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## Awakening the People's Giant: Sovereign Immunity and the Constitution's Republican Commitment

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## **AWAKENING THE PEOPLE'S GIANT: SOVEREIGN IMMUNITY AND THE CONSTITUTION'S REPUBLICAN COMMITMENT**

*Fred O. Smith, Jr.\**

*This Article explores the relationship between two constitutional doctrines that have faced withering criticisms. The first is the scant jurisprudence emanating from the Guarantee Clause, a provision that requires the United States to ensure republican forms of government in every state. John Hart Ely and Richard Posner, among others, have observed that the Clause has been interpreted in ways that demote it to a dormant aspiration, hibernating in a dusty corner of the Constitution where courts dare not enter. The second is sovereign immunity, which protects states from most federal lawsuits. Scholars have labeled sovereign immunity's application as unprincipled and "embarrassing," primarily because this jurisprudence has purportedly outpaced the language of the Constitution.*

*Taken seriously, however, the Guarantee Clause could reaffirm and reform the troubled doctrine of sovereign immunity. Reaffirm, because the Clause has the ability to pillar important aspects of sovereign immunity with a more plausible textual basis than any currently cited by the Supreme Court. The text and history of the Guarantee Clause illustrate that it protects representative democracy, a form of government that stands as one means of ensuring stability among the states. Protecting representative government and ensuring states' stability are among the very aims that*

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*animate sovereign immunity jurisprudence. Reform, because the Clause also reflects a textual commitment to the principle of popular sovereignty. Therefore, any account of sovereign immunity must reconcile how the People and the States may both claim the mantle of sovereignty in our federal system. The Court's current approach to sovereign immunity fails to engage, let alone resolve, this quandary.*

*I offer a detailed alternative approach to implementing sovereign immunity that is far more consonant with popular sovereignty and the principle of representative government. This proposal would expand plaintiffs' ability to challenge states for violations of constitutional violations bearing a substantial nexus with representative government. It would also expand state legislatures' ability to protect states from certain classes of statutory lawsuits through a new concept called "popular immunity."*

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INTRODUCTION

In America, as the story is written, the ultimate power rests with the people. This was the aspiration of the Declaration of Independence, which proclaimed that legitimate government power emanates from the consent of the governed. This was the design of constitutional architects such as Alexander Hamilton, who argued that the “fundamental principle of republican government . . . admits the right of the people to alter or abolish the established Constitution.”<sup>1</sup> And this was the promise of the Constitution itself, which not only begins with the language “We the People,”<sup>2</sup> but also establishes a textual commitment to republican forms of government in every state.<sup>3</sup> The people are sovereign.

Yet, when state actors violate federal laws enacted by the people, at least one remedy is frequently and conspicuously unavailable to the victims of lawless conduct: the right to sue states directly. For just as “the people themselves”<sup>4</sup> are sovereign in America’s political system, the states similarly purport to be sovereigns, immune from federal lawsuits absent their consent. To be sure, the words “sovereign immunity” appear nowhere in the Constitution, nor does the document speak directly to whether a citizen may sue her *own state* for violations of *federal law*. Courts have instead concluded that such immunity emanates from “presupposition[s]”<sup>5</sup> that the Eleventh Amendment affirms, as well as broader background principles of state sovereignty.

This Article is principally a tale, then, about the relationship between two constitutional provisions. The first is a clause with lofty language but little in the way of legs. The Guarantee Clause provides that “[t]he United States shall guarantee to every State in this Union a Republican Form of Government.”<sup>6</sup> The words “shall” and “guarantee” bear strong

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1. THE FEDERALIST NO. 78, at 559 (Alexander Hamilton) (Cynthia Brentley Johnson ed., 2004).

2. See AKHIL REED AMAR, AMERICA’S CONSTITUTION: A BIOGRAPHY 5–19, 121 (2005) (analyzing the import of the words “We the People” in understanding the Constitution).

3. U.S. CONST. art. IV, § 4.

4. See generally LARRY D. KRAMER, THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW (2004).

5. Blatchford v. Native Vill. of Noatak, 501 U.S. 775, 779 (1991).

6. U.S. CONST. art. IV, § 4. In full, the Clause reads: “The United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect

connotations, linguistically and historically.<sup>7</sup> More than a handful of litigants over the years have attempted to invoke this clause as a source of judicially enforced rights. Yet, for roughly a century and a half, courts have incapacitated this option<sup>8</sup> with few exceptions.<sup>9</sup>

The second is an amendment with textually modest meaning but mighty muscles. The Eleventh Amendment 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>10</sup> On its face, the text could be read to preclude federal courts from resolving suits against a state sounding in diversity jurisdiction. Or, alternatively, the text might plausibly preclude any suit in which a citizen of one state or a citizen of a foreign government sues another state. But the U.S. Supreme Court has ruled that the language stands as evidence of<sup>11</sup> a wider and more tangled thicket of principles.<sup>12</sup> No citizen<sup>13</sup> or foreign government<sup>14</sup> may

each of them against Invasion; and on Application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic Violence.”

7. Edward A. Stelzer, *Bearing the Judicial Mantle: State Court Enforcement of the Guarantee Clause*, 68 N.Y.U. L. REV. 870, 870 (1993) (observing “the vast, untapped potential of these words”).

8. *See, e.g.*, *City of Rome v. United States*, 446 U.S. 156, 183 n.17 (1980); *Highland Farms Dairy, Inc. v. Agnew*, 300 U.S. 608, 612 (1937); *Mountain Timber Co. v. Washington*, 243 U.S. 219, 234 (1917); *Ohio ex rel. Davis v. Hildebrant*, 241 U.S. 565, 569 (1916); *O’Neill v. Leamer*, 239 U.S. 244, 248 (1915); *Marshall v. Dye*, 231 U.S. 250, 256–57 (1913); *Kiernan v. Portland*, 223 U.S. 151, 163–66 (1912); *Luther v. Borden*, 48 U.S. (7 How.) 1, 42, 47 (1849).

9. *New York v. United States*, 505 U.S. 144, 185 (1992) (“We need not resolve this difficult question today. Even if we assume that petitioners’ claim is justiciable, neither the monetary incentives provided by the Act nor the possibility that a State’s waste producers may find themselves excluded from the disposal sites of another State can reasonably be said to deny any State a republican form of government.”); *Baker v. Carr*, 369 U.S. 186, 242 n.2 (1962) (Douglas, J., concurring) (“The statement[] . . . that this guaranty is enforceable only by Congress or the Chief Executive is not maintainable.”); *Attorney Gen. of Mich. ex rel. Kies v. Lowrey*, 199 U.S. 233, 239 (1905) (finding that the creation of a school district by a state legislature does not violate the Guarantee Clause); *Forsyth v. Hammond*, 166 U.S. 506, 519 (1897) (holding that state courts rather than state legislature may determine municipal boundaries without violating the Guarantee Clause); *In re Duncan*, 139 U.S. 449, 461–62 (1891) (finding that statutes were validly enacted by a republican government); *Minor v. Happersett*, 88 U.S. 162, 175–77 (1874) (holding that the Guarantee Clause did not provide women with the right to vote); *see also Plessy v. Ferguson*, 163 U.S. 537, 563–64 (1896) (Harlan, J., dissenting) (arguing that racial segregation is “inconsistent with the guarantee given by the Constitution to each State of a republican form of government”).

10. U.S. CONST. amend. XI.

11. *See Alden v. Maine*, 527 U.S. 706, 713, 728 (1999) (stating that while the phrase “Eleventh Amendment immunity” abounds in caselaw, it is “convenient shorthand but something of a misnomer” because state sovereign immunity “derives not from the Eleventh Amendment but from the structure of the original Constitution itself”).

12. Richard H. Fallon, Jr., *The “Conservative” Paths of the Rehnquist Court’s Federalism Decisions*, 69 U. CHI. L. REV. 429, 446 (2002) (“Although most sovereign immunity questions have tolerably clear answers, they often lie at the end of a maze of precedents that only a specialist could navigate with confidence.” (citing David L. Shapiro, *The 1999 Trilogy: What Is Good Federalism?*, 31 RUTGERS L.J. 753, 758 (2000) (“[T]he total picture is a Byzantine aggregation of rules and doctrines.”))).

sue a state in federal<sup>15</sup> or state court<sup>16</sup> absent either express congressional authority or state waiver.<sup>17</sup> And even when Congress expressly purports to abrogate state immunity, this legislative action “must exhibit ‘congruence and proportionality’” to the constitutional violations Congress is attempting to remedy.<sup>18</sup> Further, Congress may only abrogate states’ sovereign immunity if the legislation is authorized by either the Enforcement Clause of the Fourteenth Amendment<sup>19</sup> or the Bankruptcy Clause of Article I, Section 8.<sup>20</sup>

The Supreme Court has located these rules in the Eleventh Amendment, or at least the “Eleventeenth Amendment”<sup>21</sup> and the background principle of sovereign immunity that amendment evidences. As Justice Antonin Scalia, an architect of this expansive reading of the Eleventh Amendment, has famously put it, the Court understands the provision “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.”<sup>22</sup>

This Article argues that if the Eleventh Amendment confirms a background “presupposition” of state sovereignty, the Guarantee Clause may enrich the debate about the nature of that presupposition, especially with respect to suits premised on federal question jurisdiction. Because the Guarantee Clause reinforces the principles of *popular* sovereignty and representative government, the Clause must be a critical part of any comprehensive textual or historical account about the scope of *state* sovereign immunity.

Others have proposed a wide range of potential interpretations of the Guarantee Clause, especially over the past three decades or so. As Akhil Reed Amar has put it, the Clause, “[l]ike the apostle Paul, . . . has been

13. *Seminole Tribe v. Florida*, 517 U.S. 44 (1996); *Hans v. Louisiana*, 134 U.S. 1 (1890).

14. *Principality of Monaco v. Mississippi*, 292 U.S. 313 (1934).

15. *Hans*, 134 U.S. at 11.

16. *Alden*, 527 U.S. at 759. The case prohibited a group of Maine probation officers from suing their employer, the state of Maine, in state court for refusing to pay them overtime in violation of their federal statutory rights.

17. *Id.*

18. *Bd. of Trs. of the Univ. of Ala. v. Garrett*, 531 U.S. 356, 365, 374 n.9 (2001) (quoting *City of Boerne v. Flores*, 521 U.S. 507, 520 (1997)).

19. *Fitzpatrick v. Bitzer*, 427 U.S. 445, 456 (1976).

20. *Cent. Va. Cmty. Coll. v. Katz*, 546 U.S. 356, 378–79 (2006); *see also id.* at 379–93 (Thomas, J., dissenting).

21. Pamela S. Karlan, *Disarming the Private Attorney General*, 2003 U. ILL. L. REV. 183, 188–93 (noting that following *Seminole Tribe v. Florida*, 517 U.S. 44 (1996), “a court that used to see the Fourteenth Amendment as a limitation on the Eleventh has come to see the Eleventh as a constraint on the Fourteenth”).

22. *Blatchford v. Native Vill. of Noatak*, 501 U.S. 775, 779 (1991); *see also Welch v. Tex. Dep’t of Highways and Pub. Transp.*, 483 U.S. 468, 472 (1987) (“[T]he Court long ago held that the Eleventh Amendment bars a citizen from bringing suit against the citizen’s own State in federal court, even though the express terms of the Amendment refer only to suits by citizens of another State.”).

‘made all things to all men.’”<sup>23</sup> Scholars and political figures have argued that the Guarantee Clause is a shield against states violating the Bill of Rights;<sup>24</sup> that the Clause should anchor voting rights decisions;<sup>25</sup> that the Clause protects the right to bear arms;<sup>26</sup> and, with increasing frequency, that the Clause bans or limits forms of direct democracy.<sup>27</sup> The wide and divergent interpretations that scholars have given to the Clause stand as accidental monuments to John Adams’s acknowledgment in an 1807 letter that he “never understood” what the Guarantee Clause meant and his simultaneous prediction that “no man . . . ever will.”<sup>28</sup>

Still, invoking the Guarantee Clause to inform sovereign immunity jurisprudence has escaped academic discussion. This is surprising for at least three reasons. First, the Supreme Court’s Eleventh Amendment jurisprudence has been besieged by well-known, well-argued criticisms. Commentators and jurists have convincingly labeled the Eleventh

23. Akhil Reed Amar, *The Central Meaning of Republican Government: Popular Sovereignty, Majority Rule, and the Denominator Problem*, 65 U. COLO. L. REV. 749, 749 (1994) (quoting 1 *Corinthians* 9:22 (King James)).

24. See, e.g., Arthur E. Bonfield, *The Guarantee Clause of Article IV, Section 4: A Study in Constitutional Desuetude*, 46 MINN. L. REV. 513, 568–69 (1962); see also Akhil Reed Amar, *The Bill of Rights and the Fourteenth Amendment*, 101 YALE L.J. 1193, 1242 (1992) (discussing Sen. James Nye and Rep. Roswell Hart—two proponents of this expansive idea during the 39th Congress of 1866).

25. JOHN HART ELY, *DEMOCRACY AND DISTRUST* 118 n.\* (1980).

26. CONG. GLOBE, 39TH CONG., 1ST SESS. 1629 (1866) (statement of Rep. Roswell Hart) (cited in *McDonald v. City of Chi.*, 130 S. Ct. 3020, 3102 n.25 (2010)).

27. See, e.g., Charles R. Brock, *Republican Form of Government Imperiled*, 7 A.B.A. J. 133 *passim* (1921); Philip P. Frickey, *The Communion of Strangers: Representative Government, Direct Democracy, and the Privatization of the Public Sphere*, 34 WILLAMETTE L. REV. 421, 427 (1998); Hans A. Linde, *When Initiative Lawmaking Is Not “Republican Government”*: *The Campaign Against Homosexuality*, 72 OR. L. REV. 19 *passim* (1993); Glenway Maxon, *Is the Referendum Anti-republican?*, 72 CENT. L.J. 378 *passim* (1911); Anya J. Stein, Note, *The Guarantee Clause in the States: Structural Protections for Minority Rights and Necessary Limits on the Initiative Power*, 37 HASTINGS CONST. L.Q. 343, 345, 362–67, 370 (2010); see also Kristin Feeley, *Guaranteeing a Federally Elected President*, 103 NW. U. L. REV. 1427, 1438 n.60 (2009) (“[D]irect democracy at the state level may or may not violate the guarantee of republican state government, but direct democracy at the national level, such as a national referendum, almost certainly violates the Guarantee Clause.”). *But see* Robert G. Natelson, *A Republic, Not A Democracy? Initiative, Referendum, and the Constitution’s Guarantee Clause*, 80 TEX. L. REV. 807, 814 (2002) (“[T]here is a clear historical answer to the question of whether legislative plebiscites violate the Guarantee Clause. That answer is ‘no.’”). *Cf.* *Minn. State Bd. for Cmty. Colls. v. Knight*, 465 U.S. 271, 285 (1984) (“It is inherent in a republican form of government that direct public participation in government policymaking is limited.”); *Pac. States Tel. & Tel. Co. v. Oregon*, 223 U.S. 118, 150–51 (1912) (finding that the question whether citizen-lawmaking violates the Guarantee Clause constitutes a non-justiciable political question); Clayton P. Gillette, *Is Direct Democracy Anti-democratic?*, 34 WILLAMETTE L. REV. 609, 622–35 (1998).

28. WILLIAM M. WIECEK, *THE GUARANTEE CLAUSE OF THE U.S. CONSTITUTION* 72 (1972) (quoting Letter from John Adams to Mercy Warren (July 20, 1807)). President Adams added that the “The word [republic] is so loose and indefinite that successive predominant factions will put glosses and constructions upon it as different as light and darkness.” *Id.*

Amendment doctrine atextual,<sup>29</sup> ahistorical,<sup>30</sup> divorced from basic constitutional purposes,<sup>31</sup> unconstitutional,<sup>32</sup> and just plain embarrassing.<sup>33</sup> With so many analytic arrows puncturing a wounded Eleventh Amendment jurisprudence, one might think that the Guarantee Clause, a provision born in part to protect the principles of popular sovereignty, might be awakened and enlisted in the front lines of this conversation. It has not. This Article seeks to fill that gap.

Second, courts have tranquilized the Guarantee Clause, concluding that all causes of action under that amendment are non-justiciable political questions.<sup>34</sup> Notable scholars have criticized this outcome.<sup>35</sup> It is highly unusual for an entire clause of the Constitution to be interpreted in a manner that, in effect, demotes it superfluity. On the scale of constitutional dormancy, the Clause is only rivaled, perhaps, by the Fourteenth

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29. See Bradford R. Clark, *The Eleventh Amendment and the Nature of the Union*, 123 HARV. L. REV. 1817, 1825 (2010) ("The leading theories of the Eleventh Amendment go beyond the words of the Amendment without a fully convincing theoretical basis."); John F. Manning, *The Eleventh Amendment and the Reading of Precise Constitutional Texts*, 113 YALE L.J. 1663, 1666, 1750 (2004) ("[I]t is a familiar reality that almost none of the Court's important cases involving the Amendment deal with matters that fall within its terms. . . . [T]he Court . . . must not readjust the Amendment's precise terms to capture their apparent background purpose."); Lawrence C. Marshall, *Fighting the Words of the Eleventh Amendment*, 102 HARV. L. REV. 1342 (1989); James E. Pfander, *History and State Stability: An "Explanatory" Account of the Eleventh Amendment*, 83 CORNELL L. REV. 1269, 1323–52 (1998) (contending that the amendment was an "explanatory amendment," designed to shield states from liability for debts accrued under the Articles of Confederation); see also John J. Gibbons, *The Eleventh Amendment and State Sovereign Immunity: A Reinterpretation*, 83 COLUM. L. REV. 1889, 2004 (1983) ("Neither federal question cases nor admiralty cases fit within [the Amendment's] language, within the intention of its framers, or within the interpretation that the Court consistently gave it prior to the constitutional crisis of 1877.").

30. See, e.g., Martha A. Field, *The Eleventh Amendment and Other Sovereign Immunity Doctrines: Congressional Imposition of Suit upon the States*, 126 U. PA. L. REV. 1203, 1279–80 (1978) (arguing that sovereign immunity is not constitutionally compelled and, therefore, can be abrogated by Congress); 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, 1033–34 (1983) ("The Court apparently views the amendment as a form of jurisdictional bar that specifically limits the power of federal courts to hear private citizens' suits against unconsenting states. This article contends that as a historical matter this view of the amendment is mistaken.").

31. Erwin Chemerinsky, *Against Sovereign Immunity*, 53 STAN. L. REV. 1201, 1204–06 (2001) (arguing that a basic constitutional premise—that a remedy exist for a right—is undermined by continuing the outdated principle of sovereign immunity).

32. *Id.*

33. See Michael E. Solimine, *Formalism, Pragmatism, and the Conservative Critique of the Eleventh Amendment*, 101 MICH. L. REV. 1463 (2003) (book review).

34. See *supra* notes 8–9, 12.

35. Dean John Hart Ely called Guarantee Clause jurisprudence an "unfortunate doctrine" that extended a proper holding in *Luther v. Borden*, 48 U.S. (7 How.) 1 (1849) to contexts in which political question considerations were less relevant. See ELY, *supra* note 25, at 118 n.\*; see also Risser v. Thompson, 930 F.2d 549, 552 (7th Cir. 1991) (Posner, J.) (stating that "this result has been powerfully criticized," but that "it is too well entrenched to be overturned at our level of the judiciary" (citing ELY, *supra* note 25, at 118 n.\*)).



Amendment's Privileges or Immunities Clause.<sup>36</sup> But even that clause has been interpreted to mean *something*.<sup>37</sup>

Third, scholars such as Amar and Deborah Jones Merritt have argued that the Clause protects sovereignty, though they invoke the term "sovereignty" in distinct ways that are in tension with one another. Amar argues that the Guarantee Clause is a basis for popular sovereignty and its attendant principles.<sup>38</sup> And Merritt argues that the Clause should be understood as a basis for state sovereignty defined as "autonomy" from undue intervention by the federal government.<sup>39</sup>

While neither argument directly addresses the Clause's implications for sovereign immunity, both of their visions, to varying degrees, are nonetheless reconcilable with my own argument. To the extent that damages lawsuits have the power to threaten a state's stability or existence

36. The Fourteenth Amendment reads: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States." U.S. CONST. amend. XIV. Scholars have noted that seminal cases decided in the late 1800s threw water on any heat initially radiating from this clause. The Slaughter-House Cases, 83 U.S. (16 Wall.) 36 (1873). Indeed, as one commentator put it, "From the perspective of modern American constitutional law, the privileges or immunities clause of the fourteenth amendment belongs in a museum, in the dinosaur section." Dr. Patricia Allan Lucie, *White Rights as a Model for Black: Or—Who's Afraid of the Privileges or Immunities Clause?*, 38 SYRACUSE L. REV. 859, 859 (1987); see also ROBERT H. BORK, *THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW* 37, 166 (1990) (concluding that the Supreme Court rendered the clause "a dead letter"); THE CONSTITUTION OF THE UNITED STATES OF AMERICA: ANALYSIS AND INTERPRETATION 1675 (Johnny H. Killian, George A. Costello & Kenneth R. Thomas eds., 2002) (stating that nineteenth-century Supreme Court precedents relegated the Privileges or Immunities Clause superfluous); Charles Fairman, *What Makes a Great Justice?: Mr. Justice Bradley and the Supreme Court, 1870–1892*, 30 B.U. L. REV. 49, 78 (1950) (stating that the *Slaughter-House Cases* "virtually scratched" the clause from the Constitution). But see Jeffrey M. Shaman, *On the 100th Anniversary of Lochner v. New York*, 72 TENN. L. REV. 455, 465 (2005) ("The Privileges or Immunities Clause is a more logical source for the protection of the right to contract than the Due Process Clause."); see also Douglas G. Smith, *Natural Law, Article IV, and Section One of the Fourteenth Amendment*, 47 AM. U. L. REV. 351, 383 (1997) (comparing the Privileges or Immunities Clause with the Guarantee Clause).

