

Sovereignty and Democracy: The States' Obligations to Their Citizens Under Federal Statutory Law[†]

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The current limits on Congress's power to subject states to lawsuits under federal law without their consent are the result of a pair of decisions less than a decade old, *Seminole Tribe v. Florida*¹ and *Alden v. Maine*.² After *Seminole* and *Alden*, states are entitled to assert a constitutional immunity to many damages actions by citizens who assert that their federal statutory rights have been violated.³ But they are not required to do so. The Supreme Court continues to assert that states are free to waive their immunity from suit under federal statutory law.⁴ This Article explores how states should make those waiver decisions, and what constraints—both political and legal—states face in doing so.

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1. 517 U.S. 44 (1996). *Seminole Tribe* held that while Congress could use its Article I powers to subject states to various substantive obligations, such as paying minimum wage to its employees or complying with the Age Discrimination in Employment Act, it was not permitted to allow enforcement of those obligations through private damages actions in federal court. *Id.*

2. 527 U.S. 706 (1999). *Alden* held that this constitutional limitation on congressional power, set out in *Seminole*, applied whether plaintiffs filed their lawsuits in federal or state court. *Id.*

3. In theory, Congress may still subject states to damages actions if they violate legislation enacted under the Congress's Fourteenth Amendment Section 5 power, *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976), although the scope of that power has been increasingly narrowed. *See, e.g., City of Boerne v. Flores*, 521 U.S. 507 (1997).

4. *See, e.g., Alden*, 527 U.S. at 745.

Relying on preconstitutional history⁵ and what it understands to be the implications of constitutional structure,⁶ the Supreme Court has built from the Eleventh Amendment a strong sovereignty model, highly disabling of Congress, premised, at least most recently, less on fiscal sympathy for the states⁷ and more on the Court's beliefs about the requirements of state dignity.⁸ As announced by the Court, the doctrine protects states from suit by private plaintiffs who seek to enforce many federal statutory rights, whether they bring those lawsuits in state⁹ or federal court.¹⁰ The doctrine also generally requires that Congress use some method other than damages actions by private plaintiffs to enforce state duties, even though it may, under Article I, constitutionally both require states to perform those duties, and use other methods, such as suits by the United States, to enforce them.¹¹

The Supreme Court's opinions in this area are enormously controversial: all are 5-4 decisions, and every aspect of the majority's approach—its historical analysis, its structural arguments, its casual treatment of the Eleventh Amendment's text—has led to passionate dissent, from the members of the Court on the losing side of the equation,¹² from other members of the bench,¹³ and from the academy.¹⁴ Perhaps it is understandable, then, that little attention has yet focused on what states should do in the face of these decisions.

The answer to that question will not be found in the Court's most recent opinions on the Eleventh Amendment. And the answer is important, for sovereign immunity is, practically speaking, where much of the Supreme Court's federalism jurisprudence can be expected to affect most deeply the lives of individual citizens. Individuals will enforce their rights through lawsuits only if they can see an outcome that makes it worthwhile. For the citizens whose rights, under laws like the Americans with Disabilities Act, the Age Discrimination in Employment Act, or the Family Medical Leave Act, have been violated by the state, the possibility of injunctive relief, while some incentive, is unlikely to be enough. What most people want is to be made whole, and for many people—as Justice Harlan recognized in an analogous context many years ago—“It is damages or nothing.”¹⁵

5. See *id.* at 715. “The generation that designed and adopted our federal system considered immunity from private suits central to sovereign dignity.” *Id.*

6. See *Seminole Tribe*, 517 U.S. at 54; Ernest A. Young, *Alden v. Maine and the Jurisprudence of Structure*, 41 WM. & MARY L. REV. 1601 (2000) (analyzing the Court's use of structural reasoning in that case).

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

8. *Alden*, 527 U.S. at 754; *Seminole Tribe*, 517 U.S. at 68.

9. *Alden*, 527 U.S. at 754.

10. *Seminole Tribe*, 517 U.S. at 51.

11. See *id.* at 71 n.14, 72-73.

12. See *e.g.*, *id.* at 97 (Souter, J., dissenting) (stating that preventing indignity to the states is an “embarrassingly insufficient rationale for the rule”) (internal quotations omitted).

13. See JOHN T. NOONAN JR., *NARROWING THE NATION'S POWER: THE SUPREME COURT SIDES WITH THE STATES* (2002).

14. See Symposium, *Shifting the Balance of Power? The Supreme Court, Federalism, and State Sovereign Immunity*, 53 STAN. L. REV. 1115 (2001).

15. *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 410 (1971) (Harlan, J., concurring).

The answer to the question of how the states should respond to their citizens' claims under federal law can be found in an understanding of two legal stories, both of which complicate sovereign immunity's relationship to both our democracy and our federalism. First, there is the story of immunity told in the states, where the last half century has seen a marked abandonment, both judicial and legislative, of sovereign immunity doctrines. Second, there is the story told through older cases such as *Mondou v. New York, New Haven & Hartford Railroad Co.*¹⁶ and *Testa v. Katt*,¹⁷ both of which speak to the obligations of states to enforce federal law. The first of those stories is about the requirements of state accountability in a democracy; the second is about state responsibility in a federal republic.

Both of these traditions have important lessons for states making decisions about their obligations in the face of the Court's Eleventh Amendment doctrine. This Article seeks to resurrect these narratives, to reiterate their insights, and to remind us of their relevance both to the immediate decisions that states must make, and to the Court's larger project. Part I briefly describes the vision of state sovereignty currently articulated by the Supreme Court. That vision has become centered in recent years around a reified and metaphysical concept of state dignity, one that the Court believes requires the federal judiciary to rebuff citizen demands for compensation for injury at the hands of the state, despite Congress's intention to make the states accountable. Part II looks at the states' treatment of the doctrine of sovereign immunity under their own law. That history is marked by a growing—indeed, overwhelming—recognition, during the early and middle parts of the last century, that sovereign immunity is a doctrine inconsistent with many values deeply ingrained in our democratic form of government, including the accountability of democratic governments to their citizens, and the democratic identity between citizen and state. States have increasingly come to see waiver of immunity as that state's moral obligation to its injured citizens. They have thus viewed the problem of state responsibility for injuring its citizens as involving a careful balance of the obligation of the whole community to its members on the one hand, with the needs of the people as a whole for effective government on the other. Part III looks at the concept of discrimination against federal law, and both the federal and state courts' pre-*Alden* understandings of its requirements. Those understandings required both that states not treat their federal law obligations as less significant than their own law's obligations, and that they not refuse to enforce federal law out of disagreement with the substantive policies enacted by Congress. While *Alden* briefly touched on these earlier cases, that decision gives no guidance concerning its application to immunity waivers generally.

Part IV connects these two discussions by outlining how states should answer the question regarding whether to waive immunity to damages actions based on federal statutory law, and how courts should determine whether immunity has, in fact, been waived. The Supremacy Clause of the Constitution makes validly enacted federal law as much a part of the law of the states as their own law.¹⁸ As a political matter, states should begin by noting that their obligations to their citizens under validly enacted federal law do not have a lesser moral status than their obligations under their own

16. 223 U.S. 1 (1912).

17. 330 U.S. 386 (1947).

18. See *infra* Part IV.

law, and should recognize that the political pressures and policy concerns that led to the current frailty of state immunity law are equally powerful in the context of federal laws such as the Americans with Disabilities Act or the federal environmental laws. In short, citizens injured by the state in violation of federal as well as state law demand a more satisfactory answer to their claims than an invocation of the concept of sovereignty. As a constitutional matter, courts should recognize that no state currently takes the position that it has absolute immunity from suit in all cases brought against it under its own laws, despite some courts' occasional statements to the contrary. The antidiscrimination principle therefore would dictate that states not be permitted to stand on formal general statements of immunity when presented with cases under federal law. If state courts are open to some cases against the state under state law, then the state may not close its courts when the source of the obligation is federal. To do so would violate the command of the Supremacy Clause. At a minimum, courts should critically examine states' explanations of their unwillingness to be sued under valid federal law, particularly when the state practice is to respond to its citizens under its own law in analogous cases. When a state claims its courts are open when the source of the obligation is state law, but closed when it is federal, it should be presumed that the reason for the refusal to hear federal cases is a disagreement with substantive federal policy. That kind of disagreement is forbidden under the Constitution.

I. STRONG SOVEREIGNTY: THE DIGNITY OF THE STATES

The Supreme Court's rhetorical support for its understanding of the purposes of constitutional sovereign immunity has narrowed over the years, becoming less pragmatic and more symbolic. In describing its concerns about damages suits against states, the Court's opinions—from the area's inception with *Chisholm v. Georgia*,¹⁹ through *Hans v. Louisiana*,²⁰ and through the later part of the twentieth century in cases like *Edelman v. Jordan*²¹—had combined discussions of history and sovereignty with concerns that damage awards might unduly shift state priorities, moving state funding from public goods—education or road repair, for instance—to private plaintiffs.²²

More recently, the Supreme Court has described the function of immunity in highly symbolic terms.²³ The Court has focused primarily on the states' status as sovereigns, and the proper respect due states because of that status, to develop state dignity as a separate and distinct justification for the doctrine of sovereign

19. 2 U.S. (2 Dall.) 419 (1793).

