ITS HOUR COME ROUND AT LAST? STATE SOVEREIGN IMMUNITY AND THE GREAT STATE DEBT CRISIS OF THE EARLY TWENTY-FIRST CENTURY

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This is a story of austerity's influence on constitutional doctrine. Outside the narrow community of federal jurisdiction aficionados, people seem to pay attention to state sovereign immunity about every hundred years. In 1793, the Supreme Court decided *Chisholm v. Georgia*,[1] holding that a state could be sued by an individual in federal court for nonpayment of a debt. This made people so angry that Congress proposed and the States ratified the Eleventh Amendment two years later, overruling *Chisholm* and enshrining some degree of state sovereign immunity (exactly how much is disputed) in the Constitution itself.[2] In the 1880s and 1890s, the Court decided a series of important immunity cases, chief among them *Hans v. Louisiana*,[3] generally expanding the States' immunity beyond the confines of the Amendment's text. And in the late 1990s and early 2000s, the Rehnquist Court issued a string of expansive state sovereign immunity decisions, holding, among other things, that Congress could not override the States' immunity by stat-

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

2. U.S. CONST. amend. XI ("The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.").

3. 134 U.S. 1 (1890) (extending immunity to suits by citizens of the same state).

ute.[4] These decisions arguably formed the keystone of that Court's "federalist revival"[5]—a broader movement to reinvigorate constitutional limitations on national power generally.[6] But whatever the relation of those cases to broader trends in federalism jurisprudence, state sovereign immunity is a sort of constitutional comet, streaking across the sky once a century to the amazement and consternation of legal commentators.

The comet's first two appearances coincided with potentially catastrophic state debt crises. The first involved the States' Revolutionary War debts, while the second involved a mass of Southern debts as well as the political fallout from Reconstruction. In both eras, sovereign immunity blocked serious, perhaps existential, threats to the public fisc. This history highlights the fact that, as John Orth observed, the Eleventh Amendment has always been "a dollars-and-cents proposition."[7] When the Rehnquist Court set out to expand sovereign immunity in the 1990s, however, no comparable financial threat to the states was looming. Rather, the Court argued for state sovereign immunity as a matter of constitutional fidelity—a way to assert the sovereignty of state governments in an age of expansive national supremacy.

The current Court's state sovereign immunity jurisprudence suffers from significant internal confusion[8] and a barrage of external criticism.[9] I argue in this Essay that much of the problem

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4. *See, e.g.*, Seminole Tribe of Fla. v. Florida, 517 U.S. 44 (1996) (holding that Congress could not abrogate the States' immunity when acting pursuant to its Article I powers); *see also* Alden v. Maine, 527 U.S. 706 (1999) (holding that Congress could not abrogate the States' immunity for suits in state court).

5. *See generally* Ernest A. Young, *State Sovereign Immunity and the Future of Federalism*, 1999 SUP. CT. REV. 1 (1999).

6. *See also, e.g.*, Printz v. United States, 521 U.S. 898 (1997) (holding that Congress may not "commandeer" state officers by requiring them to enforce federal law); United States v. Lopez, 514 U.S. 549 (1995) (striking down a federal statute as outside Congress's commerce power for the first time since the 1930s).

7. JOHN V. ORTH, THE JUDICIAL POWER OF THE UNITED STATES: THE ELEVENTH AMENDMENT IN AMERICAN HISTORY 7 (1987).

8. *Compare Seminole Tribe*, 517 U.S. at 47 (holding that Congress may not abrogate state sovereign immunity pursuant to its Article I powers), *with* Cent. Va. Cmty. Coll. v. Katz, 546 U.S. 356 (2006) (holding that Congress may subject the States to suit in bankruptcy proceedings).

9. *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); Vicki C. Jackson, *The Supreme Court, the Eleventh Amendment, and State Sovereign Immunity*, 98 YALE L.J. 1 (1988); John F. Manning, *The Eleventh Amendment and the Reading of Precise Consti-*

arises from the Court's effort to decouple the doctrine of state sovereign immunity from the practical imperatives that have historically enjoined recourse to it. Sovereign immunity is one of the Constitution's austerity mechanisms: It rarely allows governments to avoid their obligations entirely, but it does confer a degree of discretion on government officials as to how and when they will comply with those obligations.[10] But our constitutional culture does not easily tolerate departures from the principle that rights require remedies,[11] and the strong medicine of sovereign immunity generally will lack legitimacy in the absence of compelling public need.

Ironically, the Rehnquist Court's revival of state sovereign immunity might simply have come fifteen years too soon. As a result of both the "Great Recession" of the last several years and, perhaps more importantly, long term mismanagement of pension and healthcare obligations, the states are once more in crisis. According to Michael Greve, "Deficits for the current budget cycle are estimated at $175 billion. In some states (Texas, California, Nevada, and Illinois), the shortfall exceeds 30 percent of projected budgets."[12] The long term picture is considerably worse: "Unfunded pension obligations are estimated at upwards of $1 *trillion* and are probably three or four times that amount. Unfunded health care commitments clock in at upwards of a half trillion. Bond debt issued by state and local governments comes in around $2.8 trillion."[13] These develop-

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tutional Texts, 113 YALE L.J. 1663 (2004); Daniel J. Meltzer, *The* Seminole *Decision and State Sovereign Immunity*, 1996 SUP. CT. REV. 1. The doctrine is not without its defenders, *see, e.g.*, Alfred Hill, *In Defense of Our Law of Sovereign Immunity*, 42 B.C. L. REV. 485 (2001), but these defenders have frequently had to substantially recast the Court's doctrine to defend it. *See, e.g.*, Bradford R. Clark, *The Eleventh Amendment and the Nature of the Union*, 123 HARV. L. REV. 1817 (2010); Caleb Nelson, *Sovereign Immunity as a Doctrine of Personal Jurisdiction*, 115 HARV. L. REV. 1559 (2002).

10. Our law of state sovereign immunity thus satisfies a "structural" principle of constitutional remedies that "demands a system of constitutional remedies adequate to keep government generally within the bounds of law," while sometimes departing from "[t]he *Marbury* principle that calls for individually effective remediation." *See* Richard H. Fallon, Jr. & Daniel J. Meltzer, *New Law, Non-Retroactivity, and Constitutional Remedies*, 104 HARV. L. REV. 1731, 1778–79 (1991) (contrasting these two remedial principles).

11. *See, e.g.*, Marbury v. Madison, 5 U.S. 1 (1 Cranch) 137, 147 (1803).

12. Michael S. Greve, *Bailouts or Bankruptcy: Are States Too Big to Fail?*, AM. ENTERPRISE INST. LEGAL OUTLOOK 1 (2011), www.aei.org/article/bailouts-or-bankruptcy-are-states-too-big-to-fail-outlook/.

13. *Id.*

ments raise an obvious question: What role will state sovereign immunity play in this new crisis?

Part I of this Essay traces the history of sovereign immunity and state debt, demonstrating that, historically, legal actors have tied state sovereign immunity closely to protecting the fiscal health of the States while relaxing immunity rules where necessary to permit the enforcement of federal law in contexts that do not threaten the public fisc. I offer this account as a stab at understanding the overall shape of the Supreme Court's immunity doctrine, but I cannot hope to run that claim to ground in this brief Essay. It will be enough if I can point the way toward a more fruitful understanding. Part II addresses the disjuncture between sovereign immunity and fiscal crisis in the Rehnquist Court's state sovereign immunity jurisprudence and speculates that this disconnect has undermined both the coherence and the legitimacy of the Court's doctrine. In Part III, I speculate as to how state sovereign immunity will help shape the law's response to the States' current fiscal crisis.

I. THE HISTORY OF SOVEREIGN IMMUNITY AND STATE DEBT

Sovereign immunity seems anomalous in a democratic republic. Lawyers of a certain age grew up singing along with Schoolhouse Rock's infectious account of the Revolution: *No More Kings!*[14] A century earlier in *United States v. Lee*,[15] Justice Miller emphasized this essential difference between American government and our English forbears: "Under our system the *people*, who are there called *subjects*, are the sovereign. . . . The citizen here knows no person, however near to those in power, or however powerful himself, to whom he need yield the rights which the law secures to him . . . ."[16] *Lee* did not reject the very idea of sovereign immunity, however; it simply held that the

14. Schoolhouse Rock!, *No More Kings* (ABC 1975), *available at* http://www.youtube.com/watch?v=t-9pDZMRCpQ; lyrics *available at* http://www.schoolhouserock.tv/No.html.

15. 106 U.S. 196 (1882).

