.* at 1615–17; Baude & Sachs, *supra* note 9, at 613 (“Distinguishing the unwritten rules of sovereign immunity from the written rules of the Eleventh Amendment lets us deal with each set of rules on its own terms . . .”). The Court has not adopted this view. *See, e.g.*, *Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 675, 689 (1999) (stating that “a State’s sovereign immunity is ‘a personal privilege which it may waive at pleasure,’” even in suits that “fall foursquare within the literal text of the Eleventh Amendment” (quoting *Clark v. Barnard*, 108 U.S. 436, 447 (1883))). However, Justices Gorsuch and Thomas recently endorsed it. *Compare PennEast Pipeline Co. v. New Jersey*, 141 S. Ct. 2244, 2264 (2021) (Gorsuch, J., dissenting) (urging, in an opinion joined by Justice Thomas, that “[s]tates have two distinct federal-law immunities from suit,” with the text conferring “an ironclad rule for a particular category of diversity suits”), *with id.* at 2262 (majority opinion) (stating that “under our precedents that no party asks us to reconsider here, we have understood the Eleventh Amendment to confer ‘a personal privilege which [a State] may waive at pleasure.’” (alteration in original) (quoting *Clark*, 108 U.S. at 447)). My focus in this Article is on the evolution of the Court’s doctrine, and so the merits of this alternative interpretation will have to await future work.

90. *Ex parte New York*, 256 U.S. 490, 497 (1921); *cf. Am. Ins. Co. v. Canter*, 26 U.S. (1 Pet.) 511, 544 (1828) (observing that the Constitution contemplates admiralty as a distinct class of cases from “law or equity”).

91. 292 U.S. 313 (1934).

92. *Id.* at 322. *Cf. Griswold v. Connecticut*, 381 U.S. 479, 484 (1965) (“[S]pecific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance.”).

93. *Blatchford v. Native Village of Noatak*, 501 U.S. 775, 781 (1991).

94. *See Alden v. Maine*, 527 U.S. 706, 760 (1999) (state courts); *Fed. Mar. Comm’n v. S.C. State Ports Auth.*, 535 U.S. 743, 754 (2002) (administrative agency adjudication).



Court concluded, in *Alden v. Maine*,<sup>95</sup> that the phrase “Eleventh Amendment immunity” is “something of a misnomer, for the sovereign immunity of the States neither derives from, nor is limited by, the terms of the Eleventh Amendment.”<sup>96</sup>

Not all of the Court’s departures from the text have expanded immunity. On the same day that *Hans* came down, the Court held that state sovereign immunity does not extend to municipalities and other political subdivisions despite the Constitution’s general tendency to ignore institutional distinctions between state and local governments.<sup>97</sup> *Ex parte Young*<sup>98</sup> offset *Hans*’s impact on the enforcement of federal law by holding that state immunity does not bar private suits against state officers for prospective relief.<sup>99</sup> This option remains open even when the defendant officer is plainly acting on the state’s behalf,<sup>100</sup> and it is available even if compliance with a federal injunction may require significant state expenditure.<sup>101</sup> Although the Eleventh Amendment is clearly written as a limit on federal subject matter jurisdiction, the Court has generally assumed that it is waivable in much the same manner as an affirmative defense or an objection to personal jurisdiction.<sup>102</sup> Finally, the Court has concluded that the states did implicitly waive certain aspects of their immunity in the “plan of the Convention,” as Hamilton put it.<sup>103</sup> Hence, state sovereign immunity does not bar a suit against a state by the United

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95. 527 U.S. 706 (1999).

96. *Id.* at 713.

97. *Lincoln County v. Luning*, 133 U.S. 529, 530–31 (1890). On American constitutional law’s general tendency to treat local governments as extensions of the states, see *infra* note 363.

98. 209 U.S. 123 (1908).

99. *Id.* at 155–56.

100. Although the Court will look past the nominal defendant and treat a suit as one against the state for Eleventh Amendment purposes if a state is the real party in interest, “a State is the real party in interest generally only when the State is directly liable for a money judgment.” *Port Auth. Trans-Hudson Corp. v. Feeney*, 495 U.S. 299, 316 (1990) (Brennan, J., concurring in part).

101. See, e.g., *Milliken v. Bradley*, 433 U.S. 267, 290 (1977) (holding that a state could be ordered to pay for costly desegregation remedies ordered by the court); see also *Hutto v. Finney*, 437 U.S. 678, 691–92 (1978) (permitting federal courts to award attorneys’ fees against state governments where the fees are ancillary to a claim for prospective relief).

102. E.g., *Wis. Dep’t of Corr. V. Schacht*, 524 U.S. 381, 389 (1998) (“[T]he Eleventh Amendment grants the State a legal power to assert a sovereign immunity defense should it choose to do so. The State can waive the defense.”); *Patsy v. Bd. Of Regents of Fla.*, 457 U.S. 496, 515 n.19 (1982); *Clark v. Barnard*, 108 U.S. 436, 447 (1883). But see *Mansfield, Coldwater & Lake Mich. Ry. Co. v. Swan*, 111 U.S. 379, 384 (1884) (holding that limits on subject matter jurisdiction cannot be waived by the parties and must be raised by the court on its own motion). The Court has suggested that the issue of whether the *Mansfield* rule applies to state immunity remains open. *Schacht*, 524 U.S. at 389–91. But that reservation appears limited to whether conduct in litigation waives the defense—not whether, for example, a state legislature may waive its immunity by statute. See *Nelson, Sovereign Immunity*, *supra* note 48, at 1609–11 (elaborating the “hybrid” nature of state immunity doctrine).

103. See *supra* note 55 and accompanying text.

States government,<sup>104</sup> and states may sue one another in the original jurisdiction of the Supreme Court without immunity barring the action.<sup>105</sup>

*B. Abrogation and the Rehnquist/Roberts Court*

Most of the action in state sovereign immunity law over the past half century has concerned Congress's ability to override or "abrogate" state sovereign immunity by statute. Justice Stevens offered the most persuasive account of legislative abrogation by "emphasiz[ing] the distinction between our *two* Eleventh Amendments."<sup>106</sup> The first, he said, is "the correct and literal interpretation of the plain language of the Eleventh Amendment" captured by the diversity reading.<sup>107</sup> The second "is the defense of sovereign immunity that the Court has added to the text of the Amendment in cases like *Hans v. Louisiana*."<sup>108</sup> Congress cannot abrogate the first, textual immunity; after all, "[a] statute cannot amend the Constitution."<sup>109</sup> But "[w]ith respect to the latter—the judicially created doctrine of state immunity even from suits alleging violation of federally protected rights," Stevens insisted, "Congress has plenary power to subject the States to suit in federal court."<sup>110</sup>

This view would treat the broader, extra-textual immunity recognized in *Hans—Monaco*'s "postulates which limit and control"<sup>111</sup>—as a form of federal common law. Neither *Hans* nor any of the Court's other immunity cases prior to the late twentieth century, after all, involved a federal statute purporting to override the states' immunity.<sup>112</sup> None of those cases, in other words, needed to consider whether the states' immunity was constitutional in stature or a default rule displaceable by ordinary law.<sup>113</sup> One could readily concede, moreover, that the Court did not *create* the states' immunity in *Hans* but rather recognized it as a "backdrop" that the Constitution never meant to

104. *E.g.*, *United States v. Mississippi*, 380 U.S. 128, 140–41 (1965).

105. *E.g.*, *Kansas v. Colorado*, 206 U.S. 46, 83 (1907); *Principality of Monaco v. Mississippi*, 292 U.S. 313, 328–29 (1934) (explaining the exceptions for suits by U.S. or other states as "inherent in the constitutional plan").

106. *Pennsylvania v. Union Gas Co.*, 491 U.S. 1, 23 (1989) (Stevens, J., concurring) (emphasis added).

107. *Id.* (citing *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 247 (1985) (Brennan, J., dissenting), which embraced the diversity reading, *id.* at 260–61).

108. *Id.*

109. *Id.* at 23–24.

110. *Id.* at 24; *see also* *Seminole Tribe v. Florida*, 517 U.S. 44, 100 (1996) (Souter, J., dissenting) (endorsing Justice Stevens's "two Eleventh Amendments" view as "entirely correct").

111. *Principality of Monaco v. Mississippi*, 292 U.S. 313, 322–23 (1934).

112. *Seminole Tribe*, 517 U.S. at 117 (Souter, J., dissenting).

113. One might likewise say that our courts have never needed to determine whether *federal* sovereign immunity is a constitutional or common law principle. Any federal statute purporting to override that principle, after all, could also be treated as waiving it, so that the question whether federal immunity is defeasible by statute never arises.

sweep away.<sup>114</sup> The modern Court has insisted, however, that state sovereign immunity is a constitutional doctrine in *all* cases.<sup>115</sup> Although the Court has accepted statutory abrogation in certain contexts, Congress has had to rely on arguments specific to particular legislative powers.

The key example is *Fitzpatrick v. Bitzer*,<sup>116</sup> which upheld a private plaintiff's right to seek damages against a state agency for employment discrimination under Title VII of the 1964 Civil Rights Act.<sup>117</sup> Congress originally enacted Title VII under the Commerce Clause, but in 1972 it extended the law's coverage to state and local governments pursuant to its power under Section Five of the Fourteenth Amendment.<sup>118</sup> The Court held 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."<sup>119</sup> Even as the Court has expanded its

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114. See *Union Gas*, 491 U.S. at 31–32 (Scalia, J., concurring in part and dissenting in part) (stating that "sovereign immunity, for States as well as for the Federal Government, was part of the understood background against which the Constitution was adopted, and which its jurisdictional provisions did not mean to sweep away," without explaining why that background was insusceptible to statutory modification); Stephen E. Sachs, *Constitutional Backdrops*, 80 GEO. WASH. L. REV. 1813, 1869–72 (2012) (arguing that the pre-constitutional law of state sovereign immunity existed as a backdrop unaltered by Article III).

115. See, e.g., *Franchise Tax Bd. v. Hyatt*, 139 S. Ct. 1485, 1493–94 (2019) (contending that "[t]he Constitution's use of the term 'States'" embodies the "traditional immunity" that the founding generation would have recognized as an established principle); *Alden v. Maine*, 527 U.S. 706, 712 (1999) ("We hold that the powers delegated to Congress under Article I of the United States Constitution do not include the power to subject nonconsenting States to private suits for damages in state courts.").

116. 427 U.S. 445 (1976).

117. *Id.* at 447–48, 456.

118. *Id.* at 449 n.2, 452–53, 453 n.9.

119. *Id.* at 456. This proposition is currently unquestioned at the Court. *Allen v. Cooper*, 140 S. Ct. 994, 1003 (2020). However, commentators have occasionally expressed some skepticism. E.g., Nelson, *Sovereign Immunity*, *supra* note 48, at 1624 n.286. Three distinct rationales for Section Five abrogation exist, only one of which seems workable. The first is that the Fourteenth Amendment is simply later in time than the Eleventh and thus necessarily overrides the latter's positions. E.g., *Union Gas*, 491 U.S. at 42 (Scalia, J., concurring in part and dissenting in part); see also Jesse Michael Feder, Note, *Congressional Abrogation of State Sovereign Immunity*, 86 COLUM. L. REV. 1436, 1442–43 (1986) (considering and rejecting this argument). In other words, 14 > 11. But 14 > 8, too, and no one thinks that Congress can enforce the Fourteenth Amendment by drawing and quartering state officials who discriminate by race. We generally require further evidence to conclude that a subsequent amendment overrides preexisting constitutional provisions. See *id.* at 1443 (noting that the Court applies no "mechanical, chronological test" to reconcile conflicting constitutional provisions). That leads to the second argument, which is that the Reconstruction Amendments specifically restrict the states' sovereign authority. See *Fitzpatrick*, 427 U.S. at 454 ("The prohibitions of the Fourteenth Amendment are directed to the States, and they are to a degree restrictions of State power." (quoting *Ex parte Virginia*, 100 U.S. 339, 346 (1880))). That is true, but it hardly means all federalism bets are off. Historians have shown that the Reconstruction Congress sought to preserve as much of the existing federal structure as possible while protecting the Freedpeople and reforming Southern state governments. E.g., Michael Les

doctrine of state sovereign immunity in many ways, it has held firm to this exception for Fourteenth Amendment legislation.<sup>120</sup>

Initially, the Court also said that Congress could abrogate state immunity pursuant to its Commerce Clause authority. In *Pennsylvania v. Union Gas*,<sup>121</sup> the Court considered a complaint filed against the state of Pennsylvania under the federal Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA).<sup>122</sup> That statute permits a party held liable for costs to clean up a hazardous waste site to seek contribution from other owners or operators of the site, and it includes “States” among the parties against whom contribution may be sought.<sup>123</sup> Justice Brennan’s plurality opinion argued that the commerce power was indistinguishable from the Section Five power, which the Court had found able to abrogate state immunity in *Fitzpatrick*,<sup>124</sup> and that “[i]t would be difficult to overstate the breadth and depth of the commerce power.”<sup>125</sup> This reasoning failed to persuade a majority of the Court, however.<sup>126</sup> And so it was unsurprising that the Court revisited the question less than a decade later.

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Benedict, *Preserving Federalism: Reconstruction and the Waite Court*, 1978 SUP. CT. REV. 39, 40–41. This is why, for example, so much of Reconstruction was grounded in temporary emergency powers arising out of the War. GREGORY P. DOWNS, AFTER APPOMATTOX: MILITARY OCCUPATION AND THE ENDS OF WAR 7 (2015). And Northern states would hardly have been eager to expose themselves to broad financial liability. Hence, the Court has resisted calls to ignore traditional aspects of federalism even when Congress is enforcing the Reconstruction Amendments. *See, e.g.*, *Shelby County v. Holder*, 570 U.S. 529, 556 (2013) (insisting that the constitutional principle of equal sovereignty remains relevant when Congress acts to enforce the Fifteenth Amendment). We need a more specific argument that these Amendments targeted a particular aspect of state sovereignty—state immunity. Hence, the third argument rests upon the ordinary meaning of “enforce” in Section Five of the Fourteenth Amendment (and Section Two of the Thirteenth and Fifteenth). Congress’s enforcement power is “remedial.” *South Carolina v. Katzenbach*, 383 U.S. 301, 326 (1966). So providing traditional remedies like damages seems readily within the scope of Congress’s power. *See City of Boerne v. Flores*, 521 U.S. 507, 518 (1997) (describing “[l]egislation which deters or remedies constitutional violations” as “within the sweep of Congress’ enforcement power”).

120. *E.g.*, *Allen*, 140 S. Ct. at 1003; *Seminole Tribe v. Florida*, 517 U.S. 44, 59 (1996).

121. 491 U.S. 1 (1989).

122. *Id.* at 5; 42 U.S.C. §§ 9601–9675.

123. *Union Gas*, 491 U.S. at 7–8; *see also id.* at 8–13 (concluding that Congress clearly intended to subject states to liability under CERCLA); *id.* at 29–30 (Scalia, J., concurring in part and dissenting in part) (agreeing that CERCLA purports to override the states’ immunity).

124. *See id.* at 16 (plurality opinion) (“Like the Fourteenth Amendment, the Commerce Clause with one hand gives power to Congress while, with the other, it takes power away from the States.”).

125. *Id.* at 20.

126. Justice White, who provided the fifth vote for the Court’s holding that Congress could abrogate state immunity under the commerce power, said that “I agree with the conclusion reached by Justice Brennan . . . although I do not agree with much of his reasoning.” *Id.* at 57 (White, J., concurring in the judgment in part and dissenting in part). Such a statement in an opinion might ordinarily arouse expectations that an alternative rationale is about to follow, but Justice White offered none.

In *Seminole Tribe v. Florida*, the Court considered a seemingly narrow question under the Indian Gaming Regulatory Act (IGRA).<sup>127</sup> That statute, which provided a general framework for gaming on Indian lands, permitted Indian tribes to conduct certain forms of gaming only pursuant to a valid compact between the tribe and the State in which the gaming was to take place.<sup>128</sup> The IGRA required states to “negotiate with the Indian tribe in good faith to enter into such a compact,” and it made that obligation enforceable by a suit in federal court.<sup>129</sup> Although the Court granted certiorari to consider whether Congress might abrogate state sovereign immunity when acting “pursuant to the Indian Commerce Clause,” the Court ultimately treated that question as identical to whether Congress may abrogate state immunities under the Interstate Commerce Clause.<sup>130</sup> The Court overruled *Union Gas* and held that Congress may not use its general commerce power to override the states’ sovereign immunity from private suits.<sup>131</sup> Four Justices, led by Justice Souter, dissented at length.<sup>132</sup>

*Seminole Tribe* led to an extended line of cases in which federal statutory plaintiffs sought ways around state sovereign immunity. Two cases involved the Eleventh Amendment’s textual limitation to suits involving the “judicial power of the United States.” This limit turned out to make no difference. *Alden v. Maine* held that Congress may not abrogate the states’ immunity with respect to suits in *state court*,<sup>133</sup> and *Federal Maritime Commission v. South Carolina State Ports Authority*<sup>134</sup> held that the same immunity extends to suits before federal administrative agencies.<sup>135</sup> Each case is hard to square with the Amendment’s text but plausible if that text is taken as a subset of a broader, preexisting notion of immunity.<sup>136</sup>

After *Seminole Tribe*, Congress was understood to lack power to abrogate state immunities under any enumerated power other than its power to enforce the Reconstruction Amendments.<sup>137</sup> Accordingly, the need to overcome state immunity has become the key driver of litigation exploring

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127. *Seminole Tribe v. Florida*, 517 U.S. 44, 47 (1996); 25 U.S.C. §§ 2701–2721.

128. 25 U.S.C. § 2710(d)(1).

129. *Id.* § 2710(d)(3), (d)(7).

130. *Seminole Tribe*, 517 U.S. at 53, 63.

131. *Id.* at 66, 72–73. The Court also held that the Seminoles’ IGRA suit could not proceed against Florida Governor Lawton Chiles under the doctrine of *Ex parte Young*, 209 U.S. 123 (1908), which held that state sovereign immunity does not bar a suit against a state officer for prospective relief. *Seminole Tribe*, 517 U.S. at 73–76.

132. *Id.* at 100–85 (Souter, J., dissenting); *id.* at 76–100 (Stevens, J., dissenting).

133. 527 U.S. 706, 712 (1999).

134. 535 U.S. 743 (2002).

135. *Id.* at 747.

136. See Ernest A. Young, Essay, *Alden v. Maine and the Jurisprudence of Structure*, 41 WM. & MARY L. REV. 1601, 1604 (2000) (exploring how *Alden* prioritized “continuity with the past and the organic development of social institutions over the primacy of text”).

137. *E.g.*, *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 78–80 (2000).

the limits of the Section Five power.<sup>138</sup> With only a few exceptions,<sup>139</sup> the Rehnquist and Roberts Court decisions construing the bounds of Congress's power to enforce the Reconstruction Amendments have involved attempts to abrogate state sovereign immunity.<sup>140</sup>

As the doctrine stands now, two distinct abrogation “tracks” exist under Section Five of the Fourteenth Amendment. On the first track, the statute abrogates *prophylactically*, subjecting states to liability whenever they violate the abrogating statute. Plaintiffs under such statutes need *not* show that the state's conduct violating the statute is also in violation of the Fourteenth Amendment. Prophylactic abrogation requires, however, that the statute be “congruent and proportional” to the underlying constitutional violation.<sup>141</sup> In *Kimel v. Florida Board of Regents*,<sup>142</sup> for example, a plaintiff sued the Florida Board of Regents for violations of the federal Age Discrimination in Employment Act (ADEA) at Florida State University.<sup>143</sup> The Court has held that age is not a suspect classification,<sup>144</sup> so “[s]tates may discriminate on the basis of age without offending the Fourteenth Amendment if the age classification in question is rationally related to a legitimate state interest.”<sup>145</sup> The ADEA, on the other hand, “through its broad restriction on the use of age as a discriminating factor, prohibits substantially more state employment decisions and practices than would likely be held unconstitutional under the applicable equal protection, rational basis standard.”<sup>146</sup> Because the statute swept much more broadly than the

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138. See, e.g., Vicki C. Jackson, *Federalism and the Uses and Limits of Law: Printz and Principle?* 111 HARV. L. REV. 2180, 2209 (1998) (noting that “*Seminole Tribe* has already created incentives to litigate . . . the scope of the Section 5 powers and the substantive reach of Section I of the Fourteenth Amendment”).

139. See, e.g., *City of Boerne v. Flores*, 521 U.S. 507, 517 (1997) (assuming that the Section Five power was the only enumerated option to support the Religious Freedom Restoration Act); *Shelby County v. Holder*, 570 U.S. 529, 550 (2013) (considering whether Congress had adequately justified the Voting Rights Act's differential treatment of states under the Section Five power).

