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## Sovereign Immunity and Interstate Government Tort

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# SOVEREIGN IMMUNITY AND INTERSTATE GOVERNMENT TORT\*

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Louise Weinberg\*\*

## ABSTRACT

*This paper argues that the Supreme Court made a serious mistake last term, when, in a case of interstate government tort, it tore up useful options that should be available to each state for the rare cases in which they would be of service. In seeking to insulate a state from liability when its employee intrudes on a sister state’s territory and causes injury there, the Court stripped every state of power, in cases of interstate government tort, to try injuries occurring on its own territory to its own residents—an unprecedented disregard of a state’s acknowledged traditional interests. Indeed, the Court went beyond interstate government tort and seemed to say that the Constitution prohibits litigation against a state in all cases, whether to enforce state or federal law, whether in state or federal courts. It is argued that the Court’s originalist and structural arguments cannot withstand scrutiny. Moreover, the Court’s position, if firmly established, would balk the actual interests even of a state as defendant. The states typically do see a need to meet their tort responsibilities. Real damage has been done, but it is argued that conservative and liberal views on judicial review of government action in time may well converge to put an end to judicial abnegation of the duty to place government at all levels under the rule of law.*

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## INTRODUCTION

The Supreme Court’s overrule of *Nevada v. Hall*<sup>1</sup> this past Term was widely perceived to be a threat to *Roe v. Wade*.<sup>2</sup> Reporters of le-

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1. 440 U.S. 40 (1979) (Stevens, J.) (holding that there is no principle of sovereign immunity that would prevent California from taking jurisdiction over Nevada, where negligent driving by a University of Nevada driver caused a collision in California resulting in severe personal injuries to a California family). For interesting perspectives on *Nevada v. Hall*, see Anthony J. Bellia, Jr. & Bradford R. Clark, *The International Origins of American Federalism*, 120 COLUM. L. REV. 835 (2020); Zachary D. Clopton, *Diagonal Public Enforcement*, 70 STAN. L. REV. 1077 (2018); and James E. Pfander & Jessica Dwinell, *A Declaratory Theory of State Accountability*, 102 VA. L. REV. 153 (2016).

2. 410 U.S. 113 (1973) (holding that women have a constitutional right to abortion in the first trimester of pregnancy; in the second trimester, that the state can render nugatory the right to abortion by purporting to regulate for the safety of the mother; and in the third trimester, that the interest of the fetus is paramount and that the state can prohibit abortion outright).

gal news could find little else to say<sup>3</sup> about *Nevada v. Hall* or its overruling case, *Franchise Tax Board v. Hyatt*.<sup>4</sup> But neither case had anything to do with *Roe v. Wade*. The apparent threat to *Roe* lay in the fact that lawyers arguing in support of *Nevada v. Hall* relied almost exclusively on *stare decisis*.<sup>5</sup> The thinking was that if a precedent of forty years' vintage could be tossed aside, *Roe* must be in danger. As far as the press could see, *Nevada v. Hall* itself was of no interest.

After all, *Nevada v. Hall* was a very ordinary case involving a two-car collision.<sup>6</sup> Its apparently surprising holding,<sup>7</sup> that a state could

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3. See, e.g., Editorial, *Liberals Who Cry Roe*, WALL ST. J. (May 14, 2019), <https://www.wsj.com/articles/liberals-who-cry-roe-11557876134> [<https://perma.cc/FRU6-YMSL>]; Leah Litman, Opinion, *Supreme Court Liberals Raise Alarm Bells About Roe v. Wade: Conservatives May be Laying the Foundation for the Reversal of the Landmark Abortion Decision*, N.Y. TIMES (May 13, 2019) <https://www.nytimes.com/2019/05/13/opinion/roe-supreme-court.html> [<https://perma.cc/HGK9-GAU3>]; see also Thomas J. Molony, *Taking Another Look at the Call on the Field: Roe, Chief Justice Roberts, and Stare Decisis*, 4 HARV. J.L. & SOC. POL. 733 (2020) (taking the same tack).

4. 139 S. Ct. 1485, 1490 (2019) (reversing *Nevada v. Hall* in view of the paucity of cases relying on it and holding that the Constitution does not “permit” disregard of a state’s sovereign immunity). One month after this decision was handed down, the Federal Circuit departed from it, declining to extend state sovereign immunity to administrative patent proceedings. *Regents of the Univ. of Minn. v. LSI Corp.*, 926 F.3d 1327, 1341 (Fed. Cir. 2019). The Federal Circuit relied on a theory of “constructive” waiver that occurs when the state seeks the benefit of the patent system by applying for a patent, a theory once suggested to me by my former colleague, Mitch Berman, who later concluded dispiritedly that the idea could not get off the ground. I agreed, recalling that the doctrine of “constructive waiver,” see *Parden v. Terminal Railway*, 377 U.S. 184 (1964), had been disapproved in *Atascadero State Hospital v. Scanlon*, 473 U.S. 234, 238 (1985). 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 TEX. L. REV. 1037 (2001). The Constitution’s explicit grant to Congress of power over intellectual property, U.S. CONST. art. I, § 8 (providing that, in order to encourage science and the useful arts, Congress may grant patents and copyrights for limited times), arguably should have saved patent and copyright cases from the indefensible rule of *Seminole Tribe v. Florida*, 517 U.S. 44 (1996), improvidently stripping Congress of Article I power to overcome the Eleventh Amendment. But the Federal Circuit’s exercise in legal realism, although distinguishing administrative from judicial proceedings and stressing the explicitness of the grant of power over patents, could not overcome *Florida Prepaid Postsecondary Education Expense Board v. College Savings Bank*, 527 U.S. 627 (1999), which held the state immune notwithstanding the specificity of the patent and copyright power in Article I, Section 8. The Supreme Court has since carved out a needed exception to *Seminole Tribe* for cases in bankruptcy. See *Cent. Va. Cmty. Coll. v. Katz*, 546 U.S. 356 (2006). But the *Katz* exception is limited to bankruptcy. *Allen v. Cooper*, 140 S. Ct. 994, 1002 (2020). There will be no further exceptions.

5. Dean Chemerinsky’s fine brief for Hyatt stressed that there was no reason to overrule *Nevada v. Hall*, Brief for Respondent at 31–32, *Franchise Tax Board v. Hyatt*, 139 S. Ct. 1485 (2019) (No. 114-1175), 2015 WL 6467826, as did his oral argument, Transcript of Oral Argument at 38, *Franchise Tax Board v. Hyatt*, 139 S. Ct. 1485 (2019) (No. 17-1299), 2019 WL 144815. For a similar concern for *stare decisis*, see also Stephen Vladeck’s fine Brief of Professors of Federal Jurisdiction as Amici Curiae in Support of Respondent at 12, *Franchise Tax Board v. Hyatt*, 139 S. Ct. 1485 (2019) (No. 114-1175), 2018 WL 6168772. (I was a signatory). I note that neither the Chemerinsky brief nor the Vladeck brief argued for *Nevada v. Hall* on its merits.

6. For the facts of *Nevada v. Hall*, see *supra* note 1; and *infra* notes 37–38.

7. *Nevada v. Hall*, 440 U.S. 410, 446–47 (1979).

haul another state into its courts, also turned out to be of slight importance, if the frequency of resort to it is any measure. In the forty years since *Nevada v. Hall* was decided, only fourteen cases relying on it could be unearthed, with all the diligence of counsel and *amici*.<sup>8</sup>

Shortly before his death,<sup>9</sup> Justice Stevens, author of *Nevada v. Hall*, was interviewed about the death of that case. Stevens pointed out that the very sparseness of cases that allowed the *Franchise* Court to find insufficient reason to preserve *Nevada v. Hall* could as easily have prompted the Court to find insufficient reason to overrule it.<sup>10</sup> Even Justice Stevens had little of substance to say about the case. But in my opinion *Nevada v. Hall* deserved to be argued on its *merits*.

The occasion for reconsideration of a forty-year-old case was the long litigation in *Franchise Tax Board v. Hyatt*,<sup>11</sup> which came to a head in 2019, its third iteration before the Supreme Court.<sup>12</sup> Like *Nevada v. Hall*, *Franchise Tax Board* was a case against state officials. But *Franchise Tax Board*, unlike *Nevada v. Hall*, was not about some ordinary road accident in another state. *Nevada v. Hall* involved the negligence or recklessness of a driver who happened to be a state worker driving a state university car into another state, on state business.<sup>13</sup> Instead, the tort in *Franchise Tax Board* was *deliberate*. Officials of one state were found by a jury to have behaved in another state with intentional and damaging abusiveness.<sup>14</sup> The only thing our two cases had in common was that in each of them a state was held to be within the jurisdiction of another state.

The question whether to overrule *Nevada v. Hall* had been raised twice previously in the *Franchise Tax Board* litigation. In 2003, in what I will call *Franchise I*, the Court, by Justice O'Connor, unan-

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8. The paucity of cases was noted during oral argument by both Justice Alito and Justice Kavanaugh. Transcript of Oral Argument at 50, *Franchise Tax Bd. v. Hyatt*, 139 S. Ct. 1485 (2019) (No. 17-1299), 2019 WL 144815 (Alito, J.) (“Is there any reliance here?”); *id.* at 54 (Kavanaugh, J.) (“[T]here’s no real reliance interest at stake.”). The paucity of cases is probably best explained by the fact that they typically arise between neighboring states engaged in substantial interstate activity, rather than between any two of fifty states.

9. Justice Stevens passed away on July 16, 2019.

10. Justice Stevens remarked that “overruling Nevada against Hall—it makes absolutely no sense . . . . Because states have been sued in the courts of other states so rarely, that you might just as well have a rule you can follow rather than change it 40 years later for a different rule that clearly is not any better than the other one.” *Ask the Author: Interview with Justice John Paul Stevens*, SCOTUSBLOG (June 12, 2019), <https://www.scotusblog.com/2019/06/ask-the-author-interview-with-justice-john-paul-stevens> [<https://perma.cc/58XS-CUHU>].

11. *Franchise Tax Bd. v. Hyatt* (Franchise III), 139 S. Ct. 1485 (2019) (Thomas, J.).

12. *Franchise Tax Bd. v. Hyatt* (Franchise I), 538 U.S. 488 (2003) (O’Connor, J.); *Franchise Tax Bd. v. Hyatt* (Franchise II), 136 S. Ct. 1277 (2016) (Breyer, J.).