37. *Saenz v. Roe*, 526 U.S. 489, 500–01 (1999) (recognizing the right to travel). The Supreme Court recently considered the question of whether the Second Amendment is incorporated into the Due Process Clause or the Privileges or Immunities Clause of the Fourteenth Amendment. *McDonald v. City of Chi.*, 130 S. Ct. 3020 (2010). The Court concluded that the Due Process Clause is the source of this incorporation. See generally *id.*

38. See Amar, *supra* note 23, at 749. Amar explains that popular sovereignty includes "the people's right to alter or abolish, and popular majority rule in making and changing constitutions." He explains, however, that his exposition of the principles animating "Republican Government" is not intended to be exhaustive, as "many particular ideas can comfortably nestle under its big tent." *Id.*

39. See Deborah Jones Merritt, *The Guarantee Clause and State Autonomy: Federalism for a Third Century*, 88 COLUM. L. REV. 1, 25–26 (1988). Building on her thesis, Michael B. Rappaport briefly considered the possibility that the Guarantee Clause could serve as a basis for sovereign immunities in a footnote of *Reconciling Textualism and Federalism: The Proper Textual Basis of the Supreme Court's Tenth and Eleventh Amendment Decisions*, 93 NW. U. L. REV. 819, 830 n.41 (1999) ("It might be argued that state immunities could be derived from the Guarantee Clause."). He nevertheless rejected this possibility, concluding that "the clause, however, cannot be the source of these immunities [because, among other reasons, the] language and structure of the clause indicate that it was addressed primarily to anti-republican actions taken on the state level rather than by the federal government." *Id.*

by undermining fundamental premises of representative government, the Guarantee Clause is the Constitution's most textually and historically sound guard against these threats. But the Guarantee Clause also stands for the principle that the ultimate sovereign is the people, and therefore the people alone have the final say over when a state may inoculate itself with the immunities of sovereignty.

This Article proceeds as follows. Part I presents the textual and historical support for the view that the Guarantee Clause informs the background principle of state sovereign immunity in classes of cases not outlined in the Eleventh Amendment. The part opens with the text, examining the structure and words of the Clause, as well as the language of various draft versions that preceded it. This part also explores broader historical documents such as the Federalist Papers, constitutional ratification debates, and materials that proponents of the Constitution distributed to assure those who feared that the document's passage would critically weaken states. Collectively, this evidence reveals that the Clause, like others in Article IV, was motivated by a desire to protect what I call "state integrity." In particular, as a definitional matter, the Clause was intended to protect states' stability, parity, and existence, values that also have traditionally motivated sovereign immunity for states.

Through the Clause, the Founders sought to protect these tenets of state integrity through what they called "the republican principle."<sup>40</sup> The "republican principle" is the cardinal and indispensable axiom that the ultimate sovereignty in our constitutionally recognized polities rests in the hands of the governed, not persons who happen to govern. The Founders sought to actualize this principle through a specific form of government: representative democracy. They believed that this form defended the people against the polar forces of despotism and anarchy, forces that could strengthen or weaken a state to such a point that the union itself faced peril.

Part II provides an overview of the relevant sovereign immunity jurisprudence before testing the Guarantee Clause's key principles against three legal moments—two historical realities and one futurist hypothetical. These collective lessons counsel against eradicating sovereign immunity altogether, but nonetheless suggest that there is a gap between republican values and existing practice with respect to the content and contours of sovereign immunity in cases predicated on federal question jurisdiction.

Building on these lessons, Part III examines the doctrinal consequences of my reading of the Guarantee Clause. I argue that the Clause invites two departures from the current manner in which state sovereign immunity is enforced with respect to cases grounded in federal law. First, when Congress expressly abrogates states' sovereign immunity, any violating state should face suit under that enacted statutory provision unless, *by legislation*, that state expressly opts out of that damages provision. Second, states should be subjected to damages liability for violations of

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40. James Madison, *The Virginia Plan*, reprinted in *THE ANTI-FEDERALIST PAPERS AND THE CONSTITUTIONAL CONVENTION DEBATES* 36 (Ralph Ketcham ed., 1986).

constitutional provisions that bear a substantial nexus with free and equal representative government.

Part IV explores why rousing the Guarantee Clause would protect sovereign immunity from a number of the criticisms currently launched at that doctrine. The Clause protects the background principle of sovereign immunity from the criticism that the doctrine has outpaced the text of the Constitution. Simultaneously, taking the Clause seriously urges that it must not serve as an impenetrable barrier to suits in which state citizens sue states for violations of federal laws enacted by the people.

#### I. “A SLEEPING GIANT”<sup>41</sup>

The United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion; and on Application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic Violence.

United States Constitution, Article IV, Section 4<sup>42</sup>

[T]o assure us of the intention of the framers of this constitution to preserve the individual sovereignty and independence of the States inviolate, we find it expressly declared by the 4th section of the 4th article, that “the United States shall guarantee to every State in this Union, a republican form of government.”

Jasper Yeates, Pennsylvania Ratification Delegate, 1787<sup>43</sup>

To understand the implications of the Guarantee Clause for state sovereignty, this Article invokes a form of constitutional interpretation rooted in the original meaning of the Constitution’s language. In particular, I use a method popularized by Jack Balkin called “text and principle.”<sup>44</sup> This approach involves two steps. First, it requires a careful study of the Constitution’s precise text, with a focus on the original meaning of those words. Second, if the Constitution invokes a broad principle (like republicanism), interpreters investigate the reasons the adopters chose specific language, and exercise fidelity to the key concepts embodied in the constitutional text. The goal is not necessarily to discover how the Founders predicted that courts would apply necessarily capacious words to specific circumstances. Instead, the goal is to excavate and apply the principles the words command. To that end, this part marshals founding

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41. See CONG. GLOBE, 40TH CONG., 1ST SESS. 614 (1867) (statement of Sen. Sumner); Waldrop, *supra* note \*, at 275.

42. U.S. CONST. art. IV, § 4.

43. PENNSYLVANIA AND THE FEDERAL CONSTITUTION, 1787–1788, at 297 (John Bach McMaster & Frederick Dawson Stone eds., 1888).

44. See Jack M. Balkin, *Fidelity to Text and Principle*, in THE CONSTITUTION IN 2020, at 11, 11 (Jack M. Balkin & Reva B. Siegel eds., 2009); see also Jack M. Balkin, *Abortion and Original Meaning*, 24 CONST. COMMENT. 291, 293 (2007). Cf. Fred O. Smith, Jr., *Crawford’s Aftershock: Aligning the Regulation of Nontestimonial Hearsay with the History and Purposes of the Confrontation Clause*, 60 STAN. L. REV. 1497, 1521–23 (2008) (identifying the original principles animating the Confrontation Clause, and exploring ways the doctrine could be more faithful to those principles).

documents to discern the key concepts that motivated the language of the Guarantee Clause. Part II then tests whether these concepts are compatible with sovereign immunity in cases predicated on federal question jurisdiction.

The weight of historical evidence suggests that the Clause was conceived, at least in significant part, to protect the principle of "state integrity." By state integrity, I intend to capture a different and broader concept than Professor Merritt's "state autonomy" principle.<sup>45</sup> She argues that the Clause "suggest[s] a limit on the power of the federal government to infringe state autonomy: the citizens of a state cannot operate a republican government, 'choos[ing] their own officials' and 'enact[ing] their own laws,' if their government is beholden to Washington."<sup>46</sup> I argue that the Framers and the people were not only concerned about excessive intervention by the Federal government; they were at least as concerned with a broader range of threats to the states' existence, stability, and parity—threats to state integrity that loomed without and within.

As described below, these three prongs of state integrity were viewed as overlapping and symbiotic, rather than distinct concepts. A threat to a state's stability or existence is, by definition, a threat to that state's parity with its sister states. On the other hand, the strength that an enterprising state could gain by taking advantage of a destabilized state could, likewise, imperil state parity.

Among the means the Framers conscripted to protect state integrity were readily intuitive ones, including protecting states from invasions and insurrections.<sup>47</sup> Yet, in the same article and section of the Constitution that guards against those two threats, the Framers also invoked a third, less intuitive method to protect states from becoming significantly weaker or stronger than their neighbors, "the republican principle."<sup>48</sup> This principle affirmatively guaranteed that the ultimate power in state governments rested in the hands of the people. As James Madison explained, "the republican principle" defended against "the prospect of anarchy from the laxity of government everywhere."<sup>49</sup> And as Alexander Hamilton explained, among the virtues of a republic is that this "form of . . . society" helped reduce and prevent "internal corruptions" and "all manner of inconveniences."<sup>50</sup> Under such a system, the people have the power to change representatives and laws, including in the event of "ill-administration."<sup>51</sup> It was accepted

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45. Merritt, *supra* note 39, at 25; *see also* Amar, *supra* note 23, at 754 (explaining that under the "State Autonomy Thesis . . . a core meaning of the Article IV Republican Government Clause is that the federal government is limited in its ability to restructure state government at will").

46. Merritt, *supra* note 39, at 25.

47. U.S. CONST. art. IV, § 4.

48. Madison, *supra* note 40, at 36.

49. *Id.*

50. THE FEDERALIST NO. 9, *supra* note 1, at 56 (Alexander Hamilton).

51. THE FEDERALIST NO. 21, *supra* note 1, at 141 (Alexander Hamilton) ("The natural cure for an ill-administration, in a popular or representative constitution, is a change of men.").

“that frequent elections of the representatives of the people, are the sovereign remedy of all grievances in a free government.”<sup>52</sup>

### A. Text

Two text-based interpretive approaches help elucidate the original meaning of the Guarantee Clause.<sup>53</sup> The first is the legal maxim that a word is known by its associates.<sup>54</sup> The second is a more cardinal principle: words and phrases reflect what those who adopted the Constitution most naturally would have understood them to mean.<sup>55</sup>

#### 1. The Company the Clause Keeps

Each clause in Section 4 of Article IV is aimed at protecting states’ existence, stability, and parity.<sup>56</sup> The two clauses accompanying the

52. FABIVS, FRIENDS OF THE CONSTITUTION: WRITINGS OF THE “OTHER” FEDERALISTS, 1787–1788, at 62 (Colleen A. Sheehan & Gary L. McDowell eds., 1998).

53. See generally HOWARD BALL, HUGO L. BLACK: COLD STEEL WARRIOR 119 (1996) (describing Justice Black’s textual approach to constitutional interpretation). Even proponents of different forms of purposivism believe that interpretations should bear a significant relationship to the text. See ELY, *supra* note 25, at 118 n.\* (explaining that “in textual terms” the right to vote “is most naturally assignable to the Republican Form Clause”); GOODWIN LIU, PAMELA S. KARLAN & CHRISTOPHER H. SCHROEDER, KEEPING FAITH WITH THE CONSTITUTION 37 (2010) (“[C]onstitutional meaning is a function of both text and context.”); John Hart Ely, *Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 YALE L.J. 920, 949 (1973) (“A neutral and durable principle may be a thing of beauty and a joy forever. But if it lacks connection with any value the Constitution marks as special, it is not a constitutional principle and the Court has no business imposing it.”).

54. BLACK’S LAW DICTIONARY 1160–61 (9th ed. 2009) (defining *noscitur a sociis* as a “canon of construction holding that the meaning of an unclear word or phrase should be determined by the words immediately surrounding it”); see, e.g., *Watson v. Mercer*, 33 U.S. 88, 104–05 (1834) (invoking this principle to define the ex post facto clause in the constitution). *Ogden v. Saunders* is another early case that illustrates both the long-standing precedential validity and practical usefulness of this approach to constitutional interpretation. 25 U.S. 213, 217 (1827). Cf. Akhil Reed Amar, *Intratextualism*, 112 HARV. L. REV. 747 (1999) (arguing that when the same word or phrase recurs in the Constitution, a presumption should arise that those usages should receive similar constitutional definitions). But see Adrian Vermeule & Ernest A. Young, *Hercules, Herbert, and Amar: The Trouble with Intratextualism*, 113 HARV. L. REV. 730, 731 (2000) (rejecting a “strong” version of Amar’s argument that reoccurrences of the same word should generally be construed identically, but accepted a “weak” version of the argument sensitive to other traditional tools of constitutional interpretation such as history and precedent); see also Akhil Reed Amar, *Heller, HLR, and Holistic Legal Reasoning*, 122 HARV. L. REV. 145, 168 (2008) (clarifying that intratextual analysis “must be used with caution and close attention to context”).

My use of the clauses surrounding the Guarantee Clause falls outside the perimeter of this debate for two reasons. First, my argument does not depend at all on interpreting recurring words similarly or identically. Second, to the extent my argument may be termed “intratextual,” it is a “weak” form, sensitive to the context and proximity of a set of constitutional clauses and their shared history.

55. See *District of Columbia v. Heller*, 554 U.S. 570, 576 (2008) (“[T]he Constitution was written to be understood by the voters; its words and phrases were used in their normal and ordinary as distinguished from technical meaning.” (quoting *United States v. Sprague*, 282 U.S. 716, 731 (1931))); see also *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 188 (1824); *Martin v. Hunter’s Lessee*, 14 U.S. (1 Wheat.) 304, 325–26 (1816).

56. Cf. *Nw. Austin Mun. Util. Dist. No. One v. Holder*, 129 S. Ct. 2504, 2512 (2009) (“[A] departure from the fundamental principle of equal sovereignty requires a showing that

Guarantee Clause in that section protect each state "against Invasion" and "against domestic Violence."<sup>57</sup> In *Federalist No. 43*, Madison concluded that the Invasion Clause provided security to "each state . . . against foreign hostility, [and] . . . ambitious or vindictive enterprizes of its more powerful neighbours."<sup>58</sup> Likewise, the Domestic Violence Clause was aimed at squelching insurrections by those who wished "to subvert a government."<sup>59</sup> Madison predicted that such moments would be rare,<sup>60</sup> but that when they occurred, the insurrection should be "repressed by the Superintending power."<sup>61</sup>

Both clauses, then, protected states from events that threatened their existence, stability, and, concomitantly, parity with other states. But the promise of protection against insurrections came with the contemporaneous assurance that such protection would only come when a state expressly asked for it, either through an "Application of the Legislature," or the state's executive if the legislature could not convene.<sup>62</sup> Thus, the Invasion Clause carried with it the not-so-subtle understanding that the unchecked and unsolicited intervention by the federal government could be a source of, rather merely than a shield against, the very harm that clause sought to prevent: "tearing a State to pieces."<sup>63</sup>

Importantly, the Drafters feared that a calamitously ruptured state not only threatened that infirm state. It also threatened the existence of the union itself. In defending Section 4, Madison cited Montesquieu's observation, offered in *Spirit of Laws*, "that should a popular insurrection happen in one of the States, the others are able to quell it. Should abuses creep into one part, they are reformed by those that remain sound."<sup>64</sup> Otherwise, the probability would escalate that an insurrection could have "pervad[ed] all the States," a "calamity[] for which no possible constitution can provide a cure."<sup>65</sup>

The remaining sections in Article IV surrounding Section 4 similarly protect states' integrity, largely by protecting their equality relative to each other. Article IV, Section 1 contains the Full Faith and Credit Clause, requiring the mutual recognition of states' public records, acts, and

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a statute's disparate geographic coverage is sufficiently related to the problem that it targets.").

57. U.S. CONST. art. IV, § 4.

58. THE FEDERALIST NO. 43, *supra* note 1, at 312 (James Madison); *see also* Debate From the Virginia Convention (June 16, 1788), *reprinted in* 10 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 1299, 1311–12 (John P. Kaminski et al. eds., 1993). Some courts have cited *Federalist No. 43* for the proposition that to qualify as an invasion, the invader must be a government or similar political entity. *See, e.g.,* California v. United States, 104 F.3d 1086, 1091 (9th Cir. 1997); Padavan v. United States, 82 F.3d 23, 28 (2d Cir. 1996).

59. THE FEDERALIST NO. 43, *supra* note 1, at 312 (James Madison).

60. *Id.* at 312–13 (noting that "federal interposition" would occur in the rare instance that the insurgent faction bore "some proportion to the friends of government").

61. *Id.* at 313.

62. U.S. CONST. art. I, § 4.

63. THE FEDERALIST NO. 43, *supra* note 1, at 313 (James Madison).

64. *Id.* at 314 (citing MONTESQUIEU, SPIRIT OF LAWS (1748)).

65. *Id.* (citing MONTESQUIEU, *supra* note 64).

judgments.<sup>66</sup> Section 2, sometimes referred to as the Comity Clause,<sup>67</sup> guarantees that the citizens of each state will receive the privileges and immunities of the “citizens in the several states,” thereby protecting individuals from discrimination based on their state citizenship.<sup>68</sup> Section 3<sup>69</sup> further protects states’ integrity by ensuring that no newly created state can be “formed or erected within the Jurisdiction of any other State.”<sup>70</sup> Nor can any two states be joined together without those states’—and the federal government’s—consent.<sup>71</sup>

Thus, not only is every clause in Section 4 of Article IV aimed at protecting state’s existence, stability, and parity—every section in Article IV is as well.

## 2. “Republican Form”: Popular Sovereignty and Representative Government

There is broad consensus that as a textual matter, “republican” refers at a minimum to popular sovereignty and the principle of majority rule.<sup>72</sup>

66. U.S. CONST. art. IV, § 1. *See generally* 142 CONG. REC. S5932, 13360–61 (daily ed. June 16, 1996) (Letter from Laurence H. Tribe regarding the Defense of Marriage Act) (stating that the Full Faith and Credit Clause embodies “one of the Constitution’s core guarantees that the United States of America will remain a union of equal sovereigns”).

67. *See* Maldonado v. Houstoun, 177 F.R.D. 311, 327 n.19 (E.D. Pa. 1997) (“The Comity Clause guarantees that the ‘Citizens of each state shall be entitled to all Privileges and Immunities of Citizens in the several States.’” (quoting U.S. CONST. art. IV, § 2)); Robert J. Kaczorowski, *Revolutionary Constitutionalism in the Era of the Civil War and Reconstruction*, 61 N.Y.U. L. REV. 863, 889 (1986).

68. The clause has long been understood to mean that states cannot discriminate on the basis of an American citizen’s state citizenship. *See* Corfield v. Coryell, 6 F. Cas. 546, 549 (C.C.E.D. Pa.) (1823). James Madison, in *Federalist No. 42*, described a similar provision in the Articles of Confederation: “[T]hose who come under the denomination of *free inhabitants* of a State, although not citizens of such State, are entitled in every other State to all the privileges of *free citizens* of the latter; that is, to greater privileges than they may be entitled to in their own State.” THE FEDERALIST NO. 42, *supra* note 1, at 304 (James Madison). For a general discussion of the clause, see David S. Bogen, *The Privileges and Immunities Clause of Article IV*, 37 CASE W. RES. L. REV. 794 (1987). For a challenge to the traditional view of the clause, see Robert G. Natelson, *The Original Meaning of the Privileges and Immunities Clause*, 43 GA. L. REV. 1117, 1192 (2009) (“As originally understood, the Privileges and Immunities Clause did not protect a right to travel, or any other natural right.”).

69. In a memorialization of officially sanctioned terrorism, Section 3 provides that escaped slaves were required to be returned to the state in which they were owned. *Scott v. Sandford*, 60 U.S. 393, 537 (1856) (Grier, J., concurring) (“In the formation of the Federal Constitution, care was taken to confer no power on the Federal Government to interfere with this institution in the States.”); *cf.* Ronald Hamowy, THE ENCYCLOPEDIA OF LIBERTARIANISM 127 (2008) (referencing William Lloyd Garrison’s views that the pro-slavery Constitution amounts to a “pact with the devil”).