20. 134 U.S. 1 (1890).

21. 415 U.S. 651 (1974).

22. In *Edelman*, for instance, Justice Rehnquist notes that monetary awards to a class of welfare recipients who were wrongly denied them would necessarily mean that the state had less available to other currently needy recipients. *Edelman*, 451 U.S. at 666 n.11.

23. See Evan H. Caminker, *Judicial Solicitude for State Dignity*, 574 ANNALS AM. ACAD. POL. & SOC. SCI. 81, 83-84 (2001) (describing the Court's rhetoric about state dignity); Carlos Manuel Vazquez, *Eleventh Amendment Schizophrenia*, 75 NOTRE DAME L. REV. 859, 861 (2000) (noting "increasing prominence of the state sovereignty strain in the Court's opinions").

immunity.²⁴ Indeed, in its most recent immunity opinion, the Court described the doctrine exclusively in such terms: “The preeminent purpose of state sovereign immunity is to accord States the dignity that is consistent with their status as sovereign entities.”²⁵

On the Court’s understanding, that dignity requires that states not be subject to suit under most federal statutory law without their consent.²⁶ Indeed, it is an affront to their status to be “haled into court” at the behest of a mere private citizen.²⁷ States may, however, give that consent by waiving their constitutional immunity to suit,²⁸ and indeed can give it simply by removing a lawsuit from state to federal court.²⁹ But should states do so?

The question whether a state should waive its immunity is made more pressing by an underlying tension in the Court’s cases, for while Congress is not permitted to abrogate a state’s immunity to private damages actions when it legislates using its Article I powers, it is nonetheless constitutionally quite capable of imposing substantive obligations on the states through Article I. Thus, for example, the state of Maine was still constitutionally bound by the Fair Labor Standards Act, despite the fact that Alden was not permitted to assert his claim to overtime wages through a private damages action,³⁰ and the state of Florida was still obligated to negotiate in good faith with the Seminole Tribe over gaming.³¹

The Court’s insistence on conceiving of the states as separate sovereigns, while archaic in a more than two-hundred-year-old federal republic, highlights the states’ moral and civic responsibilities as separate constitutional actors. When a citizen claims damage as a result of a state’s failure to live up to its federal obligations, how should a state respond? This is, in fact, a question with which the states have a great deal of related experience, and it is to that experience we now turn.

II. SOVEREIGN IMMUNITY IN THE STATES

While the Court has constructed a provenance for sovereign immunity that predates the Constitution,³² the path that the doctrine took in this country after the founding

24. Caminker, *supra* note 23, at 83.

25. *Fed. Mar. Comm’n v. S.C. State Ports Auth.*, 122 S. Ct. 1864, 1874 (2002) (extending constitutional sovereign immunity to administrative proceedings against states).

26. *Id.*

27. “[It is] neither becoming nor convenient that several states . . . should be summoned as defendants to answer the complaints of private persons.” *Id.* (quoting *Alden v. Maine*, 527 U.S. 706, 748 (1999)).

28. *Lapides v. Bd. of Regents of the Univ. Sys. of Ga.*, 122 S. Ct. 1640, 1643 (2002).

29. *Id.* at 1642 (noting removal equals waiver). Note, however, that the Court has ruled that there is no doctrine of “implied waiver” of sovereign immunity. *Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 680 (1999).

30. *Alden*, 527 U.S. at 759.

31. *Seminole Tribe v. Florida*, 517 U.S. 44 (1996).

32. This Article does not address the Court’s understanding of that preconstitutional history. See John J. Gibbons, *The Eleventh Amendment and State Sovereign Immunity: A Reinterpretation*, 83 COLUM. L. REV. 1889, 1895-1941 (1983) (arguing that Framers had no sense of sovereign immunity as a broad and sweeping prohibition against suits against states); Alfred Hill, *In Defense of Our Law of Sovereign Immunity*, 42 B.C. L. REV. 485, 493-

is a more complicated story. In adopting its current approach, which finds immunity integral to the sovereign dignity of states, the Supreme Court has wandered far from the path walked by most of the states themselves. The history of sovereign immunity in the states is one of steady amelioration. Indeed, one of the great political victories of our relatively recent past, as well as a remarkable story of judicial-legislative dialogue, was the states' virtual unanimity in tempering or abandoning the vision of strong sovereignty that the Supreme Court has adopted. In following this course, the states have often rejected both the historical and the nonhistorical arguments articulated by the Supreme Court. The short history of sovereign immunity in the states is that when states and their subdivisions consider damages actions by their own citizens under their own law, they have become more and more responsive to private lawsuits, and less and less reliant on claims about their special status as sovereigns.

When we turn to the states, we see a set of events that can be encapsulated in the chapter headings from three successive editions of Kenneth Culp Davis's treatise on administrative law.³³ In the 1958 edition of Davis's treatise, his chapter on the tort liability of governmental units begins with a section entitled, "The Doctrine of Sovereign Immunity and the Patchwork of Liability."³⁴ In his view, the doctrine had been persuasively criticized, but few states had gone very far in abandoning it, and in those that had, the gains had been construed away by the courts. In Davis's next edition, the chapter began, triumphantly, with a section titled, "Twenty-Nine State Courts Have Abolished Chunks of Sovereign Immunity by Judicial Action," and reported that when one adds the states that had taken legislative action to modify sovereign immunity, the number stood at thirty-four.³⁵ By the 1984 edition, the section—now an epitaph—is titled: "Historical Background: Today's Remnants of Sovereign Immunity."³⁶

As I describe how this remarkable transformation occurred, I will focus on the retreat from sovereign immunity in the area of torts.³⁷ Tort liability raises many of the

98 (2001) (arguing that the Constitution was grounded on an understanding of state nonsuability); see also James E. Pfander, *Sovereign Immunity and the Right to Petition: Toward a First Amendment Right to Pursue Judicial Claims Against the Government*, 91 NW. U. L. REV. 899, 926-45 (1997) (outlining the preconstitutional history of rights to petition, both judicial and legislative, in the early states). For the most recent historical reading, see Caleb Nelson, *Sovereign Immunity as a Doctrine of Personal Jurisdiction*, 115 HARV. L. REV. 1559, 1592-1622 (2002) (distinguishing between the immunity from personal jurisdiction discussed by several of the Founders in the ratification debates, and the subject matter jurisdiction limitation actually adopted by the Eleventh Amendment).

33. KENNETH CULP DAVIS, *ADMINISTRATIVE LAW TREATISE* (1958). In the interest of full disclosure, I should note that Professor Davis was no fan of sovereign immunity. Among his many publications is a law review article with the admirably direct title, "Sovereign Immunity Must Go." Kenneth Culp Davis, *Sovereign Immunity Must Go*, 22 ADMIN. L. REV. 383 (1969).

34. 3 KENNETH CULP DAVIS, *ADMINISTRATIVE LAW TREATISE* § 25.01, at 434 (1958).

35. KENNETH CULP DAVIS, *ADMINISTRATIVE LAW OF THE SEVENTIES* § 25.00 (1976) (Section 25.00-2 proclaims "Tort Liability of State and Local Governments Now Exceeds Immunity").

36. 5 KENNETH CULP DAVIS, *ADMINISTRATIVE LAW TREATISE* § 27.2, at 6 (2d ed. 1984).

37. States found it easier to think through their responsibilities to their citizens under contracts or other forms of obligations through the doctrine of waiver and implied consent.

concerns that have previously disturbed the Supreme Court—particularly the specter of large monetary awards that might wreak havoc with state treasuries and skew state policy choices.³⁸ In abolishing and tempering sovereign immunity, the states functioned as the proverbial laboratories, with state supreme courts justifying and explaining the rejection of the doctrine, and both state courts and state legislatures performing the more difficult task of calibrating a system of governmental liability that accommodates competing concerns for compensating individuals and avoiding overdeterrence of governmental discretionary activity.³⁹

While sovereign immunity was well-established in the states, it was not usually well-established as a matter of state constitutional law, but as a matter of common law.⁴⁰ The beginning of the twentieth century found sovereign immunity a concept lacking in serious theoretical foundation in this country. Early sovereign immunity decisions relied on little more than English common-law precedent and brief discussions of the indignity of hauling a state into court,⁴¹ bolstered, if by anything, by citations to Blackstone's explanation of the doctrine of sovereign immunity as rooted in the sixteenth-century prerogatives of the English Crown.⁴² Indeed, many early judges struggled with how to integrate this understanding of sovereign immunity

See J.A. Sullivan Corp. v. Commonwealth, 494 N.E.2d 374, 377 (Mass. 1986) (holding that sovereign immunity is no bar to a quantum meruit theory of recovery in contract); Smith v. North Carolina, 222 S.E.2d 412, 419-20 (N.C. 1976) (collecting cases and statutes finding implied waiver of sovereign immunity in contract cases); Note, 40 MINN. L. REV. 234, 258 n.140 (1956) (noting that twenty-one states had consented to suit in contract).

