

# The Fourteenth Amendment: A Structural Waiver of State Sovereign Immunity from Constitutional Tort Suits

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#### ABSTRACT

The Court's state sovereign immunity jurisprudence has recently undergone a fundamental change. Both scholars and the Court have long recognized the Immunity Theory as the authoritative methodology for interpreting the Eleventh Amendment. But the Immunity Theory is not stagnant. It has evolved with the modern Court. Scholars have discussed the immediate results of this evolution by focusing on the fact that, through the modern Immunity Theory, state sovereign immunity has become a constitutionalized feature of this Nation's federalist system. That is, state sovereign immunity is now detached from the Eleventh Amendment's text, and appears to be a universal default absent affirmative destruction.

This academic focus has ignored what this Article explores: the modern Immunity Theory's evolving selection of analytical tools used to justify the scope and application of state sovereign immunity. The modern Immunity Theory now emphasizes constitutional structure and constitutional history to explore the boundaries of state sovereign immunity. This Article uses those tools to ascertain the correct bounds of the Fourteenth Amendment's intrusion on state sovereign immunity. And the Fourteenth Amendment's impact on state sovereign immunity is unmistakable. Section 1 of the Fourteenth Amendment extinguished state sovereign immunity. To the extent that a State violates the substantive provisions of the Fourteenth Amendment—be it the protections found within that Amendment, or the constitutional protections incorporated against states through the Fourteenth Amendment—such violations are unprotected by state sovereign immunity. A Section 5 enactment is not required to abrogate state sovereign immunity, because Section 1 has already eviscerated state sovereign immunity with respect to its provisions. Congress need only to create a right of action against the states to allow citizens to vindicate their constitutional rights.

Congress has created such a right of action-42 U.S.C. § 1983. However, the Court previously ruled that States are not “persons” for § 1983 purposes because of state sovereign immunity concerns. In light of this Article’s assessment of state sovereign immunity giving way to Section 1 of the Fourteenth Amendment, this Article concludes that § 1983 is a viable right of action against infringing states. No state sovereign immunity exists against violations of the Fourteenth Amendment, and therefore no state sovereign immunity concerns exist to validate removing States from the scope of § 1983 constitutional tort suits.

### INTRODUCTION

A group of Alabama Sheriff’s Department employees subject a correctional officer to sex-based and race-based discrimination.<sup>1</sup> Alabama avoids all monetary liability despite any culpability for violation of the correctional officer’s Fourteenth Amendment rights.<sup>2</sup>

The Massachusetts sheriff’s office and its officers knowingly deny an inmate medical treatment, resulting in the inmate enduring a month of intense pain and the potential loss of bone and teeth.<sup>3</sup> Massachusetts avoids all monetary liability despite any culpability for violations of the inmate’s Fourth Amendment, Eighth Amendment, and Fourteenth Amendment rights.<sup>4</sup>

Iowa State Patrol officers arrest protestors standing on a public street while simultaneously ignoring other individuals in the area who are vocalizing a different political point of view.<sup>5</sup> Iowa avoids all monetary liability despite any culpability for violations of the protestors’ First Amendment, Fourth Amendment, and Fourteenth Amendment rights.<sup>6</sup>

These cases fall into an all too frequent fact pattern. A government actor violates an individual’s constitutional rights. The wronged individual then seeks the society-approved method to make herself whole and right the wrong—a lawsuit.<sup>7</sup> The individual’s right of action<sup>8</sup> against offending state

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1. Cobb v. Marshall, 481 F. Supp. 2d 1248, 1253-54 (M.D. Ala. 2007).

2. *Id.* at 1257-58.

3. Villanueva v. Franklin Cnty. Sheriff’s Office, 849 F. Supp. 2d 186, 189-90 (D. Mass. 2012).

4. *Id.* at 190-91.

5. McCabe v. Macaulay, 551 F. Supp. 2d 774, 780-81 (N.D. Iowa 2007).

6. *Id.* at 783-84.

7. See generally Jason M. Solomon, *Civil Recourse as Social Equality*, 39 FLA. ST. U. L. REV. 243, 246-63 (2011) (discussing how civil recourse for tort violations is normatively justified as a matter of distributive justice and social equality); Michael L. Wells, *Civil Recourse, Damages-as-Redress, and Constitutional Torts*, 46 GA. L. REV. 1003, 1014-18 (2012) (recognizing that the modern Court frames § 1983 actions as a means to make the plaintiff whole); *id.* at 1019-33 (arguing that § 1983 actions should be a means to remedy the

entities is 42 U.S.C. § 1983,<sup>9</sup> which allows suit for constitutional rights violations.<sup>10</sup> But even though a State imbued an official with authority to act under the color of state law, that State cannot be a defendant to the § 1983 action.<sup>11</sup>

The problem in each of these situations is commonplace in modern civil rights litigation: state sovereign immunity prohibits an individual's monetary suit against a state sovereign for that State's violation of the individual's constitutional rights. This prohibition, centered at the crossroads of constitutional rights and sovereign immunity, is more than an obstacle in

injury of abstract constitutional harm, rather than a mechanism to compensate only traditional tort harm such as tangible injury or emotional distress).

8. Charles E. Clark, *The Code Cause of Action*, 33 YALE L.J. 817, 823-24 (1924) ("A right of action has been defined as the right to prosecute an action with effect.") (internal quotation marks omitted); Douglas D. McFarland, *The Unconstitutional Stub of Section 1441(c)*, 54 OHIO ST. L.J. 1059, 1063 n.15 (1993).

9. Section 1983 reads in pertinent part: "Every person who, under color of . . . [state law], subjects, or causes to be subjected, any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law . . ." 42 U.S.C. § 1983 (2012).

10. Section 1983 originated as § 1 of the Ku Klux Klan Act of 1871. The Ku Klux Klan Act of 1871 was part of a concerted congressional effort to provide individuals with a means to combat racial violence that was ignored or condoned by local officials in the post-Civil War South. A. E. Dick Howard, *The States and the Supreme Court*, 31 CATH. U. L. REV. 375, 376-77 (1982); David Pruessner, *The Forgotten Foundation of State-Created Danger Claims*, 20 REV. LITIG. 357, 375-76 (2001). The expanded use of § 1983 in modern litigation can be traced to the Court's decision in *Monroe v. Pape*, 365 U.S. 167 (1961). See Myriam E. Gilles, *Breaking the Code of Silence: Rediscovering "Custom" in Section 1983 Municipal Liability*, 80 B.U. L. REV. 17, 23-25 (2000) (noting that the *Monroe* Court altered how to understand the "under color of" requirement of § 1983, so that "every unconstitutional action taken in official capacity [was open] to a potential § 1983 claim against the offending officer").

11. *Will v. Mich. Dep't of State Police*, 491 U.S. 58, 66 (1989) ("Section 1983 provides a federal forum to remedy many deprivations of civil liberties, but it does not provide a federal forum for litigants who seek a remedy against a State for alleged deprivations of civil liberties."). Moreover, a § 1983 action cannot be brought against the constitutionally-infringing official in her official capacity, because such a suit is not "against the official but rather . . . against the official's office." *Id.* at 71 (citing *Brandon v. Holt*, 469 U.S. 464, 471 (1985)). "As such, [a suit against an official in her official capacity] is no different from a suit against the State itself." *Id.* (citing *Kentucky v. Graham*, 473 U.S. 159, 165-66 (1985); *Monell v. Dep't of Soc. Servs. of N.Y.*, 436 U.S. 658, 690 n.55 (1978)). See generally Jennifer Lynch, *The Eleventh Amendment and Federal Discovery: A New Threat to Civil Rights Litigation*, 62 FLA. L. REV. 203, 213 n.59 (2010) (explaining the "quite confusing" distinction—and practical implications—"between suits against state employees acting in their individual or personal capacities versus official capacities"). Further compounding the confusion is that a § 1983 action *can* be brought against an official in her official capacity under the "fiction" of the *Young* doctrine. *Va. Office for Prot. & Advocacy v. Stewart*, 131 S. Ct. 1632, 1638 (2011) (citing *Ex parte Young*, 209 U.S. 123 (1908)). The distinction is that the *Young* doctrine only allows injunctive relief—not monetary compensation—against officials acting in their official capacity. *Will*, 491 U.S. at 71 n.10.

civil rights litigation—it is a wall.<sup>12</sup> The prohibition is inflexible and practically absolute. And it undermines vindication of individuals’ constitutional rights against infringing state sovereigns.

This Article contends that individuals should be able to bring constitutional tort suits against state sovereigns under § 1983—that is, suits for monetary damages against state sovereigns who violate an individual’s constitutional rights. This argument is based on both constitutional law and statutory interpretation.

As to the matter of constitutional law, the Fourteenth Amendment fundamentally altered this Nation’s federalism structure. This Article explores how this change affected state sovereign immunity, and concludes that the states submitted their sovereign authority to Section 1 of the Fourteenth Amendment. This conclusion diverges from Supreme Court precedent, which held that States relinquished their sovereign immunity to Section 5 of the Fourteenth Amendment.

The difference is more than academic. Section 5 provided Congress the power to enact legislation to enforce the substantive provisions of the Fourteenth Amendment. If the states submitted to this authority, then the resulting conclusion is that the states relinquished their sovereign immunity only to certain congressional legislation. In contrast, Section 1 created new, substantive constitutional rights. By submitting to this substantive provision, the states relinquished their sovereign immunity to those newly created constitutional rights—regardless of whether Congress enacts any Section

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12. Of course, the pitfalls underlying any civil rights claim are not limited to state sovereign immunity. For example, the “under color of” state law requirement precludes a § 1983 action against a defendant whose harm-causing conduct was entirely private and without a connection to the government. *See Lugar v. Edmondson Oil Co., Inc.*, 457 U.S. 922, 928 (1982) (“In cases under § 1983, ‘under color’ of law has consistently been treated as the same thing as the ‘state action’ required under the Fourteenth Amendment.” (quoting *United States v. Price*, 383 U.S. 787, 794 n.7 (1966))); Timothy I. Oppelt, *The Foundations of § 1983 Jurisprudence: A Look from the Concept of Law*, 2 FLA. A & M U. L. REV. 91, 107-14 (2007).

Another example is that a defendant cannot be liable for the actions of another, regardless of what relationship exists between the defendant and the harm-causing individual. *Monell v. Dep’t of Soc. Servs. of N.Y.*, 436 U.S. 658, 691 (1978) (“[W]e conclude that a municipality cannot be held liable *solely* because it employs a tortfeasor—or, in other words, a municipality cannot be held liable under § 1983 on a *respondeat superior* theory.”); *see also Connick v. Thompson*, 131 S. Ct. 1350, 1358 (2011) (holding that “the policymaker for the district attorney’s office” could not be liable for another prosecutor’s *Brady* violations without “actual or constructive notice of . . . a need for more or different *Brady* training”). The absence of *respondeat superior* liability in § 1983 actions is not without critics. *See, e.g., Bd. of Cnty. Comm’rs of Bryan Cnty., Okla. v. Brown*, 520 U.S. 397, 430-37 (1997) (Breyer, J., dissenting) (setting forth a multi-prong assault on the continued reliance of the *Monell* Court’s rejection of *respondeat superior* liability); Donald L. Doernberg, *Taking Supremacy Seriously: The Contrariety of Official Immunities*, 80 FORDHAM L. REV. 443, 471 (arguing that the *Monell* Court’s historical rationale is “highly questionable”).

5 legislation. As a matter of the default status quo, then, the Fourteenth Amendment shifted the federalism balance of power by requiring the states to affirmatively surrender their sovereign immunity to the newly created constitutional rights, rather than relinquish their sovereign immunity in reaction to appropriately enacted law.

This leads to the matter of statutory interpretation. Section 1983 must be read against the background that no state sovereign immunity exists as against Section 1's substantive constitutional rights. In light of this absence of sovereign immunity, § 1983 must be read as authorizing suit against state sovereigns who violate an individual's constitutional rights.

Arriving at this conclusion requires engaging in the following analysis. Section I reviews state sovereign immunity and Eleventh Amendment jurisprudence. Section II shifts the focus to the relation between state sovereign immunity and federal constitutional rights—and specifically the Fourteenth Amendment—within the structure of the Constitution. At the end of Section II, it will be shown that States relinquished their sovereign immunity to Section 1 of the Fourteenth Amendment. Section III will then explain how the absence of state sovereign immunity against Section 1 of the Fourteenth Amendment requires allowing individuals to bring suit under § 1983 against States for violations of an individual's Fourteenth Amendment rights.

## I. STATE SOVEREIGN IMMUNITY AND THE CONSTITUTION

Because this Article ultimately advocates for the reversal of *Will v. Michigan Department of State Police*,<sup>13</sup> a review of that decision serves a logical starting point and directs the course of discussion.

Ray Will filed a 42 U.S.C. § 1983 action in Michigan Claims Court alleging, in part, that he had been improperly denied a promotion by his state employer in contravention of the United States Constitution.<sup>14</sup> Will brought suit against multiple defendants, including the Michigan Department of State Police and the Director of State Police in his official capacity.<sup>15</sup> Will's case worked its way through the Michigan judicial system until it reached the Michigan Supreme Court.<sup>16</sup> The Michigan Supreme Court held that neither a State, nor a state official acting in their official capacity, is a person for § 1983 purposes.<sup>17</sup> The Supreme Court granted certiorari to resolve

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13. *Will*, 491 U.S. 58 (1989); *see also infra* Part III.

14. *Will*, 491 U.S. at 60.

15. *Id.* at 60-61.

16. *See id.*

17. *Id.*

the widespread conflict on these points,<sup>18</sup> and thereafter affirmed the Michigan Supreme Court's holding.<sup>19</sup>

The Court acknowledged that it was not clear, at the time Will brought his case before the Court, whether a State was subject to a § 1983 suit.<sup>20</sup> True, the Court had already declared in *Fitzpatrick v. Bitzer* that States were not a person for § 1983 purposes.<sup>21</sup> This determination was based off of the prior *Monroe v. Pape* holding which concluded that municipalities were removed from the scope of a § 1983 person.<sup>22</sup> Thus, in *Fitzpatrick*, it was simple to extrapolate that if “cities and other municipal corporations [are excluded] from [§ 1983's] ambit . . . , it could not have been intended to include States as parties defendant.”<sup>23</sup> But the Court afterwards overruled its *Monroe* decision with respect to municipalities, thereby concluding that municipalities were indeed a person subject to a § 1983 suit.<sup>24</sup> This reversal undercut the extrapolation of the *Fitzpatrick* decision, leaving uncertain whether States could be subject to a § 1983 action.<sup>25</sup>

The Court was not bothered by *Monroe*'s limited reversal<sup>26</sup> and reaffirmed the *Fitzpatrick* holding that a State is not a person for § 1983 purposes.<sup>27</sup> Because the underpinning of the *Fitzpatrick* holding had been overturned, the Court relied on a new rationale—state sovereign immunity. The Court's reliance on state sovereign immunity fragmented into three separate arguments to support its holding.

The Court grounded its first rationale in the words of § 1983 itself. Not only would including States in the term person be “decidedly awkward,”<sup>28</sup>

18. *Id.* at 61; *id.* at 61 n.3.

19. *Will v. Mich. Dep't of State Police*, 491 U.S. 58, 71 (1989).

20. *See id.* at 62-63.

21. *Fitzpatrick v. Bitzer*, 427 U.S. 445, 452 (1976).

22. *Monroe v. Pape*, 365 U.S. 167, 191 (1961), *overruled by* *Monell v. Dep't of Soc. Servs. of N.Y.*, 436 U.S. 658 (1978) (“The response of the Congress to the proposal to make municipalities liable for certain actions being brought within federal purview by the Act of April 20, 1871, was so antagonistic that we cannot believe that the word ‘person’ was used in this particular Act to include them.”).

23. *Fitzpatrick*, 427 U.S. at 452 (citing *Monroe*, 365 U.S. at 187-91).

24. *Monell v. Dep't of Soc. Servs. of N.Y.*, 436 U.S. 658, 690 (1978) (“Our analysis of the legislative history of the Civil Rights Act of 1871 compels the conclusion that Congress *did* intend municipalities and other local government units to be included among those persons to whom § 1983 applies. Local governing bodies, therefore, can be sued directly under § 1983 . . . .”) (footnotes omitted).

25. *Will*, 491 U.S. at 62-63.

26. *See id.* at 70 (arguing that the partial reversal of *Monroe* did not mandate holding that States were § 1983 persons).

27. *See id.* at 64.