70. U.S. CONST. art. IV, § 3.

71. *Id.*

72. *See* Charlton C. Copeland, *Ex Parte Young: Sovereignty, Immunity, and the Constitutional Structure of American Federalism*, 40 U. TOL. L. REV. 843, 865 (2009) (“[T]he Guarantee Clause also stands for the position that recognizing states as political communities is inextricably connected to their being controlled by a sovereign People.”); Daniel S. Korobkin, *Republicanism on the Outside: A New Reading of the Reconstruction Congress*, 41 SUFFOLK U. L. REV. 487, 491 (2008) (“One conventional view of

Indeed, the word “republican” derives from the Latin word “*respublica*,” *res* means “affair” and *publicus* means “public.”<sup>73</sup> As James Madison noted, at its core, the word “republican” describes a government that “derives *all* its powers . . . from the great body of the people.”<sup>74</sup> Similarly, an eighteenth century dictionary defined “Republican” as “Placing the government in the people.”<sup>75</sup> Professor Amar has demonstrated that the historical record is replete with similar definitions of the word at the Founding,<sup>76</sup> leading to one increasingly accepted conclusion:

[T]he subtle invocation of the people in the Republican Government Clause of Article IV reaffirms basic principles of popular sovereignty—of the right of the people to ordain and establish government, of their right to alter or abolish it, and of the centrality of popular majority rule, in these exercises of ultimate popular sovereignty.<sup>77</sup>

The more debatable point is whether “republican form” also refers to a system of representative government.<sup>78</sup> However, the weight of the evidence suggests that the phrase “republican form” was understood to protect representative government. For example, Justice Joseph Story’s early-nineteenth-century constitutional *Commentaries* defined a republican government as one in which “all its powers were derived directly or indirectly from the people, and were administered by functionaries holding

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republicanism is simply government by the people, or popular sovereignty. In developing this theory of republicanism, Professor Amar suggests that true republicanism is properly understood as pro-democratic rather than anti-democratic.” (citing Amar, *supra* note 23, at 756–59); William T. Mayton, *Direct Democracy, Federalism and the Guarantee Clause*, 2 GREEN BAG 2d 269, 271 (1999) (stating that the Guarantee Clause prohibits “choices and experiments” that fall outside “the zone of popular sovereignty”); Note, *The Case for Compulsory Voting in the United States*, 121 HARV. L. REV. 591, 606 (2007) (“[T]here is some consensus that the clause guarantees majoritarian democratic government.”); see also Jacob Heller, Note, *Death by a Thousand Cuts: The Guarantee Clause Regulation of State Constitutions*, 62 STAN. L. REV. 1711, 1718 (2010) (“In short, republican governments rule (1) by the majority (and not a monarch), (2) through elected representatives, (3) in separate, coequal branches.”).

73. THE OXFORD ENGLISH DICTIONARY 673 (2d ed. 1989).

74. THE FEDERALIST NO. 39 (James Madison) (emphasis added) (cited in Amar, *supra* note 23, at 765).

75. Amar, *supra* note 23, at 764; Merritt, *supra* note 39, at 24 n.130.

76. Amar, *supra* note 23, at 761–73.

77. *Id.* at 762.

78. Amar has thoughtfully contended that “republican” was understood to protect majority rule, but not necessarily in the form of elected representatives. See Amar, *supra* note 23, at 756 n.27. He notes that most arguments as to whether republicanism was intended to protect representative government rely almost exclusively on *Federalist No. 10*, which I refer to in greater detail above in the text. *Id.* at 756. He contends that a close reading of that essay illustrates that Madison was expressing his own views; he was not purporting to capture or provide the commonly understood definition of the day. *Id.* at 757. In reaching the conclusion that I do, I rely on more than *Federalist No. 10*—including the text of the Constitution, dictionaries, treatises, other Federalist Papers, and the broader purpose behind the Guarantee Clause. See also Natelson, *supra* note 27, at 815 (“The Guarantee Clause *probably* does not require a state to have any representative legislature at all.”).



their offices during pleasure, or for a limited period, or during good behavior.”<sup>79</sup>

Likewise, in James Madison’s canonical essay on the danger of factions, he distinguished between what he considered to be a “pure Democracy” and a “Republic.”<sup>80</sup> He wrote: “A Republic, by which I mean a Government in which *the scheme of representation takes place* . . . promises the cure for which we are seeking.”<sup>81</sup> He continued:

The two great points of difference between a Democracy and a Republic are, first, the delegation of the Government, in the latter, to a small number of *citizens elected by the rest*: secondly, the greater number of citizens, and greater sphere of country, over which the latter may be extended.<sup>82</sup>

He expounded this view in *Federalist No. 37*:

The genius of republican liberty seems to demand on one side, not only that all power should be derived from the people, but that those entrusted with it should be kept . . . by a short duration of their appointments; and that even during this short period, the trust should be placed not in a few, but in a number of hands.<sup>83</sup>

Madison’s view that republicanism referred in part to representative government was by no means anachronistic. During the Virginia ratification debates, Patrick Henry stated, “The delegation of power to an adequate number of representatives, and an unimpeded reversion of it back to the people, at short periods, form the principal traits of a republican government.”<sup>84</sup> Even today, the *Oxford English Dictionary* defines a republic as “[a] state in which the supreme power rests in the people and their elected representatives or officers, as opposed to one governed by a king or similar ruler; a commonwealth.”<sup>85</sup>

The constitutional language surrounding “republican form” adds credence to the view that the phrase was understood to capture popular sovereignty *and* representative government within its ambit. For one, Article IV’s words reflect an unqualified assumption that each state would have a legislature. Article IV, Section 3 commands that no state shall be formed within the boundaries of another state unless Congress and both states’ legislatures approve. And the very section in which the Guarantee Clause is found, Article IV, Section 4, permits Congress to protect states from invasion if a state legislature requests.

It is relevant that every state had a legislature and a system of representative government at the time the Constitution was drafted and

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79. 1 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 293 (5th ed. 1994).

80. THE FEDERALIST NO. 10, *supra* note 1, at 65–66 (James Madison).

81. *Id.* at 65 (emphasis added).

82. *Id.* at 66 (emphasis added).

83. THE FEDERALIST NO. 37, *supra* note 1, at 253 (James Madison).

84. 3 DEBATES IN THE SEVERAL STATE CONVENTIONS, ON THE ADOPTION OF THE FEDERAL CONSTITUTION 396 (J. Elliot ed. 1881) [hereinafter ELLIOT DEBATES].

85. THE OXFORD ENGLISH DICTIONARY, *supra* note 73, at 673.

ratified. It was widely understood that the state governments in place at the founding were, in fact, republican. James Madison explained in *Federalist No. 43* that the new American system was “founded on republican principles, and composed of republican members.”<sup>86</sup> Further, as Justice Story explained in *Commentaries*, and as was reiterated in *Bouvier’s Law Dictionary* decades later, for a “form of government . . . to be guaranteed,” one must “suppose[] a form already established, and this is the republican form of government the United States have undertaken to protect.”<sup>87</sup> Madison confirmed this in equally lucid terms in *Federalist No. 37*.<sup>88</sup> In a governmental system comprised of intimately connected political institutions, a union has a “right to insist that the forms of government under which the compact was entered into, should be *substantially* maintained.”<sup>89</sup> Thus, substantial deviations from the forms of representative government found in states at the founding would prompt vexing if not insurmountable questions about whether the new forms were republican.

The goals of the Guarantee Clause counter any remaining doubt that the founders sought to include both “popular sovereignty” and “representative government” under the umbrella “republican form.” As described in greater detail below, the Founders sought to protect state stability, in order to ensure that no state became too strong (bending toward despotism) or too weak (bending toward anarchy).<sup>90</sup> Irregular or easily malleable legislation, according to Madison, was “odious to the people.”<sup>91</sup> To the extent the Clause was expected to reduce the prospect of chaotic anarchy, it is difficult to conceive how guaranteeing majority rule, without guaranteeing a “form” to actualize majority rule, could produce this stability. Representative government provided the well-tested and contained form for the ultimate sovereign, the people, to express its will.

## B. History

### 1. The Drafters

The drafting history of the Guarantee Clause further reflects the Founders’ view that republicanism would serve to protect state integrity. The Clause was conceived in May 1787, when Governor Edmond Randolph

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86. THE FEDERALIST NO. 43, *supra* note 1, at 310 (James Madison).

87. BOUVIER’S LAW DICTIONARY 465 (1868); Copeland, *supra* note 72, at 865 (“[T]he Guarantee Clause stands for the Constitution’s recognition that state governments are political communities, whose existence predates the Constitution’s ratification.”); *see also* 2 STORY, *supra* note 79, § 1807.

88. THE FEDERALIST NO. 47 (James Madison).

89. THE FEDERALIST NO. 43, *supra* note 1, at 310–11 (James Madison).

90. Shay’s Rebellion, effectuated under the Articles of Confederation, escalated the fear of anarchy. *See* WIECEK, *supra* note 28, at 48. King George III’s rule likely fueled the fear of despotism. *See generally* THE DECLARATION OF INDEPENDENCE (U.S. 1776). Dean Larry Kramer has identified evidence that some Anti-Federalists were also concerned that Federalists had monarchial aims. *See* KRAMER, *supra* note 4, at 130.

91. THE FEDERALIST NO. 37, *supra* note 1, at 253 (James Madison).

of Virginia introduced a resolution at the Constitutional Convention “that a Republican Government & the territory of each State, except in the instance of a voluntary junction of Government & territory, ought to be guaranteed by the United States to each State.”<sup>92</sup> Over the course of the next several months, as amendments to the resolution were considered and enacted, the Clause morphed into its current form. James Madison, one of the more active members of the amendment process, proposed substituting “that the constitutional authority of the States shall be guaranteed to them respectively [against] domestic as well as foreign violence.”<sup>93</sup>

At the outset, however, at least one historical characteristic about the Clause’s original form is noteworthy. The Clause closely resembles the language of a 1781 Virginia statute that ceded territory to the Confederation Congress: “[T]hat the States so formed shall be distinct Republican States and be admitted Members of the Federal Union having the same Rights of Sovereignty Freedom and Independence as the other States.”<sup>94</sup> In light of the fact that Randolph was not only a Virginia delegate,<sup>95</sup> but also the Governor of Virginia,<sup>96</sup> it is likely that the Clause is a self-conscious descendent of an earlier territory-based statute that expressly linked republicanism and sovereignty.

During the convention and beyond, Randolph and Madison both illuminated the Clause’s intent. Their words suggest that the Clause was intended to ensure that no state government became too destabilized or weak, and that no government became too strong. Either extreme threatened the remaining states and, therefore, the Union. At the convention, Randolph explained that the resolution was both to “secure” republican government and stop “domestic commotions.”<sup>97</sup> Just as important, he explained that warding off forms of commotion that could undermine a state’s existence and protecting republican government were related, rather than distinct, concepts: the republican principle would help reduce “the prospect of anarchy from the laxity of government everywhere.”<sup>98</sup>

Madison’s greater concern was that absent a guarantee of a republican form of government, a state government would become rapacious, devouring its neighbors.<sup>99</sup> He expressed concerns about monarchies and other unforeseeable “experiments” induced by “the ambition of enterprising

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92. 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 22 (Max Farrand ed., 1966) [hereinafter FARRAND].

93. 2 *id.* at 47–48.

94. WIECEK, *supra* note 28, at 16 (quoting 1 THE PAPERS OF THOMAS JEFFERSON 352 (Julian P. Boyd ed., 1950)).

95. 2 JOHN R. VILE, THE CONSTITUTIONAL CONVENTION OF 1787: A COMPREHENSIVE ENCYCLOPEDIA OF AMERICA’S FOUNDING 641 (2005); *see also* Madison, *supra* note 40, at 37–39.

96. VILE, *supra* note 95, at 641.

97. 2 FARRAND, *supra* note 92, at 47.

98. Madison, *supra* note 40, at 36.

99. *See* THE FEDERALIST NO. 43 (James Madison).

leaders."<sup>100</sup> He intimated that "ambitious or vindictive enterprizes" by powerful states could threaten the existence and stability of other states, by rendering "the weaker members of the Union" even weaker.<sup>101</sup>

## 2. Ratification Debates: Within and Without Chamber Halls

During ratification debates, leaders invoked the Clause and the Constitution's commitment to republicanism to ease anxiety that the new constitution would "annihilate[]"<sup>102</sup> or dissolve<sup>103</sup> states generally, and undermine their sovereignty in particular.<sup>104</sup> The most extensive exchanges with respect to the Clause during the ratification debates occurred in Pennsylvania. Lawyer James Wilson, who voted in favor of the Constitution<sup>105</sup> and would later serve on the Supreme Court,<sup>106</sup> catalogued some of the concerns others had expressed with respect to sovereignty. He noted others' apprehension that "[i]n this confederated republic, the sovereignty of states, it is said, is not preserved."<sup>107</sup> He remarked that some of the delegates had expressed concerns that if states were sued in federal court, they would need to "be engaged in a controversy" and "acknowledge the jurisdiction of that court."<sup>108</sup> That was not "the custom of sovereigns,"<sup>109</sup> a point made by delegates at ratification debates elsewhere.<sup>110</sup>

Wilson and delegate Jasper Yeates answered these charges in a number of ways. Wilson focused largely on the relationship between popular sovereignty and state sovereignty. He argued that supreme sovereignty actually rested with the people.<sup>111</sup> The people could delegate or surrender that sovereignty to a government if they wished.<sup>112</sup> And while he did not explicitly cite the Guarantee Clause in support of his popular sovereignty argument, it has been posited that he intended to mention the clause, since

100. *Id.* at 311; *see also* THE FEDERALIST NO. 21, *supra* note 1, at 141–42 (Alexander Hamilton) ("A guarantee by the national authority would be as much levelled against the usurpations of rulers, as against the ferments and outrages of faction and sedition in the community.").

101. THE FEDERALIST NO. 43, *supra* note 1, at 312 (James Madison).

102. Tench Coxe, *A Freeman, Essays: I–III*, PENNSYLVANIA GAZETTE, Jan. 23, 30 & Feb. 6, 1788, *as reprinted in* FRIENDS OF THE CONSTITUTION: WRITINGS OF THE "OTHER" FEDERALISTS, *supra* note 52, at 89 [hereinafter Coxe Essays].

103. Merritt, *supra* note 39, at 32 (General Brooks sought to allay fears that the "Constitution would produce a dissolution of the state governments." (quoting 2 ELLIOT DEBATES, *supra* note 84, at 99–100)).

104. *See* Merritt, *supra* note 39, at 39.

105. *Id.* at 32 n.173.

106. HAMPTON LAWRENCE CARSON, THE SUPREME COURT OF THE UNITED STATES: ITS HISTORY 147 (1892).

107. 2 ELLIOT DEBATES, *supra* note 84, at 455.

108. *Id.* at 490.

109. *Id.*

110. *Alden v. Maine*, 527 U.S. 706, 718 (1999) (describing the role of sovereign immunity discussions during ratification debates in Rhode Island, New York, and Virginia).

111. 2 ELLIOT DEBATES, *supra* note 84, at 456, 502.

112. *Id.* at 456; *id.* at 502 ("If they choose to indulge a part of their sovereign power to be exercised by the state governments, they may.").

he listed it in his notes as among “Reasons for Adopting the Constitution.”<sup>113</sup> Yeates was more explicit in his reliance on the Clause:

[T]o assure us of the intention of the framers of this constitution to preserve the individual sovereignty and independence of the States inviolate, we find it expressly declared by the 4th section of the 4th article, that “the United States shall guarantee to every State in this Union, a republican form of government.”<sup>114</sup>

Others, beyond the walls of the ratifying conventions, also relied on the Guarantee Clause to assuage fears about the role of state sovereignty and popular sovereignty in the new nation, sometimes alluding to the relationship between the two. Political economist Tench Coxe, under the pen name “A Freeman,” provides an illustrative discussion. He observed that many were concerned about whether, under the new Constitution, “state sovereignties . . . would indeed be finally annihilated.”<sup>115</sup> In his view, however, states could not “be dispensed with” under the new constitution.<sup>116</sup> “The states have, in the federal constitution, a guarantee of a *separate* republican form of government.”<sup>117</sup> He also explained that one of the Constitution’s apparent strengths was that it embodied republican principles, “a never failing antidote to aristocracy, oligarchy and monarchy.”<sup>118</sup> “[T]he sovereignty of the people is never to be infringed or destroyed.”<sup>119</sup>

Drawing on these principles, I argue that as the ultimate sovereign, the people have the final say over when a state may claim for itself the immunities of sovereignty. On the other hand, to the extent lawsuits for damages unduly present the risk of impeding state integrity by undermining rather than furthering representative government and the people’s will, the Guarantee Clause presents a means for states to protect themselves from such suits. The next part explores in practical terms how the Constitution’s guarantee of popular sovereignty and representative government—coupled with the Clause’s broader purpose of protecting state integrity—is critical to any comprehensive account about the doctrine of sovereign immunity, and the manner in which it should operate.

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113. Merritt, *supra* note 39, at 32 (quoting 2 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 439 (Merrill Jensen et al. eds., 1976)).

114. *Id.* at 31 (quoting PENNSYLVANIA AND THE FEDERAL CONSTITUTION, *supra* note 43, at 296–97).

115. Coxe Essays, *supra* note 102, at 89 (emphasis added).

116. *Id.* at 91.

117. *Id.* at 97.

118. *Id.* at 94.

119. *Id.* at 95. Immediately after one of his discussions of the Guarantee Clause, he noted that the Constitution could only be adopted and amended by votes of state legislatures, a perhaps inadvertent reminder that under the constitution, the people vested power in the states, who in turn delegated duties to the federal government, responsibilities that could be reclaimed under Article V.

## II. SOVEREIGN IMMUNITY AND REPUBLICANISM

The Constitution's guarantee of popular sovereignty and representative government commands concrete changes to the manner in which sovereign immunity operates. Before outlining the precise contours of these changes, however, it is important to identify (1) whether or how *current* sovereign immunity doctrine threatens republicanism, and (2) whether or how *eradicating* state sovereign immunity threatens republicanism.

### A. *The Life and Legacy of State Sovereign Immunity*

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.

United States Constitution, Eleventh Amendment<sup>120</sup>

While accounts of the Eleventh Amendment's conception are oft told, it is important to review those accounts to understand how such a narrowly drawn amendment has lived such an excitingly dubious life.

During the August 1792 Term of the Supreme Court, two citizens of South Carolina initiated a suit against the State of Georgia in the seminal case of *Chisholm v. Georgia*.<sup>121</sup> Both of the South Carolina citizens were executors of a British creditor.<sup>122</sup> Among the questions presented in the suit was whether "the State of Georgia, being one of the United States of America, [may] be made a party-defendant in any case, in the Supreme Court of the United States, at the suit of a private citizen, even although he himself is . . . a citizen of the State of South-Carolina?"<sup>123</sup> Some members of the Court viewed this question as a jurisdictional matter, examining whether the heads of jurisdiction articulated in the Constitution and federal law authorized such suits.<sup>124</sup> Others viewed the question as a more fundamental philosophical matter, in which the nation's character, the definition of sovereignty, and the definition of republicanism were all on trial.<sup>125</sup> After examining Article III and the Judiciary Act of 1789,<sup>126</sup> the

120. U.S. CONST. amend. XI.

121. 2 U.S. (2 Dall.) 419 (1793).

122. 1 CHARLES WARREN, THE SUPREME COURT IN UNITED STATES HISTORY 93 (1922).

123. *Chisholm*, 2 U.S. (2 Dall.) at 420.

124. *Id.* at 466 (opinion of Cushing, J.) ("The point turns not upon the law or practice of England, although perhaps it may be in some measure elucidated thereby, nor upon the law of any other country whatever; but upon the Constitution established by the people of the United States; and particularly upon the extent of powers given to the Federal Judicial in the 2d section of the 3d article of the Constitution."); *see also id.* at 430 (Iredell, J., dissenting) ("The question, as I before observed, is,—will an action of assumpsit lie against a State? If it will, it must be in virtue of the Constitution of the United States, and of some law of Congress conformable thereto.")