140. E.g., *Allen v. Cooper*, 140 S. Ct. 994, 1001 (2020); *Coleman v. Ct. of Appeals*, 566 U.S. 30, 33 (2012) (plurality opinion); *Tennessee v. Lane*, 541 U.S. 509, 518 (2004); *Nev. Dep't of Hum. Res. v. Hibbs*, 538 U.S. 721, 726 (2003); *Bd. of Trs. of the Univ. of Ala. v. Garrett*, 531 U.S. 356, 363 (2001); *Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank*, 527 U.S. 627, 638–39 (1999).

141. See, e.g., *Florida Prepaid*, 527 U.S. at 637–39 (quoting *City of Boerne*, 521 U.S. at 519–20). “Prophylactic” legislation under Section Five typically restricts state action that is not itself unconstitutional, but which is for some reason difficult to distinguish from unconstitutional action in practice. Hence, Congress may sweep in some constitutional state behavior in order to catch unconstitutional behavior. The *City of Boerne* test is designed to ensure that Section Five legislation does not regulate so much constitutional behavior that the statute effectively expands the scope of the constitutional prohibition. 521 U.S. at 518–19.

142. 528 U.S. 62 (2000).

143. *Id.* at 70; 29 U.S.C. §§ 621–634.

144. *Mass. Bd. of Ret. v. Murgia*, 427 U.S. 307, 312–13 (1976) (per curiam).

145. *Kimel*, 528 U.S. at 83.

146. *Id.* at 86.

constitutional prohibition, the ADEA failed the congruence and proportionality test and could not abrogate state immunity for all statutory violations.<sup>147</sup> The Court has rejected most, but not all, efforts to prophylactically abrogate state sovereign immunity pursuant to Congress's Section Five power.<sup>148</sup>

The Court recognized a second abrogation track, however, in *United States v. Georgia*.<sup>149</sup> That case involved a paraplegic prison inmate who claimed that his conditions of confinement in a Georgia prison violated Title II of the Americans with Disabilities Act (ADA).<sup>150</sup> He also alleged that those conditions violated the Eighth Amendment.<sup>151</sup> Justice Scalia wrote for a unanimous court:

While the Members of this Court have disagreed regarding the scope of Congress's "prophylactic" enforcement powers under § 5 of the Fourteenth Amendment . . . no one doubts that § 5 grants Congress the power to "enforce . . . the provisions" of the Amendment by creating private remedies against the States for *actual* violations of those provisions . . . . This enforcement power includes the power to abrogate state sovereign immunity by authorizing private suits for damages against the States . . . . Thus, insofar as Title II creates a private cause of action for damages against the States for conduct that *actually* violates the Fourteenth Amendment, Title II validly abrogates state sovereign immunity.<sup>152</sup>

Under *Georgia*, then, a plaintiff may sue a state for damages under a statute purporting to abrogate state immunity, whether or not that statute would pass muster as a prophylactic abrogation, so long as the plaintiff alleges not only a statutory but a constitutional violation as well. Two things are particularly interesting about *Georgia* and its as-applied abrogation theory. One is that, unlike all the other state sovereign immunity cases other than *Allen*, the Court

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147. *Id.* at 82–83.

148. *E.g.*, *Allen v. Cooper*, 140 S. Ct. 994, 1007 (2020); *Coleman v. Ct. of Appeals*, 566 U.S. 30, 43–44 (2012) (plurality opinion); *Bd. of Trs. of the Univ. of Ala. v. Garrett*, 531 U.S. 356, 374 (2001); *Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank*, 527 U.S. 627, 647–48 (1999); *Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 675 (1999). *But see* *Tennessee v. Lane*, 541 U.S. 509, 533–34 (2004) (upholding the abrogation statute); *Nev. Dep't of Hum. Res. v. Hibbs*, 538 U.S. 721, 737–40 (2003) (same). *Lane* and *Hibbs* suggest that prophylactic abrogation is more likely to succeed when the underlying constitutional principle that the statute enforces is one implicating heightened scrutiny of government action. *See Lane*, 541 U.S. at 522–23 (observing that in that case, the statute was enforcing various constitutional guarantees of access to the courts, "infringements of which are subject to more searching judicial review"); *Hibbs*, 538 U.S. at 728–29 (noting that the statute in question prohibited gender-based discrimination that is "subject to heightened scrutiny").

149. 546 U.S. 151 (2006).

150. *Id.* at 154–55.

151. *Id.* at 156.

152. *Id.* at 158–59.

was unanimous.<sup>153</sup> The other is that, notwithstanding the apparent likelihood that many plaintiffs—especially in the intellectual property area—might be able to make out actual constitutional violations, the lower courts have so far upheld *Georgia* claims in a remarkably small number of cases.<sup>154</sup>

Because the scope of statutory abrogation remains narrow, attention has focused on alternatives to abrogation for getting around state sovereign immunity. The first set of alternatives involve state waivers of immunity. Despite the Eleventh Amendment’s phrasing as a limit on federal subject matter jurisdiction, state sovereign immunity has historically been an affirmative defense and, as such, subject to waiver.<sup>155</sup> The interesting question, of course, is what amounts to a waiver. Waivers of state sovereign immunity must be “unequivocally expressed”;<sup>156</sup> they are construed narrowly,<sup>157</sup> and the Court has rejected “constructive” waiver inferred from a state’s decision to engage in an activity it knows to be regulated by federal law.<sup>158</sup> Congress can, however, offer benefits to state governments conditioned on a waiver of sovereign immunity.<sup>159</sup> Such conditions must meet tests of clear statement and non-coerciveness under the Court’s

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153. *Id.* at 152.

154. For a prevailing *Georgia* claim, see *Alaska v. EEOC*, 564 F.3d 1062, 1068, 1071 (9th Cir. 2009), which permitted suit under the abrogation provision of the Government Employee Rights Act where sex discrimination plaintiff alleged actual constitutional violations. For more typical outcomes, see, for example, *Canada Hockey, L.L.C. v. Texas A&M University Athletic Department*, No. 20-20503, 2022 WL 445172, at \*7–8 (5th Cir. Feb. 14, 2022), which rejected *Georgia* claims against state university by construing takings and due process protections for intellectual property very narrowly, and *National Association of Boards of Pharmacy v. Board of Regents of the University System of Georgia*, 633 F.3d 1297, 1300, 1315–19 (11th Cir. 2011), which rejected a claim under the Copyright Remedies Clarification Act because the plaintiffs failed to argue that state law remedies were so “inadequate” as to amount to “an actual due process violation.”

155. See, e.g., *Clark v. Barnard*, 108 U.S. 436, 447 (1883) (stating that immunity is “a personal privilege which [the state] may waive at pleasure”). Similarly, *federal* sovereign immunity is characterized by broad statutory waivers—such as the Federal Tort Claims Act or the Tucker Act for non-tort claims—the terms of which dominate federal sovereign immunity jurisprudence. See HART & WECHSLER, *supra* note 71, at 896–904 (surveying statutory waivers of federal immunity).

156. *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 99 (1984).

157. See *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 241 (1985) (citing *Smith v. Reeves*, 178 U.S. 436, 441 (1900)) (noting that a general state statutory waiver of immunity will be construed to extend only to suits in *state* court without some indication of specific intent to waive immunity in *federal* court as well).

158. See *Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 676–83 (1999) (overruling *Parden v. Terminal Ry. of the Ala. State Docks Dep’t*, 377 U.S. 184 (1964), which had recognized constructive waivers, *id.* at 192).

159. See *Atascadero*, 473 U.S. at 247 (acknowledging that Congress may “condition participation” in federal programs “on a State’s consent to waive its constitutional immunity” when Congress manifests “a clear intent” to do so).



Spending Clause precedents—tests that may have become more stringent in recent years.<sup>160</sup>

The Court has also recognized a quite different waiver theory, however, grounded not in contemporary concessions by state governments but rather in the original constitutional bargain itself. In *Central Virginia Community College v. Katz*,<sup>161</sup> the Court held that state sovereign immunity did not bar a suit by a federally appointed bankruptcy trustee against a state institution to recover a preferential transfer by the debtor.<sup>162</sup> Writing for the Court, Justice Stevens determined that the States had waived their immunity to bankruptcy claims “in the plan of the Convention”—that is, the Bankruptcy Clause of Article I “reflects the States’ acquiescence . . . to subordinate [their immunity] to the pressing goal of harmonizing bankruptcy law.”<sup>163</sup> *Katz* naturally raised the question of what *other* federal powers might also support plan-of-the-Convention waivers. Although the Court eschewed any “general, ‘clause-by-clause’ reexamination of Article I” for such waivers in *Allen*,<sup>164</sup> the Court surprised many observers by finding waivers under the federal eminent domain power and the war power in the following two terms.<sup>165</sup> Although the Court insists that plan-of-the-Convention waiver is conceptually distinct from the Article I abrogation rejected in *Seminole Tribe*,<sup>166</sup> that assertion seems hard to defend.<sup>167</sup>

The second set of routes around state sovereign immunity involves suits against state officers. Under the “party of record rule,” the Supreme Court has long distinguished sharply between suits naming state governmental institutions as defendants and those directed against the state’s officers—even though any government entity acts only through its officers, and many

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160. See, e.g., *Nat’l Fed’n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 585 (2012) (opinion of Roberts, C.J.) (invalidating the Affordable Care Act’s Medicaid Expansion under the spending power); *Sossamon v. Texas*, 563 U.S. 277, 285, 290–91 (2011) (holding that a spending condition subjecting states to “appropriate relief” was not sufficiently clear to indicate waiver of immunity to damages claims). See generally Lynn A. Baker, *The Spending Power After NFIB v. Sebelius*, 37 HARV. J.L. & PUB. POL’Y 71 (2014) (surveying the scope of the spending power).

161. 546 U.S. 356 (2006).

162. *Id.* at 379.

163. *Id.* at 362, 373.

164. *Allen v. Cooper*, 140 S. Ct. 994, 1003 (2020) (suggesting that *Katz* was “a good-for-one-clause-only holding”).

165. See *PennEast Pipeline Co. v. New Jersey*, 141 S. Ct. 2244, 2262–63 (2021) (recognizing a plan-of-the-Convention waiver for suits exercising the federal eminent domain power); *Torres v. Tex. Dep’t of Pub. Safety*, 142 S. Ct. 2455, 2466 (2022) (recognizing a plan-of-the-Convention waiver for statutes enacted pursuant to federal war powers).

166. *Katz*, 546 U.S. at 379; *Seminole Tribe v. Florida*, 517 U.S. 44, 73 (1996).

167. See *infra* subpart II(B).

officer suits implicate states as the real party in interest.<sup>168</sup> Under the landmark case of *Ex parte Young*, plaintiffs may generally sue state officers in their official capacities for prospective relief (injunctions and declaratory judgments), which means they may require states to conform their future conduct to federal law.<sup>169</sup> Moreover, plaintiffs may also sue state officers in their individual capacities for money damages, subject to qualified immunity and similar defenses, which will often provide some likelihood of financial compensation for past injury.<sup>170</sup> The Court has occasionally restricted *Ex parte Young* relief in recent years,<sup>171</sup> and it has raised the qualified immunity bar to damages suits against individual officers significantly,<sup>172</sup> but in principle (and often in practice) meaningful relief against officers remains available.

### C. Seminole Tribe as Paradigm

This sketch of state sovereign immunity doctrine and its development necessarily glosses over any number of important wrinkles, but it should provide enough groundwork to assess where we stand now. My aim is to understand the regime of remedies against state governmental actors as at least a quasi-coherent whole and to assess how that regime has changed and is changing still. Like many attempting to understand changing ways of thinking about a broad range of fields, I looked to Thomas Kuhn's work on the history of science. Although certainly not equating the two fields, Kuhn

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168. See *Osborn v. Bank of the United States*, 22 U.S. (9 Wheat.) 738, 797 (1824) (“That the suit concerns the public acts of an officer of the State government, who is one of the defendants, does not make the State itself a necessary party.”); HART & WECHSLER, *supra* note 71, at 907–08 (collecting cases); John C. Jeffries, Jr., *In Praise of the Eleventh Amendment and Section 1983*, 84 VA. L. REV. 47, 49–50 (1998) (“Very generally, a suit against a state officer is functionally a suit against the state, for the state defends the action and pays any adverse judgment.”).

169. *Ex parte Young*, 209 U.S. 123, 159–60 (1908); DOUGLAS LAYCOCK, *MODERN AMERICAN REMEDIES* 482–83 (3d ed. 2002) (explaining that “the dominant theme in governmental immunity law is that injunctions are the preferred remedy”). The Court has also held that state immunity does not bar attorneys’ fee awards incidental to claims for injunctive relief. *Hutto v. Finney*, 437 U.S. 678, 690–91 (1978). This makes it possible to fund much civil rights litigation under 42 U.S.C. § 1988.

170. *E.g.*, *Hafer v. Melo*, 502 U.S. 21, 28 (1991); Jeffries, *supra* note 168, at 59 (stating that the Eleventh Amendment “functions to force civil rights plaintiffs to sue state officers rather than the states themselves, thus triggering qualified immunity”).

171. See, e.g., *Idaho v. Coeur d’Alene Tribe*, 521 U.S. 261, 270 (1997) (refusing to apply *Young* to a quiet title action involving special state sovereignty interests); *Seminole Tribe*, 517 U.S. at 75–76 (disallowing relief under *Young* where the statutory scheme suggested relief could run only against the state itself). *But see Verizon Md. Inc. v. Pub. Serv. Comm’n*, 535 U.S. 635, 645 (2002) (rejecting suggestions to narrow *Ex parte Young* more generally).

172. See, e.g., William Baude, *Is Qualified Immunity Unlawful?*, 106 CALIF. L. REV. 45, 82–88 (2018) (arguing that the Supreme Court has aggressively enforced qualified immunity in a way that effectively raises the bar for plaintiffs seeking to overcome the defense). *But see* Katherine Mims Crocker, *The Supreme Court’s Reticent Qualified Immunity Retreat*, 71 DUKE L.J. ONLINE 1, 7–13 (2021) (qualifying this picture somewhat based on more recent rulings).

did at times volunteer that a scientific paradigm is “like an accepted judicial decision in the common law.”<sup>173</sup>

Professor Kuhn argued that stable periods of normal science are punctuated by “scientific revolutions” in which one tradition of scientific research or paradigm is replaced by another.<sup>174</sup> Such revolutions involve “the community’s rejection of one time-honored scientific theory in favor of another incompatible with it.”<sup>175</sup> Each produces “a consequent shift in the problems available for scientific scrutiny” as well as in “the standards by which the profession determined what should count as an admissible problem or as a legitimate problem-solution.”<sup>176</sup> By contrast, periods of normal science involve “research firmly based upon one or more past scientific achievements, achievements that some particular scientific community acknowledges for a time as supplying the foundation for its further practice.”<sup>177</sup> Such practice “will seldom evoke overt disagreement over fundamentals,” but Kuhn was at pains to stress both the importance and fascination of such work.<sup>178</sup>

I do not make any strong claims here about the extent to which law is like or unlike science.<sup>179</sup> Rather, I have found Professor Kuhn’s theory useful in suggesting questions to ask about legal development, without relying on that theory to *answer* those questions.<sup>180</sup> My core assertion is that, like Kuhn’s scientific paradigms, some landmark judicial decisions or doctrines come to embody a particular way of thinking about the law that structures future legal inquiry as to related legal questions. I do not claim that this is true of all precedents or doctrines. But some precedents and doctrines seem not just to settle the points within their binding ambit but also to generate broader assumptions and imperatives that influence how any number of open

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173. KUHN, *supra* note 10, at 23. *See generally* Trueblood & Hatfield, *supra* note 25 (discussing Kuhn’s use of legal analogies).

174. KUHN, *supra* note 10, at 5–7, 10–11.

175. *Id.* at 6.

176. *Id.*

177. *Id.* at 10.

178. *Id.* at 11, 24–25.

179. *See, e.g.*, Jeffrey W. Stempel, *New Paradigm, Normal Science, or Crumbling Construct? Trends in Adjudicatory Procedure and Litigation Reform*, 59 BROOK. L. REV. 659, 697 (1993) (observing that “[t]he science discussed by Kuhn primarily concerns itself with decoding the laws of nature. Law seeks to shape and control society at least as much as to reflect or explain it,” and that “law is a political institution as well as a learned discipline . . . [It is] expected to be responsive to public concern about perceived problems, while science is given more insulation” (footnote omitted)).

180. I am hardly the only legal academic to have taken this tack. *See, e.g.*, Jeremy K. Kessler & David E. Pozen, *Working Themselves Impure: A Life Cycle Theory of Legal Theories*, 83 U. CHI. L. REV. 1819, 1868 (2016) (“A comparison with the work of Professor Thomas Kuhn, in particular, helps to illuminate ways in which the progress of ‘legal science’ does and does not resemble other fields of scientific endeavor.”). *But see* Stempel, *supra* note 179, at 696 (warning against the “pop-culturalization of Kuhn”).

questions may be resolved.<sup>181</sup> Not all precedents with these qualities retain them forever, however.<sup>182</sup> I am interested both in how these sorts of paradigmatic precedents become established and how they shape the law going forward. My hope is both to throw some light on our law of sovereign immunity and to learn something about *stare decisis* in general.

Many things could serve as paradigms in the law. The field of Federal Courts law, for example, has long been thought to contain multiple paradigms within it.<sup>183</sup> Historically speaking, there is a Founding-era paradigm built around the Madisonian Compromise, which emphasizes broad congressional control over the scope of federal court jurisdiction and an assumption of parity between federal and state courts.<sup>184</sup> That paradigm contrasts with a rival worldview grounded in Reconstruction's expansion of both federal constitutional rights against state governments and federal jurisdiction and remedies.<sup>185</sup> Each provides a framework for thinking about new problems. In the present era, these paradigms uneasily coexist in current doctrine.<sup>186</sup> Or we might slice the field quite differently to come up with alternative collections of rival paradigms: Legal Process theory versus more recent approaches grounded in critical theory or law and economics, or the longstanding conflict between private rights and public rights models of adjudication.<sup>187</sup> Viewed from these varying perspectives, the most interesting thing about Federal Courts law might be its *resistance* to the sort of

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181. See, e.g., *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177–78 (1803) (establishing judicial review); *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954) (setting the stage for public law litigation across a broad range of civil rights issues).

182. See, e.g., *Lochner v. New York*, 198 U.S. 45, 64 (1905) (recognizing the right to freedom of contract under the Fourteenth Amendment), *abrogated by* *W. Coast Hotel Co. v. Parrish*, 300 U.S. 379, 391 (1937).

183. Cf. KUHN, *supra* note 10, at 15, 17 (observing that “it remains an open question what parts of social science have yet acquired such paradigms at all” and suggesting that the emergence of a common paradigm may be “unique in its degree to the fields we call science”).

184. See, e.g., HART & WECHSLER, *supra* note 71, at 296–301 (describing the Madisonian Compromise and its implications for federal jurisdiction and parity with state courts).

185. See, e.g., *Monroe v. Pape*, 365 U.S. 167, 182–83 (1961) (emphasizing, as part of the legacy of Reconstruction, the unique role of federal courts and federal remedies to correct the defects of state court proceedings).

186. See, e.g., *Heck v. Humphrey*, 512 U.S. 477, 480, 486–87 (1994) (addressing a § 1983 action by state prisoner for wrongful acts leading to his arrest and conviction by harmonizing the Reconstruction principle that federal plaintiffs need not first go to state court with the principle of *habeas* law, grounded in respect for the role of state courts, that petitioners must first exhaust state remedies).

187. See, e.g., Richard H. Fallon, Jr., *Comparing Federal Courts “Paradigms”*, 12 CONST. COMMENT. 3, 6–13 (1995) (defending the traditional Legal Process paradigm); Michael Wells, *Busting the Hart & Wechsler Paradigm*, 11 CONST. COMMENT. 557, 567–70 (1995) (offering a “pragmatic” paradigm for federal courts law); Curtis A. Bradley & Ernest A. Young, *Unpacking Third-Party Standing*, 131 YALE L.J. 1, 11–14 (2021) (comparing private and public rights models in standing law).

revolution that establishes one paradigm as dominant and its ability to accommodate competing paradigms at once.<sup>188</sup>

My focus here, however, is the extent to which particular doctrinal regimes operate as paradigms in Professor Kuhn's sense. Such regimes will rarely consist of a single decision, although it will often be convenient to use particular cases as shorthand for a broader set of rules and principles. By "the *Seminole Tribe* paradigm," I mean the doctrinal regime featuring the following principles:

1. The American States began as and remain *sovereign* in a meaningful sense, notwithstanding their incorporation into the national Union;<sup>189</sup>
2. Sovereign *immunity* from suit is a key component of that sovereignty;<sup>190</sup>
3. That sovereign immunity is *not limited by the text* of the Eleventh Amendment;<sup>191</sup> and
4. The States' immunity is *constitutional* in stature—that is, not to be overcome by ordinary federal legislation.<sup>192</sup>

These principles come with two important qualifiers:

5. Sovereign immunity will generally be treated like a traditional immunity *defense to personal jurisdiction*, with traditional limitations, rather than a categorical restriction on federal subject matter jurisdiction;<sup>193</sup> and
6. State sovereign immunity remains subject to certain constitutional *side constraints* that limit state sovereignty generally, including those stemming from structural relationships between the national government and the several states as well as Congress's power to enforce the Fourteenth Amendment.<sup>194</sup>

The unanimous court in *Allen* acknowledged each of these principles, except for number 5, which was not at issue in the case. These principles leave many issues unresolved, of course. As Kuhn points out, "the puzzles that constitute normal science exist only because no paradigm that provides a basis for scientific research ever completely resolves all its problems."<sup>195</sup> I address

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188. One might acknowledge the Legal Process paradigm as dominant, moreover, while ascribing that dominance to Legal Process's ability to take a wide variety of perspectives on board. Fallon, *Federal Courts Paradigms*, *supra* note 187, at 8.