16. *Id.* at 208; *see also* David L. Shapiro, Comment, *Wrong Turns: The Eleventh Amendment and the* Pennhurst *Case*, 98 HARV. L. REV. 61, 62 (1984) (arguing that "the doctrine [of sovereign immunity] in its more blatant forms is at war with the principle that government must be accountable to the people through the courts").

government's immunity might be avoided in certain actions brought against the government's officers.[17] To this day, both national and state governments in our system continue to enjoy robust immunity protections from private lawsuits.[18]

Sovereign immunity has survived in this country not out of nostalgia for merry olde England, but rather because it serves practical public values. Dissenting in *Lee*, Justice Gray insisted: "That maxim is not limited to a monarchy, but is of equal force in a republic" because it protects public property that might be "essential to the common defence and general welfare . . . ."[19] When a private plaintiff recovers a large damage award against a state government, the money inevitably comes out of funds that otherwise would be available for public use. It is one thing to compensate a plaintiff for grievous injuries; it is quite another to take money from the K–12 education budget to do so. Unsurprisingly, the ebb and flow of immunity doctrine has tended to follow practical necessity; the more dire the financial straits that government confronts, the more that zero-sum realities compel protection of the state's coffers. The first two eras of expansive state sovereign immunity thus correspond to serious state debt crises that threatened the States' very financial existence.

When Alexander Chisholm filed his initial lawsuit against the State of Georgia in 1790, the States had millions of dollars of outstanding debts from the Revolutionary War. Under those circumstances, *Chisholm*'s holding that a state could be hauled into federal court and made to pay up would have posed an existential threat to state finances. As Charles Warren put it,

> In the crucial condition of the finances of most of the States at that time, only disaster was to be expected if suits could

17. *See Lee*, 106 U.S. at 220–22.

18. It is worth emphasizing that federal sovereign immunity remains a robust principle despite having even less grounding in constitutional text than state sovereign immunity enjoys. *See* Gray v. Bell, 712 F.2d 490, 506 (D.C. Cir 1983) ("The United States is protected from uncontested suit under the ancient common law doctrine of sovereign immunity.").

19. 106 U.S. at 226 (Gray, J., dissenting). The consequence of allowing the Lees' suit to go forward, after all, was that the U.S. Army was divested of a fort protecting the river approaches to the nation's capital. *See id.* at 217, 225–26. In any event, the Government purchased the land, which now houses Arlington National Cemetery. *See* Robert M. Poole, *How Arlington National Cemetery Came to Be*, SMITHSONIAN, Nov. 2009, *available at* http://www.smithsonianmag.com/history-archaeology/The-Battle-of-Arlington.html.

> be successfully maintained by holders of State issues of paper and other credits, or by Loyalist refugees to recover property confiscated or sequestered by the States; and that this was no theoretical danger was shown by the immediate institution of such suits against the States in South Carolina, Georgia, Virginia and Massachusetts.[20]

John Marshall gave a similar account, writing nearly three decades after the Eleventh Amendment's ratification in *Cohens v. Virginia*[21]: "It is a part of our history," he said, "that, at the adoption of the constitution, all the States were greatly indebted; and the apprehension that these debts might be prosecuted in the federal Courts, formed a very serious objection to that instrument."[22] When the Court in *Chisholm* suggested that states might be sued on these debts in federal courts, "[t]he alarm was general; and, to quiet the apprehensions that were so extensively entertained, this amendment was proposed in Congress, and adopted by the State legislatures."[23] Chief Justice Marshall rejected the explanation that the Amendment was meant simply to protect "the dignity of a State"; after all, a state might still be hauled into federal court by another state or a foreign state. Instead, "[t]hose who were inhibited from commencing a suit against a State . . . were persons who might probably be its creditors."[24]

This standard account requires some qualification. Although the States certainly feared being forced to pay their debts during the drafting and ratification of the original Constitution, Clyde Jacobs points out that "[m]uch had transpired between 1787 and 1794."[25] By the time the Supreme Court rendered its decision in *Chisholm*, Alexander Hamilton had persuaded the U.S. Congress to assume much of the outstanding state debt.[26] And as Congress and the state legislatures deliberated on the Eleventh Amendment, the States were generally paying off

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20. 1 CHARLES WARREN, THE SUPREME COURT IN UNITED STATES HISTORY 99 (1922).

21. 19 U.S. (6 Wheat.) 264 (1821).

22. *Id.* at 406.

23. *Id.*

24. *Id.*

25. CLYDE E. JACOBS, THE ELEVENTH AMENDMENT AND SOVEREIGN IMMUNITY 69 (1972).

26. *See id.*; DAVID P. CURRIE, THE CONSTITUTION IN CONGRESS: THE FEDERALIST PERIOD, 1789–1801, at 76–78 (1997) (discussing assumption of the state debts).

their remaining obligations.[27] That hardly refutes the basic proposition that protecting the States from large-scale financial liability was a central motivation behind the Eleventh Amendment, however. The States had other liabilities that may have caused them to value immunity even after federal assumption of their Revolutionary War debts.[28] More importantly, the memory of crushing state debts must have been fresh in everyone's mind. Under such circumstances, it is hardly surprising that *Chisholm* concerned the States enough to revive prior state proposals for restricting suits against state governments.[29]

Chisholm also highlighted a related theme that would figure prominently in subsequent expansions of state sovereign immunity: the difficulty of judicial enforcement of a large damages award against a recalcitrant state. Georgia had refused to even appear in the suit, and in the aftermath of the Court's ruling the state House of Representatives passed a bill providing that any person (including "any Federal Marshal") attempting to enforce the judgment "shall suffer death, without the benefit of clergy, by being hanged."[30] More generally, Hamilton had warned in *Federalist 15* of the futility of any effort by federal courts to coerce the States.[31] Even though the immediate threat of the state debt crisis had passed by 1795, the Eleventh Amendment may well have been intended to head off similar confrontations in the future.

The late nineteenth century once again saw the States in over their financial heads. The problem was particularly acute in the South. Many southern states had antebellum debts whose repayment had been interrupted by the War.[32] After Appomattox, "reconstructed" Republican governments incurred further debts to rebuild their economies, expand rail networks, and provide pub-

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27. *See* JACOBS, *supra* note 25, at 69.

28. *See* ORTH, *supra* note 7, at 7 ("Fearful of suits by British creditors and American Tories whose property had been confiscated during the Revolution, the states amended the Constitution to deprive federal courts of jurisdiction over suits against states by citizens of another state or by foreigners.").

29. *See* JACOBS, *supra* note 25, at 64 (describing these earlier proposals).

30. Quoted in ORTH, *supra* note 7, at 18. The bill failed in the Georgia Senate, *see id*. at 17, and despite Georgia's bravado, the State ultimately settled with Chisholm, *see* JACOBS, *supra* note 25, at 55.

31. *See* THE FEDERALIST No. 15, at 110 (Alexander Hamilton) (Clinton Rossiter, ed., 1961).

32. *See* ORTH, *supra* note 7, at 5.

lic education and social services for the newly freed slaves.[33] Many of these investments went south, as it were, after the Panic of 1873.[34] To make matters worse, Democratic administrations returned to power in the 1870s, culminating in the electoral compromise of 1877 that saw federal troops withdrawn from the South in return for Democratic acquiescence in the election of Rutherford B. Hayes.[35] The white supremacist "Redeemer" regimes tended to see their predecessors' actions—including their bonds—as fundamentally illegitimate.[36] Eight Southern states formally repudiated or scaled down these debts.[37] Although bondholders sought to enlist the federal courts to enforce the states' financial obligations, those courts proved unwilling—and perhaps unable—to help. To avoid hearing these claims, however, the Supreme Court had to extend the States' immunity considerably beyond the relatively narrow confines of the Eleventh Amendment's text.[38]

As with the reaction to *Chisholm* a century earlier, the Court's reaction to the post-Reconstruction repudiations seems likely to have been motivated by a complex combination of factors. The debts themselves, while large, were not necessarily crippling. They were, however, "odious" to the Redeemer governments, if not in the eyes of history. And the courts had serious reason to doubt whether a judgment requiring the southern states to pay these debts would be obeyed.[39] The end of Reconstruction, after all, had potentially serious consequences for the authority of the federal courts. As John Orth explains, "[t]he compromise between Southern Democrats and Northern Republicans meant that Congress would pass no more Civil Rights Acts or Force Bills and that the President would no longer use military

33. *Id.* at 53; *see also id.* at 59 (describing how "North Carolina state debt more than doubled in the five years after the end of the Civil War").

34. *See id.* at 53.