125. *See id.* at 452 (opinion of Blair, J.) ("[W]hen a State, by adopting the Constitution, has agreed to be amenable to the judicial power of the United States, she has, in that respect, given up her right of sovereignty."); *id.* at 457 (opinion of Wilson, J.) ("[T]he citizens of Georgia, when they acted upon the large scale of the Union, as a part of the 'People of the United States,' did not surrender the Supreme or sovereign Power to that State; but, as to the purposes of the Union, retained it to themselves. As to the purposes of the Union, therefore,

Court famously—or infamously, depending on one’s perspective—ruled 4-1 that such a suit could be brought.<sup>127</sup>

Under the traditional narrative, the Supreme Court’s decision in *Chisholm* “shocked the Nation,”<sup>128</sup> creating both the necessity and the momentum for the Eleventh Amendment’s passage.<sup>129</sup> Indeed, the amendment was introduced just two days after *Chisholm*,<sup>130</sup> proposed almost unanimously at Congress’s first opportunity,<sup>131</sup> and ratified five years later.<sup>132</sup> Even those who question the traditional view acknowledge that the decision fueled a sense of urgency in the debate on whether, and under what circumstances, states were amenable to civil suits.<sup>133</sup>

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Georgia is NOT a sovereign State.”); *id.* at 471 (opinion of Jay, C.J.) (“[W]e see the people acting as sovereigns of the whole country; and in the language of sovereignty, establishing a Constitution by which it was their will, that the State Governments should be bound, and to which the State Constitutions should be made to conform.”); *see also id.* at 457 (opinion of Wilson, J.) (“As a citizen, I know the Government of that State to be republican; and my short definition of such a Government is,—one constructed on this principle, that the Supreme Power resides in the body of the people.”); *id.* at 476 (opinion of Jay, C.J.) (“[T]rue Republican Government requires that free and equal citizens should have free, fair, and equal justice.”). For an essay navigating the five opinions authored in *Chisholm*, see Randy E. Barnett, *The People or the State?: Chisholm v. Georgia and Popular Sovereignty*, 93 VA. L. REV. 1729, 1733–34 (2007).

126. Ch. 20, 1 Stat. 73 (1789).

127. *Chisholm*, 2 U.S. (2 Dall.) at 480 (“Ordered, that unless the said State shall either in due form appear, or [show] cause to the contrary in this Court, by the first day of next Term, judgment by default shall be entered against the said State.”).

128. *Edelman v. Jordan*, 415 U.S. 651, 662 (1974); *see also* 1 CHARLES WARREN, THE SUPREME COURT IN UNITED STATES HISTORY 96 (1922) (“[*Chisholm*] fell upon the country with a profound shock.”). *But see* Gibbons, *supra* note 29, at 1926 (“Congress’s initial reaction to the *Chisholm* decision hardly demonstrates the sort of outrage so central to the profound shock thesis.”).

129. *See, e.g., Edelman*, 415 U.S. at 662 (“Sentiment for passage of a constitutional amendment to override the decision rapidly gained momentum.”); AMAR, *supra* note 2, at 332 (“To appreciate the impulse animating this (the Eleventh) amendment, we need to understand the first constitutionally significant case ever decided by the Supreme Court, *Chisholm v. Georgia*.”); Martha A. Field, *The Eleventh Amendment and Other Sovereign Immunity Doctrines: Part One*, 126 U. PA. L. REV. 515, 515 (1978) (“The one interpretation of the eleventh amendment to which everyone subscribes is that it was intended to overturn *Chisholm v. Georgia*.”); Fletcher, *supra* note 30, at 1034 (“The eleventh amendment was passed in the 1790’s in order to overrule a particular case—*Chisholm v. Georgia*.”); Manning, *supra* note 29, at 1680 (“No one questions that the nation adopted the Eleventh Amendment in response to *Chisholm*.”).

130. RICHARD H. FALLON, JR. ET AL., HART & WECHSLER’S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 871 (6th ed. 2009).

131. *Hans v. Louisiana*, 134 U.S. 1, 11 (1890) (“[*Chisholm*] . . . created such a shock of surprise throughout the country that, at the first meeting of Congress thereafter, the Eleventh Amendment to the Constitution was almost unanimously proposed, and was in due course adopted by the legislatures of the States.”).

132. *Edelman*, 415 U.S. at 662.

133. Kurt T. Lash, *Leaving the Chisholm Trail: The Eleventh Amendment and the Background Principle of Strict Construction*, 50 WM. & MARY L. REV. 1577, 1584 (2009) (“Although the decision added urgency to this debate, the actual opinions in the case had little impact due to their public unavailability for months after the decision was handed down.”).

Almost a century after the amendment's passage, the Court interpreted its scope in the landmark case *Hans v. Louisiana*.<sup>134</sup> By then, Congress permitted courts to resolve suits that involved federal questions, regardless of the parties' citizenship.<sup>135</sup> Relying on this entrée into federal court, a citizen of Louisiana sued the state under the federal constitutional clause that forbade states from "impairing the Obligation of Contracts."<sup>136</sup> A Louisiana federal court dismissed the suit pursuant to sovereign immunity.<sup>137</sup>

Reviewing that dismissal, the Supreme Court considered, for the first time, whether a citizen could sue his or her own state in federal court for violations of federal law. Citing Federalist Papers, ratification debates, and the reaction to *Chisholm*, the Court concluded that the history of the Constitution broadly and the Eleventh Amendment specifically precluded such an action. The Court explained that to permit citizens to sue their own states would be "no less startling and unexpected" than *Chisholm*.<sup>138</sup> The Court concluded that in "light of history and experience and the established order of things," permitting a suit against a state government was obnoxious to the common law and the intent fueling the Eleventh Amendment's passage.<sup>139</sup>

During the first half of the twentieth century, the Court expanded sovereign immunity to cases launched in federal court pursuant to admiralty jurisdiction<sup>140</sup> and Article III's grant of jurisdiction to cases between a foreign state and the United States.<sup>141</sup>

Within the last two decades, the Supreme Court has further expanded sovereign immunity in three principal ways. First, the Court has precluded

134. 134 U.S. 1 (1889).

135. Act of Mar. 3, 1875, ch. 137, 18 Stat. 470; *see also* Fletcher, *supra* note 30, at 1039 n.15 (noting that "the Judiciary Act of 1801 conferred the first original general federal question jurisdiction on the federal courts, but it was repealed a year after its enactment" (citing Act of Mar. 8, 1802, ch. 8, 2 Stat. 132; Act of Feb. 13, 1801, ch. 4, 2 Stat. 89)).

136. U.S. CONST. art. I, § 10, cl. 1. The state of Louisiana issued consolidated bonds in 1874, and declared by legislation that each of the bonds "create[d] a valid contract between the state and each and every holder of said bonds, which the state shall by no means and in nowise impair." *Hans v. Louisiana*, 24 F. 55, 55 (C.C.E.D. La. 1885).

137. *Hans*, 24 F. at 67–68. In dismissing the suit, the court relied on Alexander Hamilton in *Federalist No. 81* and James Madison's pronouncements during ratification debates. The Court was particularly persuaded, however, by the Eleventh Amendment. "The reasons which prompted [the amendment], and the arguments which secured it, are equally strong against the citizen suing his own state, and against his suing any other state. In both cases the exemption springs from the inability of a court to deal directly with the treasury of a state."

138. *Hans v. Louisiana*, 134 U.S. 1, 10–11 (1890).

139. *Id.*

140. *Ex Parte New York*, 256 U.S. 490, 500 (1921) ("[T]he immunity of a State from suit *in personam* in the admiralty brought by a private person without its consent, is clear."); *see also* U.S. CONST. art. III, § 2, cl. 1 ("The judicial Power shall extend to all Cases . . . to all Cases of admiralty and maritime Jurisdiction.").

141. *Principality of Monaco v. Mississippi*, 292 U.S. 313, 321–24, 329–30 (1934); *see also* U.S. CONST. art. III, § 2, cl. 1 ("The judicial Power shall extend . . . to Controversies . . . between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.").



citizens from initiating lawsuits grounded in federal law against states in state court<sup>142</sup> absent either express congressional authority or state consent.<sup>143</sup> Second, the Court has effectively limited Congress's power to abrogate sovereign immunity to instances where the legislation has "congruence and proportionality" to the constitutional violations Congress is attempting to remedy.<sup>144</sup> Third, the Court has concluded that Congress may only abrogate state sovereign immunity under the Enforcement Clause of the Fourteenth Amendment or the Bankruptcy Clause of Article I, Section 8.<sup>145</sup>

It is important to note that this body of law does not preclude all suits against state conduct that violates federal law.<sup>146</sup> There are two chief legal avenues through which plaintiffs may challenge such conduct. First, a litigant may file a suit for injunctive relief against state officials,<sup>147</sup> so long as the requested injunction does not command a state to dole out retrospective monetary payments.<sup>148</sup> To successfully obtain injunctive relief, however, a plaintiff must not only show that the government's illegal conduct *has* wronged her, but that the conduct will likely harm her *again*.<sup>149</sup> Second, plaintiffs may seek damages actions against officials acting under color of state law.<sup>150</sup> To successfully obtain damages from a state official, however, a plaintiff must show that the state official's conduct violated clearly established law, a hurdle plaintiffs often cannot overcome.<sup>151</sup>

## *B. With Sovereign Immunity: Our Countermajoritarian Experiment*

### 1. Departure from Statutory Text

In the late 1930s, Franklin D. Roosevelt, riding the wave of a considerable elective mandate for his party, successfully urged Congress to

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142. *Alden v. Maine*, 527 U.S. 706, 759 (1999).

143. *Id.*

144. *Bd. of Trs. of the Univ. of Ala. v. Garrett*, 531 U.S. 356, 365, 372 (2001) (quoting *City of Boerne v. Flores*, 521 U.S. 507, 520 (1997)).

145. *Cent. Va. Cmty. Coll. v. Katz*, 546 U.S. 356, 379–93 (Thomas, J., dissenting).

146. See generally Jesse H. Choper & John C. Yoo, *Who's so Afraid of the Eleventh Amendment? The Limited Impact of the Court's Sovereign Immunity Rulings*, 106 COLUM. L. REV. 213 (2006) (describing the alternate ways plaintiffs may challenge a state official's lawless conduct).

147. See *Ex Parte Young*, 209 U.S. 123, 125 (1908) ("While the courts cannot control the exercise of the discretion of an executive officer, an injunction preventing such officer from enforcing an unconstitutional statute is not an interference with his discretion.").

148. See generally *Edelman v. Jordan*, 415 U.S. 651 (1974).

149. See generally *City of Los Angeles v. Lyons*, 461 U.S. 95 (1983).

150. 42 U.S.C. § 1983 (2006).

151. See, e.g., *Safford Unified Sch. Dist. v. Redding*, 129 S. Ct. 2633 (2009) (concluding that while it was unconstitutional to strip search a thirteen-year-old girl on an apparently false report that she possessed two ibuprofen tablets, the search did not violate clearly established law); *Buckley v. Haddock*, 292 F. App'x 791, 792–93 (11th Cir. 2008) (concluding that it did not violate clearly established law to repeatedly tase an unarmed, handcuffed, and sobbing man who refused to sign a traffic citation).

pass the Fair Labor Standards Act.<sup>152</sup> It passed the House 291–89, and cleared the Senate on a full-throated voice vote.<sup>153</sup> Popular sovereignty and representative government were in action.<sup>154</sup> The Act required, among other things, the payment of a minimum wages to employees<sup>155</sup> and was later amended to include overtime pay provisions.<sup>156</sup> Further, the Act contained a private cause of action, giving employees a legal weapon to wield if an employer opted to defy the law.<sup>157</sup> A few decades later, the Court remarked that congressional legislation must evince a clear intent to abrogate states' immunity in order to permit damages lawsuits against them.<sup>158</sup> In 1974, Congress responded by amending the Act to provide that the term employer included "the government of a State or political subdivision thereof [or] any agency of . . . a State, or a political subdivision of a State."<sup>159</sup>

In 1996, John Alden and a group of other probation officers in Maine sought to avail themselves of the law that their duly elected representatives passed.<sup>160</sup> The group brought a lawsuit in state court, alleging that the state of Maine failed to pay them overtime as the Act required. The suit faced an uphill climb; the Supreme Court had already ruled that Congress could not abrogate sovereign immunity pursuant to its Commerce Clause powers.<sup>161</sup> However, Alden relied on the language of the Eleventh Amendment.<sup>162</sup> Simply put, he contended that an amendment expressly addressing the "Judicial power of the United States" extended only to the judicial power of the United States, and not to suits brought in state courts.<sup>163</sup>

Alden's quest failed. The Maine Supreme Court ruled that "[i]f Congress cannot force the states to defend in federal court against claims by private individuals, it similarly cannot force the states to defend in their own courts against these same claims."<sup>164</sup> The Supreme Court affirmed.<sup>165</sup> The effect was that despite the fact that the republican process produced a statutory right to overtime pay, state employees like Alden were without a compensable remedy if their states chose to ignore the law. And while injunctive relief may prove an adequate remedy in some contexts,<sup>166</sup> that

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152. KENNETH S. DAVIS, *FDR: INTO THE STORM, 1937–1940: A HISTORY* 218–19 (1993).

153. *Id.*

154. *See generally* WILLIS J. NORDLUND, *THE QUEST FOR A LIVING WAGE: THE HISTORY OF THE FEDERAL MINIMUM WAGE PROGRAM* (1997).

155. Fair Labor Standards Act of 1938, ch. 676, § 6, 52 Stat. 1060, 1062–63 (codified as amended at 29 U.S.C. § 206 (2006)).

156. 29 U.S.C. § 207.

157. § 16, 52 Stat. at 1069 (codified as amended at 29 U.S.C. § 216(b)).

158. *Emps. of the Dep't of Health & Welfare v. Dep't of Health & Welfare*, 411 U.S. 279, 281, 285 (1973).

159. 29 U.S.C. § 203(x).

160. *Alden v. Maine*, 715 A.2d 172, 173 (Me. 1998), *aff'd*, 527 U.S. 706 (1999).

161. *Id.*

162. *See id.* at 174.

163. *See generally Alden*, 527 U.S. 706.

164. *Alden*, 715 A.2d at 174.

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

166. *See generally* Pamela S. Karlan, *The Paradoxical Structure of Constitutional Litigation*, 75 *FORDHAM L. REV.* 1913 (2007).

was not the case for Alden and those in his position. He would never receive *compensation* for denied overtime pay.<sup>167</sup>

In this way, Alden is similar to state employees like Patricia Garrett, a breast cancer survivor who sued the state of Alabama for alleged employment discrimination by the University of Alabama. Invoking the Eleventh Amendment, the Supreme Court dismissed her suit on the grounds that the Americans with Disabilities Act was not “congruent and proportional” to the state constitutional violations Congress sought to remedy.<sup>168</sup> Also like Alden, J. Daniel Kimel, Jr. sued the state of Florida for compensatory relief authorized by the Age Discrimination in Employment Act.<sup>169</sup> Citing the Eleventh Amendment, the Supreme Court dismissed Kimel’s suit too, striking down portions of the Act while depriving him of the benefits his elected representatives sought to award him.<sup>170</sup>

In each of these moments, the Court did more than deny individual plaintiffs the ability to file a suit. Rather, the Court overturned provisions of legislation enacted by Congress that expressly granted citizens the right to file suit. To be sure, courts have long assumed the role of declaring unconstitutional statutes invalid. But in these instances, the Court went further. As discussed below, it overturned democratically enacted legislation while openly stating that the result was not dictated by the only constitutional provision that explicitly exempts states from certain lawsuits.

## 2. Departure from the Constitutional Text

The Court has long acknowledged that the text of the Eleventh Amendment does not in and of itself compel a ban on citizens suing their states for violating federal law. An early and explicit acknowledgment of this appears in *Hans v. Louisiana*.<sup>171</sup> There, the Court concluded that citizens could not sue their own states for violations of federal law.<sup>172</sup> In doing so, the court rejected two plausible textual readings of the amendment, both of which have been thoroughly explored by scholars.

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167. Under 42 U.S.C. § 1983, plaintiffs may seek damages against state *officials*, but as others have made clear, this is often inadequate, because such suits often fail under qualified immunity principles. *See generally id.* at 1918, 1920.

In the particular case of John Alden and his fellow probation officers, other barriers stood in the way of a successful Section 1983 suit. First, under Maine law, the State rather than any identifiable official was charged with providing overtime pay. *See* Pamela S. Karlan, *The Irony of Immunity: The Eleventh Amendment, Irreparable Injury, and Section 1983*, 53 STAN. L. REV. 1311, 1328–29 (2001) (explaining Alden’s quandary). Second, at the time, at least one federal court of appeals had ruled that § 1983 suits were impermissible in light of Fair Labor Standards Act’s carefully calibrated compensatory scheme. *Id.* at 1323 (citing *Kendall v. City of Chesapeake*, 174 F.3d 437, 443 (4th Cir. 1999)).

168. *Bd. of Trs. of the Univ. of Ala. v. Garrett*, 531 U.S. 356, 374 (2001).

169. *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 70 (2000).

170. *Id.* at 92.

171. 134 U.S. 1, 10 (1889) (putting forth both plausible textual interpretations of the amendment and stating, “It is true, the amendment does so read”).

172. *Id.*; *see also supra* notes 138–39 and accompanying text.

*a. Plain Meaning*

One textual interpretation has been termed the “plain meaning” approach,<sup>173</sup> and is often associated with Lawrence Marshall.<sup>174</sup> Under this theory, the “essentially unambiguous dictates of the amendment’s language” prohibit federal jurisdiction over a state.<sup>175</sup> The principal consequence of this reading is that even if an “out-of-state citizen brings the case [arising] under federal question[] jurisdiction, the suit is” impermissible.<sup>176</sup> Further, under Marshall’s reading, the language of the Eleventh Amendment does not bar citizens from suing their own states under any applicable head of federal jurisdiction—including federal questions<sup>177</sup> and admiralty.<sup>178</sup>

To support this reading, Professor Marshall has posited that the distinction drawn in the Eleventh Amendment between in-state and out-of-state plaintiffs was intentional.<sup>179</sup> He has noted that a number of claims existed at the time against vulnerable states by out-of-state defendants, and that the drafters might have wanted to protect those states while still giving litigants the chance to hold states accountable for violations of the Constitution.<sup>180</sup> Out-of-state plaintiffs had initiated land claims against Virginia, seeking to make land grants using almost two million acres of property in Virginia.<sup>181</sup> Similarly, much of the southern states’ war debt

173. *Id.*

174. See Marshall, *supra* note 29, at 1371; see also Manning, *supra* note 29, at 1750. Professor John Manning does not state whether he finds the “plain meaning” or diversity explanation more persuasive. Finding both possibilities plausible, he has presented a modified version of the argument that sovereign immunity is limited to the categories of cases enumerated by the Eleventh Amendment’s text. The alternative view found in current doctrine—that the Eleventh Amendment simply serves as evidence of the importance of sovereign immunity—is too quick to ignore two canons of interpretation: the specificity canon and the *expressio unius* canon. Manning, *supra* note 29, at 1671. Under the specificity canon, a specific reference in legislation will govern an earlier, more general reference. See *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000). And under the *expressio unius* maxim, “the mention of some implies the exclusion of others not mentioned.” See *United Dominion Indus., Inc. v. United States*, 532 U.S. 822, 836 (2001). Applying either canon, Manning contends that *Alden* and its predecessors overlook the likelihood that the “Eleventh Amendment carries a negative implication, precluding judicial recognition of additional categories of state sovereign immunity under the general authority of Article III or the constitutional structure.” See Manning, *supra* note 29, at 1671; see also John F. Manning, *Deriving Rules of Statutory Interpretation from the Constitution*, 101 COLUM. L. REV. 1648 (2001). Bradford Clark has characterized Manning’s view as the “compromise theory.” Clark, *supra* note 29, at 1832.

175. Marshall, *supra* note 29, at 1346.

176. *Id.* at 1346.

177. 28 U.S.C. § 1331 (2006).

178. 28 U.S.C. § 1333.

179. Marshall, *supra* note 29, at 1362.

180. The original Constitution does, after all, contain express limitations on state power. See generally U.S. CONST. art. I, § 10.

181. Marshall, *supra* note 29, at 1362–63; see *Hollingsworth v. Virginia*, 3 U.S. (3 Dall.) 378, 382 (1798). During the Virginia Ratification Convention, delegate George Mason expressed concerns that if the land grant plaintiffs prevailed, it would “introduce a scene of distress and confusion never heard of before. Our peasants will be, like those mentioned by

was held by out-of-state speculators, “whom many states had a strong aversion to paying.”<sup>182</sup> Still, a number of Framers, Hamilton among them, believed that federal courts had to have the power to “restrain or correct the infractions” of the Constitution, including infractions committed by states.<sup>183</sup> The Eleventh Amendment struck that balance.

*b. Diversity Explanation*

The second plausible technical reading has been termed the “diversity explanation,” and is most associated with Judge John Gibbons<sup>184</sup> and Judge William A. Fletcher.<sup>185</sup> Judge Fletcher has described the explanation this way: rather than “forbidding” lawsuits against states by foreign citizens, foreign subjects, and out-of-state citizens, the amendment instead “fail[ed] to authorize” these forms of diversity jurisdiction.<sup>186</sup> As observed, Article III provides that “[t]he judicial Power shall extend to all Cases, in Law and Equity . . . between a State and Citizens of another State . . . and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.”<sup>187</sup> Under the diversity explanation, the Eleventh Amendment iterates that this language from Article III does not authorize federal courts to hear cases against states initiated by citizens of other states or foreign citizens. Such iteration was necessary to overrule the Supreme Court’s construction of the Diversity Clause of Article III in *Chisholm*. In the words of Judge Gibbons, the amendment “did nothing more than amend article III, section 2 of the Constitution to eliminate the power of federal courts to hear suits against states in which the sole basis for jurisdiction was the status of the parties.”<sup>188</sup>

The chief consequence of the diversity explanation is that when a suit against a state commences in federal court pursuant to federal question jurisdiction or admiralty jurisdiction, the language of the Eleventh Amendment does not bar the suit<sup>189</sup> regardless of the plaintiff’s place of citizenship. This is not to say that such suits would necessarily be permissible if the Court embraced the diversity explanation. But if such suits are not permitted, a source other than the Eleventh Amendment’s text must give rise to this proscription.

