REIMAGINING THE ELEVENTH AMENDMENT

Katherine H. Ku*

Under current law, the Eleventh Amendment exemplifies, rather than fully expresses, a principle of immunity that shields unconsenting states from suit in federal court, although this immunity is functionally constrained to a degree by a limited power of congressional abrogation, Ex parte Young, *and suits under 42 U.S.C. § 1983. This Comment suggests that the "fundamental postulates" underlying the U.S. Supreme Court's recent jurisprudence in this area—immunity as a bedrock constitutional principle rather than a common law presumption, the paramount importance of state dignity, and historical traditionalism—do not necessarily lead to the immunity regime we know today. Rather, these fundamental postulates can theoretically yield far more limited immunity regimes. If the Court's current understanding of sovereign immunity is capable of generating such profoundly different immunity regimes, it is because sovereign immunity in its current form rests on an insufficiently rigorous set of conceptual principles. The consequence is a doctrine of sovereign immunity that may well have grown beyond its suggested rationale of preserving state dignity and that is at its core overly malleable.*

---

* Editor-in-Chief, UCLA Law Review, Volume 50. Law Clerk designate to the Honorable Alex Kozinski, U.S. Court of Appeals for the Ninth Circuit; J.D. candidate, UCLA School of Law, May 2003; B.A., Harvard University, 1996. Special thanks go to my adviser, Professor Gary Rowe, for his patient and kind guidance during the preparation of this Comment, and to Judge Kozinski, for encouraging me to explore this area of the law. For their invaluable advice and help, I also thank Associate Dean Elizabeth Cheadle and Professors Kenneth Karst, Herbert Morris, Grant Nelson, Frances Olsen, and William Rubenstein. Publication is a collective enterprise, and I would be remiss if I did not recognize those members of the *UCLA Law Review* community whose efforts brought this project to completion: Pei Pei Tan, Tracy Casadio, Emily Daughtry, Todd Foreman, Cheryl Kelly, Marc Lewis, Timothy Nelson, Katherine Nichols, Kristen Rowse, Khaldoun Shobaki, Ryan Tacorda, Emily Taylor, and Christine Trinh. Editing by Samantha Eisner also improved this piece. Finally, I dedicate this Comment to that most patient of men, my husband Nicholas B. Chun.

INTRODUCTION

Imagine the following two scenarios.

Case 1:[1] In the midst of a failing market for electricity, a state struggles to keep the lights on (literally) by buying exorbitantly priced electricity on the "spot market." The state exercises a statutory emergency power in order to ensure a reliable flow of power and to preserve the public fisc. It takes over contracts between an energy wholesaler and an insolvent utility, assumes the place of the defaulting utility, pays the wholesaler the contractually fixed rates, and thereby assures its citizens of a consistent supply of power. The wholesaler sues the state in federal court under federal law. The state invokes state sovereign immunity under the Eleventh Amendment.[2]

Case 2:[3] A private bank patents financial instruments and markets them to customers as college tuition savings plans. A state imitates the bank's product

1. I base this scenario on *Duke Energy Trading & Marketing, L.L.C. v. Davis*, 267 F.3d 1042 (9th Cir. 2001). In the actual case, Duke Energy sued California Governor Gray Davis under *Ex parte Young*, 209 U.S. 123 (1908), alleging that Davis's actions violated the Supremacy Clause, U.S. CONST. art. VI, § 4, cl. 2, and the Contracts Clause, U.S. CONST. art. I, § 10. *Duke Energy*, 267 F.3d at 1047. Davis unsuccessfully raised *Idaho v. Coeur d'Alene Tribe*, 521 U.S. 261 (1997), in an attempt to preclude the *Young* suit from proceeding. *Duke Energy*, 267 F.3d at 1051–55.

2. U.S. CONST. amend. XI. The Eleventh Amendment provides in its entirety: "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." *Id.*

The term "Eleventh Amendment immunity" is something of a misnomer because, as I discuss in Part I, the doctrine of state sovereign immunity is broader than the import of the text of the amendment itself. Alden v. Maine, 527 U.S. 706, 713 (1999). For this reason, I use the term "state sovereign immunity" rather than "Eleventh Amendment immunity."

3. I base this scenario on *Florida Prepaid Postsecondary Education Expense Board v. College Savings Bank*, 527 U.S. 627 (1999). In the actual case, the plaintiff sued the defendant for patent infringement, and the U.S. Supreme Court held that the U.S. Congress had not validly abrogated state immunity under the Patent and Plant Variety Protection Remedy Clarification (Patent Remedy Act), 35 U.S.C. §§ 271(h), 296(a). *Florida Prepaid*, 527 U.S. at 645–48. The defendant was therefore immune to suit. *Id.* at 647.

and sells similar savings plans in the private market. The bank sues the state in federal court under federal law. The state invokes the Eleventh Amendment.

Which state should be immune from suit? One might instinctively reason that the state in Case 1 should enjoy immunity because it is safeguarding citizens' welfare as a governmental actor, while the state in Case 2 should be subject to suit because it is participating as a commercial actor in the private market. Case law tells us otherwise. In the actual cases on which these scenarios are based, the state as governmental actor was deemed suable, while the state as commercial actor was immune to suit.[4] These outcomes will likely puzzle a reader unfamiliar with the doctrine of state sovereign immunity.[5] After all, one might argue that it is reasonable to hold a state acting like a private individual to the same rules that constrain private actors. At the very least, it might seem more logical to subject the "commercial" state—rather than the "governmental" state—to suit. And yet we reach opposite outcomes.

Those familiar with the terrain will recognize these outcomes as simply another milepost in the currently unpredictable landscape of Eleventh Amendment jurisprudence. Since the U.S. Supreme Court's 1996 landmark decision in *Seminole Tribe of Florida v. Florida*,[6] state sovereign immunity has undergone seismic shifts.[7] To some thoughtful commentators, these shifts do not necessarily

4. *Florida Prepaid*, 527 U.S. at 647–48; *Duke Energy*, 267 F.3d at 1054–55. These two cases are drawn as they are for heuristic purposes. To be sure, one is a case from the U.S. Court of Appeals for the Ninth Circuit, while the other is from the Supreme Court. In addition, I have changed the specific contours of each case. However, the comparison illustrates a basic point—that states enjoy immunity even in commercial contexts, a fact that some continue to question. *See infra* notes 18–19 and accompanying text.

5. The reader would likely be surprised in the first instance that, in principle at least, state governments are immune from most lawsuits that she might bring in federal court in order to vindicate her federal constitutional or statutory rights. Rightly or wrongly, federal courts are popularly perceived as special protectors of federal rights. The activist era of the Warren Court and *Brown v. Board of Education*, 347 U.S. 483 (1954), instilled that belief in many in the legal profession and in the general American population. William A. Fletcher, *The Eleventh Amendment: Unfinished Business*, 75 NOTRE DAME L. REV. 843, 846–47 (2000). And, rightly or wrongly, states are popularly perceived as egregious violators of federal rights. The Fourteenth Amendment was, after all, passed on the premise that states failed to respect individual rights. Yet the law for over a century has been that states are immune to suit in federal court under federal law. *See* Hans v. Louisiana, 134 U.S. 1 (1890) (holding in a federal question case that state sovereign immunity barred a Louisiana citizen from suing the state of Louisiana).

6. 517 U.S. 44 (1996).

7. During Chief Justice Rehnquist's tenure, the doctrine of state sovereign immunity has not merely endured, but flourished. In the last decade, the Supreme Court has eliminated constructive state waiver of immunity, Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd., 527 U.S. 666, 687 (1999); constrained congressional authority to abrogate state immunity, *Seminole Tribe*, 517 U.S. at 72; extended states' immunity to the context of administrative tribunals, Fed. Mar. Comm'n v. S.C. State Ports Auth., 122 S. Ct. 1864, 1874–75 (2002); and arguably limited *Ex parte Young*, 209 U.S. 123 (1908), as a critical end-run around state immunity, *see Seminole Tribe*, 517 U.S. at 73–76; Idaho v. Coeur d'Alene Tribe, 521 U.S. 261, 287–88 (1997).

portend doom;[8] commentators who believe state sovereign immunity undermines the rule of law, as well as the Court's consistent dissenters, do not view the recent changes as so innocuous.[9]

Relying on history and constitutional structure, the Court's majority[10] argues that the Eleventh Amendment exemplifies, rather than fully expresses, a constitutional principle of immunity that upholds state dignity[11] and that, accordingly, the U.S. Congress has only narrow power to abrogate.[12] The Court's dissenters[13] argue instead that, with the exception of cases explicitly covered

---

Young enables plaintiffs to sue state officials in their official capacity for declaratory or injunctive relief to end ongoing violations of federal law. *Id.* at 269. Although a *Young* suit runs against a state official rather than a state itself, relief that stops the unlawful actions of the official has the effect of stopping the unlawful actions of the state, because a state cannot act except through its agents. ERWIN CHEMERINSKY, FEDERAL JURISDICTION 414 (3d ed. 1999). *Young* suits are thus a vital tool for judicial enforcement of the U.S. Constitution and of federal statutes against states. *Id.* at 415; *see also* John C. Jeffries, Jr., *In Praise of the Eleventh Amendment and Section 1983*, 84 VA. L. REV. 47 (1998) (discussing *Young* in conjunction with suits under 42 U.S.C. § 1983, which allow plaintiffs to sue local and state officials for damages for constitutional violations). Contraction of *Young* is accordingly an expansion of state sovereign immunity. The Court has arguably limited *Young* twice within the past seven years. In *Seminole Tribe*, the Court appears to have held that *Young* suits are unavailable to plaintiffs when Congress has created a detailed remedial scheme to vindicate statutory rights. *Seminole Tribe*, 517 U.S. at 73–77. Shortly thereafter, the Court arguably held in *Coeur d'Alene* that otherwise valid *Young* suits that implicate special sovereignty interests cannot proceed. *Coeur d'Alene*, 521 U.S. at 287–88. For extensive discussion of *Coeur d'Alene*, see *infra* Part III.

8. *See, e.g.*, Henry Paul Monaghan, *The Sovereign Immunity "Exception,"* 110 HARV. L. REV. 102 (1996); Carlos Manuel Vazquez, *Eleventh Amendment Schizophrenia*, 75 NOTRE DAME L. REV. 859 (2000); Ann Woolhandler, *Old Property, New Property, and Sovereign Immunity*, 75 NOTRE DAME L. REV. 919 (2000).

9. *See, e.g.*, *Federal Maritime Commission*, 122 S. Ct. at 1879–81 (Stevens, J., dissenting); *id.* at 1888–89 (Breyer, J., dissenting); Alden v. Maine, 527 U.S. 706, 760 (1999) (Souter, J., dissenting); *College Savings Bank*, 527 U.S. at 691 (Stevens, J., dissenting); *id.* at 693 (Breyer, J., dissenting); *Florida Prepaid*, 527 U.S. at 648 (Stevens, J., dissenting); *Coeur d'Alene*, 521 U.S. at 297 (Souter, J., dissenting); *Seminole Tribe*, 517 U.S. at 76 (Stevens, J., dissenting); *id.* at 100 (Souter, J., dissenting); Vicki C. Jackson, *Principle and Compromise in Constitutional Adjudication: The Eleventh Amendment and State Sovereign Immunity*, 75 NOTRE DAME L. REV. 953, 968 (2000) ("*Seminole Tribe* was clearly wrongly decided."); Daniel J. Meltzer, *State Sovereign Immunity: Five Authors in Search of a Theory*, 75 NOTRE DAME L. REV. 1011, 1054 (2000) ("[P]erhaps, to offer a more hopeful vista, a future Court will take the view that *Seminole Tribe* and *Alden* were misguided and will overrule their limitation of congressional power."); David L. Shapiro, *The 1999 Trilogy: What Is Good Federalism?*, 31 RUTGERS L.J. 753, 753 (2000) ("I am angry at what the Court has done in the trilogy and, especially, in *Alden*.").