28. *Id.* Having person include States would render the following reading of § 1983: “that every person, including a State, who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects . . . .” *Id.* (internal quotation marks omitted). The textual character of this argument has been subject

but such a reading of person would significantly alter the Nation's federalism balance between state and federal governments without sufficiently clear congressional intent.<sup>29</sup>

For its second rationale, the Court used the contours of the Eleventh Amendment to guide its understanding of the scope of § 1983. The Court recognized that earlier decisions<sup>30</sup> had already established that § 1983 did not, in and of itself, abrogate the states' Eleventh Amendment immunity.<sup>31</sup> Further, at that time the Court considered the Eleventh Amendment—and the constitutional state sovereign immunity it represents—inoperative against federal law pursued in state courts.<sup>32</sup> The Court rejected the contention that Congress created a scheme whereby § 1983 plaintiffs could recover against States for constitutional violations not in federal court, because of Eleventh Amendment immunity, but only in the offending States' own state courts.<sup>33</sup>

The Court's third rationale began where the second ended. As a feature of common law (and not constitutional law), state sovereign immunity—as a general matter, not in any particular forum—was well established.<sup>34</sup> The Congress enacting § 1983 had no intent to override such state sovereign immunity by the terms of § 1983 itself.<sup>35</sup> It therefore made little sense that “person” would include States, because such suits would just be prohibited by common law state sovereign immunity.<sup>36</sup>

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to counterarguments and criticisms. *See, e.g.*, *Will v. Mich. Dep't of State Police*, 491 U.S. 58, 77-82 (1989) (Brennan, J., dissenting) (arguing that a § 1983 person includes “bodies politic and corporate”—that is, the states themselves); William Burnham & Michael C. Fayz, *The State As a “Non-Person” Under Section 1983: Some Comments on Will and Suggestions for the Future*, 70 OR. L. REV. 1, 10-11 (1991) (arguing that the “presumption against including [S]tates as persons” was contrary to commonplace interpretation of “federal statutes to include [S]tates as persons”) (internal quotation marks omitted).

29. *See Will*, 491 U.S. at 65.

30. *See, e.g.*, *Quern v. Jordan*, 440 U.S. 332, 338-41 (1979).

31. *Will*, 491 U.S. at 66.

32. *See id.* at 63-64 (“Petitioner filed the present § 1983 actions in Michigan state court, which places the question whether a State is a person under § 1983 squarely before us since the Eleventh Amendment does not apply in state courts.”) (citing *Maine v. Thiboutot*, 448 U.S. 1, 9 n.7 (1980)). This limited understanding of the Eleventh Amendment—and more particularly, the greater legal principle of state sovereign immunity that the Eleventh Amendment represented—would be corrected ten years later. *See Alden v. Maine*, 527 U.S. 706, 735-36 (1999) (“There are isolated statements in some of our cases suggesting that the Eleventh Amendment is inapplicable in state courts. This, of course, is a truism as to the literal terms of the Eleventh Amendment. As we have explained, however, the bare text of the Amendment is not an exhaustive description of the States' constitutional immunity from suit.” *Id.* (citations omitted)).

33. *Will*, 491 U.S. at 66-67.

34. *See id.* at 67.

35. *Id.* at 67-70.

36. *See id.*

The Court's decision to exclude States from being a § 1983 person arose from its belief in the presence of state sovereign immunity against suits for constitutional violations. Each of the Court's rationales can be framed as concerns relating to, if not directly following from, a respect for state sovereign immunity. The Court's ultimate holding, whereby a § 1983 person does not include States, is a sound conclusion if state sovereign immunity is actually present. But in the context of federal constitutional violations, state sovereign immunity is nonexistent.<sup>37</sup>

This Article argues that States waived their immunity from suits for federal constitutional violations by submitting to the constitutional structure of this Nation's government. By clarifying this misconception of state sovereign immunity, the logical underpinning of the Court's holding is nonexistent. This point is addressed more fully later in this Article;<sup>38</sup> for now, it serves as a springboard to further review state sovereign immunity and the Constitution.

#### A. A TRUNCATED REVIEW OF SOVEREIGN IMMUNITY, THE STATES, AND THE CONSTITUTION

Sovereign entities, because of their sovereign status, are afforded several unique powers.<sup>39</sup> One such vital attribute of sovereignty is “[i]mmunity from private suits.”<sup>40</sup> “[Such] [s]overeign immunity is the privilege of the sovereign not to be sued without its consent.”<sup>41</sup>

Sovereign immunity is a long-established privilege afforded to sovereigns. Prior to the formation of the United States, “it was well established in English law that the Crown could not be sued without consent in its own courts.”<sup>42</sup> Sovereign immunity survived the English colonists' expansion to

37. See *infra* Part II.

38. See *infra* Part III.

39. See *Cent. Va. Cmty. Coll. v. Katz*, 546 U.S. 356, 384 n.2 (Thomas, J., dissenting) (remarking that two “attributes of sovereignty” is the ability “to enact legislation regulating its own citizens,” and “immunity against suit by private citizens” (citing THE FEDERALIST NO. 81 (Alexander Hamilton))).

40. *Sossamon v. Texas*, 131 S. Ct. 1651, 1657 (2011).

41. *Va. Office for Prot. & Advocacy v. Stewart*, 131 S. Ct. 1632, 1637 (2011); see also Jeffrey G. Homrig, *Caseote*, *Alden v. Maine: A New Genre of Federalism Shifts the Balance of Power*, 89 CALIF. L. REV. 183, 185-86 (2001) (identifying two “primary rationales” underlying sovereign immunity: a natural law theory and a common law theory).

42. *Alden v. Maine*, 527 U.S. 706, 715 (1999) (citing *Chisholm v. Georgia*, 2 U.S. 419, 437-46 (1793) (Iredell, J., dissenting) (reviewing English law)); see also Louis L. Jaffe, *Suits Against Governments and Officers: Sovereign Immunity*, 77 HARV. L. REV. 1, 2-19 (1963) (providing a comprehensive review of sovereign immunity under English law); Brian A. Snow & William E. Thro, *The Significance of Blackstone's Understanding of Sovereign Immunity for America's Public Institutions of Higher Education*, 28 J.C. & U.L. 97, 104-10 (2001) (discussing the nature, scope, and exceptions to sovereign immunity in English law).

the New World. Indeed, sovereign immunity was a universal truth at the time of the Constitution's ratification.<sup>43</sup> And sovereign immunity was a segment of "English political theory" retained and enshrined in the Nation's founding documents.<sup>44</sup> Thus, by ratifying the Constitution, "the States entered the Union with their sovereignty intact."<sup>45</sup> The states therefore are not "mere provinces or political corporations, but retain the dignity, though not the full authority, of sovereignty."<sup>46</sup> This sovereign status, then, affords the states the privilege of sovereign immunity.

Yet, despite—or perhaps *because of*—this self-evident attribute of sovereignty,<sup>47</sup> the original Constitution says nothing about state sovereign immunity.<sup>48</sup> The portion of the Constitution most apt to touch upon sover-

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as understood by Blackstone—who, in turn, "laid the foundation for the development of the theory of sovereign immunity").

43. *Alden*, 527 U.S. at 715-16 (citing *Hans v. Louisiana*, 134 U.S. 1, 16 (1890); *Chisholm v. Georgia*, 2 U.S. 419, 437-46 (1793) (Iredell, J., dissenting)).

44. *Alden*, 527 U.S. at 715-16; see *Sossamon*, 131 S. Ct. at 1657 (citing THE FEDERALIST NO. 81 (Alexander Hamilton)); *Fed. Mar. Comm'n v. S.C. State Ports Auth.*, 535 U.S. 743, 752 (2002) (noting that the states' ratification of the Constitution "surrender[ed] a portion of their inherent immunity by consenting to suits brought by sister States or by the Federal Government. . . . [But this] did not disturb States' immunity from private suits") (citing *Alden v. Maine*, 527 U.S. 706, 755 (1999)); see also *Alden*, 527 U.S. at 716-19 (discussing contemporary authorities who assured that the Constitution retained sovereign immunity principles).

45. *Sossamon*, 131 S. Ct. at 1657; *Fed. Mar. Comm'n*, 535 U.S. at 751 (internal quotation marks omitted) ("Dual sovereignty is a defining feature of our Nation's constitutional blueprint.").

46. *Alden*, 527 U.S. at 715.

47. *Cf. Alden*, 527 U.S. at 741 ("We believe, however, that the Founders' silence [regarding state sovereign immunity in state court] is best explained by the simple fact that no one, not even the Constitution's most ardent opponents, suggested the document might strip the States of the immunity."). Commentators have noted the seeming contradiction between sovereign immunity and the principles underlying this Nation's war for independence and founding of a democratic republic. See, e.g., Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 YALE L.J. 1425, 1466 (1987) ("By allowing . . . state governments to invoke 'sovereign immunity' from liability for constitutional violations, the Court has misinterpreted the Federalist Constitution's text, warped its unifying structure, and betrayed the intellectual history of the American Revolution that gave it birth."); Scott Dodson, *The Metes and Bounds of State Sovereign Immunity*, 29 HASTINGS CONST. L.Q. 721, 727 (2002) ("The American colonists, of course, dispensed with [sovereign immunity] justifications when they declared their independence, rejected royalty, and established a republic."); cf. John F. Duffy, *Sovereign Immunity, the Officer Suit Fiction, and Entitlement Benefits*, 56 U. CHI. L. REV. 295, 298-99 (1989) (arguing that the "general principles of sovereign immunity are applied easily in the context of suits against the United States[,] but "presents more difficult issues" when applying those same principles to the states).

48. See Brannon P. Denning & Glenn Harlan Reynolds, *Comfortably Penumbral*, 77 B.U. L. REV. 1089, 1100 (1997); Danielle J. Amorena, Case Note, *The Frailties of Alden v. Maine: A Decision Contrary to the Constitution, Precedent, and Ancient Propositions of Law*, 33 CREIGHTON L. REV. 643, 658-60 (2000).

eign immunity would be Article III, which establishes the constitutional boundaries of federal courts' jurisdiction.<sup>49</sup> In pertinent part, Article III sets forth that the judicial power of the United States *does* extend to cases “between a State and Citizens of another State[,]” as well as “between a State . . . and foreign States, Citizens or Subjects.”<sup>50</sup> Even a generous reading of Article III's grant of federal jurisdiction does not appear to carve an exception for suits implicating state sovereign immunity.<sup>51</sup>

This conflict between a presumption of state sovereign immunity and the plain text of the Constitution first came before the Supreme Court in *Chisholm v. Georgia*.<sup>52</sup> In that case, the Court held that federal courts could entertain a suit between an out-of-state citizen and a State.<sup>53</sup> Despite this seemingly natural result of the operation of Article III's plain language, the public's response to the *Chisholm* Court's holding was “profound shock”<sup>54</sup> and “outrage[.]”<sup>55</sup> This reaction culminated in swift ratification of the Eleventh Amendment—just five years after the *Chisholm* decision.<sup>56</sup> Notably, the Eleventh Amendment does not contain the phrase “sovereign immunity.”<sup>57</sup> But because the language of the Eleventh Amendment parallels that

49. Debra Lyn Bassett, *Statutory Interpretation in the Context of Federal Jurisdiction*, 76 GEO. WASH. L. REV. 52, 55 (2007).

50. See U.S. CONST. art. III, § 2, cl. 1.

51. See Laura M. Herpers, Note, *State Sovereign Immunity: Myth or Reality After Seminole Tribe of Florida v. Florida?*, 46 CATH. U. L. REV. 1005, 1005-10 (1997) (recognizing that the terms of Article III do not account for state sovereign immunity).

52. *Chisholm v. Georgia*, 2 U.S. 419, 419 (1989), *superseded by constitutional amendment*, U.S. Const. amend. XI, *as recognized in* *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89 (1984).

53. This judgment was affirmed by four Justices, each of whom issued a separate opinion. See *id.* at 451 (opinion of Blair, J.); *id.* at 463 (opinion of Wilson, J.); *id.* at 469 (opinion of Cushing, J.); *id.* at 479 (opinion of Jay, J.). For a thorough analysis of the *Chisholm* decision, see Mark Strasser, *Chisholm, The Eleventh Amendment, and Sovereign Immunity: On Alden's Return to Confederation Principles*, 28 FLA. ST. U. L. REV. 605, 606-17 (2001).

54. Fred O. Smith, Jr., *Awakening the People's Giant: Sovereign Immunity and the Constitution's Republican Commitment*, 80 FORDHAM L. REV. 1941, 1962 n.128 (2012) (qualifying this as the “traditional narrative” of the reaction to *Chisholm*).

55. Stephanie Cochran, Note, *Should It Stay or Should It Go? Seminole Tribe in the Post-Katz Era*, 62 U. MIAMI L. REV. 157, 159-60 (2007).

56. See *Hans v. Louisiana*, 134 U.S. 1, 10-11 (1890); see also Carlos Manuel Vázquez, *What Is Eleventh Amendment Immunity?*, 106 YALE L.J. 1683, 1696 (1997) (“Most scholars agree with the *Hans* Court's premise that the [Eleventh] Amendment's purpose was to reverse *Chisholm*.”). Some commentators disagree with the traditional view that *Chisholm* was the driving motivation behind the Eleventh Amendment. See, e.g., Kurt T. Lash, *Leaving the Chisholm Trail: The Eleventh Amendment and the Background Principle of Strict Construction*, 50 WM. & MARY L. REV. 1577, 1583-86 (2009).

57. Cf. Amar, *supra* note 47, at 1475 (“If the Eleventh Amendment was meant to enshrine the general immunity of state ‘sovereigns’ from private suits in federal courts, it was abysmally drafted.”).

in Article III,<sup>58</sup> the Eleventh Amendment has been construed as a limit on federal courts' jurisdiction,<sup>59</sup> as an implicit method to respect state sovereign immunity.<sup>60</sup>

The Eleventh Amendment is therefore the focal point of state sovereign immunity discussion. In light of this role, how the Eleventh Amendment is interpreted and applied is now reviewed.

## B. INTERPRETING AND APPLYING THE ELEVENTH AMENDMENT

The Eleventh Amendment to the Constitution reads: "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>61</sup>

Three main schools of thought regarding how to understand and apply the Eleventh Amendment's text exist.<sup>62</sup> Each is now briefly reviewed.

*Compromise Theory.* The Compromise Theory takes the Eleventh Amendment text at face value, and results in straightforward application.<sup>63</sup> A strict reading of the Eleventh Amendment constricts the scope of the federal courts' Article III jurisdiction only with respect to any suit in law or equity initiated by a private, out-of-state, or foreign citizen against a State.<sup>64</sup>

58. Compare U.S. CONST. art. III, § 2, cl. 1, with U.S. CONST. amend. XI. Some assert that this mimicked language means that the Eleventh Amendment is jurisdictional in nature. See George D. Brown, *State Sovereignty Under the Burger Court—How the Eleventh Amendment Survived the Death of the Tenth: Some Broader Implications of Atascadero State Hospital v. Scanlon*, 74 GEO. L.J. 363, 367-68 (1985) (explaining how "considerable justification" exists for treating the Eleventh Amendment "as just another subset of the complicated rules governing federal jurisdiction generally"). But see Katherine Florey, Comment, *Insufficiently Jurisdictional: The Case Against Treating State Sovereign Immunity as an Article III Doctrine*, 92 CALIF. L. REV. 1375, 1401-17 (2004) (showing how the Supreme Court continues to "erode[] the jurisdictional view" of State sovereign immunity embodied in the Eleventh Amendment); *id.* at 1431-38 (reviewing proposed, non-jurisdictional alternatives of how to conceptualize State sovereign immunity).

59. *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 54, 72-73 (1996).

60. See John Evans Taylor, Note, *Express Waiver of Eleventh Amendment Immunity*, 17 GA. L. REV. 513, 516 n.13 (1983).

61. U.S. CONST. amend. XI.

62. Though the following labels have different origins, their use in this Article was pulled from Bradford R. Clark, *The Eleventh Amendment and the Nature of the Union*, 123 HARV. L. REV. 1817 (2010).