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Virgil, reduced to ruin and misery, driven from their farms, and obliged to leave their country.” Marshall, *supra* note 29, at 1364.

182. Marshall, *supra* note 29, at 1366.

183. *Id.* at 1367 (citing THE FEDERALIST NO. 80, *supra* note 1, at 568 (Alexander Hamilton)).

184. Gibbons, *supra* note 29, at 1926–38.

185. William A. Fletcher, *The Diversity Explanation of the Eleventh Amendment: A Reply to Critics*, 56 U. CHI. L. REV. 1261, 1274 (1989) (arguing that the clause simply explained the metes and bounds of the diversity provision in Article III); *see also* U.S. CONST. art. III, § 2 (“The judicial Power shall extend . . . to Controversies between two or more States . . . between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.”).

186. *See* Fletcher, *supra* note 185, at 1274 (emphasis omitted).

187. U.S. CONST. art. III, § 2.

188. Gibbons, *supra* note 29, at 1894.

189. Fletcher, *supra* note 30, at 1060.

c. *Background Principle of Sovereign Immunity*

Despite the long-running disagreement between proponents of the plain meaning thesis and proponents of the diversity thesis, there is at least one point on which they agree. The text of the Eleventh Amendment says nothing about a citizen suing her own state for violations of federal law. As such, the *Hans* Court rejected both of these plausible readings of the Eleventh Amendment's scope when it concluded that citizens cannot sue their own states in actions arising under federal law. The Court explained that to permit citizens to sue their own states pursuant to federal question jurisdiction would be "no less startling and unexpected" than *Chisholm*.<sup>190</sup> In "light of history and experience and the established order of things," the Court concluded that permitting a suit against a state government was obnoxious to the common law, the *Federalist Papers*, and the intent fueling the Eleventh Amendment's passage.<sup>191</sup> At a minimum, the Eleventh Amendment stood as one piece of evidence among others that private citizens could not sue their own states under federal question jurisdiction.

Over the course of the twentieth century, relying on similar reasoning, the Court further expanded sovereign immunity in a number of ways. Among these expansions, the Court held that immunity applied in federal cases initiated against states pursuant to admiralty jurisdiction.<sup>192</sup> Then, in *Principality of Monaco v. Mississippi*,<sup>193</sup> the Court held that states were also immune from suits filed pursuant to Article III's grant of jurisdiction to cases between a foreign state and the United States.<sup>194</sup> The Court reasoned in *Principality of Monaco* that "[b]ehind the words" of Article III and the Eleventh Amendment "are postulates which limit and control."<sup>195</sup> These limiting principles include the "postulate that States of the Union, still possessing attributes of sovereignty, shall be immune from suits, without their consent, save where there has been 'a surrender of this immunity in the plan of the convention.'"<sup>196</sup>

The high-water mark of the Court's expansion of sovereign immunity, however, occurred roughly a century after *Hans*, in *Alden*. The Court found that Congress may not permit citizens to sue states for violations of federal laws passed pursuant to the Commerce Clause, even when that suit was initiated in state court. Bolstering this view, the Court provided its most recent detailed description of the operative historical narrative that sustains sovereign immunity jurisprudence. According to the *Alden* Court, it was well-established at the Founding that the English King "could not be sued

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190. *Hans v. Louisiana*, 134 U.S. 1, 11 (1889).

191. *Id.* at 14–15.

192. *Ex Parte New York*, 256 U.S. 490, 500 (1921); *see also* U.S. CONST. art. III, § 2, cl. 1.

193. *Principality of Monaco v. Mississippi*, 292 U.S. 313 (1934).

194. *Id.* at 321–24, 329–30 (1934); *see also* U.S. CONST. art. III, § 2, cl. 1 ("The judicial Power shall extend . . . to Controversies . . . between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.")

195. *Principality of Monaco*, 292 U.S. at 322.

196. *Id.* at 322–23 (citing THE FEDERALIST No. 81 (Alexander Hamilton)).

without [his] consent,"<sup>197</sup> but that English lords could be subjected to suit. As a result, the ratification debates were rife with concerns about whether the creation of a new, sovereign federal government would subject states, like the British lords, to suit in a "higher" court.<sup>198</sup>

Constitutional drafters and promoters assured states—both in the *Federalist Papers* and in ratification conventions—that the Constitution maintained sovereign immunity for states.<sup>199</sup> Alexander Hamilton expressed in *Federalist No. 81* that private suits against states in federal court, at least for debts that states owed, would amount to an "unwarrantable" "war against the contracting State."<sup>200</sup> Similarly, during the Virginia Ratification Convention, both James Madison and John Marshall pledged that despite its language, Article III, Section 2, did not permit suits by citizens of one state against another state without that state's consent.<sup>201</sup> At most, Madison explained, the section permitted citizens to *bring* such a suit, but the defendant-state would have the prerogative to object.<sup>202</sup>

The views of Hamilton, Madison, and Marshall were not unanimous.<sup>203</sup> James Wilson championed the position that "[w]hen a citizen has a controversy with another state, there ought to be a tribunal where both parties may stand on a just and equal footing."<sup>204</sup> Still, the *Alden* Court concluded that the prevailing impression of the ratifying states, in light of according assurances, was that they would not be subject to suit.<sup>205</sup>

The *Alden* Court also supported its view by pointing to the "structure of the original Constitution" and the "essential principles of federalism"

197. *Alden v. Maine*, 527 U.S. 706, 715 (1999) (citing *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419, 437–46 (1793) (Iredell, J., dissenting)); *Nevada v. Hall*, 440 U.S. 410, 414 (1979) ("The immunity of a truly independent sovereign from suit in its own courts has been enjoyed as a matter of absolute right for centuries. Only the sovereign's own consent could qualify the absolute character of that immunity."); 1 WILLIAM BLACKSTONE, COMMENTARIES \*234–35.

198. *Alden*, 527 U.S. at 715; *Hall*, 440 U.S. at 414; see also CLYDE E. JACOBS, THE ELEVENTH AMENDMENT AND SOVEREIGN IMMUNITY 1–40 (1972).

199. *Alden*, 527 U.S. at 716.

200. *Id.* at 717 (citing THE FEDERALIST NO. 81 (Alexander Hamilton)).

201. *Id.* at 717–18 (citing 3 ELLIOT DEBATES, *supra* note 84, at 533 (James Madison)).

202. *Id.* ("It appears to me that this [clause] can have no operation but this—to give a citizen a right to be heard in the federal courts; and if a state should condescend to be a party, this court may take cognizance of it." (citing 3 ELLIOT DEBATES, *supra* note 84, at 533 (James Madison))).

203. See JACOBS, *supra* note 198, at 40 ("[T]he legislative history of the Constitution hardly warrants the conclusion drawn by some that there was a general understanding, at the time of ratification, that the states would retain their sovereign immunity.").

204. *Hall*, 440 U.S. at 419 n.17 (citing 3 ELLIOT DEBATES, *supra* note 84, at 555).

205. *Alden*, 527 U.S. at 718–19. The Court relied on declarations made during ratifying conventions. For example, the Rhode Island Convention proclaimed that "[i]t is declared by the Convention, that the judicial power of the United States, in cases in which a state may be a party, does not extend to criminal prosecutions, or to authorize any suit by any person against a state." *Id.* at 718 (quoting 1 ELLIOT DEBATES, *supra* note 84, at 336). Similarly, the New York Convention declared that "the judicial power of the United States, in cases in which a state may be a party, does not extend to criminal prosecutions, or to authorize any suit by any person against a state." *Id.* at 718–19 (quoting 1 ELLIOT DEBATES, *supra* note 84, at 329).

reflected in that structure.<sup>206</sup> The Court summarily cited Article IV—where the Guarantee Clause is found—to support its structural argument. The Court explained: “Various textual provisions of the Constitution assume the States’ continued existence and active participation in the fundamental processes of governance.<sup>207</sup> Thus, in one broad sweep, the Court cited Article IV as if each of its clauses—including the Privileges and Immunities Clause, the Fugitive Slave Clause, and the Guarantee Clause—were all equally relevant to the question of state sovereign immunity. In doing so, it missed a moment to focus on the clause most relevant to the “processes of governance”: the Guarantee Clause. Derivatively, it failed to grapple with the tension that exists between the notions that the people and the states wield the ultimate power in our federal system.

To be sure, the *Alden* Court appreciated that lawsuits against states present real challenges to representative government. “If the principle of representative government is to be preserved to the States,” Justice Kennedy wrote, “the balance between competing interests must be reached after deliberation by the political process established by the citizens of the State, not by judicial decree mandated by the Federal Government and invoked by the private citizen.”<sup>208</sup> Yet, this statement is wrought with irony. In the same opinion, by judicial decree, the Court held that a portion of a statute passed by our political processes could not stand because of a constitutional “background principle.”<sup>209</sup>

“Judging the constitutionality of an Act of Congress,” the Court has stated, is “the gravest and most delicate duty that this Court is called upon to perform.”<sup>210</sup> However, this principle is hard to reconcile with the fall of congressionally passed abrogation provisions of the Americans with Disabilities Act, Age Discrimination in Employment Act, and Fair Labor Standards Act. Is overturning democratically enacted legislation, while denying damages to aggrieved citizens for violations of federal law, a necessary cost of sovereign immunity? Or might there be another recalibration of the doctrine that accounts both for the costs to representative government inherent in permitting all suits against states, and the costs inherent in disallowing all such suits?

### C. Money Motivates

For centuries, state-sanctioned American apartheid represented a defiant denunciation of republican ideals. Popular sovereignty is threatened by a system that arbitrarily locks groups out of full participation in public life. At its absolute extreme, to arbitrarily deny a group of people full political participation is to approach a monarchical form of government, for a monarchy consigns all power in the hands of one at the expense of the rest.

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206. *Id.* at 748.

207. *Id.* at 713 (citing *Printz v. United States*, 521 U.S. 898, 919 (1997)).

208. *Id.* at 751.

209. *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 72 (1996).

210. *Citizens United v. FEC*, 130 S. Ct. 876, 917–18 (2010) (Roberts, J., concurring) (quoting *Blodgett v. Holden*, 275 U.S. 142, 147–48 (1927) (Holmes, C.J., concurring)).



Short of that extreme, unreasonably denying a group of people a full and equal public voice is often tantamount to an aristocratic cabal, for it places power in the hands of a few at the expense of the many. It is perhaps for this reason that Chief Justice John Jay defined republican government in *Chisholm* as one where “free and equal citizens should have free, fair, and equal justice.”<sup>211</sup> Absent this equality, one or more people likely are “usurping . . . and fraudulently wielding [sic] more than [their] share of the popular sovereignty.”<sup>212</sup>

In 1954, the Supreme Court brought America closer to the equality ideal when it required de jure integration of public schools.<sup>213</sup> Still, the bulk of school districts throughout the South failed to integrate until the 1960s or later.<sup>214</sup> Recently, four economists have shed considerable light on why this occurred.<sup>215</sup> Isolating key alternative variables, their article demonstrates that nearly half of desegregated school districts were motivated by Congress’s decision to tie conditional grants to states in exchange for, as they put it, “[d]ismantling the dual system of education in the South.”<sup>216</sup> The authors explain that school boards had their price.<sup>217</sup> To integrate in a meaningful way, a district needed to be paid, on average, \$1,200 per pupil by the federal government.<sup>218</sup>

These findings, coupled with the reality that municipalities were not subject to damages suits during that period,<sup>219</sup> suggest that the threat of private suits for injunctive relief was not sufficient to cajole school districts into obeying their constitutional command. Monetary incentives—and their close cousin, monetary sanctions—against governments, can meaningfully motivate state actors to obey the law when other potential motivators fail.<sup>220</sup>

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211. 2 U.S. (2 Dall.) 419, 476 (opinion of Jay, C.J.).

212. This language comes from *Steinwehr v. State*, 37 Tenn. (5 Sneed) 586 (1858) (explaining the purpose of a law prohibiting individuals from voting more than once).

213. *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

214. Elizabeth Cascio et al., *Paying for Progress: Conditional Grants and the Desegregation of Southern Schools*, 125 Q.J. ECON. 445, 446 (2010).

215. *Id.*

216. *Id.*

217. *Id.* at 467.

218. *Id.* at 467, 448.

219. *Monroe v. Pape*, 365 U.S. 167 (1961).

220. This deterrent effect—combined with this Article’s observations that money damages against states will both compensate plaintiffs and clarify law where injunctive claims and Section 1983 claims fail—strongly suggests that money damages against states matter; engagement with and critique of sovereign immunity jurisprudence is a meaningful endeavor. For a different point of view, see John C. Jeffries, Jr., *In Praise of the Eleventh Amendment and Section 1983*, 84 VA. L. REV. 47, 49 (1998) (arguing that most critiques of sovereign immunity doctrine “neglect[] a crucial fact: The Eleventh Amendment almost never matters”). See also Choper & Yoo, *supra* note 146. Choper and Yoo argue that Section 1983 suits serve to establish the metes and bounds of legal conduct; and because of qualified immunity, they argue, this constitutional clarification occurs in a less costly manner than damages suits against states. *Id.* at 229–31.

Both their article and Jeffries’s were written before *Pearson v. Callahan*, 555 U.S. 223 (2009), a case that will likely reduce instances of constitutional interpretation in Section 1983 claims, thereby increasing the need for clarification of constitutional rules outside the

Local school districts, it should be recognized, are not "states" within the meaning of sovereign immunity jurisprudence.<sup>221</sup> But they present a useful analogy to explore the ways monetary factors can incentivize constitutional conduct. Before *Monell v. City of New York* in 1978, plaintiffs generally could not sue municipal governments for violations of federal rights because they were deemed not to be "persons" within the meaning of the relevant statute.<sup>222</sup>

This lesson is worth taking into account when shaping our republican ideal of what sovereign immunity should look like. Would schools have integrated before the late 1960s if monetary damages had been in the arsenal of wronged minority children throughout the South? As noted, such damages were not available against municipalities, due to principles of statutory interpretation, or against the states, due to sovereign immunity. Outside the educational contexts, would de jure racial equality have happened more quickly if lawsuits had been permitted to vindicate the types of psychic and economic harms that state-sponsored apartheid likely exacted? We will never know.

#### D. Without Sovereign Immunity: A Thought Experiment

The above examples illustrate sovereign immunity's tension with republican precepts of representative government and popular sovereignty. This tension could lead one to question the very legitimacy of sovereign immunity. What if the Supreme Court did away with the doctrine except as expressly enumerated in the Eleventh Amendment? As a threshold matter, such a ruling would invite its own questions about the meaning of the Eleventh Amendment. The Court could plausibly adopt one of the two textual theories that have traditionally predominated in the academic literature as to how to interpret or apply the Eleventh Amendment.<sup>223</sup> Under either approach, however, if the Court eradicated sovereign immunity in all other circumstances, this could undermine majoritarianism and representative government in ways that call out for discussion.

#### 1. Monetary Judgments

A state's ability to control its own treasury has long been considered foundational to a state's ability to protect its stability and, for that matter, its existence. It is axiomatic that "the power to tax involves the power to destroy," for control over a state's treasury includes the power to control a

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context of Section 1983. *See generally id.* After *Pearson*, courts may dismiss damages cases if the right that the defendant violated was not clearly established, and under those circumstances, courts have no obligation to assess whether a constitutional right was indeed violated. This effectively means that determinations about the legality of conduct will occur less frequently. *See Greg Sobolski & Matt Steinberg, Note, An Empirical Analysis of Section 1983 Qualified Immunity Actions and Implications of Pearson v. Callahan*, 62 STAN. L. REV. 523, 546 (2010).

221. *Monell v. N.Y.C. Dep't. of Soc. Servs.*, 436 U.S. 658, 680 (1978).

222. *Monroe*, 365 U.S. at 188–91.

223. *See supra* Part II.B.

state's "most important and most valuable interests."<sup>224</sup> The ability to compel a state to pay money damages from a state's treasury, with few if any limits, invites analogous concerns.<sup>225</sup>

The power to sue a state for monetary damages is not only license to deplete a state's resources, but also to command that state to allocate its limited resources in ways unauthorized by the people's duly elected state representatives.<sup>226</sup> To sue a state is, in effect, to sue the people of that state who have collectively contributed to its coffers and elected representatives to tend to the public fisc. As the Supreme Court explained in *Alden*, such cases thereby threaten "the principle of representative government" because "money damages would place unwarranted strain on the States' ability to govern in accordance with the will of their citizens."<sup>227</sup>

History fortifies these concerns. There is a reason that states would have, in the words of Hamilton, considered it an act of "war" to permit suits against states in federal court.<sup>228</sup> As other commentators have explained in impressive detail, states faced staggering debts totaling many millions of dollars in the aftermath of the Revolutionary and Civil Wars.<sup>229</sup> And there are credible reasons to believe that if courts had permitted individuals—state citizens or otherwise—to recover on those debts, this would have threatened states' survival and ability to govern. Virginia's debt in the aftermath of the Civil War is illustrative. The state's \$47,090,867<sup>230</sup> debt led the state to issue "coupons" of dubious value to citizen creditors, coupons that ultimately turned out to be virtually worthless in practice.<sup>231</sup> And lest one conclude that an American state will never face such debilitating fiscal conditions again, California's 2009 decision to issue non-negotiable instruments called Registered Warrants (or IOUs) when it was

224. *McCulloch v. Maryland*, 17 U.S. 316, 431 (1819).

225. *Hans v. Louisiana*, 134 U.S. 1, 13 (1890) ("The circumstances which are necessary to produce an alienation of state sovereignty were discussed in considering the article of taxation, and need not be repeated here.").

226. *Horne v. Flores*, 129 S. Ct. 2579, 2594 (2009) ("States and local governments have limited funds. When a federal court orders that money be appropriated for one program, the effect is often to take funds away from other important programs.").

227. *Alden v. Maine*, 527 U.S. 706, 750–51 (1999).

228. THE FEDERALIST NO. 81 (Alexander Hamilton).

229. See Michael G. Collins, *The Conspiracy Theory of the Eleventh Amendment*, 88 COLUM. L. REV. 212, 213 (1988) ("[T]he Supreme Court helped the South out of its staggering, multi-million dollar post-Civil War debt crisis.") (reviewing JOHN V. ORTH, THE JUDICIAL POWER OF THE UNITED STATES (1987)); see also *Cohens v. Virginia*, 19 U.S. 264, 406 (1821) ("It is a part of our history, that, at the adoption of the constitution, all the states were greatly indebted; and the apprehension that these debts might be prosecuted in the federal courts, formed a very serious objection to that instrument.").

230. JOHN V. ORTH, THE JUDICIAL POWER OF THE UNITED STATES 91 (1987). This translates into about \$760 million in purchasing power today, and about \$88 billion when taken as a portion of today's Nominal Gross Domestic Product. Samuel H. Williamson, *Seven Ways to Compute the Relative Value of a U.S. Dollar Amount, 1774 to Present*, MEASURINGWORTH, <http://www.measuringworth.com/uscompare/> (last visited Mar. 23, 2012) (enter 1870 as Initial Year, 47090867 with no commas as Initial Amount, and 2012 as Desired Year).

231. *Antoni v. Greenhow*, 107 U.S. 769 (1883); 7 CHARLES FAIRMAN, HISTORY OF THE SUPREME COURT OF THE UNITED STATES, Part 2, at 714–19 (2009).

unable to meet its financial obligations should, at the least, caution against such unmitigated confidence.<sup>232</sup>

## 2. Execution of Judgments

As the Supreme Court has observed, executing judgments against states could "[endanger] government buildings or property which the State administers on the public's behalf."<sup>233</sup> It is not uncommon for a court to award property to a litigant in execution of a judgment.<sup>234</sup> And there are, in fact, examples of courts awarding government property to litigants in execution of judgments.<sup>235</sup> In *Estate of DeBow v. City of East St. Louis, Illinois*,<sup>236</sup> a court awarded a park and city hall building to a litigant in execution of a judgment. Similarly, in *Meriwether v. Garrett*,<sup>237</sup> a lower court awarded state property to a litigant in execution of a judgment against a city.<sup>238</sup>

On appeal, in *Debow*, an Illinois appellate court found that awarding city hall to a litigant violated state public policy, though that court simultaneously upheld the portion of the same execution order that awarded a litigant a city park.<sup>239</sup> And in *Meriwether*, the Supreme Court relied on the state's "public character" to reverse portions of the execution order at issue there.<sup>240</sup> Still, it is unclear what, in the absence of the Court's robust sovereign immunity jurisprudence, would have supported the "public character" thesis.