13. *Nevada v. Hall*, 440 U.S. 410, 446–47.

14. See *Franchise III*, 139 S. Ct. at 1491 (Thomas, J.) (discussing the jury award).

imously sustained *Nevada v. Hall*.<sup>15</sup> Then, in a 2016 iteration of the case, *Franchise II*, the Court granted *certiorari*, among other issues to reconsider *Nevada v. Hall*.<sup>16</sup> But then the unexpected death of Justice Scalia left a sudden vacancy on the Court, and President Obama's nomination of Merrick Garland to succeed Scalia was buried by the determined inaction of the Senate.<sup>17</sup> So it fell to an eight-Justice Court in *Franchise II* to decide whether to overrule *Nevada v. Hall*. The Court split 4:4 on that issue,<sup>18</sup> with the result that *Nevada v. Hall* was let stand—for the time being.

At last, in 2019, in *Franchise III*, the question whether to overrule *Nevada v. Hall* was cleanly presented,<sup>19</sup> and a nine-Justice Court stood ready to decide it.<sup>20</sup> *Nevada v. Hall* was overruled. When litigation under *Nevada v. Hall* was disapproved, obviously litigation under *Franchise III* was cashiered as well, since both were state assertions of jurisdiction over another state.

It is a chief argument of this paper that the loss of access to civil courts at the place of injury and plaintiff's home in these cases is seriously to be regretted. One might suppose that this loss of access to adjudication at the place of injury and the plaintiff's home might not matter much, as long as the defendant state can be sued in its own courts. But in *Franchise III*, the Supreme Court was apparently of the view that a defendant state may not be sued at home, either. According to Justice Thomas, writing for the narrow conservative majority in *Franchise III*, a state can never be sued, at home or away, without its consent. There is blanket immunity.

This immunity is a matter of federal, not state law. The federalization of the defense of state immunity began in 1795 with the

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15. *Franchise I*, 538 U.S. at 496.

16. 138 S. Ct. 2710 (2018) (granting *certiorari* in *Franchise III*).

17. Justice Scalia died on February 13, 2016. President Obama nominated Merrick Garland to replace him on March 16, 2016. See *U.S. Senators on the Nomination of Merrick Garland*, BALLOTEDIA, [https://ballotpedia.org/U.S.\\_Senators\\_on\\_the\\_nomination\\_of\\_Merrick\\_Garland](https://ballotpedia.org/U.S._Senators_on_the_nomination_of_Merrick_Garland) [https://perma.cc/DXU3-93B5].

18. *Franchise II*, 136 S. Ct. at 1280 (Breyer, J.). There was a dissent by Chief Justice Roberts, joined by Justice Thomas. 136 S. Ct. at 1283. There was also a silent concurrence by Justice Alito. *Id.* On the uses of silent concurrences, see Greg Goelzhauser, *Silent Concurrences*, 31 CONST. COMMENT. 351 (2016).

19. The question of whether to overrule *Nevada v. Hall* in this iteration of the *Franchise Tax Board* litigation was the only question presented. *Franchise III*, 139 S. Ct. at 1490 (stating that *certiorari* was granted to decide this sole question). In contrast, in *Franchise II*, 136 S. Ct. 1277, the 2016 case, a main question, bizarrely, was whether, under the Full Faith and Credit Clause, the Nevada court had to apply Nevada's *own* immunity law to a sister state within its jurisdiction. *Id.* at 1281–83. Of course, the obligations of a court under the Full Faith and Credit Clause are to *another* state, not the forum state. Moreover, as the position has developed, the obligation is to the other state's *judgments*, not its laws. See *infra* notes 67, 76, 89–92 and accompanying text.

20. Justice Brett Kavanaugh was sworn in on October 8, 2018. The case was argued January 9, 2019.

Eleventh Amendment,<sup>21</sup> prohibiting federal diversity jurisdiction over a state in a state-law case. The Supreme Court has been expanding the scope of federalized state immunity ever since. By the end of the twentieth century, this untethered process had culminated in *Alden v. Maine*,<sup>22</sup> insulating state defendants from suits to enforce federal law in the state's own courts.

The trouble with *Franchise III* is that it extends the shield of federal immunity to state courts in *state-law* cases. It did so notwithstanding the Tenth Amendment, which would seem to reserve such matters to the states.<sup>23</sup> Justice Thomas achieved this by grounding federalized immunity on the vague premise that “the Constitution” does not “permit” suits against an unconsenting state.<sup>24</sup> Justice Thomas located federalized state sovereign immunity in the structure and history of the Constitution. This holding, on these arguments, necessarily implies blanket federalized state immunity in all cases, state or federal, whether tried in federal courts, the courts of a sister state, or in the state's own courts.

To justify this radical position, Justice Thomas offered familiar originalist, but, in my view, ahistorical<sup>25</sup> claims for state immunity. He relied in part upon statements made during the Founding period which might be thought to imply constitutional recognition of state sovereignty. (One is reminded of a famous comment by Holmes: “It is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV.”<sup>26</sup>) But to the extent that any of Thomas's historical arguments had some objective correlative in the eighteenth century, they tended to support the states' own view of sovereign immunity—that the defense,

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21. The Eleventh Amendment to the U.S. Constitution, which prohibits federal diversity suits in state-law cases against a state, was extended to federal-question cases in federal courts in *Hans v. Louisiana*, 134 U.S. 1 (1890). The Eleventh Amendment, read literally, furnishes only a rule of construction for the several diversity jurisdictions to which the federal judicial power extends under Article III of the Constitution. In the Amendment's override of *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419 (1793), a diversity action against a state on an ordinary contract, the Eleventh Amendment obviously is intended to shield states from suit in federal court only in state-law cases typical of the diversity jurisdiction of the lower federal courts.

22. 527 U.S. 706 (1999) (holding the states to be shielded with federalized sovereign immunity in their own courts in suits to enforce an act of Congress).

23. This was one of Dean Chemerinsky's points in oral argument. Transcript of Oral Argument at 28, 31, *Franchise III*, 139 S. Ct. 1485 (2019) (No. 17-1299), 2019 WL 144815.

24. See *Franchise III*, 139 S. Ct. at 1490 (“This case . . . requires us to decide whether the Constitution *permits* a State to be sued by a private party without its consent in the courts of a different State.”) (emphasis added). On this formulation of the issue, see *infra* notes 108, 124 and accompanying text.

25. For the actual history, see *infra* Sections III.B–C.

26. Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 469 (1897). Ironically, Justice Thomas, the author of *Franchise III*, has quoted this himself. See *Dietz v. Bouldin*, 136 S. Ct. 1885, 1897 (2016) (Thomas, J., dissenting).

where it existed among the states in early days, was a creature of a state's own common law. Justice Thomas had to acknowledge this fact.<sup>27</sup> There was no early precedent for federalized state sovereign immunity.

But there is a later history of federal-law immunity for the states. The Eleventh Amendment of 1795 is a rule of construction for the diversity jurisdiction of federal courts, immunizing a state from commercial liability to a nonresident in state-law cases.<sup>28</sup> In 1890, in *Hans v. Louisiana*,<sup>29</sup> the Supreme Court, in an apparent attempt to avoid declaring the Amendment anomalous and obsolete (anomalous because prohibiting suits against a state by nonresidents but not by residents), extended Eleventh Amendment immunity from the diversity jurisdiction of federal courts to their federal-question jurisdiction. This relieved states of the duty—at least in federal courts—of complying with acts of Congress or the Constitution. It also created a further anomaly—federal immunity would be operative in one set of courts only. As if unwilling to acknowledge error, or perhaps in nostalgia for an antebellum view of states' rights, or perhaps in the spirit of reconciliation between North and South, the Supreme Court thereafter doubled down on the Eleventh Amendment and has been piling up a superstructure of further extensions of it ever since. In a late case the Court went so far as to extend federalized immunity in federal-law cases to actions against a state *in state courts*.<sup>30</sup> But even so, it was not foreseen that the Court would go so far as to discover a federal sovereign immunity for the states from *state-law* actions in state courts.

Justice Breyer, dissenting in *Franchise III*, responded to Justice Thomas's historical arguments with his own set of originalist ideas. He attempted to find respondent Hyatt's *stare decisis* argument convincing, but it was scarcely more so than Thomas's historicist argument, given the apparent lack of large-scale reliance on *Neva-*

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27. See 139 S. Ct. at 1494 (Thomas, J.) ("In short, at the time of the founding, it was well settled that States were immune under both the common law and the law of nations."). This would be more or less true, perhaps, if Justice Thomas had limited the conclusion to the period preceding the Founding and made clear that he was talking about state common law and general international law. See William Baude, *Sovereign Immunity and the Constitutional Text*, 103 VA. L. REV. 1 (2017) (arguing that state sovereign immunity originally was a matter of state common law and had nothing to do with the Constitution).

28. See generally 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.").

29. 134 U.S. 1 (1890).

30. *Alden v. Maine*, 527 U.S. 706 (1999). For early extensions of federalized state immunity under the Eleventh Amendment, see, for example, LOUISE WEINBERG, *FEDERAL COURTS: CASES AND COMMENTS ON JUDICIAL FEDERALISM AND JUDICIAL POWER* 779–846 (1994).



*da v. Hall*. Justice Breyer did not consider the usefulness of *Nevada v. Hall*, save for a bare remark about interests on “both sides.”<sup>31</sup>

I have said that *Nevada v. Hall* should have been argued and considered on its merits. Its actual empowerment of the states in their shared interests should have commended *Nevada v. Hall* to the states, as well as to the Supreme Court, as a positive good.<sup>32</sup> These shared interests, widely understood, are the states’ governmental interests in providing their residents with access to their own courts, in compensating their residents for injuries caused by the unlawful conduct of another, and in deterring any such conduct on their territory in the future. These are fundamental tort policies in every state.

The states might have paused, in their rush to sign briefs demanding overrule of *Nevada v. Hall*, to consider the further interest they share, not only with each other but with the nation—an interest in “domestic tranquility”<sup>33</sup>—in interstate peace. Under the new blanket federal immunity in cases of interstate government tort, there can be little interstate peace because courts will have lost their power, through civil suits brought by their own residents, to provide a judicial check on another government’s misconduct on their own territory. How can our federalism help but be diminished under such license?