63. See generally *id.* at 1832-35.

64. See, e.g., Lawrence C. Marshall, *Fighting the Words of the Eleventh Amendment*, 102 HARV. L. REV. 1342, 1351-71 (1989) (arguing why the Eleventh Amendment's plain meaning—including the lines drawn between foreign citizens and foreign governments, and between in-state citizens and out-of-state citizens—should be taken at face value); *id.* at 1371 ("The essay's goal is simply to show that there are plausible explanations for

This application of the Eleventh Amendment is justified by considering “that the Amendment’s precise limitations reflect a byproduct of the Article V process.”<sup>65</sup> Thus, the Eleventh Amendment’s text is itself “the fruits of a (potentially unrecorded) compromise.”<sup>66</sup> This straightforward application of the Compromise Theory has found proponents in academia,<sup>67</sup> but not on the Court.<sup>68</sup>

*Diversity Theory.* The Diversity Theory rejects a purely textual interpretation of the Eleventh Amendment and instead applies the Amendment to fewer situations than its text would suggest.<sup>69</sup> The Diversity Theory holds that reading the Eleventh Amendment in isolation from the remainder of the Constitution creates an “illogical”<sup>70</sup> and “unlikely result.”<sup>71</sup> The incongruous result is that the Eleventh Amendment would allow for in-state citizens to bring non-diversity-jurisdiction suits (e.g., federal question) against a State, but would prohibit such non-diversity-jurisdiction suits for out-of-state and foreign citizens.<sup>72</sup> To avoid this inconsistency, the Diversity Theory therefore reads the Eleventh Amendment in conjunction with the terms of Article III to only prohibit cases against States that rely solely upon diversity jurisdiction.<sup>73</sup> The Diversity Theory has repeatedly persuaded a minority of Supreme Court Justices—but never a majority.<sup>74</sup>

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why the [Eleventh] [A]mendment reads as it does, and that there is, therefore, no justification for discarding the plain meaning of the text.”); Calvin R. Massey, *State Sovereignty and the Tenth and Eleventh Amendments*, 56 U. CHI. L. REV. 61, 65 (1989) (“I propose that we take Eleventh Amendment text and the history of its enactment at face value.”).

65. John F. Manning, *The Eleventh Amendment and the Reading of Precise Constitutional Texts*, 113 YALE L.J. 1663, 1721 (2004).

66. *Id.*

67. See, e.g., Clark, *supra* note 62, at 1838, 1875-76 (agreeing with the Compromise Theory’s textualist interpretation by arguing that the Eleventh Amendment makes perfect sense “as written[,] if it is read against the backdrop of the Founders’ deeply and widely held understanding that the Constitution did not authorize Congress either to enact legislation for states or to coerce state compliance with federal commands”); Andrew B. Coan, *Text As Truce: A Peace Proposal for the Supreme Court’s Costly War Over the Eleventh Amendment*, 74 FORDHAM L. REV. 2511, 2527-34 (2006) (setting forth the terms of a textualist interpretation of the Eleventh Amendment, and arguing why, as a normative decision, the textualist interpretation is the best application of the Eleventh Amendment).

68. See Coan, *supra* note 67, at 2513-17 (reviewing the three theories of Eleventh Amendment understanding while noting the substantial dearth of judicial support for the Compromise Theory).

69. See generally Clark, *supra* note 62, at 1830-32.

70. John J. Gibbons, *The Eleventh Amendment and State Sovereign Immunity: A Reinterpretation*, 83 COLUM. L. REV. 1889, 1937 n.257 (1983).

71. 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, 1060-61 (1983).

72. Gibbons, *supra* note 70; Fletcher, *supra* note 71.

73. Fletcher, *supra* note 71, at 1063; William A. Fletcher, *The Diversity Explanation of the Eleventh Amendment: A Reply to Critics*, 56 U. CHI. L. REV. 1261, 1297-98

*Immunity Theory.* The Immunity Theory agrees with the Diversity Theory's rejection of the purely textual reading of the Eleventh Amendment,<sup>75</sup> but applies the Amendment to more situations than its text would suggest.<sup>76</sup> The Immunity Theory construes the Eleventh Amendment's text as embodying a constitutional principle that is greater than the terms of the words themselves.<sup>77</sup> That principle is that the states, as sovereign entities,<sup>78</sup> are afforded the dignity of sovereign immunity: the "[i]mmunity from private suits . . . without [the State's] consent."<sup>79</sup> The Court has consistently adopted the Immunity Theory as the proper understanding of the Eleventh Amendment.<sup>80</sup> Indeed, the Court has used the Eleventh Amendment time and again as the totem to justify applying state sovereign immunity in situations foreign to the Eleventh Amendment's text.<sup>81</sup>

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(1989) ("[T]he diversity explanation seems to me demonstrably superior to any competing explanation: the [Eleventh] [A]mendment was intended to require a narrower construction of the grant of jurisdiction contained in the state-citizen diversity clause and the state-foreigner diversity clause.").

74. See, e.g., *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 109-16 (1996) (Souter, J., dissenting, joined by Ginsburg, J. and Breyer, J.) ("In sum, reading the Eleventh Amendment solely as a limit on citizen-state diversity jurisdiction has the virtue of coherence with this Court's practice, with the views of John Marshall, with the history of the Amendment's drafting, and with its allusive language."); *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 286-87 (1985) (Brennan, J., dissenting, joined by Marshall, J., Blackmun, J., and Stevens, J.) (arguing that the Eleventh Amendment only established that "a State could not be sued in federal court where the basis of jurisdiction was that the plaintiff was a citizen of another State or an alien").

75. See Coan, *supra* note 67, at 2516 ("The assumption of [an Eleventh Amendment] textualist interpretation's absurdity is so universal . . . that no majority or dissenting opinion since *Hans v. Louisiana*, 134 U.S. 1, 14-15 (1890),] has even taken time to spell out the reasons for it."); Clark, *supra* note 62, at 1830 ("While the immunity theory regards the text of the Eleventh Amendment as clearly under inclusive, the diversity theory views it as unacceptably overinclusive.").

76. See generally Clark, *supra* note 62, at 1826-30.

77. See *Blatchford v. Native Vill. of Noatak*, 501 U.S. 775, 779 (1991) ("Despite the narrowness of its terms, . . . we have understood the Eleventh Amendment to stand not so much for what it says, but for the presupposition of our constitutional structure which it confirms: that the States entered the federal system with their sovereignty intact[.]") (citation omitted).

78. *Fed. Mar. Comm'n v. S.C. State Ports Auth.*, 535 U.S. 743, 751 (2002) ("States, upon ratification of the Constitution, did not consent to become mere appendages of the Federal Government. Rather, they entered the Union with their sovereignty intact." (quoting *Blatchford*, 501 U.S. at 779) (internal quotation marks omitted)).

79. *Sossamon v. Texas*, 131 S. Ct. 1651, 1657 (2011) (internal quotation marks omitted) (quoting THE FEDERALIST NO. 81 (Alexander Hamilton)) (emphasis omitted).

80. See Clark, *supra* note 62, at 1826 (characterizing the Immunity Theory as the "Court's dominant approach since 1890").

81. See, e.g., *Fed. Mar. Comm'n*, 535 U.S. at 760 (when a federal administrative agency attempts to adjudicate private complaints against a State); *Blatchford*, 501 U.S. at 779-82 (when a Native American Tribe brings suit against a State); *Principality of Monaco*

This Article accepts the Immunity Theory as authoritative. It is not the object of this Article to argue the normative value of one theory over the others, or to add to the discussion regarding what theory most accurately captures the correct role of state sovereign immunity in this Nation's federalist system. Instead, Immunity Theory's continued dominance in Eleventh Amendment jurisprudence is indicative of that theory's continuing authority. The Compromise Theory and Immunity Theory are therefore set aside without commentary as to their merits.

Further exploration of the Immunity Theory reveals an evolution in how the Immunity Theory analysis is applied.

### C. THE MODERN IMMUNITY THEORY

Immunity Theory jurisprudence dates back to the Court's 1890 decision *Hans v. Louisiana*.<sup>82</sup> The *Hans* Court was confronted with an in-state plaintiff bringing a federal question suit against a State.<sup>83</sup> Rather than adhering to the Eleventh Amendment's text, the Court instead allowed "the force and meaning" of the Eleventh Amendment—the reversal of *Chisholm*—to dictate the application of the Eleventh Amendment.<sup>84</sup> This culminated in the Court's rejection of a plain reading of the Eleventh Amendment and application of the adopters' supposed intent: that the Eleventh Amendment extended to prohibit suits by in-state citizens.<sup>85</sup> The *Hans* Court thus kick-started the purposive application of the Immunity Theory.<sup>86</sup>

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v. Mississippi, 292 U.S. 313, 329-30 (1934) (when a foreign State brings suit against a State); *In re New York*, 256 U.S. 490, 500 (1921) (when a suit in admiralty is brought against a State); *Smith v. Reeves*, 178 U.S. 436, 448-49 (1900) (when a corporation created by federal law brings suit against a State); *Hans v. Louisiana*, 134 U.S. 1, 14-15 (1890) (when an in-state citizen brings suit against a State).

82. *Hans v. Louisiana*, 134 U.S. 1 (1890). See Eric S. Johnson, Note, *Unsheathing Alexander's Sword: Lapes v. Board of Regents of the University System of Georgia*, 51 AM. U. L. REV. 1051, 1054-55 (2002) (noting that *Hans v. Louisiana* expanded the Supreme Court's "early jurisprudence interpret[ing] the Eleventh Amendment as protecting [S]tates only from suits by citizens of other [S]tates").

83. See *Hans*, 134 U.S. at 9-10.

84. *Id.* at 12.

85. *Id.* at 15. This reasoning has been compared to Richard Posner's "imaginative reconstruction" in the statutory interpretation context. See Manning, *supra* note 65, at 1682-83 n.75 (citing Richard A. Posner, *Statutory Interpretation—in the Classroom and in the Courtroom*, 50 U. CHI. L. REV. 800, 817 (1983)).

86. See Manning, *supra* note 65, at 1681 (arguing that *Hans* "initiated the strongly purposive approach to the [Eleventh] Amendment that governs its interpretation to this day"); *id.* at 1684-86 (defending further categorizing the *Hans* decision as purposive).

This purposive bent of Immunity Theory is certainly open to the criticisms frequently directed to purposivist theory of statutory interpretation.<sup>87</sup> And some observers' assert that the purposivist underpinning of Immunity Theory is alive and well.<sup>88</sup> Accurately categorizing the interpretative method of Immunity Theory is certainly beyond the scope of this Article. It is, however, pertinent to note that the modern Court's constitutionalizing of state sovereign immunity<sup>89</sup> utilizes the structure and history of the Constitution to define the scope of state sovereign immunity. Whether this "structure and history" analysis can fall neatly within the purposivist paradigm is an interesting question, but not one to be resolved here.

Instead, what is important are these new methods of rationalizing state sovereign immunity under the Immunity Theory. Exploring the following three cases helps to not only flesh out the modern legal justification of Immunity Theory, but also outline the boundaries of state sovereign immunity. These cases also underscore the interplay between the modern Immunity Theory and Congress's ability to abrogate state sovereign immunity, which will become important later in the Article.

### 1. *Seminole Tribe of Florida v. Florida*

*Seminole Tribe of Florida v. Florida*<sup>90</sup> set the stage for evolving the principled foundation of the Immunity Theory. This case reached the Supreme Court after the Seminole Tribe brought suit against Florida for having violated its statutory duty to negotiate in good faith under the Indian Gaming Regulatory Act.<sup>91</sup>

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87. See, e.g., Damien M. Schiff, *Purposivism and the "Reasonable Legislator": A Review of Justice Stephen Breyer's Active Liberty*, 33 WM. MITCHELL L. REV. 1081, 1086-1104 (2007) (arguing, contrary to Justice Breyer, that purposivist methods of statutory interpretation produces bad results in three case examples). See generally Abbe R. Gluck, *The States as Laboratories of Statutory Interpretation: Methodological Consensus and the New Modified Textualism*, 119 YALE L.J. 1750, 1761-64 (2010) (providing a brief overview of the textualist-versus-purposivist dichotomy in statutory interpretation).

88. See, e.g., Manning, *supra* note 65, at 1687 ("[T]he Rehnquist Court has not merely adhered to *Hans* as a matter of stare decisis, but rather has continued to rely on its strongly purposive technique as a means to resolve unsettled questions about the very reach and implications of *Hans* and its progeny.").

89. See *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 130 (1996) (Souter, J., dissenting) ("Three critical errors in *Hans* weigh against constitutionalizing its holding as the majority does today.").

90. *Seminole Tribe*, 517 U.S. at 48.

91. See 25 U.S.C. § 2701 (2012). To operate Class III gaming in compliance with the Act, the Seminole Tribe was required, in pertinent part, to conduct such gaming "in conformance with a Tribal-State compact entered into by the Indian tribe and the State . . . ." *Id.* at § 2710(d)(1)(C). In turn, this Tribal-State compact could be entered into after the Indian tribe requested negotiations with the State, during which the State was required to negoti-

The *Seminole Tribe* Court's central focus was deciding whether Congress, under its Article I powers, could validly abrogate a State's immunity from suit in federal court.<sup>92</sup> Before answering this question, however, the Court addressed whether such state immunity existed from the type of suit at issue.<sup>93</sup> The Court easily resolved this antecedent issue. As the majority explained, over 100 years had passed since the Court first recognized that the Eleventh Amendment was not to be strictly construed.<sup>94</sup> Instead, the Eleventh Amendment confirmed a presupposition of this Nation's federalist structure: that each State is a sovereign, and inherent to such sovereignty was immunity from an individual's suit absent a State's consent.<sup>95</sup> Therefore, as established by precedent, the states retained immunity from suit brought by Indian tribes such as the Seminole Tribe.<sup>96</sup> The succinctness of this beginning point of the Court's opinion, which altogether ignored Justice Souter's attack on the Eleventh Amendment's presupposition,<sup>97</sup> underscored the Court's commitment to conceptualizing state sovereign immunity as a constantly present barrier requiring affirmative destruction.

After moving to the main question—the scope of Congress's power to abrogate state sovereign immunity—the Court transformed the commitment to state sovereign immunity into a constitutional principle.<sup>98</sup> The Court readily determined that Congress unmistakably made clear their intent to abrogate the states' immunity from suits under the Act.<sup>99</sup> But such intent to abrogate could be effective only if the Act itself was enacted pursuant to a congressional power that imbued Congress with the ability to abrogate.<sup>100</sup> On this point, two potential sources existed.

First, it was clear that Section 5 of the Fourteenth Amendment provided Congress the ability to abrogate,<sup>101</sup> but Congress had not acted pursuant

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ate in good faith. *Id.* at § 2710(d)(3)(A). Moreover, Florida's good faith obligation was judicially enforceable. *See id.* at §§ 2710(d)(7)(A)(i), 2710(d)(7)(B)(i), *invalidated by Seminole Tribe of Fla. v. Florida*, 517 U.S. 44 (1996). Therefore, when Florida refused to even begin such negotiations, Seminole Tribe filed suit. *See Seminole Tribe*, 517 U.S. at 51-52.

92. *See Seminole Tribe*, 517 U.S. at 55-73.

93. *See id.* at 54-55.

94. *See id.* at 54 (citing *Hans v. Louisiana*, 134 U.S. 1, 15 (1890)).

95. *See id.*

96. *See id.* at 55 (citing *Blatchford v. Native Vill. of Noatak*, 501 U.S. 775, 782 (1991)).

97. *See Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 116-30 (1996) (Souter, J., dissenting). The *Seminole Tribe* Court reserved its argument with Justice Souter in its discussion pertaining to the appropriateness of overruling *Union Gas*. *See id.* at 66-71 (majority opinion).

98. *See id.* at 130 ("Three critical errors in *Hans* weigh against constitutionalizing its holding as the majority does today.") (Souter, J., dissenting).

99. *See id.* at 56-57.

100. *Id.* at 57-58.