## 3. Admiralty Claims and Attachment

Under Rule B of the Federal Rules of Civil Procedure, in admiralty cases, before a single motion on the merits has been filed, a court may place a litigant's assets "up to the amount sued for—in the hands of a garnishee"

232. See Steven E.F. Brown, *California Cash Falls Short of New Budget Targets*, SAN JOSE BUS. J. (Sept. 10, 2009), <http://www.bizjournals.com/sanjose/stories/2009/09/07/daily60.html> (describing \$862 million in "registered warrants" and \$471 million in rescheduled payments in light of a \$12.6 billion cash deficit).

233. *Alden v. Maine*, 527 U.S. 706, 749 (1999).

234. DAN DOBBS, LAW OF REMEDIES § 1.3 (2d ed. 1993); see, e.g., *Aebig v. Cox*, No. 258505, 2006 WL 1360504, at \*1 (Mich. App. May 18, 2006) (affirming award of real property in execution of a judgment); see also Bradley J.B. Toben & Elizabeth A. Toben, *Using Turnover Relief to Reach the Nonexempt Paycheck*, 40 BAYLOR L. REV. 195, 195 (1988).

235. *Murphree v. City of Mobile*, 108 Ala. 663 (1895) (awarding land belonging to a city in execution of a judgment).

236. 228 Ill. App. 3d 437 (1992). *But see* *Brazil v. City of Chicago*, 43 N.E.2d 212, 214 (1942) ("However strong the obligation of a town or city to pay its debts, . . . to allow payment to be enforced by execution would so far impair the usefulness and power of the corporation, in the discharge of its government functions, that the public good required the denial of such a right.").

237. 102 U.S. 472 (1880).

238. See Michael W. McConnell & Randal O. Picker, *When Cities Go Broke: A Conceptual Introduction to Municipal Bankruptcy*, 60 U. CHI. L. REV. 425, 436 (1993) (describing the factual background leading to *Meriwether*).

239. *Estate of DeBow v. City of East St. Louis, Ill.*, 592 N.E.2d 1137, 1144 (1992).

240. *Meriwether*, 102 U.S. at 501.

when the litigant “is not found within [a] district.”<sup>241</sup> To be sure, cases against states sounding in admiralty would likely be rare even with a background principle of no sovereign immunity—especially cases in which a state is sued in another state. But before the Court concluded in 1921 that the Eleventh Amendment barred admiralty suits, litigants sometimes initiated suits under that head of federal jurisdiction.<sup>242</sup> Accordingly, it is worth at least acknowledging that attachment of a state’s tax dollars, before a finding of liability, would be a theoretical possibility under a return to that regime.<sup>243</sup>

There are, therefore, threats to popular sovereignty and representative government inherent in *allowing* all damages suits, and threats to popular sovereignty and representative government inherent in *disallowing* all damages suits. A jurisprudence fully consistent with the Guarantee Clause must, then, give due weight to both of these considerations. At present, the Court appreciates the first at the expense of the second.

#### E. Popular Sovereignty and State Sovereignty

Some scholars and jurists have argued that sovereign immunity is anathema to the very concept of popular sovereignty.<sup>244</sup> For example, Professor Amar has argued that sovereign immunity is “wholly antithetical to the Constitution’s organizing principle of popular sovereignty.”<sup>245</sup> He argues that in the American system, sovereignty is vested in *one* people: the People of the United States,<sup>246</sup> not “thirteen [or fifty] distinct Peoples” or governments.<sup>247</sup> This view had an early proponent in Justice Wilson in *Chisholm v. Georgia*.<sup>248</sup>

This argument does not, however, fully engage the relationship between popular sovereignty and state sovereignty in America’s federalist system of government. There is evidence that the Founders intended the two terms to be inextricably linked.<sup>249</sup> Consider Madison’s statements in *Federalist No.*

241. FED. R. CIV. P. B(1)(a) (supplemental rule).

242. *Ex parte New York*, 256 U.S. 490, 500 (1921) (“[T]he immunity of a State from suit *in personam* in the admiralty brought by a private person without its consent, is clear.”); *see also* U.S. CONST. art. III, § 2, cl. 1 (“The judicial Power shall extend to all Cases . . . to all Cases of admiralty and maritime Jurisdiction.”).

243. *Cf.* 28 U.S.C. § 1610 (2006) (permitting pre-judgment attachment of foreign nations’ assets in cases arising under the Foreign Sovereign Immunities Act, but providing for restrictions on such attachments); *see also* Ernest Mabuza, *State Assets Law Gets Extension*, BUS. DAY (Sept. 1, 2009), <http://www.businessday.co.za/articles/Content.aspx?id=80170> (noting that South Africa’s Constitutional Court ruled to permit attachment of state assets to pay debts).

244. *See, e.g.*, Chemerinsky, *supra* note 31, at 1202 (“Sovereign immunity is inconsistent with a central maxim of American government: no one, not even the government, is above the law.”); *see also id.* at 1204–06.

245. Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 YALE L.J. 1425, 1466 (1987) (citing U.S. CONST. pmb1.); *see also id.* at 1425–66.

246. *Id.* at 1450.

247. *Id.*

248. 2 U.S. (2 Dall.) 419, 457 (1793).

249. As noted, one stark example of how individuals at the founding saw popular sovereignty as highly related to sovereignty appears in a work by “Fabius,” a Federalist. He

39, where he describes how the Constitution would transform from a draft<sup>250</sup> to the supreme legal document of the Land. He states that the document would become law "on the assent and ratification of the people of America."<sup>251</sup> But he also added that "the people" would ratify the Constitution "not as individuals composing one entire nation; *but as composing the distinct and independent States to which they respectively belong.*"<sup>252</sup> The Constitution itself reflects a similar duality. While the Constitution opens by describing itself as a charter for "We the People," in Article VII, the drafters called the document a "Constitution between the States."<sup>253</sup> And Article VII expressly affirmed that the document would become operable upon being "Done in Convention by the Unanimous Consent of the States" present in 1787.<sup>254</sup>

Other contemporaneous writings similarly illustrate the symbiotic relationship between popular and state sovereignty in the American system. On one hand, John Jay casually observed that it was "the people" who would decide the question of whether to ratify the Constitution<sup>255</sup> and Hamilton contended that "[the] fundamental principle of republican government . . . admits the right of the people to alter or abolish the established Constitutions."<sup>256</sup> "The power of the people," he added, "is superior" to the legislative and judicial branches.<sup>257</sup> On the other hand, in *Federalist No. 32*, Hamilton also espoused the view that if the Constitution were enacted, "the *State Governments would clearly retain all the rights of sovereignty* which they before had and which were not by that act exclusively delegated to the United States."<sup>258</sup> But if it is true that: (1) in a system based upon popular sovereignty, the only legitimate fountain of authority flows from the people; and (2) the constitutional pact "between the states" itself was premised on states retaining and relinquishing "rights of sovereignty," then one of two conclusions necessarily follows. Either the entire Constitution is illegitimate *or* the people may express its collective will through states<sup>259</sup> and confer elements of its sovereignty on those states.

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wrote: "It has been unanimously agreed by the friends of liberty, *that frequent elections of the representatives of the people, are the sovereign remedy of all grievances in a free government.*" FABIUS, *supra* note 52, at 62.

250. According to Madison, before ratification, the document's authors had only "proposed a Constitution which is to be of no more consequence than the paper on which it is written, unless it be stamped with the approbation of those to whom it is addressed. [The proposal] was to be submitted *to the people themselves.*" AMAR, *supra* note 2, at 8 (citing THE FEDERALIST NO. 40, *supra* note 1, at 283–84 (James Madison)); *see also id.* at 506 n.5 (collecting other historical references to the pre-ratification document as a draft or proposal).

251. THE FEDERALIST NO. 39, *supra* note 1, at 273 (James Madison).

252. *Id.* (emphasis added).

253. U.S. CONST. art. VII.

254. *Id.*

255. THE FEDERALIST NO. 2 (John Jay).

256. THE FEDERALIST NO. 78, *supra* note 1, at 559 (Alexander Hamilton).

257. *Id.* at 557.

258. THE FEDERALIST NO. 32, *supra* note 1, at 217 (Alexander Hamilton) (emphasis added and omitted).

259. Herbert Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 COLUM. L. REV. 543, 546

Given the choice, most would likely embrace the latter view.<sup>260</sup> Popular sovereignty and state sovereignty are not inherently antithetical to one another. Under our constitutional design, the people have the power to vest in states certain powers and immunities attendant to sovereignty.

And even if one rejects the view that popular sovereignty is inherently inclusive of state sovereignty in the American system,<sup>261</sup> the more crucial point is that the Guarantee Clause's text is still the best constitutional ally for much of the court's sovereign immunity jurisprudence for this reason: If state sovereignty does exist in a system of self-government, it could *only* be because the people vested them with this sovereignty.<sup>262</sup>

### III. DEMOCRATIZING THE DOCTRINE

The text of the Eleventh Amendment places jurisdictional limitations on lawsuits against states. The proper textual approach to understanding that jurisdictional limitation is the subject of a long-running scholarly debate.<sup>263</sup> This part engages a different question, offering proposals as to how courts should manage suits against states that fall outside of the Eleventh Amendment's jurisdictional limitations on "the Judicial power of the United States."

Prudential, extra-textual limitations on judicial power are a familiar feature of American law. The Constitution, for example, says nothing about when citizens may sue government officials in Constitution-based lawsuits for damages. Yet, as discussed below, courts have refused to hear

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(1954) ("[T]he states are the strategic yardsticks for the measurement of interest and opinion, the special centers of political activity, the separate geographical determinants of national as well as local politics.").

260. See 2 ELLIOT DEBATES, *supra* note 84, at 470 (James Wilson) ("[T]his Constitution . . . is laid before the citizens of the United States, unfettered by restraint . . . . By their *fiat*, it will become of value and authority; without it, it will never receive the character of authenticity and power."). For a general discussion on constitutional legitimacy, see Randy E. Barnett, *Constitutional Legitimacy*, 103 COLUM. L. REV. 111, 123 (2003). For a discussion of the legitimacy of a Constitution that excluded a majority of inhabitants from central aspects of the social contract—including women and all who were not white—see Vine Deloria, Jr., *Minorities and the Social Contract*, 20 GA. L. REV. 917, 918–20 (1986); Thurgood Marshall, *Commentary: Reflections on the Bicentennial of the United States Constitution*, 101 HARV. L. REV. 1 (1987) (describing how slavery undermined legitimacy of the original document). *But see* LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 10 n.2 (2d ed. 1988) (writing that Justice Marshall's statement is a "radical overstatement" in light of, among other reasons, the Constitution's amendments).

261. For example, one could conceivably, despite the language of Article VII, conclude that the Constitution is not a "Constitution between the States." And one could conclude that Hamilton's description of the constitutional pact—one where states relinquished and retained certain powers of state sovereignty—is simply wrong.

262. THE FEDERALIST NO. 37, *supra* note 1, at 253 (James Madison) (explaining that the "genius of republican liberty . . . demand[s] . . . that all power should be derived from the people"); THE FEDERALIST NO. 39, *supra* note 1, at 270 (James Madison) (describing the American system as a "government which derives all its powers directly or indirectly" from the majority); *see also* 2 ELLIOT DEBATES, *supra* note 84, at 456 (James Wilson) (noting that while some believed "supreme power reside[d] in the states . . . [he believed] that it reside[d] in the people" and that they should not surrender it to "any government whatsoever").

263. See *supra* Part II.C.

such suits against federal and state officials unless the defendants violated *clearly established* law.<sup>264</sup> This calibration emerged as the Court sought to honor and balance competing constitutional principles.<sup>265</sup> In the context of sovereign immunity, a similar calibration of competing constitutional principles is warranted. Ranking high among these principles are those that Article IV, Section 4 fortifies: protection of state integrity through its guarantee of representative government.

If courts weighed the principles animating the Guarantee Clause more heavily in applying sovereign immunity, at least two doctrinal changes should flow from that shift. The first relates to the circumstances in which courts infer that a state has consented to suit. The second relates to the class of cases that the doctrine reaches. Guiding both changes would be the text of the Guarantee Clause, as a vessel of popular sovereignty and representative government.

#### A. *State Consent as Consent of the Governed*

##### 1. Congressional Abrogation

Under the current doctrine, Congress may permissibly abrogate state sovereign immunity when it both unequivocally intends to do so<sup>266</sup> and “act[s] pursuant to a valid grant of constitutional authority.”<sup>267</sup> As noted, Congress generally may not premise abrogation of a state’s immunity on Article I powers.<sup>268</sup> Abrogation may occur, however, pursuant to Section 5 of the Fourteenth Amendment if the statute is congruent and proportional to the constitutional violations remedied.<sup>269</sup> Finally, absent this abrogation, states must “consent” before facing a lawsuit.

“State consent” to suit, as currently construed, is exceedingly difficult to prove, as *Edelman v. Jordan*<sup>270</sup> illustrates.<sup>271</sup> There, the Supreme Court reviewed the Seventh Circuit’s holding that as a matter of law, Illinois “constructively consented” to suit by accepting federal funds while contemporaneously agreeing that it would “administer federal and state

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264. *Harlow v. Fitzgerald*, 457 U.S. 800, 807 (1982).

265. *See infra* Part III.A.2.

266. *Cf.* Americans with Disabilities Act of 1990, Pub. L. No. 101-336, § 502, 104 Stat. 327 (codified in relevant part at 42 U.S.C. § 12202) (“A State shall not be immune under the eleventh amendment to the Constitution of the United States . . .”).

267. *Bd. of Trs. of the Univ. of Ala. v. Garrett*, 531 U.S. 356, 363 (2001); *see also* *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 73 (2000).

268. *See Kimel*, 528 U.S. at 79 (“Under our firmly established precedent then, if the [Age Discrimination in Employment Act of 1967] rests solely on Congress’ Article I commerce power, the private petitioners in today’s cases cannot maintain their suits against their state employers.”). *But see* *Cent. Va. Cmty. Coll. v. Katz*, 546 U.S. 356, 378–79 (2006) (permitting abrogation under the Bankruptcy Clause).

269. *Fitzpatrick v. Bitzer*, 427 U.S. 445, 447 (1976) (holding that Congress may abrogate state sovereign immunity when acting pursuant to its powers granted in Section 5 of the Fourteenth Amendment).

270. 415 U.S. 651 (1974).

271. *Id.* at 672–74.



funds in compliance with federal law.”<sup>272</sup> The Supreme Court overturned this ruling, holding that consent may only be shown “by the most express language or by such overwhelming implications from the text as [will] leave no room for any other reasonable construction.”<sup>273</sup>

I propose another approach, rooted in the Guarantee Clause’s text, history, and values. When Congress abrogates sovereign immunity in clear terms, this should generally create a presumption that each state has consented to suit unless its legislature enacts a law saying that the state does not consent.<sup>274</sup>

The word “republican,” James Madison explained, describes “a government which derives *all* its powers . . . from the great body of the people.”<sup>275</sup> It is not harmonious with this principle—and concomitantly, the Guarantee Clause—to presume that contrary to clear congressional legislation, the people nonetheless *irrevocably* ceded not just any power to the state, but their sovereignty: the “supreme” power.<sup>276</sup> As James Wilson explained during the Pennsylvania ratification debate, in a system of popular sovereignty, the supreme power “resides with the people.”<sup>277</sup> And while the people could theoretically opt to cede this ultimate power, he discouraged such a move, opining that the people should not surrender sovereignty to “any government whatsoever.”<sup>278</sup>

Because the people are the ultimate sovereign, each citizen is vested with the ability to delegate power to two governments: her state government and the Federal government. In electing members of the House of Representatives, individuals have the opportunity to express their collective national will.<sup>279</sup> Further, in the original design of the Constitution, the people also had the power to elect state representatives who elected members of the Senate to represent the States.<sup>280</sup>

272. *Id.*

273. *Id.* at 673 (citing *Murray v. Wilson Distilling Co.*, 213 U.S. 151, 171 (1909)) (alteration in original); *cf.* *Great N. Life Ins. Co. v. Read*, 322 U.S. 47, 54 (1944) (“[W]hen we are dealing with the sovereign exemption from judicial interference in the vital field of financial administration a clear declaration of the state’s intention to submit its fiscal problems to other courts than those of its own creation must be found.”).

274. I say “generally,” because as later discussed, I argue that states should not be able to exempt themselves from damages statutes passed pursuant to the Fourteenth Amendment.

275. THE FEDERALIST NO. 39 (James Madison) (cited in Amar, *supra* note 23, at 764).

276. BLACK’S LAW DICTIONARY, *supra* note 54, at 1524 (defining sovereignty as “1. Supreme dominion, authority, or rule. . . . 2. The supreme political authority of an independent state. 3. The state itself.”).

277. 2 ELLIOT DEBATES, *supra* note 84, at 456 (James Wilson).

278. *Id.*

279. See THE FEDERALIST NO. 52, *supra* note 1, at 378–79 (James Madison) (describing the importance of a “branch of the federal government . . . dependent on *the people* alone” and that the House “should have an immediate dependence on, and an intimate sympathy with, the people”) (emphasis added); see also THE FEDERALIST NO. 57, *supra* note 1, at 141 (James Madison) (describing the House as “a great proportion of the men deriving their advancement from their influence with the people,” which would oppose “innovations in the government subversive of the authority of the people”).

280. As James Madison explained in *Federalist No. 62*, the original design of the Constitution sought, through the Senate, “[to give] state governments such an agency in the

While the Seventeenth Amendment later provided citizens with the ability to elect senators directly, there is still little doubt that senators are expected to represent the interests of their respective states.<sup>281</sup> We know this, in part, because the one provision in the entire Constitution that may not be amended, according to Article V, is the provision guaranteeing that “no State, without its Consent, shall be deprived of *its* equal Suffrage in the Senate.”<sup>282</sup> James Madison explained at the Founding that under this system of equal suffrage, “each State is at once a constitutional recognition of the portion of sovereignty remaining in the individual States, and an instrument for preserving that residuary sovereignty.”<sup>283</sup>

When Congress votes to abrogate sovereign immunity in legislation signed by the President, it means that the people have collectively voted to do so through the House and, on behalf of their states, through the Senate. Madison put it this way: “No law or resolution can now be passed without the concurrence first, of a majority of the people, and then of a majority of the states.”<sup>284</sup> Chief Justice Marshall later concurred, writing that “the states themselves[] are represented in congress.”<sup>285</sup> Thus, congressional abrogation *is* presumptive state consent. The notion that a state must subsequently consent again is really, in practice, to say that a state attorney in a pre-trial motion may rescind the consent that the people collectively and through the states have already given. And this is, in effect, placing the ultimate powers and immunities of sovereignty into the hands of one person at the expense of the people’s expressed will. This is unsustainable in a Constitution that guarantees republican forms of government to the states and, therefore, to the people of those states.

## 2. Popular Immunity from Congressional Abrogation

Even if one accepts that congressional abrogation should create a strong presumption in favor of state consent, questions remain. Should this presumption ever be rebuttable? If Congress authorized a class of lawsuits, that threatened a state’s integrity, what protection, if any, could that state seek? How do we balance the fundamental principles animating the Guarantee Clause; that is, the desire to uphold popular sovereignty and the need to protect state integrity?

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formation of the federal government, as must secure the *authority* of the former.” THE FEDERALIST NO. 62, *supra* note 1, at 442 (James Madison) (emphasis added).

281. *See generally id.* (describing the Senate, including the underlying premise for “the equality of representation” in the body).

282. U.S. CONST. art. V (emphasis added).

283. THE FEDERALIST NO. 62, *supra* note 1, at 443 (James Madison).

284. *Id.*; *see also* JESSE H. CHOPER, JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS 175–83 (1980) (describing the protection of state interests in the constitutional design); Wechsler, *supra* note 259, at 548 (“[T]he Senate cannot fail to function as the guardian of state interests as such, when they are real enough to have political support or even to be instrumental in attaining other ends.”). *See generally* Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 550–51 (1985).

285. McCulloch v. Maryland, 17 U.S. 316, 435 (1819); *see also* John Marshall, *Essays from the Alexandria Gazette: John Marshall, “A Friend of the Constitution”*, 21 STAN. L. REV. 456, 495 (1969) (calling Senators “representatives of the state sovereignties”).