If we disregard as dictum the Court’s apparent extension of federalized immunity to the tortfeasor state in its own courts, and limit *Franchise III* to its facts, it raises the narrower question whether the Court should have denied to private persons access to their own state’s courts just because the defendant is a state actor. It is not customary in our jurisprudence to deny injured residents access to their own state’s courts for suit against nonresident tortfeasors over whom jurisdiction can be obtained. The typical state long-arm statute is all that is needed. We pay taxes for our state courts, and, until *Franchise III*, it was generally assumed that a state citizen’s choice to sue at home, if jurisdiction over the defendant can be obtained, would be respected as a matter of course.

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31. *Franchise III*, 139 S. Ct. 1485, 1504 (2019) (Breyer, J., dissenting) (remarking that “sovereignty interests here lie on both sides of the constitutional equation”).

32. For commentary urging overrule of *Nevada v. Hall*, see, for example, Timothy Dill, *A Test of Sovereignty: Franchise Tax Board of the State of California v. Gilbert P. Hyatt*, 14 DUKE J. CONST. L. & PUB. POL’Y SIDEBAR 129 (2019); and Ann Woolhandler, *Interstate Sovereign Immunity*, 2006 S. CT. REV. 249, 254–59 (2006).

33. The Preamble to the Constitution of the United States sets out the purposes of the Constitution: “We the People of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defense, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America.”

Yet forty-five states were signatory to *amicus* briefs urging overrule of *Nevada v. Hall*.<sup>34</sup> These were heavy guns indeed, and we lost *Nevada v. Hall*. One wonders to what calculation of advantage we can ascribe the zeal of so many states in rushing to sign briefs urging the Supreme Court to strip their own courts of the option to govern events within their own borders under their own law.

Nothing in *Nevada v. Hall* or *Franchise I* impaired the sovereignty of each state in its own courts or a state's power to adjudicate injuries to its own residents on its own territory.<sup>35</sup> But overruling those cases did.<sup>36</sup>

## I. OUR TWO CASES

### A. Nevada v. Hall

The *Nevada v. Hall* story began back in 1968. A University of Nevada employee drove into California in a university car on university business and there collided with another car, causing serious personal injuries to the California occupants of the other car.<sup>37</sup> The Nevada driver was killed.<sup>38</sup>

The injured Californians filed suit at home in California. The Nevada driver's estate, if any, could offer little in the way of meaningful compensation. But the University of Nevada is an arm of the state of Nevada, and jurisdiction over the state was asserted when it was asserted over the university. The state, filing a special appearance, moved for dismissal on the point of jurisdiction, arguing that a state cannot take jurisdiction over a sister state. As to such attempted jurisdiction, Nevada argued, all states are immune. The lower California court, agreeing, dismissed.<sup>39</sup> But eventually the

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34. See Brief of Indiana and 44 Other States as Amici Curiae in Support of Petitioner, Franchise III, 139 S. Ct. 1485 (No. 17-1299), 2018 WL 1850970; Brief of the Council of State Governments, National Ass'n of Counties, National League of Cities, United States Conference of Mayors, City/County Management Ass'n & International Municipal Lawyers Ass'n as Amici Curiae in Support of Petitioner, Franchise II, 136 S. Ct. 1277 (No. 14-1175), 2015 WL 5316999.

35. Justice Breyer made this point in his dissent in *Franchise III*, 139 S. Ct. at 1504, as did Justice Sotomayor in oral argument. Transcript of Oral Argument at 6, Franchise III, 139 S. Ct. 1485 (No. 17-1299), 2019 WL 144815.

36. Cf. *Nevada v. Hall*, 440 U.S. 410, 426–27 (Stevens, J.) (stating that, if the states are forced to accord each other immunity that would be a greater offense to state sovereignty than prohibiting them from doing so).

37. See *id.* at 413 n.4 (“The evidence indicated that respondent John Hall, a minor at the time of the accident, sustained severe head injuries resulting in permanent brain damage which left him severely retarded and unable to care for himself, and that respondent Patricia Hall, his mother, suffered severe physical and emotional injuries.”).

38. *Id.*

39. *Hall v. Univ. of Nev.*, 503 P.2d 1363 (Cal. 1972) (en banc).

California Supreme Court reversed, sustaining California's jurisdiction over Nevada.<sup>40</sup> The United States Supreme Court denied *certiorari*.<sup>41</sup>

Back in the California trial court, the jury awarded the plaintiffs damages of \$1,125,000.<sup>42</sup> In 1979, the Supreme Court, in an opinion by Justice Stevens, affirmed.<sup>43</sup> Justice Stevens found nothing in the Eleventh Amendment or its background postulates<sup>44</sup> that would immunize a state in a sister state's courts. He pointed to California's governmental interests as the place of wrongful conduct and injury—interests in deterring unsafety on California's roads and in compensating Californians injured by such unsafety.<sup>45</sup>

There was a dissent by Justice Blackmun, joined by Chief Justice Burger and Justice Rehnquist.<sup>46</sup> There was also a dissent by Justice Rehnquist, joined by Chief Justice Burger.<sup>47</sup> To a millennial eye, both dissents seem weak. Justice Blackmun trod the ground in a tentative way, and Justice Rehnquist, in a rambling opinion, rounded up the usual references.

To my mind, *Nevada v. Hall* solved a real problem: the existence of a remedial gap. Until *Nevada v. Hall*, there seems to have been no thought given to the propriety of trial of one state in the courts of another, perhaps because state officials have little business out of state, as evidenced by the above-noted paucity of cases that emerged in the wake of *Nevada v. Hall*.<sup>48</sup> And since the state of Nevada waives immunity, there would have been jurisdiction over the defendant state, Nevada, in any event in its own courts. That is why, in *Nevada v. Hall*, Nevada did not plead sovereign immunity.<sup>49</sup> Nevada's own sovereign immunity statute need not matter to a court in another state. But the fact is that Nevada had waived its immunity—although Nevada capped its waiver at the then-meager figure of \$25,000.<sup>50</sup> California was free to ignore Nevada's \$25,000 cap. Every state is always free to apply its own law to the question of the

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40. *Id.*

41. *Hall v. Univ. of Nev.*, 414 U.S. 820 (1973).

42. All online calculators consulted conclude that the amount of the 1972 jury award would be about \$5,550,000 in 2019 dollars.

43. *Nevada v. Hall*, 440 U.S. at 427 (affirming the California judgment below).

44. See *Principality of Monaco v. Mississippi*, 292 U.S. 313, 322 (1934) (Hughes, C.J.) (referring to “postulates which limit and control” and holding a state immune from suit in the original jurisdiction of the Supreme Court, although in terms such suit is available under Article III, if the action is brought by a foreign state).

45. 440 U.S. at 424.

46. *Id.* at 427. Rehnquist did not become Chief Justice until 1985.

47. *Id.* at 432.

48. On the paucity of cases, see *supra* notes 4, 8 and accompanying text.

49. NEV. REV. STAT. § 41.035(1) (2019).

50. *Id.*

immunity *vel non* of another state.<sup>51</sup> The Nevada “cap” could not tie California’s hands to defeat California’s own compensatory and deterrent interests. California, as the place of wrongful conduct, the place of injury, and the residence of the plaintiff, had every interest in taking jurisdiction. And it was entitled to deploy its own tort law on the merits—as Justice Stevens pointed out.<sup>52</sup> California law, like the law of every state in the Union, provides compensation and deterrence for a tort on the state’s own roads injuring the state’s own residents.

Interestingly, in the later case of *Alden v. Maine*,<sup>53</sup> in extending federal sovereign immunity to a state in an action under federal law in the state’s own courts, the Supreme Court had not overruled *Nevada v. Hall*, but had *distinguished* it.<sup>54</sup> Although the *Alden* Court, by Justice Kennedy, ruled that a state cannot be sued in its own courts without its consent, even to enforce an act of Congress, *a state could nevertheless be sued in a sister state*.<sup>55</sup> Justice Kennedy saw that the sister state would have policies and interests of its own to vindicate.

*Franchise III* overrules *Alden* on that point.

## B. Franchise Tax Board

Now let us turn to the interesting litigation in *Franchise Tax Board v. Hyatt*. This case, which wound up in the Supreme Court three times, was there first in 2003 (*Franchise I*).<sup>56</sup> In this case, it was a Nevada court that took jurisdiction over California. *The tables were turned.*

Gilbert P. Hyatt (no connection with the hotels) is a man of considerable wealth, the inventor of a useful computer chip. It seems clear that Mr. Hyatt moved to Nevada to avoid California’s high taxes. According to California’s taxing authority, the Franchise Tax

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51. For the general rule denying power to a defendant sovereign to immunize itself in the courts of another sovereign, see *infra* Sections III.A.2, III.C.1.

52. *Nevada v. Hall*, 440 U.S. at 426–27 (discussing California’s compensatory and regulatory interests).

53. 527 U.S. 706 (1999).

54. *Id.* at 738–39 (distinguishing and saving *Nevada v. Hall*).

55. *Id.*

56. *Franchise I*, 538 U.S. 488, 499 (2003) (O’Connor, J. for a unanimous court) (holding, under *Nevada v. Hall*, that Nevada could take jurisdiction over California); *id.* at 496–97 (declining to distinguish between governmental functions and non-governmental functions). Salient distinctions, not acknowledged and thus not addressed by Justice O’Connor, would seem to be, first, the distinction between unintentional and intentional torts; second, the distinction between ordinary workers and officials; third, the distinction between breach of a duty pleadable as an ordinary tort and breach of a constitutional duty; and fourth, the distinction between personal misconduct and state action.

Board, Mr. Hyatt left California allegedly owing that sunny state some \$13 million.<sup>57</sup> Hyatt denied this, insisting that he was fully paid up when he left California. It all depended on the date of Hyatt's move to Nevada. But this Nevada case was not about any of that.

Now living in Nevada, Hyatt was fighting back with a grievance of his own. While continuing his battle with California's tax collectors in California, he filed suit against California's Franchise Tax Board in Nevada, complaining of abuses in Nevada by California's auditors.

