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## **ARTICLES**

### SOVEREIGN IMMUNITY AND THE CONSTITUTIONAL TEXT

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*Despite the opprobrium heaped on the Supreme Court’s modern doctrine of state sovereign immunity, there is a theory that makes sense of that doctrine, and also renders it consistent with the constitutional text. The theory is that sovereign immunity is a common law rule—a “backdrop”—that is not directly incorporated into the Constitution, but is shielded by the Constitution from most kinds of change.*

*That theory also has important implications for the future of sovereign immunity. The Supreme Court’s decision in Nevada v. Hall holds that state sovereign immunity need not be respected in another state’s courts. Last term, in Franchise Tax Board v. Hyatt, the Court nearly overruled Hall, and its future hangs by a single vote. The backdrop theory suggests that Hall is rightly decided, consistent with modern doctrine, and should not be overruled.*

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## INTRODUCTION

“I am,” as David Currie once said, “that *rara avis*, a law professor who thinks *Hans v. Louisiana* was rightly decided.”<sup>1</sup>

*Hans* holds that states have sovereign immunity from being sued without their consent.<sup>2</sup> And it so holds despite the absence of constitutional text that says so in so many words, and despite the *presence* of a constitutional amendment that seems to pointedly exclude broad immunity. The Eleventh Amendment gives states immunity to suit in federal court when sued “by Citizens of *another* State, or by Citizens or Subjects of any Foreign State.”<sup>3</sup> *Hans* found immunity even when the suit was by citizens of the *same* state, and hence beyond the text of the Eleventh Amendment.

The Supreme Court has continued to build an elaborate doctrine of sovereign immunity on *Hans*’s back—holding that sovereign immunity extends to some courts and not others, and can be abrogated by Congress on occasion, but rarely.<sup>4</sup> The doctrine remains widely criticized, to the point that modern sovereign immunity doctrine is often invoked as major evidence that the U.S. Supreme Court wanders from the constitutional text.<sup>5</sup>

<sup>1</sup> David P. Currie, Response, *Ex Parte Young* After *Seminole Tribe*, 72 N.Y.U. L. Rev. 547, 547 (1997) (footnote omitted); accord *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 117 (1996) (Souter, J., dissenting) (“[*Hans*] was wrongly decided, as virtually every recent commentator has concluded.”).

<sup>2</sup> *Hans v. Louisiana*, 134 U.S. 1, 17, 20–21 (1890).

<sup>3</sup> U.S. Const. amend. XI (emphasis added).

<sup>4</sup> See *infra* Parts II and III.

<sup>5</sup> See, e.g., Erwin Chemerinsky, *Against Sovereign Immunity*, 53 Stan. L. Rev. 1201, 1205 (2001); Lawrence C. Marshall, *Commentary, Fighting the Words of the Eleventh Amendment*, 102 Harv. L. Rev. 1342, 1346 (1989); Eric J. Segall, *The Constitution According to Justices Scalia and Thomas: Alive and Kickin’*, 91 Wash. U. L. Rev. 1663, 1670–71 (2014); David A. Strauss, *Foreword: Does the Constitution Mean What It Says?*, 129 Harv. L. Rev. 1, 50–52 (2015); see also John F. Manning, *The Eleventh Amendment and the Reading of Precise Constitutional Texts*, 113 Yale L.J. 1663 (2004) (offering a textualist critique of sovereign immunity doctrine).

But there is a way to make sense of all of this. The key is a new way of thinking about sovereign immunity—as what Stephen Sachs has called a “constitutional ‘backdrop[.]’”<sup>6</sup> That new understanding explains how sovereign immunity fits into the constitutional text and also makes sense of the Court’s sovereign immunity cases—at least for now.<sup>7</sup>

The “backdrop” theory of sovereign immunity not only explains the path of state sovereign immunity so far, but it also provides direction for the future. Indeed, the theory was put to one of its greatest tests last Term by the Supreme Court case of *Franchise Tax Board v. Hyatt*.<sup>8</sup> There the Court considered whether to overrule *Nevada v. Hall*, an older case that *denies* states sovereign immunity when a state is sued in another state’s court.<sup>9</sup> *Hall* seems like an anomaly compared to modern immunity doctrine. The Court’s agreement to reconsider its validity made it seem likely that *Hall* was indeed doomed.<sup>10</sup> And at oral argument several key members of the Court seemed ready to overturn *Hall*.<sup>11</sup>

But in the end, the Court left the question undecided. Justice Scalia’s untimely death rendered the Court short-handed, and it split 4-4 on whether *Hall* should be overruled.<sup>12</sup> The remaining Justices instead created a novel doctrine under the Full Faith and Credit Clause to resolve the case, leaving the bigger question of *Hall*’s fate for another time.<sup>13</sup>

*Hall*’s temporary survival provides an occasion for reflection. The arguments against *Hall* may seem quite intuitive, and some of its defenders may not be prepared to defend all of the modern sovereign immunity regime more generally.<sup>14</sup> But the enemy of my enemy is not always my friend. There is in fact a very good reason to think that *Hall* is rightly decided, and should lie undisturbed, even for those of us (like me) who think that the Court’s more recent sovereign immunity cases are basically right.

<sup>6</sup> Stephen E. Sachs, *Constitutional Backdrops*, 80 *Geo. Wash. L. Rev.* 1813, 1816 (2012).

<sup>7</sup> See *infra* Part I.

<sup>8</sup> 136 S. Ct. 1277 (2016).

<sup>9</sup> *Id.* at 1279; *Nevada v. Hall*, 440 U.S. 410, 426–27 (1979).

<sup>10</sup> See *infra* notes 126–32.

<sup>11</sup> See, e.g., Transcript of Oral Argument at 29, *Franchise Tax Board*, 136 S. Ct. 1277 (No. 14-1175) (Justice Kennedy); *id.* at 35–36 (Justice Scalia); *id.* at 49–50 (Justice Alito). But Chief Justice Roberts and Justice Thomas asked no questions.

<sup>12</sup> *Franchise Tax Board*, 136 S. Ct. at 1279.

<sup>13</sup> *Id.* at 1281–83. This turn to the Full Faith and Credit Clause is (mostly) beyond the scope of this Article.

<sup>14</sup> See, e.g., Brief of Professors of Federal Jurisdiction as *Amici Curiae* in Support of Respondent at 1, *Franchise Tax Board*, 136 S. Ct. 1277 (No. 14-1175), 2015 WL 6690029.

Part I of this Article explains the competing theories of sovereign immunity and introduces sovereign immunity as a constitutional backdrop. Part II shows how the backdrop theory fits *Hans* and the Court's more modern sovereign immunity cases. Part III explains why *Hall* is likely right under the backdrop theory. Part IV flags other doctrines that might keep *Hall*'s result from being surprising or anomalous as a practical matter.

## I. THEORIES

Sovereign immunity is a government's right not to be haled into court without its consent. Whatever its theoretical provenance, it has been a part of American procedure for a long time. Read for all it is worth, it might be a bar to nearly all affirmative judicial relief against government action. But government officers have long been held to be suable in their own right, without the government's immunity, meaning that in most cases sovereign immunity recedes into the background.<sup>15</sup>

Sometimes, however, litigants are not content with officer suits; they want to sue the state itself. To do that, they need some legal authority that trumps, or "abrogates," the state's sovereign immunity. In a series of cases, the Supreme Court has made this abrogation very difficult, sometimes nearly impossible, for the federal government to do. These cases are a mainstay of federal courts classes today, widely criticized by professors and often puzzling to students. To figure out whether the cases are right, we must figure out the legal status of state sovereign immunity. Consider the three main positions, discussed below.

*Nonconstitutional*: The first position, probably the most common one among law professors, is that after ratification, state sovereign immunity simply had no constitutional protection at all. There are two versions of this position: Either state sovereign immunity was abrogated at the Founding, or else Congress is free to abrogate state sovereign immunity as much as it likes.<sup>16</sup>

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<sup>15</sup> See, e.g., *Ex Parte Young*, 209 U.S. 123, 155–56 (1908); *United States v. Lee*, 106 U.S. 196, 204 (1882); see also Pamela S. Karlan, *The Irony of Immunity: The Eleventh Amendment, Irreparable Injury, and Section 1983*, 53 *Stan. L. Rev.* 1311 (2001) (discussing tensions between sovereign immunity and officer suits).

<sup>16</sup> In stressing ratification, I am putting aside the Eleventh Amendment because the key modern question is what kind of immunity exists beyond the text of the Amendment.

In the first version of this position, the Constitution simply trumps any sovereign immunity the states might have had.<sup>17</sup> One could say that the states forfeited their immunity by ratifying a Constitution that contained the Article III judicial power, which extends generally to “all Cases” arising under federal law and also specifically to various “Controversies” to which the state is a party.<sup>18</sup> Or one could say the elimination of the sovereign immunity was a consequence of the Constitution itself, which created a new federal sovereign directly in the name of “We the People.”<sup>19</sup> Something like this was the theory of most of the Justices when they decided *Chisholm v. Georgia* in 1793, holding that Georgia had no immunity from an action of assumpsit by a South Carolina citizen<sup>20</sup> (though *Chisholm* was soon surpassed by the Eleventh Amendment).