38. Finally, I will refer in this Article to cases that involve both states and their subdivisions when the cases themselves involve significant discussions of sovereign immunity that would apply more generally to the states proper.

39. *See, e.g.*, California Law Revision Commission, *Recommendation Relating to Sovereign Immunity*, 4 REPORTS, RECOMMENDATIONS, AND STUDIES 801 (1963) [hereinafter *California Report*].

40. Note, *supra* note 37, at 237 n.7 (At the time of the Note, only four state constitutions—Alabama, Arkansas, Illinois, and West Virginia—included an express prohibition on states being made a defendant. Tennessee included that prohibition in a statute.); Twenty state constitutions authorized state legislatures to provide that states could be sued in a manner they directed. *Id.* at 238. The author of this study, which focused on nontort claims, noted that “[r]egardless of constitutional provisions, virtually all of the states have found means to insure governmental responsibility when desired, and disagreement lies only in the method to be used.” *Id.* at 239. The author catalogued twenty-one states which had “enacted statutes waiving a part of the state’s immunity from suit in the regular courts,” and another nine where “decisions of administrative claims boards or officers may be appealed to the courts.” *Id.* at 241. “Thus it appears that the trend in state legislative modifications of sovereign immunity has been from legislative determination, to administrative adjudication, and more recently toward consent to suit in the regular courts.” *Id.* at 243. *See also* Robert A. Leflar & Benjamin E. Kantrowitz, *Tort Liability of the States*, 29 N.Y.U. L. REV. 1363, 1407 (1954) (finding that while four states had constitutional prohibitions against the state “ever being a defendant in the courts,” all four undertook responsibility for governmental torts in almost all cases).

41. ROBERT DORSEY WATKINS, *THE STATE AS A PARTY LITIGANT* 57-58 (1927) (tracing the justifications for doctrine in U.S.).

42. *Id.* at 12-13 (quoting 1 WILLIAM BLACKSTONE, *COMMENTARIES* *237-38, 241).

with the doctrine of popular sovereignty upon which this nation had been founded.⁴³

No judge attempted a more serious justification for the doctrine until 1907, when Justice Holmes explained it in natural-law terms.⁴⁴ Citing Hobbes,⁴⁵ Bodin,⁴⁶ and Baldus,⁴⁷ Holmes found immunity's source, "not [in] any formal conception or obsolete theory, but [in] the logical and practical ground that there can be no legal right as against the authority that makes the law on which the right depends."⁴⁸ In Holmes's view, sovereign immunity was nothing more than a practical recognition that rights are insecure against an entity that can change the foundation for those rights—that can, in Holmes's words, "change at their will the law of contract and property, from which persons within the jurisdiction derive their rights."⁴⁹

Despite his rejection of "formal conception or obsolete theory," Holmes's citations to theorists whose pathbreaking views of the nature of sovereignty were developed in monarchies,⁵⁰ in nonfederal states,⁵¹ in support of the divinity of kings,⁵² and in many

43. Indeed, this conflict between sovereign immunity and the concept of popular sovereignty surfaced as early as *Chisolm v. Georgia*, 2 U.S. (1 Dall.) 419, 457 (1793) in Justice Wilson's opinion. In determining whether Georgia could be sued, Wilson wrote:

In another sense . . . every State which governs itself without any dependence on another power is a sovereign state. Whether, with regard to her own citizens, this is the case of the State of Georgia, whether those citizens have done, as the individuals of England are said...to have done, surrendered the Supreme Power to the State or Government, and reserved nothing to themselves, or whether like the people of other States and of the United States, the citizens of Georgia have reserved the Supreme Power in their own hands; and on that Supreme Power have made the State dependent . . . , these are questions to which, as a Judge in this cause, I can neither know nor suggest the proper answers; though as a citizen of the Union, I know, and am interested to know, that the most satisfactory answers can be given. As a citizen, I know the Government of that State to be republican; and my short definition of such a Government is, —one constructed on this principle, that the Supreme Power resides in the body of the people.

44. *Kawananakoa v. Polyblank*, 205 U.S. 349, 353 (1907).

45. THOMAS HOBBS, *LEVIATHAN* *136-50. Hobbes's view that sovereign power was irrevocable and absolute, and particularly his opposition to theories "which favored limiting the power of the state in some way," led constitutionalists to view him as "one of their main adversaries." NORBETO BOBBIO, *THOMAS HOBBS AND THE NATURAL LAW TRADITION* 53 (Daniela Gobetti trans., The University of Chicago Press 1993) (1989).

46. JEAN BODIN, *LES SIX LIVRES DE LA RÉPUBLIQUE* 132 (Geneva, Estienne Gamonet 1629).

47. BALDUS DE UBALDIS, *LECTURASUPER I. -IX. LIBROS CODICIS* (Venice, Baptista de Tortis 1496).

48. *Kawananakoa*, 205 U.S. at 353.

49. *Id.*

50. Baldus's work, for instance, focused on reconciling the universal sovereignty of the papacy and the emperor with the territorial sovereignty of the Italian city-state. See JOSEPH CANNING, *THE POLITICAL THOUGHT OF BALDUS DE UBALDIS* 17 (1987) (discussing the theocratic sources of authority for the pope and emperor).

51. Bodin's insistence in the unitary and indivisible sovereign, for instance, contains "nothing . . . to enable him to explain a federal state, and his difficulties in analysing [sic] the Swiss Confederation serve to underline this weakness in his system." Kenneth Douglas McRae, *Introduction* to JEAN BODIN, *THE SIX BOOKS OF A COMMONWEALE*, A21 (Kenneth

cases in direct opposition to nascent ideas about popular sovereignty,⁵³ reveals its theoretical foundations. The citation to Hobbes, whose opposition to the common law and support for the view that the source of law is the will of the sovereign is well-known, reveals the antidemocratic, though limited,⁵⁴ roots of the Holmes's epigram.

The question of the theoretical basis for sovereign immunity in a democracy became more pointed as a result of a steady stream of critical scholarship, beginning with Edwin M. Borchard's string of Yale articles,⁵⁵ each questioning "the anomalies and paradoxes in the present state of the law, [and] the present lack of theoretical justification for the prevailing doctrine of irresponsibility."⁵⁶ Articles in the law

Douglas McRae ed., Harvard Univ. Press 1962) (1606).

52. In examining the work of the great early state theorists like Bodin, Daniel Engster notes that "[s]tate theorists . . . attributed a sacred purpose to the state. The purpose was not simply to establish a secular peace among individuals—the state was supposed to create a sanctified political order set apart from the contingent and corrupt 'outside' world of temporal affairs." DANIEL ENGSTER, *DIVINE SOVEREIGNTY* 9 (2001). In challenging the "widely held assumption that the development of modern state theory represented the triumph of secular realism over medieval idealism," Engster notes that theorists like Bodin intended to restore the state, as represented by the king, as the mediator between the "contingency and disorder" associated with secular affairs and the sacred. When the "foundations of state legitimacy were transferred from divine grace to popular consent," however, the "powers and purposes of the state [underlying the sacred vision of theorists like Bodin] never meshed very well with the more mundane and popularly based approaches to government outlined by Enlightenment thinkers." *Id.* at 10.

53. See BOBBIO, *supra* note 45, at 55-56.

54. Justice Souter traces the citations in *Kawananakoa* carefully in his dissent, *see Alden v. Maine*, 527 U.S. 706, 795-98 (1999). As he notes, Holmes never claimed that the doctrine would apply when the source of the law was not the sovereign, but another, *see id.*, as when the U.S. imposes the obligation on the states. In *Kawananakoa*, the source of the right invoked by the plaintiffs was the Territory of Hawaii. *Kawananakoa*, 205 U.S. at 352. Holmes notes that

[i]t is true that Congress might intervene, just as in the case of a state the Constitution does, and the power that can alter the Constitution might. But the rights that [the plaintiffs' invoked] are not created by Congress or the Constitution, except to the extent of certain limitations of power.

Id. at 353-54.

55. Edwin M. Borchard, *Government Liability in Tort* (pts. 1-3), 34 *YALE L.J.* 1, 129, 229 (1924-1925). These pieces by Borchard were preceded by Harold J. Laski, *The Responsibility of the State in England*, 32 *HARV. L. REV.* 447, 455-56 (1919) (demonstrating that even in England, the state had responded to suits by citizens); John M. Maguire, *State Liability for Tort*, 30 *HARV. L. REV.* 20 (1916). *See also* Leslie L. Anderson, *Claims Against States*, 7 *VAND. L. REV.* 234 (1954); Edwin M. Borchard, *Theories of Governmental Responsibility in Tort*, 28 *COLUM. L. REV.* 734 (1928); Charles B. Nutting, *Legislative Practice Regarding Tort Claims Against the State*, 4 *MO. L. REV.* 1 (1939); Symposium, *Governmental Tort Liability*, 9 *LAW & CONTEMP. PROBS.* 179 (1942).