101. *Id.* at 59 (citing *Fitzpatrick v. Bitzer*, 427 U.S. 445, 452-56 (1976)).

to the Fourteenth Amendment.<sup>102</sup> Second, a fractured Court in *Pennsylvania v. Union Gas Co.*<sup>103</sup> had determined that the Interstate Commerce Clause provided Congress the ability to abrogate.<sup>104</sup> Yet, once again, Congress did not act pursuant to this power; instead, Congress had acted under its Indian Commerce Clause power.<sup>105</sup> Despite this lack of an on-point congressional power, the Court held that the rationale of the *Union Gas* plurality opinion extended from the Interstate Commerce Clause to the Indian Commerce Clause.<sup>106</sup> Thus, Congress could abrogate by enacting legislation pursuant to the Indian Commerce Clause<sup>107</sup>—and, by extrapolation, presumably any Article I power—as long as the *Union Gas* plurality opinion’s rationale was itself still valid. It was not.<sup>108</sup>

In coming to this conclusion, the Court emphasized the Eleventh Amendment’s restriction on the federal courts’ Article III jurisdiction.<sup>109</sup> In particular, it was the Eleventh Amendment’s embodiment of state sovereign immunity—the presupposition of the Eleventh Amendment’s text—that limited the scope of Article III.<sup>110</sup> This constitutional principle of state sovereign immunity could not be undercut, and the boundaries of Article III expanded, by Congress as a matter of course.<sup>111</sup> Indeed, until *Union Gas*, only the Fourteenth Amendment provided Congress the ability to abrogate state sovereign immunity, and therefore expand Article III jurisdiction.<sup>112</sup> This feature arose from the Fourteenth Amendment having altered the balance of power between the Federal and State Sovereigns embodied in Article III and the Eleventh Amendment.<sup>113</sup> The same could not be said of either Commerce Clause.<sup>114</sup>

Thus considered, the Court determined that the broad concept of state sovereign immunity was the Eleventh Amendment’s constitutional principle—not the Amendment’s text. Making this conclusion explicit, the Court confirmed that the “background principle of state sovereign immunity embodied in the Eleventh Amendment . . . restricts the judicial power under Article III . . . .”<sup>115</sup> The Court’s opinion signaled that the history of applying

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- 102. *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 60.
  - 103. *Pennsylvania v. Union Gas Co.*, 491 U.S. 1 (1989).
  - 104. *Seminole Tribe*, 517 U.S. at 59-60.
  - 105. *Id.* at 60.
  - 106. *Id.* at 61-63.
  - 107. *See id.* at 63.
  - 108. *See id.* at 72 (explicitly overruling *Union Gas*).
  - 109. *See Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 64-65.
  - 110. *Id.* at 64.
  - 111. *Id.* at 64-65 (citing *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803)).
  - 112. *Id.* at 65.
  - 113. *Id.* at 65-66.
  - 114. *See Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 66 (1996).
  - 115. *Id.* at 72-73.

the Eleventh Amendment's immunity from suit in situations foreign to that Amendment's text<sup>116</sup> was the result of state sovereign immunity being a constitutional imperative. With the Eleventh Amendment being framed in these terms, what was left to explore was the scope of this constitutionalized state sovereign immunity.

## 2. *Alden v. Maine*

*Alden v. Maine*<sup>117</sup> began where *Seminole Tribe* concluded by refining the understanding of constitutionalized state sovereign immunity. This case reached the Supreme Court after state employees filed suit against Maine—first in federal court, and then in state court after the federal suit was dismissed under *Seminole Tribe*<sup>118</sup>—for violating the Fair Labor Standards Act.<sup>119</sup>

Just as in *Seminole Tribe*,<sup>120</sup> the *Alden* Court's central focus was deciding whether Congress, under its Article I powers, could abrogate a State's immunity from suit.<sup>121</sup> The difference was that whereas *Seminole Tribe* was concerned with abrogation in federal court,<sup>122</sup> *Alden* was concerned with abrogation in state court.<sup>123</sup> And, as showcased in *Seminole Tribe*,<sup>124</sup> this question of abrogation involved the antecedent issue of whether state sovereign immunity existed against the type of suit at issue. The issue was not as easily resolvable as it was in *Seminole Tribe*, and the *Alden* Court was required to undergo a two step analysis.

First, the Court analyzed the constitutional principle of state sovereign immunity embodied in the Eleventh Amendment.<sup>125</sup> The Court held that constitutionalized state sovereign immunity is universally afforded to States.<sup>126</sup> *Seminole Tribe* concluded with the Eleventh Amendment being a mere totem that the Court had consistently used to represent the greater "background principle of state sovereign immunity."<sup>127</sup> From that premise, the *Alden* Court explained that the text of the Eleventh Amendment neither

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116. See *supra* note 81 and accompanying text.

117. *Alden v. Maine*, 527 U.S. 706 (1999).

118. See *Mills v. Maine*, No. 92-410-P-H, 1996 WL 400510, at \*1 (D. Me. July 3, 1996), *aff'd*, 118 F.3d 37, 56 (1st Cir. 1997).

119. See *Alden*, 527 U.S. at 711-12.

120. See *supra* notes 92-100, 102-114 and accompanying text.

121. See *Alden*, 527 U.S. at 741-54.

122. See *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 51-52, 57-58 (1996).

123. See *Alden*, 527 U.S. at 741.

124. See *supra* notes 93-96 and accompanying text.

125. See *Alden*, 527 U.S. at 712-30.

126. See *id.* at 713.

127. *Seminole Tribe*, 417 U.S. at 72.

creates nor limits state sovereign immunity.<sup>128</sup> Instead, the Constitution's structure,<sup>129</sup> the Constitution's history,<sup>130</sup> and the Court's own decisions<sup>131</sup> all indicated that state sovereign immunity is a universal "default" afforded to States as sovereigns.<sup>132</sup>

Second, the Court analyzed whether States surrendered this constitutionalized state sovereign immunity from Article I legislation in state courts "pursuant to the constitutional design."<sup>133</sup> The Court held that the states did not relinquish such state sovereign immunity in the plan of the Constitutional Convention.<sup>134</sup> And neither the Eleventh Amendment's text nor the Court's own previous decisions could be read to restrict the states' constitutionalized sovereign immunity from operating in state court.<sup>135</sup>

If *Seminole Tribe* reframed Eleventh Amendment immunity as constitutionalized state sovereign immunity, then *Alden* restructured the scope of that constitutionalized immunity to exist as a default barrier to any suit. Having established this broad, unrestricted sweep of constitutional state sovereign immunity, the Court moved to the main question of whether Congress could abrogate state sovereign immunity in state court pursuant to its Article I powers.<sup>136</sup> Though this question regarding Congress's Article I powers was similar to that posed in *Seminole Tribe*,<sup>137</sup> the actual analysis contained significant deviations from that prior decision. The *Seminole Tribe* Court's central concern was whether a provision of Article I empowered Congress to abrogate state sovereign immunity.<sup>138</sup> This focus made sense in light of the Court's ready acceptance of state sovereign immunity existing in federal court against the type of suit at issue.<sup>139</sup>

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128. *Alden*, 527 U.S. at 713 ("We have . . . sometimes referred to the States' immunity from suit as 'Eleventh Amendment immunity.' The phrase is convenient shorthand but something of a misnomer, for the sovereign immunity of the States neither derives from, nor is limited by, the terms of the Eleventh Amendment.").

129. *See id.* at 713-15.

130. *See id.* at 715-27.

131. *See id.* at 727-30.

132. *See id.* at 713 (qualifying state sovereign immunity as "a fundamental aspect" of the states' sovereignty which is retained absent alteration "by the plan of the Convention or certain constitutional Amendments.").

133. *See Alden v. Maine*, 527 U.S. 706, 730-40 (1999).

134. *See id.* at 731-35.

135. *See id.* at 735-40.

136. *See id.* at 741 ("Whether Congress has authority under Article I to abrogate a State's immunity from suit in its own courts is, then, a question of first impression." *Id.* at 707).

137. *See Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 55 (1996) ("Petitioner argues that Congress through the Act [enacted pursuant to the Indian Commerce Clause,] abrogated the States' immunity from suit [in federal court].").

138. *See id.* at 63-73.

139. *See supra* notes 94-97 and accompanying text.

In contrast, the *Alden* Court did not frame the question of Article I abrogation as only whether Article I empowered Congress to obviate existing state sovereign immunity. In addition to this consideration, the Court devoted its attention to whether the states' constitutionalized sovereign immunity remained operative in state court. Thus, the Court—just as in *Seminole Tribe*—did directly address Congress's inability to abrogate state sovereign immunity under Article I.<sup>140</sup> But the Court also emphasized and affirmed that constitutionalized state sovereign immunity exists in state courts just as much as in federal courts.<sup>141</sup> In splitting its attention in this manner, the Court drew together two related discussions: the Court's prior rumination on the broad, fundamental character of each State's sovereign immunity,<sup>142</sup> and the *Seminole Tribe* determination that Article I did not provide Congress the power to abrogate.<sup>143</sup>

What *Seminole Tribe* established and *Alden* refined was understanding constitutionalized state sovereign immunity in relation to the Eleventh Amendment. The entire paradigm regarding the nature of state sovereign immunity and the Eleventh Amendment had shifted. Constitutionalized state sovereign immunity was not created by the Eleventh Amendment;<sup>144</sup> it was a principle enshrined as a constitutional constant by the Constitution's structure and history and affirmed by Supreme Court decisions.<sup>145</sup> Because state sovereign immunity existed before *Chisholm*, the Eleventh Amend-

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140. This conclusion arose from the Court's review of early congressional practice. See *Alden*, 527 U.S. at 743-45 (finding that federal statutes authorizing suits against non-consenting states is a recent phenomenon that fails to speak of a difference between state and federal forums for state sovereign immunity purposes); as well from the Court's analysis of the Constitution's structure. See *id.* at 748-54 (holding that federalism principles and the role of state courts counsels against allowing Congress the ability to abrogate state sovereign immunity in state court).

141. Such affirmations were throughout the Court's review of the historical understanding of the Constitution. See *id.* at 741-43 (concluding that inferring "that the Constitution stripped the States of immunity in their own courts and allowed Congress to subject them to suit there would turn on its head the concern of the founding generation—that Article III might be used to circumvent state-court immunity." *Id.* at 743); and throughout the Court's review of precedent. See *id.* at 745-48. ("The theory and reasoning of our earlier cases suggest the States do retain a constitutional immunity from suit in their own courts." *Alden*, 537 U.S. at 708).

142. See *id.* at 712-30; see also *supra* notes 125-35 and accompanying text.

143. See *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 55 (1996).

144. *Alden*, 527 U.S. at 713 ("We have, as a result, sometimes referred to the States' immunity from suit as 'Eleventh Amendment immunity.' The phrase is convenient shorthand but something of a misnomer, for the sovereign immunity of the States neither derives from, nor is limited by, the terms of the Eleventh Amendment.")

145. See *id.* at 713-30.

ment had simply been narrowly drafted to mend *Chisholm*'s modest intrusion on the states' broad sovereign immunity.<sup>146</sup>

Thus, the scope of constitutionalized state sovereign immunity is unrestrained by the Eleventh Amendment.<sup>147</sup> In fact, sovereign immunity is inherent to the states' status as sovereigns; the resulting conclusion is that state sovereign immunity exists regardless of the status of the plaintiff, the nature of the claim, or the location of the judicial forum.<sup>148</sup> When that conclusion could ever be adequately countered was left to be determined.

### 3. *Central Virginia Community College v. Katz*

*Seminole Tribe* and *Alden* pushed outwards the boundaries of state sovereign immunity. In contrast, *Central Virginia Community College v. Katz*<sup>149</sup> revealed that the justifications bolstering state sovereign immunity into a constitutional principle could cut the other way. This case reached the Supreme Court after a bankruptcy trustee sought the return of property transferred to Virginia higher education institutions<sup>150</sup> by avoiding those transfers under the Bankruptcy Code.<sup>151</sup>

The *Katz* decision, on the face of its facts, mirrored the situation in *Seminole Tribe*: the Virginia education institutions were afforded state sovereign immunity as arms of the state,<sup>152</sup> and Congress attempted to abrogate such immunity through Article I legislation.<sup>153</sup> Indeed, if the Court assessed whether the Bankruptcy Clause empowered Congress to abrogate state sovereign immunity, *Seminole Tribe* would have been persuasive, if not dispositive.<sup>154</sup>

The Court did address *Seminole Tribe*, but only to explain that the *Seminole Tribe* holding was limited to its facts. Thus, only the Interstate

146. *Alden*, 527 U.S. at 723 (“Congress chose not to enact language codifying the traditional understanding of sovereign immunity but rather to address the specific provisions of the Constitution that had raised concerns during the ratification debates and formed the basis of the *Chisholm* decision.”).

147. *See Fed. Mar. Comm’n v. S.C. State Ports Auth.*, 535 U.S. 743, 753 (2002) (“[T]he Eleventh Amendment does not define the scope of the States’ sovereign immunity; it is but one particular exemplification of that immunity.”).

148. *See Alden*, 527 U.S. at 713 (“[T]he States’ immunity from suit is a fundamental aspect of the sovereignty which the States enjoyed before the ratification of the Constitution, and which they retain today . . .”).

149. *Cent. Va. Cmty. Coll. v. Katz*, 546 U.S. 356 (2006).

150. *See id.* at 360.

151. *See* 11 U.S.C. § 547(b) (2006).

152. *Katz*, 546 U.S. at 360.

153. *See* 11 U.S.C. § 106(a) (2006).

154. *See Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 72-73 (1996) (holding that “Article I cannot be used to circumvent the constitutional limitations” of the Eleventh Amendment. *Id.* at 73).

and Indian Commerce Clauses did not empower Congress to abrogate; the *Seminole Tribe* dicta regarding all other Article I powers, including the Bankruptcy Clause, was not controlling.<sup>155</sup> This certainly opened the door for the Court to independently determine whether Congress could abrogate under the Bankruptcy Clause. But the Court circumvented prolonging a conflict with *Seminole Tribe* by altogether avoiding that question.<sup>156</sup> Instead, the Court's attention centered on an antecedent issue: whether the states relinquished their sovereign immunity to federal law enacted under the Bankruptcy Clause as part of the plan of the Constitutional Convention.<sup>157</sup> With the discussion thus framed, the Court's focus invoked the antecedent issues in both *Seminole Tribe* and *Alden* that questioned whether state sovereign immunity existed in the first place,<sup>158</sup> rather than whether Congress could abrogate such state sovereign immunity.<sup>159</sup>

The *Katz* Court's opinion built upon itself in a streamlined manner to come to a single conclusion—that the states surrendered their sovereign immunity to the Bankruptcy Clause in the plan of the Constitutional Convention.<sup>160</sup> To this end, the Court shaped its discussion by using tools similar to those wielded by the *Alden* Court, including constitutional history, the purpose of the constitutional structure, and early practices.<sup>161</sup>

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155. See *Katz*, 546 U.S. at 363.

156. See *id.* at 379.

157. See *id.* at 373, 379.

158. See *supra* notes 93-96 and accompanying text (discussing *Seminole Tribe*'s antecedent issue); notes 124-35 and accompanying text (discussing *Alden*'s antecedent issue).

159. To this end, some commentators have mistakenly claimed that *Seminole Tribe* and *Katz* are irreconcilable. See, e.g., Stephen I. Vladeck, *State Sovereign Immunity and the Roberts Court*, 5 CHARLESTON L. REV. 99, 122 (2010) ("The [*Katz*] majority's attempt to sidestep the issue notwithstanding, it is objectively impossible to reconcile *Katz* with *Seminole Tribe* and its progeny."). The two fit cleanly together because they speak past each other: *Katz* to the antecedent issue of whether state sovereign immunity exists; *Seminole Tribe* to the subsequent issue of, if such state sovereign immunity exists, can Congress validly abrogate that immunity.

160. See *Katz*, 546 U.S. at 379.

161. Compare *id.* at 362-63 ("The history of the Bankruptcy Clause, the reasons it was inserted in the Constitution, and the legislation both proposed and enacted under its auspices immediately following ratification of the Constitution demonstrate that it was intended not just as a grant of legislative authority to Congress, but also to authorize limited subordination of state sovereign immunity in the bankruptcy arena."), with *Alden v. Maine*, 527 U.S. 706, 713 (1999) ("Rather, as the Constitution's structure, its history, and the authoritative interpretations by this Court make clear, the States' immunity from suit is a fundamental aspect of the sovereignty which the States enjoyed before the ratification of the Constitution, and which they retain today . . ."), and *id.* at 741 ("In determining whether there is 'compelling evidence' that [Congress has Article I authority to abrogate state sovereign immunity in state court] is 'inherent in the constitutional compact,' we continue our discussion of history, practice, precedent, and the structure of the Constitution.") (quoting *Blatchford v. Native Vill. of Noatak*, 501 U.S. 775, 781 (1991)).