*Common Law:* The alternative version is that sovereign immunity exists as a rule of common law.<sup>21</sup> And like most rules of common law, it can be displaced by a statute. States might have sovereign immunity in cases like *Chisholm*, where nothing has been done to displace it. But as soon as Congress passes a federal statute regulating the state, it can also create a judicial remedy under the Necessary and Proper Clause.<sup>22</sup> That statutory remedy displaces any common law rules to the contrary. Something like this was Justice Stevens’s theory in his dissent in *Seminole Tribe of Florida v. Florida*.<sup>23</sup> The common law theory was also a premise of Justice Brennan’s “diversity theory”<sup>24</sup> of the Eleventh Amendment, which worked from a premise that sovereign immunity was a matter of “state law.”<sup>25</sup>

<sup>17</sup> See Caleb Nelson, *Sovereign Immunity as a Doctrine of Personal Jurisdiction*, 115 *Harv. L. Rev.* 1559, 1580 (2002) (describing both positions in this paragraph).

<sup>18</sup> U.S. Const. art. III, § 2. For a modern interpretation see John J. Gibbons, *The Eleventh Amendment and State Sovereign Immunity: A Reinterpretation*, 83 *Colum. L. Rev.* 1889, 1899, 1907–08 (1983).

<sup>19</sup> U.S. Const. pmb.

<sup>20</sup> See 2 U.S. 419, 452 (1793) (Blair, J.); *id.* at 465–66 (Wilson, J.); *id.* at 467 (Cushing, J.); *id.* at 476–77 (Jay, J.). For a modern version see Chemerinsky, *supra* note 5, at 1206–09.

<sup>21</sup> See Vicki C. Jackson, *The Supreme Court, the Eleventh Amendment, and State Sovereign Immunity*, 98 *Yale L.J.* 1, 72–104 (1988).

<sup>22</sup> U.S. Const. art. I, § 8, cl. 18.

<sup>23</sup> 517 U.S. 44, 78–82 (1996) (Stevens, J., dissenting).

<sup>24</sup> William A. Fletcher, *The Diversity Explanation of the Eleventh Amendment: A Reply to Critics*, 56 *U. Chi. L. Rev.* 1261, 1262 (1989) (“The new view has been called, in shorthand fashion, the ‘diversity theory.’”).

<sup>25</sup> *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 261–62 (1985) (Brennan, J., dissenting); see also William A. Fletcher, *A Historical Interpretation of the Eleventh Amendment:*

Thus, under the original Constitution, sovereign immunity either did not apply at all in federal courts, or was a rule of common law that could be abrogated by Congress. In either event, “[t]he original Constitution did not embody a principle of sovereign immunity as a limit on the federal judicial power.”<sup>26</sup>

*Quasi-textual:* Those who would deny Congress’s power to force states into court must find some answer to these theories. The deniers usually conclude that they must find some part of the Constitution that implicitly preserves state sovereign immunity.

One possibility is to read state sovereign immunity into the Eleventh Amendment. Even though the “letter”<sup>27</sup> of the Amendment—i.e., the text—refers only to suits “by Citizens of another State, or by Citizens or Subjects of any Foreign State” (among other restrictions),<sup>28</sup> one might choose to read it as a stand-in for a broader principle of immunity. This broader immunity could be said to be “implicit in the Eleventh Amendment”<sup>29</sup> or an “assumption adopted by the Eleventh Amendment.”<sup>30</sup> But the textual difficulty of this position is obvious.<sup>31</sup>

Currie seems to have found immunity in the *intent* of the Framers without regard to any specific textual provision. Acknowledging that “[the Eleventh Amendment] doesn’t say that,”<sup>32</sup> Currie lumped sovereign immunity with other seemingly nontextual rules like intergovernmental tax immunity, the ban on secession, the equal footing doctrine, official immunity, and executive privilege: “The Constitution cannot be construed by looking only at its words; history, tradition, consequences,

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A Narrow Construction of an Affirmative Grant of Jurisdiction Rather than a Prohibition Against Jurisdiction, 35 Stan. L. Rev. 1033 (1983) (providing historical arguments for this theory); Gibbons, *supra* note 18 (same).

<sup>26</sup> *Atascadero*, 473 U.S. at 289 (Brennan, J., dissenting). For a sophisticated, related theory see Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 Yale L.J. 1425, 1473–84 (1987) (arguing that state sovereign immunity doesn’t apply if the rule of decision is federal law (as in federal question or admiralty cases)).

<sup>27</sup> *Pennsylvania v. Union Gas Co.*, 491 U.S. 1, 32 (1989) (Scalia, J., concurring in part and dissenting in part) (quoting *Hans v. Louisiana*, 134 U.S. 1, 15 (1890)).

<sup>28</sup> U.S. Const. amend. XI (“The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.”).

<sup>29</sup> *Union Gas Co.*, 491 U.S. at 33 (Scalia, J., concurring in part and dissenting in part).

<sup>30</sup> *Id.* at 34.

<sup>31</sup> See Manning, *supra* note 5, at 1665–66; Marshall, *supra* note 5, at 1346.

<sup>32</sup> David P. Currie, *Inflating the Nation’s Power*, 71 U. Chi. L. Rev. 1229, 1237 (2004) (reviewing John T. Noonan, Jr., *Narrowing the Nation’s Power: The Supreme Court Sides with the States* (2002)); see also *id.* (“No, it doesn’t.”).

and purpose help us to understand what the words of the Constitution mean.”<sup>33</sup>

Well, that’s one possibility. But these analogies tie sovereign immunity to a shaky post. Several of the other doctrines Currie mentions have their critics too,<sup>34</sup> and each of them is a difficulty for those who claim that it is the written document, not its penumbras and emanations, that supplies our constitutional law. Perhaps it is not a coincidence that Justice Blackmun, author of a famously controversial opinion on unenumerated rights,<sup>35</sup> defended “a constitutional source” for state sovereign immunity by analogy to the unenumerated “guarantee of freedom of association” and “right of interstate travel.”<sup>36</sup>

Other defenders are more textually specific. Michael Rappaport has argued that immunity can be found implicit in the definition of “State.” The term “creates a strong inference that there must be certain state immunities,” and is also “the source of these immunities. When the Framers invoked a traditional institution or power, they often intended that institution or power to possess certain of its traditional attributes. By calling the local governments ‘States,’ the Framers intended that these governments possess some of the traditional immunities that states enjoyed.”<sup>37</sup> This theory has the virtue of pointing to an actual textual provision, but it still requires packing a single word with an awful lot of freight.<sup>38</sup>

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<sup>33</sup> *Id.*

<sup>34</sup> See, e.g., Jesse H. Choper, *The Scope of National Power Vis-à-Vis the States: The Dispensability of Judicial Review*, 86 *Yale L.J.* 1552, 1582 (1977) (intergovernmental tax immunity); Thomas Reed Powell, *The Remnant of Intergovernmental Tax Immunities*, 58 *Harv. L. Rev.* 757, 804 (1945) (arguing that intergovernmental tax immunity need not “have a constitutional foundation”); C. Perry Patterson, *The Relation of the Federal Government to the Territories and the States in Landholding*, 28 *Tex. L. Rev.* 43, 62 (1949) (equal footing); Charles F. Wilkinson, *The Headwaters of the Public Trust: Some Thoughts on the Source and Scope of the Traditional Doctrine*, 19 *Envtl. L.* 425, 443–47 (1989) (part of equal footing); Raoul Berger, *Executive Privilege: A Constitutional Myth I* (1974) (executive privilege); Michael Stokes Paulsen, *Nixon Now: The Courts and the Presidency After Twenty-Five Years*, 83 *Minn. L. Rev.* 1337, 1374, 1378 (1999) (arguing that while there is “a constitutionally-based executive privilege,” it nonetheless “should have no status in the courts”).

<sup>35</sup> *Roe v. Wade*, 410 U.S. 113, 152–53 (1973).

<sup>36</sup> *Nevada v. Hall*, 440 U.S. 410, 430 (1979) (Blackmun J., dissenting).

<sup>37</sup> Michael B. Rappaport, *Reconciling Textualism and Federalism: The Proper Textual Basis of the Supreme Court’s Tenth and Eleventh Amendment Decisions*, 93 *Nw. U. L. Rev.* 819, 821 (1999) (footnote omitted).

<sup>38</sup> Cf. *Sachs*, *supra* note 6, at 1873 (suggesting that “it’s far from clear” that “State” had this meaning as a “linguistic” matter).

*Constitutional Backdrop*: There is a third way. Sachs proposed that we can see sovereign immunity as a “constitutional backdrop”—something in between the previous two theories.<sup>39</sup> A constitutional backdrop is a common law rule like any other, with one key difference: Some part of the Constitution insulates that rule from being changed.<sup>40</sup> Sachs suggests that this category ranges from the trivial—e.g., the lawfulness of gambling that took place in 1786 (shielded from change by the Ex Post Facto Clause)—to the fundamental—e.g., the law of state borders (shielded from change by Article IV and the Article I ban on states’ “engag[ing] in War”<sup>41</sup>).<sup>42</sup>

State sovereign immunity is just such a common law rule. Because it touches on several different fields of law, there are different ways to characterize the rule’s precise nature. Some would describe it as a common law principle of personal jurisdiction: States simply cannot be haled into court without their consent.<sup>43</sup> Others would describe it as part of “the law of nations.”<sup>44</sup> But either way, it is a form of unwritten customary law deserving the label “common law.”<sup>45</sup>

If sovereign immunity is a constitutional backdrop, that means that the common law theorists are right that it is not directly implied by the Constitution itself. It’s simply a background rule of procedure like waiver or precedent or capacity to sue. But unlike most common law rules of procedure, this one can’t be changed because of the properly limited nature of Articles I and III.<sup>46</sup> While this may be the most intricate of the

<sup>39</sup> Id. at 1868–75.