10. Chief Justice Rehnquist and Justices O'Connor, Scalia, Kennedy, and Thomas frequently vote as a unified majority in state sovereign immunity cases. *See, e.g.*, cases cited *supra* note 9. But these five Justices split their votes in *Coeur d'Alene*, even though they converged on a common rationale for the judgment in that case. See *infra* the discussion in Part III.

11. *Alden*, 527 U.S. at 713–15.

12. *Seminole Tribe*, 517 U.S. at 54, 72.

13. Justices Stevens, Souter, Ginsburg, and Breyer are frequent dissenters in state sovereign immunity decisions. *See* cases cited *supra* note 9. They have consistently maintained that sovereign immunity is a common law, not a constitutional, principle. *See, e.g.*, *College Savings Bank*, 527 U.S. at 700 (Breyer, J., dissenting) ("Sovereign immunity is a common-law doctrine."); *Seminole Tribe*, 517

by the text of the Eleventh Amendment, state sovereign immunity is merely a common law doctrine that Congress may abrogate.[14] The former position largely shields states from direct liability, while the latter position would likely result in states being made subject to suit in a broad range of areas.

But one need not view sovereign immunity as an issue of federal common law—or denigrate the importance of historical tradition and of the states' sovereign dignity—to believe that the Court's extension of the doctrine during the last decade has been insufficiently justified. Among critical evaluations of state sovereign immunity, the diversity theory embraced by Justice Souter in his *Seminole Tribe* dissent[15] has perhaps garnered the most attention. Diversity theorists argue that the extension of sovereign immunity beyond the text of the Eleventh Amendment is indefensible.[16] Their work does not exhaust the critique of sovereign immunity, however, for the current doctrine's contours fail to follow even the nontextual premises articulated by the Court's majority. In other words, even assuming arguendo the underlying premises of the majority's position, we should arrive at a doctrine of state sovereign immunity that takes greater account of the actual nature of modern state government and that better accommodates rule-of-law values. Accepting the "fundamental postulates"[17] of the majority does not necessarily lead one down the path the Court has taken—or so this Comment argues.

This Comment is a thought experiment in how the foundations of state sovereign immunity can and perhaps should yield doctrines with significantly

---

U.S. at 84 (Stevens, J., dissenting) ("*Hans* . . . reflects, at the most, this Court's conclusion that, as a matter of federal common law, federal courts should decline to entertain suits against unconsenting states."); *id.* at 102 (Souter, J., dissenting) ("[I]n holding that a nontextual common-law rule limits a clear grant of congressional power under Article I, the Court follows a course that has brought it to grief before in our history, and promises to do so again."). They have also consistently disputed the majority's use of history in giving content to the immunity principle. *See, e.g.*, *Federal Maritime Commission*, 122 S. Ct. at 1884 (Breyer, J., dissenting) (arguing that, contrary to the majority opinion, "total 18th-century silence about state immunity in Article I proceedings would argue against, not in favor of, immunity"); *Alden*, 527 U.S. at 808 (Souter, J., dissenting) ("[T]oday's decision occasions regret at its anomalous version[ ] of history . . . ."); *Seminole Tribe*, 517 U.S. at 106 n.5 (Souter, J., dissenting) ("This lengthy [historical] discussion . . . is necessary to explain why, in my view, the contentions . . . that *Chisholm* created a great 'shock of surprise' misread the history. . . . The Court's response to this historical analysis is simply to recite yet again [ ] th[is] erroneous assertion . . . . This response is, with respect, no response at all.") (citations omitted).

14. *Seminole Tribe*, 517 U.S. at 84 (Stevens, J., dissenting).

15. *Id.* at 110 (Souter, J., dissenting) ("The history and structure of the Eleventh Amendment convincingly show that it reaches only to suits subject to federal jurisdiction exclusively under the Citizen-State Diversity Clauses."). Justice Ginsburg and Justice Breyer joined Justice Souter's dissent.

16. *See, e.g.*, 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 (1983); John J. Gibbons, *The Eleventh Amendment and State Sovereign Immunity: A Reinterpretation*, 83 COLUM. L. REV. 1889 (1983).

17. *Alden*, 527 U.S. at 729. I employ this term frequently in this Comment.

different parameters than the existing regime. I explore two possible alternatives to current law, one that distinguishes commercial and noncommercial activity by states and another that distinguishes core sovereign attributes from nonessential state activity. These imagined alternatives assume the constitutionalized character of state sovereign immunity and incorporate the values of state dignity and historical tradition, but also place greater value on rule-of-law concerns. In Part I, I provide a brief background on state sovereign immunity for readers unfamiliar with this area, then describe the fundamental postulates underpinning the current doctrine. In Part II, I consider the possibility of reconfiguring Eleventh Amendment jurisprudence on the basis of a commercial-noncommercial distinction, which has been posed by Judge William Fletcher[18] and, more limitedly, by Justices Stevens and Breyer.[19] In Part III, I suggest that both the Court's past Tenth Amendment cases and its present Eleventh Amendment jurisprudence contain the potential for an alternative immunity regime that shields only an "essential state"—those governmental attributes historically at the core of state sovereignty. I ultimately conclude that, if the Court's current understanding of sovereign immunity is capable of generating such profoundly different immunity regimes, it is because sovereign immunity in its current form rests on an insufficiently rigorous set of conceptual principles. The consequence is a doctrine of sovereign immunity that may well have grown beyond its suggested rationale of preserving state dignity and that is at its core overly malleable.

18. Fletcher, *supra* note 5, at 854–56. In making this suggestion, Judge William Fletcher noted that a "possible exception" to a state's commercial behavior might be "deciding how much to pay its employees," which might be better construed as sovereign action. *Id.* at 855.

19. *See* Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd., 527 U.S. 666, 699 (1999) (Breyer, J., dissenting) (arguing that the Court's holding that states do not constructively waive their immunity by participating in federally regulated, commercial behavior creates a "legal 'anomaly'" "given the widely accepted view among modern nations that when a State engages in ordinary commercial activity sovereign immunity has no significant role to play"). Justice Breyer argued in his *College Savings Bank* dissent, "When a State engages in ordinary commercial ventures, it acts like a private person, outside the area of its 'core' responsibilities, and in a way unlikely to prove essential to the fulfillment of a basic governmental obligation." *Id.* at 694; *see also id.* at 691–92 (Stevens, J., dissenting). Justice Stevens suggested that "[i]n future cases, it may . . . be appropriate to limit the coverage of state sovereign immunity by treating the commercial enterprises of States like the commercial activities of foreign sovereigns under the Foreign Sovereign Immunities Act of 1976." *Id.* at 692 (Stevens J., dissenting) (citing 28 U.S.C. § 1605(a)(2) (2000), which carves out commercial activity from immunity for foreign sovereigns).

I. DOCTRINAL BACKGROUND

A. State Sovereign Immunity

Under Article III, section 2 of the U.S. Constitution, the subject matter jurisdiction of the federal judiciary may derive either from the substantive law at issue in a case or from the identity of the parties to a case.[20] The plain language of section 2 provides, without specifying party status, that federal courts shall have cognizance of cases involving either "a State and Citizens of another State" or "a State, or the Citizens thereof, and foreign States, Citizens or Subjects."[21] In other words, the plain language alone appears to allow federal courts jurisdiction over diversity cases in which a state is either the plaintiff or the defendant. In 1793, the Supreme Court held in *Chisholm v. Georgia*[22] that it had original jurisdiction over a case in which Alexander Chisholm, a citizen of South Carolina, sued the State of Georgia.[23] The Eleventh Amendment was drafted and enacted in response. The Eleventh Amendment in its entirety states that "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."[24] The plain language of the Eleventh Amendment seems to provide simply that federal courts do not have cognizance of cases in which individual plaintiffs from one state (or foreign country) sue another state.[25]

---

20. Section 2 provides:

> The Judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State;—between Citizens of different States;—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

U.S. CONST. art. III, § 2.

21. *Id.*

22. 2 U.S. (1. Dall.) 419 (1793).

23. *Id.* at 431. The Court's majority and dissenters interpret the significance of *Chisholm v. Georgia* differently. *Compare* Alden v. Maine, 527 U.S. 706, 720 (1999) (arguing that Justice Iredell, in his influential dissent, utilized history and principles of sovereignty to conclude that the Constitution did not abrogate state immunity), *with* Seminole Tribe of Fla. v. Florida, 517 U.S. 44, 78–81 (1996) (Stevens, J., dissenting) (arguing that Justice Iredell relied on statutory interpretation to conclude that Congress had not extended federal jurisdiction over states).

24. U.S. CONST. amend. XI. Parties protected by state sovereign immunity include states themselves and their agencies, but do not include localities and municipalities. CHEMERINSKY, *supra* note 7, at 406–07.

25. This plain language reading of the Eleventh Amendment provides the basis for two alternative interpretations of state sovereign immunity. As earlier alluded to in the text, diversity theorists such as Fletcher suggest that the Eleventh Amendment does not act as a bar to federal jurisdiction over

However, the scope of state sovereign immunity under current doctrine does not rest upon the plain language of the Eleventh Amendment. A majority consisting of Chief Justice Rehnquist and Justices O'Connor, Scalia, Kennedy, and Thomas has agreed that state sovereign immunity cannot be located in or derived from the text of the Constitution itself[26]—a striking move for jurists who typically rely on an originalist interpretative stance. Rather, Justice Kennedy wrote in *Alden v. Maine*,[27] the Eleventh Amendment merely exemplifies a principle presupposed and embodied in the structure of the Constitution, as part of the original understanding of the Founders.[28]

State sovereign immunity originally derives from English common law.[29] English law provided that *rex non potest peccare*—or, the King could do no wrong.[30] The five-member majority argues that it was the original understanding of the Founders that states, like the English king, enjoyed immunity from private suits and that, though the states ceded specific enumerated powers to the national government, they continued to enjoy their immunity from private suit as an aspect of the residual sovereignty they retain under our system of dual

---

all cases simply because the state is a party. Fletcher, *supra* note 16, at 1035. Instead, the Eleventh Amendment restrains the state-diversity clause of Article III, section 2, prohibiting a state from being sued in the absence of another basis for Article III jurisdiction. *Id.* at 1035–37. Thus, the Eleventh Amendment would not, under this theory, prevent a state from being sued in a case raising a federal question. Prohibition theorists, on the other hand, believe that the Eleventh Amendment bars federal jurisdiction whenever out-of-state citizens or foreign citizens bring suits against states in law or equity. Fletcher, *supra* note 5, at 848. That is, the defendant status of a state would bar jurisdiction, even if the case concerned a federal question. Unlike current doctrine, both theories are grounded in the text of the amendment itself, and both result in much narrower grants of immunity to states.

Like Fletcher, Akhil Amar concludes that the Eleventh Amendment merely repeals diversity-party jurisdiction in cases in which noncitizens or foreign plaintiffs sue states. Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 YALE L.J. 1425, 1473–75 (1987). However, Amar relies on structural and historical analysis as well as the plain language of the amendment to support his conclusion. *Id.* at 1481–84. Erwin Chemerinsky argues even more broadly that state sovereign immunity is inherently unconstitutional under the Supremacy Clause and should be rejected in its entirety. Erwin Chemerinsky, *Against Sovereign Immunity*, 53 STAN. L. REV. 1201, 1211–12 (2001).

26. *Alden*, 527 U.S. at 728.

27. 527 U.S. 706 (1999).