First, the Court determined that the Framers adopted the Bankruptcy Clause so federal uniformity would ameliorate the disjointed landscape of colonial and state bankruptcy laws.<sup>162</sup> Second, the Court recognized that bankruptcy's primarily *in rem* jurisdiction does not threaten state sovereign immunity.<sup>163</sup> But the Bankruptcy Clause encompasses more than *in rem* jurisdiction; it additionally includes ancillary orders implicating *in personam* jurisdiction, which potentially interferes with state sovereign immunity.<sup>164</sup> Third, in light of the above considerations and early congressional legislation, the Court held that the states agreed in the Constitutional Convention to relinquish sovereign immunity when federal bankruptcy proceedings conflicted with their immunity.<sup>165</sup>

The *Katz* Court, therefore, accepted the modern Immunity Theory's legal justification<sup>166</sup> by accepting *Seminole Tribe*'s constitutionalized state sovereign immunity<sup>167</sup> and *Alden*'s expansion of sovereign immunity as a universal attribute of state sovereignty.<sup>168</sup> But in using the tools to determine the scope of Immunity Theory's constitutionalized state sovereign immunity, *Katz* discovered that such immunity is not without exception.<sup>169</sup> *Seminole Tribe* and *Alden* therefore provided the modern legal framework for analyzing state sovereign immunity, but *Katz* showcased that this framework is not without internal limits.<sup>170</sup> With this understanding of these three cases as a baseline, this Article now moves to establish another exception to the nearly universal attribute of state sovereign immunity: the states waived their sovereign immunity from suit for violations of the Federal Constitution.

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162. See *Katz*, 546 U.S. at 365-69.

163. See *id.* at 369-70.

164. See *id.* at 370-73.

165. See *id.* at 373-78.

166. See *id.* at 393 (Thomas, J., dissenting) ("It would be one thing if the majority simply wanted to overrule *Seminole Tribe* altogether. That would be wrong, but at least the terms of our disagreement would be transparent. The majority's action today, by contrast, is difficult to comprehend.").

167. See *supra* notes 115-16 and accompanying text.

168. See *supra* notes 144-48 and accompanying text.

169. See *supra* notes 162-65 and accompanying text.

170. Compare *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 56-58, 64-66, 72-73 (1996), and *Alden v. Maine*, 527 U.S. 706, 712-30 (1999), with *Katz*, 546 U.S. at 365-78.

## II. STATE SOVEREIGN IMMUNITY AND FEDERAL CONSTITUTIONAL RIGHTS

Determining whether state sovereign immunity exists so as to bar a private suit involves multiple, sequential steps. The following outlines this logical sequence.<sup>171</sup>

As an initial matter, the states, as sovereign entities, retained sovereign immunity before the Constitution's ratification, and such immunity remained attached to the states' sovereignty when they entered into this Nation's constitutional system.<sup>172</sup> However, this preexisting immunity did not survive to modern day without exception. These alterations to state sovereign immunity may have been carved out at two different points in time. First, a showing that the states relinquished their sovereign immunity in the plan of the Constitutional Convention will extinguish the existence of such immunity.<sup>173</sup> Second, even if the states retained their sovereign immunity as part of the Constitutional Convention, a constitutional amendment can remove such state sovereign immunity.<sup>174</sup>

This Article contends that state sovereign immunity from individuals' constitutional tort suits is nonexistent. The following is an analysis of this claim placed within the context of the structure of the above sequential analysis. This analysis not only will underscore precisely why such state sovereign immunity has been relinquished, but also will showcase why currently available methods of enforcing constitutional rights are inadequate.

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171. The following does not consider a State's voluntary waiver of sovereign immunity. *See, e.g.*, Michael T. Gibson, *Congressional Authority to Induce Waivers of State Sovereign Immunity: The Conditional Spending Power (and Beyond)*, 29 HASTINGS CONST. L.Q. 439, 462-63 (2002) (concluding that Congress can induce States to waive state sovereign immunity as a non-coercive condition of Congress's spending powers); Shannon Shepard, Case Note, *Lapides: Striking a Balance Between State Sovereignty and Fairness to Individual Litigants?*, 54 MERCER L. REV. 1741, 1746-49, 1752-55 (2003) (discussing the development of Supreme Court jurisprudence regarding State waiver of sovereign immunity by litigation conduct).

172. *See supra* notes 39-46, 148 and accompanying text.

173. *See Alden v. Maine*, 527 U.S. 706, 713 (1999) ("[T]he States' immunity from suit is a fundamental aspect of the sovereignty . . . which [the States] retain today . . . except as altered by the plan of the Convention . . ."); *see, e.g.*, *Cent. Va. Cmty. Coll. v. Katz*, 546 U.S. 356, 377-78 (2006) (holding that, in the plan of the Convention, States relinquished their sovereign immunity to legislation enacted pursuant to the Bankruptcy Clause of Article I).

174. *See Alden*, 527 U.S. at 713 ("[T]he States' immunity from suit is a fundamental aspect of the sovereignty . . . which [the States] retain today . . . except as altered by . . . certain constitutional Amendments."); *see, e.g.*, *Fitzpatrick v. Bitzer*, 427 U.S. 445, 456 (1976) (holding that state sovereign immunity is limited by Section 5 of the Fourteenth Amendment).

However, before engaging in this analysis, it is pertinent to address a potential criticism regarding the value of such an exercise. This criticism might arise from normative judgments such as the premise that not every right must have a remedy,<sup>175</sup> or from the notion that the current methods of enforcing federal constitutional rights are perfectly sufficient.<sup>176</sup> This Article might therefore be construed as pointless at best, or a problematic attempt to undermine important federalism principles at worst.

The response to this criticism is twofold. First, this Article openly accepts the theory that every constitutional right deserves a remedy.<sup>177</sup> Though the state sovereign immunity slate is far from blank—and so doctrine cannot simply be written anew—this theory nonetheless is the underlying motivation for the Article to seek *justifiable* remedies under current doctrine. In this light, one need to only agree with the general philosophy that constitutional rights deserve remedies, rather than all rights must be afforded remedies at all costs.<sup>178</sup> From this position, one can easily sanction

175. See Richard H. Fallon, Jr. & Daniel J. Meltzer, *New Law, Non-Retroactivity, and Constitutional Remedies*, 104 HARV. L. REV. 1731, 1779-86 (1991) (discussing the historical and modern gap between rights and remedies in constitutional litigation).

176. See, e.g., Jesse H. Choper & John C. Yoo, *Who's Afraid of the Eleventh Amendment? The Limited Impact of the Court's Sovereign Immunity Rulings*, 106 COLUM. L. REV. 213, 215-17 (2006); John C. Jeffries, Jr., *The Right-Remedy Gap in Constitutional Law*, 109 YALE L.J. 87, 91 (1999) ("My point is not that the curtailment of damage recoveries for constitutional violations is intrinsically desirable, but only that it has important (and overlooked) advantages, which may or may not be thought offsetting. In other words, I hope to convince the reader that the gap between right and remedy in constitutional torts is not an unmitigated disaster but a double-edged sword.").

177. See, e.g., *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803); Alfred Hill, *Constitutional Remedies*, 69 COLUM. L. REV. 1109, 1112-13 (1969) ("It is submitted that if a court, federal or state, has authority generally to grant such remedies as an injunction, or a judgment for possessory relief, or a judgment for damages, it must afford these remedies to the degree determined, ultimately by the Supreme Court, to be appropriate in implementation of the Constitution.").

178. Holding constitutional rights as having a constitutionally-motivated imperative of adjudication, and therefore being more important than other private rights, is a commonly-held perception of this Nation's constitutionalized government. See, e.g., Richard H. Fallon, Jr. & Daniel J. Meltzer, *Habeas Corpus Jurisdiction, Substantive Rights, and the War on Terror*, 120 HARV. L. REV. 2029, 2063 (2007) (arguing that a complete statutory preclusion of constitutional "conditions of confinement" claims "contravenes a broader postulate of the constitutional structure . . . that some court must always be open to hear an individual's claim to possess a constitutional right to judicial redress of a constitutional violation"); Michael B. Richardson, *The Department of the Navy's Equal Employment Opportunity Complaint Dispute Resolution Process Pilot Program: A Bold Experiment That Deserves Further Exploration*, 169 MIL. L. REV. 1, 43 (2001) (framing the contention that constitutional rights are not less important than statutory rights in light of role and importance of this Nation's founding documents). *But see* Recent Case, 120 HARV. L. REV. 860, 864-66 (2007) (accepting that the "idea that constitutional rights are more important than statutory rights seems accurate" but providing examples undermining the authority for this position).

the following analysis of determining whether current jurisprudence supports a limiting of state sovereign immunity with respect to constitutional rights. Second, one need not be motivated by either constitutional rights or constitutional remedies to reject complacency with the status quo. The following analysis dovetails with a desire to ascertain an accurate understanding of state sovereign immunity's scope and boundaries under the modern Immunity Theory. Even if one accepts that the current state of affairs are desirable, that should not preclude ascertaining whether the legal landscape has shifted in light of the Supreme Court's evolution of legal principles.

Accepting that determining whether state sovereign immunity is inoperative against individuals' constitutional tort suits has normative value, the Article now turns to the sequential analysis.

#### A. STATE SOVEREIGN IMMUNITY AND THE STATES' PREEXISTING SOVEREIGN IMMUNITY

This stage of the analysis requires determining whether the states' sovereign immunity, existing prior to the ratification of the Constitution, was limited as against individuals' suits for the violation of a correlation to federal constitutional rights. This Article concedes that such suits were not carved out from the states' preexisting sovereign immunity. Thus, if States do not retain sovereign immunity from individuals' constitutional tort suits, it is not because the states lacked such immunity before they entered into this Nation's constitutional system.

#### B. STATE SOVEREIGN IMMUNITY AND THE PLAN OF THE CONSTITUTIONAL CONVENTION

This stage of the analysis requires determining whether the states' sovereign immunity, once the states submitted to the plan of the Constitutional Convention, was limited by that plan as against individuals' constitutional tort suits. This Article accepts that such suits were not carved out from the states' sovereign immunity in the Constitutional Convention.<sup>179</sup>

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179. Other commentators, however, have asserted that such state sovereign immunity contravenes fundamental aspects of the original Constitution. *See, e.g.*, Amar, *supra* note 47, at 1483 (“[The Diversity Theory] reading [of the Eleventh Amendment] preserves various basic structural principles of the original Constitution repudiated by the Court's doctrine . . . .”); Aman Pradhan, Note, *Rethinking the Eleventh Amendment: Sovereign Immunity in the United States and the European Union*, 11 N.Y.U. J. LEGIS. & PUB. POL'Y 215, 220-22 (2008) (arguing that state sovereign immunity “conflicts with popular sovereignty . . . [.] an idea embedded deep in the history and structure of the American republic”). These commentators can be categorized as arguing that the states' surrender to the constitutional plan—and particular components of this Nation's government—compels concluding that States relinquished their sovereign immunity from individuals' constitutional tort suits.

Thus, if States do not retain sovereign immunity from individuals' constitutional tort suits, it is not because the states relinquished such immunity in the plan of the Constitutional Convention.

However, it is important to address what portions of state sovereign immunity the Court has recognized as relinquished in the plan of the Constitutional Convention. This will inform the imperative of enforcing federal constitutional rights on a level that is meaningful to the injured individual.

### 1. *The Constitutional Convention: Waiver of Immunity from Suits by the United States*

The Constitutional Convention removed from the universal scope of state sovereign immunity the immunity from suits initiated by the United States.<sup>180</sup> This aspect was withdrawn from state sovereign immunity because the United States was the best entity to ensure individual states' compliance with obligations to both sister states and to the federal government, while also "forestall[ing] the United States' resort to extralegal measures."<sup>181</sup> Moreover, the United States has an independent interest in the enforcement of federal law, thereby allowing the federal sovereign to bring suit whenever an individual's federal constitutional rights are infringed.<sup>182</sup>

This method to vindicate federal constitutional rights therefore appears as a viable avenue to ensure sufficient enforcement.<sup>183</sup> This is especially true if the federal sovereign may route monetary damages recovered from infringing States to constitutionally injured individuals.<sup>184</sup> Yet this waiver

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180. *Alden v. Maine*, 527 U.S. 706, 755; *Principality of Monaco v. Mississippi*, 292 U.S. 313, 329 (1934).

181. Evan H. Caminker, *State Immunity Waivers for Suits by the United States*, 98 MICH. L. REV. 92, 113 (1999); *see also id.* at 101-13 (filtering the "plausible" justifications from the multitude of rationales supporting waiver of immunity from suit by the United States).

182. Jonathan R. Siegel, *Congress's Power to Authorize Suits Against States*, 68 GEO. WASH. L. REV. 44, 68-69 (1999).

183. *See* Ginger R. Burton, Note, *Piercing the State Sovereign Immunity Shield: Utilizing Suit by the United States on Behalf of Individuals to Provide the Complete Remedy for States' Violation of Federal Laws Enacted Under Article I*, 37 GA. L. REV. 1401, 1425-32 (2003) (going through the legal arguments on this point with respect to enforcing federal legislation enacted under Article I, rather than enforcing the Constitution).

184. *See* Siegel, *supra* note 182, at 69-70 (explaining that the Supreme Court has approved of such a scheme in dicta, and lower courts have affirmed such a scheme as permissible). *But see* Vicki C. Jackson, *Seminole Tribe, the Eleventh Amendment, and the Potential Evisceration of Ex Parte Young*, 72 N.Y.U. L. REV. 495, 505-06 (1997) ("The closer such a scheme comes to a mere *parens patriae* suit . . . the more likely it will stumble into a jurisdictional trap and be rejected."); Daniel J. Meltzer, *Overcoming Immunity: The Case of Federal Regulation of Intellectual Property*, 53 STAN. L. REV. 1331, 1362-63 (2001) (argu-

of immunity is actually of limited use to harmed individuals. A federal official's decision to file suit is made on a case-by-case basis, not subject to the individual's control, and influenced by considerations of resources, belief as to the merits, and political calculations.<sup>185</sup> The reliability of this option is therefore suspect and even if available, compensating the individual for her constitutional harm might be proven impossible. This method of enforcement is therefore insufficient to reliably compensate the wronged individual.

## 2. *The Constitutional Convention: Waiver of Immunity from Suits by Sister States*

The Constitutional Convention removed from the universal scope of state sovereign immunity from suits initiated by other States.<sup>186</sup> This was the result of a practical compromise creating an independent forum in which to settle disputes between otherwise coequal States<sup>187</sup> “as a necessary feature of the formation of a more perfect Union.”<sup>188</sup>

The same concerns relating to the reliability of federal enforcement of individual rights apply with equal force to States enforcing the rights of its own citizens against other States.<sup>189</sup> But a more fundamental problem exists. The Court has held that state sovereign immunity is fully functional when a State's suit actually seeks to recover from another State for the injuries to an individual.<sup>190</sup> This prohibition against State suits on behalf of in-

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ing that the Court might “view this technique as an end run [around state sovereign immunity], improperly pressing private claims against the [S]tates”).

185. Jonathan R. Siegel, *Waivers of State Sovereign Immunity and the Ideology of the Eleventh Amendment*, 52 DUKE L.J. 1167, 1181-82 (2003).

186. *Alden v. Maine*, 527 U.S. 706, 755 (1999); *Principality of Monaco v. Mississippi*, 292 U.S. 313, 328-29 (1934) (collecting authority).

187. See Allan Erbsen, *Horizontal Federalism*, 93 MINN. L. REV. 493, 507-08 (2008).

188. *Monaco*, 292 U.S. at 328-29.

189. See Siegel, *supra* note 185 and accompanying text.

190. See, e.g., *New Hampshire v. Louisiana*, 108 U.S. 76, 89-91 (1883). This limitation on the State-against-State waiver of sovereign immunity has its own exceptions. A State can bring suit against another State on the basis of an individual's claim when that claim has been outright given to the suing State so that the suing State becomes the real party in interest. See, e.g., *South Dakota v. North Carolina*, 192 U.S. 286, 309-12, 321 (1904). And a State may bring suit against another State as a *parens patriae* action for the benefit of all the citizens of the suing State. See *Hawaii v. Standard Oil Co. of Cal.*, 405 U.S. 251, 257-59 (1972). Regardless, the limitation itself is real—and has actually been argued as the basis for prohibiting the federal government from bringing such suits. See, e.g., John H. Clough, *Federalism: The Imprecise Calculus of Dual Sovereignty*, 35 J. MARSHALL L. REV. 1, 25 (2001).

dividual's claims is well established and recently affirmed.<sup>191</sup> This method to enforce individuals' constitutional rights against infringing States is therefore entirely unavailable.

### C. STATE SOVEREIGN IMMUNITY AND CONSTITUTIONAL AMENDMENTS

This stage of the analysis requires determining whether the states' sovereign immunity, being affected by constitutional amendment, was limited as against individuals' constitutional tort suits. Making no further concessions, this Article argues that the Fourteenth Amendment disarmed the states of sovereign immunity from individuals' constitutional tort suits. In this manner, this Article parallels the *Katz* Court: it accepts that the states entered into the Union with their sovereignty intact, and it avoids determining whether Congress can abrogate state sovereign immunity.<sup>192</sup> But whereas *Katz* looked to the plan of the Constitutional Convention to ascertain whether state sovereign immunity ceased to exist,<sup>193</sup> this Article looks to whether the Fourteenth Amendment fundamentally altered that plan so as to erase once-existing state sovereign immunity.