Could Hyatt have sued in California? This question was posed by Justice Sotomayor during oral argument.<sup>58</sup> With her customary insight, she pointed out that the availability of a remedy at home implied that the sovereign immunity issue lacked substance. But for those who might read her question as a suggestion that Hyatt *ought* to have sued at home, it will be helpful to point out that Hyatt's Nevada suit was not about taxes in California—the subject of his ongoing struggle back in California—but about a tort in Nevada.<sup>59</sup>

Were Hyatt's claims frivolous? He alleged that the California tax auditors came after him extraterritorially in Nevada and engaged there in a course of harassment and abusive misconduct, intentionally inflicting emotional distress upon him. The Nevada jury found most of this to be true.<sup>60</sup>

It was the audit from hell. The California auditors peered through his windows. They read his mail. They rummaged through his garbage. They lied to him about the confidentiality of some of his information and then released that confidential information to the very persons with whom he did not want to share it. They delayed resolution of his protests. They intruded into his place of work, rummaging through his files. They bustled noisily into his synagogue. They made disparaging remarks about his religion. Perhaps the unkindest cut was their seeking out and questioning Hyatt's estranged relatives. Witnesses testified that Hyatt's emotional distress was patent, that he was drinking heavily, and that he suffered severe migraine headaches and abdominal pains. In sum,

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57. Hyatt eventually wound up substantially victorious in his California tax dispute, agreeing to pay \$2 million to California. See Zach Weissmueller, *California Tried To Seize Millions of This Inventor's Fortune. He Fought Back. And Won.*, REASON (Oct. 23, 2017), <https://reason.com/archives/2017/10/23/gilbert-hyatts-25-year-battle-against-ca/print> [<https://perma.cc/9STM-5MJ8>].

58. Transcript of Oral Argument at 46, Franchise I, 538 U.S. 488 (No. 02-42), 2003 WL 439743.

59. On the congeries of immunities arguably involved in the case, see *infra* text accompanying notes 62–65.

60. 335 P.3d 125 (Nev. 2014) (working throughout with the evidence and the damages the jury awarded on each count of the complaint).

a jury could find that the California auditors invaded Hyatt's privacy, destroyed his peace, and intentionally inflicted the alleged emotional distress.

Conceivably, Hyatt's case could have been pleaded as one of constitutional tort. Intentional infliction of harm by a government official, in my view, is unconstitutional.<sup>61</sup> Perhaps, at a stretch, it was an unconstitutional search within the broader reaches of the Fourth and Fourteenth Amendments. It could have been pleaded, I suppose, as an extension of the constitutional right of privacy, although that has been deployed mostly in aid of family autonomy. But the gravamen of Hyatt's complaint was an infliction of emotional distress, a state common-law tort.

Now consider the legal position of the defendant of record, California's Franchise Tax Board, an arm of the state of California. Under the California Tort Claims Act<sup>62</sup> (a typical workaround enacted to deal with improvidently enacted state immunity), the state's government employees become immune. But the state itself waives its immunity, appears, defends, and pays any judgment. That is a mechanism roughly analogous to that of the Federal Tort Claims Act,<sup>63</sup> and, like that statute, it is also available in some cases of intentional tort, such as Mr. Hyatt's.

There may have been some confusion among the judges and lawyers throughout this Nevada litigation, not only about the California Tort Claims Act but also about California's additional separate special statutory immunity for its tax collectors, the Franchise Tax Board and its agents.<sup>64</sup> California law immunizes California's tax collectors, confiding complaints against them to their administrative agency, the Franchise Tax Board. But this latter immunity

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61. The Supreme Court has carved out exceptions. The Court reasons that some intentional torts by a government official are best left to state law—libel, for example. *Paul v. Davis*, 424 U.S. 693 (1976).

62. CAL. GOV'T CODE § 810–810.8 (West 2012) (dealing with the liabilities in tort and contract of California's administrative agencies); CAL. GOV'T CODE §§ 900–998.3 (West 2012) (California Tort Claims Act); CAL. GOV'T CODE § 860.2 (West 2012) (California's limited immunity for tax officials).

63. 28 U.S.C. § 1346(b), as amended by the Westfall Act, 28 U.S.C. § 2679 (dealing with ordinary common-law torts by federal workers in the course of their employment). The Westfall Act, *inter alia*, codifies the general rule that the Federal Tort Claims Act has no extraterritorial effect. In my view, a little further thought would have cautioned Congress against this codification. The interests of the United States in sensible management of ordinary government torts are heightened by our need to maintain good foreign relations when an American civilian officer commits a tort causing injury abroad.

64. See CAL. GOV'T CODE § 860.2 (“Neither a public entity nor a public employee is liable for an injury caused by: (a) Instituting any judicial or administrative proceeding or action for or incidental to the assessment or collection of a tax. (b) An act or omission in the interpretation or application of any law relating to a tax.”).

applies only to disputes over the calculation and amount of taxes owed. It has no bearing on a question of tort liability.<sup>65</sup>

The Nevada court apparently assumed that California's waiver of immunity under its Tort Claims Act was effective in Nevada, just as it would have been at home in California, immunizing the auditors in the case and putting the state itself in their place as the defendant. The Californians apparently made the same assumption. In any event, California did not plead sovereign immunity in Nevada. Instead, California came up with an unconvincing argument that the Full Faith and Credit Clause required Nevada to give California the benefit of Nevada's \$25,000 cap on its own waiver of immunity.<sup>66</sup> This argument was nonsense. The obligation of full faith and credit is an obligation concerning *judgments*. The obligation has long been understood as having little or no bearing on laws.<sup>67</sup> Moreover, the Clause imposes on the forum an obligation to *a sister state*, not to the forum itself. In other words, the Clause requires that the judgment of a sister state be recognized and enforced at the forum state. Further, the Clause empowers Congress to determine the extent of that obligation.<sup>68</sup> Congress has enacted the Full Faith and Credit Act, which provides that the scope of a judgment is determined by the law of the judgment-rendering state.<sup>69</sup> Nothing in the Full Faith and Credit Clause, or its implementing statute, requires a court to apply another state's laws, and certainly nothing in these measures requires a state to apply its own law.<sup>70</sup>

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65. See *Mitchell v. Franchise Tax Bd.*, 183 Cal. App. 3d 1133 (1986). In the *Franchise Tax Board* litigation in Nevada, the California Tort Claims Act, CAL. GOV'T CODE §§ 800–810.8, 900–998.3 (West 2012), may have been misunderstood among the welter of the Code's various exceptions and immunity provisions. The statutory scheme involves exceptions to exceptions and contains special immunities in tax cases. My reading is that the taxing agency, Franchise Tax Board, as an arm of the state, and the State of California itself, are each immune to judicial adjudication of disputes concerning the tax itself and its computation. Litigation over the tax and its computation is confided to the agency. See CAL. GOV'T CODE ANN. § 860.2 (West 2012). But for *torts* by tax officials, having nothing to do with their calculation of taxes owed, the California Tort Claims Act governs. CAL. GOV'T CODE §§ 800–810.8 (West 2012). Under this provision, California immunizes its officials, waives its own immunity, appears, defends, and pays any judgment.

66. Nev. Rev. Stat. §§ 41.031–.970 (2019).

67. On the inapplicability of the Full Faith and Credit Clause to laws (as opposed to judgments), see Justice O'Connor's clarification of the point and Justice Stone's view, *infra* note 76. See also Chief Justice Roberts to the same effect, *infra* note 89. For the classic exposition of the position that nothing need displace the forum's own policies, see *Fauntleroy v. Lum*, 210 U.S. 230 (1908) (Holmes, J.).

68. U.S. CONST. art IV.

69. 28 U.S.C. § 1738. For the early history and evolution of the Full Faith and Credit statute, before and after the initial Act of 1790, see the excellent study in Stephen E. Sachs, *Full Faith and Credit in the Early Congress*, 95 VA. L. REV. 1201 (2009).

70. See *Alaska Packers Ass'n v. Indus. Accident Comm'n*, 294 U.S. 532, 547 (1935); *Pac. Emp. Ins. Co. v. Indus. Accident Comm'n*, 306 U.S. 493, 501 (1939).

But by the time *Franchise Tax Board* reached the United States Supreme Court, California was not only making its spurious argument under the Full Faith and Credit Clause but also attacking *Nevada v. Hall*, arguing that a state should not be permitted to haul a sister state into its courts. In 2003, in *Franchise I*, the Supreme Court sustained Nevada's jurisdiction and remanded the case for trial.<sup>71</sup> On this point of jurisdiction, Justice O'Connor's *Franchise I* opinion for a unanimous Court was based on *Nevada v. Hall*.<sup>72</sup>

California argued, in the alternative, that *Nevada v. Hall* could be distinguished—that a tax audit, being part of tax collection, is a “core sovereign function” and that this distinguished the case from *Nevada v. Hall*.<sup>73</sup> In oral argument, Justice O'Connor wondered whether driving a car on official business might be a “core sovereign function” just as well as conducting a tax audit.<sup>74</sup> Justice O'Connor could have been helped here by recognizing that the act of driving a state car recklessly, however “core” a “sovereign function,” cannot be pleaded as though negligent driving were unconstitutional. At least since the days of the Burger Court, a pleading of a constitutional tort requires an allegation of intentionality.<sup>75</sup> Moreover, the defendant in a constitutional case must be an *official*, rather than an ordinary worker, an official with a power of *governmental action* in some degree, and the official's breach must be a breach of *a constitutional duty*. Bad driving by a government worker is not unconstitutional, whereas intentional mistreatment by a government official is.

In her opinion for the Court, Justice O'Connor also declined the invitation to “balance” competing state interests under the Full Faith and Credit Clause in order to impose a particular state's law on any case.<sup>76</sup>

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71. *Franchise I*, 538 U.S. 488 (2003) (holding that, under *Nevada v. Hall*, Nevada could take jurisdiction over California, and nothing in the Full Faith and Credit Clause compelled Nevada to give California the benefit of Nevada's \$25,000 cap on Nevada's own waiver of sovereign immunity).

72. *Id.* at 497. Among the other distinctions of Justice O'Connor's opinion was her refined understanding of the immunity tangle confronting the Nevada Supreme Court. She wrote, “The Nevada Supreme Court sensitively applied comity principles with a healthy regard for California's sovereign status, relying on the contours of Nevada's own sovereign immunity from suit as a benchmark for its analysis.” *Id.* at 499.

73. Transcript of Oral Argument at 5–6, *Franchise I*, 538 U.S. 488 (No. 02-42), 2003 WL 439743.

74. *Franchise I*, 538 U.S. at 498.

75. See *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252 (1977) (holding that a zoning ordinance with a discriminatory effect was not unconstitutional because there was no showing of discriminatory intent).