56. Borchard, *Government Liability in Tort*, *supra* note 55, at 3. Those articles, which also looked comprehensively at "the theories on which the responsibility of the State has been justified, the history of the doctrine of responsibility, and the state of the law in continental Europe," *id.*, were enormously influential, cited repeatedly by courts. *See, e.g., Stone v. Ariz. Highway. Comm'n*, 381 P.2d 107, 109 (Ariz. 1963); *Moskopsfv. Corning Hosp. Dist.*, 359 P.2d 457, 459 (Cal. 1961); *Molitor v. Kaneland Cmty. Unit Dist.*, 163 N.E.2d 89,

reviews of Harvard,⁵⁷ New York University,⁵⁸ Vanderbilt,⁵⁹ Minnesota,⁶⁰ Chicago,⁶¹ and Cornell,⁶² all uniformly critical, followed.

Nonetheless, even before the triumphal march recorded by Professor Davis's treatise, virtually all the states had found means to provide for some governmental responsibility to private lawsuits.⁶³ By the time that state supreme courts began sweeping away the doctrine wholesale, it had often been eroded substantially both by legislation directed at discrete areas of government activity⁶⁴ and by court opinions creating unworkable categories of exceptions.⁶⁵ As courts became increasingly frustrated with the "patchwork of sovereign liability,"⁶⁶ state supreme court judges, first through dissenting opinions,⁶⁷ and then through pathbreaking majority opinions,⁶⁸ began to excise major parts of the doctrine, while urging state legislatures

90 (Ill. 1959); *Granite Oil Sec. Inc. v. Douglas County*, 219 P.2d 191, 195 (Nev. 1950).

57. Joseph D. Block, *Suits Against Government Officers and the Sovereign Immunity Doctrine*, 59 HARV. L. REV. 1060, 1061 (1946) (rejecting all rationales for sovereign immunity except the possibility of "serious interference with the performance of [governmental] functions and with their control over their respective instrumentalities, funds, and property."); see also Louis L. Jaffe, *Suits Against Governments and Officers: Sovereign Immunity*, 77 HARV. L. REV. 1, 2 (1963) (criticizing the doctrine comprehensively).

58. Leflar & Kantrowitz, *supra* note 40 (summarizing the law in all forty-eight states and noting that "most of the critical writing about state liability in tort in America has deplored the unquestioning acceptance by our courts of the medieval notions that 'the king can do no wrong' and 'the sovereign from which law derives is of necessity above the law'").

59. Anderson, *supra* note 55, at 224.

60. *Claims Against the State in Minnesota: Report of the Subcommittee on Immunity of the State from Suit to the Committee on Jurisprudence and Law Reform of the Minnesota Bar Association*, 32 MINN. L. REV. 539 (1948) (noting pervasive criticism of the doctrine and recommending methods for claims in Minnesota); see also Cornelius J. Peck, *The Role of the Courts and Legislatures in the Reform of Tort Law*, 48 MINN. L. REV. 265, 287-90 (1963).

61. Flemming James, Jr., *Tort Liability of Governmental Units and Their Officers*, 22 U. CHI. L. REV. 610, 615, 655 (1955).

62. Kenneth Culp Davis, *Sovereign Immunity in Suits Against Officers for Relief Other than Damages*, 40 CORNELL L. REV. 3 (1954) (noting "the almost unbelievable lack of specific judicial inquiry into reasons for the basic doctrine" of sovereign immunity).

63. Note, *supra* note 37, at 238. 5 *California Report*, *supra* note 39, at 35-102 (detailing exceptions in California)

64. See *California Report*, *supra* note 39.

65. *California Report*, *supra* note 39, at 1, 15; see, e.g., *Boyce v. Lancaster County Natural Gas Auth.*, 223 S.E.2d 769, 771 (S.C. 1976).

66. *McCall v. Batson*, 329 S.E.2d 741, 742 (S.C. 1985) (detailing patchwork of exceptions in South Carolina); see Davis, *supra* note 62, at 3.

67. See, e.g., *Boorse v. Springfield Township*, 103 A.2d 708, 715 (Pa. 1954) (Musmanno, J., dissenting); *Bingham v. Bd. of Educ. of Ogden City*, 223 P.2d 432, 438-39 (Utah 1950) (Wolfe, J., dissenting) (stating that the "state should not shield itself behind the immoral and indefensible doctrine that 'the king (sovereign) can do no wrong'").

68. See, e.g., *Muskopf v. Corning Hosp. Dist.*, 359 P.2d 457, 463 (Cal. 1961) (abrogating sovereign immunity for municipalities in tort); *Hargrove v. Town of Cocoa*

to take action to work through the delicate problems of balancing state accountability with fiscal responsibility.⁶⁹ And state legislatures did so by enacting statutes to place the burden for governmental torts, especially on the government, and by authorizing the purchase of liability insurance.⁷⁰

Most important for present purposes, however, are the reasons, both theoretical and practical, that states articulated in their often landmark court decisions and legislation sweeping away sovereign immunity. First, courts rejected the doctrine because they viewed the underlying theory of complete sovereign immunity as distasteful and anachronistic in a democracy. Second, courts and legislatures were influenced by the growth of the modern administrative state and the extension of governmental activities into broad new areas of government-citizen interaction, with the corresponding increase in possibilities for citizen injury. Third, states were influenced by the insights of tort reform scholarship, with its views about fault, risk, and loss-spreading. All three rationales are relevant to the states' current problem of evaluating their newly won immunity from federal statutory claims.

A. Sovereign Immunity and Democratic Values

One of the major theoretical objections to sovereign and governmental immunity was its source as a prerogative of monarchy. To the extent Blackstone's maxim, "The King can do no wrong," represented a view of the sovereign as divinely commissioned, and of the citizen as lacking power and agency, the maxim fit poorly with both American self-understanding, and the founding generation's belief in democratic accountability. Quoting that maxim as the judicial abolition movement began in earnest in 1957, the Florida Supreme Court wrote:

In applying this theory the Courts have transposed into our democratic system the concept that the sovereign is divine and that divinity is beyond reproach. In preserving the theory they seem to have overlooked completely the wrongs that produced our Declaration of Independence and in the ultimate resulted in the Revolutionary War. We, therefore, feel that the time has arrived to declare this doctrine anachronistic not only to our system of justice but to our traditional concepts of democratic government.⁷¹

Beach, 96 So. 2d 130, 134 (Fla. 1957) (same); *Molitor v. Kaneland Comty. Unit Dist.*, 163 N.E.2d 89, 98 (Ill. 1959) (same).

69. See, e.g., *White v. State*, 784 P.2d 1313, 1319 (Wyo. 1989) ("This court's disenchantment with the doctrine of governmental immunity . . . had been held in check largely by our deference to the legislature's proper role in determining such issues."); Arvo Van Alstyne, *Governmental Tort Liability: A Decade of Change*, 1966 U. ILL. L. FORUM 919, 920 (noting "a close interrelationship between judicial and legislative lawmaking").

70. See Van Alstyne, *supra* note 69, at 928-29, 933-37, 939-40, 942-43, 950-51, 953, 955, 966-67.

71. *Hargrove*, 96 So.2d at 132; see also *Tuengel v. City of Sitka*, 118 F. Supp. 399, 400 (D. Alaska 1984) (stating that "[i]mmunity from suit is in disfavor in the United States because it is an anomaly in a republic and because of the general recognition of the fact that it is unjust to make the innocent victim of negligence bear the entire loss rather than to distribute the burden among the members of the general public"); *Cauley v. City of*

Florida was followed soon after by the California Supreme Court, which concluded immunity “must be discarded as mistaken and unjust.”⁷² In direct answer to Holmes, Justice Traynor stated that “only out of sixteenth century metaphysical concepts of the nature of the state did the king’s personal prerogative become . . . sovereign immunity.”⁷³ After an examination of the doctrine’s English roots that convinced him that it had never fully barred relief against the Crown in any event, Justice Traynor dubbed the rule “an anachronism, without rational basis, [that] has existed only by the force of inertia . . . None of the reasons for its continuance can withstand analysis.”⁷⁴ The New Mexico Supreme Court rejected sovereign immunity as a “medieval absolutism”⁷⁵; the Pennsylvania Supreme Court’s opinion discarding the doctrine states that “immunity can no longer be justified by ‘an amorphous mass of cumbrous language about sovereignty.’”⁷⁶

The state courts were reacting to more than the idea that sovereign immunity is an old doctrine with a royal pedigree. Rather, the courts were stating a basic postulate of democratic government: Sovereign immunity, at least as expressed through the Blackstone maxim, expresses a view that the sovereign is above the law. As an early Pennsylvania dissenter noted, “In a government of checks and balances, with no branch or department supreme over any of the others, it would be extraordinary that the whole of these interdependent parts should become irresponsible to the only power that is sovereign, the people.”⁷⁷ While democratic governments can explain why full compensation—or perhaps any compensation—for the violation of an individual’s rights is at odds with some other compelling public policy, they cannot take the position that they are above answering to the citizens. To the extent that ancient justifications for the doctrine do so, they create “a double standard of morality that is simply intolerable in a democracy.”⁷⁸ Such a concept strikes at the heart of both the

Jacksonville, 403 So. 2d 379, 383-86 (Fla. 1981) (recounting history of immunity abrogation by the legislature, for state and municipalities in Florida, after the *Hargrove* decision); *Molitor*, 163 N.E.2d at 94 (stating that “[w]e agree with the Supreme Court of Florida that in preserving the sovereign immunity theory, courts have overlooked the fact that the Revolutionary War was fought to abolish that ‘divine right of kings’ on which the theory is based”).