<sup>40</sup> Id. at 1816–17.

<sup>41</sup> U.S. Const. art. IV; id. art. I, § 10, cl. 2.

<sup>42</sup> Sachs, supra note 6, at 1816–18, 1828–34.

<sup>43</sup> E.g., Nelson, supra note 17, at 1565–66.

<sup>44</sup> E.g., James E. Pfander, Rethinking the Supreme Court’s Original Jurisdiction in State-Party Cases, 82 Calif. L. Rev. 555, 582 (1994).

<sup>45</sup> Ann Woolhandler argues that “[e]ven if the Court initially discussed state immunity as a matter of general law, . . . it likely would have eventually treated the law of state immunity as a form of either *federal* constitutional or subconstitutional law,” and further argues that “[t]he Court has long handled many other issues of interstate relations according to rules of *federal* common law.” Ann Woolhandler, Interstate Sovereign Immunity, 2006 Sup. Ct. Rev. 249, 261, 261–62 n.50 (emphases added) (footnote omitted). Under the backdrop approach, the label “*federal* common law” is confusing here. Both sovereign immunity and “other issues of interstate relations” are treated as common law, but one must then look to other legal provisions to see if those common law rules have been insulated from change. Sachs, supra note 6, at 1834–38.

<sup>46</sup> See infra Sections II.B–II.C.

three theories, it is the only one that makes sense of both the text and the Court's sovereign immunity cases.

## II. CASES

### A. Hans

In *Hans v. Louisiana*, a disappointed Louisiana bondholder tried to sue the state over its failure to pay the interest promised on its state bonds.<sup>47</sup> Indeed, the state had gone so far as to specifically repudiate the interest payments in a provision of its 1879 state constitution.<sup>48</sup> This, Bernard Hans argued, violated the Federal Constitution's injunction that "[n]o State shall . . . pass any . . . Law impairing the Obligation of Contracts."<sup>49</sup> The Supreme Court ultimately barred the suit, concluding that "[t]he suability of a State without its consent was a thing unknown to the law" and that nothing about the Constitution had changed that.<sup>50</sup>

The Court's opinion in *Hans* made some unfortunate references to the Eleventh Amendment,<sup>51</sup> which refers to suits "commenced or prosecuted against one of the United States by Citizens of another State"<sup>52</sup> and thus did not bear on Bernard Hans's suit. But the Court then went on to suggest that even without the Eleventh Amendment, state sovereign immunity had somehow survived the adoption of Article III.<sup>53</sup>

Under a backdrop theory this latter reasoning makes sense, and *Hans* is rightly decided. The key to the case is not the Eleventh Amendment, but rather the limited nature of Article III. Article III's grant of jurisdiction is defeasible. It establishes the baseline categories of federal juris-

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<sup>47</sup> 134 U.S. 1, 1 (1890).

<sup>48</sup> See La. Const. of 1879, "State Debt," art. 3 (cited in *Hans*, 134 U.S. at 2).

<sup>49</sup> U.S. Const. art. I, § 10 (cited in *Hans*, 134 U.S. at 3).

<sup>50</sup> *Hans*, 134 U.S. at 16–18.

<sup>51</sup> *Id.* at 11–12 (suggesting that the ratification of the Eleventh Amendment demonstrated that "the highest authority of this country," i.e., the people, thought *Chisholm v. Georgia* was wrongly decided); see also *id.* at 21 (Harlan, J., concurring) ("I am of opinion that the decision in [*Chisholm*] was based upon a sound interpretation of the Constitution as that instrument then was.").

<sup>52</sup> U.S. Const. amend. XI.

<sup>53</sup> *Hans*, 134 U.S. at 15 ("The truth is, that the cognizance of suits and actions unknown to the law, and forbidden by the law, was not contemplated by the Constitution when establishing the judicial power of the United States."); see also *id.* at 16 (invoking Justice Iredell's dissent in *Chisholm*).

diction, but doesn't purport to sweep away literally every doctrine of procedure that might otherwise defeat a case.<sup>54</sup>

For instance, what about capacity? Does the Constitution's authorization of suits by citizens mean that even infant children can sue? Does the Constitution's authorization of suits arising under federal law allow nonhuman entities, like whales or trees, to attempt to vindicate federal rights?<sup>55</sup> Maybe, but it's certainly not a necessary consequence of the text.

And most to the point, what about personal jurisdiction, which holds that the case can only be brought if the parties are properly haled before the Court? (Recall the theory that sovereign immunity *was* a doctrine of personal jurisdiction.<sup>56</sup>) No. The grants of jurisdiction are general provisions that are still subject to some of the more specific rules of the common law.

Indeed, James Madison specifically invoked the common law of capacity at the Virginia ratifying convention when he argued that Article III preserved the doctrine of sovereign immunity:

It is not in the power of individuals to call any State into Court. . . . This may be illustrated by other cases. It is provided, that citizens of different States may be carried to the Federal Court.—But this will not go beyond the cases where they may be parties. A *feme covert* may be a citizen of another State, but cannot be a party in this Court. A subject of a foreign power having a dispute with a citizen of this State, may carry it to the Federal Court; but an alien enemy cannot bring suit at all. It appears to me, that this can have no operation but this—to give a citizen a right to be heard in the Federal Court; and if a State should condescend to be a party, this Court may take cognizance of it.<sup>57</sup>

And the lower court opinion in *Hans* made a similar analogy, concluding that:

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<sup>54</sup> See Sachs, *supra* note 6, at 1869–72.

<sup>55</sup> Cf. *Sierra Club v. Morton*, 405 U.S. 727, 741–45 (1972) (Douglas, J., dissenting) (arguing, implausibly, that it should).

<sup>56</sup> See Nelson, *supra* note 17, at 1565.

<sup>57</sup> Debates of the Virginia Convention (June 20, 1788), in 10 *The Documentary History of the Ratification of the Constitution* 1412, 1414 (John P. Kaminski & Gaspare J. Saladino eds., 1993). See generally Steven Menashi, Article III as a Constitutional Compromise: Modern Textualism and State Sovereign Immunity, 84 *Notre Dame L. Rev.* 1135, 1165–77 (2009) (arguing that Article III was understood to reflect Madison's views).

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.

The general clause, that “the judicial power shall extend to all cases in law and equity arising under the constitution of the United States,” establishes the rule of boundary of jurisdiction so far as it depends upon the subject-matter of the suit, *but was not meant to change or affect the capacity or liability of parties to be sued*. It therefore included all suits involving or arising under the federal constitution, brought by parties competent to sue against parties capable of being sued. It included all suits of a requisite character against parties so situated or constituted that they could be sued, whether brought by individuals or by the United States or one of the states or by a foreign government; but it had no effect to subject to the jurisdiction of the courts parties incapable to be sued.<sup>58</sup>

In the decades immediately after *Hans*, the Court extended its sovereign immunity holding to several other permutations. *In re State of New York* found that state sovereign immunity applied in an admiralty suit involving two Erie Canal tugboats under the control of the State of New York.<sup>59</sup> In *Monaco v. Mississippi*, a foreign principality was blocked from invoking Article III’s jurisdiction over controversies “between a State . . . and foreign States”<sup>60</sup> in an original action in the Supreme Court.<sup>61</sup>

Both cases found sovereign immunity on the same constitutional logic as *Hans*. Neither case was covered by the terms of the Eleventh Amendment, which refers to “law or equity,” but not admiralty, and which refers to “Citizens or Subjects of any Foreign State,” but not the foreign states themselves.<sup>62</sup> But in *New York*, the Court concluded that state sovereign immunity was “a fundamental rule of jurispru-

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<sup>58</sup> *Hans v. Louisiana*, 24 F. 55, 65–66 (C.C.E.D. La. 1885), *aff’d*, 134 U.S. 1 (1890) (emphasis added); cf. Calvin R. Massey, *State Sovereignty and the Tenth and Eleventh Amendments*, 56 U. Chi. L. Rev. 61, 138 (1989) (“The trial judge had concluded that ‘a state can no more be sued contrary to its continuing assent than can the dead’ but never made clear the connection between this assertedly ‘settled idea[]’ and the Eleventh Amendment.” (footnotes omitted)).

<sup>59</sup> 256 U.S. 490, 497, 500 (1921).

<sup>60</sup> U.S. Const. art. III, § 2.

<sup>61</sup> 292 U.S. 313, 330–32 (1934).

<sup>62</sup> U.S. Const. amend. XI.

dence . . . of which the [Eleventh] Amendment is but an exemplification.”<sup>63</sup> Similarly, in *Monaco* the Court rejected “mere literal application” of Article III or the Eleventh Amendment: “Behind the words of the constitutional provisions are postulates which limit and control.”<sup>64</sup> What *New York* called a “fundamental rule of jurisprudence” and *Monaco* called a “postulate” is what we can now recognize as a constitutional backdrop.