76. As Justice O'Connor pointed out, the Court had long ago “abandoned the balancing-of-interests approach to [a] conflict[] of law[s] under the Full Faith and Credit Clause.” *Franchise I*, 538 U.S. at 496 (citing *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 308 n.10 (1981) (plurality opinion); *Pac. Emps. Ins. Co. v. Indus. Accident Comm'n.*, 306 U.S. 493, 501



The Nevada jury awarded Hyatt damages of nearly \$500 million. Yes, a half-billion dollars. Nevada's high court threw cold water on such enthusiasm. By the time the Nevada high court was through with the case, the jury's award was reduced to a less unreasonable \$1 million. The Nevada high court ruled that Hyatt had no legitimate expectation of privacy in certain features of the tax audit at issue, so damages for invasion of privacy were wiped out. In addition, there could be no recovery for mere negligence; the case was one of intentional tort. So the damages for negligence were wiped out. And in the interest of comity, the Nevada Supreme Court chose (in my view, properly) not to approve punitive damages.<sup>77</sup>

I pause to note that prohibition of punitive damages is the general rule in cases against a government.<sup>78</sup> For what it is worth, however, I should add that Congress specifically provides for punitive damages against the Internal Revenue Service for deliberate or reckless disclosures of private information.<sup>79</sup> And in Hyatt's case, there was such a claim, which was also disallowed by the Nevada Supreme Court.<sup>80</sup> The Nevada high court also suspended further consideration of Hyatt's chief claim, intentional infliction of emo-

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(1939); *Phillips Petrol. Co. v. Shutts*, 472 U.S. 797, 818–19 (1985)). Indeed, ever since 1935 it has been clear that there can be no obligation of full faith and credit to laws. The only obligation is to judgments. *See Alaska Packers*, 294 U.S. at 547 (Stone, J.) (“A rigid and literal enforcement of the Full Faith and Credit Clause, without regard to the statute of the forum, would lead to the absurd result that, wherever the conflict arises, the statute of each state must be enforced in the courts of the other, but cannot be in its own.”).

77. *Franchise Tax Bd. v. Hyatt*, 130 Nev. 662, 705 n.19 (2014) (denying punitive damages).

78. I note that the Foreign Sovereign Immunities Act, as amended, 28 U.S.C. §§ 1330, 1332, 1391(f), 1441(d), 1602–1611, makes an appropriate exception to the rule against punitive damages in suits against government. The exception approves punitive damages against foreign state supporters of terrorism. 28 U.S.C. § 1605A; *see infra* notes 114, 151, 225. Apart from that anti-terrorism exception, the more general rule of the Act provides that

a foreign state except for an agency or instrumentality thereof shall not be liable for punitive damages; if, however, in any case wherein death was caused, the law of the place where the action or omission occurred provides, or has been construed to provide, for damages only punitive in nature, the foreign state shall be liable for actual or compensatory damages measured by the pecuniary injuries resulting from such death which were incurred by the persons for whose benefit the action was brought.

28 U.S.C. § 1606. The Federal Tort Claims Act provides that “The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment *or for punitive damages*.” 28 U.S.C. § 2674 (emphasis added). Punitive damages are unavailable in actions against cities. *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 268 (1981).

79. 26 U.S.C. § 7431(c)(1)(B)(ii).

80. Hyatt's allegation of “fraud” involved assurances of confidentiality by the California auditors, assurances on which he relied in supplying certain information. *Franchise Tax Bd.*, 130 Nev. at 669–70. Hyatt alleged that the California agents deceived him and that they “shared his personal information not only with newspapers but also with his business contacts and even his place of worship.” *Franchise II*, 136 S. Ct. 1277, 1284 (2016).

tional distress, mandating that on remand it be sent to the jury on corrected instructions.

Most remaining damages were remittitured, bringing recovery down to that more plausible million.<sup>81</sup> What turned out to be important in all this was the Nevada high court's instruction to the trial court that it need not give California the benefit of Nevada's cap on its waiver of immunity<sup>82</sup>—now amended to the still-less-than-handsome figure of \$50,000. This instruction, in my view, was quite sound. To apply the Nevada legislature's protection for Nevada to every other state in the Union would take the cap outside its rational scope, and in this case would needlessly impede effectuation of Nevada's tort policies as the place of wrongful conduct and injury.

Once again, California sought review in the United States Supreme Court. In this 2016 phase of the litigation (*Franchise II*), the eight-Justice Supreme Court<sup>83</sup> split 4:4 on the question whether to overrule *Nevada v. Hall* and, thus, sustained Nevada's jurisdiction.<sup>84</sup> But in a strange opinion for the Court, Justice Breyer ruled, apparently for the first time in American legal history, that a state is required to give full faith and credit to *its own law*.<sup>85</sup> And thus, Nevada was required, irrationally, to give California the benefit of Nevada's own cap on Nevada's own waiver of Nevada's own immunity. This limited *California's* liability to \$50,000.

Justice Breyer evidently was encouraged in his novel view of the Full Faith and Credit Clause by his perception of "hostility" on the part of the Nevada courts.<sup>86</sup> For this "hostility" point, Justice Breyer

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81. *Franchise Tax Bd.*, 130 Nev. at 669. In 2015, in oral argument in *Franchise II*, Justice Sotomayor stated that recovery was then down to "\$100,000" (query whether she meant to refer to the \$1 million remaining in the case at that time, or whether the Court had been apprised that a settlement might have been reached in such an amount, or was under some misapprehension). Justice Sotomayor suggested that that sum was for "the attorneys." Transcript of Oral Argument at 23, *Franchise II*, 136 S. Ct. 1277 (No. 14-1175), 2015 WL 9304859.

82. See *Franchise II*, 136 S. Ct. at 1280.

83. On the eight-justice Court, see *supra* notes 17, 20 and accompanying text.

84. *Franchise II*, 136 S. Ct. at 1283. I note that, somewhat surprisingly, the Justices have been shifting back in forth in their views of these cases. Back in 1979, the liberal Justices had supported *Nevada v. Hall*, while three of the conservatives dissented. Both wings of the Court fell in with the unanimous opinion in 2003 in *Franchise I*. But in 2016, in *Franchise II*, the liberals joined Justice Breyer's opinion requiring Nevada to give California the benefit of Nevada's \$50,000 cap on its waiver of immunity and finding "hostility" in the Nevada Supreme Court's correct instruction to the court below not to apply the \$50,000 cap. And the conservatives in 2016 were supportive of *Nevada v. Hall*, except for Justice Alito, who concurred in the judgment.

85. *Franchise II*, 136 S. Ct. at 1280–81 (Breyer, J.) (holding that the Full Faith and Credit Clause required Nevada to apply its own law).

86. *Id.* at 1281 (Breyer, J.) (noting "hostility" in the Nevada courts).

cited the old case of *Carroll v. Lanza*.<sup>87</sup> The Court in *Carroll v. Lanza* had casually remarked that, in the presence of hostility, the forum might be required to apply a sister state's law as well as to recognize its judgments.<sup>88</sup> The Court in *Lanza* did not say that in the presence of hostility a court could be required to apply *its own* law. *Lanza* did not require a state to do anything against its own policies and interests. To these clear understandings there is one vital exception—that a state must recognize and enforce the judgment of a sister state.<sup>89</sup> There is no obligation to enforce sister state laws.<sup>90</sup>

Lawyers continue to argue for nonforum law under the Full Faith and Credit Clause, and the Court does not bother to correct them, but the Court will not apply the Full Faith and Credit Clause to resolve a conflict of laws. For the latter purpose, the Court will consult only what the Due Process Clause requires.<sup>91</sup> The modern position, under the Due Process Clause, is that the law applied must be rational as to its source as well as its content<sup>92</sup>—that is, the law applied must be that of a state with a legitimate governmental interest in the application on the particular facts. There is no constitutional requirement that, in a two-state case, an interested forum apply the other state's law, even if the other state is also, on the particular facts, an interested one. As Justice (later Chief Justice<sup>93</sup>) Stone explained way back in 1938 in the *Alaska Packers* case,<sup>94</sup>

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87. 349 U.S. 408 (1955) (Douglas, J.) (mentioning “hostility” as a possible exception to the obligation of full faith and credit. *Id.* at 413. But the Court found no hostility in that case. “[T]he State of the forum, is not adopting any policy of hostility to the public Acts of Missouri. It is choosing to apply its own rule of law to give affirmative relief for an action arising within its borders.” *Id.*

88. *Id.*

89. As Chief Justice Roberts pointed out, dissenting in *Franchise II* on the issue of full faith and credit, the full faith and credit obligation is an obligation *to a sister state*, not to the forum state itself. *Id.* at 1284; U.S. CONST. art. IV, § 1. In the Supreme Court, the Full Faith and Credit Clause is resignedly applied to laws when lawyers argue it on a choice-of-law point, but only to the extent that the Due Process Clause would require. Choice of law has long been solely under due process control since the 1930s. What due process requires in a choice of law is a rational basis—a legitimate governmental interest. The interested forum need never bow to another interested state's laws. See *Alaska Packers Ass'n v. Indus. Accident Comm'n*, 294 U.S. 532, 547 (1935). See also leading cases to the same effect under both the Due Process and Full Faith and Credit Clauses, *infra* note 91. The full faith and credit obligation is to judgments, not laws. 136 S. Ct. at 1283–84 (Roberts, C.J., dissenting).

90. *Franchise II*, 136 S. Ct. at 1283–84 (Roberts, C.J., dissenting).

91. See *Phillips Petrol. Co. v. Shutts*, 472 U.S. 797, 818, 823 (1985); *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 312–13 (1981); *Pac. Emp. Ins. Co. v. Indus. Accident Comm'n*, 306 U.S. 493, 501 (1939); *Alaska Packers Ass'n*, 294 U.S. at 547.

92. For the foundational case on the due process requirement of rationality in choices of law, see *Home Insurance Co. v. Dick*, 281 U.S. 397 (1930) (Brandeis, J.). A similar perspective on *Erie v. Tompkins*, 304 U.S. 64 (1938) (Brandeis, J.), is offered in Louise Weinberg, *A General Theory of Governance: Due Process and Lawmaking Power*, 54 WM. & MARY L. REV. 1057 (2013).