72. *Muskopf*, 359 P.2d at 458. Indeed, as early as 1947, the California Supreme Court had found that the State could be held liable for the negligent operation of a business or industrial enterprise. *People v. Superior Court*, 178 P.2d 1, 6 (Cal. 1947).

73. *Muskopf*, 359 P.2d at 459 n.1.

74. *Id.* at 460.

75. *Barker v. City of Santa Fe*, 136 P.2d 480, 482 (N.M. 1943). The *Barker* Court rejected “the medieval absolutism supposed to be implicit in the maxim, ‘the King can do no wrong.’” *Id.* (quoting Annotation, *Role of Municipal Immunity from Liability for Acts in Performance of Governmental Functions as Applicable in Case of Personal Injury or Death as Result of Nuisance*, 75 A.L.R. 1196, 1196 (1931)).

76. *Ayala v. Philadelphia Bd. of Public Educ.*, 305 A.2d 877, 881 (Pa. 1973) (quoting Leflar & Kantowitz, *supra* note 40, at 1364).

77. *Boorse v. Springfield Township*, 103 A.2d 708, 715 (Pa. 1954) (Musmanno, J., dissenting).

78. *Id.* at 720. Even courts unwilling to abrogate the doctrine recognize that it is vulnerable to this criticism. *See, e.g.*, *G.M. McCrossin, Inc. v. W. Va. Bd. of Regents*, 355 S.E.2d 32, 34 (W. Va. 1987) (declining nonetheless to abrogate immunity in contracts

popular sovereignty and the equality central to democracy—first, that the citizens *are* the government, and second, that no one citizen stands taller before that government than another.⁷⁹

Thus, in approaching the question of governmental accountability under their own laws, states have largely disavowed the ideas that are at the center of current Supreme Court doctrine: that immunity is simply the proper manifestation of states' status as sovereigns, and that there is something unseemly about citizens requiring states to respond through lawsuits for the injuries they inflict.

B. Sovereign Immunity and the Modern Administrative State

As they rejected status-based explanations for sovereign immunity, state courts attempted to elaborate more public-regarding rationales. The most common was the idea that governmental functions, undertaken for the entire populace, should not be impeded by private lawsuits for the benefit of individuals,⁸⁰ although that rationale too faced criticism for overbreadth and lack of nuance. In particular, as we shall see, it faced the difficulty of explaining why individuals should bear the entire cost of misconduct by the state.⁸¹

However, courts and legislatures were increasingly troubled by the reach of the state in the twentieth century, with its corresponding ability to do harm in ways that mimic the harms done by private actors.⁸² Indeed, the breadth of state activity, coupled with

cases):

There is little question that the government is capable of wrongs; indeed because the government wields great power, it is capable of great wrongs. The philosophical basis of our pluralistic society is crippled when the government's power is found to be so absolute that it cannot be made to answer for the wrongs committed in its name.

79. See *Pajewski v. Perry*, 363 A.2d 429, 433 (Del. 1976) (“[A] concept that draws its strength from the notion that the State is outside the law is hardly at home in our third century of independence.”).

80. 5 *California Report*, *supra* note 39, at 270.

81. *Id.*

82. See, e.g., *Ayala v. Philadelphia Bd. of Pub. Educ.*, 305 A.2d 877, 882 (Pa. 1973) (“[T]oday cities and states are active and virile creatures capable of inflicting great harm, and their civil liability should be co-extensive.”); *Carroll v. Kittle*, 457 P.2d 21, 26 (Kan. 1969) (“At the time the rule of governmental immunity was adopted the courts could not have come close to imagining all of the proprietary functions in which the government and its agencies are now engaged.”); *Kamau v. County of Hawaii*, 1957 WL 10597, at *15 (Haw. Terr. Jan. 24, 1957) (abolishing municipal immunity “[i]n view of the wide expansion of governmental activities over a period of years . . . many matters that were considered primarily private functions to be carried out by private industry are today carried out by various branches of the government.”); see also Frederick F. Blachly & Miriam E. Oatman, *Approaches to Governmental Liability in Tort: A Comparative Survey*, 9 LAW & CONTEMP. PROB. 181 (1942):

The rapid growth of public services and functions in most countries, the large number of persons engaged in the civil service or in the military forces, and the increase in the number of risks brought about by mechanisms such as the automobile, the airplane, and other methods of transportation, mean that an ever-increasing number of persons will suffer injuries resulting from

the enormous possibilities for citizen contact with state actors, led states to attempt to enforce the public-regarding rationale by drawing distinctions for immunity purposes between activities that are quintessentially governmental and those that are “proprietary,” and thus akin to private. But those distinctions vexed courts from the beginning. As early as 1911, the South Carolina Supreme Court predicted that future courts attempting to apply the distinction “will find themselves involved in a maze of shadowy distinctions . . . for the functions of government . . . are being extended almost every day.”⁸³ As the breadth of governmental activity widened, courts and legislatures found it more difficult to distinguish the state and its subdivisions from private actors, with the “demarcation between what are purely public functions . . . and what are not . . . increasingly difficult to observe.”⁸⁴ After California’s Supreme Court judicially abolished governmental tort immunity,⁸⁵ inviting the legislature to enact a more nuanced approach to governmental obligations, the California Law Commission wrote a comprehensive report describing the large body of specific immunity-related provisions that existed in California law, and it dismissed the distinction between proprietary and governmental functions as “utterly useless” and “ludicrous.”⁸⁶ Frustration with the distinction between those state activities that fit the public-regarding rationale and those that did not became intolerable by the 1960s, leading courts either to discard the distinction or discard immunity,⁸⁷ or to beg legislatures to attempt a solution.

C. Sovereign Immunity and Post-War Theories of Loss-Spreading

Courts and legislatures both were also influenced by the growing scholarship arguing in favor of enterprise liability tempered by insurance.⁸⁸ Courts reached a growing consensus that if a government “operates or maintains injury-inducing activities or conditions, the harm thus caused should be viewed as a part of the normal and proper costs of public administration and not as a diversion of public funds. The

governmental acts and operations.

83. *Irvine v. Town of Greenwood*, 72 S.E. 228, 230 (S.C. 1911).

84. *Boorse v. Springfield Township*, 103 A.2d 708, 719 (Pa. 1954) (Musmanno, J., dissenting); *see also* *City of Miami v. Bethel*, 65 So. 2d 34, 37 (Fla. 1953) (Hobson, J., concurring) (“[A]s various functions fuse[,] the classes overlap, and the commingling will increase as urban civilization becomes more complex and inclusive.”) (citations omitted).

85. *Muskopf v. Corning Hosp. Dist.*, 359 P.2d 457, 460 (Cal. 1961) (noting that immunity in California was “riddled with exceptions, both legislative and judicial, and the exceptions operate so illogically as to cause serious inequality”).

86. *California Report*, *supra* note 39, at 222-23 (describing the distinction between proprietary and governmental function as “utterly useless as a rational guide to sensible law-making” and “ludicrous”).

87. *See, e.g., Cauley v. City of Jacksonville*, 403 So. 2d 379, 382 (Fla. 1981) (“As Florida courts continued to erode away municipal immunity by placing more and more municipal functions into the proprietary category, inconsistencies developed which defied both logic and common sense.”); *California Report*, *supra* note 39, at 219-25.

88. Blachly & Oatman, *supra* note 82, at 213 (arguing for responsibility of governmental bodies based on the insurance principle); *see, e.g., Pajewski v. Perry*, 363 A.2d 429, 436 (Del. 1976) (describing Delaware system of immunity waiver coextensive with state insurance).

[government] is a far better loss-distributing agency than the innocent and injured victim.”⁸⁹ Indeed, courts noted, taxpayers profit from governmental projects, and they should bear the costs of “maladministration,” not the injured citizen.⁹⁰ And the broader the expansion of governmental activities, the less sensible it appeared that individual citizens should be left to bear the costs of the increased likelihood of government misconduct.⁹¹ As the New Mexico Supreme Court put it:

It is almost incredible that in this modern age of comparative sociological enlightenment, and in a republic, [sovereign immunity] should exempt the various branches of the government from liability for their [actions], and that the entire burden of damage resulting from the wrongful acts of the government should be imposed upon the single individual who suffers the injury, rather than distributed among the entire community constituting the government, where it could be borne without hardship upon any individual, and where it justly belongs.⁹²

D. Sovereign Immunity and Justice: The Political Salience of the Injured

At bottom, however, courts and legislatures abrogated immunity doctrines for the most compelling of reasons: The repeated claims of the injured to justice were both politically and humanly hard to ignore. As the Supreme Court of Minnesota put it,

89. *Ayala v. Philadelphia Bd. of Educ.*, 305 A.2d 877, 882 (Pa. 1973).