28. *Id.* at 728–30.

29. *Id.* at 715–16.

30. JOHN V. ORTH, THE JUDICIAL POWER OF THE UNITED STATES 41 (1987). Query whether this phrase means that no action of the monarch can be construed as wrong or that the monarch is prohibited from doing wrong to his subjects. *See* Seminole Tribe of Fla. v. Florida, 517 U.S. 44, 103 n.2 (1996) (Souter, J., dissenting) ("Professor [Louis] Jaffe has argued this expression 'originally meant precisely the contrary to what it later came to mean,' that is, 'it meant that the king must not, was not allowed, not entitled, to do wrong.'" (quoting Louis L. Jaffe, *Suits Against Governments and Officers: Sovereign Immunity*, 77 HARV. L. REV. 1, 4 (1963) (first internal quote); *id.* (quoting Ludwig Ehrlich, *Proceedings Against the Crown (1216–1377)*, *in* 6 OXFORD STUDIES IN SOCIAL AND LEGAL HISTORY Ch. XII, 42 (P. Vinogradoff ed., 1921) (second internal quote)))).

sovereignty.[31] When the *Chisholm* Court mistook the reach of federal jurisdiction, the Eleventh Amendment was passed to overrule *Chisholm*'s specific holding and to restore the original understanding of the Founders.[32] Written for that limited purpose, the majority concludes, the Eleventh Amendment is only a partial expression of a larger notion implicit in our constitutional structure.[33] That is, state sovereign immunity derives its meaning, purpose, and shape from the special role of states in our system of federalism.

The current doctrine of state sovereign immunity bars certain plaintiffs—out-of-state and foreign citizens,[34] in-state citizens,[35] federal corporations,[36] Indian tribes,[37] and foreign states[38]—from suing an unconsenting state in federal court.[39] In contrast, federal courts may take cognizance of suits brought by the United States and other states, because the Court deems jurisdiction in these instances to have been part of the Plan of the Convention, to which all states consented under the Constitution.[40]

State sovereign immunity seems to be—but is not wholly—a substantive limit on federal subject matter jurisdiction.[41] On the one hand, state sovereign immunity "sufficiently partakes" of jurisdiction such that a state can raise this defense at any time, including on appeal.[42] On the other hand, state sovereign immunity is sufficiently unlike subject matter jurisdiction such that a state can either consent to a specific suit or waive its immunity in a subject area—concessions not normally permissible as to subject matter jurisdiction.[43] State sovereign immunity is also unlike subject matter jurisdiction in that Congress may abrogate it.[44]

---

31. *Alden*, 527 U.S. at 713. *But see Seminole Tribe*, 517 U.S. at 103 (Souter, J., dissenting) (arguing that the extent of immunity afforded to colonial governments in pre–Revolutionary America is unclear and that the record concerning the Framers' intent is ambiguous).

32. *Alden*, 527 U.S. at 722–23.

33. *Id.* at 713.

34. *E.g.*, *In re* New York, 256 U.S. 490, 497 (1921).

35. Hans v. Louisiana, 134 U.S. 1, 21 (1890).

36. Smith v. Reeves, 178 U.S. 436, 448–49 (1900).

37. Blatchford v. Native Vill. of Noatak, 501 U.S. 775, 781–82 (1991).

38. Principality of Monaco v. Mississippi, 292 U.S. 313, 331–32 (1934).

39. In addition, when suing state officials in federal court for violations of federal law, such plaintiffs cannot pursue pendent state law claims against the defendant-officials. Pennhurst State Sch. & Hosp. v. Halderman, 465 U.S. 89, 106 (1984).

40. Alden v. Maine, 527 U.S. 706, 755–56 (1999).

41. See Caleb Nelson, *Sovereign Immunity as a Doctrine of Personal Jurisdiction*, 115 HARV. L. REV. 1559 (2002), for an interesting argument that the Framers who supported sovereign immunity actually perceived it to be grounded in personal jurisdiction, not subject matter jurisdiction.

42. Edelman v. Jordan, 415 U.S. 651, 677–78 (1974).

43. CHEMERINSKY, *supra* note 7, at 399.

44. Congress formerly could abrogate state sovereign immunity by virtue of its Commerce Clause powers, Pennsylvania v. Union Gas Co., 491 U.S. 1, 5 (1989), *overruled by* Seminole Tribe of Fla. v. Florida, 517 U.S. 44, 72–73 (1996), or its Fourteenth Amendment, section 5 enforcement

In sum, except for state waiver or valid congressional abrogation, the rules of state sovereign immunity substantially foreclose most plaintiffs' ability to sue a state—but for the judicially created *Ex parte Young*[45] doctrine.

B. *Ex parte Young*

Under *Ex parte Young*, a plaintiff may sue a state official for injunctive relief to end an ongoing violation of the Constitution or of federal law. Because *Ex parte Young*[46] permits suit only against state officials, not states, it is technically not an exception to the Eleventh Amendment like state waiver or congressional abrogation. However, *Young* has been dubbed an "obvious fiction"[47] by the Court—and for good reason. In effect, a *Young* suit is an action against a state (or one of its agencies) to bring the state's policies and actions into compliance with the requirements of the Constitution and federal law. *Young* is the practical compromise between two competing values: It is a mechanism by which the supremacy of federal law may be vindicated, while also in theory preserving some modicum of state dignity by preventing the state itself

---

powers, Fitzpatrick v. Bitzer, 427 U.S. 445, 456 (1976). Now, however, Congress may abrogate state sovereign immunity only after a clear statement of its intent to do so, Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 238–39 (1985), and pursuant to a valid exercise of its Fourteenth Amendment, section 5 powers, *Seminole Tribe*, 517 U.S. at 55. Furthermore, Congress may not authorize suits against states in their own courts. *Alden*, 527 U.S. at 754.

45. 209 U.S. 123 (1908). John C. Jeffries, Jr. and Carlos Manuel Vazquez have suggested that legal mechanisms other than direct suits against states help enforce the rule of law. In addition to *Ex parte Young*, suits against officers in their individual capacities for money damages—under § 1983, for example—also help uphold the law. *See* Jeffries, *supra* note 7, at 49–50; Vazquez, *supra* note 8, at 875–76.

46. The *Young* doctrine actually pre-dates the 1908 case for which it is named, CHEMERINSKY, *supra* note 7, at 412 n.6, but the facts of *Young* illustrate the basic principle. The state of Minnesota had passed railroad rate legislation which imposed prohibitive penalties, such as fines of $2500 or imprisonment for up to five years, on any railroad company or company agent who violated the rate structure. *Id.* at 412. Railroad companies believed the legislation to be unconstitutional but, because of the severe penalties involved, were unwilling to violate the rate laws and raise unconstitutionality as a defense. *Id.* Instead, shareholders in one railroad company sued in federal court to have the attorney general of Minnesota enjoined from enforcing the rate structure. *Id.* The district court issued a preliminary injunction to stay enforcement, but Attorney General Edward T. Young immediately violated the order by filing a suit and was jailed for contempt. *Id.* at 412–13. Young argued that the Eleventh Amendment barred the district court's injunction. *Id.* at 413. Reasoning that states lack the power to authorize violations of the Constitution or federal law, the Supreme Court held that the district court properly exercised jurisdiction. *Id.* In other words, the "Eleventh Amendment does not bar suits against state officers to enjoin violations of federal law." *Id.* (citing *Young*, 209 U.S. at 159–60). In order for a *Young* suit to proceed, it is normally sufficient for the plaintiff merely to plead that she seeks declaratory or injunctive relief against a state official in his official capacity in order to remedy ongoing violations of federal law. Idaho v. Coeur d'Alene Tribe, 521 U.S. 261, 288 (1997) (O'Connor, J., concurring).

47. *Coeur d'Alene*, 521 U.S. at 270.

from being dragged into court in its own name.[48] As the Court has recognized, any *Young* suit that goes forward will, although permissible, nevertheless implicate "substantial state interests."[49]

The primary limitation on *Young* is *Edelman v. Jordan*,[50] which held that, although a party may sue a state official for prospective injunctive relief, the plaintiff may not seek retrospective relief in the form of damages.[51] The rationale is that *Young* suits serve to vindicate federal rights and the supremacy of federal law, but do not serve a compensatory function for past injuries.[52] However, though a court may not award retrospective relief that would draw down on the public fisc, it is perfectly permissible for prospective injunctive relief to result in "ancillary" effects on the state treasury—effects that might be far costlier than damages would have been.[53]

As discussed in Part III below, *Young* is also arguably subject to a narrow exception based on the Court's 1997 decision *Idaho v. Coeur d'Alene Tribe*.[54]

C. Basic Principles

It will be useful to clarify the fundamental postulates that the Court has articulated in its recent state sovereign immunity cases, as any proposed revision in this thought experiment must embrace and work from the premises of the current doctrine. In addition, I will begin to discuss here how these premises afford the flexibility to formulate alternative immunity regimes.

Three fundamental postulates emerge from the immunity cases of the last decade. First, the immunity principle is to the Court's majority constitutional in nature. As Justice Kennedy explained in *Alden*, for example, the scope of state sovereign immunity extends beyond the text of the Eleventh Amendment and yet is nonetheless constitutional:

> [The state sovereign immunity cases] reflect a settled doctrinal understanding, consistent with the views of the leading advocates of the Constitution's ratification, that sovereign immunity derives not from the Eleventh Amendment but from the structure of the original Constitution itself. The Eleventh Amendment confirmed, rather than established, sovereign immunity as a constitutional principle; it fol-

48. *Id.* at 269.
49. *Id.* at 270.
50. 415 U.S. 651 (1974).
51. *Id.* at 663.
52. *Id.* at 665–67.
53. *Id.* at 667–68. *See, e.g.*, Milliken v. Bradley, 433 U.S. 267, 289–90 (1977) (upholding a court order that Detroit school officials pay half the costs of desegregation programs out of the state treasury).
54. 521 U.S. 261 (1997).

> lows that the scope of the States' immunity from suit is demarcated not by the text of the Amendment alone but by fundamental postulates implicit in the constitutional design.[55]

Second, the majority views the dignity of a state as the primary concern underlying the immunity doctrine. In *Federal Maritime Commission v. South Carolina State Ports Authority*,[56] Justice Thomas explained:

> While state sovereign immunity serves the important function of shielding state treasuries and thus preserving "the States' ability to govern in accordance with the will of their citizens," the doctrine's central purpose is to "accord the States the respect owed them as" joint sovereigns. It is for this reason, for instance, that sovereign immunity applies regardless of whether a private plaintiff's suit is for monetary damages or some other type of relief.[57]

However, the notion of state dignity seems inherently vague and thus potentially limitless. To assert that states possess dignity seems merely to beg the question of why this is the case. The Court's majority has given more specific meaning to the concept of state dignity by locating its source in the sovereign character of states *qua* states. Thus, in *Alden*, Justice Kennedy wrote that states "are not relegated to the role of mere provinces or political corporations, but retain the dignity, though not the full authority, of sovereignty."[58] More explicitly linking state dignity with the immunity doctrine, Justice Thomas wrote in *Federal Maritime Commission*, "The *preeminent purpose* of state sovereign immunity is to accord States the dignity that is consistent with their status as sovereign entities."[59] Articulated more precisely, then, the driving purpose of state sovereign immunity is not protecting the dignity of states but rather protecting the *sovereign* dignity of states.

Third, the Court believes that history is our best guide, for interpretation "rest[ing] on the words of the [Eleventh] Amendment alone would be to engage in the type of ahistorical literalism [the Court has] rejected in interpreting the scope of the States' sovereign immunity."[60] The current immunity doctrine in its entirety cannot be derived from the text of the Eleventh Amendment itself.