While these early cases all make sense under the backdrop theory, they can also be justified under a generous version of the common law theory. Congress had not tried to abrogate the state’s sovereign immunity in *Hans*, *New York*, or *Monaco*, so it is possible that those cases stand only for the principle that state sovereign immunity exists until Congress expressly abrogates it.<sup>65</sup> But about a century later, the Supreme Court started carrying sovereign immunity further than the common law theory could sustain.

### B. Seminole Tribe

Fast-forward from 1890 to 1996, and the Supreme Court’s decision in *Seminole Tribe of Florida v. Florida*.<sup>66</sup> In *Seminole Tribe* the Supreme Court held that the State of Florida had sovereign immunity from a lawsuit brought under the Indian Gaming Regulatory Act.<sup>67</sup> And it found immunity despite an important new wrinkle: This time, federal law explicitly authorized suit against the state and hence abrogated the state’s immunity.<sup>68</sup> That is, *Seminole Tribe* held not only that states have sovereign immunity beyond the terms of the Eleventh Amendment, but also that it was unconstitutional for Congress to abrogate that immunity.

*Seminole Tribe* is thus inconsistent with the purely common law theory of sovereign immunity. The quasi-textual theories can reach the result in *Seminole Tribe* but with an unsatisfying approach to the text. The backdrop theory, however, is consistent with both the case and the text:

<sup>63</sup> 256 U.S. at 497.

<sup>64</sup> 292 U.S. at 322.

<sup>65</sup> *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 86–88 (1996) (Stevens, J., dissenting) (acknowledging this point about *Hans*). But see Currie, *supra* note 32, at 1237 (“*Hans* is the fulcrum on which the entire argument turns. If *Hans* is right, almost everything the Court has done since in the sovereign immunity cases follows easily.”).

<sup>66</sup> 517 U.S. 44.

<sup>67</sup> *Id.* at 47. Five years earlier, the Court had extended *Monaco* to include suits brought by Indian tribes. *Blatchford v. Native Vill. of Noatak*, 501 U.S. 775, 781–82 (1991).

<sup>68</sup> 25 U.S.C. § 2710(d)(7) (1994).

Sovereign immunity is a rule of common law, not a rule of constitutional law. But constitutional law limits Congress's power to abrogate that common law rule, rendering it a constitutional backdrop.

We've already seen how Article III itself can be read to leave in place the common law doctrine of sovereign immunity. For *Seminole Tribe* to be right, Article I must not give Congress the power to alter this immunity either. That is indeed a plausible construction of Article I, which could be reached in one of two ways.

One is to say that Congress lacks the power to add to the jurisdiction given by Article III, as the Court said in *Mossman v. Higginson*<sup>69</sup> and again in *Marbury v. Madison*.<sup>70</sup> The syllogism seems to follow: Suits barred by sovereign immunity are outside of Article III; Congress can't add to Article III; presumably, it follows that Congress can't eliminate sovereign immunity.<sup>71</sup>

But note that this is stronger than the *Marbury* principle. *Marbury* said that Congress couldn't add to the enumerated textual grants of Article III jurisdiction. Otherwise, said the Court, those textual enumerations would be pointless.<sup>72</sup> This sovereign immunity theory would go further; it would say that Congress can't even change the unenumerated common law rules that Article III left in place. Presumably that would mean no changing the common law rules of precedent, no changing the common law rules of capacity, no changing the common law rules of waiver, and no changing the common law rules for service of process. That has dramatic implications for the ossification of the common law.<sup>73</sup>

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<sup>69</sup> 4 U.S. (4 Dall.) 12, 13 (1800).

<sup>70</sup> 5 U.S. (1 Cranch) 137, 174 (1803). To be sure, three Justices rejected this view in *National Mutual Insurance Co. v. Tidewater Transfer Co.*, 337 U.S. 582, 591 (1949) (Jackson, J., joined by Black and Burton, JJ.). But the remaining six Justices all rightly adhered to it. *Id.* at 607 (Rutledge, J., joined by Murphy, J., concurring); *id.* at 648 (Frankfurter, J., joined by Reed, J., dissenting); *id.* at 627–28 (Vinson, C.J., joined by Douglas, J., dissenting).

<sup>71</sup> See, e.g., Currie, *supra* note 1, at 547 (making this argument); see also John M. Rogers, *Applying the International Law of Sovereign Immunity to the States of the Union*, 1981 *Duke L.J.* 449, 455–56 (“This theory permits suits on federal claims against states in state courts, but prevents Congress from subjecting the states to suit by individuals in federal court, because Congress cannot expand the constitutional limits of federal judicial power.” (footnote omitted)).

<sup>72</sup> *Marbury*, 5 U.S. (1 Cranch) at 174 (“Affirmative words are often, in their operation, negative of other objects than those affirmed; and in this case, a negative or exclusive sense must be given to them or they have no operation at all.”).

<sup>73</sup> I might have added “no changing the common law rules of standing” to my *reductio*, except that it is not clear whether that position is regarded as absurd. Compare *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1549 (2016) (“[I]t is instructive to consider whether an alleged

The second and more promising option is to focus on the limited nature of Congress's implied powers under the Necessary and Proper Clause.<sup>74</sup> Perhaps the Necessary and Proper Clause simply does not extend to the power to abrogate state sovereign immunity. This may seem counterintuitive: Nobody doubted that the substantive provisions of the Indian Gaming Regulatory Act were within Congress's power to "regulate Commerce . . . with the Indian Tribes."<sup>75</sup> The abrogation of state immunity helped enforce the substantive provisions, so it seemed to be "necessary and proper for carrying into Execution" the tribal commerce power.<sup>76</sup> But that seems obvious only if one assumes that everything that is "helpful" is "necessary and proper." The Necessary and Proper Clause is not quite so broad.

The Necessary and Proper Clause includes a broad range of so-called "incidental" powers, but those incidental powers are subject to the important interpretive principle that the Constitution doesn't hide elephants in mouseholes.<sup>77</sup> Or to put it in historical terms: James Madison said in opposing the national bank that more important powers, however useful, were less likely to "be[ ] left to construction" and that the Clause should not be used to imply "a great and important power."<sup>78</sup> And Chief Justice John Marshall agreed: In upholding the bank in *McCulloch v. Maryland*, he nonetheless conceded that "a great substantive and independent pow-

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intangible harm has a close relationship to a harm that has traditionally been regarded as providing a basis for a lawsuit in English or American courts."), with *id.* ("[B]ecause Congress is well positioned to identify intangible harms that meet minimum Article III requirements, its judgment is also instructive and important.").

<sup>74</sup> U.S. Const. art. I, § 8, cl. 18. It is a neat question whether Congress's implied powers really come from the Necessary and Proper Clause, or whether the Clause is merely declaratory and so the implied powers come from the grants of power in the first place. See William Baude, *Sharing the Necessary and Proper Clause*, 128 Harv. L. Rev. F. 39, 44 (2014) and sources cited therein. But the analysis works the same either way, so I mention the Clause for ease of exposition to the modern eye.

<sup>75</sup> U.S. Const. art. I, § 8, cl. 3.

<sup>76</sup> *Id.* cl. 18.

<sup>77</sup> See William Baude, *Rethinking the Federal Eminent Domain Power*, 122 Yale L.J. 1738, 1746–55 (2013). See generally Gary Lawson et al., *The Origins of the Necessary and Proper Clause* (2010) (describing the incidental-powers doctrine enacted by the Necessary and Proper Clause).

<sup>78</sup> James Madison, *Speech in the House of Representatives* (Feb. 2, 1791), reprinted in *Legislative and Documentary History of the Bank of the United States* 39, 40, 43 (M. St. Clair & D.A. Hall eds.; Washington, Gales & Seaton 1832). But see Robert J. Reinstein, *The Limits of Congressional Power*, 89 Temple L. Rev. 1, 22–44 (2016) (arguing that Madison's views were rejected).

er . . . cannot be implied as incidental to other powers, or used as a means of executing them.”<sup>79</sup>

So *Seminole Tribe* is right under the backdrop theory if abrogating sovereign immunity is one of the “great and important” or “great substantive and independent” powers that falls outside of the implied powers of Article I.<sup>80</sup> Defining those great powers is a tough question, but sovereign immunity seems to be a plausible candidate in light of its deep historical roots, its connection to state sovereignty and (if you must) the evidence from the Eleventh Amendment itself that it is the kind of power that the Constitution takes very seriously. Indeed, it has been plausibly argued that the broader category of “coercive power over states” was understood to be outside of Congress’s originally enumerated powers,<sup>81</sup> which might also support decisions like the anti-commandeering rule of *New York v. United States*.<sup>82</sup>

In any event, the backdrop theory relocates the question of sovereign immunity from Article III to Article I and therefore provides the best justification for the Court’s decision in *Seminole Tribe*.

### C. Alden

For devotees of the common law theory, *Seminole Tribe* crosses the most important line. But other critics of modern doctrine direct their harshest fire at the rule subsequently adopted by the Court in *Alden v. Maine*.<sup>83</sup> In *Alden*, the Court extended the nonabrogation rule of *Seminole Tribe* to state courts, stating that Congress can’t abrogate immunity

<sup>79</sup> *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 411, 424 (1819); see also *NFIB v. Sebelius*, 132 S. Ct. 2566, 2591 (2012) (Roberts, C.J.) (repeating this point).