189. *Allen v. Cooper*, 140 S. Ct. 994, 1000 (2020).

190. *Id.*

191. *Id.*

192. *Id.* at 1002.

193. *See, e.g.*, *Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 675–76 (1999) (rejecting implicit waivers of state immunity); *Clark v. Barnard*, 108 U.S. 436, 447 (1883) (holding that immunity may be waived); Nelson, *Sovereign Immunity*, *supra* note 48, at 1610–11 (discussing waivers of personal and subject matter jurisdiction).

194. *Allen*, 140 S. Ct. at 1003.

195. KUHN, *supra* note 10, at 79.

some of the more prominent puzzles remaining within the *Seminole Tribe* paradigm in Part III.

I have been speaking of a *Seminole Tribe* paradigm, but the first three of the principles set out above are much older than that decision. Principles 1 and 2 were accepted at the Founding, called into question by *Chisholm*, and reinstated by the Eleventh Amendment. Principle 3 dates back at least as far as *Hans* in 1890, and that decision plausibly claimed to vindicate the Founding Era's broader expectations about when states would and would not be subject to suit.<sup>196</sup> The qualifiers—principles 5 and 6—were likewise well-established prior to the Rehnquist Court. What *Seminole Tribe* adds is proposition 4, that Congress may not abrogate the States' immunity through ordinary legislation. But even that holding did not reverse any prior well-established principle—*Union Gas*'s cryptic minority holding doesn't count—but rather answered a question that largely hadn't come up before. There is more continuity than revolution here.

Nor is it all that accurate to call the modern sovereign immunity cases a “revival” of a previous jurisprudence, although many commentators have described them as part of a broader “Federalist Revival” undertaken by the Rehnquist Court.<sup>197</sup> *United States v. Lopez*,<sup>198</sup> for example, truly revived a notion of judicially-enforceable enumerated national powers that had lain dormant since the New Deal's own judicial “revolution” in 1937.<sup>199</sup> On the sovereign immunity side, however, there simply was no New Deal interregnum during which the Court took a more nationalist turn; the New Deal Court issued no landmark decisions on sovereign immunity, but it upheld that immunity in the smaller cases that it did decide.<sup>200</sup> With few exceptions, “[t]he story of state sovereign immunity is one of gradual but implacable expansion, from the ratification of the Eleventh Amendment itself in 1795” to the Rehnquist and Roberts courts.<sup>201</sup>

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196. *Hans v. Louisiana*, 134 U.S. 1, 10, 12–17 (1890).

197. E.g., Young, *Two Federalisms*, *supra* note 2, at 2–3; see also Jackson, *Printz and Principle*, *supra* note 138, at 2181–82 (discussing “[t]he Court's recent federalist revival”).

198. 514 U.S. 549 (1995).

199. See *id.* at 564–68 (striking down the Gun-Free School Zones Act on the ground that it exceeded Congress's commerce power); compare, e.g., *United States v. E.C. Knight Co.*, 156 U.S. 1, 12–13 (1895) (narrowly construing Congress's commerce power in order to preserve a sphere of exclusive state authority), with *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 36–37 (1937) (announcing a much broader view of Congress's authority).

200. *Ford Motor Co. v. Dep't of Treasury*, 323 U.S. 459, 464–65, 469 (1945); *Great N. Life Ins. Co. v. Read*, 322 U.S. 47, 49–50, 55 (1944); *Worcester Cnty. Trust Co. v. Riley*, 302 U.S. 292, 299–300 (1937); see also Young, *Sky Falling*, *supra* note 88, at 1556 (“No retrenchment in state sovereign immunity law accompanied the general expansion of federal authority after the Civil War; in fact, Reconstruction's primary impact in this context was another state debt crisis that, in turn, caused a new round of *expansion* of state immunities.”).

201. Young, *Sky Falling*, *supra* note 88, at 1556.

Nonetheless, it seems fair to characterize the Rehnquist Court's sovereign immunity jurisprudence as revolutionary in a particular and qualified sense. Although the New Deal Court never issued a state sovereign immunity version of *Wickard v. Filburn*,<sup>202</sup> the New Deal and particularly the Great Society that built upon it did create a broad array of rights against the government and an expectation that they could be asserted in court.<sup>203</sup> Similarly, constitutional law in the twentieth century has witnessed both a "substantive expansion of constitutional rights" that "broadened the conception of legally cognizable interests," as well as a shift from seeing constitutional rights "as shields against governmental coercion" to viewing them as "swords authorizing the award of affirmative relief to redress injury."<sup>204</sup> More crudely, an increase in the sheer scale of government activity at both the national and state levels<sup>205</sup> multiplied the occasions on which individuals might be injured by government action. On the federal side, Congress enacted the Administrative Procedure Act, the Federal Tort Claims Act, and various other measures waiving sovereign immunity and permitting challenges to government action.<sup>206</sup> These measures tended to create a broad norm of accountability for unlawful government action, such that decisions like *Seminole Tribe* rejecting accountability on immunity grounds have struck many as a radical departure.<sup>207</sup>

On closer examination, the remedial options against states are not so different from those available against the national government, even though federal sovereign immunity is rarely attacked as problematic.<sup>208</sup> In both settings, prospective relief is broadly available, and damages relief may be *more* available against state and local officers than it is against federal ones—at least for constitutional violations—simply because 42 U.S.C. § 1983 is a

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202. 317 U.S. 111, 125 (1942) (interpreting the scope of Congress's commerce power very broadly).

203. CASS R. SUNSTEIN, *AFTER THE RIGHTS REVOLUTION: RECONCEIVING THE REGULATORY STATE* 24–25 (1990); HART & WECHSLER, *supra* note 71, at 74 (observing that "the vast increase in the modern administrative state has created diffuse rights shared by large groups and new legal relationships that are hard to capture in traditional, private law terms" and that, "[a]t the same time, a need has arisen for judicial control of administrative power").

204. HART & WECHSLER, *supra* note 71, at 74–75.

205. *See, e.g.*, Stephen Gardbaum, *New Deal Constitutionalism and the Unshackling of the States*, 64 U. CHI. L. REV. 483, 485–86 (1997) (demonstrating that the New Deal expanded government power and activity at every level).

206. HART & WECHSLER, *supra* note 71, at 896–904.

207. *See, e.g.*, Vicki C. Jackson, *Seductions of Coherence, State Sovereign Immunity, and the Denationalization of Federal Law*, 31 RUTGERS L.J. 691, 692 (2000) (insisting that the Rehnquist Court's sovereign immunity decisions were "inconsistent with the fundamental presumption of the U.S. constitutional system, that the laws of the country provide a remedy for the violation of any vested right"). Professor Jackson traced this principle back much further, all the way to *Marbury*. *Id.* at 692 n.5.

208. *See* Young, *Sky Falling*, *supra* note 88, at 1567–70 (noting that critics of state sovereign immunity are often far more tolerant of federal sovereign immunity).

more robust remedy than the implied *Bivens* right of action.<sup>209</sup> But even incremental expansions of *state* sovereign immunity nonetheless stand out as aberrational because they offend the profound nationalism of post–New Deal legal culture.<sup>210</sup> Hence, Judge John Noonan complained that “[t]he chief practical effect” of the state immunity decisions was “to shield not only state government but many subsidiary state agencies from complying with federal laws enacted for the good of all.”<sup>211</sup> What was revolutionary about the Supreme Court’s state immunity jurisprudence in the late 1990s and the early 2000s was that it reaffirmed an idea—that the states have certain sovereign prerogatives not subject to federal control—that contemporary legal culture had largely rejected even though that rejection had never actually extended to the specific immunity doctrines at issue.

That revolution—limited as it was—was highly significant for the law of federalism.<sup>212</sup> On the most general level, the state immunity cases played a critical role in shifting paradigms from the New Deal worldview that rejected any notion of state sovereignty whatsoever to a world in which state sovereignty is a fact of life.<sup>213</sup> That paradigm is evident across federalism doctrines, from an expansively construed anti-commandeering doctrine<sup>214</sup> to

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209. See *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 392, 397 (1971) (recognizing an implied right of action under the Constitution itself for certain kinds of police misconduct by federal officers); Laurence H. Tribe, *Death by a Thousand Cuts: Constitutional Wrongs Without Remedies After Wilkie v. Robbins*, 2006–2007 CATO SUP. CT. REV. 23, 26 (“[T]he best that can be said of the *Bivens* doctrine is that it is on life support with little prospect of recovery.”). In some areas, such as intellectual property, federal law does authorize monetary remedies against the United States that are broader than what state sovereign immunity would permit—although not as broad as what a plaintiff could obtain in the absence of sovereign immunity. 28 U.S.C. § 1498; Daniel J. Meltzer, *Overcoming Immunity: The Case of Federal Regulation of Intellectual Property*, 53 STAN. L. REV. 1331, 1339–40 (2001).

210. E.g., 1 BRUCE ACKERMAN, *WE THE PEOPLE: FOUNDATIONS* 105–30 (1991); Cass R. Sunstein, *Constitutionalism After the New Deal*, 101 HARV. L. REV. 421, 425 (1987) (stating that the New Deal “produced a massive shift in the relationship between the federal government and the states” and “rejected traditional notions of federalism”).

211. NOONAN, *supra* note 4, at 85.

212. In retrospect, this reaffirmation of a basic notion of state sovereignty seems both more significant and more benign than I gave it credit for in my earlier work. See Young, *Future of Federalism*, *supra* note 3, at 58–65 (worrying that focusing on state sovereign immunity might undermine more functionally beneficial expansions of federalism-based limits on national power).

213. Compare, e.g., Heather K. Gerken, *Federalism and Nationalism: Time for a Détente?*, 59 ST. LOUIS U. L.J. 997, 1009–10 (2015) (suggesting that state sovereignty is now largely “beside the point”), and Sotirios A. Barber, *Defending Dual Federalism: A Self-Defeating Act*, in *NOMOS LV: FEDERALISM AND SUBSIDIARITY* 3, 3 (James E. Fleming & Jacob T. Levy eds., 2014) (same), with *Allen v. Cooper*, 140 S. Ct. 994, 1000 (2020) (unanimously acknowledging that “each state is a sovereign entity in our federal system” (quoting *Seminole Tribe v. Florida*, 517 U.S. 44, 54 (1996))).

214. See *Murphy v. NCAA*, 138 S. Ct. 1461, 1481 (2018) (holding that the anti-commandeering doctrine forbids any “direct command to the States”).



reinvigorated limits on conditional federal spending and implied powers<sup>215</sup> to recognition of the states' sovereign equality and standing as litigants.<sup>216</sup> Nor is this acceptance just the work of the Supreme Court's conservative majority. Increased political polarization of the national electorate has led both political parties to appreciate the virtues of de-nationalizing some issues.<sup>217</sup> And modern state governments enjoy significantly increased institutional capacity that enhances their ability to act as players in national politics and address important problems at home.<sup>218</sup>

My focus here, however, is on the narrower doctrinal level of remedies for government wrongdoing. As I have explained, the Court's unanimous opinion in *Allen* acknowledged all the crucial elements of the *Seminole Tribe* paradigm. The remainder of this Article considers how our law of state sovereign immunity transitioned from a state of revolution to one of normal science, whether post-*Allen* legal developments are likely to undermine the current paradigm, whether it is functionally well-adapted to the underlying imperatives of our remedial ecosystem, and finally what remaining questions are likely to preoccupy participants in that ecosystem going forward.

## II. The Normalization of State Sovereign Immunity Law

For much of the past half-century, state sovereign immunity has divided the Supreme Court. The key landmarks in the development of the contemporary jurisprudence—in particular, the cases from *Seminole Tribe* in 1996 through *Board of Trustees of the University of Alabama v. Garrett*<sup>219</sup> in 2001 and *South Carolina Ports Authority* in 2002—were 5–4 decisions split along the Rehnquist Court's usual ideological divide.<sup>220</sup> Immunity decisions

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215. See *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 559 (2012) (opinion of Roberts, C.J.) (recognizing limits on Congress's "necessary and proper" power); *id.* at 581–82 (finding that conditions on the Affordable Care Act's expansion of Medicaid were coercive and thus exceeded Congress's spending power).

216. See *Shelby County v. Holder*, 570 U.S. 529, 544 (2013) (recognizing "a 'fundamental principle of equal sovereignty' among the States" (quoting *Nw. Austin Mun. Util. Dist. No. One v. Holder*, 557 U.S. 193, 203 (2009))); *Massachusetts v. EPA*, 549 U.S. 497, 520 (2007) (recognizing that states are "entitled to special solicitude in our standing analysis").

217. *E.g.*, Kathleen M. Sullivan, *From States' Rights Blues to Blue States' Rights: Federalism After the Rehnquist Court*, 75 *FORDHAM L. REV.* 799, 800–01 (2006).

218. See, *e.g.*, Margaret H. Lemos & Ernest A. Young, *State Public-Law Litigation in an Age of Polarization*, 97 *TEXAS L. REV.* 43, 67–68, 67 n.106 (2018) (discussing how the increased institutional capacity of state solicitor generals' offices has enabled states to play a more prominent role in national public litigation).

219. 531 U.S. 356 (2001).

220. 535 U.S. 743, 746 (2002). That pattern saw Chief Justice Rehnquist and Justices O'Connor, Scalia, Kennedy, and Thomas typically voting to restrict national power, with Justices Stevens, Souter, Ginsburg, and Breyer typically voting to uphold it. See, *e.g.*, Neil S. Siegel, Comment, *State Sovereign Immunity and Stare Decisis: Solving the Prisoners' Dilemma Within the*

fitting this pattern occurred as late as 2019, even as particular Justices came and went.<sup>221</sup> But more fundamental change was evident as early as 2003 when the Rehnquist Court upheld the Family Medical Leave Act as a valid abrogation of state immunity pursuant to Section Five of the Fourteenth Amendment.<sup>222</sup> It took nearly two more decades for the Court to reach a consensus on the basic rules governing state sovereign immunity in *Allen*.<sup>223</sup>

This Part considers the arc of the Court's state sovereign immunity jurisprudence between 2003 and 2022 as an instance of doctrinal normalization. That arc marks the end of the Court's revolution in immunity law and the commencement of what Thomas Kuhn might recognize as a period of normal science in the field. Ending the revolution seems to have required both a willingness by *Seminole Tribe*'s proponents to set limits on the scope of their revolution, as well as acquiescence by the paradigm's opponents. I next turn to the plan-of-the-Convention waiver cases since *Allen*, which have challenged *Seminole Tribe*'s core principle that immunity may not be overridden through the exercise of Congress's ordinary powers. These cases illustrate that *stare decisis*—under which legal actors may accept the binding force of precedents without respecting their underlying principles' generative force—may be insufficient to establish an enduring legal paradigm. Finally, I examine the pragmatic equilibrium established under *Seminole Tribe* as a factor contributing to the paradigm's stability, notwithstanding important challenges to its principles. The paradigm's ability to satisfy the basic demands of a remedial system—plausibly balancing protection of important public interests in government financial stability against the need to generally keep government within legal bounds—may prop up the paradigm for some time, even as its intellectual coherence comes under attack.

#### A. *Revolution's End?*

To see how the Rehnquist Court's immunity revolution began to end, it will help to start with *Garrett*. That case was the last in an unbroken series of decisions, beginning in *Seminole Tribe*, extending the reach of state sovereign immunity and invalidating congressional attempts to abrogate it. Patricia Garrett was the Director of Nursing for OB/GYN/Neonatal Services

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*Court*, 89 CALIF. L. REV. 1165, 1168–69 (2001) (observing that “the five-to-four voting pattern” in the Court's Eleventh Amendment jurisprudence has “become as predictable as the New York Yankees winning the World Series”).

221. *See* Franchise Tax Bd. v. Hyatt, 139 S. Ct. 1485, 1499 (2019) (holding that the constitutional principle of sovereign immunity bars suits against nonconsenting states in the courts of another state).

222. *Nev. Dep't of Hum. Res. v. Hibbs*, 538 U.S. 721, 735 (2003).

223. *Allen v. Cooper*, 140 S. Ct. 994 (2020).

at the University of Alabama in Birmingham Hospital.<sup>224</sup> After she was diagnosed with breast cancer and began radiation and chemotherapy treatment, she had to take substantial leave from work and lost her director position.<sup>225</sup> She sued the hospital—an arm of the state of Alabama—under Title I of the Americans with Disabilities Act, which prohibits discrimination in employment on the basis of disability.<sup>226</sup> The question in the Supreme Court was whether the ADA’s provision abrogating state sovereign immunity was a valid exercise of Congress’s power to enforce the Fourteenth Amendment.<sup>227</sup>

The Court held that it was not.<sup>228</sup> Noting prior decisions holding that disability is not a suspect classification, the Court concluded that the ADA prohibited far more state conduct than would fail the rational basis test applicable under the Equal Protection Clause.<sup>229</sup> Two things about *Garrett* matter for present purposes. The first is that, although the Court accepted the basic principle that Congress might use its Section Five power to abrogate state sovereign immunity, it had not upheld an effort to do so since concluding that Section Five was the *only* power that could abrogate state immunities in *Seminole Tribe*,<sup>230</sup> or since articulating the “congruence and proportionality” test in *City of Boerne v. Flores*.<sup>231</sup> Second, the dissenters not only disputed the Court’s application of the *Boerne* test to the ADA but also noted their continued disagreement with the basic holding of *Seminole Tribe*.<sup>232</sup> That disagreement was somewhat more muted in *Garrett*, but it recalled other unusually acrimonious statements by the dissenting nationalists that *stare decisis* principles simply did not apply in this line of cases.<sup>233</sup>

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224. Bd. of Trs. of the Univ. of Ala. v. Garrett, 531 U.S. 356, 362 (2001).

225. *Id.*

226. *Id.*

227. *Id.* at 363–64.

228. *Id.* at 374.

229. *Id.* at 366–67, 372–74 (citing *Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432, 446 (1985), for the proposition that discrimination based on disability is subject only to rational basis review).

230. *Seminole Tribe v. Florida*, 517 U.S. 44, 66 (1996).

231. 521 U.S. 507, 520 (1997).

232. *Garrett*, 531 U.S. at 385–89 (Breyer, J., dissenting); see also *Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 699 (1999) (Breyer, J., dissenting) (“I am not yet ready to adhere to the proposition of law set forth in *Seminole Tribe*.”).

233. See, e.g., *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 97–98 (2000) (Stevens, J., dissenting in part and concurring in part) (“Despite my respect for *stare decisis*, I am unwilling to accept *Seminole Tribe* as controlling precedent” because “the reasoning of that opinion is so profoundly mistaken and so fundamentally inconsistent with . . . the constitutional order that it has forsaken any claim to the usual deference or respect owed to decisions of this Court”); see also Larsen, *supra* note 5, at 454 (discussing “perpetual dissents” in state sovereign immunity cases).

Ending the revolutionary period in state sovereign immunity required at least some Justices on each side to relax these positions. Two of the conservatives went first a year after *Garrett*, upholding the immunity-abrogating provisions of the Family Medical Leave Act (FMLA) in *Nevada Department of Human Resources v. Hibbs*.<sup>234</sup> Chief Justice Rehnquist wrote for a majority that included all four liberals as well as Justice O'Connor, noting that Congress had identified a substantial history of gender discrimination by state governmental entities.<sup>235</sup> Moreover, because the FMLA was directed to redressing gender discrimination—a quasi-suspect classification that would be unconstitutional in a relatively broad range of cases—the statute was “congruent and proportional” to address unconstitutional state discrimination.<sup>236</sup>

A year later, in *Tennessee v. Lane*,<sup>237</sup> Justice O'Connor again joined the nationalists to uphold abrogation of state immunity under Title II of the Americans with Disabilities Act, which guarantees access to programs and activities without regard to disability.<sup>238</sup> *Lane* was a heavier lift than *Hibbs*, because the Court had already said that disability-based discrimination would not ordinarily justify abrogation in *Garrett*.<sup>239</sup> But *Lane* analyzed the ADA as applied to disabled persons seeking access to *courts*, which the Court noted did implicate a fundamental right requiring heightened scrutiny of government barriers to access.<sup>240</sup> “Because we find that Title II unquestionably is valid § 5 legislation as it applies to the class of cases implicating the accessibility of judicial services,” the Court said, “we need go no further.”<sup>241</sup>

The most striking break in the ideological pattern of the Court's immunity cases, however, came in 2006 in *United States v. Georgia*. This was another ADA Title II case, in which a state prisoner alleged violation of his statutory rights of equal access to suitable prison facilities that also rose to the level of an Eighth Amendment conditions-of-confinement claim.<sup>242</sup> Although most of the conservative Justices had been reluctant to recognize a quasi-as-applied form of abrogation in *Lane*, Justice Scalia wrote for a unanimous court in *Georgia* to endorse abrogation for *any* claimant who could allege an actual constitutional violation along with his statutory cause

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234. 538 U.S. 721, 725 (2003).