35. *See generally* C. VANN WOODWARD, REUNION AND REACTION: THE COMPROMISE OF 1877 AND THE END OF RECONSTRUCTION 3–21 (1991).

36. *See* Sarah Ludington et al., *Applied Legal History: Demystifying the Doctrine of Odious Debts*, 11 THEORETICAL INQUIRIES L. 247, 275–79 (2010).

37. *See id.* at 276.

38. *See, e.g.*, Hans v. Louisiana, 134 U.S. 1, 10–11, 21 (1890) (holding that a state's sovereign immunity extended to a federal question suit by a citizen of the defendant state).

39. *See* Shapiro, *supra* note 16, at 70.

power to coerce the South."[40] Even if the federal courts had been inclined to hold states to their repudiated bond contracts, then, they might well have lacked the practical ability to do so.

Interestingly, the Court does not appear to have feared similar enforcement difficulties with respect to municipal bond defaults. Confronting municipal bond repudiations on the same day that it decided *Hans*, the Court held municipalities to their contracts in *Lincoln County v. Luning*.[41] The Court may have felt no need to bow to post-Reconstruction realities because, as John Orth has pointed out, "counties had tended to issue bonds in the West, while in the South, states had usually done the job."[42] *Luning*'s distinction between municipalities and states thus ensured that suits could go forward in parts of the country where enforcement was more likely (albeit still not easy). Another explanation has to do with disparate regional needs for capital. Professor Orth suggests that "[f]oreign investment in internal improvements was not a high priority" in the late nineteenth century South; as a result, Southern states could be allowed to destroy their credit ratings through repudiation.[43] By subjecting municipalities to suit on their bonds, however, decisions like *Luning* protected municipal credit ratings, so that "[t]he historic process of importing capital to develop the mid-West and West continued unabated."[44] This account simply highlights the pragmatic dimension of sovereign immunity: Where suits on debts did not constitute a dire financial threat to public governance, those suits were allowed to go forward.

By tying state sovereign immunity doctrine to history, I do not mean to suggest that the Supreme Court's doctrine has been inconsistent. Others certainly have made that argument, contending that the Court's decisions in the midst of the debt crises actually are incompatible with the rules articulated in calmer times.[45] This is no doubt true up to a point.[46] And there

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40. ORTH, *supra* note 7, at 55.

41. 133 U.S. 529 (1890).

42. ORTH, *supra* note 7, at 111.

43. *Id.* at 118.

44. *Id.*

45. *See, e.g.*, Edward A. Purcell, Jr., *The Particularly Dubious Case of* Hans v. Louisiana*: An Essay on Law, Race, History, and "Federal Courts"*, 81 N.C. L. REV. 1940–41 (2003) (arguing that *Hans* conflicted with the Court's prior Eleventh Amendment jurisprudence).

are inconsistencies within even the Rehnquist Court's own jurisprudence, as I shall discuss. But by and large I want to suggest that the Court has developed a relatively consistent and even balanced view of state sovereign immunity. It tends to develop rules limiting liability, such as *Hans*'s extension of immunity to federal question suits, during state debt crises when imposing liability would both threaten the States' ability to govern and, because the stakes are so high, call into question the courts' ability to enforce their judgments. On the other hand, the Court has tended to develop pro-accountability rules, such as officer suits under *Ex parte Young*,[47] when concerns about state debt are less salient and there is less reason to question compliance with court judgments. But the contrast between these two tendencies does not mean the two sets of rules cannot fit together into a coherent framework.

The gist of that framework is that it is hard to get damages against states but much easier to get injunctive and declaratory relief.[48] The Eleventh Amendment barred state creditors from federal court in *Chisholm*-like suits seeking to enforce state debts under state law. *Hans* cut off attempts to turn such suits into federal question suits by construing breach of the debt contract as an "impairment" under the Contracts Clause; such suits would have allowed in-staters—who are not covered by the Eleventh Amendment's text—access to federal court on federal question grounds. Other cases similarly stymied efforts to sue on state bonds by a range of parties—for example, other states[49] or foreign countries[50]—who also are unmentioned in

46. Possibly three people on the planet understand the nuances of the Court's state bond cases in the late nineteenth century well enough to say whether they are consistent or not, and I am not one of them. *See generally* Mark P. Strasser, Hans, Ayers, *and Eleventh Amendment Jurisprudence: On Justification, Rationalization, and Sovereign Immunity*, 10 GEO. MASON L. REV. 251, 266–85 (2001) (wading through the cases and finding more consistency than is sometimes thought).

47. 209 U.S. 123 (1908).

48. *Cf.* Ann Woolhandler, *Patterns of Official Immunity and Accountability*, 37 CASE W. RES. L. REV. 396, 433 (1987) (explaining that actions for injunctive relief have been dominated by a "legality" model holding government officials accountable to law, while a "discretion" model protecting government decisionmaking from liability has dominated actions for damages).

49. *See* New Hampshire v. Louisiana, 108 U.S. 76 (1883).

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

that Amendment.[51] As Louis Jaffe put it, "the sensitive areas—the areas where consent to suit [was] likely to be required—[were] those involving the enforcement of contracts, treasury liability for tort, and the adjudication of interests in property which [had] come unsullied by tort into the bosom of the government."[52]

On the other hand, *Ex parte Young* recognized and extended the traditional availability of equitable relief against government officers,[53] and this tradition has enabled judicial intervention to force government compliance with a broad array of federal rights.[54] In *Young* itself, the claim was a *Lochner*-era argument that the state was overregulating railroad rates.[55] But injunctive relief in school desegregation[56] and free speech cases,[57] as well as federal habeas corpus review of state criminal convictions[58] all owe their efficacy to this principle. Damages were relatively unimportant in most of these cases, so that *Young* could provide the most meaningful form of relief in civil rights cases without needing to question *Hans*'s general prohibition on damages.

It is true that the second theme I have traced through the eighteenth- and nineteenth-century expansions of immunity—the fear that court judgments against a state cannot be enforced—can apply to prospective as well as damages relief. Some injunctions are hard to enforce against government actors,

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51. *See also Ex parte* New York, 256 U.S. 503 (1921) (holding that state sovereign immunity bars suits in admiralty, notwithstanding that the Eleventh Amendment speaks only of suits "in law or equity").

52. Louis L. Jaffe, *Suits Against Governments and Officers: Sovereign Immunity*, 77 HARV. L. REV. 1, 29 (1963).

53. *See* 209 U.S. 123, 168 (1908). For an earlier example on the federal side, see United States v. Lee, 106 U.S. 196 (1882).

54. *See, e.g.*, Green v. Mansour, 474 U.S. 64, 68 (1985) ("Both prospective and retrospective relief implicate Eleventh Amendment concerns, but the availability of prospective relief of the sort awarded in *Ex parte Young* gives life to the Supremacy Clause. Remedies designed to end a continuing violation of federal law are necessary to vindicate the federal interest in assuring the supremacy of that law.").

55. 209 U.S. at 169 (Harlan, J., dissenting).

56. *See, e.g.*, Milliken v. Bradley, 433 U.S. 267 (1977).

57. *See, e.g.*, Dombrowski v. Pfister, 380 U.S. 479, 483–84 (1965).

58. RICHARD H. FALLON, JR., JOHN F. MANNING, DANIEL J. MELTZER, & DAVID L. SHAPIRO, HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 1214–15 (6th ed. 2009) [hereinafter HART & WECHSLER] (noting that a habeas petition attacking a state criminal conviction "names as respondent a state office having custody of the petitioner").

as any school desegregation plaintiff can attest. It is probably no coincidence that *Young* itself involved a railroad's challenge to a rate regulation rather than, say, an attack on Jim Crow laws; in the former sort of case, the federal courts can count on powerful allies in the business community in any contest with the State. By the time that federal injunctions came to be used in more sensitive areas, norms of compliance were more well-established. Moreover, the equitable calculus involved in most requests for prospective relief itself provides an opportunity for the court to consider enforcement difficulties at retail, without the need to avoid them through a categorical rule of immunity.[59] To the extent that they motivate broad immunity rules, then, we might expect enforcement concerns to be more salient for damages claims than claims for prospective relief.