93. Justice Harlan Fiske Stone was appointed Chief Justice, with the consent of the Senate, by President Franklin Delano Roosevelt in 1941. Stone served as Chief Justice until his death in 1946. *Harlan Fiske Stone*, BRITANNICA, <https://www.britannica.com/biography>

to hold otherwise would produce the “absurd” result that in every two-state case the forum must apply the law of the other state but never its own.<sup>95</sup>

Perhaps Justice Breyer (understandably) was shocked by the amount of the jury’s original half-billion dollar award to Hyatt. Perhaps Justice Breyer simply did not believe the allegations of the complaint, the jury verdict to the contrary notwithstanding. Perhaps he reacted negatively to Mr. Hyatt’s move to Nevada in obvious tax avoidance. But tax avoidance is legal, after all. And the right to move to another state surely is a cherished freedom our federalism affords all Americans. It is reflected in our “right to travel”—a right held to be protected by the Privileges and Immunities Clause of Article IV.<sup>96</sup>

So it was that, as far as damages are concerned, the Court’s liberals in *Franchise II* wound up favoring an abusive agency over an individual<sup>97</sup> whose peace the agency had intentionally destroyed. But at least *Nevada v. Hall* was intact—the 4:4 split in the Court meant that *Nevada v. Hall* was let stand.<sup>98</sup>

In the final act in the drama, in *Franchise III*, the curtain opened on California doggedly fighting on to wipe out the last \$50,000 of Mr. Hyatt’s jury award. At stake was not only the bare justice afforded Mr. Hyatt on the facts of outrageous government misconduct as found by a jury. At stake also were the remedial mechanisms that *Nevada v. Hall* and *Franchise I* had made available. If *Nevada v. Hall* fell, *Franchise I* would fall with it.

But now, in *Franchise III*, the Full Faith and Credit Clause was no longer available to California. The Full Faith and Credit Clause had furnished California’s constitutional argument in *Franchise I* in

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/Harlan-Fiske-Stone [<https://perma.cc/T4TV-ZAYW>]; LOUISE WEINBERG, *FEDERAL COURTS: CASES AND COMMENTS ON JUDICIAL FEDERALISM AND JUDICIAL POWER* (1994), Table of the Justices, app. F, at F-1.

94. *Alaska Packers Ass’n*, 294 U.S. at 547. This language was later quoted by Chief Justice Roberts in his dissenting opinion in *Franchise II*. 136 S. Ct. at 1285 (Roberts, C.J., dissenting).

95. *Alaska Packers Ass’n*, 294 U.S. at 547; see also, e.g., *Pac. Emps.*, 306 U.S. 493 (1939); cases cited *supra* notes 76, 88–92, 94.

96. U.S. CONST. art. IV § 2; *Saenz v. Roe*, 526 U.S. 489 (1999); *Zobel v. Williams*, 457 U.S. 55 (1982); cf. *Angel v. Bullington*, 330 U.S. 183, 188 (1947).

97. This is not the first time the Court’s liberals have been protective of an abusive federal agency. One thinks, for example, of the regrettable case of *Astrue v. Capato*, 566 U.S. 541 (2012) (Ginsburg, J., for a unanimous Court) (denying dependent children access to their Social Security support, in effect because they were born *in vitro*). In denying support to the children, the unanimous *Astrue* Court impoverished the entire family, in the teeth of the purposes of the legislation, enacted in the second trough of the Great Depression in 1938. For a possible explanation for the liberals’ occasional tolerance of illiberal outcomes, see *infra* Part IX.

98. Justice Alito concurred without opinion.

2003,<sup>99</sup> and that argument had been victorious in *Franchise II*.<sup>100</sup> The Supreme Court had given California's tax agency all it had so implausibly asked for. There was nothing more that the Supreme Court could do for California in *Franchise III* under the Full Faith and Credit Clause.

However, California's actual question had always been the question whether one state could take jurisdiction over another. In *Franchise III*, California simply raised the question directly. There was nothing in the Constitution that seemed to answer that question, yet some federal question was needed to gain Supreme Court review once more. In its petition for *certiorari* in *Franchise III*, California adroitly posed the question as: whether *Nevada v. Hall* should be overruled.<sup>101</sup> California had succeeded finally in raising the real question the earlier iterations of the case had attempted to raise. That is, should one state be allowed to take jurisdiction over another?

Justice Thomas, writing for a slim conservative majority in *Franchise III* and under the necessity of explaining why the Court's answer was "No," was in the same quandary in which California's legal team had found itself. The Court could not overrule *Nevada v. Hall* without finding some reason for doing so in the Constitution, preferably, or in some federal statute. With full faith and credit out of the case, Thomas needed to find some other ground for the Court's decision. He could not rely on the Fourteenth Amendment and the Due Process Clause, not in this case. A defendant is not denied due process simply because he comes within the jurisdiction of a court. A defendant state that has waived immunity cannot credibly argue that jurisdiction over it, and nothing more, violates the Due Process Clause. At all events, the unvarnished question of *state immunity* in *state-law* cases in *state courts* would seem to be reserved to the states, within the meaning of the Tenth Amendment, since the Constitution nowhere delegates it to the nation.<sup>102</sup> As Justice Breyer would point out, dissenting in *Franchise III* (in some

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99. *Franchise I*, 538 U.S. 488, 499 (2003).

100. *Nevada v. Hall*, 440 U.S. 410, 411 (1979). Full faith and credit is owed to judgments, not laws. Lawyers often get this wrong, but the Court traditionally decides questions so argued by considering the rational bases—governmental interests—supporting the choice of law, exactly as it would decide them under the Due Process Clause. The forum is always free to apply its own law and policy, but due process requires that the application be within the law's rational scope. Nevada's waiver of immunity up to the amount of its statutory cap cannot waive any other state's immunity or cap any other state's waiver. Construction of law, as well as choice of law, as well as application of law—all must be rational. See Louise Weinberg, *A General Theory of Governance: Due Process and Lawmaking Power*, 54 WM. & MARY L. REV. 1057 (2013).

101. Petition for Writ of Certiorari, *Franchise II*, 136 S. Ct. 1277 (2016) (No. 14-1175), 2015 WL 1346455.

102. U.S. CONST. amend. X.

tension with his views in *Franchise II*), “Compelling states to grant immunity to their sister states would risk interfering with sovereign rights that the Tenth Amendment leaves to the states.”<sup>103</sup>

With no constitutional texts on which to draw, what was left to Justice Thomas was the massive body of Supreme Court cases expanding state sovereign immunity. He had at his disposal the researches and arguments made in those prior cases. We will have a closer look at his opinion shortly. Here, it is sufficient to say that Justice Thomas held, for the Court, that *Nevada v. Hall* was overruled, and that the Constitution requires every state court to bow to the immunity of every other state.<sup>104</sup>

In August 2019, *Franchise III* was back in the Nevada courts. In view of the overrule of *Nevada v. Hall*, the Nevada Supreme Court had no alternative. It remanded the case to the court below for vacatement of Mr. Hyatt’s judgment.<sup>105</sup>

## II. CONSTITUTIONAL TORT AND ORDINARY TORT: TWO DIFFERENT WRONGS, TWO DIFFERENT REMEDIES

It will be helpful here to limn out the two novel, serviceable, but very different remedial mechanisms deployed by the trial courts in our two cases.

We have seen that, in the *Franchise Tax Board* litigation, the Supreme Court had before it a case very different from the case of *Nevada v. Hall*. It is not the only salient difference between them that *Franchise Tax Board* grew out of a “core sovereign function,”<sup>106</sup> a tax audit, while *Nevada v. Hall* grew out of a two-car collision, a road accident. An equally important distinction between the two is the fact that the tort in *Franchise Tax Board*, unlike the tort in *Nevada v. Hall*, was *intentional*. Deliberate misconduct by a government official, when causing injury or threatening to cause it, in my view is unconstitutional.<sup>107</sup> Furthermore, in *Nevada v. Hall* the offending driver was a *worker*, with some quotidian job to do, whereas in *Franchise Tax Board*, the offending auditors were *officials*, capable of governmental action. The case against the worker will be for some

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103. Dean Chemerinsky raised the point in oral argument, but it met with no particular interest. Transcript of Oral Argument at 28, 31, *Franchise III*, 139 S. Ct. 1485 (2019) (No. 17-1299), 2019 WL 144815.

104. *Franchise III*, 139 U.S. at 1498 (Thomas, J.) (ruling that “[t]he Constitution implicitly strips States of any power they once had to refuse each other sovereign immunity”).

105. *Franchise Tax Bd. v. Hyatt*, 445 P.3d 1250 (Nev. 2019) (unpublished disposition).

106. See *Franchise I*, 538 U.S. 488, 496 (2003) (noting that a tax audit might not qualify as a “core sovereign function” when it was as abusive as Hyatt’s).

107. *But see, e.g.*, *Paul v. Davis*, 424 U.S. 693 (1976), *supra* note 61 and accompanying text.

common-law tort, but the case against the official, when for intentional injurious misgovernance, can be pleaded as a breach of constitutional duty.

These differences suggest that the remedial options the Court struck down as unconstitutional in *Franchise III*<sup>108</sup> had been usefully closing not one but two different remedial gaps of some consequence in our adjudicatory system. These would have furnished forums for litigation of the interstate torts of government workers and the intentional interstate torts of government officials, respectively. The former is generally pleadable under state common law; the latter is generally pleadable under the Constitution.

The two cases did share valuable features. In both cases, state law had immunized the state employee, protecting her from damages that she could not pay. In both cases, state statutes immunized the state's employees and *waived* state immunity. And in both cases, the state itself appeared and defended. In both cases the courts were familiar with such arrangements and comfortable with them. The reader will recognize at once the typical workings of tort claims acts.

#### A. Nevada v. Hall: A Non-Federal Interstate Tort Claims "Act" at Common Law

With *Nevada v. Hall*, interstate government torts in cases of personal injury, previously in a legal no-man's-land, became *actionable*. This was a great achievement of the common law. Utilizing state common law, *Nevada v. Hall* was functioning, in effect, as an *interstate non-federal tort claims "act" at common law*, analogous to the Federal Tort Claims Act<sup>109</sup> and like typical "little" state tort claims acts.<sup>110</sup>

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108. *Franchise III*, 139 S. Ct. at 1490 (2019) (Thomas, J.) ("This case, now before us for the third time, requires us to decide whether *the Constitution permits* a state to be sued by a private party without its consent in the courts of a different state. We hold that it does not and overrule our decision to the contrary in *Nevada v. Hall*." (emphasis added and citation omitted)).