235. *Id.* at 729–35.

236. *Id.* at 735–37.

237. 541 U.S. 509 (2004).

238. *Id.* at 512–15.

239. *Bd. of Trs. of the Univ. of Ala. v. Garrett*, 531 U.S. 356, 367–68 (2001).

240. *Lane*, 541 U.S. at 522–23 (citing *Faretta v. California*, 422 U.S. 806, 819 n.15 (1975), and *Boddie v. Connecticut*, 401 U.S. 371, 379 (1971)).

241. *Id.* at 531.

242. *United States v. Georgia*, 546 U.S. 151, 154–56 (2006).

of action.<sup>243</sup> Scalia's position reflected his frustration with the "flabby" congruence and proportionality test; under his approach, expressed in his *Lane* dissent, Congress could act prophylactically *only* to prevent or remedy race discrimination by states.<sup>244</sup> Nonetheless, the Justices' broad agreement in *Georgia* on case-by-case abrogation as an alternative to prophylaxis opened up significant possibilities for relief that the earlier cases had seemed to foreclose.

These limiting cases are important because "[a]ny principle is at least somewhat unstable until the Court decides a case establishing an outer limit."<sup>245</sup> As long as the Court was striking down every attempt to abrogate state sovereign immunity under the Section Five power that came before it, the Court's critics could continue to discount any assurances the Court might offer about Congress's remaining authority. As Larry Kramer put it, "[s]uch remarks sound reassuring, but we must wait for a case in which the Court actually upholds something Congress did to know whether they are more than empty rhetoric."<sup>246</sup> After cases like *Hibbs* and *Lane* and *Georgia*, however, the "potentially calamitous consequences of these cases [like *Kimel* and *Garrett*] for federal power"<sup>247</sup> of which Dean Kramer and many others warned now seem considerably overblown. The first step from revolution toward normal science is establishing bounds for at least some of the new paradigm's principles.

The second step is acquiescence by the revolution's opponents.<sup>248</sup> That acquiescence did not come easily with respect to state sovereign immunity. All four of the *Seminole Tribe* dissenters announced their intention to continue dissenting from that decision in subsequent cases. Here is Justice Stevens, for example, in *Kimel*:

Despite my respect for *stare decisis*, I am unwilling to accept *Seminole Tribe* as controlling precedent. First and foremost, the reasoning of that opinion is so profoundly mistaken and so fundamentally inconsistent with the Framers' conception of the constitutional order that it has forsaken any claim to the usual deference or respect owed to decisions of this Court.<sup>249</sup>

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243. *Id.* at 158–59.

244. *Lane*, 541 U.S. at 557, 564–65 (Scalia, J., dissenting).

245. Ernest Young, *The Normalization of Rehnquist Court Commerce Clause Jurisprudence?* SCOTUSBLOG (June 6, 2005, 4:56 PM), <https://www.scotusblog.com/2005/06/the-normalization-of-rehnquist-court-commerce-clause-jurisprudence/> [https://perma.cc/HUP4-VTFJ].

246. Larry D. Kramer, *Foreword: We the Court*, 115 HARV. L. REV. 4, 148 (2001).

247. *Id.*

248. Cf. William Baude, *Constitutional Liquidation*, 71 STAN. L. REV. 1, 18 (2019) (discussing acquiescence by opponents as an important step in "liquidating" constitutional meaning).

249. *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 97–98 (2000) (Stevens, J., dissenting in part and concurring in part).

Justice Stevens was a fairly frequent practitioner of the “perpetual dissent,”<sup>250</sup> but even Justices more committed to stare decisis proved unwilling to accept *Seminole Tribe*.<sup>251</sup> As Allison Larsen has suggested, “[a] pattern of resistance, far more than a strongly-worded single dissent, indicates that a precedent is vulnerable and can perhaps prompt action from eager challengers.”<sup>252</sup> Whether or not persistent judicial dissent can always prevent a transition from revolutionary to “normal” jurisprudence, it surely makes that transition more difficult—and possibly unstable.<sup>253</sup> After all, as *Katz* would show, with four persistent dissenters it takes only one defection from the majority to depart from the paradigm and create a counter-precedent.<sup>254</sup>

That is why, even though controversy over state immunity lessened considerably after the 2003 to 2006 decisions recognizing some limits on that principle, the revolutionary period in state sovereign immunity jurisprudence probably did not really end until *Allen* in 2020. That case held that the Copyright Remedy Clarification Act (CRCA)<sup>255</sup> did not successfully abrogate state immunity, as a broad prophylactic matter, under the Section Five power.<sup>256</sup> The decision was unanimous, and Justice Kagan’s opinion for the Court embraced *Seminole Tribe* and the conservative Justices’ general thinking about state immunity.<sup>257</sup> Kagan said that the general principle of state sovereign immunity “has several parts. First, ‘each state is a sovereign entity in our federal system.’ Next, ‘[i]t is inherent in the nature of sovereignty not to be amenable to [a] suit’ absent consent. And last, that fundamental aspect of sovereignty constrains federal ‘judicial authority.’”<sup>258</sup> *Allen* also embraced the analysis of the Section Five power contained in *Florida Prepaid Postsecondary Education Expense Board v. College Savings Bank*,<sup>259</sup> *Kimel*, and similar cases; indeed, it treated Mr. Allen’s

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250. Larsen, *supra* note 5, at 454–55.

251. *See, e.g.*, Nev. Dep’t of Hum. Res. v. Hibbs, 538 U.S. 721, 740 (2003) (Souter, J., concurring) (“I join the Court’s opinion here without conceding the dissenting positions” in *Garrett*, *Kimel*, *Florida Prepaid*, or *Seminole Tribe*); *see also* Larsen, *supra* note 5, at 457 (noting that Justice Souter “appear[ed] more hesitant to engage in a perpetual dissent”). Even academics got into the act. *See, e.g.*, Jackson, *Principle and Compromise*, *supra* note 4, at 968 (“I do not believe that *Seminole Tribe* . . . is yet entitled to be treated as ‘stare decisis.’”).

252. Larsen, *supra* note 5, at 466.

253. *See, e.g.*, KUHN, *supra* note 10, at 19–20 (suggesting that normal science begins “[w]hen the individual scientist can take a paradigm for granted” without “starting from first principles and justifying the use of each concept introduced”).

254. *See infra* subpart II(B).

255. Pub. L. No. 101-553, 104 Stat. 2749 (codified at 17 U.S.C. §§ 501(a), 511).

256. *Allen v. Cooper*, 140 S. Ct. 994, 1007 (2020).

257. *Id.* at 1000.

258. *Id.* (citations omitted) (alterations in original) (first quoting *Seminole Tribe v. Florida*, 517 U.S. 44, 54 (1996); and then quoting *Blatchford v. Native Village of Noatak*, 501 U.S. 775, 779 (1991)).

259. 527 U.S. 627 (1999).

claim (involving abrogation to protect property in federal copyrights) as a re-run of *Florida Prepaid* (rejecting abrogation to protect patents) and rejected it.<sup>260</sup>

Justice Breyer, joined by Justice Ginsburg, concurred in the judgment and reaffirmed their longstanding view that “we went astray in *Seminole Tribe*” and “erred again in *Florida Prepaid*.”<sup>261</sup> “But recognizing that my longstanding view has not carried the day, and that the Court’s decision in *Florida Prepaid* controls this case,” Breyer conceded, “I concur in the judgment.”<sup>262</sup> Thus ended the *Seminole Tribe* dissenters’ perpetual protest. It is worth noting that Justices Breyer and Ginsburg, of the four Rehnquist Court nationalists, had never seemed quite as invested in that protest. And the authors of the two major dissents in *Seminole Tribe*—Justices Stevens and Souter—had left the Court before *Allen* was decided. As Professor Kuhn notes, revolutions end not only by conversion or concession but also simply by generational turnover that replaces the old guard.<sup>263</sup> Justices Kagan and Sotomayor, who embraced *Seminole Tribe* more wholeheartedly in *Allen*, may have thus represented a new generation willing to work within the new paradigm, either out of agreement or a wish to shore up the weight of stare decisis across the board.<sup>264</sup>

In any event, *Allen*’s unanimous holding could plausibly be read as a marker initiating a period of normal science in state sovereign immunity law. Within that subfield, one can identify plenty of important puzzles in which to play out the principles that *Seminole Tribe* and its progeny have laid down.<sup>265</sup> But within a year of *Allen*, the Court’s agreement on first principles seemed to fracture, casting doubt on the extent to which the Rehnquist Court’s immunity doctrine is truly a consensus paradigm.

#### B. Waiver in the Plan of the Convention

The most jarring departure from *Seminole Tribe*’s paradigm has been the Court’s 2006 holding, in *Central Virginia Community College v. Katz*,

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260. See *Allen*, 140 S. Ct. at 1007 (“Under *Florida Prepaid*, the CRCA thus must fail our ‘congruence and proportionality’ test.”).

261. *Id.* at 1009 (Breyer, J., concurring in the judgment).

262. *Id.*

263. KUHN, *supra* note 10, at 18–19. This is sometimes called “Planck’s principle.” See *id.* at 151 (“[A] new scientific truth does not triumph by convincing its opponents and making them see the light, but rather because its opponents eventually die, and a new generation grows up that is familiar with it.” (quoting MAX PLANCK, SCIENTIFIC AUTOBIOGRAPHY AND OTHER PAPERS 25 (Frank Gaynor trans., 1949))). As a former Souter clerk, of course, I fervently hope (and fully expect) that the Justice will outlive me. But—alas—he is no longer deciding sovereign immunity cases.

264. See *infra* text accompanying notes 307–09.

265. See *infra* Part III.

that state sovereign immunity is generally unavailable in bankruptcy.<sup>266</sup> That decision purported to get around *Seminole Tribe*'s holding that Congress may not abrogate state immunity when it acts pursuant to its Article I powers by characterizing its holding as one of *waiver*, not abrogation.<sup>267</sup> Citing “the Bankruptcy Clause’s unique history” and “the singular nature of bankruptcy courts’ jurisdiction,”<sup>268</sup> the Court suggested that it was making only a narrow exception to *Seminole Tribe*'s principle that Congress may not subject states to private suits when acting pursuant to its Article I powers.<sup>269</sup>

The Bankruptcy Clause is not particularly unique, either textually or historically. As the *Katz* Court acknowledged, “nothing in the words of the Bankruptcy Clause evinces an intent . . . to alter the ‘background principle’ of state sovereign immunity,”<sup>270</sup> and Article I identifies several areas of substantive law as being of special national concern.<sup>271</sup> In *Allen*, the plaintiff’s central theory sought to build on *Katz* and extend it to copyright by arguing that the Founders included specific intellectual property powers in Article I for similar reasons to those that supported a specific bankruptcy power.<sup>272</sup> The Court ignored those arguments, insisting on bankruptcy’s uniqueness and arguing that *Florida Prepaid*'s holding that Congress could not abrogate state immunities for intellectual property violations foreclosed any finding of plan-of-the-Convention waiver in such cases.<sup>273</sup>

Certainly there is solid precedent holding that the states did waive immunity in certain circumstances “in the plan of the convention,” as Hamilton put it in Federalist 81.<sup>274</sup> The inefficacy of state sovereign immunity in the face of a suit by the United States, for example, has long been understood to rest on this ground.<sup>275</sup> So, too, with suits between states

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266. 546 U.S. 356, 359 (2006).

267. *Id.* at 362–63, 378–79.

268. *Id.* at 369 n.9.

269. See Bellia & Clark, *supra* note 24, at 519 (interpreting *Katz* as “a narrow exception”).

270. 546 U.S. at 375–76 (emphasis omitted) (quoting *Seminole Tribe v. Florida*, 517 U.S. 44, 72 (1996)).

271. *Id.* at 376 n.13.

272. *Allen v. Cooper*, 140 S. Ct. 994, 1001–02 (2020); Brief for Petitioners at 20–38, *Allen*, 140 S. Ct. 944 (No. 18-877); James F. Caputo, Note, *Copy-Katz: Sovereign Immunity, the Intellectual Property Clause, and Central Virginia Community College v. Katz*, 95 GEO. L.J. 1911, 1930 (2007) (collecting evidence that “the Framers understood the Intellectual Property Clause to embody a tacit waiver of state sovereign immunity similar to the one the *Katz* Court found in the Bankruptcy Clause”).

273. *Allen*, 140 S. Ct. at 1002–03. The tenor of this argument suggested the Court thought *Katz*'s departure from *Seminole Tribe* was a mistake that it was unprepared to overrule, but would not extend beyond bankruptcy. See *id.* at 1003 (stating that *Katz* was “a good-for-one-clause-only holding”).

274. THE FEDERALIST NO. 81, *supra* note 54, at 549.

275. *United States v. Texas*, 143 U.S. 621, 646 (1892); see also *Alden v. Maine*, 527 U.S. 706, 755 (1999) (“In ratifying the Constitution, the States consented to suits brought by other States or by the Federal Government.”).



in the original jurisdiction of the Supreme Court.<sup>276</sup> And one could argue the States surrendered the immunity to *all* federal suits in the Supremacy Clause. But if the *Seminole Tribe* paradigm means anything at all, it must mean that *that* ship has sailed. *Katz* took an important step toward reviving such a broad waiver, however, by holding that immunity could be bypassed based on the nature and history of particular enumerated powers in Article I.

One could be forgiven for thinking that plan-of-the-Convention waiver is basically the same thing as abrogation. That is what Justice Brennan thought; he began his *Union Gas* argument for broad Commerce Clause authority to abrogate state immunity by observing that “[b]y empowering Congress to regulate commerce, . . . the States necessarily surrendered any portion of their sovereignty that would stand in the way of such regulation.”<sup>277</sup> And Justice Stevens, dissenting in *Seminole Tribe*, objected that barring abrogation of state immunity under Congress’s Article I powers would leave “persons harmed by state violations of federal copyright, bankruptcy, and antitrust laws [with] no remedy.”<sup>278</sup> All the arguments mustered by the *Katz* majority were exactly the same things one would say were one arguing that the Bankruptcy Clause, like Section Five of the Fourteenth Amendment, afforded Congress special power to abrogate state immunities.

*Katz*’s notion of plan-of-the-Convention waiver was thus *not* a normal science effort to play out *Seminole Tribe*’s implications. Taken seriously, it had the potential to reopen questions *Seminole Tribe* closed and upset the

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276. *E.g.*, *Rhode Island v. Massachusetts*, 37 U.S. (12 Pet.) 657, 731 (1838); *see also* Baude & Sachs, *supra* note 9, at 627 (noting that because “at least one state will always have to be a defendant . . . it would be implausible to provide for such cases if the defendant state didn’t need to show up”).

277. *Pennsylvania v. Union Gas Co.*, 491 U.S. 1, 14 (1989) (plurality opinion) (quoting *Parden v. Terminal Ry. of the Ala. State Docks Dep’t*, 377 U.S. 184, 192 (1964)). By relying on *Parden*, *Union Gas* equated abrogation and waiver. *Id.* at 19–20. *Parden* concerned *constructive* waiver, in which the Court held that a state can waive its immunity by “commission of an act to which Congress, in the exercise of its constitutional power to regulate commerce, has attached the condition of amenability to suit.” 377 U.S. at 195. Plan-of-the-Convention waiver seems, in both rhetoric and operation, like another form of constructive waiver. In 1999, however, the Court rejected constructive waiver altogether, finding that “we cannot square *Parden* with our cases requiring that a State’s express waiver of sovereign immunity be unequivocal.” *Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 680 (1999). The problem, the Court said, was that by suggesting that “the States necessarily surrendered any portion of their sovereignty that would stand in the way of [Commerce Clause] regulation,” *Parden* rested on “the notion that state sovereign immunity is not constitutionally grounded.” *Id.* at 682–83 (quoting *Parden*, 377 U.S. at 192). The Court’s “more recent decision in *Seminole Tribe*,” however, “expressly repudiate[d] that proposition.” *Id.* at 683. *Parden*, in other words, rested on an older paradigm of immunity law that the *Seminole Tribe* paradigm rejected. The Court’s embrace of similar reasoning in *Katz*, *PennEast*, and *Torres* calls that revolution into question.

278. *Seminole Tribe v. Florida*, 517 U.S. 44, 77 n.1 (1996) (Stevens, J., dissenting).

paradigm that case and its progeny created.<sup>279</sup> *Katz* necessarily invited future plaintiffs to argue that the federal statute under which they sued was also enacted pursuant to a “special” federal power. Hence the plaintiff’s argument, in *Allen*, that Congress’s power to protect copyrights was designed to unify disparate state laws just as the bankruptcy power was in *Katz*.<sup>280</sup> *Allen*’s rejection of “the kind of general, ‘clause-by-clause’ reexamination of Article I that *Allen* proposes”<sup>281</sup> was thus every bit as important—for purposes of consolidating *Seminole*’s paradigm—as the Court’s unanimous embrace of *Seminole Tribe* itself. According to Justice Kagan, *Katz* was “a good-for-one-clause-only holding.”<sup>282</sup>

But the Court’s resolve to forswear further *Katz*-ing lasted approximately one year. In *PennEast Pipeline Company v. New Jersey*, the Court considered whether a private pipeline company, having been delegated the use of the federal eminent domain power by statute, could commence eminent domain proceedings against a state government.<sup>283</sup> Chief Justice Roberts wrote for five Justices that “the States consented in the plan of the Convention to the exercise of federal eminent domain power, including in condemnation proceedings brought by private delegates.”<sup>284</sup> In dissent, Justice Barrett cited *Allen* and insisted that plan-of-the-Convention waiver must be “rare in our constitutional system.”<sup>285</sup> Moreover, she noted the inconvenient fact that “[t]here is no ‘Eminent Domain Clause’ on which the Court can rely. . . . Nor . . . does the constitutional structure single out eminent domain for special treatment.”<sup>286</sup> Indeed, Justice Barrett pointed out, because there is no freestanding federal eminent domain power, Congress necessarily exercises (or delegates) eminent domain authority as part of its *commerce* power—precisely the power that *Seminole Tribe* held cannot overcome state sovereign immunity.<sup>287</sup> Justice Kagan—who had pledged the

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279. *Katz* was a 5–4 decision in which Justice O’Connor—in her last term on the Court—joined the four *Seminole Tribe* dissenters. *Cent. Va. Cmty. Coll. V. Katz*, 546 U.S. 356, 358 (2006).

280. *Allen v. Cooper*, 140 S. Ct. 994, 1002 (2020).

281. *Id.* at 1003.

282. *Id.* The *Allen* Court seemed to concede (unanimously!) that plan-of-the-Convention waiver and abrogation are the same thing. Even if the Court were willing to consider *Katz*-style exceptions for other Article I clauses, Justice Kagan wrote, the Court’s earlier rejection of Congress’s power to *abrogate* state immunities for federal intellectual property suits in *Florida Prepaid* “would still doom *Allen*’s argument” on stare decisis grounds. *Id.* But *Florida Prepaid* would only bind the *Allen* Court if the two cases were addressing the same issue.

283. 141 S. Ct. 2244, 2251 (2021).

284. *Id.* at 2259. Justices Breyer, Alito, Sotomayor, and Kavanaugh joined the Chief’s opinion. *Id.* at 2251.

285. *Id.* at 2266 (Barrett, J., dissenting). Justices Thomas, Kagan, and Gorsuch joined Justice Barrett’s dissent. *Id.* at 2265.

286. *Id.* at 2267–68.

287. *Id.* at 2267.