The qualifications to the broad rule against damages confirm my basic account. Private individuals may sue state officers for damages in their individual capacities, and this is true notwithstanding that many state and local governments reimburse their officers for such damages out of state coffers.[60] John Jeffries famously argued that this means that the Eleventh Amendment "almost never matters": private plaintiffs can reach the deep pockets of the State by suing state officers who pass that liability through to their employer.[61] Similarly, the Court has allowed monetary awards against states in the form of contempt judgments and attorneys' fee awards where those awards are incidental to a claim for injunctive relief.[62] But these practical end-runs around sovereign immunity work only for civil rights claims under Section 1983—typically constitutional torts-type suits. Section 1983 provides no means for holding states liable on

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59. *Cf.* Shapiro, *supra* note 16, at 78–79 (suggesting that the purposes of state sovereign immunity doctrine to protect state governmental prerogatives could be equally well-served by narrower doctrines of comity and deference).

60. *See* HART & WECHSLER, *supra* note 58, at 957.

61. John C. Jeffries, *In Praise of the Eleventh Amendment and Section 1983*, 84 VA. L. REV. 47, 49–50 (1998). The Eleventh Amendment still matters to the extent that reimbursement schemes do not operate so as to "pass through" truly large damages awards—if, for example, the State reimburses only what the plaintiff is actually able to recover from an individual officer. But that simply underscores the central point, which is that immunity is generally structured so as to foreclose major damages liability for states while permitting actions to force compliance with federal rights.

62. *See* Hutto v. Finney, 437 U.S. 678 (1978).

contracts or debts. Accordingly, the individual capacity suit for damages poses no threat to sovereign immunity's core purpose: protecting the government's discretion to adjust its relations with creditors, especially in times of financial crisis.

So, too, with qualifications to the broad rule in favor of injunctive relief. In *Larson v. Domestic & Foreign Commerce Corp.*,[63] the Court identified an exception to the broad rule that sovereign immunity does not bar suits against state officers for prospective relief. Under *Larson*, such relief is unavailable unless the suit alleges that the officer acted outside her statutory or constitutional authority.[64] This rule has little impact on federal civil rights claims, but it effectively bars suits for specific performance or other non-damages relief in contract actions. Likewise, *Edelman v. Jordan* limited injunctive relief under *Ex parte Young* to injunctions that are prospective in nature: a plaintiff cannot enjoin the State to write a check compensating him for past wrongs.[65] This distinction between prospective and retrospective relief occasionally will cramp efforts to vindicate individual non contractual rights,[66] but in general suits to require government compliance with constitutional commands will be prospective, while suits to require performance of debt obligations will be retrospective. Once again, sovereign immunity remains robust in its area of core functional concern—state debt—even as exceptions cabin its impact on other sorts of suits.[67]

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63. 337 U.S. 682 (1949).

64. *Id.* at 695; *see also* Gregory C. Sisk, *A Primer on the Doctrine of Federal Sovereign Immunity*, 58 OKLA. L. REV. 439, 457 (2005) (explaining that under *Larson*, "suit may be maintained directly against a governmental officer" if (1) "the officer allegedly acted outside of the [statutory] authority conferred upon his or her office" or (2) "if the officer acted within the conferred statutory limits of the office, but his or her conduct allegedly offended a provision of the Constitution").

65. 415 U.S. 651 (1974).

66. *See, e.g.*, Breard v. Greene, 523 U.S. 371, 377–78 (1998) (holding that the *Edelman* doctrine barred Paraguay's suit to enjoin the execution of Angel Breard as a remedy for the violation of Breard's rights under the Vienna Convention on Consular Relations, because that violation had occurred during the course of Breard's arrest and had no continuing consequences).

67. The *Pennhurst* rule is similar. In *Pennhurst State School & Hospital v. Halderman*, 465 U.S. 89 (1984), the Court held that *Ex parte Young*'s exception for officer suits seeking prospective relief did not extend to injunctions sought against violations of *state* law. That holding, of course, affects federal civil rights suits only indirectly (by complicating the procedural options for plaintiffs with claims under both federal and state law). If anything, *Pennhurst*'s refusal to extend the *Ex parte*

It bears repeating that no single theory or variable can hope to unify the entire corpus of state sovereign immunity law. Nor can one hope, in a brief Essay like this one, to consider all the details and counterexamples that would be necessary to fully assess the explanatory power of my account. My goal is considerably more modest. Current discussions of state sovereign immunity have discounted the explanatory power of state debt crises as well as the possibility that they may recur. If that is so, then my account may help redirect the discussion in a more fruitful direction.

As usual in the field of remedies, Doug Laycock puts it best:

> All the law in this area is dominated by this search for a middle ground between two unthinkable outcomes. For obvious institutional reasons, the Court will not make the Constitution unenforceable; for equally obvious historical reasons, it will not reaffirm *Chisholm v. Georgia*. But how to draw the line? How to say states are free to flout the contract clause at will, withholding money from bondholders who relied on a solemn promise to repay, but they are not free to flout other clauses at will?[68]

My point is not so much that the Court has drawn this line successfully, but rather that this is the line the Court has been trying to draw. The "obvious historical reasons" for not reaffirming *Chisholm* derive their staying power from practical considerations of fiscal necessity. They might seem unsympathetic in good times, but the considerations return with renewed urgency in bad. That is why the Rehnquist Court's effort to revive state sovereign immunity seemed so strange in the 1990s—and also why it might seem less strange today.

II. A DEBTLESS REVOLUTION: SOVEREIGN IMMUNITY IN THE REHNQUIST COURT

The Rehnquist Court decided *Seminole Tribe v. Florida* in 1996, holding that Congress could not override, or abrogate, the sovereign immunity of the States by enacting a law explicitly subjecting the States to liability.[69] Four years earlier, the Court star-

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Young "fiction" to state claims reaffirms the Court's grounding of officer suits in the need to enforce federal rights.

68. Douglas Laycock, *Teacher's Manual* to MODERN AMERICAN REMEDIES: CASES AND MATERIALS (2d ed. 1994), at 123 (quoted with permission).

69. 517 U.S. 44, 72–73 (1996).

tled some observers by striking down a portion of the federal Low Level Radioactive Waste Amendments on the ground that it "commandeered" state governments into implementing federal policy.[70] By the time the Court struck down the Gun Free School Zones Act in 1995[71]—the first time it invalidated a federal statute on enumerated powers grounds since the New Deal Revolution of 1937—it was clear that some sort of "federalist revival" was taking place.[72] After *Seminole*, however, state sovereign immunity quickly took over the Court's federalism agenda. Although the immunity cases tended not to draw as much popular attention as decisions under the Commerce Clause, those cases were both more numerous and more expansive in their holdings.[73]

Seminole primarily concerned Congress's power to subject states to damages suits, but the case also featured an odd holding purporting to limit officer suits under *Ex parte Young* in cases where Congress had provided an alternate remedial scheme.[74] Justice Kennedy's plurality opinion the following year tried to limit *Young* even further, only to see that effort pretty soundly rejected by a majority of the justices.[75] But the Court extended the primary holding of *Seminole* two years later in *Alden v. Maine*, which held that Congress may not abrogate state sovereign immunity in *state* court lawsuits,[76] even though the Eleventh Amendment purports to limit only "the judicial power of the United States."[77] In 2002, the Court went further to prohibit suits against States before a federal administrative agency, which arguably does not exercise "judicial power" at

70. New York v. United States, 505 U.S. 144 (1992).

71. United States v. Lopez, 514 U.S. 549 (1995).

72. For an overview, see Ernest A. Young, *The Rehnquist Court's Two Federalisms*, 83 TEX. L. REV. 1 (2004).

73. *See* Richard H. Fallon, Jr., *The "Conservative" Paths of the Rehnquist Court's Federalism Decisions*, 69 U. CHI. L. REV. 429, 452–68 (2002); Young, *supra* note 5, at 1.

74. 517 U.S. at 73–74.

75. *See* Idaho v. Coeur d'Alene Tribe of Idaho, 521 U.S. 261, 270–80 (1997); *id.* at 291–92 (O'Connor, J., concurring in part and concurring in the judgment); *id.* at 297–98 (Souter, J., dissenting).

76. 527 U.S. 706, 727–31 (1999).

77. U.S. CONST. amend. XI.

all.[78] As Justice Kennedy explained in *Alden*, the phrase "Eleventh Amendment immunity" is "something of a misnomer, for the sovereign immunity of the States neither derives from, nor is limited by, the terms of the Eleventh Amendment."[79]

Although *Seminole* denied Congress power to abrogate state sovereign immunity pursuant to its Article I powers, it did not question, and indeed reaffirmed, the Court's earlier holding, in *Fitzpatrick v. Bitzer*, that Congress *can* abrogate state sovereign immunity when it acts pursuant to its power to enforce the Reconstruction Amendments.[80] Capitalizing on *Fitzpatrick*, Congress sought to bolster its ability to subject the States to private damages suits by regrounding several important federal statutes, such as the Patent Act and the Americans with Disabilities Act (ADA), in Section Five of the Fourteenth Amendment. The Rehnquist Court thus had to confront a series of questions as to whether this or that federal statute could qualify as a Section Five statute under the test articulated in *City of Boerne v. Flores*.[81] In rapid succession, the Court found that the Patent Act,[82] the false advertising provisions of the Lanham Act,[83] the Age Discrimination in Employment Act,[84] and Title I of the ADA[85] all failed this test and therefore could not validly abrogate the States' immunity.