---

55. Alden v. Maine, 527 U.S. 706, 728–29 (1999).

56. 122 S. Ct. 1864 (2002).

57. *Id.* at 1877 (citations omitted) (quoting *Alden*, 527 U.S. at 750–51 (first internal quote); P.R. Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc., 506 U.S. 139, 146 (1993) (second internal quote)). *But see* Roderick M. Hills, Jr., *The Eleventh Amendment as Curb on Bureaucratic Power*, 53 STAN. L. REV. 1225, 1226–28 (2001) (suggesting that a useful, if unintended, benefit of the damages-injunction distinction might be preventing state bureaucrats from disrupting the budgetary constraints with which elected state officials must grapple).

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

59. *Federal Maritime Commission*, 122 S. Ct. at 1874 (emphasis added).

60. *Alden*, 527 U.S. at 730.

For example, how one understands and interprets history is fundamental to whether one views sovereign immunity as a bedrock constitutional principle or rather as a weaker common law presumption. Thus, the present scope of state sovereign immunity relies heavily on historical tradition.[61]

Moreover, the concepts of historical tradition and state dignity can be conceptualized as interrelated. An attribute of statehood that has existed from our earliest history may be taken as foundational to a state's sovereignty and thus cloaked in a dignity that merits institutional respect because of its long provenance. For example, in *Coeur d'Alene*, the Supreme Court regarded the interest in submerged lands beneath a state's waters as so historically central to statehood that it precluded an otherwise appropriate *Young* suit from going forward.[62] Conversely, modern innovations may merit less deference because of their shorter pedigree and their concomitant lack of traditional sovereign character. Thus, in *Verizon Maryland Inc. v. Public Service Commission*,[63] for example, the Court rebuffed efforts by a state utility commission implementing federal telecommunications regulations to bar a suit under the Eleventh Amendment; the Court held that the suit could proceed against the individual commissioners under *Young*.[64]

Accepting sovereign immunity as a constitutional principle, then, does not necessarily imply that sovereign immunity should assume the same scope the current Court gives it. Rather, it is surely possible to acknowledge that, even if the states entered the Union cloaked with immunity for the governmental functions they then fulfilled, they have since taken up additional, quite different roles that do not merit immunity.

The alternative immunity regimes I canvass in Parts II and III rely on this notion that modern state activities merit less deference. Under these alternative regimes, plaintiffs would be able to sue states directly in name, rather than rely on *Young*, in a variety of areas. These proposals would therefore expose states to damages awards as well as injunctive relief (to which states are already functionally exposed through *Young* suits), subject to the reconfigured limits of state immunity. It is necessary, then, to demonstrate that subjecting states to damages awards is both acceptable and appropriate given the stated purpose of the present Court's sovereign immunity doctrine.

---

61. For challenges to the majority's interpretation of history, see generally the dissents of Justices Stevens and Souter in *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996), and John V. Orth, *History and the Eleventh Amendment*, 75 NOTRE DAME L. REV. 1147 (2000).

62. Idaho v. Coeur d'Alene Tribe, 521 U.S. 261, 281–88 (1997). For extensive discussion of *Coeur d'Alene*, see *infra* Part III.

63. 122 S. Ct. 1753 (2002).

64. *Id.* at 1760.

The Court has treated concern about subjecting states to damages as derivative of the dignity concern.[65] Although the Court's majority has expressed reluctance to subject state treasuries to damages awards,[66] it seems less concerned with the fact that damages impose upon the public fisc than with *who* imposes these damages on states. Directly linking the payment of damages and offense to state dignity, Justice Kennedy wrote in *Alden*:

> Petitioners contend that immunity from suit in federal court suffices to preserve the dignity of the States. Private suits against nonconsenting States, however, present "the indignity of subjecting a State to the coercive process of judicial tribunals at the instance of private parties," regardless of the forum. Not only must a State defend or default *but also it must face the prospect of being thrust, by federal fiat and against its will, into the disfavored status of a debtor, subject to the power of private citizens* to levy on its treasury or perhaps even government buildings or property which the State administers on the public's behalf.[67]

However, there would seem to be little to fear for state dignity or for the solvency of the public fisc if it could be shown that states already pay damages to private parties. And they do. Suits under 42 U.S.C. § 1983, in addition to congressional abrogation, state waiver, and *Young*, also serve to uphold the rule of law.[68] But whereas in a *Young* suit the defendant is technically a state officer in her official capacity and only prospective injunctive relief is available, in a § 1983 suit the defendant is a state officer in her individual capacity and damages are available.[69] Even though it appears that the defendant will pay any damages award out of pocket, in fact the state usually foots the bill. States frequently indemnify defendants and pay any damages awards or, in the absence of an indemnification agreement or practice, adjust their officials' compensation to take into account the costs of the officials buying insurance against such damages awards.[70] Thus, directly or indirectly, states often pay the costs of plaintiffs' § 1983 victories.

---

65. *See Alden*, 527 U.S. at 749.

66. Justice Kennedy argued in *Alden* that damages are relevant to the immunity doctrine, noting that "[u]nderlying constitutional form are considerations of great substance. Private suits against nonconsenting States—especially suits for money damages—may threaten the financial integrity of the States." *Id.* at 750.

67. *Id.* at 749 (emphasis added) (citations omitted) (quoting *In re* Ayers, 123 U.S. 443, 505 (1887)).

68. *See* Jeffries, *supra* note 7, at 49–50; Vazquez, *supra* note 8, at 875–76.

69. *See* Vazquez, *supra* note 8, at 875–76; *see also* John C. Jeffries, Jr., *The Right-Remedy Gap in Constitutional Law*, 109 YALE L.J. 87, 89 (1999) (noting that § 1983 suits "provide[ ] for damages actions against state and local officers who violate constitutional rights").

70. Jeffries, *supra* note 7, at 50 ("In most jurisdictions, the state's readiness to defend and indemnify constitutional tort claims is a policy rather than a statutory requirement, but it is nonetheless routine."); Vazquez, *supra* note 8, at 880–81. Admittedly, however, the Supreme Court has made it

In addition, states already pay for the expense of complying with *Young* injunctions—expenses that are potentially far greater than that of damages awards[71]—and for related ancillary damages.[72] One might well note that damages may be far less intrusive than injunctions. Damages merely quantify the amount necessary to compensate a victim of wrongful state action; it is left to the state, rather than the court, to decide how to budget for the payment of the damages. In contrast, prospective relief in the form of an injunction requires the state to conform its future conduct to a federal court's interpretation of federal law. As between damages and an injunction, the injunction seems to afford the court greater control over the state and its future conduct—and thus arguably gives greater offense to the state's dignity.[73]

Exploring these basic principles of current sovereign immunity doctrine teaches us that the Court is engaged in a delicate balancing act, weighing the necessity of upholding the rule of law against the deference the majority believes is required by the dignity of states as sovereigns. The rule of law is important, but where the constitutional principle of immunity holds, the

---

increasingly difficult for plaintiffs to prevail in § 1983 suits through the doctrine of qualified immunity. *Id.* at 876–78 (citing Anderson v. Creighton, 483 U.S. 635, 640 (1987)).

71. *See* CHEMERINSKY, *supra* note 7, at 417 ("[I]t is firmly established that the Eleventh Amendment does not forbid a federal court from issuing an injunction, even when compliance will cause the state to expend substantial amounts of money."). As then-Associate Justice Rehnquist wrote for the Court in *Edelman v. Jordan*,

> [T]he difference between the type of relief barred by the Eleventh Amendment and that permitted under *Ex parte Young* will not in many instances be that between day and night. The injunction issued in *Ex parte Young* was not totally without effect on the State's revenues, since the state law which the Attorney General was enjoined from enforcing provided substantial monetary penalties against railroads which did not conform to its provisions. Later cases from this Court have authorized equitable relief which has probably had greater impact on state treasuries than did that awarded in *Ex parte Young*. In *Graham v. Richardson*, Arizona and Pennsylvania welfare officials were prohibited from denying welfare benefits to otherwise qualified recipients who were aliens. In *Goldberg v. Kelly*, New York City welfare officials were enjoined from following New York State procedures which authorized the termination of benefits paid to welfare recipients without prior hearing. But the fiscal consequences to state treasuries in these cases were the necessary result of compliance with decrees which by their terms were prospective in nature. State officials, in order to shape their official conduct to the mandate of the Court's decrees, would more likely have to spend money from the state treasury than if they had been left free to pursue their previous course of conduct. Such an ancillary effect on the state treasury is a permissible and often an inevitable consequence of the principle announced in *Ex parte Young*.

Edelman v. Jordan, 415 U.S. 651, 667–68 (1974) (citations omitted). *See also supra* note 53.

72. CHEMERINSKY, *supra* note 7, at 420.

73. Pamela S. Karlan, *The Irony of Immunity: The Eleventh Amendment, Irreparable Injury, and Section 1983*, 53 STAN. L. REV. 1311, 1311 (2001) ("[I]njunctive relief may turn out to be far broader and more intrusive than the damages that would have been available after the fact, [in part] because it may involve more invasive judicial supervision of state entities . . . .").

majority usually deems injunctive relief,[74] and not damages, to be the appropriate means for private enforcement of the Constitution and federal law.

II. COMMERCIAL VERSUS NONCOMMERCIAL ACTIVITY

A. The Proposal

Under current doctrine, states enjoy the benefit of formal immunity for commercial as well as noncommercial conduct, and Congress does not have the power to abrogate this immunity under Article I of the Constitution.[75] The failure of the doctrine to take into account the nature of the conduct in which states engage has drawn criticism and suggestions that the Court should correct its course. For example, in reviewing the trilogy of *Alden*, *College Savings Bank v. Florida Prepaid Postsecondary Education Expense Board*,[76] and *Florida Prepaid Postsecondary Education Expense Board v. College Savings Bank*,[77] Fletcher urged that the Supreme Court differentiate between states' commercial and noncommercial activities.[78] Similarly, in their *College Savings Bank*

74. *Coeur d'Alene*, discussed below in Part III, is an exception to the majority's usual conclusion that injunctive relief is permissible.

75. *Pennsylvania v. Union Gas Co.*, 491 U.S. 1 (1989), permitted Congress to abrogate state immunity under the Commerce Clause, but was subsequently overruled in *Seminole Tribe*. *Union Gas*, 491 U.S. at 5, *overruled by* Seminole Tribe of Fla. v. Florida, 517 U.S. 44, 72–73 (1996).

The Court's five-member majority has rejected arguments that a commercial-noncommercial distinction should be of significance, at least in the context of constructive waiver. In *College Savings Bank*, the United States and the petitioner-plaintiff College Savings Bank argued that the engagement of a state in essentially private commercial behavior—as opposed to essential governmental activity that the state could not choose to cease—should constitute constructive waiver by the state of its immunity. Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd., 527 U.S. 666, 679–80 (1999). The Supreme Court cited "the operation of a police force" as an example of essential governmental activity. *Id.* at 679. Writing for the Court in overruling constructive waiver, Justice Scalia replied:

> [W]e do [not] think that the constitutionally grounded principle of state sovereign immunity is any less robust where, as here, the asserted basis for constructive waiver is conduct that the State could realistically choose to abandon, that is undertaken for profit, that is traditionally performed by private citizens and corporations, and that otherwise resembles the behavior of "market participants." Permitting abrogation or constitutional waiver of the constitutional right only when these conditions exist would of course limit the evil—but it is hard to say that that limitation has any more support in text or tradition than, say, limiting abrogation or constructive waiver to the last Friday of the month. Since sovereign immunity itself was not traditionally limited by these factors, and since they have no bearing upon the voluntariness of the waiver, there is no principled reason why they should enter into our waiver analysis.

Id. at 684.