Court to recognize no further plan-of-the-Convention waivers in *Allen*—joined Barrett’s dissent.<sup>288</sup>

If *PennEast* represented a fall off *Allen*’s wagon, *Torres v. Texas Department of Public Safety* raised doubts whether there was ever a wagon at all. Le Roy Torres was a U.S. Army reservist deployed to Iraq, where he developed a serious respiratory condition after being exposed to toxic burn pits.<sup>289</sup> Returning stateside, Torres found that his condition prevented him from performing his prior job as a state trooper and asked his employer, the Texas DPS, for an accommodation. When Texas refused, Torres sued under the Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA),<sup>290</sup> which creates a federal right for returning veterans to reclaim their prior jobs and requires their employers to accommodate any service-related disability.<sup>291</sup> Torres’s suit thus asked whether a federal suit under the USERRA, which Congress enacted pursuant to its power “[t]o raise and support Armies” and “[t]o provide and maintain a Navy,”<sup>292</sup> fell within a waiver of state immunity in the plan of the Convention. The Court held, five to four, that it did.<sup>293</sup>

Writing for the majority, Justice Breyer defined “the test for structural waiver as whether the federal power at issue is ‘complete in itself, and the States consented to the exercise of that power—in its entirety—in the plan of the Convention.’”<sup>294</sup> The key phrase—that a power is “complete in itself”—is somewhat mysterious.<sup>295</sup> It appears to originate in Chief Justice Marshall’s opinion in *Gibbons v. Ogden*,<sup>296</sup> which said of the *commerce* power that “[t]his power, like all others vested in congress, is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations, other than are prescribed in the constitution.”<sup>297</sup> By invoking this language, both *Torres* and *PennEast*<sup>298</sup> cast doubt on *Seminole Tribe*’s core holding that the

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288. The other two nationalists—Justices Breyer and Sotomayor—joined the majority in *PennEast*. Neither wrote separately to say what had become of their acquiescence in *Allen*.

289. 142 S. Ct. 2455, 2461 (2022).

290. 38 U.S.C. §§ 4301–4335.

291. 142 S. Ct. at 2461; 38 U.S.C. §§ 4301, 4313(a)(3).

292. U.S. CONST. art. I, § 8, cls. 12–13.

293. *Torres*, 142 S. Ct. at 2459–60.

294. *Id.* at 2463 (quoting *PennEast Pipeline Co. v. New Jersey*, 141 S. Ct. 2244, 2263 (2021)).

295. *See id.* at 2481 (Thomas, J., dissenting) (stating that the majority’s principle “has the certainty and objectivity of a Rorschach test”); Bellia & Clark, *supra* note 24, at 560 (observing that this “complete in itself” test has “no apparent stopping point”).

296. 22 U.S. (9 Wheat.) 1 (1824).

297. *Id.* at 196 (emphasis added).

298. The phrase does not occur in *Katz*.

Article I powers in general and the Commerce Clause in particular do not permit Congress to subject states to private suits for money damages.<sup>299</sup>

Justice Breyer's *Torres* opinion suggested that "[b]y committing not to 'thwart' or frustrate federal policy, the States accepted upon ratification that their 'consent,' including to suit, could 'never be a condition precedent to' Congress' chosen exercise of its authority."<sup>300</sup> But that sounds like the ordinary operation of the Supremacy Clause. After all, the Court has long held that state policies that "frustrate"—much less "thwart"—federal policy are preempted under ordinary doctrine.<sup>301</sup> That principle is not limited to federal statutes enacted under particular enumerated powers but extends to any valid federal law. And sovereign immunity *always* thwarts federal policy when it bars litigation of a federal cause of action that Congress intended to apply to the states. If plan-of-the-Convention waiver is simply a conflict preemption standard, then little will be left of the *Seminole Tribe* paradigm.

*Torres*'s phraseology harkens unmistakably back to Justice Brennan's doomed plurality opinion in *Union Gas*, which held that Congress may abrogate state immunities under the commerce power—and which the Court overruled in *Seminole Tribe*.<sup>302</sup> Here is the key language from Justice Brennan:

We have recognized that the States enjoy no immunity where there has been "a surrender of this immunity in the plan of the convention." Because the Commerce Clause withholds power from the States at the same time as it confers it on Congress, and because the congressional power thus conferred would be incomplete without the authority to

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299. Bellia & Clark, *supra* note 24, at 539–41. As these authors point out, the Court's account also undermines other federalism doctrines besides sovereign immunity, such as the anti-commandeering doctrine, by suggesting that state prerogatives that stand in the way of national policy are foreclosed by structural waiver. *Id.* at 542. Anti-commandeering is another aspect of state sovereignty from which the nationalist Justices had initially dissented but then seemed to accept in more recent cases. Compare *Printz v. United States*, 521 U.S. 898, 976–78 (1997) (Breyer, J., dissenting) ("[T]here is no need to interpret the Constitution as containing an absolute principle [that] forbid[s] the assignment of virtually any federal duty to any state official."), and *New York v. United States*, 505 U.S. 144, 210–11 (1992) (Stevens, J., concurring in part and dissenting in part) ("The Tenth Amendment surely does not impose any limit on Congress' exercise of the powers delegated to it by Article I."), with *Murphy v. NCAA*, 138 S. Ct. 1461, 1489–90 (2018) (Ginsburg, J., dissenting) (appearing to accept the anti-commandeering doctrine and dissenting only on severability in an opinion joined by Justices Breyer and Sotomayor).

300. 142 S. Ct. at 2463 (quoting *PennEast Pipeline Co. v. New Jersey*, 141 S. Ct. 2244, 2255–57 (2021)).

301. See, e.g., *Geier v. Am. Honda Motor Co.*, 529 U.S. 861, 881 (2000) (asserting that state law is preempted when it "would have stood 'as an obstacle to the accomplishment and execution of' . . . federal objectives" (quoting *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941))); *CSX Transp., Inc. v. Easterwood*, 507 U.S. 658, 663 (1993) ("Where a state statute conflicts with, or frustrates, federal law, the former must give way."); *Cap. Cities Cable, Inc. v. Crisp*, 467 U.S. 691, 711 (1984) (finding state law preempted because it would "plainly thwart the policy identified by both Congress and the FCC").

302. *Pennsylvania v. Union Gas Co.*, 491 U.S. 1, 5 (1989).

render States liable in damages, it must be that, to the extent that the States gave Congress the authority to regulate commerce, they also relinquished their immunity where Congress found it necessary, in exercising this authority, to render them liable. The States held liable under such a congressional enactment are thus not “unconsenting”; they gave their consent all at once, in ratifying the Constitution containing the Commerce Clause, rather than on a case-by-case basis.<sup>303</sup>

The structural point is likewise the same. Both *Torres* and *Union Gas* emphasize that the enumerated powers in question not only empower Congress but also restrict the powers of the States.<sup>304</sup> This sort of reasoning occurs throughout the pre-*Seminole Tribe* case law recognizing implied waivers of state immunities and broad Congressional power to abrogate them.<sup>305</sup> Noting “the clear parallel between the Court’s analysis today and the discredited approach to sovereign immunity that we rejected in *Seminole Tribe*,” Justice Thomas concluded that “if *Seminole Tribe* was right, then the Court’s decision today is wrong.”<sup>306</sup>

Justice Kagan wrote a somewhat wounded concurrence in *Torres*, complaining—justly—that the *PennEast* majority had ignored her no-new-*Katzes* pledge in *Allen*.<sup>307</sup> But she was in a position to enforce that pledge in *Torres*; instead, she provided the fifth vote to override Texas’s immunity. It seems plausible to speculate that the nationalists’ acquiescence in *Allen* was part of a general effort to shore up norms of stare decisis in preparation for readily foreseeable clashes with an emerging conservative supermajority on questions like abortion and affirmative action. One need not be a psychoanalyst to read some of the despair about stare decisis from the

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303. *Id.* at 19–20 (citation omitted) (quoting *Principality of Monaco v. Mississippi*, 292 U.S. 313, 322–23 (1934)).

304. Compare *id.* at 20 (“The Commerce Clause . . . displaces state authority even where Congress has chosen not to act . . .”), with *Torres*, 142 S. Ct. at 2463–64 (emphasizing that the war powers not only authorize federal action but “divest[] the States of like power”), and *id.* at 2464 (“Congress has, since the founding era, directed raising and maintaining the national military, including at the expense of state sovereignty.”).

305. See *Torres*, 142 S. Ct. at 2485 (Thomas, J., dissenting) (first citing *Parden v. Terminal Ry. of the Ala. State Docks Dep’t*, 377 U.S. 184, 191–92 (1964), *overruled by* *Coll. Sav. Bank v. Fla. Prepaid Postsecondary Ed. Expense Bd.*, 527 U.S. 666, 683 (1999), and then citing *Union Gas*, 491 U.S. at 19–20). *Union Gas*, for instance, said that “every addition of power to the general government involves a corresponding diminution of the governmental powers of the States.” 491 U.S. at 16 (emphasis added) (quoting *Ex parte Virginia*, 100 U.S. 339, 346 (1880)).

306. *Torres*, 142 S. Ct. at 2485 (Thomas, J., dissenting).

307. See *id.* at 2469 (Kagan, J., concurring) (“I thought [in *Allen*] that our precedents had shut the door on further Article I exceptions to state sovereign immunity. But *PennEast* proved me wrong.”).

*Dobbs*<sup>308</sup> dissent—filed five days before *Torres* came down—into her vote in the latter case.<sup>309</sup>

The more significant point about both *PennEast* and *Torres*, however, is the fracturing of the conservative coalition on state sovereign immunity that had remained remarkably cohesive since 1996. The Court’s conservatives have never been monolithic, and one can discern distinctions not only on an ideological scale but also in terms of attachments to states or commitments to textualism.<sup>310</sup> But none of the possible variables track very well in the plan-of-the-Convention waiver cases.<sup>311</sup> The truth is probably that multiple factors are in play and the lines of doctrinal division have yet to stabilize. It is at least possible, however, that this line of cases will end up revising the terms of the *Seminole Tribe* paradigm. Unlike the movement of the nationalists in these cases—which seem likely to be a function of when *stare decisis* arguments do and do not seem compelling—Chief Justice Roberts’s and Justice Kavanaugh’s votes against immunity may point toward a narrowing of the *Seminole Tribe* paradigm to recognize a few more core federal powers, perhaps analogous to Congress’s power to enforce the Reconstruction Amendments.<sup>312</sup> Or they may ultimately create an opening for the older view that *all* national enumerated powers represent surrenders of state sovereignty, fatally undermining the paradigm altogether.

### C. *Stare Decisis and the Stability of Legal Paradigms*

The end of persistent dissent in state sovereign immunity cases, combined with continuing efforts to circumvent *Seminole Tribe*’s basic holding through a new doctrine of waiver, suggests that much of the Supreme Court’s support for the *Seminole Tribe* paradigm may rest on *stare decisis* rather than strong commitment to its premises. *Stare decisis* derives much of

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308. *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228 (2022).

309. *See id.* at 2319–20 (Breyer, Sotomayor, and Kagan, JJ., dissenting) (stating that “[*stare decisis*] is a doctrine of judicial modesty and humility. . . . Today, the proclivities of individuals rule”).

310. *See, e.g.*, Ernest A. Young, *Just Blowing Smoke? Politics, Doctrine, and the Federalist Revival After Gonzales v. Raich*, 2005 SUP. CT. REV. 1, 42–49 (speculating about reasons conservative Justices on the early Roberts Court might or might not be committed to federalism).

311. In both *PennEast* and *Torres*, the “Beltway” conservatives—those having spent most of their professional lives in Washington, D.C., and thus presumably feeling a greater investment in national government prerogatives—joined the majority. *See PennEast Pipeline Co. v. New Jersey*, 141 S. Ct. 2244, 2251 (2021) (Roberts, C.J. & Kavanaugh, J., joining the majority); *Torres*, 142 S. Ct. at 2459 (same). But Justice Alito also joined the majority in *PennEast*, 141 S. Ct. at 2251. And Justice O’Connor—the Justice whose life history most strongly identified her with state governments and their prerogatives—was the surprising defector in *Central Virginia Community College v. Katz*, 546 U.S. 356, 358 (2006).

312. After all, *Fitzpatrick v. Bitzer* emphasized that “[a]s ratified by the States after the Civil War, [the Fourteenth] Amendment quite clearly contemplates limitations on their authority.” 427 U.S. 445, 453 (1976).

its force not from agreement with an underlying legal principle but from concerns for stability, reliance, and the rule of law that are largely independent of the substance of the underlying decision.<sup>313</sup> Hence, “[f]or stare decisis to be of genuine importance, it must tell decision makers to make decisions they think mistaken on first-order substantive grounds.”<sup>314</sup> Stare decisis can function as a valuable bridge between judges who disagree on principle—an “incompletely theorized agreement” resting on the need for legal stability rather than persuasion on the underlying law.<sup>315</sup> In this sense, stare decisis can enhance a legal paradigm’s stability.

But in practice the acquiescence stemming from an institutional value like stare decisis may be quite different from what Professor Kuhn would expect from the adoption of a new scientific paradigm. For Kuhn, a new scientific paradigm supplies a theory and a framework that guides and constrains future research; its influence, then, extends far beyond the particular applications that give rise to the paradigm.<sup>316</sup> In law, however, it is common for courts to accept a precedent or group of precedents as settled while rejecting those precedents’ underlying theory and refusing to apply it to undecided questions in the future.<sup>317</sup> As Caleb Nelson has warned, judges foreclosed by stare decisis from overruling precedents with which they disagree “might well draw fine distinctions that minimize the precedents’ impact. In the long run, those fine distinctions might produce more uncertainty than a clean break from precedent.”<sup>318</sup>

*Torres* and *PennEast* create uncertainty whether *Seminole Tribe* can function as a paradigm in Kuhn’s sense. Both cases revealed that the Court’s conservatives are split between a group that accepts *Seminole Tribe* as a broad principle guiding further development of the law (and thus eschewing

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313. See, e.g., *Kimble v. Marvel Ent., LLC*, 576 U.S. 446, 455 (2015) (“[S]tare decisis has consequence only to the extent it sustains incorrect decisions; correct judgments have no need for that principle to prop them up.”); *Hubbard v. United States*, 514 U.S. 695, 716 (1995) (Scalia, J., concurring in part and concurring in the judgment) (“Who ignores [stare decisis] must give reasons, and reasons that go beyond mere demonstration that the overruled opinion was wrong (otherwise the doctrine would be no doctrine at all).”).

314. Frederick Schauer, *Stare Decisis—Rhetoric and Reality in the Supreme Court*, 2018 SUP. CT. REV. 121, 128.

315. Cass R. Sunstein, Commentary, *Incompletely Theorized Agreements*, 108 HARV. L. REV. 1733, 1742–43 (1995).

316. See KUHN, *supra* note 10, at 23 (“[L]ike an accepted judicial decision in the common law, [the paradigm] is an object for further articulation and specification under new or more stringent conditions.”). “Accepted” is doing considerable work in this sentence, because legal method also encompasses treatment of disfavored precedents that, while still good law, are not “object[s] for further articulation and specification.”

317. See, e.g., *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1856–57 (2017) (reaffirming the validity of the *Bivens* cause of action in the contexts in which it arose, but also announcing that the Court will not extend it to new circumstances).

318. Caleb Nelson, *Stare Decisis and Demonstrably Erroneous Precedents*, 87 VA. L. REV. 1, 64–65 (2001).

work-arounds like plan-of-the-Convention waiver),<sup>319</sup> and another group sympathetic to *Seminole Tribe*'s premises but looking to limit it when it conflicts with favored federal interests.<sup>320</sup> This division leaves the nationalists with at least three options: (1) embrace *Seminole Tribe* as a paradigm for further development of the law in the sphere of remedies against state governments; (2) accept *Seminole Tribe* as a matter of stare decisis, while rejecting its underlying theoretical assumptions and distinguishing it wherever possible; or (3) return to perpetual dissent and hope eventually to persuade those conservatives less committed to the paradigm to overturn it.

In *Torres*, for example, it seems fair to say that Justice Breyer took the second approach, working around *Seminole Tribe* rather than faithfully elaborating its premises, and he joined Chief Justice Roberts's opinion in *PennEast* doing much the same thing.<sup>321</sup> With Breyer's retirement, however, none of the Court's remaining nationalists have strong prior commitments to opposing *Seminole Tribe*.<sup>322</sup> There may be, moreover, advantages for the nationalists to accepting at least some of the paradigm's premises. To the extent that many significant questions remain concerning how the *Seminole Tribe* paradigm will play out—for instance, as to what entities count as arms of the state, or when relief may be available under *United States v. Georgia*—the nationalists are likely to have more of a voice in resolving those questions as participants in the paradigm than as outsiders. On the other hand, to the extent that the nationalists' acquiescence in *Allen* was part of a broader effort to shore up a general commitment to stare decisis in anticipation of a case like *Dobbs*, involving an assault on a valued liberal precedent, the denouement of that case may discourage similar efforts going forward. Future cases, however, may provide the Court's liberals with reason to continue caring about damage control.

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319. This group includes Justices Thomas, Gorsuch, and Barrett. Justice Alito joined the majority in *PennEast* but dissented in *Torres*.

320. This group includes Chief Justice Roberts and Justice Kavanaugh (as well as Justice Alito in *PennEast* but not *Torres*).

321. See *Torres v. Tex. Dep't of Pub. Safety*, 142 S. Ct. 2455, 2462–63 (2022) (construing plan-of-the-convention waiver broadly and discarding *Allen*'s suggestion that it should apply only in bankruptcy); *PennEast Pipeline Co. v. New Jersey*, 141 S. Ct. 2244, 2259 (2021) (finding plan-of-the-Convention waiver for federal eminent domain power). Justice Sotomayor joined the majority opinions in both *Torres* and *PennEast*. Justice Kagan dissented in *PennEast* but came around to Justice Breyer's position in *Torres*. See 142 S. Ct. at 2469 (Kagan, J., concurring) (“I thought then [in *Allen*] that our precedents had shut the door on further Article I exceptions to state sovereign immunity. But *PennEast* proved me wrong.”).

322. In *Coleman v. Court of Appeals of Maryland*, 566 U.S. 30 (2012), both Justices Kagan and Sotomayor joined Justice Ginsburg's dissent from the Court's holding that the self-care provision of the Family Medical Leave Act did not meet the standard for prophylactic abrogation under *Florida Prepaid* and *City of Boerne*. *Coleman*, 566 U.S. at 32, 45. But both Justices conspicuously did not join the footnote in which Justice Ginsburg reiterated her perpetual dissent from *Seminole Tribe*. See *id.* at 32, 45, 46 n.1 (Ginsburg, J., dissenting) (maintaining “the view that Congress can abrogate state sovereign immunity pursuant to its Article I Commerce Clause power”).



The broader point, however, is simply that in the law, acquiescence in a ruling as a matter of precedent will not always suffice to establish that precedent as a new paradigm or to prevent a contrary paradigm from emerging. Justice Kennedy's opinion in *Ziglar v. Abbasi*,<sup>323</sup> for example, acknowledged the continuing force of *Bivens v. Six Unknown Federal Narcotics Agents*<sup>324</sup> within its areas of original application.<sup>325</sup> But the Court insisted that *Bivens*'s particular methodological paradigm—an “*ancien régime*” under which courts freely implied private rights of action to enforce federal law—had been superseded by a new paradigm that generally leaves creating private rights of action to Congress.<sup>326</sup> In other words, a legal revolution may only end when the opposition not only accepts the binding force of contrary precedent but also accepts that precedent's underlying reasoning as generative for future decisions. In the state sovereign immunity context, even *Allen*'s extraordinary unanimity may not tell us whether the Age of *Seminole Tribe* has fully arrived.

Accepting all these qualifications, however, it still seems possible that *Allen* will prove a more important and enduring precedent than *PennEast* or *Torres*, and that the Supreme Court's state sovereign immunity jurisprudence may be entering a period of comparative stability. The plan-of-the-Convention waiver cases seem driven by perceptions that the federal interests underlying the enumerated powers in question were particularly and distinctively strong. It is hard to think of too many other obvious candidates.<sup>327</sup> If the Court manages to limit the number of plan-of-the-Convention waivers before they fatally undermine *Seminole Tribe*'s basic framework, then *Allen* may, after all, mark the end of the revolution.

#### D. Pragmatic Equilibrium and the Remedial Ecosystem

Even a thoroughly consistent and intellectually satisfying paradigm is unlikely to be stable unless it *works*, functionally speaking. This section argues, conversely, that *Seminole Tribe*'s paradigm largely *does* work as a

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323. 137 S. Ct. 1843 (2017).

324. 403 U.S. 388 (1971).

325. See *Ziglar*, 137 S. Ct. at 1856–57.

326. *Id.* at 1855–56; see also *id.* at 1857 (“Given the notable change in the Court’s approach to recognizing implied causes of action . . . expanding the *Bivens* remedy is now a ‘disfavored’ judicial activity.” (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 675 (2009))). See generally Carlos M. Vázquez, *Bivens and the Ancien Régime*, 96 NOTRE DAME L. REV. 1923 (2021) (discussing paradigm shifts under *Bivens*).

327. One possibility would be the foreign affairs powers, which have a doctrinal history of exceptionalism. See generally Ganesh Sitaraman & Ingrid Wuerth, *The Normalization of Foreign Relations Law*, 128 HARV. L. REV. 1897 (2015) (describing the development of foreign-relations exceptionalism and the recent shift towards foreign-relations “normalization”); Curtis A. Bradley, Response, *Foreign Relations Law and the Purported Shift Away from “Exceptionalism”*, 128 HARV. L. REV. F. 294 (2015) (questioning whether there has been a genuine shift away from foreign-relations exceptionalism).

functional matter because it protects the states from the sorts of existential financial threats that have historically motivated the expansion of state immunity, while permitting a number of viable means for ensuring that state governments respect federal rights. At the end of the day, that basic functionality may prove more important than intellectual coherence in maintaining the basic stability of the Court's state immunity jurisprudence.