<sup>80</sup> So far as I know, this point was first made by Caleb Nelson, *supra* note 17, at 1640. See also Sachs, *supra* note 6, at 1874–75.

<sup>81</sup> Bradford R. Clark, *The Eleventh Amendment and the Nature of the Union*, 123 *Harv. L. Rev.* 1817, 1851–52 (2010). The most direct critique of Clark’s broader thesis, Carlos M. Vázquez, *The Unsettled Nature of the Union*, 123 *Harv. L. Rev. F.* 79 (2011), nonetheless agrees with the narrower claim that “the Founders understood that the federal obligations of the states would be enforced in court in suits against individual state officers rather than the states themselves.” *Id.* at 79; accord Carlos Manuel Vázquez, *What Is Eleventh Amendment Immunity?*, 106 *Yale L.J.* 1683, 1780 (1997).

<sup>82</sup> 505 U.S. 144, 149 (1992); accord Clark, *supra* note 81, at 1915 n.568; see also Nelson, *supra* note 17, at 1652 (“Congress’s power to command states to answer private suits seeking the minimum wage should stand or fall with Congress’s power to command states to pay the minimum wage in the first place.”).

<sup>83</sup> See, e.g., Ellen D. Katz, *State Judges, State Officers, and Federal Commands After Seminole Tribe and Printz*, 1998 *Wis. L. Rev.* 1465, 1475–76.

in state courts any more than in federal courts.<sup>84</sup> For those still focused on the text of the Eleventh Amendment or of Article III, this may seem gratuitously antitextual.<sup>85</sup> But under the backdrop theory, this extension makes perfect sense.

In *Alden*, a group of Maine employees sued the State for violations of the Fair Labor Standards Act.<sup>86</sup> The legal issues mostly reprised *Seminole Tribe*. Once again, it was conceded that the substantive provisions of the Act were constitutional.<sup>87</sup> (The Court had once flirted briefly with the view that state employment was outside of Congress's powers<sup>88</sup> but quickly retreated from it.<sup>89</sup>) And, once again, a suit against the State seemed to follow naturally from the Act's substantive requirements.<sup>90</sup> And, once again, the Court said, "No."<sup>91</sup>

This time, however, Article III and the Eleventh Amendment dropped out of the case entirely.<sup>92</sup> Even if you think that the Eleventh Amendment should be read to ban federal suits by all citizens, it bans only federal suits. Even if you think that Article III preserves state sovereign immunity and that Congress can't change Article III, suits in state court have nothing to do with Article III. So what is left to insulate common law immunity from change in *Alden*?

The answer is just Article I. Once we accept that abrogating sovereign immunity is a "great" power, it's easy to see why abrogation is the same in both state and federal court. The immunity itself is just a common law rule, so it applies wherever it hasn't been abrogated. The real question is Congress's Article I power to abrogate, which is about the scope of the Necessary and Proper Clause and state sovereignty, not the forum. Indeed, Congress's Article I powers are *no greater* when regulating state

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<sup>84</sup> 527 U.S. 706, 712 (1999).

<sup>85</sup> See Ernest A. Young, *Alden v. Maine* and the Jurisprudence of Structure, 41 Wm. & Mary L. Rev. 1601, 1602 (2000) ("It is hard to see how a textualist could view *Alden* as anything other than a disaster.").

<sup>86</sup> 527 U.S. at 711–12.

<sup>87</sup> *Id.* at 759.

<sup>88</sup> See Nat'l League of Cities v. Usery, 426 U.S. 833, 837–40 (1976).

<sup>89</sup> See *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 531 (1985). For skepticism, see Clark, *supra* note 81, at 1915–16; Nelson, *supra* note 17, at 1650–52.

<sup>90</sup> See *Alden*, 527 U.S. at 731.

<sup>91</sup> See *id.* at 732.

<sup>92</sup> See *id.* at 730.

courts than federal courts.<sup>93</sup> So under the backdrop theory, *Alden* follows a fortiori from *Seminole Tribe*.

Moreover, *Alden* also comes closer to an explicit articulation of the theory in several respects. It further distances the doctrine of sovereign immunity from the Eleventh Amendment, describing “Eleventh Amendment immunity” as “something of a misnomer.”<sup>94</sup> And it emphasizes that the limits on Congress’s power to abrogate sovereign immunity come from the limits of the Necessary and Proper Clause:

Nor can we conclude that the specific Article I powers delegated to Congress necessarily include, by virtue of the Necessary and Proper Clause or otherwise, the incidental authority to subject the States to private suits as a means of achieving objectives otherwise within the scope of the enumerated powers. . . . As we have recognized in an analogous context:

“When a ‘Law for carrying into Execution’ the Commerce Clause violates the principle of state sovereignty reflected in the various constitutional provisions it is not a ‘Law *proper* for carrying into Execution the Commerce Clause,’ and is thus, in the words of *The Federalist*, ‘merely an act of usurpation’ which ‘deserves to be treated as such.’”<sup>95</sup>

To be sure, not every passage in *Alden* is consistent with the technicalities of the backdrop theory. For instance, after correctly accusing the dissenters of a “false dichotomy” and concluding that the common law origins of sovereign immunity do not necessarily mean it can be abrogated, the Court analogizes sovereign immunity to a number of *enumerated* rights in the Constitution.<sup>96</sup> It went on: “The common-law lineage of these rights does not mean they are defeasible by statute or remain mere common-law rights, however. *They are, rather, constitutional rights*, and form the fundamental law of the land.”<sup>97</sup> As a matter of

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<sup>93</sup> See Anthony J. Bellia, Jr., *Federal Regulation of State Court Procedures*, 110 *Yale L.J.* 947, 963 (2001).

<sup>94</sup> *Alden*, 527 U.S. at 713 (first internal quotation marks omitted).

<sup>95</sup> *Id.* at 732–33 (quoting *Printz v. United States*, 521 U.S. 898, 923–24 (1997)) (ellipses and alterations omitted). It’s not clear that the Court is right to treat “proper” as a separate requirement rather than as part of a unitary phrase, see Samuel L. Bray, “Necessary AND Proper” and “Cruel AND Unusual”: Hendiadys in the Constitution, 102 *Va. L. Rev.* 687, 726 (2016), but it works out basically the same here.

<sup>96</sup> *Alden*, 527 U.S. at 733.

<sup>97</sup> *Id.* (emphasis added).

backdrops, this is not quite right—sovereign immunity *does* “remain [a] common-law right,” but maybe not a “mere” one. It is insulated from abrogation by statute without *quite* becoming a constitutional right itself. Still, this is pretty close.

Similar analysis, for similar reasons, applies in federal administrative agencies, as the Court held in *Federal Maritime Commission v. South Carolina State Ports Authority*.<sup>98</sup> Just as Congress lacks the Article I power to eliminate states’ sovereign immunity by forcing them into federal courts, it lacks the Article I power to do the same thing by forcing them into administrative adjudications instead.<sup>99</sup>

#### D. Fitzpatrick and Katz

Congress’s inability to abrogate state sovereign immunity is not absolute. Several cases *have* permitted Congress to abrogate immunity under a few specific enumerated powers.<sup>100</sup> Through its focus on Congress’s power to abrogate rather than the constitutional status of the immunity, the backdrop theory also makes sense of these exceptions.

For instance, while Congress cannot abrogate sovereign immunity using most of its Article I powers, in *Fitzpatrick v. Bitzer* the Court held that Congress can abrogate sovereign immunity when legislating under its power to enforce the Fourteenth Amendment.<sup>101</sup> What explains the difference? Some people think that the cases are just inconsistent—*Fitzpatrick* had the good fortune to be decided in the 1970s; *Seminole Tribe* came up after some new Justices were on the Court.<sup>102</sup> But the modern cases have not cast aspersions on *Fitzpatrick*.<sup>103</sup> Indeed there are more than a half dozen modern Supreme Court abrogation cases deciding whether various statutes are “appropriate” legislation to enforce the

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<sup>98</sup> 535 U.S. 743, 760 (2002).

<sup>99</sup> *Id.* at 761. The Court relied in part on the fact that failure to appear before the agency could be effectively preclusive in later litigation. *Id.* at 762–64.

<sup>100</sup> For example, Spending Clause statutes can create state liability, but that is because states consent to federal funds and the conditions on them and, for reasons internal to all major theories of sovereign immunity, liability can be waived. See *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 238, 246–47 (1985).

<sup>101</sup> 427 U.S. 445, 456 (1976).

<sup>102</sup> See Daniel J. Meltzer, *The Seminole Decision and State Sovereign Immunity*, 1996 *Sup. Ct. Rev.* 1, 21, 62–63.

<sup>103</sup> See, e.g., *Alden*, 527 U.S. at 756; *Seminole Tribe*, 517 U.S. at 65 (“*Fitzpatrick* was based upon a rationale wholly inapplicable to the Interstate Commerce Clause.”).

Fourteenth Amendment.<sup>104</sup> All of these analyses are ultimately premised on the availability of *Fitzpatrick* abrogation.<sup>105</sup> So *Fitzpatrick* must be explained by any theory of the modern doctrine.