Using the same tools of constitutional history and structure that both the *Alden* and *Katz* Courts wielded,<sup>194</sup> this Article now explores the Fourteenth Amendment.

#### 1. *The Fourteenth Amendment Fundamentally Altered This Nation's Historical Structure of Federalism*

Section 1 to the Fourteenth Amendment reads in pertinent part:

No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.<sup>195</sup>

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191. See *Kansas v. Colorado*, 533 U.S. 1, 7 (2001) ("We have decided that a State may recover monetary damages from another State in an original action, without running afoul of the Eleventh Amendment. . . . [But], we have several times held that a State may not invoke our original jurisdiction when it is merely acting as an agent or trustee for one or more of its citizens." (citations omitted)); *Standard Oil Co. of Cal.*, 405 U.S. at 258 n.12 (collecting historical authority).

192. See *supra* notes 155-59 and accompanying text.

193. *Cent. Va. Cmty. Coll. v. Katz*, 546 U.S. 356, 373-79 (2006).

194. *Id.* at 362-63; *Alden v. Maine*, 527 U.S. 706, 713, 741 (1999).

195. U.S. CONST. amend. XIV, § 1.

Section 5 to the Fourteenth Amendment affords Congress the “power to enforce, by appropriate legislation” the substantive provisions of the Fourteenth Amendment.<sup>196</sup>

Taken together, these two Sections of the Fourteenth Amendment had a profound effect on the structure of this Nation’s federalism. Before the Fourteenth Amendment was ratified, the Federal Constitution was mainly concerned with the operation of, and limits of powers given to, the federal government.<sup>197</sup> For example, the governmental structure set forth in the Constitution<sup>198</sup> established a limited scope of the federal government—leaving all other sovereign power to the states.<sup>199</sup> Exceptions did exist, as portions of the original Constitution applied directly to the states.<sup>200</sup> But for purposes most important to this Article, “the Bill of Rights originally applied only to the federal government.”<sup>201</sup> States were simply unconstrained

196. U.S. CONST. amend. XIV, § 5.

197. See Michael F. Roessler, *Mistaking Doubts and Qualms for Constitutional Law: Against the Rejection of Legislative History as a Tool of Legal Interpretation*, 39 SW. L. REV. 103, 119 (2009) (“[B]efore the adoption of the Fourteenth Amendment, the federal Constitution imposed few restrictions on the [S]tates and regulated very little of the [S]tates’ interactions with their citizens . . .”).

198. See U.S. CONST. art. I, § 1 (“All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.”); U.S. CONST. art. II, § 1, cl. 1 (“The executive Power shall be vested in a President of the United States of America.”); U.S. CONST. art. III, § 1, cl. 1 (“The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.”).

199. See James M. McGoldrick, *The Civil Rights Cases: The Relevancy of Reversing a Hundred Plus Year Old Error*, 42 ST. LOUIS U. L.J. 451, 456 n.28 (1998) (“Simply put, the Tenth Amendment means that the federal government is limited to enumerated powers, but that the [S]tates are not.”); see also Mary L. Senkbeil, Recent Development, *Constitutional Trends: The New Majority Limits Congress’ Power to Abrogate State Sovereign Immunity*, 26 WM. MITCHELL L. REV. 1235, 1236 (2000) (“The essence of American federalism is the concept of divided sovereignty. With the adoption of the Constitution, enumerated powers national in nature were given to the national (federal) government, while the [S]tates retained power in areas of local concern.”).

200. See, e.g., U.S. CONST. art. I, § 10, cl. 1 (“No State shall enter into any Treaty, Alliance, or Confederation; grant Letters of Marque and Reprisal; coin Money; emit Bills of Credit; make any Thing but gold and silver Coin a Tender in Payment of Debts; pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts, or grant any Title of Nobility.”) This Article does not delve into whether the states’ sovereign immunity was relinquished in the plan of the Constitutional Convention as to these portions of the original Constitution that directly addressed the obligations of the State. *Cf.* Cent. Va. Cmty. Coll. v. Katz, 546 U.S. 356, 373 (2006) (“Insofar as orders ancillary to the bankruptcy courts’ *in rem* jurisdiction, like orders directing turnover of preferential transfers, implicate States’ sovereign immunity from suit, the States agreed in the plan of the [Constitutional] Convention not to assert that immunity.”).

201. Garrett Epps, Lecture, *Second Founding: The Story of the Fourteenth Amendment*, 85 OR. L. REV. 895, 898 (2006). *But see* Richard L. Aynes, *Enforcing the Bill of*

by the rights federal citizens were afforded against the federal government.<sup>202</sup> The Fourteenth Amendment changed that dynamic in two substantial ways.

First, the Fourteenth Amendment imposes, by its very terms, direct obligations on the states.<sup>203</sup> States are affirmatively prohibited from engaging in conduct which would violate the protections of privileges and immunities, due process, and equal protection.<sup>204</sup> And these obligations are more than a moral duty of the states—they are a constitutional imperative that Congress can enforce through appropriate legislation.<sup>205</sup> Second, the Fourteenth Amendment indirectly imposes obligations on the states beyond the terms of the text. The Due Process Clause of the Fourteenth Amendment has been read to include both a procedural and substantive component.<sup>206</sup> As a part of the “substantive due process” jurisprudence of the Fourteenth Amendment, the Court has read the Due Process Clause as incorporating

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*Rights Against the States: The History and the Future*, 18 J. CONTEMP. LEGAL ISSUES 77, 79-80 (2009).

202. See *Barron v. City of Baltimore*, 32 U.S. (7 Pet.) 243, 250 (1833) (“In compliance with a sentiment thus generally expressed, to quiet fears thus extensively entertained, [the Bill of Rights] [A]mendments were proposed by the required majority in congress, and adopted by the [S]tates. These [A]mendments contain no expression indicating an intention to apply them to the state governments. This court cannot so apply them.”).

203. See U.S. CONST. amend. XIV, § 1 (“No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.” (emphasis added)). See generally Bret Boyce, *Originalism and the Fourteenth Amendment*, 33 WAKE FOREST L. REV. 909, 983-84 (1998) (reviewing the history the development of the Fourteenth Amendment’s § 1 language).

204. See Epps, *supra* note 201, at 898-99 (collecting Supreme Court authority whereby the express provisions of the Fourteenth Amendment have been held to limit the states’ conduct).

205. *Ex parte Virginia*, 100 U.S. 339, 347-48 (1879) (“The argument in support of the petition for a *habeas corpus* ignores entirely the power conferred upon Congress by the Fourteenth Amendment. Were it not for the fifth section of that amendment, there might be room for argument that the first section is only declaratory of the moral duty of the State . . . . But the Constitution now expressly gives authority for congressional interference and compulsion in the cases embraced within the Fourteenth Amendment. It is but a limited authority, true, extending only to a single class of cases; but within its limits it is complete.”).

206. John Paul Stevens, *The Bill of Rights: A Century of Progress*, 59 U. CHI. L. REV. 13, 24-25 (1992) (“The Supreme Court nevertheless has concluded in a long and unbroken line of cases that the Due Process Clause of the Fourteenth Amendment does require the states not only to comply with specific procedural protections in the Bill of Rights, but also to respect certain substantive guarantees.”). See generally Travis Gunn, Note, *Knowledge is Power: The Fundamental Right to Record Present Observations in Public*, 54 WM. & MARY L. REV. 1409, 1422-25 (2013) (discussing this procedural-substantive divide, as well as the different applications of substantive due process).

certain Amendments of the Bill of Rights against the states.<sup>207</sup> Through these two avenues—direct obligations and indirect incorporation—the Fourteenth Amendment reshaped the historical structure of this Nation’s federalism.

Indeed, comparing the disconnect between the Federal Constitution and the states prior to the Fourteenth Amendment,<sup>208</sup> to the enormous top-down intrusion on State autonomy that the Fourteenth Amendment heralded,<sup>209</sup> practically compels what the Court has repeatedly recognized: “that the Fourteenth Amendment . . . fundamentally altered the balance of state and federal power struck by the Constitution.”<sup>210</sup> What this Article now examines is just how this altered balance of power actually manifested in relation to state sovereign immunity.

## 2. *The Fourteenth Amendment’s Structural Changes Impacted State Sovereign Immunity*

In one sense, the Fourteenth Amendment’s direct obligations and indirect incorporation were themselves an alteration of the constitutional structure.<sup>211</sup> But this altered constitutional structure also extended to reconfiguring the boundaries of the states’ constitutionalized sovereign immunity. This Section first discusses the Fourteenth Amendment’s two judicially recognized restrictions on state sovereign immunity. It then turns to a limitation of state sovereign immunity currently unrecognized by the courts.

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207. See *Duncan v. Louisiana*, 391 U.S. 145, 147-49 (1968) (acknowledging this jurisprudential path the Court has taken, and reciting the different tests the Court has used to determine whether a right is incorporated against the states). See also Dale E. Ho, *Dodging a Bullet: McDonald v. City of Chicago and the Limits of Progressive Originalism*, 19 WM. & MARY BILL RTS. J. 369, 379-81 (2010) (giving a brief synopsis of Due Process Clause incorporation); Steven T. Voigt, *Exploring the Original Intent of Congress for the Fourteenth Amendment and the Incorporation Doctrine*, 79 PA. B.A.Q. 126, 127-28 (2008) (providing a truncated history of the Court’s incorporation jurisprudence).

208. See *supra* notes 197-202 and accompanying text.

209. See *supra* notes 203-207 and accompanying text.

210. *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 59 (1996) (citing *Fitzpatrick v. Bitzer*, 427 U.S. 445, 455 (1976)).

211. See Ho, *supra* note 207, at 373 (“Along with the other Reconstruction Amendments, the Fourteenth Amendment fundamentally altered the balance of federal and state power by establishing broad constitutional protections for substantive rights against interference by state and local governments.”).

a. The Fourteenth Amendment: Restricting State Sovereign Immunity to Allow Suit Against State Officials

The Fourteenth Amendment created new restrictions on state action, so that the states could no longer operate in a manner that violated federal constitutional rights.<sup>212</sup> The Supreme Court has maintained adherence to the belief that the states will operate in good faith so as to not violate these obligations.<sup>213</sup> Yet despite the potential for good faith compliance, states frequently run afoul of these Fourteenth Amendment constraints. If state sovereign immunity prohibits individuals' suits to force states to comply with the Fourteenth Amendment, this conflict puts the supremacy of federal law in doubt.

The Court crafted its solution to this problem in *Ex parte Young*.<sup>214</sup> There, the Court distinguished between state sovereigns and individuals acting in their official capacity on behalf of the State.<sup>215</sup> Recognizing that a State has no power to sanction a violation of the Federal Constitution, the Court held that an individual acting in their official capacity, when violating the Constitution, is "stripped of [their] official or representative character" and therefore the State "has no power to impart him any immunity" from suit.<sup>216</sup> Regardless of this stripping of the individual's representative character, a suit against the official in the official's capacity is still a suit against the position itself—not an action against the individual in his personal capacity.<sup>217</sup>

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212. See *supra* notes 203-207 and accompanying text.

213. See, e.g., *Alden v. Maine*, 527 U.S. 706, 754-55 (1999) ("We are unwilling to assume the States will refuse to honor the Constitution or obey the binding laws of the United States. The good faith of the States thus provides an important assurance that '[federal law] . . . shall be the supreme Law of the Land.'" (quoting U.S. CONST. art. VI)). *But see*, e.g., Adam Beam, *SC's New Nullifiers Intent on Blocking Federal Laws*, THE STATE (Feb. 17, 2013), <http://www.thestate.com/2013/02/17/2636706/scs-new-nullifiers-intent-on-blocking.html> (reviewing a multitude of Republican-proposed legislation in the South Carolina legislature that contravenes or purportedly nullifies certain federal legislation within the bounds of the State).

214. *Ex Parte Young*, 209 U.S. 123 (1908).

215. See *id.* at 159-60.

216. *Id.* at 160.

217. See *Kentucky v. Graham*, 473 U.S. 159, 167 n.14 (1985) ("Unless a State has waived its Eleventh Amendment immunity or Congress has overridden it, however, a State cannot be sued directly in its own name regardless of the relief sought. Thus, implementation of state policy or custom may be reached in federal court only because official-capacity actions . . . are not treated as actions against the State." (internal citations omitted)); see also James E. Pfander, *Resolving the Qualified Immunity Dilemma: Constitutional Tort Claims for Nominal Damages*, 111 COLUM. L. REV. 1601, 1609 (2011) ("[T]he notion that a suit brought against an officer in his official capacity puts into issue the legality and constitutionality of the government's conduct."). For a hypothetical example distinguishing between a suit against an official in his official capacity, and a suit against an official in his personal

The solution in *Young* has been characterized—perhaps pejoratively—as a legal fiction<sup>218</sup> on two bases. First, the suit against the individual in his official capacity is, for all practical purposes, a suit against the State in everything but name.<sup>219</sup> Second, a suit against a private individual, such as the state officer stripped of his official character, cannot traditionally be brought for violations of the Fourteenth Amendment because there is no state action.<sup>220</sup> Yet despite this legal fiction, the *Young* doctrine survives as an indirect intrusion on state sovereign immunity.<sup>221</sup>

Despite the rights-vindicating quality of *Young* official-capacity suits, this avenue to enforce federal constitutional rights actually has limited viability for individual plaintiffs. The *Young* doctrine cannot make a plaintiff whole because monetary relief is barred.<sup>222</sup> This alone is a severe impediment to individuals' constitutional tort suits, as monetary relief represents the best method to remedy a person's injuries.<sup>223</sup> But other obstructions further restrict the utility of *Young* official-capacity suits. The injunctive

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capacity, see Steven B. Dow, *The Eleventh Amendment and Corrections Litigation: The Impact of Sovereign Immunity on the Religious Land Use and Institutionalized Persons Act*, 37 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 247, 254-55 (2011).

218. See, e.g., *Va. Office for Prot. & Advocacy v. Stewart*, 131 S. Ct. 1632, 1638 (2011); *Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261, 280 (1997) ("As no one disputes, the *Young* fiction is an exercise in line-drawing.")

219. See Ann Althouse, *When to Believe a Legal Fiction: Federal Interests and the Eleventh Amendment*, 40 HASTINGS L.J. 1123, 1123 (1989) ("Legal fiction permeates [E]leventh [A]mendment analysis. *Ex Parte Young*, which the Supreme Court openly calls a fiction, enables citizens, kept from suing [S]tates by the [E]leventh [A]mendment, to sue state officials and achieve virtually the same result . . .") (footnote omitted); see also Richard E. Welch III, *Mr. Sullivan's Trunk: Constitutional Common Law and Federalism*, 46 NEW ENG. L. REV. 275, 283 (2012) ("The fiction is that such a lawsuit (even though it will bind the state just as much as if the state had been named itself in the lawsuit) is not a suit against the state . . .").

220. See Michael Landau, *State Sovereign Immunity and Intellectual Property Revisited*, 22 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 513, 537 n.116 (2012) ("[T]he same unconstitutional action by the same officer that strips state involvement for Eleventh Amendment purposes, creates state action under the Fourteenth Amendment."); David L. Shapiro, *Ex Parte Young and the Uses of History*, 67 N.Y.U. ANN. SURV. AM. L. 69, 75-76 (2011).

221. Though official-capacity suits intrude on state sovereign immunity as a theoretical matter, see *supra* notes 217, 219 and accompanying text, such suits also have real-world consequences. See, e.g., Pfander, *supra* note 217, at 1609 n.36 (noting that "the [federal] government provides counsel as a matter of course" in official-capacity suits).

222. *Ford Motor Co. v. Dep't. of Treasury of Ind.*, 323 U.S. 459, 464 (1945) ("And when the action is in essence one for the recovery of money from the [S]tate, the [S]tate is the real, substantial party in interest and is entitled to invoke its sovereign immunity from suit even though individual officials are nominal defendants."), *overruled on other grounds* by *Lapides v. Bd. of Regents of Univ. Sys. Of Ga.*, 535 U.S. 613, 621-23 (2002).