The Court seemed to change course, however, in *Nevada Department of Human Resources v. Hibbs*, which upheld the immu-

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78. Fed. Maritime Comm'n v. S.C. State Ports Auth., 535 U.S. 743 (2002). By combining the Eleventh Amendment, non-Article III courts, and admiralty law, *Ports Authority* arguably qualifies as the Federal Courts nerd's greatest case ever.

79. 527 U.S. at 713. *Alden* echoed the language of *Monaco v. Mississippi*, 292 U.S. 313, 322 (1934), which asserted that "we cannot rest with a mere literal application of the words of § 2 of Article III, or assume that the letter of the Eleventh Amendment exhausts the restrictions upon suits against non-consenting States. Behind the words of the constitutional provisions are postulates which limit and control." This passage, of course, is why *Monaco* is known as the *Griswold v. Connecticut* of Federal Courts law.

80. 427 U.S. 445, 455–56 (1976).

81. 521 U.S. 507, 519–20 (1997) (holding that Congress may act under Section Five if it (1) seeks to prevent or remedy an actual constitutional violation, and (2) the remedy is "congruen[t] and proportional" to the constitutional wrong).

82. Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank, 527 U.S. 627 (1999).

83. Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd., 527 U.S. 666 (1999).

84. Kimel v. Fla. Bd. of Regents, 528 U.S. 62 (2000).

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

nity-abrogating provisions of the Family Medical Leave Act.[86] Writing for the Court as he had in *Fitzpatrick* and *Seminole*, Chief Justice Rehnquist found that the FMLA was a congruent and proportional remedy for unconstitutional gender discrimination.[87] Likewise, a year later in *Tennessee v. Lane*, the Court said that Congress had validly abrogated the States' immunity for claims under Title II of the ADA, which covers access to public accommodations, where the claims involved denial of the fundamental right of access to the courts.[88] Most recently, in *Central Virginia Community College v. Katz*, the Court seemed to undermine the holding of *Seminole* itself by holding that Congress could abrogate state sovereign immunity under the Bankruptcy Act, which rests on an Article I power rather than the Reconstruction Amendments.[89] Although Justice Stevens's opinion in *Katz* tried to reconcile its holding with *Seminole* by explaining that the history of the Bankruptcy Clause renders that power analogous to Section Five,[90] the logic of that position was hardly overwhelming. It is hard not to conclude that the Court in *Katz*—or, more precisely, Justice O'Connor, who was the only justice in the majority in both *Seminole* and *Katz*—might have been rethinking the Court's broad holdings on abrogation.

I have recounted the Rehnquist Court's state sovereign immunity holdings in some detail because they might offer important clues as to the relationship between state immunity doctrine and the underlying functional rationale for that doctrine. The first point is that the Rehnquist Court's expansion—the most important extension of state sovereign immunity since the 1890s—occurred *without* any sort of state debt crisis comparable to that which existed in the Early Republic or after Reconstruction. Why, then, did the Court do it? The most plausible account, in my view, has to do with the interaction of the Rehnquist Court's desire to revive the notion of an enforceable constitutional federalism with the precedential and institutional constraints confronting the Court.[91]

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86. 538 U.S. 721 (2003).

87. *See id.* at 737.

88. 541 U.S. 509, 531 (2004).

89. 546 U.S. 356, 377 (2006).

90. *See id.* at 375–77.

91. I venture no answer here to the logically prior question of why the Rehnquist Court wanted to revive constitutional federalism in the first place. On

In *Garcia v. San Antonio Metropolitan Transit Authority*,[92] the Court overruled *National League of Cities v. Usery*[93] and seemed to eschew the very notion of a judicially enforceable federalism. Three conservative justices dissented, with Justices Rehnquist and O'Connor practically promising to overturn the decision as soon as their side gained the necessary votes.[94] By the early 1990s, the votes seemed to be there, but the Court confronted difficult choices about the course that any "federalist revival" should take. One suspects that an outright revival of *National League of Cities*—with its ambiguous categories of "traditional state functions" and its open-ended multifactor balancing test—was unacceptable to some of the new conservatives, especially Justice Scalia, who were committed to bright-line rules.[95]

In *Lopez* and *United States v. Morrison*,[96] the Court flirted with narrowing the Commerce Clause, but any effort to do so would have confronted severe obstacles: the intrinsic difficulty of defining a category of interstate commerce distinct from economic activity at large;[97] a half-century of judicial precedent built on *Wickard v. Filburn*'s broad construction of the Clause;[98] and, most importantly, the sheer institutional weight of the national administrative state built on an expansive conception of Congress's power. Not surprisingly, the Commerce Clause initiative stalled in *Gonzales v. Raich*[99] and *United States v. Com-*

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that question, see, for example, Ernest A. Young, *The Conservative Case for Federalism*, 74 GEO. WASH. L. REV. 874, 877–80 (2006) (suggesting that conservatives may seek to limit national power out of a fidelity-based aversion to reading principles like federalism out of the Constitution).

92. 469 U.S. 528 (1985).

93. 426 U.S. 833 (1976).

94. *See, e.g.*, *Garcia*, 469 U.S. at 580 (Rehnquist, J., dissenting) ("I do not think it incumbent on those of us in dissent to spell out further the fine points of a principle that will, I am confident, in time again command the support of a majority of this Court."); *id.* at 589 (O'Connor, J., dissenting) ("I share Justice Rehnquist's belief that this Court will in time again assume its constitutional responsibility.").

95. *See, e.g.*, Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175 (1989).

96. 529 U.S. 598 (2000) (striking down certain provisions of the Violence Against Women Act as outside both the Commerce Clause and Section Five powers).

97. *See, e.g.*, Lawrence Lessig, *Translating Federalism:* United States v. Lopez, 1995 SUP. CT. REV. 125 (1995) (tracing the history of the indeterminacy problem).

98. 317 U.S. 111 (1942).

99. 545 U.S. 1 (2005) (upholding Congress's power, under the Commerce Clause, to regulate homegrown medical marijuana).

stock.[100] Similar constraints hindered any effort to tighten the Spending Clause test under *South Dakota v. Dole*.[101] And without tightening *Dole*, it was hard to make much of the anti-commandeering doctrine recognized in *New York v. United States*[102] and *Printz v. United States*;[103] after all, without a meaningful limit on conditional spending, Congress can nearly always induce the States to implement federal programs. That left state sovereign immunity under the Eleventh Amendment.[104]

State sovereign immunity implicated far fewer precedential and institutional constraints than other doctrinal avenues for reviving federalism.[105] It is true that *Seminole Tribe* had to overrule *Pennsylvania v. Union Gas Co.*,[106] which had held just seven years earlier that Congress *could* abrogate state sovereign immunity when acting pursuant to the Commerce Power.[107] But *Union Gas* was a limping precedent at best: The plurality opinion rested on a completely unpersuasive effort to explain why the Commerce Clause was really just like Section Five of the Fourteenth Amendment, structurally speaking;[108] even worse,

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100. 130 S. Ct. 1949 (2010) (upholding Congress's power, under the Necessary and Proper Clause, to civilly commit mentally ill, sexually dangerous persons for a period beyond the duration of their federal criminal sentence).

101. 483 U.S. 203, 207 (1987). It surely did not help that William Rehnquist was the author of *Dole* and had been skeptical of the "unconstitutional conditions" doctrine throughout his career. *See* Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 HARV. L. REV. 1413, 1441–42 (1989) (describing Chief Justice Rehnquist's opposition to the doctrine).

102. 505 U.S. 144 (1992) (holding that Congress may not require state legislators to implement federal law).

103. 521 U.S. 898 (1997) (holding that Congress may not require state executive officials to implement federal law).

104. The Court did take up another alternative, which was to strengthen and expand its "clear statement" jurisprudence that enforced constitutional federalism through narrowing constructions of federal statutes. *See* Ernest A. Young, *The Story of* Gregory v. Ashcroft*: Clear Statement Rules and the Statutory Constitution of American Federalism*, *in* STATUTORY INTERPRETATION STORIES 196 (William N. Eskridge, Jr., Philip P. Frickey & Elizabeth Garrett eds., 2010). Ironically, the Court's conservatives—who took the lead on other aspects of the federalist revival—were reluctant if not actively opposed to the most important aspect of the clear statement jurisprudence, which was to enforce a presumption against preemption of state law. *See* Young, *supra* note 72, at 36–39.