76. 527 U.S. 666 (1999).

77. 527 U.S. 627 (1999).

78. Fletcher, *supra* note 5, at 854–56.

dissents, Justices Stevens and Breyer recommended that the Court take greater account of this distinction in its future Eleventh Amendment decisions.[79]

The argument for this commercial-noncommercial distinction would be that the Framers did not envision the broad scope of today's state participation in the private market and thus did not intend to immunize commercial conduct on the part of states.[80] Because one cannot extrapolate an intent to immunize commercial behavior from the historical tradition, it makes little sense today to afford such conduct immunity. Thus, the Eleventh Amendment and the sovereign immunity it exemplifies would not bar federal adjudication concerning the commercial activities of states, except in those cases explicitly covered by the text of the Eleventh Amendment. Congress would have the discretion to create a commercial regulatory scheme imposing remedies against states. It would also have the discretion to constrain those remedies—for example, perhaps by limiting the nature or amount of damages that could be awarded to plaintiffs against defendant states. Thus, under this proposal, plaintiffs could potentially sue states for damages or injunctive relief, rather than simply suing under *Ex parte Young* for only prospective injunctive relief.

Making states suable on the basis of conduct akin to that of private commercial actors would of course change the outcomes of cases such as *Florida Prepaid*. There, the Court held that Florida retained its immunity to suit in federal court under federal patent law because Congress had not validly abrogated the state's immunity.[81] By contrast, under a regime that shielded only noncommercial behavior by states, Florida would not have enjoyed immunity in the first instance. To be sure, a court still would have to engage in statutory analysis to determine whether Congress had explicitly or implicitly created a cause of action. But assuming that Congress did create a cause of action against states, whether under the Fourteenth Amendment or under its Article I powers, a state allegedly engaging in violations of federal patent law would be suable on the basis of its conduct.

---

79. *See supra* note 19.

80. One might infer this from the notion that states today engage in commercial conduct to a degree unknown at the time of the founding. *See College Savings Bank*, 527 U.S. at 692 (Stevens, J., dissenting) ("[Eighteenth-century s]overeigns did not then play the kind of role in the commercial marketplace that they do today."). In a similar vein, Justice Souter noted in his *Alden* dissent that the Framers would be astonished at the expansion of modern government: "The proliferation of government, State and Federal, would amaze the Framers, and the administrative state with its reams of regulations would leave them rubbing their eyes." Alden v. Maine, 527 U.S. 706, 807 (1999) (Souter, J., dissenting).

81. *Florida Prepaid*, 527 U.S. at 630 (discussing the limits of the congressional power of abrogation under section 5 of the Fourteenth Amendment).

B. Assessing the Proposal

1. State Dignity: An Argument for State Liability in Commercial Contexts

Recognizing the commercial-noncommercial distinction in the reach of the Eleventh Amendment would acknowledge that states do not stand on their dignity as sovereigns when participating in the private marketplace or pursuing profit. Indeed, as Fletcher has noted, the idea that states as commercial actors should be distinguished from states as sovereign actors is woven into our law in other areas. For example, under "the market participant doctrine under the dormant Commerce Clause, [a state is] allowed to favor its own residents only when it is engaged in commercial activities."[82] Fletcher also observes dissonance between the Court's position in state sovereign immunity and its decision in *Reno v. Condon*,[83] in which the Supreme Court acknowledged that states as the owners of Department of Motor Vehicle databases were subject to federal regulation on the release and sale of information in the databases.[84] And, finally, as Fletcher urges, those in the current majority who defended *National League of Cities v. Usery*[85] surely must find some way to rationalize their earlier judgment about basing the permissibility of federal regulation on the nature of state conduct with their current voting pattern in state sovereign immunity cases.[86]

2. Overcoming Arguments Against the Commercial-Noncommercial Distinction

One opposed to the recognition of a commercial-noncommercial distinction might argue that this limit on state sovereign immunity has no basis in the text of the Eleventh Amendment or in historical practice.

---

82. Fletcher, *supra* note 5, at 855 (citing South-Central Timber Dev. v. Wunnicke, 467 U.S. 82 (1984); Reeves, Inc. v. Stake, 447 U.S. 429 (1980)). The Commerce Clause is a "self-executing limitation on the power of the States to enact laws imposing substantial burdens on such commerce." *South-Central Timber Development*, 467 U.S. at 87. However, the dormant Commerce Clause does not limit a state that participates in—rather than regulates—a market. *Id.* at 93 (plurality opinion). The market participant doctrine appears to rest on the "long recognized right of trader or manufacturer, engaged in an entirely private business, freely to exercise his own independent discretion as to parties with whom he will deal." *Id.* at 94 (plurality opinion) (internal quotations omitted) (quoting *Reeves*, 447 U.S. at 438–39 (quoting United States v. Colgate & Co., 250 U.S. 300, 307 (1919))).

83. 528 U.S. 141 (2000).

84. Fletcher, *supra* note 5, at 855–56 (citing *Condon*, 528 U.S. at 143).

85. 426 U.S. 833 (1976).

86. Fletcher, *supra* note 5, at 855–56.

The textual argument is easily overcome, for state sovereign immunity has been unmoored from the text of the Constitution and the Eleventh Amendment for over a century. Indeed, the very recognition of immunity from suits brought by in-state plaintiffs in federal question cases runs directly counter to the specific language of the amendment itself.[87]

The historical argument is not as easily overcome, less because of the history that we may be aware of than because of the historical practice on which one chooses to focus. If one favors the commercial-noncommercial distinction, one will argue, as Justice Stevens did in his *College Savings Bank* dissent, that there is no historical tradition in which states have undertaken commercial participation in the way that they currently do.[88] States acting as market participants is a relatively new phenomenon; therefore states engaging in this new behavior are simply not covered under the original understanding of the immunity exemplified by the Eleventh Amendment. Moreover, it is not helpful to ask what the Framers *would have thought, if* indeed states had been engaging in a similar scope of commercial behavior at the time of the Constitution's adoption.[89] The answer will be pure speculation, not historical approximation.

In contrast, one opposed to the commercial-noncommercial distinction will conclude that because there has never been such a distinction in Eleventh Amendment jurisprudence, there is no historical basis for such a distinction now.[90] The weakness of this argument is that there could be no such distinction if its basis—the participation of states in the commercial marketplace—did not exist until more recent times.[91]

The better historical argument against a commercial-noncommercial distinction would rely not on the *absence* of historical tradition, but rather on the notion that such a distinction runs counter to the historical roots of the

87. See *supra* note 2 for the text of the Eleventh Amendment.

88. Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd., 527 U.S. 666, 691–92 (1999) (Stevens, J., dissenting).

89. *See, e.g.*, Fed. Mar. Comm'n v. S.C. State Ports Auth., 122 S. Ct. 1864, 1872 (2002) ("[W]e must . . . determine whether [these] are the type of proceedings from which the Framers would have thought the States possessed immunity when they agreed to enter the Union.").

90. For example, in rejecting a commercial-noncommercial distinction for constructive waiver, Justice Scalia argued that there was no historical tradition supporting such a distinction. *College Savings Bank*, 527 U.S. at 684. Similarly, in the context of administrative tribunals, Justice Thomas quoted *Hans v. Louisiana*, 134 U.S. 1 (1890), for the notion that "the Constitution was not intended to 'raise up' any proceedings against the States that were 'anomalous and unheard of when the Constitution was adopted.'" *Federal Maritime Commission*, 122 S. Ct. at 1872 (quoting *Hans*, 134 U.S. at 18).

91. While historical inquiry in general may be difficult and the record often ambiguous, posing such questions as whether states engaged in certain kinds of conduct at the time of the founding at least may be amenable to scholarly research and inquiry. In contrast, speculation about the Framers' thoughts about nonexistent facts (or the suggestion that the absence of limitations on historically nonexistent conduct supports the idea that there should be no limitations on such conduct now) is not amenable to scholarly research; such an inquiry is counterfactual, not historically concrete, and potentially limitless.

Eleventh Amendment in eighteenth- and nineteenth-century borrowing cases.[92] Because the Eleventh Amendment arose in the context of debt cases, the argument would go, and the conclusion of such cases was the inability to enforce debt contracts against states, states are clearly protected in the context of commercial behavior.

There are three possible (and perhaps intertwined) replies to this argument. One could argue that the ability of a state to borrow to fund its activity should be viewed as central to its sovereign character. Certainly, private actors also engage in borrowing, and thus borrowing behavior might best be characterized as being hybrid in quality—quasi-sovereign, quasi-commercial. But this mixed characterization does not necessarily detract from either the notion that the ability to borrow remains central to state functioning or the fact that there is a historical tradition of states exercising a power to borrow money since the inception of the Union. Alternately, one could argue that the commercial activities in which states now engage—for example, selling college savings instruments that allegedly infringe on another party's patent, or selling consumer information gathered in the course of administering drivers' licenses—are fundamentally different from borrowing in the sense that such activities are not central to states' sovereign functioning. They may add to the coffers of a state and its arms, but do we view it as centrally important that a state be able to engage in these activities? And is there a historical tradition of states engaging in such activities? The answer to these questions would be, I think, no. Finally, one could argue that, if we are to look to history for guidance about traditional state conduct and practices, we should look at the *entire* history available to us. That is, we must look to the specific contexts in which sovereign immunity cases were decided to infer their true significance and purpose, just as the current majority of the Court looks to the context in which the Eleventh Amendment was passed—and not just the text of the amendment—to give the doctrine meaning in the first place. A convincing case has been made that the eighteenth- and nineteenth-century borrowing cases were responses to potentially dire financial crises for states—the states' staggering debt that remained after the American Revolution, and the southern states' debt that remained after the Civil War.[93] If the underlying rationale of these cases was the threat to the very financial viability of the states at these specific

92. For detailed historical analysis of borrowing cases as they relate to the Eleventh Amendment, see generally ORTH, *supra* note 30. John V. Orth argues that the Eleventh Amendment was passed out of concern that foreign and domestic creditors would bankrupt the states by enforcing their Revolutionary debts. The amendment was subsequently given a narrow construction after the financial threat had passed, but the Court revived a doctrine of broad immunity in response to the southern states' post–Civil War debt. *Id.* at 7–8.

93. *See supra* note 92.

historical moments, that rationale hardly supports immunizing states in their current commercial activity.

3. A Pro-Liability Argument for Moving Beyond the Commercial-Noncommercial Distinction

Proponents of reducing state immunity in commercial cases may have yet another argument against the commercial-noncommercial distinction and for a more immunity-reducing distinction: A rule that immunizes noncommercial activity potentially sweeps within its ambit the conduct of states that assume an administrative role within a federal regulatory scheme.[94] One could view this as problematic for two reasons. First, it seems anomalous to afford a state immunity in its role in furthering federal programs or mandates. While the argument that states retain a residual dignity in the implementation of state programs and mandates has some force, that force seems blunted when a state acts as partner to the federal government under federal law. If so, a state should surely not enjoy immunity from private enforcement of a federal mandate if the state fails to live up to that mandate. More importantly, being a regulatory partner of the federal government in implementing federal law does not seem to be a historically traditional role of the states *qua* states under the Constitution.[95] If one is to be true to the majority's historical traditionalism, then it seems one must consider the activities states engaged in at the time the Eleventh Amendment was enacted in order to determine what the Founding Generation considered sovereign state conduct. These traditional practices and activities would be the aspects of sovereignty with which states originally entered the Union and thus would constitute the essential core attributes of today's states. A state would stand on its dignity as a sovereign—and thus merit immunity—only when implicating such core attributes. That is, under this reasoning, states would be directly liable not simply when engaged in commercial conduct but rather, more broadly, when acting beyond their core sovereign attributes.