Sovereign immunity often appears to arise out of theory—both of the nature of the State (“[t]he king can do no wrong”<sup>328</sup>) and of our federal Union (“the States entered the federal system . . . with their sovereignty intact”<sup>329</sup>). But especially in this country, sovereign immunity has always rested on pragmatic grounds. Consider, for example, the seminal discussion in *United States v. Lee*,<sup>330</sup> which acknowledged that the United States *has* sovereign immunity but held that this immunity did not foreclose a suit to bar government officers from unlawful action.<sup>331</sup> The *Lee* majority seemed to question the very relevance of sovereign immunity in a democratic republic,<sup>332</sup> but those doubts prompted the Court only to recognize an exception for officer suits—not to abandon the principle altogether. The reasons are most apparent in Justice Gray's dissent, which insisted that immunity “is not limited to a monarchy, but is of equal force in a republic” because it protects public property that might be “essential to the common defence and general welfare.”<sup>333</sup> *Lee*, after all, concerned the possibility that a federal court might divest the U.S. Army of a fort that it had established on Robert E. Lee's old plantation in Arlington, Virginia, in order to guard the water approaches to the U.S. Capitol.<sup>334</sup>

Federal sovereign immunity is tolerable—indeed, hardly ever criticized—because it serves these public functions while maintaining ample avenues for holding government accountable for violations of law.<sup>335</sup> Richard

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328. *E.g.*, 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 238 (1766). See generally Janelle Greenberg, *Our Grand Maxim of State, 'The King Can Do No Wrong,'* 12 HIST. POL. THOUGHT 209 (1991) (exploring the meaning of the maxim).

329. *PennEast Pipeline Co. v. New Jersey*, 141 S. Ct. 2244, 2258 (2021) (quoting *Blatchford v. Native Village of Noatak*, 501 U.S. 775, 779 (1991)); see also Clark, *supra* note 61, at 1862–75 (illustrating the influence that “background notions of sovereign immunity” had on the Founders).

330. 106 U.S. 196 (1882).

331. *Id.* at 204–05.

332. See *id.* at 206–07 (noting that sovereign immunity derived from English monarchy should not apply in America, and that “the doctrine met with a doubtful reception in the early history of this court”).

333. *Id.* at 226 (Gray, J., dissenting).

334. See *id.* (insisting “that the sovereign should not, without its consent, be dispossessed by judicial process of forts, arsenals, military posts, and ships of war, necessary to guard the national existence against insurrection and invasion”).

335. On the federal side, those avenues exist largely by way of broad statutory waivers of federal sovereign immunity. See HART & WECHSLER, *supra* note 71, at 896–904 (discussing the Federal Tort Claims Act, the Tucker Act, and the Administrative Procedure Act).

Fallon and Dan Meltzer's leading account of constitutionally required remedies distinguishes between two principles: "the *Marbury* dictum" that "for every violation of a right, there must be a remedy" and "[a]nother principle, whose focus is more structural, [that] demands a system of constitutional remedies adequate to keep government generally within the bounds of law."<sup>336</sup> The first principle is "not an ironclad rule" and "can sometimes be outweighed; the principle requiring an overall system of remedies that is effective in maintaining a regime of lawful government is more unyielding in its own terms, but can tolerate the denial of particular remedies, and sometimes of individual redress."<sup>337</sup> Under this structural principle, sovereign immunity's legitimacy depends on balancing the protection of public functions and the public fisc against the demand for legal accountability. At the end of the day, the *Seminole Tribe* paradigm will stand or fall according to its success in striking that balance.

The history of state sovereign immunity in the eighteenth and nineteenth centuries was largely driven by state debt. As John Orth said, the Eleventh Amendment was "[a]lways a dollars-and-cents proposition,"<sup>338</sup> as was the broader doctrine of sovereign immunity that the amendment protected. *Chisholm* involved an effort to recover a debt for Revolutionary War materiel provided to the State, and concerns that judicial power to force repayment on those debts would destabilize state finances largely sparked the movement resulting in the Eleventh Amendment.<sup>339</sup> Similarly, *Hans* reflected concerns that southern states in the Gilded Age could not (or would not) pay their repudiated bonds and the federal government—having abandoned Reconstruction—was in no position to make them.<sup>340</sup>

This concern with protecting state finances also shaped the exceptions to state sovereign immunity that developed after *Hans*. The contemporaneous decision in *Lincoln County v. Luning*<sup>341</sup> that municipalities *lack* state sovereign immunity may have reflected a pattern that "counties had tended to issue bonds in the West, while in the South, states had usually done the job"; Western jurisdictions both needed considerable investment for capital improvements and were unlikely to resist federal judicial decrees.<sup>342</sup>

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336. Richard H. Fallon, Jr. & Daniel J. Meltzer, *New Law, Non-Retroactivity, and Constitutional Remedies*, 104 HARV. L. REV. 1731, 1778–79 (1991).

337. *Id.* at 1778–79.

338. ORTH, *supra* note 42, at 7.

339. 1 CHARLES WARREN, *THE SUPREME COURT IN UNITED STATES HISTORY* 99 (1922); ORTH, *supra* note 42, at 7; Young, *Its Hour Come Round*, *supra* note 30, at 597–99; *see also* *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 406 (1821) (offering a similar account).

340. *See* ORTH, *supra* note 42, at 58–89 (describing how the Eleventh Amendment thwarted the claims of plaintiffs who held Southern bonds after Reconstruction); *see also supra* text accompanying notes 77–82.

341. 133 U.S. 529 (1890).

342. ORTH, *supra* note 42, at 111, 118.

Likewise, the Supreme Court's 1908 decision in *Ex parte Young* empowered federal courts to force state officers to comply with federal law, but the prospective relief it allowed did not threaten states with catastrophic financial liability.<sup>343</sup> Even the waiver doctrine, allowing federal courts to hear cases where the state consents to be sued—notwithstanding the text of the Eleventh Amendment<sup>344</sup>—can be understood as protecting the states' ability to obtain access to capital markets by offering a guarantee that new obligations can be enforced.<sup>345</sup>

*Hans*, *Luning*, and *Young*—together with 42 U.S.C. § 1983's general remedy against state and local officers violating federal law—frame a remedial regime that persists to this day. *Hans* ensures that cases like *Chisholm*, involving enforcement of financial obligations posing an existential threat to state finances, cannot be brought in federal court. *Luning*, however, enables damages suits against municipalities that not only oversee most direct contact between government and individual citizens, such as police searches and arrests, but also commit most takings requiring just compensation. Municipal financial liabilities arising from these actions are not only likely to be on a smaller scale but can be addressed through a federal bankruptcy process that is not available to states.<sup>346</sup> *Young* makes declaratory and injunctive relief fully available against governments, so long as it is prospective in character and an appropriate official with authority to enforce the challenged law or policy can be identified.<sup>347</sup> And § 1983 permits actions for damages against state and local officers (as well as municipalities themselves) in their personal capacity. John Jeffries famously argued that the practical effect of officer suits means that state sovereign immunity “almost never matters.”<sup>348</sup>

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343. *Young*, *Its Hour Come Round*, *supra* note 30, at 602–03. *Ex parte Young* reflected a tradition of broader government accountability in actions for equitable relief than in actions at law. Ann Woolhandler, *Patterns of Official Immunity and Accountability*, 37 CASE W. RES. L. REV. 396, 433 (1987). But it also strikes a pragmatic balance between accountability and fiscal security for states.

344. Baude & Sachs, *supra* note 9, at 625–28.

345. See, e.g., Emily D. Johnson & Ernest A. Young, *The Constitutional Law of State Debt*, 7 DUKE J. CONST. L. & PUB. POL'Y 117, 150–51 (2012) (citing examples of state bonds including an express waiver of sovereign immunity in their terms).

346. Anna Gelpern, *Bankruptcy, Backwards: The Problem of Quasi-Sovereign Debt*, 121 YALE L.J. 888, 897, 923–24 (2012).

347. See Henry Paul Monaghan, *The Sovereign Immunity “Exception,”* 110 HARV. L. REV. 102, 103 (1996) (arguing *Young* made sovereign immunity “a rare exception to the otherwise prevailing system of state governmental accountability in federal court for violations of federal law”); Fletcher, *Historical Interpretation*, *supra* note 52, at 1042 (“Although the doctrinal structure is untidy, one may say that the *Ex parte Young* principle today permits considerable federal judicial control over state behavior and permits generally effective remedies against wrongful acts of state officers.”).

348. Jeffries, *supra* note 168, at 49–50.

The sufficiency of these exceptions to government immunity thus largely depends on the continued viability of officer suits—both for prospective relief under *Ex parte Young*, and for damages under § 1983. Some Justices made an effort to narrow *Young* considerably in the 1990s, but that effort ultimately failed to attract a majority.<sup>349</sup> The more serious problem involves cases of sporadic and unlawful conduct by individual officers. These cases generally can't be reached by injunctions,<sup>350</sup> and qualified immunity may prevent compensation through § 1983 suits against individual officers.<sup>351</sup> If, as some critics suggest, qualified immunity represents a “collapse” of constitutional remedies,<sup>352</sup> then the entire remedial ecosystem—and with it the *Seminole Tribe* paradigm of state sovereign immunity—would be in trouble.

Reports of remedial collapse, however, are exaggerated. Recent empirical work finds that qualified immunity results in dismissal in less than four percent of a sample of cases in which it could be raised.<sup>353</sup> Further, qualified immunity's winning streak at the Supreme Court may be coming to an end.<sup>354</sup> Many of the most pressing problems involving unlawful police actions, moreover, involve local police departments and officers rather than

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349. *Seminole Tribe* held *Young* unavailable when Congress provides a statutory scheme for relief, even if immunity bars that scheme. *Seminole Tribe v. Florida*, 517 U.S. 44, 74–76 (1996). But that holding proved to be a sport. *See Verizon Md. Inc. v. Pub. Serv. Comm'n*, 535 U.S. 635, 647–48 (2002) (rejecting arguments that the backdrop of a robust legislative scheme foreclosed invoking *Ex parte Young* to avoid sovereign immunity). Justice Kennedy argued that *Young* was essentially discretionary in *Idaho v. Coeur d'Alene Tribe*, but seven Justices expressly rejected that position. 521 U.S. 261, 264, 274–80 (1997) (plurality opinion); *see also* HART & WECHSLER, *supra* note 71, at 931–32 (reviewing this line of cases).

350. *E.g.*, *City of Los Angeles v. Lyons*, 461 U.S. 95, 113 (1983); *O'Shea v. Littleton*, 414 U.S. 488, 496–97 (1974); *see also* Curtis A. Bradley & Ernest A. Young, *Standing and Probabilistic Injury*, 122 MICH. L. REV. (forthcoming June 2024) (manuscript at 22–24) (available at [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=4350160](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4350160) [<https://perma.cc/7J2U-ZV4R>]) (discussing *Lyons* and the availability of injunctions for sporadic official misconduct).

351. *See Harlow v. Fitzgerald*, 457 U.S. 800, 818 & n.30 (1982) (holding that “government officials performing discretionary functions, generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known” and that this standard applies to state as well as federal officers); Baude, *Qualified Immunity*, *supra* note 172, at 87 (“The Court is not just maintaining the doctrine of qualified immunity as a matter of precedent, but doubling down on it, enforcing it aggressively against lower courts.”).

352. AZIZ Z. HUQ, *THE COLLAPSE OF CONSTITUTIONAL REMEDIES* 109 (2021). *See generally* Katherine Mims Crocker, *Qualified Immunity, Sovereign Immunity, and Systemic Reform*, 71 DUKE L.J. 1701 (2022) (discussing connections between individual officer immunity and sovereign immunity).

353. Joanna C. Schwartz, *How Qualified Immunity Fails*, 127 YALE L.J. 2, 10 (2017).

354. *E.g.*, *Taylor v. Riojas*, 141 S. Ct. 52, 53 (2020) (per curiam); *Lombardo v. City of St. Louis*, 141 S. Ct. 2239, 2241–42 (2021) (per curiam); *see also* Crocker, *Qualified Immunity Retreat*, *supra* note 172, at 3–5 (reviewing *Taylor*).

state officials.<sup>355</sup> Even if official immunities (or shallow pockets) render officer suits an inadequate substitute for entity liability, state sovereign immunity does not shield local entities and 42 U.S.C. § 1983 provides a vehicle for suits against them.<sup>356</sup> It is hard, in other words, to chalk up any serious gaps in remedies for unlawful policing to state sovereign immunity. If state official conduct *were* the problem, Congress could amend § 1983 to provide a vicarious liability cause of action against the state government itself for actual constitutional violations under *United States v. Georgia* without questioning the *Seminole Tribe* paradigm.<sup>357</sup>

Despite the historically contingent and path-dependent evolution of our law of public remedies, and the questionable historical assumptions on which some of it rests, our law of state sovereign immunity does largely seem consistent with a constitutional imperative to keep government within the bounds of law. The *Seminole Tribe* paradigm of state sovereign immunity is sufficiently focused on vital interests in state financial stability, and it has enough exceptions, qualifications, and workarounds, both to hold the government accountable and, in many cases, compensate victims of government misconduct. That basic pragmatic sufficiency may not guarantee the paradigm's stability, but it does eliminate one critical source of pressure to change. And changes that would disrupt that stability will face a correspondingly heavier burden of persuasion.

### III. Sovereign Immunity and Normal Science

Professor Kuhn insisted that normal science need not be either boring or unimportant. What makes science normal is the absence of “overt disagreement over fundamentals” and commitment to “the same rules and standards for scientific practice.”<sup>358</sup> For Kuhn, this consensus makes progress possible. Although normal science generally consists in confirming and elaborating an existing paradigm by rendering it ever more precise, he maintains that most non-scientists fail to realize “how fascinating such work can prove in the execution.”<sup>359</sup> These sorts of inquiries “engage most scientists throughout their careers.”<sup>360</sup> Nowadays, Kuhn might have praised the virtues of “thinking *inside* the box.”

Normal science consists largely in “puzzle-solving,” with the paradigm serving as “a criterion for choosing problems that, while the paradigm is

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355. See, e.g., Crocker, *Systemic Reform*, *supra* note 352, at 1708 (noting that “local governments simply employ more law-enforcement officers than the federal government and states do”).

356. E.g., *Monell v. Dep’t of Soc. Servs. of N.Y.C.*, 436 U.S. 658, 690 (1978).

357. See *infra* text accompanying notes 410–11.

358. KUHN, *supra* note 10, at 11.

359. *Id.* at 24.

360. *Id.*

taken for granted, can be assumed to have solutions.”<sup>361</sup> So what are the most important puzzles currently existing under the *Seminole Tribe* paradigm? I consider four such puzzles in this part: Which entities, precisely, can claim sovereign immunity as arms of the state? What is the scope of case-by-case abrogation under *Georgia*? Should state sovereign immunity block claims for just compensation under the Takings Clause? And may the United States delegate its privilege of bypassing state immunities when *it* is the plaintiff to private parties? For Professor Kuhn, the defining characteristic of a normal science “puzzle” is “the assured existence of a solution” under the existing paradigm.<sup>362</sup> Each of these puzzles seems susceptible to solution. But as in science, that does not necessarily mean that a solution can be reached without considerable additional work—or that everyone will agree as to what the right solution is.

A. *Who Is the State?*

Under *Seminole Tribe* and its progeny, state sovereign immunity is hard to overcome (at least when seeking money damages). It thus matters a great deal which governmental entities have it. Although American constitutional law generally does not recognize state political subdivisions—cities, counties, etc.—as having any sort of separate constitutional status from the state themselves,<sup>363</sup> sovereign immunity is an important exception to that principle. Under *Lincoln County v. Luning*, the state’s constitutional immunity does *not* extend to municipalities.<sup>364</sup> *Luning* has long required courts to draw lines among non-federal public institutions to determine which are entitled to state sovereign immunity and which are not. Over a century later, a decline in public funding for institutions like state universities, increasing use of special-purpose entities by states, privatization of state functions, and the tendency of states to engage in essentially for-profit

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361. *Id.* at 35, 37.

362. *See id.* at 37 (“[O]ne of the things a scientific community acquires with a paradigm is a criterion for choosing problems that, while the paradigm is taken for granted, can be assumed to have solutions.”).

363. *E.g.*, Richard Briffault, *Our Localism: Part I—The Structure of Local Government Law*, 90 COLUM. L. REV. 1, 7–8 (1990). State law may endow localities with significant rights. *Id.* at 9–11. But the federal Constitution speaks of the nation and the states. *See Cmty. Commc’ns Co. v. City of Boulder*, 455 U.S. 40, 53 (1982) (“Ours is a ‘dual system of government,’ which has no place for sovereign cities.” (quoting *Parker v. Brown*, 317 U.S. 341, 351 (1943))); Richard Schragger, *The City in the Future of Federalism*, in CITIES IN FEDERAL CONSTITUTIONAL THEORY 204, 205 (Erika Arban ed., 2022) (“US federal constitutional law is actively hostile to . . . the recognition of cities as relevant constitutional units at all.”).

364. 133 U.S. 529, 531 (1890).

functions in competition with private entities has made this line-drawing question increasingly salient.<sup>365</sup>

The Supreme Court considers the arm-of-the-state question infrequently, generally in cases involving unconventional state entities or arrangements. The leading case is *Hess v. Port Authority Trans-Hudson Corp.*,<sup>366</sup> which held that a commuter railroad operated by the Port Authority of New York and New Jersey did not enjoy the sovereign immunity that those states possessed on their own.<sup>367</sup> *Hess* relied heavily on the Port Authority's origins as an interstate compact approved by Congress under the Compact Clause.<sup>368</sup> Because "the federal court is ordained by one of the [Compact Clause] entity's founders," a federal-court suit "is not an affront to the dignity of [the] entity."<sup>369</sup>

Nonetheless, *Hess* treated these propositions as establishing only a presumption against immunity, and it reviewed a number of more general considerations to consider whether that presumption had been rebutted.<sup>370</sup> The courts of appeals have thus applied a multi-factor test governing not only Compact Clause entities but also more conventional arm-of-the-state cases. Although this test varies slightly by circuit, a typical version considers the following factors, which are deemed to be "non-exclusive":

- (1) whether any judgment against the entity as defendant will be paid by the State;
- (2) the degree of autonomy exercised by the entity, including such circumstances as who appoints the entity's directors or officers, who funds the entity, and whether the State retains a veto over the entity's actions;
- (3) whether the entity is involved with state concerns as distinct from non-state concerns, including local concerns; and

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365. See, e.g., Jeremy Pilaar, *The Laws of Public Higher Education Retrenchment*, 23 N.Y.U. J. LEGIS. & PUB. POL'Y 159, 163 (2020) (noting that "[f]or decades, U.S. states have reduced funding for tertiary education," while "[p]ublic colleges and universities have made up for the shortfall by raising tuition"); Gillian E. Metzger, *Privatization as Delegation*, 103 COLUM. L. REV. 1367, 1377 (2003) (warning that delegating government power to private entities "will undermine constitutional accountability").

366. 513 U.S. 30 (1994).

367. *Id.* at 32–33.

368. *Id.* at 35, 41–44; see also U.S. CONST. art. I, § 10, cl. 3 ("No State shall, without the Consent of Congress . . . enter into any Agreement or Compact with another State, or with a foreign Power . . .").

369. *Hess*, 513 U.S. at 41.

370. *Id.* at 43–49.



- (4) how the entity is treated under state law, such as whether the entity's relationship with the State is sufficiently close to make the entity an arm of the State.<sup>371</sup>

Both the Supreme Court and the circuits have uniformly prioritized the first factor—whether a judgment against the entity will reach the state's coffers—as the most important.<sup>372</sup> That makes sense, given state immunity law's historical preoccupation with protecting the states from existential financial threats.<sup>373</sup> But considerable uncertainty remains concerning how this factor should be applied.<sup>374</sup>

Difficult immunity questions arise not only with respect to exotic creatures like the Trans-Hudson interstate compact but also concerning more conventional entities like public universities. Consider, for example, a recent Fifth Circuit decision rejecting a suit for copyright infringement against the Athletic Department of Texas A&M University.<sup>375</sup> The complaint alleged that plaintiff, a writer and editor of sports books, sent a portion of a new book on a prominent A&M football hero to the Department seeking comments on the draft.<sup>376</sup> Officials at the Department instead removed the author's byline and copyright notice, then posted the chapter on the Department's website and sent it, via email and Twitter, to over two hundred thousand A&M alumni and fans.<sup>377</sup> Plaintiffs attempted to sue the Athletic Department rather than the University as a whole, alleging that the Department was “100% self-supporting and receives no funding from the State of Texas or public tax

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371. United States *ex rel.* Oberg v. Pa. Higher Educ. Assistance Agency, 804 F.3d 646, 650–51 (4th Cir. 2015); *see also, e.g.*, Clark v. Tarrant County, 798 F.2d 736, 744–45 (5th Cir. 1986) (considering similar factors).