105. *See generally* Fallon, *supra* note 73, at 486–92.

106. 491 U.S. 1 (1989).

107. *Id.* at 6.

108. *Id.* at 15–17. For example, *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976), relied rather heavily on the notion that Congress could abrogate state sovereign immu-

Justice White had provided the fifth vote while explicitly disavowing the plurality's reasoning and—inexplicably—failing to offer any of his own.[109] *Union Gas*'s critics, on the other hand, had the century-old authority of *Hans v. Louisiana*, which did not decide the abrogation issue but certainly weighed against reading the Eleventh Amendment narrowly. More generally, there simply is no New Deal Revolution in state sovereign immunity jurisprudence. The constitutional crisis of the 1930s does not seem to have implicated state immunities in any significant way, and although the New Deal Court did not decide a great many immunity cases, when it did so it tended to decide them in favor of the States.[110] There was therefore no *NLRB v. Jones & Laughlin Steel Corp.*[111] or *Wickard* to be confronted if the Court chose to extend state immunities.

Likewise, expanding state sovereign immunity required no direct confrontation with Congress or the national administrative state. To be sure, the Court's immunity decisions racked up an impressive total of federal law invalidations, causing some critics to accuse the Court of unprecedented activism.[112] But these decisions did not invalidate the underlying statutes—that is, they did not question Congress's power to adopt the

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nity under its Section Five power because the Fourteenth Amendment had modified the principles of state sovereignty reflected in the original Constitution and the Eleventh Amendment. *See id.* at 453–54. Put more directly, fourteen is greater than eleven. But that argument hardly works for the Commerce Clause.

109. *See Union Gas*, 491 U.S. at 57 (White, J., concurring in the judgment in part and dissenting in part) ("I agree with the conclusion reached by Justice Brennan . . . that Congress has the authority under Article I to abrogate the Eleventh Amendment immunity of the States, although I do not agree with much of his reasoning."). Sentences like this generally serve as introductions to a concurring Justice's own account of his own reasons for supporting the judgment of the Court. Justice White's opinion simply ends after this statement.

110. *See, e.g.*, Ford Motor Co. v. Dep't of Treasury of Ind., 323 U.S. 459 (1945) (holding that state sovereign immunity barred a suit for a tax refund against officers of the state treasury, on the ground that the suit was in fact one against the State) *overruled on other grounds by* Lapides v. Bd. of Regents of Univ. of Ga., 535 U.S. 613 (2002); Great Northern Life Ins. Co. v. Read, 322 U.S. 47 (1944) (holding that a suit against the state insurance commissioner to recover taxes wrongfully collected was barred as a suit against the state).

111. 331 U.S. 416 (1947).

112. *See, e.g.*, JOHN T. NOONAN, JR., NARROWING THE NATION'S POWER: THE SUPREME COURT SIDES WITH THE STATES (2003). For a more extended argument that this critique was overblown, see Ernest A. Young, *Is the Sky Falling on the Federal Government? State Sovereign Immunity, the Section Five Power, and the Federal Balance*, 81 TEX. L. REV. 1551 (2003) (reviewing NOONAN, *supra*).

ADA, the ADEA, or other statutes under the Commerce Power. Rather, they simply foreclosed individual damages actions against state governments. Even this limit was more inconvenience than absolute barrier, as individual plaintiffs could still seek both injunctive and damages relief against state officers, and Congress retained broad power to induce the States to waive their immunity through conditional spending. The state sovereign immunity decisions thus did not constrict Congress's power in anything like the way that a serious effort to limit the Commerce Clause would have done.

The aftermath of *Florida Prepaid* is instructive in this regard. In that case, the Court held that Congress could not abrogate state sovereign immunity for patent infringements committed by state governments by grounding the Patent Act in the Section Five power.[113] (Not entirely surprisingly, the Court seemed to doubt that the Civil War was fought to protect intellectual property.) Probably because patent cases implicate corporate interests with good lobbyists, bills were promptly introduced in Congress to overturn the result, primarily by conditioning the grants of patents to state governmental entities on the states' waiver of immunity in any future patent suits brought against them by private patent holders.[114] But the bills ultimately fizzled in Congress, probably because there had never been much of an actual problem with state patent infringement in the first place.

State sovereign immunity, in other words, was a path of least resistance: It allowed the Court to do something nice for constitutional federalism without overruling important precedents or directly challenging the national regulatory state. If my psychoanalysis of the Court is correct—and such analysis is always risky[115]—then this line of cases reflects a somewhat odd mix of principle and pragmatism. It was principled in the sense that the impetus came from a desire to vindicate a neglected aspect of constitutionalism, not so much from a desire to achieve particular

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113. Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank, 527 U.S. 627, 633–34 (1999).

114. For an exhaustive consideration of the issues these bills raised, *see* Mitchell N. Berman, R. Anthony Reese & Ernest A. Young, *State Accountability for Violations of Intellectual Property Rights: How To "Fix"* Florida Prepaid *(And How* Not *To)*, 79 Texas L. Rev. 1037 (2001).

115. Even if my account is plausible, it is of course utterly unverifiable.

policy results.[116] And it was pragmatic, as I have suggested, in the sense that the Court chose a doctrinal path suited to minimize the institutional and precedential obstacles bedeviling any effort to revive a judicially-enforceable federalism. But it was highly *un*-pragmatic in a different sense: The sovereign immunity revival did not respond to any practical threat of state financial collapse of the sort that had marked judicial expansions of immunity in the late eighteenth and nineteenth centuries.

This decoupling of doctrine from practical necessity had some costs. The Rehnquist Court was largely unable to provide a persuasive normative justification for state sovereign immunity beyond constitutional fidelity, and even that justification was sharply contested.[117] By 2002, the Court settled on state "dignity" as the underlying value that sovereign immunity protects; as Justice Thomas put it in *Federal Maritime Commission v. South Carolina Ports Authority*, "[t]he preeminent purpose of state sovereign immunity is to accord States the dignity that is consistent with their status as sovereign entities."[118] My own view is that this emphasis on state dignity was not quite the anthropomorphic fallacy that some critics made it out to be;[119] every new nation, for example, puts considerable importance on getting other countries to respect its dignity as a fellow sovereign in the international community.[120] Nonetheless, the Court's paeans to state

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116. *See, e.g.*, Young, *supra* note 91, at 877–80 (exploring a fidelity-based case for federalism).

117. I do not mean to concede that the Rehnquist Court's immunity decisions were, in fact, faithful to the Constitution's original meaning. Justice Souter's comprehensive treatment of the history in his *Seminole* dissent still awaits an adequate answer, see Seminole Tribe of Fla. v. Fla., 517 U.S. 44, 100 (Souter, J., dissenting), and the strong consensus of historical treatments by academics take a similar position. *See* Fletcher, *supra* note 9; Jackson, *supra* note 9.

118. 535 U.S. 743, 760 (2002).

119. *See, e.g.*, Scott Dodson, *Dignity: The New Frontier of State Sovereignty*, 56 OKLA. L. REV. 777, 820 (2003). *But cf.* Evan H. Caminker, *Judicial Solicitude for State Dignity*, 574 ANNALS AM. ACAD. POL. & SOC. SCI. 81, 85 (2001) (dismissing one reading of the Court's solicitude for dignity as "silly" because "states have no feelings of dignity to be protected; the Court's apparent anthropomorphization of states [would] simply reflect[] a category mistake" and rejecting more sophisticated versions of the dignitarian argument as implausible).

120. *See, e.g.*, Judith Resnik & Julie Chi-hye Suk, *Adding Insult to Injury: Questioning the Role of Dignity in Conceptions of Sovereignty*, 55 STAN. L. REV. 1921, 1927 (2003) (acknowledging the importance of sovereign dignity in such contexts). To say this, however, is not to deny that in a democracy, allowing government insti-

dignity persuaded virtually no one, leaving the jurisprudence without a compelling rationale. Had the States actually been in fiscal crisis, such that damages claims on the public fisc actually threatened the States' ability to carry out important public functions, I suspect that sovereign immunity doctrine would have had a more sympathetic reception.