---

94. *See, e.g.*, Verizon Md. Inc. v. Pub. Serv. Comm'n, 122 S. Ct. 1753, 1756 (2002) (noting that federal law required telecommunications carriers to negotiate interconnection agreements with new market entrants and to submit the agreements to state commissions, which had the power to reject the agreements if they were "not consistent with 'the public interest, convenience, and necessity'" (quoting 47 U.S.C. § 252(e)(2)(A) (2000))). In his *Verizon* concurrence, Justice Souter characterized the defendant state commission as a "state commission *qua* federal regulator." *Id.* at 1763 (Souter, J., concurring).

95. *But see* Saikrishna Bangalore Prakash, *Field Office Federalism*, 79 VA. L. REV. 1957, 1959–61 (1993) (arguing that at least some in the Founding Generation intended to empower Congress to commandeer state executive officers and state courts, but not state legislatures, in order to carry out congressional mandates).

III. THE ESSENTIAL STATE: IMMUNIZING CORE SOVEREIGN ATTRIBUTES

The proposal to confine state immunity to core sovereign attributes in cases other than those explicitly covered by the text of the Eleventh Amendment would make states suable in name, for damages or injunctive relief, for violations of the Constitution or federal law while engaged in commercial activity or other conduct outside their core character. I base this proposal on the categorical approach to state sovereignty discernible in *Coeur d'Alene* and reminiscent of the Court's previous Tenth Amendment jurisprudence. Below, I trace the rise and fall of a categorical approach to state sovereignty in the Court's Tenth Amendment cases. I then discuss the manifestation of this approach in *Coeur d'Alene*.

A. The Tenth Amendment

The history of the Court's Tenth Amendment jurisprudence is relevant to a discussion of state sovereign immunity because the recent spate of immunity cases is part of—indeed, has been propelled by—a larger story: the emergence of a profound concern with federalism as the dominant theme of the Rehnquist Court.[96] The Rehnquist Court's decisions have elevated the autonomy and independence of states as separate sovereign entities and have sought to contain the expanding powers of the national government. Implicit in the Rehnquist Court's concern is the possibility of defining states *qua* states, for the Court can protect state sovereignty only as well as its content and boundaries can be identified.

National League of Cities located this definitional search for the essential state in the Tenth Amendment by asking whether particular state-assumed functions were sovereign or nonsovereign in nature.[97] In *National League of Cities*, the Court invalidated amendments to the Fair Labor Standards Act, which extended minimum wage and maximum hour provisions to state employees. In doing so, it broke from its earlier Tenth Amendment jurisprudence and asserted that congressional Article I powers were constitutionally limited when

96. For discussion of such concerns, see, for example, Ann Althouse, *The* Alden *Trilogy: Still Searching for a Way to Enforce Federalism*, 31 RUTGERS L.J. 631, 635–40 (2000); Amar, *supra* note 25, at 1425–26; Richard H. Fallon, Jr., *The "Conservative" Paths of the Rehnquist Court's Federalism Decisions*, 69 U. CHI. L. REV. 429, 452–68 (2002); Vicki C. Jackson, Coeur d'Alene, *Federal Courts and the Supremacy of Federal Law: The Competing Paradigms of Chief Justices Marshall and Rehnquist*, 15 CONST. COMMENT. 301, 301 (1998).

97. Nat'l League of Cities v. Usery, 426 U.S. 833, 851–52 (1976), *overruled by* Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 531 (1985).

directed to the "States *qua* States,"[98] in order to prevent "the utter destruction of the State as a sovereign political entity."[99] Writing for the Court, then-Associate Justice Rehnquist reasoned:

> We have repeatedly recognized that there are attributes of sovereignty attaching to every state government which may not be impaired by Congress, not because Congress may lack an affirmative grant of legislative authority to reach the matter, but because the Constitution prohibits it from exercising the authority in that manner . . . . One undoubted attribute of state sovereignty is the States' power to determine the wages which shall be paid to those whom they employ in order to carry out their governmental functions, what hours those persons will work, and what compensation will be provided where these employees may be called upon to work overtime. The question we must resolve here, then, is whether these determinations are "'functions essential to separate and independent existence,'" so that Congress may not abrogate the States' otherwise plenary authority to make them.[100]

National League of Cities thus initiated a series of cases in which the Court attempted to determine what state functions or interests represented "traditional aspects of state sovereignty"[101] that shielded states from federal regulation. Or, put another way, the concern with a federalism that would preserve a vital role for states put the Court on a quest to define the essential state. Only by defining the core of the state *qua* state—without which it could not maintain its "separate and independent existence"—could the Court determine the reach of the national government under the Commerce Clause.

That quest apparently ended in *Garcia v. San Antonio Metropolitan Transit Authority*.[102] Over the dissents of Chief Justice Burger and Justices Powell, Rehnquist, and O'Connor, a majority comprising Justices Brennan, White, Marshall, Blackmun, and Stevens overruled *National League of Cities*.[103] The Court declared that "the attempt to draw the boundaries of state regulatory immunity in terms of 'traditional governmental function' is not only unworkable but is also inconsistent with established principles of federalism."[104] The quest for the essential state appeared to be dead.

---

98. *Id.* at 847.
99. *Id.* at 842 (internal quotations omitted) (quoting Maryland v. Wirtz, 392 U.S. 183, 196 (1968)).
100. *Id.* at 845–46 (citations omitted) (quoting Coyle v. Oklahoma, 221 U.S. 559, 580 (1911) (quoting Lane County v. Oregon, 7 Wall. 71, 76 (1869))).
101. *Id.* at 849.
102. 469 U.S. 528 (1985).
103. *Id.* at 531.
104. *Id.*

Important intervening Tenth Amendment cases such as *New York v. United States*[105] and *Printz v. United States*[106] have focused on the absence of congressional power to "commandeer" state government and resources, rather than on inherent state sovereignty as a shield against federal regulation.[107] But this does not mean that the search for the essential state is over. Despite *Garcia*, the reasoning that states have an essential, defining core has since made cameo appearances in the Court's Tenth Amendment jurisprudence.

Writing for the Court in *Gregory v. Ashcroft*,[108] Justice O'Connor offered a lesson in federalism, reminding readers that "[a]s every schoolchild learns, our Constitution establishes a system of dual sovereignty between the States and the Federal Government."[109] Justice O'Connor concluded that Missouri's imposition of a mandatory retirement age for state judges did not violate the Age Discrimination in Employment Act of 1967,[110] reasoning: "This provision goes beyond an area traditionally regulated by the States; it is a decision of the most fundamental sort for a sovereign entity. Through the structure of its government, and the character of those who exercise government authority, a State defines itself as a sovereign."[111] Thus, Justice O'Connor explicitly staked out for states not only areas of traditional regulation but also an essential core of sovereignty.

Even more recently, Chief Justice Rehnquist wrote for a unanimous Court in *Reno v. Condon*, holding that Congress did not exceed the bounds of its authority in regulating the "disclosure of personal information contained in the records of state motor vehicle departments (DMVs)."[112] The Court held that "in enacting this statute Congress did not run afoul of the federalism principles enunciated in *New York v. United States* and *Printz v. United States*"[113] by imposing administration of the statutory provisions on state personnel.[114] The Court reached this conclusion, however, because the statute "[did] not require

105. 505 U.S. 144, 176 (1992) (holding that the "taking title" provision of the Low-Level Radioactive Waste Policy Amendments Act of 1985, 42 U.S.C. §§ 2021b–2021j (2000), was inconsistent with the Tenth Amendment).

106. 521 U.S. 898, 935 (1997) (invalidating an interim provision of the Brady Handgun Violence Prevention Act, 18 U.S.C. § 925A (2000), commanding local law enforcement to conduct background checks on individuals attempting to acquire firearms).

107. *Printz*, 521 U.S. at 926; *New York*, 505 U.S. at 188.

108. 501 U.S. 452 (1991). The majority in *Gregory* comprised Justice O'Connor, Chief Justice Rehnquist, and Justices Scalia, Kennedy, and Souter. Justices White and Stevens joined only portions of Justice O'Connor's opinion. In addition, Justice White filed a partial dissent/partial concurrence in which Justice Stevens joined, and Justice Blackmun filed a dissent in which Justice Marshall joined.

109. *Id.* at 457.

110. 29 U.S.C. §§ 621–634 (2000).

111. *Gregory*, 501 U.S. at 460.

112. 528 U.S. 141, 143 (2000); *see also supra* text accompanying notes 83–84.

113. *Id.* (citations omitted).

114. *Id.* at 149–50.

the States in their sovereign capacity to regulate their own citizens"; rather, the statute merely regulated "the States as the owners of data bases."[115] In other words, the Court's conclusion turned on the fact that the statute did not regulate states as sovereigns but rather as commercial actors—as "initial suppliers of the information in interstate commerce and private resellers or redisclosers of that information in commerce."[116]

The resurfacing of the categorical approach in the Court's Tenth Amendment jurisprudence teaches us that the Justices espousing a state-protective federalism have never stopped thinking in *National League of Cities* terms, even though they have not explicitly revived the Tenth Amendment endeavor to delineate areas of traditional state regulation and core state attributes. Their efforts to protect state autonomy have been focused instead on directly limiting congressional commerce powers and on bolstering state sovereign immunity.[117] But the five-member majority comprising Chief Justice Rehnquist and Justices O'Connor, Scalia, Kennedy, and Thomas has explicitly drawn the link between the Tenth Amendment's recognition of states as separate sovereign

115. *Id.* at 151.

116. *Id.*

117. *See, e.g.*, Fed. Mar. Comm'n v. S.C. State Ports Auth., 122 S. Ct. 1864, 1874 (2002) (holding that states are immune from adjudication in administrative courts); Bd. of Trs. of the Univ. of Ala. v. Garrett, 531 U.S. 356, 374 (2001) (holding that Title I of the Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12101–12213 (2000), did not validly abrogate state immunity under section 5 of the Fourteenth Amendment); United States v. Morrison, 529 U.S. 598, 627 (2000) (invalidating section 13,981 of the Violence Against Women Act of 1994, Pub. L. No. 103-322, 108 Stat. 1902 (codified as amended in scattered sections of 18 U.S.C.), as impermissible under the Commerce Clause); Kimel v. Fla. Bd. of Regents, 528 U.S. 62, 91 (2000) (holding that the Age Discrimination in Employment Act of 1967, 29 U.S.C. §§ 621–634 (2000), did not validly abrogate state immunity under section 5 of the Fourteenth Amendment); Alden v. Maine, 527 U.S. 706, 756 (1999) (holding that Congress cannot authorize suits against states in their own courts, under federal law); Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd., 527 U.S. 666, 691 (1999) (holding that the Trademark Remedy Clarification Act, Pub. L. No. 102–542, 106 Stat. 3567 (codified as amended in scattered sections of 15 U.S.C.), did not validly abrogate state immunity under section 5 of the Fourteenth Amendment and that Florida did not voluntarily waive its immunity); Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank, 527 U.S. 627, 647–48 (1999) (holding that the Patent Remedy Act, 35 U.S.C. §§ 271(h), 296(a) (2000), did not validly abrogate state immunity under section 5 of the Fourteenth Amendment); City of Boerne v. Flores, 521 U.S. 507, 520 (1997) (requiring that there be "congruence and proportionality" between harms being remedied and the remedies enacted by Congress pursuant to section 5 of the Fourteenth Amendment); Idaho v. Coeur d'Alene Tribe, 521 U.S. 261, 287 (1997) (holding that an otherwise proper *Young* suit was barred because the suit implicated special sovereignty interests); Seminole Tribe of Fla. v. Florida, 517 U.S. 44, 72–74 (1996) (holding that Congress cannot abrogate state immunity pursuant to its Article I powers and that the enactment by Congress of a complex remedial scheme precluded a *Young* suit); United States v. Lopez, 514 U.S. 549, 567–68 (1995) (invalidating the Gun-Free School Zones Act of 1990, Pub. L. No. 101-647, 104 Stat. 4844 (codified as amended in scattered sections of 18 U.S.C.), as impermissible under the Commerce Clause).

entities and state sovereign immunity. Writing for this majority in *Alden*, Justice Kennedy reasoned:

> [A]s the Constitution's structure, its history, and the authoritative interpretations by this Court make clear, the States' immunity from suit is a fundamental aspect of the sovereignty which the States enjoyed before the ratification of the Constitution, and which they retain today . . . except as altered by the plan of the Convention or certain constitutional Amendments . . . . Various textual provisions of the Constitution assume the States' continued existence and active participation in the fundamental processes of governance . . . . Any doubt regarding the constitutional role of the States as sovereign entities is removed by the Tenth Amendment, which, like the other provisions of the Bill of Rights, was enacted to allay lingering concerns about the extent of the national power.[118]

Thus, the locus of state protectionism has shifted to the Eleventh Amendment. And in *Coeur d'Alene*, the categorical approach to state sovereignty resurfaced even more strongly.