372. *E.g.*, Regents of the Univ. of Cal. v. Doe, 519 U.S. 425, 430 (1997); *Hess*, 513 U.S. at 48 (approving decisions “recogniz[ing] the vulnerability of the State's purse as the most salient factor in Eleventh Amendment determinations”); *see also* Hudson v. City of New Orleans, 174 F.3d 677, 682 (5th Cir. 1999) (noting the “well established” rule that protecting state treasuries is the more important factor when determining an entity's status); Héctor C. Bladuell, Note, *Twins or Triplets?: Protecting the Eleventh Amendment Through a Three-Prong Arm-of-the-State Test*, 105 MICH. L. REV. 837, 842 (2007) (criticizing *Hess*'s “nearly exclusive focus on the vulnerability of the state's treasury”).

373. Fletcher, *Historical Interpretation*, *supra* note 52, at 1129 (identifying “the award of money judgments against the states” as “the traditional core of eleventh amendment protection”); Young, *Its Hour Come Round*, *supra* note 30, at 596.

374. *See, e.g.*, Bladuell, *supra* note 372, at 844–46 (observing considerable variance among the circuits).

375. *Can. Hockey, L.L.C. v. Tex. A&M Univ. Athletic Dep't*, No. 20-20503, 2022 WL 445172, at \*2 (5th Cir. Feb. 14, 2022). The author served as a consultant in support of the plaintiff's suit in this case.

376. *Id.* at \*1.

377. *See* Petition for A Writ of Certiorari at 7–8, *Can. Hockey*, 2022 WL 445172 (June 15, 2022) (No. 21-1603), 2022 WL 2345596, at \*7–8.

dollars,” as mandated by the Texas state constitution and other state laws.<sup>378</sup> The Fifth Circuit nonetheless reflexively relied on circuit precedent holding “auxiliary enterprises” of state universities to be arms of the state and considered Texas’s ban on state funding for college athletics to be irrelevant to whether a judgment against the Department would be paid out of the state treasury.<sup>379</sup>

The Texas A&M case calls into question what sort of financial autonomy it would take to move a state university (or a department thereof) outside the ambit of sovereign immunity, especially in an age when such universities operate highly lucrative athletics programs and other businesses that are both self-sufficient and intensely competitive with private entities. But it also highlights a more far-reaching set of questions arising from widespread privatization of public functions and creation of innovative entities that blur the line between public and private. Michael Francus has recently argued, for example, that state governments may effectively access federal bankruptcy protection—something they had long been thought unable to do<sup>380</sup>—by devolving their debt to public entities that would be considered distinct from the state itself.<sup>381</sup> Professor Francus argues that only a small percentage of state debt is held in the name of the state itself, with the rest owed by school or water districts, state agencies, and the like, that could fit within the Bankruptcy Code’s definition of a “municipality” and thus file for bankruptcy.<sup>382</sup> Whether this statutory argument would fly constitutionally, however, may well turn on whether these public entities qualify as “arms of the state” under *Hess* and similar cases.<sup>383</sup>

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378. Complaint at 3, *Can. Hockey*, 2022 WL 445172 (Jan. 19, 2017) (No. 4:17-cv-00181), 2017 WL 264811; see TEX. CONST. art. VII, § 17(f) (prohibiting the use of public dollars for intercollegiate athletics). According to figures for the fiscal year ending in June 2019, the Texas A&M Athletic Department had total revenue of \$212.7 million, ranking first in the National Collegiate Athletic Association’s Southeastern Conference and second nationally (behind the University of Texas at Austin). Blake Toppmeyer, *How SEC Athletic Departments Ranked in Total Revenue for 2018–19 Fiscal Year*, KNOXVILLE NEWS SENTINEL (July 23, 2020, 5:58 PM), <https://www.knoxnews.com/story/sports/college/university-of-tennessee/football/2020/07/16/sec-athletics-finances-texas-am-georgia-alabama-tennessee-vols-ncaa/5442712002/> [<https://perma.cc/L9W9-3D9F>].

379. *Can. Hockey*, 2022 WL 445172, at \*4–5.

380. Chapter 9 of the Bankruptcy Code permits municipalities, but not states, to “adjust” their debts through bankruptcy. 11 U.S.C. §§ 901–946. Underlying the Code’s distinction between municipalities and states are constitutional concerns, some involving sovereign immunity. See generally Johnson & Young, *supra* note 345, at 155–59 (discussing these concerns).

381. Michael A. Francus, *Disaggregating State Bankruptcy*, 171 U. PENN. L. REV. 1589, 1618–19, 1648 (2023).

382. *Id.* at 1603, 1605–07, 1610.

383. See Johnson & Young, *supra* note 345, at 159–60 (noting sovereign immunity objections to state bankruptcy). *Central Virginia Community College v. Katz* held that the States waived their sovereign immunity in bankruptcy cases “in the plan of the Convention.” 546 U.S. 356, 377 (2006).

Unwinding these “arm of the state puzzles” may require renewed attention to what values state sovereign immunity primarily serves. The traditional concern with protecting the state fisc,<sup>384</sup> for example, has little purchase when considering a state university athletic program with hundreds of millions of dollars of its own revenue and no contributions from the state. Some decisions, however, have insisted that “[t]he preeminent purpose of state sovereign immunity is to accord States the dignity that is consistent with their status as sovereign entities.”<sup>385</sup> I am not as skeptical of that value as some; governments quite rightly act to preserve their institutional dignity and prestige in many contexts.<sup>386</sup> If this value is to become primary, however, then courts must ask not only whether litigation and accountability in damages suits for government wrongs actually undermine institutional dignity in our litigious culture,<sup>387</sup> but also whether asserting jurisdiction against particular entities is likely to undermine such dignity. Haling the North Carolina Turnpike Authority into federal court, for example, seems unlikely to impede the Old North State from maintaining the loyalty and respect of its citizens.

Tightening up the scope of state sovereign immunity will necessarily involve difficult line-drawing problems. As Professor Francus’s argument suggests, even a strict follow-the-money approach may require increasingly sophisticated analysis of complex financial arrangements.<sup>388</sup> Some of the Court’s critics have urged it to confine immunity “to the core functions of government.”<sup>389</sup> But those functions have been notoriously hard to define in other contexts.<sup>390</sup> Excluding commercial enterprises run by states<sup>391</sup>—like the

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But *Katz* considered whether states could be sued incidentally in the course of another person’s or entity’s bankruptcy; it did not consider whether “the plan of the Convention” contemplated a waiver such that states could *themselves* be subject to the control of a federal bankruptcy Court. *Id.* at 360, 379. Nor is it clear that a state could voluntarily relinquish its autonomy (and accountability to the electorate) to a bankruptcy court’s control. Johnson & Young, *supra* note 345, at 160.

384. Young, *Its Hour Come Round*, *supra* note 30, at 596.

385. Fed. Mar. Comm’n v. S.C. State Ports Auth., 535 U.S. 743, 760 (2002); see also Alden v. Maine, 527 U.S. 706, 748–49 (1999) (citing dignity as a purpose of immunity); *In re Ayers*, 123 U.S. 443, 505 (1887) (same).

386. Young, *Two Federalisms*, *supra* note 2, at 157–58; Judith Resnik & Julie Chi-hye Suk, *Adding Insult to Injury: Questioning the Role of Dignity in Conceptions of Sovereignty*, 55 STAN. L. REV. 1921, 1943, 1946 (2003).

387. Young, *Two Federalisms*, *supra* note 2, at 158.

388. See *supra* notes 380–83 and accompanying text.

389. NOONAN, *supra* note 4, at 100.

390. *E.g.*, Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 542–46 (1985); Young, *Sky Falling*, *supra* note 88, at 1558–59.

391. See, e.g., Coll. Sav. Bank v. Fla. Prepaid Postsecondary Expense Bd., 527 U.S. 666, 692 (1999) (Stevens, J., dissenting) (arguing that “it may . . . be appropriate to limit the coverage of state sovereign immunity by treating the commercial enterprises of the States like the commercial activities of foreign sovereigns under the Foreign Sovereign Immunities Act of 1976”); NOONAN,

semi-professional sports franchises operating out of many state universities—may be more workable. After all, the Foreign Sovereign Immunities Act statutorily excludes foreign commercial enterprises from protection, and while that exclusion generates the occasional hard case it is not generally thought to be unmanageable.<sup>392</sup>

More generally, three decades have passed since *Hess*, and in that time state immunity has become both stronger and more salient. The structure, scope, and nature of state activities has changed in that period as well—and more changes may be in the offing. All that suggests it may be time to work out more consistent and functional rules for resolving who is an arm of the state. That task will no doubt be a complex one. The important point for present purposes, however, is these sorts of questions seem both intelligible and answerable within the *Seminole Tribe* paradigm.

#### B. *As-Applied Abrogation*

The Court's unanimous decision in *United States v. Georgia* held that a federal statute abrogating state immunity may be enforced whenever a plaintiff can also show an actual constitutional violation on the facts of her case.<sup>393</sup> This as-applied abrogation theory has the potential to provide damages relief in particularly egregious cases of federal law violations by state government entities. But to date, few reported decisions exist in which plaintiffs have actually overcome state immunity on a *Georgia* theory.<sup>394</sup>

The facts of *Allen* provide a good example of how case-by-case abrogation might work in practice. Rick Allen, an underwater videographer, alleged that the state of North Carolina appropriated copyrighted videos and photos that Allen had taken of an effort to salvage a sunken pirate ship and displayed them online and in a state museum.<sup>395</sup> Allen argued that the State's copyright infringement deprived him of his property in the works without due process of law; hence, he invoked the Copyright Remedy Clarification Act's abrogation of state immunity.<sup>396</sup> Although Allen pursued both abrogation tracks initially, the district court found that the CRCA validly abrogated state immunity as a prophylactic matter and so did not reach the as-applied abrogation claim.<sup>397</sup> On appeal, however, the Supreme Court

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*supra* note 4, at 96–97 (suggesting that states should lack immunity when “the state was acting for profit and might be competing unfairly with private persons”).

392. 28 U.S.C. § 1605(a)(2); see *Jam v. Int'l Fin. Corp.*, 139 S. Ct. 759, 766, 772 (2019) (discussing the FSIA's commercial activity exception); *Saudi Arabia v. Nelson*, 507 U.S. 349, 358–59 (1993) (holding that the Saudi government's detention and torture of Mr. Nelson was not “commercial activity” within the meaning of the exception).

393. 546 U.S. 151, 158–59 (2006).

394. For one example, see *Alaska v. EEOC*, 564 F.3d 1062, 1071 (9th Cir. 2009).

395. *Allen v. Cooper*, 244 F. Supp. 3d 525, 530–31 (E.D.N.C. 2017).

396. *Allen v. Cooper*, 140 S. Ct. 994, 999, 1001 (2020); 17 U.S.C. § 511(a).

397. *Allen*, 244 F. Supp. 3d at 540.

reversed on the ground that copyright infringement does *not* violate the Due Process Clause unless the infringement is intentional and state law provides no remedy after the fact.<sup>398</sup> Because Allen could not show that state infringements are generally intentional or that state laws generally provide no remedies, prophylactic abrogation failed for lack of congruence and proportionality.<sup>399</sup>

Some of Mr. Allen's *amici* pressed the Court to resolve the case on the narrower ground of case-by-case abrogation under *Georgia*.<sup>400</sup> The Court seems to have accepted the State's argument that the *Georgia* issue was not before it because the district court had not ruled on it and so no appeal on that issue had been taken. Interestingly, counsel for North Carolina invoked the *Georgia* theory at oral argument to answer questions about egregious state violations of intellectual property:

JUSTICE KAVANAUGH: Justice Breyer's point is that it could be rampant, states ripping off copyright holders. And how . . . can that be squared with the exclusive right, if states can do this, which presumably a ruling in your favor will do nothing but encourage them to do?

MR. PARK: So I think that's the beauty of the Copyright Remedy Act, combined with this Court's *Georgia* decision. . . . [W]henver a plaintiff can reasonably allege that there has been intentional copyright infringement and there are not adequate remedies, then, under this Court's *Georgia* decision, they can bring a direct constitutional claim. We don't dispute that.

And so I think . . . that the *Georgia* issue . . . relieves many of these concerns that, Justice Breyer and Justice Kavanaugh, you've outlined . . . .

JUSTICE BREYER: That would cure my problem to a considerable degree . . . .<sup>401</sup>

As North Carolina conceded, then, Allen would have been entitled to proceed under *Georgia* if he had shown that the state's infringement was intentional and that no state remedy was available.<sup>402</sup> As it happened, the District Court proved willing to reopen the *Allen* litigation on remand to allow the plaintiffs

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398. *Allen*, 140 S. Ct. at 1004, 1007.

399. *Id.* at 1006–07.

400. Brief of Public Law Scholars as *Amici Curiae* in Support of Petitioners at 18–23, *Allen*, 140 S. Ct. 944 (No. 18-877). The present author was counsel of record on this brief.

401. Transcript of Oral Argument at 39–41, *Allen*, 140 S. Ct. 944 (No. 18-877).

402. *Id.* at 41.

to present their arguments for an actual constitutional violation that could support abrogation as to their particular claims.<sup>403</sup>

*Georgia*'s reasoning strikes a sensible balance between Congress's concern for statutory enforcement and the legitimate values of governmental autonomy and solvency that sovereign immunity protects. A plaintiff's ability to establish not only a statutory violation but a constitutional one as well is not a perfect proxy for the severity of the violation, but it does provide a decent filter. And certainly *Georgia* provides no basis for broad abrogations in the areas of contract or tort law that might threaten the states' financial viability—the key historical concern of sovereign immunity law. Finally, *Georgia* will often provide a narrower ground for decision, allowing courts both to avoid difficult questions of congruence and proportionality that arise whenever prophylactic abrogation is at issue and to confine their decisions on the validity of the abrogation statute to the circumstances of the case before them.

The real puzzle with respect to case-by-case abrogation is why we do not see it more often. The Supreme Court's decision in *Georgia* was unanimous—nearly unheard of in state immunity cases—and penned by Justice Scalia, one of the *Seminole Tribe* paradigm's most stalwart supporters. One would expect that unusual consensus to attract plaintiffs willing to allege actual constitutional violations in support of their statutory claims. To be sure, such claims will not always be easy to allege. In cases like *Kimel* or *Garrett*, which involved claims of discrimination on grounds that, as a constitutional matter, trigger only rational basis review, it would be rare for a statutory plaintiff to plausibly allege that the discrimination they suffered was actually irrational.<sup>404</sup> But especially for property claimants—who generally need to show only intentional deprivation and a lack of state remedies—*Georgia* should often prove a winning theory.<sup>405</sup>

It has not, so far, for various reasons. One is evident skepticism in the lower courts. Some district courts, for example, have suggested that case-by-case abrogation is limited to cases under Title II of the ADA—that is, to the statute under which the plaintiff in *Georgia* sued.<sup>406</sup> That is a curious claim,

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403. *Allen v. Cooper*, 555 F. Supp. 3d 226, 242–43 (E.D.N.C. 2021), *app. dismissed*, 2022 WL 19226124 (4th Cir. Oct. 14, 2022). That litigation is ongoing in the district court as this Article goes to press.

404. *See Kohn v. State Bar*, 497 F. Supp. 3d 526, 536 (N.D. Cal. 2020) (holding that where plaintiff failed to allege the violation of a fundamental right, he had not plausibly alleged that the state's policy was irrational).

405. That should especially be true for patent and copyright claims, which often do involve intentional conduct and where state law remedies are generally preempted.

406. *See, e.g., Campinha-Bacote v. Regents of the Univ. of Mich.*, No. 1:15-cv-330, 2016 WL 223408, at \*4 (S.D. Ohio Jan. 19, 2016) (asserting that "*Georgia* . . . has no bearing on the CRCA or an individual's right to due process with respect to a copyright"); *Grizzle v. Okla. Dep't of*

given that nothing in the Court's analysis in *Georgia* was unique to the ADA context; everything turned, rather, on the presence and nature of the underlying constitutional violation alleged in tandem with the plaintiff's statutory claim. Other lower court decisions have simply construed the underlying rights extremely narrowly in order to avoid finding an actual constitutional violation that might support case-by-case abrogation.<sup>407</sup>

The lower courts' skepticism is not all that surprising, because *Georgia*, with relatively little fanfare, created a potentially large loophole in an apparently quite restrictive state sovereign immunity regime. It doesn't help that *Georgia* has flown largely under the academic radar. The leading *Hart & Wechsler* casebook, for instance, gives it only a short paragraph in its chapter on state sovereign immunity and nowhere highlights it as an alternative theory to prophylactic abrogation under *Florida Prepaid* and similar cases.<sup>408</sup> On the other hand, one can also see why *Georgia* could attract a unanimous court. What makes prophylactic abrogation difficult is the risk that, if Congress is allowed to use the Section Five power to regulate beyond the scope of the underlying constitutional provision, Congress may end up altering the meaning of the Constitution itself.<sup>409</sup> And the limits of congruence and proportionality have always been difficult to discern. But *Georgia* holds out the prospect of *perfect* congruence and proportionality: *Georgia* plaintiffs, after all, simply cannot recover damages from a state until they establish an actual violation of their constitutional rights.

*Georgia* thus offers a particularly fruitful—but largely unexplored—line of inquiry for plaintiffs seeking to overcome state sovereign immunity going forward. It seems unlikely that case-by-case abrogation will reach its full remedial potential until it is either specifically embodied in an abrogation statute or vindicated in a Supreme Court decision. It remains an option for Congress, however. That body could readily amend the Copyright Clarification Act, for example, to explicitly impose liability on the states for copyright infringements that are actually unconstitutional because they are

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Veterans Affs., No. CIV-06-210-SPS, 2006 WL 3227880, at \*3 (E.D. Okla. Nov. 2, 2006) (holding that *Georgia* doesn't apply to claims under the ADEA).

407. See, e.g., *Can. Hockey, L.L.C. v. Tex. A&M Univ. Athletic Dep't*, No. 20-20503, 2022 WL 445172, at \*7–8 (5th Cir. Feb. 14, 2022) (finding that the possibility that a state court might, in the future, recognize a state takings remedy foreclosed a federal due process claim to support abrogation under the CRCA in federal court).

408. HART & WECHSLER, *supra* note 71, at 962.

409. See *City of Boerne v. Flores*, 521 U.S. 507, 508 (1997) (“There must be a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end. Lacking such a connection, legislation may become substantive in operation and effect.”). The Court has been willing, however, to countenance remedies more elaborate than the Constitution itself provides as a means of implementing the Constitution where there are actual violations of its requirements. See, e.g., *South Carolina v. Katzenbach*, 383 U.S. 301, 327–28, 334 (1966) (upholding statutory remedies in the Voting Rights Act, such as federal preclearance of new state election laws, as a remedy for unconstitutional race discrimination in voting).

intentional and state law provides no ready remedy. More broadly, Congress could amend § 1983 to make states proper defendants in cases where the plaintiff alleges a constitutional claim.<sup>410</sup> As with *Georgia* claims under existing statutes, such an amendment would necessarily satisfy *City of Boerne*'s congruence and proportionality test by requiring proof of a constitutional violation in every case.<sup>411</sup>

### C. Immunity in Takings Cases

Thirty-seven years ago the Supreme Court rejected the view that “the Constitution does not, of its own force, furnish a basis for a court to award money damages against the government” and suggested that the government’s obligation to compensate existed notwithstanding “principles of sovereign immunity.”<sup>412</sup> Leading commentators took this language to mean that the Just Compensation Clause of the Fifth Amendment requires a compensatory remedy in takings cases and abrogates state sovereign immunity as to such claims.<sup>413</sup> The Court muddied the waters in a subsequent case,<sup>414</sup> however, and it has never squarely decided the question. After all, the vast majority of takings litigation arises in response to actions by municipalities, which lack sovereign immunity, or the federal government, which has largely waived it.<sup>415</sup> Every circuit court that decided the question, however, has held that state sovereign immunity *does* bar a takings claim for just compensation against a state government.<sup>416</sup>

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410. See *Will v. Mich. Dep’t of State Police*, 491 U.S. 58, 71 (1989) (holding that states are not “persons” suable under 42 U.S.C. § 1983). Such a change would also require a clear statement that Congress was abrogating the states’ immunity from suit. See *Quern v. Jordan*, 440 U.S. 332, 345 (1979) (holding that 42 U.S.C. § 1983 lacks such a statement).

411. See *City of Boerne*, 521 U.S. at 532–35 (applying the congruence and proportionality test to statute sweeping more broadly than the constitutional provision it was meant to enforce).