These questions are not new. A doctrinal template exists; because litigants may file damages actions against constitutional wrongdoers acting under the color of state law,<sup>286</sup> courts have long wrestled with how to balance vindicating rights with the need to ensure that government continues to function without undue impediment. For example, in *Harlow v. Fitzgerald*, the Supreme Court confronted whether and how immunity should operate in damages actions against “high officials.”<sup>287</sup> The Court framed its task as “an attempt to balance competing values: . . . the importance of a damages remedy to protect the rights of citizens [and] ‘the need to protect officials who are required to exercise their discretion and the related public interest in encouraging the vigorous exercise of official authority.’”<sup>288</sup>

In *Harlow*, the Court rejected the notion that all high officials should receive absolute immunity. “[T]he greater power of [high] officials . . . affords a greater potential for a regime of lawless conduct,” the Court reasoned.<sup>289</sup> Accordingly, “Damages actions against high officials [are] . . . ‘an important means of vindicating constitutional guarantees.’”<sup>290</sup> Indeed, damages actions are sometimes the only viable means through which a person may vindicate his or her rights.<sup>291</sup>

On the other hand, the *Harlow* Court acknowledged that officials are sometimes wrongly accused of unlawful conduct, and that the cost of disputing such claims is great, both for government officials and society.<sup>292</sup> Further, a fear of lawsuits, the Court contended, could create a chilling effect, causing officials to perform their duties with less vigor.<sup>293</sup>

Balancing these concerns, the Court concluded that in suits against officials, something between absolute immunity and full exposure to lawsuits was required as a matter of policy. These officials were entitled to “qualified immunity,” the Court concluded.<sup>294</sup> The Court then proceeded to plot out what qualified immunity should look like. Rejecting a subjective test,<sup>295</sup> the Court embraced an objective test that continues to operate today:

286. 42 U.S.C. § 1983 (2006).

287. *Harlow v. Fitzgerald*, 457 U.S. 800, 807 (1982).

288. *Id.* (quoting *Butz v. Economou*, 438 U.S. 478, 406 (1978)). While *Harlow* was a damages action against federal officials, not state officials, the Court has found that qualified immunity for these two groups operate identically. *See Butz*, 438 U.S. at 504 (concluding that it would be “untenable to draw a distinction for purposes of immunity law between suits brought against state officials under § 1983 and suits brought directly under the Constitution against federal officials”).

289. *Harlow*, 457 U.S. at 809 (citing *Butz*, 438 U.S. at 506).

290. *Id.* (citing *Butz*, 438 U.S. at 506).

291. *Id.* at 814.

292. *Id.* (“At the same time, however, it cannot be disputed seriously that claims frequently run against the innocent as well as the guilty—at a cost not only to the defendant officials, but to society as a whole.”).

293. *Id.*

294. *Id.*

295. *Id.* at 815–16. Prior to *Harlow*, the Supreme Court wrestled with whether to rely on defendant’s subjective intentions upon determining whether he or she was entitled to “qualified immunity.” *See, e.g., Wood v. Strickland*, 420 U.S. 308, 321–22 (1975) (embracing a disjunctive standard that assessed whether the defendant acted subjectively

a person may only maintain damages suits against officials who have transgressed clearly established federal rights of which a reasonable person would have known at the time of the violation.<sup>296</sup>

*Harlow* is instructive. Qualified immunity jurisprudence accounts for the real challenges to our constitutional tradition of accountability that would occur if suits against government officials were never permitted. Yet this jurisprudence also aims to account for the challenges to the constitutional tradition of government stability that would occur if all suits were permitted against government officials.

Despite its usefulness as a template, providing states with a form of qualified immunity *identical* to government officials would suffer three problems. First, there would be substantial overlap in the classes of cases in which litigants could proceed against state officials and cases in which they could proceed against states. This overlap would render suits against states largely duplicative and superfluous. Second, the policy risks present in lawsuits against *states* are different in kind from those present in lawsuits against state *officials*. In suits against officials, there is the risk that fears of financial reprisal will prevent discretionary officials from performing their tasks fully or vigorously.<sup>297</sup> This risk would presumably decrease, however, if the state, not the discretionary official, faced financial liability for illegal conduct. The Supreme Court has convincingly observed that the deterrence calculus operates differently in suits against employers as opposed to suits against employees.<sup>298</sup>

Third, I contend that there is a way to protect states from suit that is more responsive to the Guarantee Clause's values of popular sovereignty and state integrity than the entirely judicially constructed doctrine that governs officials. Specifically, I propose what I call "popular immunity." For a state to be exempt from a statute's damages provisions, a democratically accountable body in a state must expressly object to specific congressional enactments that purport to abrogate sovereign immunity. That is, if Congress passed a law that conferred rights on citizens and purported to bind states through civil actions, the presumption would be that states consented to suit unless a legislature or analogous body voted to exempt a state from classes of the authorized lawsuits.<sup>299</sup> Just as a state legislature

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maliciously or objectively unreasonably under existing law); *Scheuer v. Rhodes*, 416 U.S. 232, 247–48 (1974) (relying on whether defendant acted in good faith).

296. *Harlow*, 457 U.S. at 818.

297. *Id.* at 814 (“[T]here is the danger that fear of being sued will ‘dampen the ardor of all but the most resolute, or the most irresponsible [public officials], in the unflinching discharge of their duties.’” (citing *Gregoire v. Biddle*, 177 F.2d 579, 581 (2d Cir. 1949))).

298. In *Owen v. City of Independence*, 445 U.S. 622 (1980), the Court explained that while “overriding considerations of public policy . . . demanded that the official be given a measure of protection from personal liability,” those concerns were “less compelling, if not wholly inapplicable, when the liability of the municipal entity is at issue.” *Id.* at 653.

299. Two other alternatives, discussed in conversations with Professor Mark Gergen, would be to allow states to exempt themselves from *specific executions* of judgments (as opposed to classes of lawsuits), or require that state legislatures consent to specific executions. The first would raise severe bill of attainder questions. *See, e.g.*, TEX. CONST. art. I, § 16 (“No bill of attainder, ex post facto law, retroactive law, or any law impairing the

must approve before the state's territorial boundaries may be altered,<sup>300</sup> state legislatures would have the ability to protect their treasuries from some specific classes of congressionally authorized suits.

Under the current regime, in the battle between popularly enacted legislation and federalism, the latter almost always wins.<sup>301</sup> By contrast, my approach absorbs dual values of federalism and democratic accountability, both of which are encompassed in the Guarantee Clause's mission of protecting state integrity and popular sovereignty. Different states would potentially reach different outcomes on questions such as whether to exempt their states from damages suits in specific contexts. Still, because democratically elected bodies would make decisions about these exemptions, final questions about sovereignty immunities would be answered by those who the Clause guarantees will remain the ultimate sovereign: the people.

Skeptics of this form of popular immunity might question whether allowing state legislatures to pass such exemptions would largely prove perfunctory because state legislatures across the country would routinely exempt their states from damages actions. I offer two responses. First, there are numerous examples of legislatures waiving sovereign immunity for the polities they represent. At the federal level, Title VII waives sovereign immunity in certain discrimination suits against the federal government.<sup>302</sup> Title III provides for suits against the United States for unlawful government surveillance.<sup>303</sup> 28 U.S.C. § 1491 provides a forum for suits against the federal government for constitutional violations and specified contractual violations, among other types of legal wrongs.<sup>304</sup> The

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obligation of contracts, shall be made."); WIS. CONST. art. I, § 12 ("No bill of attainder, ex post facto law, nor any law impairing the obligation of contracts, shall ever be passed, and no conviction shall work corruption of blood or forfeiture of estate."). And, permitting legislatures to overcome or evade final judgments would create equally vexing challenges under *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211 (1995) (finding that Congress may not reopen final judgments without violating separation of powers principles). Further, the second approach is inconsistent with my argument that Congressional authorization, by constitutional design, creates a presumption of state consent.

300. U.S. CONST. art. IV, § 3.

301. See, e.g., *Bd. of Trs. of the Univ. of Ala. v. Garrett*, 531 U.S. 356, 364 (2001) (striking down Title I of the Americans with Disabilities Act as applied to states); *United States v. Morrison*, 529 U.S. 598, 613–17, 619, 625–26 (2000) (nullifying the Violence Against Women Act to the extent that courts it permitted private remedies in federal lawsuits against perpetrators of gender-motivated violence); *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 91 (2000) (striking down portions of the Age Discrimination in Employment Act as applied to states); *Alden v. Maine*, 527 U.S. 706, 758–60 (1999) (striking down overtime provisions of the Fair Labor Standards Act as applied to states).

302. See 42 U.S.C. § 2000e(a), (b), (f) (2006); see also *Steinhardt v. Potter*, 326 F. Supp. 2d 449, 453 (S.D.N.Y. 2004) ("Section 1981a(a)(1) states that compensatory and punitive damages may be pursued under 42 U.S.C. § 2000e-16, a provision that governs suits against the United States.").

303. 18 U.S.C. § 2712 (2006).

304. See 28 U.S.C. § 1491 (2006) ("The United States Court of Federal Claims shall have jurisdiction to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort.").

Federal Tort Claims Act permits suits against the federal government under "circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred."<sup>305</sup> And states across the country, through legislation, waive their sovereign immunity for classes of cases.<sup>306</sup> Thus, it is hardly a foregone conclusion that state legislatures would routinely reject Congressional damages provisions in the same manner that state attorneys general routinely refuse to consent to suits.<sup>307</sup>

In fact, it would be surprising if legislatures rejected damages suits as frequently as government lawyers do, in light of James Madison's observations about the benefits of "the genius of republican liberty."<sup>308</sup> He contended that these benefits include "not only that all power should be derived from the people; but, that those entrusted with it should be kept in independence on the people, by a short duration of their appointments; and, that, even during this short period, the trust should be placed not in a few, but in a number of hands."<sup>309</sup> Placing decisions about sovereign immunity in the hands of state legislatures, rather than a handful of government lawyers, is harmonious with this observation.

Three additional caveats to my proposal deserve discussion. The first is that "sovereignty" is, in my view, *sui generis*. By this, I mean that while state legislatures could assert state sovereignty by exempting their states from damages suits, this does not mean that states would have the ability to exempt themselves from all other legislation. In an attempt to protect state integrity, the Guarantee Clause codifies the relationship between popular sovereignty and state sovereignty in our federal system, with the latter inevitably gaining its legitimacy from the former.<sup>310</sup> The Clause speaks, then, to when a state may legitimately wield the immunities of sovereignty, preventing practices that subvert representative government in a manner that threatens a state's stability, existence, and parity with its sister states. Forcing a state to spend its funds in a given way, and making it possible to place state buildings and assets in the possession of a few, present peculiar types of risks to representative government and state integrity.<sup>311</sup> While the

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305. 28 U.S.C. § 1346(b).

306. *See, e.g.*, Georgia Tort Claims Act, GA. CODE ANN., § 50-21-23 (2011) ("The state waives its sovereign immunity for the torts of state officers and employees while acting within the scope of their official duties or employment and shall be liable for such torts in the same manner as a private individual or entity would be liable under like circumstances; provided, however, that the state's sovereign immunity is waived subject to all exceptions and limitations set forth in this article."); MISS. CODE ANN. § 11-46-5 (2011); Texas Tort Claims Act, TEX. CIV. PRAC. & REM. CODE ANN. § 101.021 (West 2009).

307. *See* *Lapides v. Bd. of Regents of Univ. Sys. of Ga.*, 535 U.S. 613, 616, 618–22 (2002) (discussing the role of state attorneys general in waiving state immunity). If one conducts a simple legal search of cases against governments in the United States, one quickly sees that claiming sovereign immunity in pre-trial motions is very much the norm.

308. THE FEDERALIST NO. 37, *supra* note 1, at 253 (James Madison).

309. *Id.*

310. *See supra* Part I.B.

311. An interesting question is whether states could invoke the Guarantee Clause to prevent a law that required states to spend state funds in a given way. This question would almost always be rendered moot by the anti-commandeering requirement the Court has

Guarantee Clause protects against these peculiar threats, the Clause does not erase the Supremacy Clause from the Constitution.<sup>312</sup>

Second, my proposal would not disturb existing doctrine governing congressional decisions to abrogate sovereign immunity pursuant to Section 5 of the Fourteenth Amendment.<sup>313</sup> That is, state legislation could not overcome Congressional enactments passed pursuant to that provision. In passing the Fourteenth Amendment, legislators consciously sought to expand the concept of “republican forms of governments” to include those formerly excluded.<sup>314</sup> Further, as the Supreme Court explained in *Fitzpatrick v. Bitzer*, when Congress acts under the Fourteenth Amendment, “not only is it exercising legislative authority that is plenary within the terms of the constitutional grant, it is exercising that authority under one section of a constitutional Amendment whose other sections by their own terms embody limitations on state authority.”<sup>315</sup> As such, when Congress acts pursuant to Section 5, it acts with a special plenary power designed, in light of this nation’s past lessons, to protect free and equal representative government. It would be inconsistent with the Guarantee Clause to permit states to circumvent this protection.<sup>316</sup>

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found in the Tenth Amendment. *See e.g.*, *Printz v. United States*, 521 U.S. 898 (1997) (declining to consider whether anti-commandeering principles animate the Guarantee Clause, because the Tenth Amendment serves that purpose); *New York v. United States*, 505 U.S. 144 (1992). The anti-commandeering principle, then, already provides states with an administrable and sufficient remedy when Congress attempts to force states to behave in a given way. In any event, permitting states to exempt themselves from anti-commandeering legislation would prove difficult to administer. The question whether a statute expressly abrogates sovereign immunity is rarely a difficult one. The question whether a law “commandeers” a state occupies a far more contestable space.

312. U.S. CONST. art. VI, cl. 2. (“This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.”).

313. U.S. CONST. amend. XIV (“The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.”).

314. CONG. GLOBE, 39TH CONG., 1ST SESS. 2 (1865) (statement of Sen. Sumner) (“[N]o government can be accepted as ‘a republican form of government’ where a large proportion of native-born citizens, charged with no crime and no failure of duty, is left wholly unrepresented, although compelled to pay taxes; and especially where a particular race is singled out and denied all representation.”).

315. *Fitzpatrick v. Bitzer*, 427 U.S. 445, 456 (1976).

316. Indeed, the conclusion in *Bitzer* that Congress should be permitted to abrogate sovereign immunity pursuant to Section 5 was unanimous, and was written by an ardent proponent of federalism, Justice William Rehnquist. *See id.* In the following decades, both the liberal and conservative wings of the Court have continued to agree that Congress may abrogate pursuant to the Fourteenth Amendment. *See generally* *Bd. of Trs. of the Univ. of Ala. v. Garrett*, 531 U.S. 356, 356 (2001) (concluding that abrogation pursuant to the Fourteenth Amendment had not properly occurred, not that such abrogation was impermissible); *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44 (1996) (recognizing this power, while concluding that an act did not fall within the scope of this congressional authorization).

The question remains open whether Congress should be able to abrogate sovereign immunity, in an unqualified manner, when it acts under Section 2 of the Thirteenth Amendment or Section 2 of the Fifteenth Amendment. In *Bitzer*, Justice Rehnquist reasoned: “There can be no doubt that [precedent] has sanctioned intrusions by Congress,

Third, as is the current state of the law, congressional abrogation would, under my proposal, require a clear statement of Congress's specific intent to abrogate immunity.<sup>317</sup> Not only would this assure courts that Congress has confronted and deliberated about the consequences of abrogation,<sup>318</sup> any other approach would make it difficult for a state to know when it should take steps to exempt itself from damages actions. Likewise, state legislatures who sought to exempt their states from suit should be required to do so in clear terms, both so that voters may react to the decision and so that courts can apply the doctrine in a principled and administrable manner.<sup>319</sup>

*B. Constitutional Violations with a Substantial Nexus  
to Representative Government*

The second proposal permits persons to sue their own states for constitutional violations that bear a substantial nexus to free and equal representative government. In a system of popular sovereignty, a state's claim of sovereignty can only be legitimate if the people vested the state with the right to make this claim. As John Trenchard explained in Number 60 of *Cato's Letters*, his influential eighteenth century defense of republican principles, "Government . . . can have no Power, but such as Men can give, and such as they actually did give, or permit for their own Sakes," explaining that "no Man, or Council of Men . . . can claim to themselves and their Families any Superiority, or natural Sovereignty over their Fellow-Creatures naturally as good as them."<sup>320</sup> It follows that if the channels through which power flows from the governed to the government become corrupted or clogged, there should be a means to correct that.<sup>321</sup>

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acting under the Civil War Amendments, into the judicial, executive, and legislative spheres of autonomy previously reserved to the States." 427 U.S. at 455. The answer to this question is beyond the scope of this Article.

Suffice it to say that the strongest *textual* support for unqualified congressional abrogation appears in the Fourteenth Amendment. Sections 1–4 are all express limitations on state power. By contrast, the Thirteenth Amendment never mentions the word "state" (except when referring broadly to "The United States"). And the Fifteenth Amendment applies to state and federal governments alike. For the most part, however, it is difficult to conceive of an example of congressional abrogation under Section 2 of the Thirteenth or Fifteenth Amendments that was not also justifiable under Section 5 of the Fourteenth.

317. See *Emps. of the Dep't of Pub. Health & Welfare v. Dep't of Pub. Health & Welfare*, 411 U.S. 279, 281 (1973).

318. See *United States v. Bass*, 404 U.S. 336, 349 (1971) ("In traditionally sensitive areas, such as legislation affecting the federal balance, the requirement of clear statement assures that the legislature has in fact faced, and intended to bring into issue, the critical matters involved in the judicial decision."); see also *Will v. Mich. Dep't of State Police*, 491 U.S. 58, 65–66 (1989) (providing a similar reasoning).

319. ELY, *supra* note 25, at 125 (calling Gerald Gunther's goal of "flushing out legislative purposes so that the voters can better react to them, . . . entirely laudable and . . . an appropriately constitutional concern").

320. John Trenchard, No. 60 CATO'S LETTERS (cited in John Jezierski, *Parliament or People: James Wilson and Blackstone on the Nature and Location of Sovereignty*, 32 J. HIS. IDEAS 95 (1971)).

321. See generally ELY, *supra* note 25, at 105–34 (chapter entitled "Clearing the Channels of Political Change").



Under this proposal, if a state enacted a Poll Tax in contravention of the Twenty-Fourth Amendment, as at least one state was found to have done as recently as 2005,<sup>322</sup> victims would have a damages remedy compensating them for the illegal tax. Other constitutional provisions that would almost certainly bear a substantial nexus with free and equal participation in representative government are the Thirteenth Amendment, Fifteenth Amendment, Nineteenth Amendment, Twenty-Sixth Amendment, and Section 1 of the Fourteenth Amendment.

To place this proposal in context, it is important to recall that for the bulk of this nation's history, direct and indirect barriers to the franchise thwarted popular sovereignty for entire swaths of the country. For example, in antebellum America, blacks were a majority of the population in Louisiana, Mississippi, and South Carolina<sup>323</sup> and approached majorities in others.<sup>324</sup> Nonetheless, as slaves, blacks had "no rights which the white man was bound to respect."<sup>325</sup>

In the aftermath of the Civil War, Senator Charles Sumner advocated for the post-war amendments and civil rights legislation by explaining that "no government can be accepted as 'a republican form of government' where a large proportion of native-born citizens, charged with no crime and no failure of duty, is left wholly unrepresented, although compelled to pay taxes; and especially where a particular race is singled out and denied all representation."<sup>326</sup> The Reconstruction Amendments sought to correct this deeply engrained and pervasive debacle masquerading as democracy.<sup>327</sup> Most notably, the Fourteenth Amendment bestowed citizenship on all persons born in the United States, and provided for basic rights and equality

322. *Common Cause/Georgia v. Billups*, 406 F. Supp. 2d 1326, 1367 (N.D. Ga. 2005) (enjoining a \$20.00 fee required to obtain documentation to vote). As an aside, Georgia was not one of the states that voted to ratify that amendment. 22 CONG. Q. WKLY. REP. 163 (1964).

323. Christopher R. Adamson, *Punishment After Slavery: Southern State Penal Systems, 1865-1890*, 30 SOCIAL PROBS. 555, 558 (1983).

324. MARK CARLETON, POLITICS AND PUNISHMENT: THE HISTORY OF THE LOUISIANA STATE PENAL SYSTEM 44 (1971).

325. *Scott v. Sanford*, 60 U.S. 393, 407 (1856) (describing blacks' rights, or lack of rights, at the Founding).

326. CONG. GLOBE, 39TH CONG., 1ST SESS. 2 (1865) (statement of Sen. Sumner). Amar calls the problem of who constitutes "the people" in American republicanism "the denominator problem." See Amar, *supra* note 23.