223. See *supra* note 7 and accompanying text.

relief that is available may only be prospective,<sup>224</sup> so that past infringement alone does not permit application of the *Young* doctrine.<sup>225</sup> And other doctrines, like standing, frequently limit the ability of individuals to bring suit to prevent such future harm.<sup>226</sup> Official-capacity suits therefore lack a real ability to compensate harmed individuals and ensure enforcement of constitutional rights.

Though not an intrusion on state sovereign immunity, it is pertinent to discuss litigation related to official-capacity suits: personal-capacity suits. When an official, acting as a state officer, violates the Federal Constitution, the injured party may file a suit against that official in his capacity as a private individual.<sup>227</sup> This has the effect of holding the official personally responsible for his illegal conduct, even though the official acted under color of state law.<sup>228</sup> Though these personal-capacity suits do not implicate state sovereign immunity,<sup>229</sup> such suits are another avenue for individuals to enforce their constitutional rights. Because personal-capacity suits permit monetary relief for constitutional infringement, the issue of state sovereign immunity appears to be very much beside the issue.

The problem with personal-capacity suits foreclosing a determination as to whether States should be liable for constitutional violations is twofold.

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224. *Edelman v. Jordan*, 415 U.S. 651, 677 (1974) (“[A] federal court’s remedial power, consistent with the Eleventh Amendment, is necessarily limited to prospective injunctive relief . . .”).

225. *See Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 73 (1996) (“[W]e often have found federal jurisdiction over a suit against a state official when that suit seeks only prospective injunctive relief in order to end a continuing violation of federal law.”) (quoting *Green v. Mansour*, 474 U.S. 64, 68 (1985) (internal quotation marks omitted)). Though some commentators have argued that a continuing violation is not necessary for *Young* to be successfully invoked, they do not dispute that the focus is on *future*, and not past, harm. *See, e.g.*, Ralph Brubaker, *Of State Sovereign Immunity and Prospective Remedies: The Bankruptcy Discharge as Statutory Ex Parte Young Relief*, 76 AM. BANKR. L.J. 461, 556-60 (2002) (emphasis added).

226. *See Los Angeles v. Lyons*, 461 U.S. 95, 105-07 (1983) (holding that, although the plaintiff had endured previous illegal chokeholds, the plaintiff lacked standing to enjoin future use of such illegal chokeholds).

227. Daniel J. McDonald, *A Primer on 42 U.S.C. § 1983*, 12 UTAH B.J. 29, 32 (1999).

228. Michael C. Fayz, *Civil Rights*, 1995 DET. C.L. REV. 343, 351 (1995).

229. Stacey Heather O’Bryan, Note, *Closing the Courthouse Door: The Impact of the Prison Litigation Reform Act’s Physical Injury Requirement on the Constitutional Rights of Prisoners*, 83 VA. L. REV. 1189, 1220 (1997); *But see* Jaffe, *supra* note 42, at 227-28 (arguing that personal-capacity suits, when an officer is indemnified by his public employer, is a “conduit to the [State’s] treasury”—one of the primary objects sought to be protected by sovereign immunity); 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 [in his personal capacity] is functionally a suit against the [S]tate, for the [S]tate defends the action and pays any adverse judgment.”).

One issue is that personal-capacity suits do not mimic traditional private tort litigation by simply resolving the merits of a dispute. Private litigation frequently lacks immunities,<sup>230</sup> yet officials in their personal-capacity are afforded either absolute or qualified immunity.<sup>231</sup> To the extent absolute immunity is operative, the personal-capacity suit is completely barred.<sup>232</sup> Qualified immunity is always present in the absence of absolute immunity,<sup>233</sup> and has grown into a nearly *de facto* bar to recovery.<sup>234</sup> When evaluated in the context of actual litigation, the personal-capacity suit is in many ways merely illusory as a means to enforce constitutional rights and provide

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230. See Mark R. Brown, *Deterring Bully Government: A Sovereign Dilemma*, 76 TUL. L. REV. 149, 157-58 (2001) (discussing private party litigation in comparison to holding governments accountable).

231. See Mark R. Brown, *Weathering Constitutional Change*, 2000 U. ILL. L. REV. 1091, 1094 (2000) (remarking that both absolute and qualified immunity are “judicially crafted” creatures).

232. Absolute immunity is complete immunity from suit afforded to some government positions when performing certain functions based on common law traditions and public policy rationales. Erwin Chemerinsky, *Absolute Immunity: General Principles and Recent Developments*, 24 TOURO L. REV. 473, 473-76 (2008); see, e.g., *Van de Kamp v. Goldstein*, 555 U.S. 335, 340-42 (2009) (prosecutor immunity when acting as “an officer of the court”); *Stump v. Sparkman*, 435 U.S. 349, 355-56 (1978) (judicial immunity when engaged in judicial acts); *Eastland v. U.S. Servicemen’s Fund*, 421 U.S. 491, 510 (1975) (legislator immunity when acting within the “legislative sphere”).

233. Qualified immunity is a conditional immunity from suit as the result of a “pragmatic compromise” between individual rights and effective government. See John D. Kirby, Note, *Qualified Immunity for Civil Rights Violations: Refining the Standard*, 75 CORNELL L. REV. 462, 469-71 (1990). Qualified immunity affords all “government officials [immunity] 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.” *Pearson v. Callahan*, 555 U.S. 223, 231 (2009) (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982) (internal quotation marks omitted)).

234. See *Malley v. Briggs*, 475 U.S. 335, 341 (1986) (“As the qualified immunity defense has evolved, it provides ample protection to all but the plainly incompetent or those who knowingly violate the law.”); Pamela S. Karlan, *Foreword: Democracy and Disdain*, 126 HARV. L. REV. 1, 61-63 (2012) (arguing that, instead of being a conditional immunity, qualified immunity has evolved into a shield that “create[s] a presumption against recovery”); Pamela S. Karlan, *Shoe-Horning, Shell Games, and Enforcing Constitutional Rights in the Twenty-First Century*, 78 UMKC L. REV. 875, 886-87 (2010) (“Over the forty years since it began to articulate the contours of qualified immunity, the [C]ourt has made it easier and easier for defendants to assert it successfully.”) (internal footnote omitted); Nancy Leong, *Making Rights*, 92 B.U. L. REV. 405, 411 (2012) (“[T]he [qualified immunity] doctrine presents a conundrum: if courts simply hold that the law was not clearly established without stating whether a constitutional violation has occurred, then the law never becomes clearly established, and thus [a public official in his personal capacity] will never be liable for damages no matter how many times a particular action is repeated.”); see also David Jacks Achtenberg, *Symposium on Enforcing Constitutional Rights in the Twenty-First Century—Section 1983 Thirty Years After Owen*, 78 UMKC L. REV. 869, 870 n.12 (2010) (providing authority to support the claim that the Court has “significantly strengthened qualified immunity”).

monetary relief. Another issue is that the personal-capacity suit focuses only on one particular wrongdoer: the individual. But it cannot be denied that the individual was acting as an agent for the State when the unconstitutional conduct occurred<sup>235</sup>—and under principles of liability, the State shares an equal portion of fault.<sup>236</sup> So even assuming that a personal-capacity suit is a feasible method to enforce constitutional rights, it fails to adequately account for all blameworthy parties by excluding the states from its scope. For these reasons, the potential for personal-capacity suits does not allow for sufficient enforcement of constitutional rights.

b. The Fourteenth Amendment: Restricting State Sovereign Immunity to Allow Congress to Legislate Suits Against States

The Fourteenth Amendment removed from the scope of state sovereign immunity the immunity from suits that Congress authorizes as an abrogation of state sovereign immunity.<sup>237</sup> The origins of Congress's ability to abrogate state sovereign immunity can be traced back to *Ex parte Virginia*.<sup>238</sup> There, the Court recognized that the Fourteenth Amendment's substantive provisions are "prohibitions . . . directed to the States, and they are to a degree restrictions of State power."<sup>239</sup> Thus, Congress's ability to enforce such prohibitions under Section 5 "is no invasion of [s]tate sovereignty."<sup>240</sup> Almost one hundred years later, the Court recognized that the Fourteenth Amendment had therefore redefined the federal government's "role . . . as a guarantor of basic federal rights against state power."<sup>241</sup> And in such a role, Congress "may . . . provide for private suits against States" under Section 5 of the Fourteenth Amendment because the Fourteenth Amendment's "other sections[,] by their own terms[,] embody limitations on state authority."<sup>242</sup>

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235. See *supra* notes 220, 228 and accompanying text.

236. See *Brown*, *supra* note 230, at 157-58 (noting that, under *respondeat superior*, both the agent and the principal are accountable for the harm-causing conduct of the agent). *But cf.* Jeffrey K. O'Connor, Note, *Civil Rights/Civil Procedure—Is It the Officer or the Gentleman?: Issues of Capacity in § 1983 Actions Brought in Federal Court*, 28 W. NEW ENG. L. REV. 323, 355 n.215 (2006) (noting that a suit against a local government can be brought alongside a personal-capacity suit, whereby the difference is "more or less confined to the damages that may be awarded").

237. See U.S. CONST. amend. XIV, § 5; *Fitzpatrick v. Bitzer*, 427 U.S. 445, 455 (1976).

238. *Ex Parte Virginia*, 100 U.S. 339 (1879). See *Fitzpatrick*, 427 U.S. at 453-55 (citing *Ex parte Virginia* to support the ultimate holding that Congress can create a private right of action against the states pursuant to Section 5 of the Fourteenth Amendment).

239. *Virginia*, 100 U.S. at 346.

240. *Id.*

241. *Mitchum v. Foster*, 407 U.S. 225, 239 (1972).

242. *Fitzpatrick*, 427 U.S. at 456 (citations omitted).

This congressional ability to create private rights of action against States in derogation of state sovereign immunity was eventually termed “abrogation.”<sup>243</sup> The Court has fashioned additional requirements that Congress must satisfy in order to successfully abrogate state sovereign immunity under the Fourteenth Amendment.<sup>244</sup> Alongside such restrictions, however, has been a relaxing of what precisely Congress may enforce. Despite other disagreements about the Fourteenth Amendment, the entire Court agrees that Congress may enforce actual violations of the Fourteenth Amendment’s substantive provisions—be it the direct obligations found in its text, or the indirect incorporation of other rights.<sup>245</sup> But this is not all that Congress may enforce. The Court has recognized that Congress may enact “prophylactic legislation” under the Fourteenth Amendment,<sup>246</sup> so that “[l]egislation which deters or remedies constitutional violations” may also “prohibit[] conduct which is not itself unconstitutional . . . .”<sup>247</sup>

This method of protecting constitutional rights certainly has the potential to allow for vindication of constitutional infringement against States.

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243. See, e.g., *Coleman v. Ct. of Appeals of Md.*, 132 S. Ct. 1327, 1333 (2012) (“A foundational premise of the federal system is that States, as sovereigns, are immune from suits for damages, save as they elect to waive that defense. As an exception to this principle, Congress may *abrogate* the States’ immunity from suit pursuant to its powers under [Section] 5 of the Fourteenth Amendment.” (emphasis added) (internal citations removed)). In *Fitzpatrick v. Bitzer*, where the Court first recognized Congress’s abrogation power under the Fourteenth Amendment, the term “abrogate” was only used in reference to a prior case. See *id.* at 452 (citing *Edelman v. Jordan*, 415 U.S. 651 (1974)).

244. See Gillian Egan, *Unreasonable Requirements for Reasonable Enforcement: “Congruence and Proportionality” After Coleman v. Court of Appeals of Maryland*, 43 CUMB. L. REV. 29, 36-39 (2013) (“These requirements include a clear intent to abrogate state immunity, identification of a state transgression of Fourteenth Amendment rights, and a response that is congruent and proportional to the harm it seeks to remedy.” (internal footnotes omitted)).

245. See *United States v. Georgia*, 546 U.S. 151, 157-59 (2006) (Scalia, J., writing for the unanimous Court).

246. Anthony T. Kovalchick, *Getting Serious About Constitutional Enforcement: Why Congress Should Amend 42 U.S.C. § 1983 to Provide for Suits Against the States for Money Damages in Cases Involving Violations of the Fourteenth Amendment*, 22 WIDENER L.J. 51, 74-75 (2012).

247. *City of Boerne v. Flores*, 521 U.S. 507, 518 (1997) (quoting *Fitzpatrick*, 427 U.S. at 455); see also *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 81 (2000) (“Congress’[s] power ‘to enforce’ the [Fourteenth] Amendment includes the authority both to remedy and to deter violation of rights guaranteed thereunder by prohibiting a somewhat broader swath of conduct, including that which is not . . . forbidden by the Amendment’s text.” (quoting *Boerne v. Flores*, 521 U.S. 507, 518 (1997), *superseded by statute as stated in* *Burwell v. Hobby Lobby*, 134 S. Ct. 2751.)). Such prophylactic legislation can abrogate state sovereign immunity related to otherwise constitutional conduct as long as the legislation “exhibits ‘a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end.’” *Tennessee v. Lane*, 541 U.S. 509, 520 (2004) (quoting *Boerne*, 521 U.S. at 520).

But Congress has failed to abrogate state sovereign immunity from individuals' constitutional tort suits.<sup>248</sup> Notwithstanding Congress's unused ability to amend § 1983 to abrogate state sovereign immunity,<sup>249</sup> individuals may only vindicate their constitutional rights when such infringement coincides with harm addressed by prophylactic legislation.<sup>250</sup> Because such legislation is not a general grant to allow constitutional enforcement, like § 1983, the utility of this type of legislation to remedy constitutional harm is necessarily limited.

c. The Fourteenth Amendment: Restricting State Sovereign Immunity to be Subordinate to the Substantive Provisions of the Fourteenth Amendment

State sovereign immunity is not absolute. But the restriction on state sovereign immunity does not necessarily correlate into an ability to bring suit to vindicate individuals' constitutional rights.<sup>251</sup> Moreover, even when state sovereign immunity permits individuals' constitutional tort suits, those methods of enforcement are deficient.<sup>252</sup> And alternative litigation fails to adequately remedy harm and hold States accountable for their wrongdoing.<sup>253</sup> In light of this rights-remedy gap, an imperative exists to ascertain whether the Fourteenth Amendment actually carved out from state sovereign immunity the immunity from individuals' constitutional tort suits.

Before analyzing the actual contours of the Fourteenth Amendment's impact on state sovereign immunity, preemptively defusing criticism sur-

248. Apart from the issues of whether persons include States, the § 1983 constitutional tort statute does not abrogate state sovereign immunity. *See* *Quern v. Jordan*, 440 U.S. 332, 344-45 (1979).

249. *See, e.g.*, Ivan E. Bodensteiner, *Congress Needs to Repair the Court's Damage to § 1983*, 16 TEX. J. C.L. & C.R. 29, 71-73 n.319 (2010) (proposing an amended § 1983 whereby Eleventh Amendment immunity in federal court is abrogated by that law).

250. *See, e.g.*, *Georgia*, 546 U.S. at 157-59 (holding that a plaintiff's Eighth Amendment claims, when coinciding with violations of Title II of the Americans With Disabilities Act, were actionable under Title II because that legislation abrogated state sovereign immunity from suit for violations of the substantive provisions of the Fourteenth Amendment).

251. *See supra* notes 189-191 and accompanying text (state sovereign immunity is inoperative against suits initiated by other States, but not when States are seeking to vindicate the rights of particular citizens).

252. *See supra* notes 183-185 and accompanying text (collecting issues relating to the federal sovereign filing suit against States to vindicate a particular citizen's rights); notes 222-226 and accompanying text (discussing the multitude of reasons why official-capacity suits are not viable methods to reliably enforce individuals' constitutional rights); notes 248-250 and accompanying text (explaining the limited practical impact of Congress's ability to abrogate relative to individuals vindicating their constitutional rights).

253. *See supra* notes 230-236 and accompanying text (making this point with respect to personal-capacity suits against public officials).

rounding the Fourteenth Amendment's purpose will clear the table. The Court has recognized that the Fourteenth Amendment had an actual, substantive impact on this Nation's federalism structure.<sup>254</sup> It is possible that this alteration was not the intent or the purpose of either the Congress who proposed and debated the Fourteenth Amendment, or the states who ratified it.<sup>255</sup> As Professor Lash contends, after having studied the debates to the Fourteenth Amendment, no congressional member believed that, under the Fourteenth Amendment, "Congress . . . had [the] authority to authorize suits by individuals against the [S]tates. Instead, the various debates indicate a widespread belief that although individual state officials might be held accountable, [S]tates as such could not be sued without their consent."<sup>256</sup>

This Article does not challenge such a position directly. Instead, it is sufficient for purposes here to note that such purposivist methodology has been disregarded by the Court when construing the Fourteenth Amendment's impact. For example, despite Professor Lash's insight into the drafting Congress's psyche, the Court has construed the Fourteenth Amendment as "operat[ing] to alter the pre-existing balance between state and federal power achieved by Article III and the Eleventh Amendment."<sup>257</sup> To this end, the Court has held that Congress *can* legislate rights of actions to allow for private individuals to bring suit against offending States.<sup>258</sup> This disregard for the drafters' potential original understanding of the Fourteenth Amendment has led the Court to recognize the actual impact the Fourteenth Amendment had on state sovereign immunity.<sup>259</sup>

This Article adopts the same tact. It does not look to the enacting Congress's (or the ratifying States') intent. It also accepts the Court's determi-

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254. See *supra* notes 203-210 and accompanying text.