412. *First Eng. Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304, 316 n.9 (1987) (internal quotation marks omitted) (quoting Brief for the United States as Amicus Curiae Supporting Appellee at 14, *First Eng.*, 482 U.S. 304 (No. 85-1199)).

413. E.g., Thomas W. Merrill, *The Landscape of Constitutional Property*, 86 VA. L. REV. 885, 981 (2000); Fallon & Meltzer, *supra* note 336, at 1779 n.244; Jackson, *supra* note 74, at 115.

414. See *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 714 (1999) (plurality opinion) (allowing for the possibility that “the sovereign immunity rationale retains its vitality in cases where [the Fifth] Amendment is applicable”).

415. In at least one prominent case, however, the Court did consider a takings claim against a state regulatory agency without mentioning sovereign immunity. See *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1030 (1992) (holding that the effects of a state law rendered plaintiff’s real property valueless and amounted to a “total taking”). *Lucas*, however, was brought initially in state court. See *id.* at 1009.

416. E.g., *Bay Point Props., Inc. v. Miss. Transp. Comm’n*, 937 F.3d 454, 457 (5th Cir. 2019); *Williams v. Utah Dep’t of Corr.*, 928 F.3d 1209, 1214 (10th Cir. 2019); *Hutto v. S.C. Ret. Sys.*, 773 F.3d 536, 552 (4th Cir. 2014); *DLX, Inc. v. Kentucky*, 381 F.3d 511, 527–28 (6th Cir. 2004); *Citadel Corp. v. P.R. Highway Auth.*, 695 F.2d 31, 33 n.4 (1st Cir. 1982); *Garrett v. Illinois*, 612 F.2d 1038, 1040 (7th Cir. 1980).



The availability of state immunity in takings cases is likely to be important both because state entities do occasionally take property and because takings theories may be invoked to vindicate certain federal property rights, such as patents or copyrights, when states violate those rights. The best argument that state sovereign immunity should not block takings claims comes from the Court's recent decision in *Knick v. Township of Scott*, which overruled the *Williamson County* doctrine requiring federal takings plaintiffs to first seek relief in state court.<sup>417</sup> *Knick* endorsed the Court's understanding of the Takings Clause in *First English Evangelical Lutheran Church v. County of Los Angeles*<sup>418</sup> as conferring a federal constitutional right to immediate compensation when a government takes private property.<sup>419</sup> If the Fifth Amendment confers a right to monetary compensation, then it is hard to see how a state could interpose its sovereign immunity.

Several circuits have upheld state immunity in takings cases after *Knick*, but they have generally held only that, since *Knick* involved a local government lacking sovereign immunity, *Knick* has nothing to say concerning the immunity belonging to a state government.<sup>420</sup> That dismissal is too quick, however. Circuit court decisions upholding state immunity in takings cases have generally done so only when state remedies were available to provide just compensation.<sup>421</sup> That rule sets up a regime nearly identical to *Williamson County*: federal takings plaintiffs must first seek a remedy in state court, and they have viable federal court claims only if the state remedy proves unavailable. That, of course, is precisely what *Knick* rejected. As the Chief Justice explained, “[t]he fact that the State has provided a property owner with a procedure that may subsequently result in just compensation cannot deprive the owner of his Fifth Amendment right to compensation under the Constitution, leaving only the state law right.”<sup>422</sup> And the Fourteenth Amendment generally guarantees federal rightholders a right to proceed in federal court, irrespective of what state law remedies may be available.<sup>423</sup>

The Roberts Court has generally been more receptive to takings claims than its predecessors; we have yet to see what may happen when its

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417. 139 S. Ct. 2162, 2179 (2019) (overruling *Williamson Cnty. Reg'l Plan. Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172 (1985)).

418. 482 U.S. 304 (1987).

419. *Knick*, 139 S. Ct. at 2172.

420. *E.g.*, *Bay Point Props.*, 937 F.3d at 456; *Williams*, 928 F.3d at 1214.

421. *E.g.*, *Williams*, 928 F.3d at 1213; *Hutto*, 773 F.3d at 552–53.

422. *Knick*, 139 S. Ct. at 2171.

423. *E.g.*, *McNeese v. Bd. of Educ. for Cmty. Unit Sch. Dist. 187*, 373 U.S. 668, 674 (1963) (where plaintiffs assert the “depriv[ation] . . . of rights protected by the Fourteenth Amendment . . . [s]uch claims are entitled to be adjudicated in the federal courts”); *Home Tel. & Tel. Co. v. City of Los Angeles*, 227 U.S. 278, 283–84 (1913) (rejecting interpretation of the Fourteenth Amendment’s state action requirement that would have given state courts the first say as to federal rights claims).

enthusiasm for property rights collides with its longstanding love affair with sovereign immunity.<sup>424</sup> *Knick* points the answer to that question, but as with claims under *United States v. Georgia*, the lower courts are unlikely to change their own longstanding practice without further guidance from the Supreme Court.

*D. Suits by the United States—and Its Proxies*

State sovereign immunity has long been understood to give way when the United States is the plaintiff.<sup>425</sup> As already discussed, this is the original and non-controversial instance of a waiver of immunity in the plan of the Convention.<sup>426</sup> The waiver protects the vital settlement function of the federal courts when disputes arise within our federal system. As the Court explained in *United States v. Texas*,<sup>427</sup> the Framers expected “that controversies, capable of judicial solution, might arise between the United States and some of the States, and that the permanence of the Union might be endangered if some tribunal was not entrusted the power to determine them according to the recognized principles of law.”<sup>428</sup> Hence, “[t]he States of the Union have agreed, in the Constitution, that the judicial power of the United States shall extend . . . to controversies to which the United States shall be a party.”<sup>429</sup> As Jonathan Siegel has explained, “[t]he United States may sue a state in federal court in an ordinary civil action. In particular, it may sue in federal court to obtain civil damages from a state for violations of acts of Congress.”<sup>430</sup>

Professor Siegel would go much further, insisting that “[t]he power of the United States to sue the states is the hidden source of Congress’s power to *abrogate* state sovereign immunity.”<sup>431</sup> Siegel’s goal was to put general

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424. As this Article heads to press, the Supreme Court has heard oral argument on a related issue in *Devillier v. Texas*, No. 22-913 (*cert. granted* Sept. 29, 2023, argued Jan. 16, 2024), concerning whether the Takings Clause is “self-executing” so as to provide a private right of action against state governments. Like the arguments against state immunity in takings cases, the arguments for a private right action rely on the textual mandate for a compensatory remedy and the analysis in *First English*. It is possible that the Takings Clause could provide a cause of action without piercing state immunities; after all, most statutes do just that. But arguments for a private right to sue and for constitutional abrogation of immunity both rest on the same textual mandate to pay just compensation.

425. *See, e.g.*, *United States v. Mississippi*, 380 U.S. 128, 140 (1965) (“[N]othing in [the 11th Amendment] or any other provision of the Constitution prevents or has ever been seriously supposed to prevent a State’s being sued by the United States.”).

426. *See supra* notes 274–75 and accompanying text.

427. 143 U.S. 621 (1892).

428. *Id.* at 644–45.

429. *Id.* at 646.

430. Siegel, *supra* note 39, at 552–53 (citing *United States v. California*, 297 U.S. 175, 187–89 (1936) (holding that California’s immunity did not bar a U.S. suit in federal district court seeking monetary penalties for violations of the Safety Appliance Act)).

431. *Id.* at 570 (emphasis added).

abrogation statutes—that is, statutes empowering private parties to sue the states for violations of federal law—on a firmer ground than the commerce power argument rejected in *Seminole Tribe*. He thought it was uncontroversial that, through a “device . . . similar to a *qui tam* action,” Congress could “authorize individuals to bring actions against states in the name of the United States.”<sup>432</sup> Such suits “in function would allow private parties to sue states for retroactive monetary damages for violation of any duty that Congress may constitutionally place upon the states.”<sup>433</sup> Hence, Siegel reasoned, Congress must have the power to cut out the “empty formality” of authorizing the suits in the name of the United States and simply abrogate the states’ immunity in private suits.<sup>434</sup>

Professor Siegel wrote before the Court’s decision in *Seminole Tribe*, and it seems likely that the Court would view his argument for a general abrogation power based on the *qui tam* idea as an invalid end run around *Seminole*’s holding. My present interest, however, is in the intermediate step in Siegel’s argument—that is, that because sovereign immunity would not bar a suit by the United States enforcing a federal statutory obligation against a state government, Congress may delegate the United States’ ability to pierce state immunity to private parties through a *qui tam*-style device. Siegel thought this proposition uncontroversial, and if he was right, then the device might offer a viable option for recovering damages against states for violations of federal law in a wide variety of federal statutory settings. After all, Congress continues to rely heavily on “private attorneys general” to enforce federal law in settings from federal environmental law to antitrust and securities law to consumer protection and civil rights. If Congress may delegate the President’s authority to “take Care that the Laws be faithfully executed”<sup>435</sup> to private parties, why may it not delegate the national government’s immunity from state immunity?

The Supreme Court has twice reserved the question of whether state governmental immunity must yield to suits by parties exercising, in some degree, the delegated authority of the United States. In *Vermont Agency of Natural Resources v. United States ex rel. Stevens*,<sup>436</sup> the Court construed the *qui tam* provisions of the False Claims Act not to include state governments in the “persons” subject to suit.<sup>437</sup> Justice Scalia’s majority opinion said that “[w]e of course express no view on the question whether an action in federal

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432. *Id.* at 551.

433. *Id.*

434. *Id.* at 564–65, 564 n.131.

435. U.S. CONST. art. II, § 3.

436. 529 U.S. 765 (2000).

437. *Id.* at 787.

court by a *qui tam* relator against a State would run afoul of the Eleventh Amendment, but we note that there is ‘a serious doubt’ on that score.”<sup>438</sup>

Nearly two decades earlier, in *Blatchford v. Native Village of Noatak*,<sup>439</sup> the Court considered a suit by a Native American tribe against a State government under 28 U.S.C. § 1362; that statute, the tribe argued, “embod[ied] a general delegation of the authority to sue on the tribes’ behalf from the Federal Government back to the tribes themselves” and thus carried with it a delegation of the United States’ right to disregard state immunity.<sup>440</sup> The Court was quite skeptical:

We doubt, to begin with, that that sovereign exemption *can* be delegated—even if one limits the permissibility of delegation . . . to persons on whose behalf the United States itself might sue. The consent, “inherent in the convention,” to suit by the United States—at the instance and under the control of responsible federal officers—is not consent to suit by anyone whom the United States might select; and even consent to suit by the United States for a particular person’s benefit is not consent to suit by that person himself.<sup>441</sup>

The Court did not actually decide this question, concluding that “assuming that delegation of exemption from state sovereign immunity is theoretically possible, there is no reason to believe that Congress ever contemplated such a strange notion” in § 1362.<sup>442</sup>

The Court’s much more recent decision in *PennEast* cuts the other way, however. That case involved the exercise of the United States’ eminent domain power, which Congress had delegated to a private party constructing an interstate natural gas pipeline.<sup>443</sup> The Court held that the States had surrendered their immunity to federal eminent domain suits in the plan of the Convention, and that this surrender allowed the private pipeline company to haul the State of New Jersey into federal court and condemn its property.<sup>444</sup> On its face, *PennEast* looks like a case in which the United States was allowed to delegate its unique privilege to sue state governments. On the other hand, the Court emphasized the unique history of federal eminent domain. “For as long as the eminent domain power has been exercised by the United States,” the Court said, “it has also been delegated to private parties. It was commonplace before and after the founding for the Colonies and then

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438. *Id.* (quoting *Ashwander v. Tenn. Valley Auth.*, 297 U.S. 288, 348 (1936) (Brandeis, J., concurring)).

439. 501 U.S. 775 (1991).

440. *Id.* at 783.

441. *Id.* at 785.

442. *Id.* at 785–86.

443. *PennEast Pipeline Co. v. New Jersey*, 141 S. Ct. 2244, 2263 (2021).

444. *Id.* at 2262–63.

the States to authorize the private condemnation of land for a variety of public works.”<sup>445</sup> And the Court was at pains to say that New Jersey had “misconstrued the issue in this case as whether the United States can delegate its ability to sue States. The issue is instead whether the United States can delegate its eminent domain power to private parties.”<sup>446</sup> Nonetheless, *PennEast* seems likely to inspire a renewed interest in *qui tam*-style delegations of national authority to sue states.

Any such proposals will arise in a legal and political environment complicated by extensive discussions of how delegations of governmental authority to sue bear on other issues, such as standing to sue and the enjoyment of individual rights. The Court’s standing jurisprudence, for example, has recognized that the government may sometimes delegate its right to litigate while suggesting important principles limit that power. *Stevens* rejected a challenge to the False Claims Act on Article III standing grounds, holding that the Act effects a valid assignment to the relator of the Government’s proprietary interest in recovering its funds lost through fraud and this interest suffices for standing.<sup>447</sup> Considerable doubt exists, however, whether the United States can similarly assign its *sovereign* interest in enforcing the law.<sup>448</sup> And recent state efforts to delegate their sovereign interests to private enforcement have raised intense controversy.<sup>449</sup>

The alternative would be to consider the private delegee an *agent* rather than an assignee of the government. In *Hollingsworth v. Perry*,<sup>450</sup> the Court accepted in principle that a state government could deputize a private party as an agent for the purposes of defending the constitutionality of a state ballot measure in court, but it held that such a party would have to be subject to

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445. *Id.* at 2255.

446. *Id.* at 2262. This statement is emphatic enough, but it remains difficult to understand. Notwithstanding occasional objections under the Take Care Clause, Congress enjoys well-established power to delegate its authority to enforce federal laws to private attorneys general. But when they exercise that power, *Stevens* and *Blatchford* suggest that *Seminole Tribe* bars such parties from suing state governments. *PennEast* seems necessarily to have recognized delegation of something more—that is, the power not only to enforce federal law but to haul a state government into court. The *PennEast* Court cryptically said that “the federal eminent domain power is ‘complete in itself.’” *Id.* at 2263 (quoting *Kohl v. United States*, 91 U.S. 367, 374 (1876)). Perhaps this means that taking property for public use is simply a different kind of thing than enforcing federal law or that the power that the government (or its delegee) exercises over property in eminent domain cases is distinct from the sovereign power to enforce the law. Some version of this distinction could probably be used to cabin *PennEast* if the Court decides that it wishes to do so, but it is hardly pellucid.

447. *Vt. Agency of Nat. Res. v. United States ex rel. Stevens*, 529 U.S. 765, 773–74 (2000); see also Bradley & Young, *Third Party Standing*, *supra* note 187, at 61–62 (discussing *Stevens*).

448. See HART & WECHSLER, *supra* note 71, at 156 (raising this question); Bradley & Young, *Third Party Standing*, *supra* note 187, at 62 (suggesting that “such assignments do not confer the assignor’s status on the private litigant”).

449. See *infra* notes 452–455 and accompanying text.

450. 570 U.S. 693 (2013).

considerable government control in order to be treated as the state's agent in federal court.<sup>451</sup> None of these decisions translate directly to the United States' ability to delegate its exemption from state sovereign immunity or designate a private party as its agent in a suit against a state, but the Court is likely to consider many of the same principles in addressing that issue.

The legitimacy of private persons exercising government enforcement prerogatives has also arisen in connection with controversy over Texas's Senate Bill 8,<sup>452</sup> which imposed a strict ban on abortions in the state and relied solely on enforcement through private civil lawsuits.<sup>453</sup> Texas SB 8 incurred widespread condemnation as a deliberate effort to make the legislation's substantive provisions prohibiting abortion quite early in pregnancy difficult to challenge in court.<sup>454</sup> That difficulty stemmed primarily from SB 8's most unusual feature, which was its disabling of *public* enforcement by the State and its officers. But many of SB 8's opponents condemned the practice of incentivizing private parties to enforce the bill's statutory prohibition more generally, characterizing it as a "vigilante abortion law" or "bounty hunter law."<sup>455</sup> A similar objection would apply in principle to efforts to circumvent state immunities by deputizing private enforcement of federal statutes. More fundamentally, both the debate over SB 8 and more traditional conservative concerns over private attorneys general<sup>456</sup> tend to highlight the issue of

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451. *Id.* at 712–13; *see also Stevens*, 529 U.S. at 772 (recognizing that private parties might be able to invoke the Government's interests as agents in some circumstances); Bradley & Young, *Third Party Standing*, *supra* note 187, at 62 (noting that the False Claims Act affords the United States significant instruments for controlling FCA litigation by private parties).

452. Texas Heartbeat Act, S.B. 8, 87th Leg., Reg. Sess. (Tex. 2021) (codified as amended at TEX. HEALTH & SAFETY CODE ANN. §§ 171.201–.212 (West 2024)).

453. *See* TEX. HEALTH & SAFETY CODE ANN. § 171.208(a) (West 2024) (creating civil liability for performing, inducing, or aiding and abetting an abortion after "cardiac activity" becomes detectable); *id.* § 171.207(a) (prohibiting public enforcement).

454. *E.g.*, *Whole Woman's Health v. Jackson*, 142 S. Ct. 522, 546–47, 550–51 (2021) (Sotomayor, J., concurring in the judgment in part and dissenting in part) (describing SB 8 as a "scheme" to "nullify federal constitutional rights" reminiscent of Jim Crow laws).

455. Emma Bowman, *As States Ban Abortion, the Texas Bounty Law Offers a Way to Survive Legal Challenges*, NPR (July 11, 2022, 5:00 AM), <https://www.npr.org/2022/07/11/1107741175/texas-abortion-bounty-law> [<https://perma.cc/55SY-PGZZ>]. *See also* Jon D. Michaels & David L. Noll, *Vigilante Federalism*, 108 CORNELL L. REV. 1187, 1188 (2023) (describing laws like Texas SB 8 as "both a symptom and an accelerant of today's corrosive political dynamics"). Of course, the federal government authorizes private citizens to enforce any number of federal rights favored by progressives, such as civil rights, consumer protection, securities regulation, and environmental protection. *See, e.g.*, Pamela S. Karlan, *Disarming the Private Attorney General*, 2003 U. ILL. L. REV. 183, 186–87 (pointing out that "[v]irtually all modern civil rights statutes rely heavily on private attorneys general" and criticizing the Supreme Court for limiting them).

456. *See, e.g.*, *Friends of the Earth, Inc. v. Laidlaw Env't Servs. (TOC), Inc.*, 528 U.S. 167, 209 (2000) (Scalia, J., dissenting) ("By permitting citizens to pursue civil penalties payable to the Federal Treasury, the Act does not provide a mechanism for individual relief in any traditional sense, but turns over to private citizens the function of enforcing the law. A Clean Water Act

retaining public control and oversight over private litigation enforcing public laws. All those concerns may influence the viability and contours of any effort to pierce state immunities by expanding who counts as the “United States” in public litigation.

### Conclusion

Americans have always had a complicated relationship with sovereign immunity. As small “r” republicans, we don’t much like talk of “sovereigns” (unless we’re referring to “We the People”), and we place a high value on governmental accountability that immunity tends to frustrate. But state sovereign immunity persists in our legal system because it protects both democracy, by ensuring that publicly elected institutions control the allocation of public resources and the conduct of public programs, and federalism, by safeguarding the institutional viability and independence of state governments. State sovereign immunity is thus likely to be with us for the foreseeable future.

Widespread ambivalence about the tradeoffs that state sovereign immunity entails, however, makes this area of doctrine a fascinating case study in legal change over time. For over a century, the Supreme Court has been constructing a doctrine of state immunity that affirmed the States’ sovereignty, was not limited by the narrow text of the Eleventh Amendment, but maintained sufficient limits and exceptions to balance the values immunity serves with the need for government accountability. The Court’s decision in *Seminole Tribe* adapted this paradigm for an age of activist government by holding that state immunities can prevail not only against common law claims, but against express legislative efforts to create rights and subject states to liability for violations. The establishment of that principle, I have suggested, can be viewed as a Kuhnian “revolution” because it overthrew a different way of thinking about States’ role in modern governance; *Seminole Tribe*’s settlement, moreover, is a Kuhnian paradigm because it generates a way of thinking about legal problems that come up in the future.

Those future problems are likely to be difficult, interesting, and important even if the underlying principles remain settled. Recent decisions like *Torres* suggest, however, that they may *not* remain settled—and that *Seminole Tribe*’s revolution may not have truly ended. These cases

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plaintiff pursuing civil penalties acts as a self-appointed mini-EPA”); *see also* *Sierra v. City of Hallandale Beach*, 996 F.3d 1110, 1115 (11th Cir. 2021) (Newsom, J., concurring) (“Article II’s vesting of the ‘executive Power’ in the President and his subordinates prevents Congress from empowering private plaintiffs to sue for wrongs done to society in general or to seek remedies that accrue to the public at large.”).

demonstrate a basic ambiguity within the foundational idea of settlement through stare decisis. Unless deference extends not only to the results of cases but also to the embrace of their underlying rationales, a new paradigm is unlikely to enjoy either stability or generative force. Without ultimate agreement on first principles, disagreements will tend to come out.