90. *Id.* See also *Parish v. Pitts*, 429 S.W.2d 45, 49 (Ark. 1968) (When a municipality enjoys immunity, the victim of its malfeasance “bears the entire, sometimes calamitous, burden resulting from these enterprises undertaken for the benefit of the entire community. The considered conclusion of the legal commentators has been that this burden should be treated as any other cost of administration of municipal activity and thereby be spread by taxes among the public receiving the benefits.”); *Richards v. Birmingham Sch. Dist.*, 83 N.W.2d 643, 657 (Mich. 1957) (Edwards, J., dissenting) (“Society has developed systems whereby risks may be pooled and distributed.”).

91. See, e.g., *Stone v. Ariz. Highway Comm’n*, 381 P.2d 107, 109 (Ariz. 1963):

It requires but a slight appreciation of the facts to realize that if the individual citizen is left to bear almost all the risk of a defective, negligent, perverse or erroneous administration of the state’s functions, an unjust burden will become graver and more frequent as the government’s activities are expanded and become more diversified.

(quoting *Hernandez v. County of Yuma*, 369 P.2d 271, 272 (Ariz. 1962)).

92. *Barker v. City of Santa Fe*, 136 P.2d 480, 482 (N.M. 1943); *Evans v. Bd. of County Comm’r*, 482 P.2d 968, 969 (Colo. 1971):

The monarchical philosophies invented to solve the marital problems of Henry VIII are not sufficient justification for the denial of the right of recovery against the government in today’s society. Assuming that there was sovereign immunity of the Kings of England, our forebears won the Revolutionary War to rid themselves of such sovereign prerogatives.

See also *McCall v. Batson*, 329 S.E.2d 741, 749 (S.C. 1985) (Chandler, J., concurring) (“A doctrine which issues from the maxim, ‘the king can do no wrong,’ is antagonistic to American democracy and, now that whatever may have justified its adoption has passed, should be abolished.”).

We have been troubled for three generations by the unheeded petitions of the lame Frederick Bank, the halt Jennie Snider, and the blind Frank Mokovich [all plaintiffs denied relief due to sovereign immunity]. Since we have repeatedly proclaimed that this defense is based on neither justice nor reason, the time is now at hand when corrective measures should be taken by either legislative or judicial fiat.⁹³

Court after court noted the injustice of turning away the injured without remedy on the strength solely of sovereign immunity.⁹⁴ Courts also urged legislatures “to do . . . ‘common justice’ by a statute eliminating the doctrine and making the State answer for its faults in a court of law.”⁹⁵ Indeed, legislatures did not always wait for courts to insist that citizens be compensated in some manner for injury at the hands of the state. Numerous legislatures anticipated the trend away from immunity by passing modifications of immunity rules.⁹⁶

Abrogation of immunity has not typically resulted in full liability for all governmental violations of state law duties. Indeed, as the careful and thorough California Commission report and numerous courts made clear, there are reasons to calibrate governmental liability in order to assure that discretionary decisions are not overdeterred and that the state can plan for its fiscal responsibility. Blanket waivers of all immunity for all functions are not common. But blanket assertions of immunity are even rarer, for the political realities of turning away injured citizens are not appealing to many elected officials, both judicial and legislative.

It is therefore unsurprising that two states have already moved to waive, statutorily, their immunity to suit for violations of those federal statutes whose abrogations of immunity have been invalidated or called into question by developments since *Alden*.⁹⁷ Legislation has been introduced in eight other states to waive immunity.⁹⁸

93. *Spanel v. Mounds View Sch. Dist.*, 118 N.W.2d 795, 799 (Minn. 1962) (alteration added).

94. *E.g.*, *State v. Brosseau*, 470 A.2d 869, 875 (N.H. 1983) (“This sense of injustice over the application of the doctrine of sovereign immunity has caused our sister States to abrogate the doctrine in whole or in part.”); *Bd. of Comm’rs v. Splendour Shipping & Enter. Co.*, 255 So. 2d 869, 875 (La. Ct. App. 1971) (Lemmon, J., concurring):

To place the financial burden of negligent damages on the innocent victim of that negligence is social injustice at its worst. This oppression is magnified when it is considered that the innocent tort victim also bears the basic (tax) burden of financing the governmental agency which negligently caused his damages.

95. *Pajewski v. Perry*, 363 A.2d 429, 435 (Del. 1976); *McCall*, 329 S.E.2d at 749-50 (Chandler, J., concurring):

It is no less than incredible that a government which addresses the needs of its indigent through programs involving millions of tax revenue dollars, and properly so, should turn a deaf ear to those others of its citizens who, through no fault of their own, are victims of governmental torts.

96. *Van Alstyne*, *supra* note 69, at 978-79; *DAVIS*, *supra* note 35, at § 25.00-1 (noting that “unconditional waiver of immunity [was] the most common legislative action [for tort liability], but the extent of the waiver is often limited to particular functions, or to a designated state of mind . . . , or to a maximum amount.”).

97. Both Minnesota and North Carolina have expressly waived immunity under the federal Fair Labor Standards Act, 29 U.S.C. §§ 201-219 (2002); the Age Discrimination in

III. SUPREMACY PRINCIPLES, *ALDEN*, AND STATE ASSERTIONS OF IMMUNITY

While states broadly abrogated immunity under their own law, few did the same for the immunity from suit in federal court that was the whole of Eleventh Amendment immunity before *Alden*. As constituted in the pre-*Alden* case law, Eleventh Amendment immunity was in many ways little more than a venue device that protected states from lawsuits in federal court for certain kinds of relief. *Alden* changed that calculus by providing states with immunity from suit under federal statutory law in their own courts. Before *Alden*, most—if not all—states would have thought themselves barred from asserting sovereign immunity to a federal claim brought in state court. This is so because sovereign immunity in state court was a state law defense, and ordinary understandings of the Constitution’s Supremacy Clause,⁹⁹ which makes validly enacted federal law a part of, and paramount to, the laws of the several states,¹⁰⁰ would have barred the use of a state-law defense to a federal claim.¹⁰¹ After *Alden* made clear that the United States Supreme Court views sovereign immunity as a defense to suit under federal law, states now are permitted

Employment Act, 29 U.S.C. §§ 621-634 (2002); the Family and Medical Leave Act, 29 U.S.C. §§ 2601-2654 (2002); and the Americans with Disabilities Act, 42 U.S.C. §§ 12,101-12,213 (2002). See Waiver of Immunity for Violations of Certain Federal Statutes, MINN. STAT. § 1.05 (2002); State Employee Federal Remedy Restoration Act, N.C. GEN. STAT. § 143-300.35.

98. See S.B. 1196, 2001-02 Reg. Sess. (Cal. 2001); H.B. 5755, 2002 Gen. Assem., Reg. Sess. (Conn. 2002); HB 3772, 92nd Gen. Assem. (Ill. 2002); H.B. 802, 2002 Gen. Assem., Reg. Sess. (Md. 2002); H.B. 98, 92nd Gen. Assem., 1st Reg. Sess. (Mo. 2003); L.B. 58, 98th Leg., 1st Reg. Sess. (Neb. 2003); S.B. 5493, 224th Ann. Leg. Sess. (N.Y. 2001); H 7438, 2002 Gen. Assem., Jan. Sess. (R.I. 2002).

99. U.S. Const. art. VI § 2. For instance, in *Howlett v. Rose*, 496 U.S. 356 (1990), a Florida school board’s assertion of sovereign immunity in response to a claim under 42 U.S.C. § 1983 was disallowed as a violation of the principle. Importantly, the school board was not an arm of the state, but akin to a municipality. “The elements of, and the defenses to, a federal cause of action are defined by federal law.” *Id.* at 375.

100. See, e.g., *Howlett*, 496 U.S. at 367:

Federal law is enforceable in state courts . . . because the Constitution and laws passed pursuant to it are as much laws in the States as laws passed by the state legislature. The Supremacy Clause makes those laws ‘the supreme Law of the Land,’ and charges state courts with a coordinate responsibility to enforce that law according to their regular modes of procedure. ‘The laws of the United States are laws in the several States, and just as much binding on the . . . courts thereof as the State laws. . . . The two together form one system of jurisprudence, which constitutes the law of the land for the State’

(quoting *Clafin v. Houseman*, 93 U.S. 130, 136-37 (1876)); *Mondou v. N.Y., New Haven & Hartford R.R. Co.*, 223 U.S. 1, 57 (1912) (declaring that when Congress legislates, its “policy is as much the policy of [the State] as if the act had emanated from its own legislature”); but see Vicki C. Jackson, *The Supreme Court, the Eleventh Amendment, and State Sovereign Immunity*, 98 YALE L.J. 1, 75-88 (1988) (arguing that the immunity created by the Amendment should be viewed as a form of federal common law).