255. See Kurt T. Lash, *Beyond Incorporation*, 18 J. CONTEMP. LEGAL ISSUES 447, 462-64 (2009) ("In sum, it appears that the Reconstruction Congress assumed the continued, if trimmed, operation of the Tenth Amendment and the continued existence of the [S]tate as independent sovereign entities.").

256. *Id.* at 462-63.

257. *Seminole Tribe*, 517 U.S. at 65-66 (citing *Fitzpatrick v. Bitzer*, 427 U.S. 445, 454 (1976)).

258. See *United States v. Georgia*, 546 U.S. 151, 158-59 (2006) ("[N]o one doubts that [Section] 5 [of the Fourteenth Amendment] grants Congress the power to 'enforce the . . . provisions['] [of the Amendment] by creating private remedies against the States for *actual* violations of those provisions." (citing U.S. CONST. amend. XIV, § 5)).

259. See Jamal Greene, *Fourteenth Amendment Originalism*, 71 MD. L. REV. 978, 990 (2012) ("Members of the Court have on occasion engaged the history of Section 5 of the Fourteenth Amendment in cases in which the scope of that provision was directly at issue. . . . But even in cases in which Section 5 is the very provision under review, careful attention to original understanding is the exception rather than the rule. Thus, in *Fitzpatrick v. Bitzer*, when then-Justice Rehnquist wrote for the Court upholding the power of Congress to abrogate state sovereign immunity via Section 5, his opinion was deeply doctrinal in nature, referring only indirectly to the original understanding of the Fourteenth Amendment.").

nation that the Fourteenth Amendment actually shifted the structure of state sovereign immunity. But it breaks with Court precedent when ascertaining in what manner the Fourteenth Amendment altered state sovereign immunity. The Court has framed Congress's enforcement power under the Fourteenth Amendment as the ability to abrogate state sovereign immunity.<sup>260</sup> This Article argues a related point: the Fourteenth Amendment's substantive provisions affirmatively revoked the states' sovereign immunity as against that Amendment's constitutional limitations on state conduct.<sup>261</sup>

This distinction is subtle, but important. If Congress is attempting to abrogate state sovereign immunity, then it must abide by the particular rules governing such abrogation.<sup>262</sup> But if such state sovereign immunity is simply nonexistent, then it only matters that Congress has legislated on the issue.<sup>263</sup> Because this Article argues for the latter understanding of the Fourteenth Amendment's impact on state sovereign immunity, the doctrine of abrogation becomes very much beside the point. This is not to say that abrogation is completely eradicated under this Article's argument. Because the scope of the states' relinquished sovereign immunity is limited to the constitutional scope of the Fourteenth Amendment, it cannot be said that state sovereign immunity is nonexistent against otherwise constitutional conduct. Thus, for the prophylactic legislation that targets otherwise constitutional conduct,<sup>264</sup> state sovereign immunity exists except to the extent Congress successfully abrogates that immunity.

Turning now to the impact the Fourteenth Amendment had on state sovereign immunity, it is important to distinguish between the substantive sections and the enforcement section of the Fourteenth Amendment.

The substantive provision this Article focuses on—a portion of Section 1 to the Fourteenth Amendment<sup>265</sup>—is a prohibition against the states. The earliest Supreme Court cases following ratification of the Fourteenth Amendment recognized that such constitutionally prohibited conduct restrained only States.<sup>266</sup> Moreover, these prohibitions are self-executing in

260. See *supra* notes 243-247 and accompanying text.

261. Such limitations include both the Fourteenth Amendment's direct obligations and indirect incorporation of rights. See *supra* notes 203-207 and accompanying text.

262. See Egan, *supra* note 244.

263. Cf. *Cent. Va. Cmty. Coll. v. Katz*, 546 U.S. 356, 379 (2006) ("The relevant question is not whether Congress has 'abrogated' States' immunity in proceedings to recover preferential transfers. The question, rather, is whether Congress'[s] determination that States should be amenable to such proceedings is within the scope of its power to enact 'Laws on the subject of Bankruptcies.'" (internal citations omitted)).

264. See *supra* notes 246-247 and accompanying text.

265. U.S. CONST. amend. XIV, § 1.

266. See, e.g., *Civil Rights Cases*, 109 U.S. 3, 10-11 (1883) ("Individual invasion of individual rights is not the subject-matter of the [A]mendment. It has a deeper and broader scope. It nullifies and makes void all state legislation, and state action of every kind, which

that a State can violate the constitutional guarantees without Congress having legislated on the issue.<sup>267</sup> Thus, on its own accord, Section 1's prohibitions are "restrictions of State power."<sup>268</sup> In contrast, Section 5 to the Fourteenth Amendment is the enforcement mechanism of the substantive provisions.<sup>269</sup> But such enforcement must be remedial and preventive in nature, rather than an independent congressional ability to say what violates the Fourteenth Amendment.<sup>270</sup>

This split in the purpose and effect between Section 1 and Section 5 underscores where the Fourteenth Amendment's substantive impact on the Constitution's structure, including state sovereign immunity, originates—Section 1. In fact, the Court recognized this over one hundred years ago, when it acknowledged that enforcement legislation "is no invasion of State sovereignty."<sup>271</sup> This is not because the enforcement legislation is what contracts state sovereign immunity, but because the substantive prohibitions restrict State power.

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impairs the privileges and immunities of citizens of the United States, or which injures them in life, liberty, or property without due process of law, or which denies to any of them the equal protection of the laws."); *Virginia v. Rives*, 100 U.S. 313, 318 (1879) ("The provisions of the Fourteenth Amendment of the Constitution we have quoted all have reference to State action exclusively, and not to any action of private individuals."); *United States v. Cruikshank*, 92 U.S. 542, 554-55 (1875) ("The [F]ourteenth [A]mendment prohibits a State from denying to any person within its jurisdiction the equal protection of the laws; but this provision does not, any more than the one which precedes it, and which we have just considered, add any thing to the rights which one citizen has under the Constitution against another.").

267. See *City of Boerne v. Flores*, 521 U.S. 507, 522-24 (1997), *superseded by statute as stated in* *Burwell v. Hobby Lobby*, 134 S. Ct. 2751.; see also *Ex parte Virginia*, 100 U.S. 339, 346-47 (1879) ("[I]n exercising her rights, a state cannot disregard the limitations which the Federal Constitution has applied to her power. . . . The constitutional provision, therefore, must mean that no agency of the State, or the officers or agents by whom its powers are exerted, shall deny to any person within its jurisdiction [the protections of the Fourteenth Amendment]. Whoever, by virtue of public position under a State government, deprives another of property, life, or liberty, without due process of law, or denies or takes away the equal protection of the laws, violates the constitutional inhibition; and as he acts in the name and for the State, and is clothed with the State's power, his act is that of the State.").

268. *Virginia*, 100 U.S. at 346.

269. See *Civil Rights Cases*, 109 U.S. at 11 ("[I]n order that the national will, thus declared [in the substantive provisions of the Fourteenth Amendment], may not be a mere *brutum fulmen*, the last section of the [A]mendment invests [C]ongress with power to enforce it by appropriate legislation. To enforce what? To enforce the prohibition."); *Rives*, 100 U.S. at 318 ("Congress, by virtue of the fifth section of the Fourteenth Amendment, may enforce the prohibitions whenever they are disregarded by either the Legislative, the Executive, or the Judicial Department of the State. The mode of enforcement is left to its discretion.").

270. *Flores*, 521 U.S. at 519-20; see also *id.* 524-27.

271. *Virginia*, 100 U.S. at 346.

This conclusion follows from a close reading of *Ex parte Virginia*. There, the Court first explained that the substantive provisions of the Fourteenth Amendment “are directed to the States, and they are to a degree restrictions of State power.”<sup>272</sup> The Court then turned to the enforcement provision of Section 5, but only to explain that the Constitution “empowered Congress to enact” laws to enforce the Fourteenth Amendment.<sup>273</sup> The Court then turned back to the *substantive* prohibitions against state conduct. The Court acknowledged that a State generally has the power to determine how jurors can be selected and state law may be administered, but that such authority is restricted by the Federal Constitution.<sup>274</sup> Thus, when authority is given to the federal government—that is, the limitation of state action under the Fourteenth Amendment, and the ability to ensure enforcement of those limitations—a corresponding degree of state authority is carved out from the states’ sphere of power.<sup>275</sup> The Court therefore determined that Congress could constitutionally enact a law penalizing the exclusion of a citizen on the basis of “race, color, or previous condition of servitude.”<sup>276</sup> But this legislation was not the source of federal authority that had a “corresponding diminution” of state power;<sup>277</sup> that source stemmed from the substantive prohibitions against the states.<sup>278</sup>

This close analysis is important because when the Supreme Court finally evaluated the balance between the Fourteenth Amendment and state sovereign immunity, the focus was too much on the enforcement provision. In *Fitzpatrick v. Bitzer*, the Court framed the *Ex parte Virginia*’s give-and-take between federal and state power as between “the expansion of Congress’[s] powers with the corresponding diminution of state sovereignty . . . .”<sup>279</sup> Thus, it is Congress’s enforcement powers that carve out the states’ sovereign immunity; or, to put in other terms, state sovereign immunity is “necessarily limited by the enforcement provisions of [Section] 5 of the Fourteenth Amendment.”<sup>280</sup>

This analysis is correct only insofar as the scope of Congress’s powers of mere enforcement are defined by the limits of Section 1 to the Fourteenth Amendment. That is to say, Congress is afforded enforcement power under Section 5, but that power is a derivative of Section 1. It is Section 1 that empowers substantive federal rights and limits the states. The diminution of

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272. *Id.*

273. *Id.*

274. *Id.*

275. *Id.*

276. *Ex parte Virginia*, 100 U.S. 339, 344, 349.

277. *Id.* at 346.

278. *Id.*; see also *supra* notes 267-268, 270 and accompanying text.

279. *Fitzpatrick v. Bitzer*, 427 U.S. 445, 455-56 (1976).

280. *Id.* at 455-56.

state authority is therefore governed by the metes and bounds of Section 1. To correct the *Fitzpatrick* Court would be to frame *Ex parte Virginia*'s give-and-take in the terms of how expanding Section 1 federal power corresponds in diminishing state sovereignty. The conclusion that follows is not that state sovereign immunity is limited by Congress's Section 5 enforcement power, but Section 1's substantive authority.

This shift in the locus of where in the Fourteenth Amendment state sovereign immunity is limited has practical effects. If Congress's affirmative power of enforcement does not include an ability to limit state sovereign immunity, abrogation—the power of Congress to extinguish sovereign immunity—is unavailable.<sup>281</sup> But Congress does not need such an ability to enforce the provisions of the Fourteenth Amendment, because those substantive provisions have, on their own force, restricted state sovereign immunity. In sum: Section 1 to the Fourteenth Amendment restricts state sovereign immunity, so that any legislation relating to Section 1 is unencumbered by such immunity.

### III. REVISITING *WILL V. MICHIGAN DEPARTMENT OF STATE POLICE*

It is now appropriate to return to *Will v. Michigan Department of State Police*.<sup>282</sup> As previously discussed, the *Will* Court held that a § 1983 suit could not lie against a State because States were not “person[s]” under the terms of that statutory right of action.<sup>283</sup> But the rationales supporting this conclusion all arose from—or at least were related to—a respect for the presence of state sovereign immunity.<sup>284</sup>

But state sovereign immunity does not exist with respect to conduct that violates the Fourteenth Amendment.<sup>285</sup> Therefore, the *Will* Court's respect for state sovereign immunity was misplaced to the extent a § 1983 action is brought against a State for violations of either the Fourteenth Amendment's direct obligations on the states,<sup>286</sup> or the Fourteenth Amendment's indirect incorporation of other individual rights against the states.<sup>287</sup>

The Court should therefore revisit the *Will* holding. Amending that holding to reflect the structural change the Fourteenth Amendment had on

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281. While there still may be an argument that Congress can abrogate state sovereign immunity for conduct that is otherwise constitutional under prophylactic legislation, this Article restates its avoidance of that topic.

282. *Will v. Mich. Dep't of State Police*, 491 U.S. 58 (1989); *see also supra* notes 13-36 and accompanying text.

283. *See Will*, 491 U.S. at 64.

284. *See id.* at 64-70.

285. *See supra* notes 271-281 and accompanying text.

286. *See supra* notes 203-205 and accompanying text.

287. *See supra* notes 206-207 and accompanying text.

state sovereign immunity can result in one of two outcomes. First, the Court can narrowly modify *Will* to hold that a § 1983 person continues to exclude States, except for when States are alleged to have violated the Fourteenth Amendment. This option has the benefit of being a more limited contravention of *Will*. Second, the Court can more broadly overrule *Will* by holding that a § 1983 person always includes States, but the states' sovereign immunity prohibits suit for conduct that does not violate the Fourteenth Amendment. This option has the benefit of ensuring uniformity of doctrine—so that the statutory interpretation of person is uniform, and the prohibition against some suits is directly based off of state sovereign immunity, in conformity with the Court's broad conception of such immunity under the Immunity Theory.

Regardless of which avenue the Court might choose, the end result must be the same—individual litigants must be able to bring suit against States under the § 1983 right of action for violations of their Fourteenth Amendment rights.

#### CONCLUSION

The Court has recently evolved the rationale for its Immunity Theory jurisprudence of state sovereign immunity. A shift away from merely citing purpose and towards using constitutional history and structure has invited review of the traditional understanding of state sovereign immunity's modern scope and limitations. Further, the limited ability for individuals to enforce their constitutional rights against infringing States counsels for renewed examination of state sovereign immunity under the modern Immunity Theory. This Article takes up this invitation by examining the Fourteenth Amendment.

Upon review of the Fourteenth Amendment and the earliest cases explaining that Amendment's impact on this Nation's federalism, this Article agrees with much of Supreme Court precedent. The Fourteenth Amendment fundamentally altered the relationship between the federal sovereign and state sovereigns, as well as between federal citizens and state sovereigns. One particular manifestation of this shifted structure was an alteration to the state sovereign immunity set forth in the original plan of the Constitutional Convention.

But the Article breaks from precedent at this juncture. The Court has held that Section 5 to the Fourteenth Amendment—the enforcement clause—is the portion of that Amendment which subordinated state sovereign immunity. Contrary to this holding, this Article contends that state sovereign immunity was surrendered to Section 1 to the Fourteenth Amendment—the substantive provisions. Determining that the substantive rights of the Fourteenth Amendment were carved out from state sovereign immunity has a real impact when conceptualizing state sovereign immuni-

ty: it simply does not exist as against Fourteenth Amendment rights. Congress need not legislate to abrogate such immunity; the Fourteenth Amendment itself is what has permanently “abrogated” state sovereign immunity.

In the absence of such state sovereign immunity relating to those Fourteenth Amendment individual rights, *Will v. Michigan Department of State Police* should be reconsidered. The *Will* decision held that States were not persons for purposes of § 1983 actions.<sup>288</sup> But this decision was molded by state sovereign immunity concerns. Revisiting that holding is essential, because state sovereign immunity is simply nonexistent against those constitutional rights sought to be vindicated in a § 1983 action (the direct obligations of the Fourteenth Amendment, as well as other rights incorporated through the Fourteenth Amendment). In recognizing that such state sovereign immunity concerns are actually absent, and that state sovereign immunity cannot actually prohibit an individual’s constitutional tort suit, the Court should hold that States are in fact persons under § 1983 for purposes of vindicating federal constitutional rights.<sup>289</sup>

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288. *Will*, 491 U.S. at 58.

289. Notably, because the Fourteenth Amendment altered this Nation’s constitutional structure regarding *constitutional* rights, § 1983 actions to vindicate *statutory* rights are still prohibited by state sovereign immunity.