One way to reconcile the different treatments of the Fourteenth Amendment and Article I is chronological. The Fourteenth Amendment trumps state sovereign immunity, the argument goes, because it was enacted after Article III and the Eleventh Amendment. Even on its own terms, that theory seems fishy.<sup>106</sup> The Fourteenth Amendment comes after the Fifth and the Eighth Amendments, but does anybody think it can be enforced through cruel and unusual punishment and without due process?<sup>107</sup> The Fourteenth Amendment comes after Article I, Section 7, too, but does that mean the President can't veto enforcement legislation?<sup>108</sup> (That would have been news to Andrew Johnson.) And once we see sovereign immunity as a backdrop, we see that neither Article III nor the Eleventh Amendment is the source of it anyway.

But there is a way to reconcile these cases under the backdrop approach. Under the backdrop approach, the question is not whether the Fourteenth Amendment somehow supersedes other provisions of the Constitution. Rather, the question is whether the Fourteenth Amendment Enforcement Power includes an abrogation power that Article I does not.<sup>109</sup> This means the question is whether Congress's power to enact

<sup>104</sup> *Coleman v. Court of Appeals of Md.*, 132 S. Ct. 1327, 1333 (2012); *United States v. Georgia*, 546 U.S. 151, 153–54 (2006); *Tennessee v. Lane*, 541 U.S. 509, 513 (2004); *Nev. Dep't of Human Res. v. Hibbs*, 538 U.S. 721, 726–27 (2003); *Bd. of Trs. of Univ. of Ala. v. Garrett*, 531 U.S. 356, 360 & n.1 (2001); *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 67 (2000); *Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank*, 527 U.S. 627, 635–36 (1999); *Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 669–70 (1999).

<sup>105</sup> Abrogation was upheld in *Georgia*, 546 U.S. at 159; *Lane*, 541 U.S. at 533–34; and *Hibbs*, 538 U.S. at 725.

<sup>106</sup> See, e.g., Vicki C. Jackson, *Holistic Interpretation: Fitzpatrick v. Bitzer and Our Bifurcated Constitution*, 53 *Stan. L. Rev.* 1259, 1268–69 (2001); Jesse Michael Feder, Note, *Congressional Abrogation of State Sovereign Immunity*, 86 *Colum. L. Rev.* 1436, 1442 & n.54 (1986); see also *Seminole Tribe*, 517 U.S. at 65 (noting, without explaining the point, that “the Fourteenth Amendment [was] adopted well after the adoption of the Eleventh Amendment and the ratification of the Constitution” (citing *Fitzpatrick*, 427 U.S. at 454)).

<sup>107</sup> Cf. Currie, *supra* note 1, at 547 n.6 (citing David P. Currie, *The Constitution in the Supreme Court: The Second Century, 1888–1986*, at 573–74 (1990)) (questioning *Fitzpatrick* for this reason).

<sup>108</sup> See U.S. Const. art. I, § 7, cl. 2.

<sup>109</sup> See *Seminole Tribe*, 517 U.S. at 59 (“[O]ur inquiry into whether Congress has the power to abrogate unilaterally the States’ immunity from suit is narrowly focused on one ques-

“appropriate” legislation to enforce the Fourteenth Amendment is in this way broader than the powers recognized under the Necessary and Proper Clause.

The relationship between the Enforcement Power and the Necessary and Proper Clause is a big question, but we can see several ways that the Enforcement Power might be broader. First of all, the two texts are different. The Fourteenth Amendment refers to “appropriate legislation,”<sup>110</sup> and the word “appropriate” may well be more generous than the fustier term “necessary and proper.”

Even if we think the textual differences are minor and that both clauses contain the elephants-in-mouseholes principle of authorizing great powers, there are still several reasons that the abrogation power might be implied under the Fourteenth Amendment but not Article I. As an originalist matter, for example, we’d presumably ask whether abrogation was a “great power”—hence, implicitly excluded—when the constitutional power was enacted. Article I and the Fourteenth Amendment were enacted almost eighty years apart, and the centrality of state sovereign immunity could well have changed during that time.<sup>111</sup>

The context of the two powers provides another important distinction. The Fourteenth Amendment is about direct restrictions on the states—three of its four substantive sections give direct orders to states<sup>112</sup>—and Congress is in turn empowered to enforce all of those sections.<sup>113</sup> Because the Fourteenth Amendment directly confronts and constrains state power, it’s less surprising for it implicitly to authorize abrogation of state sovereignty.<sup>114</sup>

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tion: Was the Act in question passed pursuant to a constitutional provision granting Congress the power to abrogate?” (citing *Fitzpatrick*, 427 U.S. at 452–56)).

<sup>110</sup> U.S. Const. amend. XIV, § 5.

<sup>111</sup> See Caleb Nelson, *Originalism and Interpretive Conventions*, 70 U. Chi. L. Rev. 519, 520 (2003) (“Interpretive conventions based on attitudes toward federalism, for instance, may well have been different after the Civil War than they were at the time of the founding; thus, even though Section 5 of the Fourteenth Amendment and the Necessary and Proper Clause of Article I are cast in similar terms, Section 5 may be understood to give Congress more coercive power over the states.”). John Harrison argues that as an actual historical matter there was no such change, but he doesn’t deny that this is a valid question to ask. John Harrison, *State Sovereign Immunity and Congress’s Enforcement Powers*, 2006 Sup. Ct. Rev. 353, 354–69.

<sup>112</sup> U.S. Const. amend. XIV, §§ 1–2, 4.

<sup>113</sup> *Id.* § 5.

<sup>114</sup> See *Fitzpatrick*, 427 U.S. at 453–56; see also Clark, *supra* note 81, at 1917 (“This difference suggests . . . that congressional abrogation of state sovereign immunity is constitu-

All of these are different ways of saying that the Fourteenth Amendment Enforcement Power, embodied in a different phrase, enacted at a different time, and directly addressed to coercing the states, may well contain means of enforcement that the Necessary and Proper Clause does not. Those differences explain the difference between *Fitzpatrick* and *Alden*. And the backdrop theory best explains why the question of sovereign immunity is ultimately a question of enumerated powers.

The Supreme Court also held, in *Central Virginia Community College v. Katz*, that Congress may authorize coercive jurisdiction over states when using its Article I bankruptcy power.<sup>115</sup> This is different from every other Article I power the Court has confronted.<sup>116</sup> It may be even more tempting to disregard *Katz* as an aberration, since it was decided recently and only one Justice—Justice O’Connor—was responsible for the changed outcome.<sup>117</sup>

But *Katz* can also be consistent with the backdrop theory, because the case ultimately turns on an orthogonal issue. Indeed, *Katz* concluded that the case didn’t really implicate the abrogation power.<sup>118</sup> That was partly because “[b]ankruptcy jurisdiction, at its core, is *in rem*” and thus “does not implicate States’ sovereignty to nearly the same degree as other kinds of jurisdiction.”<sup>119</sup> And partly because the particular structure and history of bankruptcy law—including bankruptcy precedents predating the Founding and statutes enacted shortly after it—suggested that states had “agreed in the plan of the Convention not to assert” their sovereign

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tional pursuant to section 5 of the Fourteenth Amendment, even if such abrogation would be unconstitutional pursuant to Article I, Section 8.” (citation omitted)).

<sup>115</sup> 546 U.S. 356, 378–79 (2006).

<sup>116</sup> See, e.g., *Seminole Tribe*, 517 U.S. at 59–65, 72–73 (discussing the Commerce Clause and Indian Commerce Clause, as well as Congress’s ability to abrogate sovereign immunity under Article I generally).

<sup>117</sup> Compare *Seminole Tribe*, 517 U.S. at 72–73 (concluding broadly that “[e]ven when the Constitution vests in Congress complete lawmaking authority over a particular area, . . . [t]he Eleventh Amendment restricts the judicial power under Article III, and Article I cannot be used to circumvent the constitutional limits placed upon federal jurisdiction.” (footnote omitted)), and *Seminole Tribe*, 517 U.S. at 77 & n.1 (Stevens, J., dissenting) (asserting that the majority holding of the case prevents Congress from providing a federal forum for bankruptcy actions against States), with *Katz*, 546 U.S. at 362–63 (authored by Justice Stevens and acknowledging that *Seminole Tribe* reflects an assumption that the Bankruptcy Clause does not authorize Congress to abrogate state sovereignty, yet finding otherwise).

<sup>118</sup> 546 U.S. at 361–62 (concluding that “Congress’ attempt to abrogate state sovereign immunity in 11 U.S.C. § 106(a) . . . was not necessary to authorize the Bankruptcy Court’s jurisdiction” (footnote omitted)).

<sup>119</sup> *Id.* at 362.

immunity.<sup>120</sup> This conclusion allowed the *Katz* Court to sidestep the usual disputes about the status of sovereign immunity and the power to abrogate it.<sup>121</sup>

Theories that put sovereign immunity directly into the text or structure of the Constitution have a hard time explaining why different powers would relate to it differently. Theories that treat it as a backdrop—a common law rule that happens to be sheltered by other provisions—can explain this, because they focus on the source of the power to abrogate. *Fitzpatrick* and *Katz* therefore confirm the logic of the backdrop theory by emphasizing the particular power to abrogate rather than the constitutional status of sovereign immunity.