Moreover, decoupling state sovereign immunity from its core concern with the public fisc had the effect of undermining some of the critical doctrinal compromises discussed earlier in this Essay. I have suggested that the combination of *Hans*'s broad bar to individual damages actions against states with *Young*'s broad exception for prospective relief against state officers meant that state sovereign immunity remained robust in its classic practical domain—large state financial liabilities, primarily contractual in nature—while federal courts retained authority to force prospective compliance with federal rights. The Rehnquist Court cases, however, tended to feature federal claims for violation of noncontractual rights—for example, wage and hour claims (*Alden*), employment discrimination (*Kimel* and *Garrett*), or patent infringement (*Florida Prepaid*). Unlike the constitutional claims commonly associated with *Ex parte Young*, these statutory claims often involved harms for which damages were a critical remedy—for example, lost wages in employment cases or lost profits from patent infringement. And damages in some of these situations, especially the patent cases, might be large enough that individual-capacity suits against officers would not furnish an adequate substitute. The Rehnquist Court cases thus arguably shifted the balance between *Hans* and *Young*, expanding the former beyond its core historical concerns.

Likewise, Justice Kennedy's abortive effort to constrict *Young* would have broadened *Hans*'s footprint still further. In *Coeur d'Alene*, Kennedy's plurality opinion insisted that "[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."[121] He thus advocated "a careful balancing and accommo-

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tutions to remain unaccountable when they injure their citizens is a strange strategy for building respect for those institutions.

121. Idaho v. Coeur d'Alene Tribe of Idaho, 521 U.S. 261, 270 (1997).

dation of state interests when determining whether the Young exception applies in a given case";[122] this balancing test would consider the availability of remedies in state court, whether the case calls for the interpretation of federal law, and similar interests.[123] Ultimately, a solid majority of the Court rejected this effort to narrow Young.[124] Had it succeeded, however, it might well have made Hans's broad principle of immunity the norm regardless of what sort of relief is sought.

The staying power of the *Hans-Young* compromise showed up in the Court's unwillingness to push its extensions of state sovereign immunity to their logical conclusions. Not only did the Court waffle and eventually turn back on *Ex parte Young*, but by the end of Chief Justice Rehnquist's tenure, the Court seemed to cast doubt on its commitment to *Seminole* as well. It is not hard to see *Hibbs* and *Lane* as the simple playing out of principles articulated in *Boerne*, *Kimel*, and *Garrett*. When Congress enacts Section Five legislation aimed at government activity that is subject to heightened scrutiny under the relevant constitutional doctrines—gender discrimination in *Hibbs*, restrictions on court access in *Lane*—that legislation is much more likely to survive the "congruence and proportionality" test than is legislation addressed to activity that draws only rational basis review.[125] But the Court's decision to allow bankruptcy-based abrogation of immunity in *Katz* seems like either a harbinger of *Seminole*'s demise or, worse yet, an ad hoc exception for a federal statute that was simply too important to push aside.

The Rehnquist Court's sovereign immunity cases thus had both justification and consistency troubles, and both were ar-

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122. *Id.* at 278.

123. *See id.* at 271–79.

124. *See* Verizon Md. Inc. v. Pub. Serv. Comm'n of Md., 535 U.S. 635, 645 (2002) ("In determining whether the *Ex parte Young* doctrine 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 in part and in the judgment)).

125. *See, e.g.*, Douglas Laycock, *Conceptual Gulfs in* City of Boerne v. Flores, 39 WM. & MARY L. REV. 743, 746 (1998) ("The proportionality part of [the *City of Boerne*] standard seems to require an empirical judgment: Congressional enforcement legislation is valid only if violations of the Constitution, as interpreted by the Court, appear in a sufficiently large proportion of all cases presenting violations of the statute.").

guably attributable to its decoupling of immunity from practical financial necessity. It is hard to know how much weight to give these costs, however. The Court is not impervious to professional criticism, but at the same time no direct institutional mechanism exists to translate that criticism into more tangible costs and the Court seems increasingly unimpressed by complaints from academia.[126] Nonetheless, the Court's retrenchment in *Verizon*, *Hibbs*, *Lane*, and especially *Katz* suggests some felt sense of unsustainability. The remaining question is whether, if financial necessity and immunity doctrine were to realign, the doctrine might take yet another turn.

III. THE GREAT STATE DEBT CRISIS OF THE EARLY TWENTY-FIRST CENTURY

If the problem with the Rehnquist Court's sovereign immunity jurisprudence was that the States were not in bad enough shape to need it, there is a good way and a bad way to fix that. The good way would have been to moderate the immunity doctrines, but we are now living through the bad way: The States' financial position has now deteriorated to the point that comparisons to the 1790s and 1890s begin to make sense. In this last section, I survey the current state debt crisis and speculate as to the effect it may have on state sovereign immunity doctrine.

In recent years, state spending increases have dramatically outstripped revenues.[127] California projects a $19-billion operating deficit in 2011–2012, with that figure growing to $22.4 billion in 2012–2013.[128] The other four most populous states—

126. *See, e.g.*, Kenneth Jost, *Roberts' Ill-Informed Attack on Legal Scholarship*, JOST ON JUSTICE (July 19, 2011, 10:56 AM), http://jostonjustice.blogspot.com/2011/07/roberts-ill-informed-attack-on-legal.html (reporting remarks by the Chief Justice suggesting that much legal scholarship "was of great interest to the academic that wrote it, but isn't of much help to the bar").

127. Shawn Tully, *Meredith Whitney: State finances are worse than estimated*, CNNMONEY (June 6, 2011, 1:44 PM), http://finance.fortune.cnn.com/2011/06/06/meredith-whitney-state-finances-are-worse-than-estimated/ ("Since 2003, state governments have raised annual outlays from $1.5 trillion to almost $2.2 trillion, or [by] $700 billion, yet tax receipts have risen only $400 billion, or $300 billion less, to $1.4 trillion.").

128. MAC TAYLOR, LEGISLATIVE ANALYST'S OFFICE, THE 2011–12 BUDGET: CALIFORNIA'S FISCAL OUTLOOK 1 (2010), *available at* http://www.lao.ca.gov/reports/2010/bud/fiscal_outlook/fiscal_outlook_2010.pdf; *see also* Josh Goodman, *Biggest states face new budget gaps*, STATELINE (Oct. 12, 2011), http://www.stateline.org

Texas, New York, Florida, and Illinois—face similar shortfalls.[129] More generally, and notwithstanding significant state efforts to close recent budget gaps, the states face a $91-billion total budget gap for Fiscal Year 2012.[130] Forty-six of the fifty states are subject to constitutional balanced budget requirements, forcing states to take extreme measures to close annual budget gaps.[131] States have relied extensively on nonrecurring federal aid, tapped their own rainy day funds, and dramatically increased their issuance of general obligation bonds.[132] Even more worrisome, states have failed to set aside money to fund future obligations for healthcare costs and pensions.[133] A recent analysis of state debt and future liability, including pensions and healthcare obligations, found that "in total, states are in debt for $4.2 trillion."[134]

These woes are not confined to a few particularly irresponsible jurisdictions. California's size, tradition of generous public services, and constitutional impediments on revenue have led it to be dubbed "the Lindsay Lohan of states,"[135] while Illinois might have experienced the most actual difficulty in the bond markets,[136] and Wisconsin the most high-profile strife over fiscal reform.[137] Nonetheless, a recent working paper concluded that "states differ

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/live/details/story?contentId=605995 (reporting new revenue figures suggesting that California's earlier projections may be unduly optimistic).

129. *See* Goodman, *supra* note 128.

130. Suzy Khimm, *The state budget crisis isn't over yet*, WASH. POST WONKBLOG (Oct. 20, 2011, 4:40 PM), http://www.washingtonpost.com/blogs/ezra-klein/post/the-state-budget-crisis-isnt-over-yet/2011/10/20/gIQA35jE1L_blog.html.

131. *See* Tully, *supra* note 127.

132. *See id*. ("[T]he states have immensely increased their issuance of General Obligation bonds that fund what corporations strive to avoid—paying operating expenses with long-term debt. . . . In 2000, the states issued $67 billion in GO securities; last year, they raised $148 billion from those bonds.").

133. *See id*.; Stephen C. Fehr, *State pension gap continues to grow*, STATELINE (April 26, 2011), www.stateline.org/live/details/story?contentId=570302.

134. *Debts of states over $4 trillion: Budget group*, REUTERS, Oct. 24, 2011, http://www.reuters.com/article/2011/10/24/us-usa-states-debt-idUSTRE79N5RX20111024.

135. Allysia Finley, *California: The Lindsey Lohan of States*, WALL ST. J., Nov. 8, 2010, at A19; *see also* CAL. CONST. art. 4, § 12, cl. d (requiring a two-thirds majority to enact budgets and revenue measures).