327. See generally Norman W. Spaulding, *Constitution as Countermonument: Federalism, Reconstruction and the Problem of Collective Memory*, 103 COLUM. L. REV. 1992 (2003); cf. *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976). Daniel Korobkin has noted that Senator Sumner, and a number of others in the Senate and House, expressly invoked the Guarantee Clause. Sumner contended that the Clause guarded against "Oligarchy, Aristocracy, Caste, and Monopoly, founded on color, with the tyranny of taxation without representation . . ." Korobkin, *supra* note 72, at 498 (citing CONG. GLOBE, 39TH CONG., 1ST SESS. 14 (1865) (statement of Sen. Sumner)). Sumner further defined republican government as a "government founded on the people and the consent of the governed." *Id.* Similarly, Senator John B. Henderson contended that "the true republican principle that 'all men are created equal,' and that when government is to be established, its just powers must come from 'the consent of the governed.'" *Id.* (citing CONG. GLOBE, 39TH CONG., 1ST SESS. 120). Representative Sidney Perham, Senator William M. Stewart, and Senator James W. Nye also invoked the clause. *Id.*

throughout the states.<sup>328</sup> That amendment has been central to “clearing the channels of political change,”<sup>329</sup> including by, for example, securing the right to vote<sup>330</sup> and “[f]acilitating the [r]epresentation of [m]inorities”<sup>331</sup> (and in some states majorities)<sup>332</sup> through the Equal Protection Clause.<sup>333</sup> To maintain republican forms of government, history teaches that these amendments should be more fully enforceable.<sup>334</sup>

A review of the rationales supporting sovereign immunity, lined up against the text and purposes behind the Guarantee Clause, further encourages permitting lawsuits against states under constitutional provisions with a substantial nexus to free and equal participation in representative government. First, it is unlikely that constitutional claims limited to provisions aimed at equal participation in representative government would result in breaking the back of a state’s treasury.<sup>335</sup> Indeed, if such claims yielded that result, this would raise questions about whether the state had a “republican form of government” at all; it would mean that the state engaged in commensurate massive deprivations of the constitutional rights embodying representative government.<sup>336</sup> Second, such suits would not be in tension with “the principle of representative government”<sup>337</sup> because they would remedy the failure to provide representative government.

Some readers may nonetheless have remaining concerns about the costs of allowing lawsuits under the Fourteenth Amendment.<sup>338</sup> It is worth

328. U.S. CONST. amend. XIV.

329. See ELY, *supra* note 25, at 118–19 n\* (describing the Fourteenth Amendment’s role in expanding the franchise in a chapter entitled “Clearing the Channels of Political Change”); see also *Harper v. Va. Bd. of Elections*, 383 U.S. 663, 666 (1966) (holding that “a State violates the Equal Protection Clause of the Fourteenth Amendment whenever it makes the affluence of the voter or payment of any fee an electoral standard”).

330. ELY, *supra* note 25, at 118–19 n\*.

331. *Id.* at 135.

332. See CARLETON, *supra* note 324, at 44.

333. See Ely, *supra* note 25, at 118–19 n\*.

334. See generally *supra* Part II.C.

335. *Alden v. Maine*, 527 U.S. 706, 749 (1999).

336. W.E.B. Du Bois explored this theme in his 1935 book on Reconstruction, noting that even after Reconstruction, blacks were disenfranchised in a manner foreign to generally recognized conceptions of popular sovereignty. “In no other civilized and modern land has so great a group of people . . . been allowed so small a voice in their own government.” W.E.B. DU BOIS, *BLACK RECONSTRUCTION IN AMERICA* 694 (First Free Press ed. 1998) (1935); see also Richard H. Pildes, *Democracy, Anti-democracy, and the Canon*, 17 CONST. COMMENT. 296 n.3 (2000) (citing DU BOIS, *supra* at 694). Indeed, the Reconstruction Amendments proved important in expanding the franchise one hundred years after their passage, providing the constitutional foundation for the Voting Rights Act. Prior to that act, very few blacks in the South were registered to vote due to decades of intimidation and legal barriers. For example, the black voter registration level was 6.7 percent in Mississippi. Richard H. Pildes, *The Politics of Race*, 108 HARV. L. REV. 1359, 1360 (1995).

337. *Alden*, 527 U.S. at 751 (providing this rationale for sovereign immunity).

338. My discussions with Richard H. Fallon raised a difficult question that implicates how to calculate the probable cost of damages suits against states: under what circumstances should a citizen be permitted to sue a state under the Takings Clause? Such claims do not have an obvious link with free and equal representative government. Though, it is worth noting, some scholars have certainly identified a link between private property and

observing, however, that permitting lawsuits against states would not necessarily require respondeat superior liability, in which a state would routinely shoulder liability for the act of its agents. In the context of municipal liability, respondeat superior has consistently, albeit if sometimes narrowly, been rejected by the Supreme Court. The Court has expressed concerns about the costs to representative government in adopting respondeat superior liability with respect to suits against municipalities. The Court has instead held that a municipality is liable for its own unconstitutional policies or for its deliberate indifference to unconstitutional acts.<sup>339</sup> Similarly, cities may not be held liable for punitive damages.<sup>340</sup> The Court reasoned in *City of Newport v. Fact Concerts, Inc.* that “[n]either reason nor justice suggests that such retribution should be visited upon the shoulders of blameless or unknowing taxpayers.”<sup>341</sup> This limitation could also be used to limit the threat to representative government in the context of suits against states.

But even with those limitations, suits against states have a role to play in ensuring free and equal representative government. Today, even when a state’s policies or laws violate federal law, damages suits against state actors are often unavailable due to qualified immunity. Likewise, injunctive or declaratory relief is often unavailable due to *City of Los Angeles v. Lyons*.<sup>342</sup> Under these circumstances, damages actions against the state would sometimes be the only means to have constitutional violations acknowledged by courts, let alone corrected.<sup>343</sup> Without such a remedy for constitutional violations that bear a substantial nexus with free and equal representative government, there is risk that the ultimate power will reside with a fraction of the population, not with “the people.”

#### IV. TOWARD A LESS “EMBARRASSING” DOCTRINE

Enlisting the Guarantee Clause to sustain sovereign immunity, in contexts other than those enumerated in the Eleventh Amendment, would likely mitigate some of the academic criticisms that sovereign immunity is inconsistent with the text of the Constitution.<sup>344</sup> The approach to sovereign immunity outlined in Part III could save the doctrine from itself.

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representative government. Cf. Richard A. Epstein, *History Lean: The Reconciliation of Private Property and Representative Government*, 95 COLUM. L. REV. 591, 592 (1995). Whether there is a sufficient doctrinal basis to justify damages suits against states for takings violations is beyond the scope of this Article, but is certainly a topic deserving of more theoretical work. See, e.g., Eric Berger, *The Collision of the Takings and State Sovereign Immunity Doctrines*, 63 WASH. & LEE L. REV. 493, 494 (2006).

339. See generally *Connick v. Thompson*, 131 S. Ct. 1350 (2011).

340. See *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 268 (1981).

341. *Id.* at 267.

342. See *supra* note 149.

343. See *supra* note 220.

344. See Solimine, *supra* note 33, at 1463 (referring to the sovereign immunity doctrine as “The Embarrassing Eleventh Amendment”).

### A. The Text

The textual gap between sovereign immunity doctrine and scholarly debates could potentially narrow if the Guarantee Clause's language, history, and principles played a prominent analytic role in shaping the doctrine. Rather than deploy "freestanding federalism" to expand the Eleventh Amendment to reach classes of cases its language simply cannot support,<sup>345</sup> the Court would instead confront the actual words of the Eleventh Amendment. The plain meaning and diversity explanations, described in Part II, would likely serve as starting points in this discussion,<sup>346</sup> as would more recent scholarly contributions.<sup>347</sup>

#### 1. State Courts

The Guarantee Clause provides better textual support than the Eleventh Amendment for the Court's conclusion in *Alden v. Maine*<sup>348</sup> that Congress could not abrogate sovereign immunity in state courts pursuant to its Article I powers.<sup>349</sup> As Dean Erwin Chemerinsky has argued, the Constitution "says absolutely nothing about whether states should have immunity in state court."<sup>350</sup> Indeed, consistent with this observation, the Eleventh Amendment's language extends only to the "Judicial Power of the United States."<sup>351</sup> By contrast, the Guarantee Clause's text broadly governs what "The United States shall guarantee," without reference to the obligations of any specific branch of government.<sup>352</sup> Thus, the Guarantee Clause more readily lends itself to capturing *Congress's* obligation to protect, and concomitantly not destroy, state integrity and representative government than the Eleventh Amendment—regardless of forum.<sup>353</sup>

#### 2. Text and Principle

The Guarantee Clause also bears a more textually sound connection to some of the reasons the court has given for why private suits against states are impermissible. The Court has reasoned that such suits clash with "the

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345. See John F. Manning, *Federalism and the Generality Problem in Constitutional Interpretation*, 122 HARV. L. REV. 2003, 2004 (2009).

346. *Pennsylvania v. Union Gas Co.*, 491 U.S. 1 (1989) (plurality opinion) (adopting the diversity explanation); see also 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, 2511 (2006) ("[T]his text appears to extinguish federal jurisdiction over all suits against states by citizens of another state, while leaving intact jurisdiction over suits arising under the Constitution or federal laws where the parties are not so aligned—most notably, suits by citizens against their own states.").

347. See generally Clark, *supra* note 29.

348. 527 U.S. 706 (1999).

349. *Id.* at 732–33.

350. Chemerinsky, *supra* note 31, at 1206.

351. U.S. CONST. amend. XI.

352. *Id.* art. IV, § 4.

353. Cf. Nicholas Quinn Rosenkranz, *The Subjects of the Constitution*, 62 STAN. L. REV. 1209 (2010) (urging closer attention to the express grammatical subjects in constitutional clauses).

principle of representative government.”<sup>354</sup> Among other things, such suits may deplete a state’s “treasury or perhaps even [endanger] government buildings or property which the State administers on the public’s behalf.”<sup>355</sup> The text within and surrounding the Guarantee Clause reflects the drafters’ concerns about representative government and its importance to states’ stability, existence and relative parity. By contrast, it is, to say the least, not facially apparent that the Eleventh Amendment commands courts to consider concerns about representative government and state integrity.

### 3. State Waiver

Allowing the Guarantee Clause to inform sovereign immunity would also help clarify an apparent enigma in the Court’s current jurisprudence. The jurisprudence facially allows states to waive subject matter jurisdiction in federal courts, an axiomatic violation of the basic principle that federal courts have limited and precisely enumerated jurisdiction. This problem emerges because the Supreme Court has sometimes broadly referred to sovereign immunity as a question of subject matter jurisdiction.<sup>356</sup> The Court has also consistently held, in other contexts, that subject matter jurisdiction cannot be waived.<sup>357</sup> Nonetheless, the Court permits states to consent to lawsuits against them,<sup>358</sup> or otherwise waive sovereign immunity.<sup>359</sup>

The approach to sovereign immunity advanced in this Article makes textual sense of this apparent paradox. The Eleventh Amendment *is* a jurisdictional provision, in that it circumscribes the “Judicial Power of the

354. *Alden*, 527 U.S. at 751.

355. *Id.* at 749.

356. See Katherine Florey, *Insufficiently Jurisdictional: The Case Against Treating State Sovereign Immunity as an Article III Doctrine*, 92 CALIF. L. REV. 1375, 1417–31 (2004).

357. See, e.g., *United States v. Cotton*, 535 U.S. 625, 630 (2002) (“[S]ubject-matter jurisdiction, because it involves a court’s power to hear a case, can never be forfeited or waived.”).

358. See *Hans v. Louisiana*, 134 U.S. 1, 17 (1890) (“Undoubtedly a State may be sued by its own consent . . .”).

359. See *Edelman v. Jordan*, 415 U.S. 651, 673 (1974) (stating, in limiting the circumstances under which a state may be deemed to have waived its immunity, that “[c]onstructive consent is not a doctrine commonly associated with the surrender of constitutional rights”); Christina Bohannon, *Beyond Abrogation of Sovereign Immunity: State Waivers, Private Contracts, and Federal Incentives*, 77 N.Y.U. L. REV. 273, 288 (2002) (noting that the Supreme Court “repeatedly has confirmed that sovereign immunity from suit in federal court is a privilege that the state may waive at its pleasure”). If one cannot waive subject matter jurisdiction, and sovereign immunity is jurisdiction, how does one waive sovereign immunity? Scott Dodson and Katherine Florey are among the most recent scholars to have engaged this apparent paradox. See Scott Dodson, *Hybridizing Jurisdiction*, 99 CALIF. L. REV. 1439, 1473 (2011) (concluding that the word “jurisdiction” is often used in a manner that lacks sufficient nuance, as it can and should reflect different concepts and rules under different circumstances); Florey, *supra* note 356 (concluding that state sovereign immunity is not a matter of subject matter jurisdiction under Article III). Another approach that has been proposed that could address the paradox is to treat sovereign immunity as a matter of personal jurisdiction. See generally Caleb Nelson, *Sovereign Immunity as a Doctrine of Personal Jurisdiction*, 115 HARV. L. REV. 1559 (2002).

United States.”<sup>360</sup> At a minimum, it would defy the plain language of that amendment for a federal court to hear a suit based on state law initiated by a citizen of one state against another state.<sup>361</sup> This is true regardless of whether a state “waived” the Eleventh Amendment or not. The language of the Eleventh Amendment parallels that of Article III so closely and so deliberately that to conclude that a state could “waive it” arguably makes no more sense than the notion that a state could “waive” federal question jurisdiction.<sup>362</sup>

My approach provides a principled textual basis to distinguish the jurisdictional constraint of the Eleventh Amendment from the sovereignty-based constraint of the Guarantee Clause. Cases in which citizens sue their own states under federal law are not captured within the jurisdictional ambit of the Eleventh Amendment. Rather, these cases fall more readily within the more accommodating language of the Guarantee Clause, and the affirmative duty that it creates for the federal government to protect states. A state’s decision to subject itself to suit does not represent an apparent textual derogation of this federal duty.

### *B. The Political Question*

Enlisting the Guarantee Clause in discussions of sovereign immunity serves an additional function: it would ameliorate the criticism that the clause has been rendered superfluous.<sup>363</sup> The Supreme Court has held that challenges to state or congressional action under the Guarantee Clause present non-justiciable political questions.<sup>364</sup> My proposal is not ensnared within this proscription, however, because unlike previous attempts to awaken the Clause, I do not contend that the Guarantee Clause creates an independent cause of action.<sup>365</sup> Rather, I simply argue that the Clause should inform, and transform, the extant affirmative defense of sovereign immunity.

This proposal, therefore, does not run up against any of the traditional reasons for concluding that a provision presents a non-justiciable political question. The text of the Guarantee Clause does not, for example, vest all

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360. U.S. CONST. amend. XI.

361. This is true under either the plain meaning or diversity approach to understanding the Eleventh Amendment.

362. *Cf.* Fletcher, *supra* note 30, at 1087–1131 (describing the advantages of viewing sovereign immunity as an issue of federal power rather than judicial power).

363. *See supra* note 35.

364. *Baker v. Carr*, 369 U.S. 186, 225 (1962).

365. *See, e.g.*, Louise Weinberg, *Political Questions and the Guarantee Clause*, 65 U. COLO. L. REV. 887, 944–45 (1994); *see also* Richard L. Hasen, *Leaving the Empty Vessel of “Republicanism” Unfilled: An Argument for the Continued Nonjusticiability of Guarantee Clause Cases*, in *THE POLITICAL QUESTION DOCTRINE AND THE SUPREME COURT OF THE UNITED STATES* 75, 82 (Nada Mourtada-Sabbah & Bruce E. Cain eds., 2007). (explaining why the clause should not create an independent cause of action, even if there are judicially manageable enforcement standards).

germane discretion in a branch of government other than courts.<sup>366</sup> To the contrary, the Clause issues a command more broadly to “The United States.”<sup>367</sup> Nor does my proposal create a risk of a national security “embarrassment” abroad or at home.<sup>368</sup> Finally, and importantly, my proposal does not “ask the Court to enter upon policy determinations for which judicially manageable standards are lacking.”<sup>369</sup> The Court has regularly defined the scope of immunities—including sovereign immunity,<sup>370</sup> qualified immunity,<sup>371</sup> and certain forms of absolute immunity for judges,<sup>372</sup> witnesses,<sup>373</sup> prosecutors<sup>374</sup> and legislators.<sup>375</sup> If courts accepted this Article’s invitation, it would therefore simply require taking the Clause more seriously when performing a task that they have regularly engaged in for hundreds of years.<sup>376</sup>

### CONCLUSION

Eleventh Amendment doctrine has undergone many substantial surgeries. And despite the term “Eleventh Amendment immunity,”<sup>377</sup> the Court has rarely been troubled by the text of any specific provision when assessing suits against one’s state rooted in federal question jurisdiction. What is unclear is how much longer a doctrine so rootless can survive. The number of times the Court has reversed itself on basic aspects of sovereign immunity doctrine probably does not help its life expectancy should members of a future court have different views about the value of federalism for its own sake.<sup>378</sup> As Professor Andrew Coan has noted, “dating back to [1985] . . . the court has split 5–4, or more narrowly, along

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366. *Hasen*, *supra* note 365, at 82; *see also* *Nixon v. United States*, 506 U.S. 224, 237–38 (1993) (concluding that whether the Senate properly tried an impeachment was a political question, in part because Article I, § 3 vested the power to try impeachments in the Senate).

367. U.S. Const. art. IV, § 4.

368. *Baker*, 369 U.S. at 226; *see* *Goldwater v. Carter*, 444 U.S. 996 (1979) (ability to terminate treaties is a political question).

369. *Baker*, 369 U.S. at 226.

370. *See generally* *Alden v. Maine*, 527 U.S. 706 (1999); *Edelman v. Jordan*, 415 U.S. 651 (1974); *Ex parte Young*, 209 U.S. 123 (1908); *Hans v. Louisiana*, 134 U.S. 1 (1890).

371. *See generally* *Pearson v. Callahan*, 555 U.S. 223 (2009); *Saucier v. Katz*, 533 U.S. 194 (2001); *Wilson v. Layne*, 526 U.S. 603 (1999); *Harlow v. Fitzgerald*, 457 U.S. 800 (1982); *Scheuer v. Rhodes* 416 U.S. 232, 236 (1974).

372. *See* *Stump v. Sparkman*, 435 U.S. 349, 351 (1978).

373. *See* *Briscoe v. LaHue*, 460 U.S. 325, 326 (1983).

374. *See* *Buckley v. Fitzsimmons*, 509 U.S. 259, 272–79 (1993); *Imbler v. Pachtman*, 424 U.S. 409 (1976).

375. *See* *Bogan v. Scott-Harris*, 523 U.S. 44, 54 (1998); *Lake Country Estates, Inc. v. Tahoe Reg’l Planning Agency*, 440 U.S. 391, 402–03 (1979); *Tenney v. Brandhove*, 341 U.S. 367, 379 (1951).

376. *See* *Malley v. Briggs*, 475 U.S. 335, 340–41 (1986) (identifying the long standing nature of certain immunities).

377. *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 66 (2000).

378. Coan, *supra* note 346, at 2526.

political lines”<sup>379</sup> on questions about the sovereign immunity’s scope and existence.

In addition, the key principles generally associated with *stare decisis* in the constitutional context, famously outlined in *Planned Parenthood of Southeastern Pennsylvania v. Casey*,<sup>380</sup> do not save the doctrine. The Court’s creation of complex tests renders sovereign immunity difficult to administer.<sup>381</sup> Reversing sovereign immunity does not readily evoke concerns about reliance interests because theoretically, states do not have an interest in maintaining unconstitutional or unlawful conduct.<sup>382</sup> But above all this, it is generally accepted by commentators and even sitting judges that current textual and historical narratives supporting current sovereign immunity jurisprudence are in serious doubt.<sup>383</sup>

A reanimated Guarantee Clause may both rescue and reform state sovereign immunity. On one hand, the text and history of the Clause support the view that it was meant to protect popular sovereignty through representative government, thereby guarding against certain adversaries of states’ ability to survive and govern. These are among the same aims that fuel sovereign immunity jurisprudence. On the other hand, as the constitutional embodiment of popular sovereignty, the Clause also necessarily suggests certain limitations on state sovereignty. The Guarantee Clause enforces a constitutional principle that sometimes gets blurred or battered in the back-and-forth about state sovereignty: all sovereignty, all power, in the American system emanates from the people. That is an unfulfilled guarantee.

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379. *Id.*; see also *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 247 (1985) (Brennan, J., dissenting) (concluding, through four justices, that the Eleventh Amendment’s reach extended no further than its text).

380. 505 U.S. 833, 854–55 (1992).

381. *Id.*; see also *Coan*, *supra* note 346, at 2520 (noting that the doctrine is “difficult for lower courts to administer”). See generally Karlan, *supra* note 166 at 1913–14 (“The United States Supreme Court has pieced together a crazy quilt of constitutional doctrines that undercut its central goal of intelligently and efficiently refining broad constitutional commands.”).

382. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 855 (1992); see also *Monell v. N.Y.C. Dep’t of Soc. Servs.*, 436 U.S. 658, 700 (noting that governments do not have a reliance interest in violating the constitution; “[t]his is not an area of commercial law in which, presumably, individuals may have arranged their affairs in reliance on the expected stability of decision” (quoting *Monroe v. Pape*, 365 U.S. 167, 221–22 (1961))).

383. See *supra* note 35.