### III. NEVADA V. HALL AND FRANCHISE TAX BOARD V. HYATT

#### A. Hall as Anomaly?

There is one important piece of the puzzle remaining, and it is a piece that may soon be the biggest change in sovereign immunity's future. What about sovereign immunity in the courts of *another state*?

In 1979, the Supreme Court decided *Nevada v. Hall*, a dispute between the state of Nevada and a group of Californians who had successfully sued Nevada in California court.<sup>122</sup> The Court upheld California's jurisdiction over Nevada, concluding that states need not recognize one another's immunity in each other's courts.<sup>123</sup>

This seems like an exception to the general pattern of immunity, an anomaly in the doctrine.<sup>124</sup> Indeed, the most recent edition of Hart & Wechsler questions whether *Alden v. Maine*<sup>125</sup> can coherently be distinguished from *Nevada v. Hall*: "If a state's sovereign immunity affords it constitutional protection from suit in a federal court that does not depend on the text of the Eleventh Amendment, why doesn't the Constitution

<sup>120</sup> *Id.* at 373.

<sup>121</sup> As with *Fitzpatrick*, one might well think the Court misinterpreted or misapplied the specific history of the Bankruptcy Clause, but the theory articulated in *Katz* still remains consistent with the backdrop approach that underlies the other cases. See *supra* notes 114–20 and accompanying text.

<sup>122</sup> 440 U.S. 410, 411 (1979).

<sup>123</sup> *Id.* at 426–27.

<sup>124</sup> See Woolhandler, *supra* note 45, at 250–51.

<sup>125</sup> 527 U.S. 706, 712 (1999)

afford at least as much protection against suit in the courts of a sister state?”<sup>126</sup>

What is more, it appears that some members of the Court agree and are out to correct the anomaly. In last term’s decision in *Franchise Tax Board of California v. Hyatt*,<sup>127</sup> the Court granted certiorari and heard argument on whether *Hall* should be overruled.<sup>128</sup> The fact that the Court had agreed to consider the question implied serious interest in overturning *Hall*.<sup>129</sup> And indeed, four of the Court’s eight Justices ultimately voted to do so.<sup>130</sup> (*Franchise Tax Board*, by the way, featured a Nevadan’s suit in Nevada court against the State of California.<sup>131</sup> Is this long-simmering revenge for *Hall*, or just a sign of how contentious interstate relations can be out west?)

The split decision in *Franchise Tax Board* leaves the issue to come up again—perhaps soon. What should the Court do? While the backdrop theory is not decisive on this point, there is a very good argument that it should leave *Hall* in place. At a minimum, the decision is not “demonstrably erroneous,”<sup>132</sup> and is probably correct. And if the Court disagrees and does wish to overrule *Hall*, it should be careful about how, precisely, it does so.

### B. State Power to Abrogate

So how can *Hall* be reconciled with more modern doctrine? Part of Justice Stevens’s majority opinion in *Hall* rested on a distinction between “two quite different concepts, one applicable to suits in the sovereign’s own courts and the other to suits in the courts of another sovereign.”<sup>133</sup> Immunity in one’s own courts, the Court wrote, “has been

<sup>126</sup> Richard H. Fallon, Jr. et al., *Hart & Wechsler’s The Federal Courts and the Federal System* 976 (7th ed. 2015) [hereinafter *Hart & Wechsler*].

<sup>127</sup> 136 S. Ct. 1277 (2016).

<sup>128</sup> See 135 S. Ct. 2940 (2015) (mem.); Petition for Writ of Certiorari at i, *Franchise Tax Bd.*, 136 S. Ct. 1277 (No. 14–1175), 2015 WL 1346455.

<sup>129</sup> In a (much) earlier round of the same litigation, the Court had declined to reexamine *Hall* because the parties had not asked it to. *Franchise Tax Bd. v. Hyatt*, 538 U.S. 488, 497 (2003); see also *Hart & Wechsler*, supra note 126, at 976 n.2 (wondering whether this earlier decision “suggest[s] that despite the difficulty of reconciling *Hall*’s rationale with that of *Alden*, *Hall* is not likely to be overruled”).

<sup>130</sup> 136 S. Ct. at 1279.

<sup>131</sup> *Id.*

<sup>132</sup> Caleb Nelson, *Stare Decisis and Demonstrably Erroneous Precedents*, 87 Va. L. Rev. 1, 1 (2001).

<sup>133</sup> *Hall*, 440 U.S. at 414.

enjoyed as a matter of absolute right for centuries,” while immunity in another sovereign’s courts was a matter of mutual agreement or comity.<sup>134</sup>

This distinction might indeed distinguish *Alden*, which featured a state’s own courts, but it still leaves *Hall* harder to reconcile with *Seminole Tribe*, which protected sovereign immunity in the “courts of another sovereign”—the federal government. The backdrop theory provides another way to reconcile *Hall*, one that works even if one lumps these two kinds of sovereign immunity together.<sup>135</sup>

As the reader will by now understand, in every backdrop case there are really two questions: First, is there a common law rule? Second, how much has it been insulated from change? We have already seen the arguments that sovereign immunity was a common law rule. In the modern sovereign immunity cases the key question is usually the second one, which usually reduces to: *What is the power to abrogate?*

It is the answer to that second question that potentially distinguishes *Alden* from *Hall*. The federal government’s powers are pervasively limited by the Constitution. When Congress tries to abrogate immunity, whether in state court or in federal court, it must confront the limit of its enumerated powers under Article I (and under the Fourteenth Amendment, etc.). But in *Hall* the attempted abrogation came from the *state* of California.<sup>136</sup> So the question is: *What part of the Constitution limits state authority to abrogate?* The Constitution doesn’t limit states to enumerated powers and imposes relatively few constraints on their treatment of one another.

Indeed, *Hall* made precisely this point, holding that “in view of the Tenth Amendment’s reminder that powers not delegated to the Federal Government nor prohibited to the States are reserved to the States or to the people, . . . caution should be exercised before concluding that unstated limitations on state power were intended by the Framers.”<sup>137</sup>

And *Alden* itself reemphasized this point in explaining why Congress’s power to abrogate was narrower than a state’s power to do so:

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<sup>134</sup> *Id.* at 414–16.

<sup>135</sup> For an argument that the two immunities should be distinguished, and are distinguished by some of the Court’s cases, see Brief of Professors of Federal Jurisdiction as *Amici Curiae* in Support of Respondent, *supra* note 14, at 4–5.

<sup>136</sup> *Hall*, 440 U.S. at 420–21; see also *Hall v. Univ. of Nev.*, 503 P.2d 1363, 1364 (Cal. 1972) (en banc) (denying Nevada’s immunity).

<sup>137</sup> 440 U.S. at 425.

Our reluctance [in *Hall*] to find an implied constitutional limit on the power of the States cannot be construed, furthermore, to support an analogous reluctance to find implied constitutional limits on the power of the Federal Government. The Constitution, after all, treats the powers of the States differently from the powers of the Federal Government.<sup>138</sup>

After quoting the above passage in *Hall*, the Court pointed out that “[t]he Federal Government, by contrast, ‘can claim no powers which are not granted to it by the constitution, and the powers actually granted must be such as are expressly given, or given by necessary implication.’”

Just so. The enumerated powers rationale of *Seminole Tribe* and *Alden* does not extend to abrogation by the states, because the states are not constricted to any specifically enumerated powers. If state sovereign immunity is a backdrop, it is one that the federal government must respect, but the states are bound by neither Article I, nor Article III, nor the Eleventh Amendment. As *Hall* put it, “A mandate for federal-court enforcement of interstate comity must find its basis elsewhere in the Constitution.”<sup>139</sup>

### C. Elsewhere in the Constitution?

If the Court does turn to overruling *Hall*, it is therefore important that it find some provision of the Constitution that disables state power to abrogate sovereign immunity analogously to how Article I restricts federal power to abrogate. I am rather dubious that there is such a provision.

At oral argument in *Franchise Tax Board*, Justice Breyer toyed with restricting abrogation through the Full Faith and Credit Clause,<sup>140</sup> which requires states to give “Full Faith and Credit . . . to the public Acts, Records, and judicial Proceedings of every other State.”<sup>141</sup> And the Court ultimately resolved the case, in an opinion written by Justice Breyer, on different Full Faith and Credit grounds sounding in nondiscrimination.<sup>142</sup> Nevada’s verdict against California was impermissible because it “applied a special rule of law applicable only in lawsuits against its sister

<sup>138</sup> *Alden*, 527 U.S. at 739.

<sup>139</sup> 440 U.S. at 421.

<sup>140</sup> Transcript of Oral Argument, *supra* note 11, at 18–19.

<sup>141</sup> U.S. Const. art. IV, § 1.

<sup>142</sup> *Franchise Tax Bd.*, 136 S. Ct. at 1281–83.