109. 28 U.S.C. § 1346(b).

110. For a useful chart describing the parameters of state tort liability for each of the 50 states, see *State Sovereign Immunity and Tort Liability in All 50 States*, MATTHIESEN, WICKERT & LEHRER, S.C. (Apr. 25, 2019), <https://www.mwl-law.com/wp-content/uploads/2018/02/STATE-SOVEREIGN-IMMUNITY-AND-TORT-LIABILITY-CHART.pdf> [<https://perma.cc/QT97-M64D>]. The foregoing chart, though quite comprehensive and detailed, is nevertheless limited in an important way. It often happens that a statute of immunity contains a clause that excepts the provisions of other legislation. It is often in this other legislation that state liability is made plain. On the other hand, the chart's inclusion of caps on damages also will reveal the fact of liability, where the statutory scheme, at first examination, appears to be one of immunity. Assuming the correctness and currency of the chart, apparently

A tort claims act usually protects government workers, immunizing from liability a government employee who has committed an ordinary tort when acting within the scope of her employment. State mail-room clerks, truck drivers, and secretaries cannot easily pay damages. When a claim against such a worker is for personal injuries or wrongful death, the sums involved cannot be collected as a practical matter. Such workers are substantially judgment-proof. It would be a nightmare for them to be made judgment debtors, in effect for life, or to have to seek relief in bankruptcy. Nor can workers do their jobs very well if stressed by having to mount a defense they cannot afford and by the threat of a judgment for damages they cannot pay. A tort claims act protects the government worker from all of this, remitting her, for any discipline or penalty, to the internal affairs desk of her office. The government, in effect, acknowledges its responsibility of supervision and training and, in turn, is encouraged to exercise those powers more effectually.

Even when a state statute will permit suits against state employees for their ordinary torts in the course of their employment, the state typically will indemnify the employee,<sup>111</sup> or it will provide course-of-employment liability insurance. Insurance can insulate a state from fully absorbing the costs of a particular accident and avoids letting the risk fall on the low-paid employee, which, as a practical matter, will actually fall on the injured party. The costs of insurance are spread across the public in a state's current budget. The insurance company settles and, when necessary, comes in and defends.

The wisdom of such mechanisms becomes even plainer as one recognizes that, in this way, access to courts and to justice is provided—the injured party is given a chance to prove her case. Yet, even if she succeeds, she is afforded only the same rights—or almost the same rights—that she would have had in a similar action against a private defendant.<sup>112</sup> Thus, the costs of her own injury will

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some twenty-nine states have tort claims acts with varying limits and qualifications. Almost all remaining states appear to have functionally equivalent remedial mechanisms.

111. See, e.g., Joanna C. Schwartz, *Police Indemnification*, 89 N.Y.U. L. REV. 885, 885 (2014) (concluding that “[g]overnments paid approximately 99.98% of the dollars that plaintiffs recovered in lawsuits alleging civil rights violations by law enforcement”).

112. The important paradigm is provided by the Federal Tort Claims Act, which requires application of the law of the *state* where the wrongful *act or omission* occurred. 28 U.S.C. § 1346(b). This was Congress's attempt to ensure that a plaintiff under the Act would have the same rights under state law as she would have enjoyed in an action against a private defendant. By use of the word “state,” an exception was made for cases that otherwise would have been governed by foreign law; accidents abroad are not covered. This exception is now codified by the Westfall Act, 28 U.S.C. § 2680(k). At the time of the original enactment of the Federal Tort Claims Act, every state in the Union applied the law of the place of injury to a tort claim. That might not be the same as the place of “act or omission,” the law of which is



not fall on the plaintiff and her innocent dependents as they would in the absence of a tort claims act. In some cases costs would also be borne by unpaid medical services or local charities. Such dysfunction would be the consequence of an attempt to impose liability on a state wage worker in the absence of a tort claims act. The states typically achieve more orderly, commonsense management of their employees' torts. Under a typical tort claims act, the state itself, waiving its formal immunity, settles the claim or comes in and defends and pays any judgment.<sup>113</sup> The plaintiff has her day in court and her chance to be compensated in damages for her injury. This is the needed mechanism *Nevada v. Hall* was supplying in cases of interstate government tort, cases in which the injurer was a nonresident government worker.

What about runaway juries? In the analogous statutory schemes, a runaway jury is constrained by the typical proscription of punitive damages against government.<sup>114</sup> Some of the relevant statutes further limit damages to economic losses only or to "actual" damages, which can be defined to eliminate grief or suffering.

The mechanism of a tort claims act has clearly proved its worth. Twenty-nine states,<sup>115</sup> California<sup>116</sup> and Nevada<sup>117</sup> among them, have enacted their own tort claims acts. Neither statute was applicable in these cases. The home state is under no duty to apply the other state's law, and the home state's law is inapplicable to the other state's workers. In *Nevada v. Hall*, California's tort claims act was a

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required by the statute. Thus, a statute intended to treat the victim of a federal worker's tort exactly the way she would be treated in an ordinary state-law case, was turning out, in a two-state case, to shunt her case into some other state's law. The Supreme Court straightened this out in *Richards v. United States*, 369 U.S. 1 (1962) (holding artfully that Congress's reference to the state of wrongful act or omission was a reference to that state's whole law, *including its choice rules*). This *renvoi* got the statute back to the place of injury. The default position under the proposed Restatement (Third) of Conflict of Laws is the place of conduct, not necessarily the place of injury. It is a plausible choice, and the better choice from a regulatory point of view; but if widely adopted it will undo the benefit of *Richards*, to the extent courts still are applying the place-of-injury rule, in securing the same rights to the federal plaintiff that she would have enjoyed under state law—as Congress intended. Notwithstanding the complexities of modern approaches to choice of law in tort cases, it seems fair to say that, for better or worse, the law of the place of injury remains the predominant choice.

113. Thus, tort claims acts are a roundabout way of providing *respondeat superior* against government, when case law has balked it. For a fine recognition of this situation and a recommendation that *respondeat superior* be restored outright to defeat government immunity, see Richard H. Fallon, Jr., *Bidding Farewell to Constitutional Torts*, 107 CALIF. L. REV. 933 (2019).

114. For statutory shielding of sovereign entities from punitive damages, see Federal Tort Claims Act, 28 U.S.C. § 2674, proscribing punitive damages; Foreign Sovereign Immunities Act, 28 U.S.C. § 1606, same; and compare *Franchise Tax Bd. v. Hyatt*, 335 P.3d 125, 131 (Nev. 2014), in action defended by the state of California, state supreme court in another state disallowing punitive damages in the interest of "comity."

115. On the 29 states, see *supra* note 110 and accompanying text.

116. CAL. GOV'T. CODE §§ 810–996.

117. NEV. REV. STAT. §§ 41.010–41.970 (2019).

regulation of California employees and did not apply to Nevada's employee. California's waiver of sovereign immunity could not rationally be construed to insulate Nevada from liability. Similarly, in *Franchise Tax Board*, Nevada's immunity rules could not apply to California and California's law was not mandatory in Nevada.<sup>118</sup> But both states' courts treated the cases in their customary way as standard tort claims act cases.

*Nevada v. Hall*, then, was providing an obviously useful and even necessary adjunct to justice, extending to the interstate case the usual methods of litigation of ordinary tort claims by government workers. It would seem to be well, from either conservative or liberal points of view, that some such commonsense path be laid for orderly administration of civil cases of this kind, in interstate as well as intrastate cases.

#### B. Franchise Tax Board: A Non-Federal Interstate Civil Rights "Act" at Common Law

With *Franchise I*, interstate *constitutional* torts, previously in a legal no-man's land, *became actionable*. I say "constitutional" because intentional injurious misconduct by a government official within the scope of her office will often be pleadable as a violation of the Constitution, although *Franchise I* was pleaded as an ordinary tort. Thus, *Franchise I* was another great achievement of the common law, one which *Nevada v. Hall* had made possible.

What about the Civil Rights Act? It is customary to plead intentional injurious misconduct by a state official under the Civil Rights Act of 1871.<sup>119</sup> True, the Supreme Court has held that a state is not a "person" within the meaning of the statute,<sup>120</sup> but that rule is a party-of-record rule only. An officer suit pleaded in the officer's individual capacity will defeat that rule.<sup>121</sup> The greater difficulty is that civil rights actions have become virtually unenforceable any-

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118. A state's legislature does not legislate for all states but only its own. A Nevada speed limit is hardly intended to apply on a California road, and Nevada's state immunity cap can hardly be bestowed on California. The Nevada Supreme Court was correct in pointing this out to the court below on remand. It explains why Justice Breyer was incorrect in finding hostility in Nevada's doing so, particularly since the same court disallowed punitive damages and threw out the bulk of ordinary damages in the case.

119. Today the substantive part of the Act is codified at 42 U.S.C. § 1983.

120. *Will v. Michigan*, 491 U.S. 58, 65–66 (1989).

121. *See, e.g., Hafer v. Melo*, 502 U.S. 21, 25–31 (1991); *Scheuer v. Rhodes*, 416 U.S. 232 (1974).

way, under such doctrines as so-called “official” or “qualified” immunity.<sup>122</sup>

Ultimately, the *Franchise Tax Board* litigation is best read as if the courts and parties in that case were applying defendant California’s tort claims act, which waived state sovereign immunity.