B. *Idaho v. Coeur d'Alene Tribe*: Reviving a Categorical Approach

In *Coeur d'Alene*, the Coeur d'Alene Tribe and some of its members (together, the "Tribe") sued the State of Idaho and a number of its agencies and officials in federal court.[119] The Tribe asked the district court to find that it held beneficial or original title to lands submerged beneath waters on the original Coeur d'Alene Reservation, to declare its right to exclusive use and occupancy, to hold invalid any contrary state regulation, and to enjoin state officials from violating the Tribe's exclusive use and occupancy.[120] The court instead found that the Eleventh Amendment barred all of the Tribe's claims against Idaho and its agencies[121] and further barred "the action against the officials for quiet title and declaratory relief . . . because these claims were the functional equivalents of a damages award against the State."[122] The court also dismissed on the merits the Tribe's request for injunctive relief against the state officials.[123] On appeal, the U.S. Court of Appeals for the Ninth Circuit

118. *Alden*, 527 U.S. at 713–14.

119. *Coeur d'Alene*, 521 U.S. at 264–65.

120. *Id.* The Tribe also requested its costs and attorney's fees. *Id.* at 265.

121. *Id.* at 265. Under *Blatchford v. Native Village of Noatak*, 501 U.S. 775 (1991), the Eleventh Amendment bars suits against states brought not only by individuals but also by other sovereigns, including federally recognized Indian tribes. *Id.* at 782.

122. *Coeur d'Alene*, 521 U.S. at 265.

123. *Id.* at 265–66.

reversed as to the Tribe's requests for declaratory and injunctive relief against the state officials, on the basis that these particular claims fit within the *Young* exception.[124] The Supreme Court granted certiorari on the issue of "whether the suit for declaratory and injunctive relief based on the Tribe's purported beneficial interest in title may proceed."[125] The Court held that it could not.[126]

At the time of *Coeur d'Alene*'s issuance, commentators wondered whether the Court was poised to significantly contract—or had contracted—*Young* and to what degree.[127] Justice Kennedy's opinion garnered the full support of the usual majority for only three parts: Part I, which stated the facts of the case; Part II.A, which discussed the rationales underpinning state sovereign immunity and the *Young* exception;[128] and Part III, which held that the suit in question could not proceed because it implicated "special sovereignty interests."[129] Only the Chief Justice joined the remaining portions of Justice Kennedy's opinion, in which he attempted to narrow the *Young* doctrine. Justice Kennedy would have replaced the straightforward pleading rule of *Young*, which required the plaintiff only to allege an ongoing violation of federal law by a state official, with a regime of case-specific jurisdictional inquiries on the part of federal courts.[130] His view did not prevail, however. Writing

124. *Id.* at 266.

125. *Id.*

126. *Id.*

127. *See, e.g.*, Jackson, *supra* note 96, at 318 ("How much this 'obvious fiction' [*Young*] is to be narrowed, either in application or through shifts in doctrine (e.g., what counts as 'retroactive relief'), must await future developments."); Carlos Manuel Vazquez, *Night and Day:* Coeur d'Alene, Breard, *and the Unraveling of the Prospective-Retrospective Distinction in Eleventh Amendment Doctrine*, 87 GEO. L.J. 1, 42 (1998) ("In *Coeur d'Alene*, the Supreme Court came very close to radically revising its *Ex parte Young* doctrine. Exactly what the Court held, and thus how radically it changed the doctrine, is a matter of some dispute.").

128. Part II.A set forth four presumably uncontroversial principles. First, Justice Kennedy briefly explained the broad scope of state sovereign immunity and the Court's understanding that the Eleventh Amendment "evidenc[ed] and exemplif[ied,]" rather than established, such immunity. *Coeur d'Alene*, 521 U.S. at 267–68. Second, he observed that the Tribe's suit was barred unless it fit *Young*'s parameters and stressed "the continuing validity of the *Ex parte Young* doctrine." *Id.* at 269. In stressing *Young*'s importance, however, Justice Kennedy noted the competing purposes underlying the doctrine—that the Court "must ensure that the doctrine of sovereign immunity remains meaningful, while also giving recognition to the need to prevent violations of federal law." *Id.* Third, Justice Kennedy emphasized that, even in appropriate *Young* suits, "the State itself will have a continuing interest in the litigation whenever state policies or procedures are at stake," *id.*, and that *Young* itself had "implicated substantial state interests," *id.* at 270. Finally, Justice Kennedy cautioned that despite *Young*'s importance, the "real interests served by the Eleventh Amendment are not to be sacrificed to elementary mechanics of captions and pleading." *Id.* Rather, "[a]pplication of the *Young* exception must reflect a proper understanding of its role in our federal system and respect for state courts instead of a reflexive reliance on an obvious fiction." *Id.*

129. *Id.* at 281.

130. In the noncontrolling portions of his opinion, Justice Kennedy laid the groundwork for his ultimate suggestion in Part II.D that federal courts, rather than regularly permitting *Young* suits, "should consider whether there are 'special factors counseling hesitation'" under a "case-by-case

separately and joined by Justices Scalia and Thomas, Justice O'Connor supported maintenance of the traditional pleading rule.[131] Moreover, the Court

approach." *Id.* at 280 (quoting Bivens v. Six Unknown Fed. Narcotics Agents, 403 U.S. 388, 396 (1971)). Arguing that one of *Young*'s underlying rationales had always been the unavailability of an adequate state forum "for vindicating the constitutional rights at stake," *id.* at 273, Justice Kennedy asserted that the availability of state tribunals to hear a case—as in *Coeur d'Alene*—should counsel against permitting a *Young* suit, *id.* at 274. He further suggested that federal courts make greater accommodation for "the constitutional immunity of the States" when deciding whether to allow *Young* suits. *Id.* at 278. Viewing state courts as adequate for most federal questions, *id.* at 275, and the "[i]nterpretation of federal law [as] the proprietary concern of state, as well as federal, courts," *id.*, Justice Kennedy concluded that when a plaintiff chooses a federal over an available state forum, "[w]hat is really at stake . . . is the desire of the litigant to choose a particular forum versus the desire of the State to have the dispute resolved in its own courts," *id.* at 277. In this context, Justice Kennedy would have preferred that the "Eleventh Amendment's background principles of federalism and comity" come to the fore and strike the balance in favor of state preferences over the plaintiff's forum preference. *Id.*

Justice Kennedy, then, would have replaced the relatively bright-line application of *Young*—"a straightforward inquiry into whether a complaint alleges an ongoing violation of federal law and seeks relief properly characterized as prospective"—with a "vague balancing test that purports to account for a 'broad' range of unspecified factors." *Id.* at 296 (O'Connor, J., concurring). If Justices O'Connor, Scalia, and Thomas had supported Justice Kennedy's case-by-case proposal, *Young* would have been significantly contracted. It might have become difficult to justify allowing a *Young* suit to proceed in federal court whenever a state forum was available to adjudicate the issue. This would be particularly true because, under Justice Kennedy's balancing analysis, a plaintiff's desire to litigate in federal court would always be counterbalanced by a state's interest in resolving disputes in its own courts, and federalism principles would strongly indicate that the state's sovereign interests should take priority over a plaintiff's mere forum preference.

131. Justice O'Connor concurred in part with the principal opinion and concurred in the judgment. Because hers was the narrowest ground for the judgment, her opinion is the holding of the case. *See Leading Cases*, 111 HARV. L. REV. 197, 276 n.56 (1997) (citing Marks v. United States, 430 U.S. 188, 193 (1977), for the proposition that the narrowest basis for the result reached in a case is the holding when the Court is fragmented); *see also Coeur d'Alene*, 521 U.S. at 298 (Souter, J., dissenting) (noting that "Justice O'Connor's view is the controlling one").

Justice O'Connor devoted most of her concurrence to countering Justice Kennedy's attempt to narrow the *Young* doctrine. She argued that neither early nor more recent *Young* cases supported consideration of the availability of a state forum in deciding whether a *Young* suit should proceed. *Id.* at 292–93. She also defended federal courts' interest in resolving federal claims, writing that the Court need not "call into question the importance of having federal courts interpret federal rights" to decide *Coeur d'Alene* and that "acknowledging the interpretive function of federal courts [does not] suggest that state courts are inadequate to apply federal law." *Id.* at 293. In sum, Justice O'Connor felt Justice Kennedy unnecessarily tried to recharacterize the Court's entire line of *Young* jurisprudence. *Id.* at 296. She concluded that she "would not narrow our *Young* doctrine" by joining these portions of Justice Kennedy's opinion. *Id.* at 296–97.

Explaining her concurrence in the judgment, Justice O'Connor essentially restated the reasoning in Part III of the principal opinion. She reasoned that the Tribe's suit differed from the "typical *Young* action in two important respects." *Id.* at 289. First, the Tribe's suit was the "functional equivalent" of a quiet title action against the State of Idaho. Second, the Tribe sought to eliminate entirely the State of Idaho's regulatory authority over lands that are "importan[t] . . . to state sovereignty." *Id.*

affirmed the vitality of a straightforward pleading rule for *Young* last Term in *Verizon*.[132]

For the purposes of this thought experiment, however, the most relevant aspect of *Coeur d'Alene* is the common ground shared by Justice Kennedy and Justice O'Connor in reaching the result in the case. In his dissent, Justice Souter expressed his concern that "the effect of [Justice Kennedy's and Justice O'Connor's] opinions is to redefine and reduce the substance of federal subject-matter jurisdiction to vindicate federal rights."[133] His concern arose because, although Justice O'Connor broke from the usual majority, she nevertheless agreed with Justice Kennedy that the *Young* suit brought by the Tribe was barred. That is, five Justices on the Court are willing to allow the possibility—however remote—of leaving a plaintiff without any federal forum in which to adjudicate her federal rights. What is more, they are willing to do so on the basis of what appears to be a categorical approach to state sovereignty.