States,”<sup>143</sup> and thus reflected impermissible “‘hostility to the public Acts’ of a sister State.”<sup>144</sup>

Whatever one thinks of that holding, there seems little basis for extending the Full Faith and Credit Clause to forbid *all* state abrogations of another state’s sovereign immunity. In *Hall*, for instance, California’s abrogation of Nevada’s sovereign immunity treated Nevada the same way as California apparently treated itself. As the California Supreme Court explained in that case: “To hold that the sister state may not be sued in California could result in granting greater immunity to the sister state than the immunity which our citizens have bestowed upon our state government.”<sup>145</sup>

More broadly, there are reasons to worry about the overuse of the Full Faith and Credit Clause, which the Court’s previous cases have read to give a state broad discretion to choose to apply its own law to a controversy.<sup>146</sup> Indeed, to the extent that the Court’s previous cases have deviated from the original meaning of the Clause, it is by reading the Clause to be too *restrictive* of state discretion.<sup>147</sup> It ought not be transformed into a more aggressive tool of review of state law.

The states are also forbidden by the Constitution to “engage in War, unless actually invaded, or in such imminent Danger as will not admit of delay.”<sup>148</sup> It’s not inconceivable that this clause could limit state abrogation authority; the argument would be that refusing to recognize another state’s sovereignty in court is an act of war akin to sending forces over a state’s borders. But this does seem like a stretch. Treating abrogation as a form of war would also have odd effects on other sovereign immunity jurisprudence, such as the Foreign Sovereign Immunities Act.<sup>149</sup> And it

<sup>143</sup> *Id.* at 1282.

<sup>144</sup> *Id.* at 1282–83 (quoting *Franchise Tax Bd.*, 538 U.S. 488, 499 (2003)).

<sup>145</sup> *Hall v. Univ. of Nev.*, 503 P.2d 1363, 1366 (Cal. 1972) (en banc).

<sup>146</sup> See, e.g., *Franchise Tax Bd.*, 538 U.S. at 494–99; *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 312–13 (1981); see also *Franchise Tax Bd.*, 136 S. Ct. at 1285–86 (Roberts, C.J., dissenting) (noting this discretion).

<sup>147</sup> See David E. Engdahl, *The Classic Rule of Faith and Credit*, 118 *Yale L.J.* 1584, 1632, 1655 (2009); Stephen E. Sachs, *Full Faith and Credit in the Early Congress*, 95 *Va. L. Rev.* 1201, 1208, 1230–31 (2009).

<sup>148</sup> U.S. Const. art. I, § 10, cl. 3.

<sup>149</sup> 28 U.S.C. §§ 1330, 1391(f), 1441(d), 1602–11 (2012). The Act abrogates foreign immunity in a range of cases, but it would be odd if each of these cases were treated as an act of war against other nations, including our allies.

also might oddly suggest that Congress has an Article I abrogation power after all, thanks to its own power to “declare War.”<sup>150</sup>

In the leading critique of *Nevada v. Hall*, Ann Woolhandler suggests that states’ ability to sue one another was instead implicitly disabled by Article III. Its “provision for state/citizen diversity and the original jurisdiction of the Supreme Court in state-as-party cases meant that any aboriginal power in the state courts to hold each other involuntarily liable to individuals’ suits had been ceded to the federal courts.”<sup>151</sup> But suppose the backdrop theory is right, and Article III left states’ preexisting immunities in place, despite explicitly creating jurisdiction over states. It seems even more unlikely that Article III *implicitly* stripped their preexisting power to *abrogate* those immunities, despite saying nothing about it.

Finally, and most speculatively, one could hold state sovereign immunity beyond other states’ power to abrogate through a somewhat complicated theory of international law. If one believes: (1) that sovereign immunity was not just general common law but specifically part of the *law of nations*,<sup>152</sup> (2) that states lack the power to enact statutes that violate the law of nations (even when there is no treaty or federal law embodying them),<sup>153</sup> and (3) that both of these rules carry over to the interstate context; then one might conclude that states lack the power to abrogate one another’s sovereign immunity. These limitations also take us well beyond the text, since the Constitution never *says* that states can’t violate international law,<sup>154</sup> especially interstate international law (if there is such a thing). But at least these limitations would maintain the structure of the current backdrop approach by focusing on the question of the power to abrogate and not by trying to elevate the common

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<sup>150</sup> U.S. Const. art. I, § 8, cl. 11.

<sup>151</sup> Woolhandler, *supra* note 45, at 265.

<sup>152</sup> See Pfander, *supra* note 44, at 583–84.

<sup>153</sup> Compare *id.* at 582 n.102 (arguing that one state could not unilaterally violate another’s rights under the law of nations), with Curtis A. Bradley & Jack L. Goldsmith, Customary International Law as Federal Common Law: A Critique of the Modern Position, 110 Harv. L. Rev. 815, 823–24 (1997) (arguing that state positive law trumped customary international law).

<sup>154</sup> See Michael D. Ramsey, The Constitution’s Text in Foreign Affairs 348–55 (2007) (making a textual argument). But see Carlos M. Vázquez, Customary International Law as U.S. Law: A Critique of the Revisionist and Intermediate Positions and a Defense of the Modern Position, 86 Notre Dame L. Rev. 1495, 1519–20, 1563–66 (2011) (arguing that “the text neither establishes nor rebuts the modern position”).

law principle of sovereign immunity to an unenumerated constitutional right.<sup>155</sup>

If, as seems most likely, there are no limits on the states' power to abrogate other states' immunity, then the Court should leave *Nevada v. Hall* in place. This would recognize sovereign immunity as a common law rule—part of the common law or law of nations background before the ratification of the Constitution—but one that *states* can still abrogate. Just as states can choose to abrogate other common law rules, states can abrogate the common law rule of sovereign immunity.<sup>156</sup> That might be a bad idea, but the Constitution lets states do lots of things that are bad ideas.

The more important point, however, is analytical. If the Court does decide to overturn *Hall*, it should be very careful about how it does so. The logic of modern sovereign immunity doctrine currently points towards the backdrop approach, which is both analytically sound and consistent with the constitutional text. That approach requires special attention to why a given government lacks constitutional power to abrogate sovereign immunity. So if the Court does overturn *Hall*, it should do so by pointing to a specific provision of the Constitution—whether the Full Faith and Credit Clause or something else—that restricts state power to abrogate analogously to the restrictions the Court has found in Article I. The Court's sovereign immunity doctrine has a remarkably strong logic, despite its critics. It would be a shame to contradict the logic and prove the critics right.

#### IV. A NONSENSICAL RESULT?

At oral argument, the Franchise Tax Board's lawyer, Paul Clement, repeatedly stressed that to allow immunity to be abrogated in the courts of other states would make no sense as a practical or historical matter: "I mean, Chisholm can't sue Georgia in a perfectly neutral Federal court; Chisholm can't sue Georgia in Georgia court; but Chisholm can sue Georgia in the least neutral court available, the State of South Carolina.

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<sup>155</sup> The same is true of Woolhandler's suggestion that "[e]ven if" sovereign immunity is a form of common law, it should be seen as "federal common law, and . . . not subject to change by the legislative power of any individual state." Woolhandler, *supra* note 45, at 266 n.59.

<sup>156</sup> Sachs, *supra* note 6, at 1834, 1874–75.

That doesn't make any sense."<sup>157</sup> But this argument assumes that the doctrine of sovereign immunity is the only rule of procedure that protects state interests. That isn't so.

*Franchise Tax Board* itself shows at least one other doctrine that provides states some protection against exploitation—the Full Faith and Credit Clause, applied as a rule against unjustified discrimination or hostility to other states.<sup>158</sup> But apart from that, there are other long-established doctrines of interstate procedure that may guard against the anomaly that the Franchise Tax Board alleged.

For instance, the fact that Nevada courts can hear a claim against California does not necessarily mean that Mr. Hyatt will actually be able to collect his money. Once the Nevada courts issue a judgment, it still needs to be enforced. To be sure, if the Tax Board has its own assets in Nevada, or if the Tax Board later wants to go after Hyatt in Nevada, a Nevada judgment may award him all the relief he seeks. But if the California Franchise Tax Board doesn't have massive assets in Nevada, then Hyatt will have to collect somewhere else, like California. Having abrogated California's sovereign immunity in Nevada, the state might discover that its judgments encounter serious legal and practical obstacles elsewhere.<sup>159</sup>

The more general point is that one ought not disregard *Nevada v. Hall* as creating a practical anomaly by looking at sovereign immunity in isolation. Sovereign immunity is only one of several rules that regulate interstate conflicts. Principles of comity in interstate disputes may come from elsewhere, such as in the law of judgments, diversity jurisdiction, and so on.<sup>160</sup> The doctrine of sovereign immunity, however, has gotten to a sound and logical point. Perhaps it is time to leave well enough alone.

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<sup>157</sup> Transcript of Oral Argument, *supra* note 11, at 16 (referencing *Chisholm v. Georgia*, 2 U.S. 419 (1793)).

<sup>158</sup> See 136 S. Ct. at 1281–83.

<sup>159</sup> Steve Sachs is responsible for every good idea in this paragraph. See also Stephen E. Sachs, *Pennoyer Was Right: Jurisdiction and General Law*, 95 Tex. L. Rev. (forthcoming 2017) <https://ssrn.com/abstract=2832200> [<https://perma.cc/QDP6-6NW5>] (discussing the relationship between jurisdiction, recognition, and due process).

<sup>160</sup> See also Woolhandler, *supra* note 45, at 266–72 (discussing possible limits on judgment enforcement and the Full Faith and Credit Clause).