136. *See* Brian Chappatta, *Illinois Bond Spread Triples After Cut by Moody's to Lowest-Rated State*, BLOOMBERG, Jan. 11, 2012, www.bloomberg.com/new/2012-01-11/illinois-sells-800-million-of-debt-competitively-to-wells-fargo-jpmorgan.html.

137. Richard A. Oppel, Jr. & Timothy Williams, *Rallies for Labor, in Wisconsin and Beyond*, N.Y. TIMES, Feb. 27, 2011, at A4.

in their degrees of fiscal imbalance, but the overriding fact is that all states face fiscal meltdown in the foreseeable future."[138]

These economic conditions raise the spectre of nineteenth-century-style state bond defaults.[139] Even bearish analysts doubt that the states will actually default on their general obligation bonds,[140] and many economists agree that the size of state debt obligations is relatively untroubling when compared with the states' gross domestic product.[141] Others are less sanguine, viewing default as likely absent significant changes in state behavior or some sort of bailout by Congress.[142] When Kenneth Rogoff, co-author of the leading book on sovereign default, was asked whether the current state debt crises will result in defaults, he explained that states "can default on stunningly small amounts of debt . . . ."[143] As Professor Rogoff and Carmen Reinhart concluded, "when an accident is waiting to happen, it eventually does."[144]

Even if states do not default on their bonds, they might find themselves unable to meet other financial obligations, such as payments on public employee pensions. California already has had to fill in temporary shortfalls by issuing IOUs to state taxpayers and vendors.[145] A number of states have enacted or are considering legislation altering the terms of their pension obligations

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138. Jeffrey Miron, *The Fiscal Health of U.S. States* 3 (George Mason Univ., Mercatus Ctr., Working Paper No. 11-33), *available at* http://mercatus.org/publication/fiscal-health-us-states).

139. Emily Johnson and I consider a range of scenarios in a forthcoming work. *See* Emily D. Johnson & Ernest A. Young, *The Constitutional Law of State Debt*, 7 DUKE J. CONST. L. & PUB. POL'Y (forthcoming 2012). That article is part of a symposium on "The Consequences and Constitutional Dilemmas of State Debt."

140. *See, e.g.*, Tully, *supra* note 127 (reporting that Meredith Whitney, who has issued highly publicized warnings about state debt levels, "sees little threat to General Obligation bonds because states simply won't default").

141. *See* R.A., *Sovereign Debt: Chump Change*, FREE EXCHANGE (May 3, 2010, 4:40 PM), http://www.economist.com/blogs/freeexchange/2010/05/sovereign_debt ("California's 2010 deficit is around $20 billion, or about 1% of state GDP. It's [sic] outstanding debt is near $90 billion, or less than 5% of GDP. Greece's deficit, by contrast, is nearly 14% of GDP and it owes a debt larger than the size of the economy.").

142. *See, e.g.*, Joe Mathews, *Golden State Bailout*, N.Y. TIMES, May 22, 2009, at A29.

143. Mary Williams Walsh, *State Debt Woes Grow Too Big to Camouflage*, N.Y. TIMES, Mar. 30, 2010, at A1.

144. CARMEN M. REINHART & KENNETH S. ROGOFF, THIS TIME IS DIFFERENT: EIGHT CENTURIES OF FINANCIAL FOLLY, at xliii (2009).

145. Tami Luhby, *Cash-poor California turns to IOUs*, CNNMONEY, July 2, 2009, http://money.cnn.com/2009/07/02/news/economy/California_IOUs/.

to public employees.[146] Retroactive legislation to alter these obligations would raise questions under the Contracts Clause,[147] which is beyond the scope of this Essay.[148] But to the extent that states simply refuse to pay (or pay in nonnegotiable IOUs), they might prompt litigation that would implicate their sovereign immunity in much the same manner as bond default suits.

As I have suggested, the recurrence of a genuine state debt crisis realigns state sovereign immunity doctrine with its underlying pragmatic justification: Immunity serves the public interest by providing public officials with breathing space in which to adjust the government's financial obligations to private individuals while considering competing demands on the public fisc. Critics of the Court's immunity jurisprudence—including this one—are likely to find themselves more sympathetic to assertions of state immunity when what is at stake is not simply some amorphous "dignity" interest but the ability of the state to provide public education, maintain state highways, and operate state prisons. In earlier work, for example, I criticized the Court's immunity jurisprudence for its obsession with "sovereignty" at the expense of "autonomy"—that is, for stressing the unaccountability of states for wrongful acts without any concern for the States' affirmative powers of self-government.[149] After all, the Court's state sovereign immunity decisions have not preserved state regulatory power from federal preemption in the way that limiting the commerce power or imposing a more vigorous presumption against preemption in statutory construction would have done.[150] In times of existential financial crisis, however, sovereign immunity *does* implicate the States' capacity to exercise self-governance. Under

146. *See generally* PEW CTR. ON THE STATES, ROADS TO REFORM: CHANGES TO PUBLIC SECTOR RETIREMENT BENEFITS ACROSS STATES (2010), http://www.pewcenteronthestates.org/uploadedFiles/wwwpewcenteronthestatesorg/Initiatives/States_Fiscal_Health_Project/Pensions_Web%20Update_121710.pdf.

147. *See, e.g.*, George G. Triantis, *Let the American States Design Their Own Restructuring Process* (Working Paper, Oct. 1, 2011), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1947500; Paul M. Secunda, *Constitutional Contracts Clause Challenges in Public Pension Litigation*, 28 HOFSTRA LABOR & EMP. L.J. 263 (2011).

148. For a discussion, see Johnson & Young, *supra* note 139.

149. *See* Young, *supra* note 72, at 13–14.

150. *See* Young, *supra* note 5, at 58–59.

such conditions, considerations of sovereignty and autonomy run together.

The more difficult predictive question is whether this new state debt crisis will engender further changes in state sovereign immunity doctrine. The answer might well be "no," the basic immunity of the states on their contractual debt obligations having been well-established since *Hans*. If anything, a bona fide state debt crisis may redirect the Court's immunity jurisprudence toward these more traditional concerns while trimming some of the more adventurous forays of the late 1990s and early 2000s.

One possible way in which a new crisis might break new doctrinal ground, however, would arise if Congress decided to intervene on behalf of state creditors. *Hans* did not involve any effort to abrogate the States' immunity by statute; one can imagine, however, a statutory effort to abrogate state immunity in cases where the states had retroactively impaired their obligations in violation of the Contracts Clause. Such a statute might be justified on either of two grounds, but neither is a sure thing. First, Congress might argue that the history of the Contracts Clause indicates a desire to suppress state fiscal imprudence similar to that relied upon in *Katz* to support abrogation in bankruptcy cases.[151] Second, although the Contracts Clause itself is not part of the Reconstruction Amendments, it may be possible to convert at least some Contracts Clause claims into takings claims.[152] If so, then Congress may be able to abrogate state immunity pursuant to its Section Five power.[153]

In any event, the comet is back in the sky. Sovereign immunity is one of the Constitution's (implicit) austerity measures, allowing governments to balance the public interest against their contractual obligations and liabilities to individuals. If the state debt crisis persists, we are likely to see a reorientation of the Supreme Court's state sovereign immunity jurisprudence back toward this traditional function.

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151. *See* Cent. Va. Cmty. Coll. v. Katz, 546 U.S. 356, 375–76 (2006).

152. *See, e.g.*, Michael L. Zigler, *Takings Law and the Contract Clause: A Takings Law Approach to Legislative Modifications of Public Contracts*, 36 STAN. L. REV. 1447 (1984).

153. For a still more radical proposal, see Adam Feibleman, *Involuntary Bankruptcy for American States (and Greece)*, 7 DUKE J. CONST. L. & PUB. POL'Y (forthcoming 2012).

CONCLUSION

This Essay has taken the radical position that the Supreme Court's sovereign immunity doctrine makes a certain degree of sense. The fundamental compromise of the late nineteenth and early twentieth centuries—well-grounded in common law history but motivated by contemporary necessity—was to block individual claims against states for damages but permit broad prospective relief against state officers. This had the effect, roughly speaking, of cutting off the sort of debt-based claims that most threatened the states in the 1790s and after Reconstruction, while leaving the federal courts able to enforce state compliance with federal law in civil rights cases. To the extent the Rehnquist Court undermined this compromise, that may have had much to do with the disjunction between that Court's effort to revive immunity and the absence of any existential threat to state finances. Perhaps the one silver lining to the states' present financial woes is the prospect of a return to normalcy in state immunity law.