101. See, e.g., *Howlett*, 496 U.S. at 377-78 (holding that sovereign immunity founded on state law could not be asserted against a federal claim brought under 42 U.S.C. § 1983 in state court).

to assert that defense in state court. But *Alden* left unclear the applicability of a line of cases barring states from taking certain positions with respect to their treatment of federal law, all of which flow from the Court's earlier readings of the Supremacy Clause.

*A. Supremacy Principle I: "The Laws of the United States are Laws in the Several States"*¹⁰²

Primary among the principles emanating from those cases is the principle that properly enacted federal law is as much a part of the law of the states as their own law. That principle flows both from the Supremacy Clause and the identity of both the state and the federal government with the people:

It has been asserted that the federal government is foreign to the state governments; and that it must consequently be hostile to them. Such an opinion could not have resulted from a thorough investigation of the great principles which lie at the foundation of our system. The federal government is neither foreign to the state governments, nor is it hostile to them. It proceeds from the same people, and is as much under their control as the state governments.¹⁰³

Indeed, one of the earliest cases to recognize this principle, *Clafin v. Houseman*,¹⁰⁴ was decided in 1876 against the background of the Civil War. While recognizing that "every citizen of a State is subject to two distinct sovereignties," the *Clafin* Court was deeply aware of the costs of treating the supremacy of federal law lightly:

The disposition to regard the laws of the United States as emanating from a foreign jurisdiction is founded on erroneous views of the nature and relations of the State and Federal governments. It is often the cause or the consequence of an unjustifiable jealousy of the United States government, which has been the occasion of disastrous evils to the country.¹⁰⁵

What follows from this principle is the rule that a state may not refuse to enforce federal law out of disagreement with its content. As early as 1912, the Court stated flatly:

The suggestion that the act of Congress is not in harmony with the policy of the State, and therefore that the courts of the State are free to decline jurisdiction, is quite inadmissible, because it presupposes what in legal contemplation does not exist. When Congress, in the exertion of the power confided to it by the Constitution, adopted that act, it spoke for all the people and all the States, and thereby established a policy for all. That policy is as much the policy of [the State] as if the act had emanated from its own

102. *Clafin*, 93 U.S. at 136.

103. *Howlett*, 496 U.S. at 368 n.15 (quoting *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 571 (1832) (McLean, J., concurring)).

104. *Clafin*, 93 U.S. at 130.

105. *Id.* at 136-37.

legislature, and should be respected accordingly in the courts of the State.¹⁰⁶

The application of this principle can be illustrated with the homely example of *Testa v. Katt*,¹⁰⁷ a post–World War II vintage case. Testa sued Katt alleging that Katt had overcharged him for a car, in violation of the federal Emergency Price Control Act, a benevolent federal law that provided for treble damages if one was overcharged by one’s car dealer. The legislation also provided for concurrent jurisdiction between state and federal courts, so Testa brought the case in state court in Providence, where he won and was awarded treble damages. The Rhode Island Supreme Court reversed, reasoning that the Emergency Price Control Act was a “penal statute in the international sense.”¹⁰⁸ The Court held that an action for its violation could not be maintained in the state courts on the theory that a “state need not enforce the penal laws of a government which is foreign in the international sense”; that “the United States is ‘foreign’ to the State in the ‘private international’ as distinguished from the ‘public international’ sense; hence, Rhode Island courts . . . need not enforce “the federal statute.”¹⁰⁹ In a refreshingly straightforward opinion, the United States Supreme Court said that whether the price control act was penal law “in the ‘public international,’ ‘private international,’ or any other sense” was completely beside the point, because Rhode Island’s basic premise was wrong.¹¹⁰ By virtue of the Supremacy Clause, federal law was as much a part of Rhode Island’s law as were the statutes of Rhode Island. “Such a broad assumption [as Rhode Island’s] flies in the face of the fact that the States of the Union constitute a nation,” said the Court.¹¹¹ The Court then rebuked Rhode Island for taking the position that it could decline to hear these cases because it disagreed with the policy expressed by the federal legislation, noting that when Congress acts, it speaks for all the people, so its policy is the prevailing policy in every state. It is simply off limits for states to refuse to apply federal law because they disagree with its content, for states have no independent existence apart from the people. Thus, states are not free to disagree with the substantive policies expressed in federal legislation, for to do so would mock both the Supremacy Clause’s assertion that federal law is supreme, as well as the identity of both the states and the Congress with the citizens. As the Court has noted before, “The Supremacy Clause forbids state courts to dissociate themselves from federal law because of disagreement with its content or a refusal to recognize the superior authority of its source.”¹¹²

B. Supremacy Principle II: State Courts Must Not Discriminate Against Federal Law

The Supremacy Clause also requires state courts to hear federal claims, and on

106. *Mondou v. N.Y., New Haven & Hartford R.R. Co.*, 223 U.S. 1, 77 (1912); *see also Howlett*, 496 U.S. at 371.

107. 330 U.S. 386 (1947).

108. *Id.* at 388.

109. *Id.*

110. *Id.* at 389.

111. *Id.*

112. *Howlett v. Rose*, 496 U.S. 356, 371 (1990).

terms as favorable as they hear claims under state law. At the least, it requires that state courts not discriminate against federal claimants by refusing to hear claims brought under federal law when the courts of the state are open to analogous claims under state law.¹¹³ A state court may refuse to hear a federal claim only when it has a valid excuse, which is generally thought to be “a neutral state rule regarding the administration of the courts.”¹¹⁴ Thus, if state courts have general jurisdiction to hear claims under state law, they are generally required to entertain federal claims as well.¹¹⁵

It should go without saying, of course, that a disagreement with the content of federal law is not a valid excuse. Nor is the fact that the activity that incurs liability under federal law would not under state law, for the Court has previously stated that state-court rejection of a federal claim on that ground is “only another way of saying that the [state] court disagrees with the content of federal law.”¹¹⁶

IV. APPLYING SUPREMACY CLAUSE PRINCIPLES IN THE CONTEXT OF MODERN

113. *McKnett v. St. Louis & S.F. Ry. Co.*, 292 U.S. 230, 233-34 (1934). In *McKnett*, Alabama’s courts refused to hear a Federal Employers’ Liability Act (“FELA”) claim by a Tennessee resident against a foreign corporation doing business in Alabama for injuries sustained in an accident in Tennessee. The Alabama courts would have heard the same claim if it had been brought under state law. Noting that “Alabama has granted to its circuit courts general jurisdiction of the class of actions to which that here brought belongs,” *id.* at 232, the Supreme Court found unconstitutional the state court’s refusal to hear the FELA claim. The Court noted that since

Congress has not attempted to compel states to provide courts for the enforcement of the Federal Employers’ Liability Act, the Federal Constitution prohibits state courts of general jurisdiction from refusing to do so solely because the suit is brought under a federal law. The denial of jurisdiction by the Alabama court is based solely upon the source of law sought to be enforced. The plaintiff is cast out because he is suing to enforce a federal act. A state may not discriminate against rights arising under federal laws.

Id. at 233-34.

114. *Howlett*, 496 U.S. at 372. “An excuse that is inconsistent with or violates federal law is not a valid excuse: The Supremacy Clause forbids state courts to dissociate themselves from federal law because of disagreement with its content or a refusal to recognize the superior authority of its sources.” *Id.* at 371.

115. *McKnett*, 292 U.S. at 233-34; *Mondou v. N.Y., New Haven & Hartford R.R. Co.*, 223 U.S. 1, 56-57 (1912) (A state court of general jurisdiction has a “duty . . . to take cognizance of an action to enforce a right of civil recovery arising under the act of Congress, and susceptible of adjudication according to the prevailing rules of procedure.”).

116. *Howlett*, 496 U.S. at 379. In *Howlett*, the Court rejected a Florida municipality’s assertion of sovereign immunity in the face of a constitutional claim under 42 U.S.C. § 1983, on the grounds that sovereign immunity was a state defense that could not be asserted in the face of a federal constitutional claim, and that it did not constitute a valid excuse under the line of cases discussed above. The Supreme Court in *Alden v. Maine*, 527 U.S. 706 (1999), distinguished *Howlett* on the ground that it involved a municipality, not the state itself. *Alden*, 527 U.S. at 740. Nonetheless, the *Howlett* Court’s statement regarding the necessary implication, for purposes of analyzing a state’s rejection of a suit under federal law, of a state’s assertion that it would not be subject to suit for the same conduct under its own law is still persuasive.

STATE IMMUNITY LAW

What lessons do these two traditions—the older tradition of Supremacy Clause cases and the modern abolition trend in the states—teach us about the states' obligations to their citizens under federal law? The Supremacy cases teach the basic, but deeply important, lesson that both state and federal law emanate from the people through their representatives, who can be expected to, and do, have different lenses for viewing national problems. As a legal matter, the states may not treat federal law as optional, nor may they decline to enforce it because the Congress's view is not their own view. As a moral matter, the states' obligations to their citizens under federal law are not subordinate to or lesser than their obligations under state law. Indeed, all of the vices that state courts and legislatures identified when struggling with sovereign immunity in the context of their own law are just as applicable when the context is federal law. Finally, the Supremacy Clause cases teach that tying a state's suability under its law to its vulnerability to suit under federal law gives courts a method to assess a state's reasons for refusing to consent to suit by a federal claimant, and to assure that the states are not rejecting federal law out of hostility to its source or disagreement with its premises.