There were two aspects of the suit that the Court deemed fundamental to its dismissal of the claims in question: functional equivalency to a suit otherwise barred by state sovereign immunity and implication of special sovereignty interests.[134] Both Justice Kennedy and Justice O'Connor emphasized that the Tribe's suit was functionally equivalent to a quiet title action.[135] However, the practical significance of this aspect of the suit is questionable. As Justice Souter pointed out in his dissent, "an officer suit implicating title is no more or less the 'functional equivalent' of an action against the government than any other *Young* suit."[136] It is the very recognition that *Young* suits are always in some degree suits against the state that gave rise to the Court's repeated invocations of the "fictional" quality of the *Young* doctrine. As Justice Souter observed,

> States are functionally barred from imposing a railroad rate found unconstitutional when enforced by a state officer; States are functionally barred from withholding welfare benefits when their officers have violated federal law on timely payment; States are

132. 122 S. Ct. 1753, 1760 (2002) ("In determining whether the doctrine of *Ex parte Young* avoids an Eleventh Amendment bar to suit, a court need only conduct a 'straightforward inquiry into whether [the] complaint alleges an ongoing violation of federal law and seeks relief properly characterized as prospective.'" (quoting *Coeur d'Alene*, 521 U.S. at 296 (O'Connor, J., concurring))).

133. *Coeur d'Alene*, 521 U.S. at 298 (Souter, J., dissenting).

134. *Id.* at 281.

135. Justice Kennedy parsed the element of functional equivalency by noting that "the declaratory and injunctive relief the Tribe seeks is close to the functional equivalent of quiet title in that substantially all benefits of ownership and control would shift from the State to the Tribe." *Id.* at 282. In her concurrence, Justice O'Connor also emphasized this aspect of the suit, observing that the "Tribe could not maintain a quiet title action in federal court without the State's consent, and for good reason: A federal court cannot summon a State before it in a private action seeking to divest the State of a property interest." *Id.* at 289 (O'Connor, J., concurring).

136. *Id.* at 308 (Souter, J., dissenting).

> functionally barred from locking up prisoners whom their wardens are told to release. There is nothing unique about the consequences of an officer suit involving title, and if the Court's reasoning were good in a title case it would be good in any *Young* case.[137]

Indeed, the majority conceded that "[w]hen suit is commenced against state officials, even if they are named and served as individuals, the State itself will have a continuing interest in the litigation whenever state policies or procedures are at stake."[138] Because all *Young* suits are "functional equivalents" of suits against states that otherwise would be barred, functional equivalency cannot provide a principled basis for determining whether *Coeur d'Alene* may be applicable in barring a particular *Young* suit.

The true analytical weight of *Coeur d'Alene* must therefore fall on the second element that the Court found dispositive—the implication of special sovereignty interests. Part III of the Court's opinion carefully catalogued a legal tradition reaching as far into history as the laws of Justinian[139] and consistently maintained in American law, in which "lands underlying navigable waters have historically been considered 'sovereign lands'" and "[s]tate ownership of [such lands] has been 'considered an *essential* attribute of sovereignty.'"[140] The Court particularly emphasized that submerged lands are "lands with a unique status in the law and *infused with a public trust the State itself is bound to respect.*"[141] Indeed, as Justice Kennedy implied in the Court's opinion, the unique interest of the states in submerged lands is a residual aspect of sovereignty that the states assumed and retained under the Constitution—much like the notion of state sovereign immunity itself:

> The Court from an early date has acknowledged that the people of each of the Thirteen Colonies at the time of independence "became themselves sovereign; and in that character hold the absolute right to all their navigable waters and the soils under them for their own common use, subject only to the rights since surrendered by the Constitution to the general government."[142]

Justice O'Connor confirmed the importance of the implication of special sovereignty interests in her concurrence. She noted that "[the Court has] repeatedly emphasized the importance of submerged lands to state sovereignty" and that

137. *Id.* at 308–09.
138. *Id.* at 269.
139. *Id.* at 284.
140. *Id.* at 283 (emphasis added) (quoting Utah Div. of State Lands v. United States, 482 U.S. 193, 195 (1987)).
141. *Id.* (emphasis added).
142. *Id.* (quoting Martin v. Lessee of Waddell, 16 Pet. 367, 410 (1842)).

"[c]ontrol of such lands is critical to a State's ability to regulate use of its navigable waters."[143]

From a certain perspective, this reliance on special sovereignty interests is not surprising. The *Coeur d'Alene* Court described the state's sovereign interest in submerged lands as unique, infused with the public trust, and of a provenance pre-dating the Constitution. It seems absurd to claim—and the Court certainly did not claim—that the only defining attribute of statehood is ownership of submerged lands. Rather, the qualities ascribed to the state's sovereign interest in submerged lands suggest that the majority implicitly regarded this particular interest as lying at the core of state sovereignty at the time of the founding. This focus on defining attributes of essential statehood recalls the Court's earlier Tenth Amendment jurisprudence in *National League of Cities*.

The rationale for permitting the *Young* end-run around the immunity principle is to enable vindication of federal rights while also upholding the sovereign dignity of states. The Court in *Coeur d'Alene* asserted that *Young* was not a caption-pleading exercise, but rather a substantive compromise between these competing interests. The Court recognized that all *Young* suits touch real, ongoing state interests but asserted that where the *Young* compromise struck at the heart of the state, in this case at an essential interest in submerged lands, the compromise was no longer balanced and the *Young* suit could not proceed. In other words, given that *Young* is a fiction and that the Court's ultimate concern is to preserve for states a sovereign core inviolable by the federal government, it seems theoretically consistent that the Justices would conclude that there is a core of interests, attributes, or functions so central to state sovereignty that a suit implicating that core is impermissible.

C. Assessing the Proposal

With the possible exception of *Coeur d'Alene*, the current immunity doctrine does not distinguish between core sovereign attributes and nonessential state activity.[144] However, an alternative immunity regime employing such a distinction would afford formal immunity from private suit only to states' core sovereign attributes (or states' special sovereignty interests, to use the language of *Coeur d'Alene*) and to states in cases explicitly covered by the text of the Eleventh Amendment. In all other instances, states would be directly liable for damages and for injunctive relief. This regime draws on the categorical

143. *Id.* at 289 (O'Connor, J., concurring).
144. *See infra* text accompanying notes 148–152.

approach to state sovereignty—echoic of *National League of Cities*—employed in *Coeur d'Alene* itself.

A proponent of this proposal would argue that, unlike the doctrine as currently formulated, it is true to the conception of state sovereignty held by the Court's majority and follows logically from the very premises the majority has articulated in support of the immunity doctrine. The majority's categorical approach to sovereignty suggests that we must look to history—to the Framers' intent, the nature of state sovereignty at the time of the founding, and the context surrounding the enactment of the Eleventh Amendment—to formulate an understanding of state sovereignty.[145] The best result that seems to emerge from such an inquiry, as suggested by *Coeur d'Alene*, is that states possess a core of sovereignty—attributes of a state *qua* state comprising the residuum of sovereignty with which the states entered the Union—much narrower than the range of roles in which they engage today.

Completely immunizing this core of essential sovereign attributes from private suit (including suits brought under *Young*) would continue to honor the Court's primary concern with state dignity. In contrast, the current doctrine fails to differentiate between various categories of state conduct as sovereign or nonsovereign and thus shields states far more indiscriminately. As discussed earlier, a state as commercial actor has stepped outside its historical sovereign role. Taking the next logical step, a state as enforcer of federal regulations has arguably placed itself under the federal government as the ultimate progenitor of a regulatory scheme, rather than positioned itself in its historical role as a "separate and independent"[146] sovereign.[147] By affording states formal immunity for these categories of conduct, the Court has extended the doctrine beyond their core sovereign attributes and thus beyond the stated rationale of preserving state dignity.

CONCLUSION

The imagined alternatives canvassed here—distinguishing between commercial and noncommercial activity or immunizing only core sovereign attributes—are unlikely to prevail in the Court's decisions, at least in the near future. Indeed, although the proposal to immunize core sovereign attributes

145. Of course, looking to history to locate the core sovereign attributes that define the essential state is not without its problems. Not only may the historical record be scant or ambiguous, but also, as discussed in Part II.B, the focus of the inquiry into that record will greatly influence the result reached.

146. Nat'l League of Cities v. Usery, 426 U.S. 833, 845–46 (1976) (citations omitted) (quoting Coyle v. Oklahoma, 221 U.S. 559, 580 (1911) (quoting Lane County v. Oregon, 7 Wall. 71, 76 (1869))), *overruled by* Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 531 (1985).

147. *But see generally* Prakash, *supra* note 95.

offers the best reading of the Court's fundamental postulates, the Court nonetheless rejected the notion just this Term in *Franchise Tax Board v. Hyatt*.[148] The Court dismissed the California Franchise Tax Board's contention that the Full Faith and Credit Clause[149] required the courts of Nevada to honor a California statute immunizing the agency from suit.[150] California argued that its taxing responsibility should be afforded particular deference by Nevada because it is a "core" sovereign responsibility.[151] Citing *Garcia*, the Court rejected as futile any attempt to categorize one state's sovereign functions as more important than those of her sister state and as therefore requiring immunity.[152]

Of course, the alternative immunity regimes in this Comment are offered not as proposals, strictly speaking, but rather as heuristic devices drawn to illustrate the considerable gap between the current rationale for state sovereign immunity and the contours of the substantive doctrine. As this Comment has tried to demonstrate, accepting as true the fundamental postulates of the Court's current jurisprudence—immunity as a constitutional principle, state dignity, and historical traditionalism—does not necessarily take us down the Court's path.

The majority in its recent cases has posited state dignity as the primary purpose underlying state sovereign immunity. Locating the basis of that dignity in the sovereign character of states, as the majority does, affords us some means to give specific content to this otherwise vague concept. But, as the alternative immunity regimes posed here illustrate, one's approach to historical interpretation will greatly influence how one characterizes state sovereignty and thus the scope of state dignity and immunity. Even under the current doctrine's terms, in other words, what is historically traditional and what state dignity means are very much open to debate, and the conclusions we draw to these questions can significantly contract or expand state sovereign immunity. This malleability is troubling, for if the postulates anchoring state sovereign immunity are unstable, there can be no principled means of determining the appropriate limits of the doctrine.

But the difficulty with state sovereign immunity might also be that the Court's majority does have an implicit, fixed notion of state sovereignty and dignity that the formal doctrine has outstripped. Indeed, the reality of state sovereign immunity demonstrates that the doctrine as formulated by the Court's majority is growing beyond its underlying purpose. The current doctrine tells us that states are immune to private suit. Yet, as a practical matter,

148. 123 S. Ct. 1683 (2003).
149. U.S. CONST. art IV, § 1.
150. *Hyatt*, 123 S. Ct. at 1687.
151. *Id.* at 1689.
152. *Id.*

states often pay plaintiffs' damages awards, whether directly or indirectly,[153] and, except where *Coeur d'Alene* may shield a core sovereign attribute, are subject to injunctive remedies under *Young*. States are often effectively being held liable where the doctrine says that they are not liable. If the Court's majority is implicitly immunizing only states' core sovereignty, then the formal bounds of sovereign immunity have exceeded the doctrine's stated purpose of preserving state dignity.

Most criticism of state sovereign immunity has sought to reset the terms of the sovereign immunity debate by disputing the doctrinal premises formulated by the Court's majority. But although the dissenting Justices have embraced at least the diversity theory, the Justices in the majority have remained unmoved. By contrast, this Comment takes as true the majority's terms. Even holding the majority's premises constant, however, we are given an unpalatable choice between an overly malleable doctrine or one that has grown beyond its stated purpose. Just as there is considerable theoretical difficulty in extending constitutional sovereign immunity beyond the text of the Eleventh Amendment, so too is there difficulty in extending sovereign immunity beyond core sovereign functions as they were understood at the time of the founding. What we are left with, as Daniel Meltzer would say, is five authors in search of a theory.[154]

153. *See* Jeffries, *supra* 7, at 53–54 (arguing that the Eleventh Amendment and § 1983 should be read together as an "integrated liability regime" that orients "the law of governmental liability for constitutional torts . . . [along] a requirement of fault"—that, in other words, creates a negligence rather than a strict liability regime of governmental liability).

154. Meltzer, *supra* note 9.