A. Democracy and Supremacy: Is the Federal Context Relevant?

Other than insisting on the states' status as separate sovereigns, the Supreme Court does not currently explain its sovereign immunity doctrine in ways that make the federal context of its application relevant. If the immunity exists simply to recognize the status of the states as sovereign, it is vulnerable to the same criticisms as a federal defense as it was as a state defense. Status rationales are inherently unsatisfactory in a democracy, and doubly so when the source of the law is, by constitutional command, paramount to the states' own laws and binding on the states. Moreover, the Article I–based federal laws whose abrogations of state immunity have fallen victim to *Seminole*¹¹⁷ all typify the modern administrative state's reach and ability to cause injury. Whether it is the state's appropriation of intellectual property,¹¹⁸ its discrimination against the aged or disabled in employment,¹¹⁹ or its denial of basic overtime pay to its employees,¹²⁰ the modern state's reach and scope are as problematic for citizens under federal as state law. And it is just as difficult politically to explain why the owner of a copyright or patent should bear the loss occasioned by a state's appropriation of her intellectual property, or a senior citizen who is dismissed as a college faculty member because of age should suffer the uncompensated loss of his job, as it is to explain why a tort victim should be left to bear the costs of the state's negligence.

B. Supremacy Principles Applied

How, then, should the Supremacy Clause cases apply in a situation like *Alden v.*

117. *Seminole Tribe v. Florida*, 517 U.S. 44 (1996).

118. *Coll. Sav. Bank v. Fla. Prepaid Secondary Educ. Expense Bd.*, 527 U.S. 666 (1999).

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

120. *Alden*, 527 U.S. at 706.

Maine,¹²¹ where the state denies amenability to suit under federal statutory law? Ambiguities in *Alden* itself make it a doctrinally perplexing case. These ambiguities arise from the Court's treatment of Alden's claim that, by asserting immunity, Maine was discriminating against federal law.

Recall *Alden*'s facts. A group of Maine probation officers sued the state for violation of the Fair Labor Standards Act's overtime provisions. These were particularly tenacious probation officers, having been booted out of federal court for the very same claim after the Supreme Court decided the *Seminole* case, on the ground that Congress did not have the power to abrogate Maine's immunity under the Eleventh Amendment.¹²² After losing before the Maine Supreme Court, the officers, assuming that any immunity Maine could assert was based in state law, argued in the United States Supreme Court that Maine specifically waived immunity for analogous wage claims under state law.¹²³ They noted that under Maine statutory law, Maine courts typically heard cases against the state by state employees for failure to make timely compensation, for failure to pay the Maine statutory minimum wage, and for other violations of state employee wage law which, like the FLSA, provide for back wages and sometimes for liquidated damages and attorneys fees. If Maine waived immunity for wage claims by state employees for monetary remedies and back pay, but refused to waive such immunity when the basis of the right to receive the wages was federal law, Alden claimed, Maine discriminated against federal law.¹²⁴ The state countered that the nondiscrimination principle had no application in a case like *Alden* and that, in any event, Maine statutes did not permit overtime pay for public employees—a substantive point, not a point about Maine's amenability to suit on these kinds of claims.¹²⁵

The Supreme Court's response to the probation officers' arguments about discrimination was cryptic. In its entirety, it read:

[T]here is no evidence that the State has manipulated its immunity in a systematic fashion to discriminate against federal causes of action. To the extent Maine has chosen to consent to certain classes of suits while maintaining its immunity from others, it has done no more than exercise a privilege of sovereignty concomitant to its constitutional immunity from suit.¹²⁶

Thus, the Court seemed to say, the Supremacy Clause cases apply to this problem, but not to this case.

These two sentences give rise to a number of interpretive possibilities. First, federal constitutional sovereign immunity might exist with respect to all federal statutory claims unless positively waived by the state's legislature or litigation

121. *Id.*

122. *Mills v. State*, Civil No. 92-410-P-H, 1996 WL 400510 (D. Me. July 3, 1996), *aff'd* 118 F.3d 37 (1st Cir. 1997).

123. Brief of Petitioners at 32-33, *Alden v. Maine*, 527 U.S. 706 (1999) (No. 98-436).

124. *Id.* at 36.

125. Brief of Respondent at 45-47, *Alden v. Maine*, 527 U.S. 706 (1999) (No. 98-436). ME. REV. STAT. ANN. tit. 26 § 664 (West Supp. 2001).

126. *Alden*, 527 U.S. at 758.

tactics.¹²⁷ What the state does with respect to analogous state claims is irrelevant, unless the state's action demonstrates positive and systematic substantive hostility to federal law. Given the Court's insistence that the immunity it identifies in *Alden* is constitutional in origin, and given that the waiver of immunity for analogous state claims has never mattered in sovereign immunity cases brought in federal courts, it is quite possible that this is what the Court intended. This interpretation also has the surface appeal of symmetry—it would make the immunity available to states the same in state or federal court. But it has the defect of being inexplicable under the Supremacy Clause cases. For a decision to be subject to suit only for state and not for federal claims is, without more, the clearest form of discrimination against federal claimants.

Alternatively, and more sensibly, the Court could have been suggesting that what the states do with analogous state claims is indeed relevant to the question whether the state is vulnerable to suit under federal statutory law. A willingness to waive immunity with respect to overtime claims based on state law, but not on federal law, is evidence either that the state has a substantive disagreement with federal policy, or that it is hostile to the source of the right in federal law. The probation officers lost on this ground in *Alden* simply because they were unable to show that Maine's waivers of immunity were analogous enough to demonstrate discrimination. (Indeed, they did not make the proper argument at all, which was probably that the lack of overtime pay for public employees under state law suggested that the state of Maine disagreed with Congress's policy choice.)¹²⁸

Judge Easterbrook, at least, has suggested this second interpretation—indeed, potentially a much broader one. In a case holding the Americans with Disabilities Act's attempted abrogation of sovereign immunity ineffective,¹²⁹ and citing *Testa v. Katt*, he noted that "states may implement a blanket rule of sovereign immunity," but that Illinois had not done so.¹³⁰ "Having opened its courts to claims based on state law, including its own prohibition of disability discrimination by units of state government, Illinois may not exclude claims based on federal law."¹³¹

Of the two interpretations, the second is immensely preferable to the first. Even given concerns about the fiscal integrity of the states, it is hard to come up with a rationale, consistent with the Supremacy Clause, that would give priority to suits against the state based on state law over analogous suits based on federal law. And,

127. *See* *Lapides v. Bd. of Regents of Univ. Sys. of Ga.*, 122 S. Ct. 1640, 1643-46 (2002) (holding that the state's voluntary removal of the case to federal court acted as waiver of sovereign immunity).

128. Indeed, the Maine Supreme Court suggested as much by stating in its opinion, erroneously, that "[a]lthough Congress may have intended to subject the states to the overtime provisions of the FLSA, it does not have the necessary power, pursuant to the Constitution, to accomplish this end." *Alden v. State*, 715 A.2d 172, 173-74 (Me. 1998). Of course, as a matter of constitutional law, that is simply incorrect: Congress may be powerless to subject states to lawsuits, but the underlying obligation remains.

129. *Erickson v. Bd. of Governors*, 207 F.3d 945 (7th Cir. 2000), *cert. denied sub nom* *United States v. Bd. of Governors*, 531 U.S. 1190 (2001). The case was decided before *Board of Trustees of University of Alabama v. Garrett*, 531 U.S. 356 (2001).

130. *Erickson*, 207 F.3d at 952.

131. *Id.*

absent overturning *Alden* altogether, given the expansive waivers of immunity most states have adopted, tying the state's own waivers of immunity to their amenability to suit on federal claims makes it much less likely that the states will be able to avoid responsibility under federal law. Finally, tying the states' waivers of immunity to analogous federal claims makes it much less possible for states to discriminate against substantive federal policy choices, because they would have to do it at the expense of their own policy choices.

V. CONCLUSION

How states and courts respond to the Supreme Court's Eleventh Amendment cases will either splinter our nation into multiple sovereignties, each with a different set of obligations to its citizens under federal law, or knit us together in a common understanding of state responsibility under federal law. As courts assess state assertions of immunity, they should be aware that those assertions take place in a context of widely abrogated immunity under state law. They should thus insist that states demonstrate that they are not rejecting federal law through hostility to its source, or in contexts where they are open to suit under their own law. And as states think through their obligations, they should recognize the current waiver question's resonance with questions they have already answered. Resorting to their own traditions of accountability should lead states to accept their responsibility to be similarly accountable under laws that have their origin with the people's representatives in Washington.