### C. A Background Case.

Armed with the Supreme Court’s own jurisprudence, Justice Thomas was content to take the question as posed in California’s petition for *certiorari*<sup>123</sup>—the vague but broad question *whether the Constitution permits* a state to take jurisdiction over another state. And he had, for this broad question, a surprisingly broad answer. His answer would not only upend *Nevada v. Hall* but every other case against a state—not only in a sister state but even in a state’s own courts.<sup>124</sup> After *Franchise III*, it becomes quite possible to argue that a state is protected from all litigation by federal sovereign immunity.<sup>125</sup>

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122. In the midst of world-wide protests over the killing of George Floyd, who died with an officer’s knee on his neck long after his pleas for breath had ceased, the Supreme Court, in a supreme act of disregard, on June 15, 2020, denied *certiorari* in four cases seeking reconsideration of qualified immunity. See *Qualified Immunity Cases Are Rejected*, WALL ST. J. (June 6, 2020), at A2. For an influential extensive critique of the defense of qualified immunity, see *Thompson v. Clark*, No. 14-CV-7349, 2018 WL 3128975, at \*6–13 (E.D.N.Y. 2018) (Weinstein, Sr., J.); see also the fine portfolio work of Joanna C. Schwartz, *After Qualified Immunity*, 120 COLUM. L. REV. 309 (2020); Joanna C. Schwartz, *Qualified Immunity’s Selection Effects*, 114 NW. U. L. REV. 1101 (2020); and Joanna C. Schwartz, *The Case Against Qualified Immunity*, 93 NOTRE DAME L. REV. 1797 (2018). The leading case today remains *Harlow v. Fitzgerald*, 457 U.S. 800, 815 (1982). *Harlow* departs from the earlier police defense of good faith and probable cause, ruling, rather, that a government actor is immune if a reasonable such officer could not have known that her conduct was in violation of “clearly established” law. In practice, after further development, this has come to mean that the plaintiff must find some previous precedent establishing that the same conduct was unconstitutional. But what two cases were ever the same? Worse, qualified immunity became litigable only pretrial, to save the officer the burden of meritless litigation, thus ousting the plaintiff of the right to trial by jury on the one issue that has become dispositive. All this dysfunction is attributable to the Supreme Court, fantasizing that a police officer must be spared the burdens of litigation and judgment, when in fact the defendant officer will be indemnified, or the city will waive immunity and defend instead. *But see* Daniel Epps, Opinion, *Abolishing Qualified Immunity Is Unlikely to Alter Police Behavior*, N.Y. TIMES (June 16, 2020), <https://www.nytimes.com/2020/06/16/opinion/police-qualified-immunity.html> [<https://perma.cc/JG34-T4TT>] (concluding that abolishing qualified immunity will not improve police behavior because police officers are indemnified for their liabilities in over 99% of cases).

123. For California’s petition for *certiorari*, see *supra* note 101 and accompanying text.

124. *Franchise III*, 139 S. Ct. 1485, 1490 (2019).

125. Perhaps we should not be too surprised by Thomas’s sweeping conception of state immunity. Consider the fact that suit against any *federal* official for constitutional tort has become unavailable as a practical matter. In effect, there seems to be immunity—impunity, in fact—for federal officials violation the Constitution. It has been decades since the Supreme Court has approved a *Bivens* suit. *Bivens v. Six Unknown Named Agents of the Fed. Bureau of Narcotics*, 403 U.S. 388 (1971) (making cognizable at common law a suit against a

Lurking in the background for Justice Thomas was the Court's seriously wrong 1999 decision in *Alden v. Maine*.<sup>126</sup> That case made legal history by extending federal sovereign immunity to a state in *its own courts*, thus blocking state enforcement of an act of Congress, as well as flouting the Supremacy Clause, contradicting state statutory waivers of immunity, and earning "the condemnation and resistance of scholars."<sup>127</sup> The Court did this for the purpose of saving the states from having to conform to federal labor law, thus stripping state government workers of those protections—such as the minimum wage, maximum hours, and safe and healthful working conditions. In order to accomplish this, the *Alden* Court, in effect, extended its untethered jurisprudence on the Eleventh Amendment to state courts.

Specifically, *Alden* licensed a state to withhold its own workers' pay for work that the state had required them to perform after hours. This wage theft was a violation of the Fair Labor Standards Act<sup>128</sup> and the Supremacy Clause. How could wage theft be a legitimate state interest? How could a state's disregard of an act of Congress and the Supremacy Clause be lawful? How could it be sound policy to permit a state to strip its workers of the protections of federal labor law for the few personal hours their job leaves to them to enjoy? The employer may pitilessly demand overtime labor

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federal official to enforce the Constitution). *Bivens* is the federal analog to the Civil Rights Act of 1871, codified as amended, at 28 U.S.C. § 1983. This last term, in *Hernandez v. Mesa*, 140 S. Ct. 735, 750 (2020), the Supreme Court refused to furnish a *Bivens* remedy for the deliberate killing of a Mexican boy cowering behind a pillar on the Mexican side of the border, by a United States border patrol officer shooting from the American side. This, notwithstanding its approval, decades earlier, of a *Bivens* action for survival (and, by implication, wrongful death), in *Carlson v. Green*, 446 U.S. 14 (1980). See also *Moragne v. States Marine Lines*, 398 U.S. 375 (1970) (holding wrongful death cognizable in admiralty, perhaps the first non-statutory action for wrongful death in American legal history). Instead, the *Hernandez* Court held that the Mexican family could not have access to *Bivens* because "special factors counsel[ed] hesitation." Cf. *Bivens*, 402 U.S. at 396 (Brennan, J.) (noting in passing that *Bivens* presented no "special factors counseling hesitation"). This casual remark has mushroomed into an all-purpose defense that invariably defeats a *Bivens* action when it gets to the Supreme Court. Chief among the irrational arguments brought to bear on *Hernandez v. Mesa* was the argument that to allow the Mexican family to sue could cause friction in our foreign relations, and thus the case had to be confided to the executive branch. This, although Mexico had filed a brief urging that the family be allowed to sue in the United States. Brief of the Government of the United Mexican States as Amicus Curiae in Support of the Petitioners, 140 S. Ct. 735 (No. 17-1678), 2019 WL 3776030. As for confiding such a case to the executive branch, consider that there had been a refusal to prosecute officer Mesa and then a refusal to extradite him. *Hernandez*, 140 S. Ct. at 755 (stating that prosecution had been declined); *id.* at 740 (stating that Mexico's request for extradition had been denied).

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

127. Vicki C. Jackson, *Principle and Compromise in Constitutional Adjudication: The Eleventh Amendment and State Sovereign Immunity*, 75 NOTRE DAME L. REV. 953, 953 (2000); see also Suzanna Sherry, *States Are People Too*, 75 NOTRE DAME L. REV. 1121 (2000); Louise Weinberg, *Of Sovereignty and Union: The Legends of Alden*, 76 NOTRE DAME L. REV. 1113 (2001).

128. 29 U.S.C. § 207.

for all of a worker's waking hours and more. But the law provides that the employer must pay for such a demand. The statutory wage is time-and-a-half for overtime.<sup>129</sup> It was this essential protection, worked for and earned, that, in *Alden*, Maine was held free to deny its overworked probation officers.<sup>130</sup> Of course, in light of the Supremacy Clause, state-law immunity could not furnish a defense to a federal claim in either set of courts. This was *federal* sovereign immunity for a state.

In *Franchise III*, *Alden* was lighting the path for Justice Thomas. He could see his way clear, relying on the federalized sovereign immunity in federal cases in federal courts (tracing back to the leading case of *Hans v. Louisiana*), to applying that immunity in state courts, following the path marked out by *Alden v. Maine*, even when that path now led to a state-law case. Ironically, however, Justice Thomas could not rely on *Alden*, notwithstanding its novel bestowal of federal immunity in a case against a state in its own courts. He could not rely on *Alden* because the *Alden* Court had specifically *saved Nevada v. Hall*. Justice Kennedy, writing for the *Alden* Court, had distinguished trial in the courts of another state from trial in a state's own courts.<sup>131</sup>

Nor was there anything in the Constitution that answered the question posed. Justice Thomas could only refer vaguely to "the Constitution," without pointing to any particular constitutional clause, and without referring to *Alden* as a precedent, to bestow on state government defendants the new federal sovereign immunity first seen in *Alden*. In *Franchise III*, however, this is not only a federal immunity in state courts, but also, for the first time in American legal history, a federal immunity in state courts *in state-law cases*. And this new immunity is held to be constitutionally required—although not by anything in the text of the Constitution.<sup>132</sup>

Notwithstanding the interesting unavailability of *Alden v. Maine* for Justice Thomas's use in *Franchise III*, *Franchise III* is best understood, I think, as flowing from *Alden v. Maine*.<sup>133</sup> *Alden* shields states

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129. *Id.*

130. *Alden v. State*, No. CV-96-751, 1997 WL 34981639 (Me. Super. 1997), *aff'd*, 527 U.S. 706 (1999) (stating the approximate number of named plaintiffs as 65). The class itself of course would have been considerably larger.

131. *Alden*, 527 U.S. at 738–39 (Kennedy, J.) ("Our opinion in *Hall* did distinguish a State's immunity from suit in federal court from its immunity in the courts of other States; it did not, however, address or consider any differences between a State's sovereign immunity in federal court and in its own courts."). For international understandings of a sovereign's immunity *vel non* in the courts of another sovereign, as well as analogous federal law on the point, *infra* Sections III.A.2, III.C.1. For the views of the American Law Institute on the point, *see infra* note 151 and accompanying text.

132. For Justice Thomas's arguments, *see infra* Section III.A.

133. *Alden*, 527 U.S. at 712 (notoriously holding, notwithstanding the Fair Labor Standards Act's provision of time-and-a-half pay for overtime work, 29 U.S.C. § 207, that a state

with federal immunity in federal-law cases in their own courts.<sup>134</sup> *Franchise III* extends this federal immunity in two ways. First, federal immunity now shields state defendants in *another state's* courts. And second, it now shields all states, apparently, in *state-law* cases. (While it is possible that one or more of the state-law torts in *Franchise III* could have been pleaded as a federal constitutional tort,<sup>135</sup> none were. Recall that the *Franchise Tax Board* litigation was a case brought under the state common-law tort of intentional infliction of emotional distress, among other state-law torts.) In one blow in *Franchise III* the Court's narrow conservative majority deftly achieved two extensions of *Alden*.

#### D. *Applying Modern Legal Theory to Our Two Cases*

The Supreme Court's neutral forum, its original jurisdiction, would not be very useful in cases like our two, in which a state is sued in a sister state by a private party. That is because the policies and interests of the two states in such cases are unlikely to conflict. These cases are in a configuration in which allowing the plaintiff a chance to prove his case will almost always respect the policy concerns and advance the interests of *both* the concerned states. A simple interest analysis can demonstrate this.

In *Franchise Tax Board*, for example, Nevada's own waiver of immunity with its monetary cap could not rationally be construed to make any other state liable for the small sum recoverable, nor shield any other state from greater liability. Both the waiver and the cap were about Nevada's own liability. Nevada had no interest in applying its immunity arrangements to any other state.

On the other hand, California was clearly an "interested" state; it would want to shield its own officials from damages liability wherever sued, and could do so rationally, under its own tort claims act. But its purpose in doing so is to open the state to liability. On this ground, the Nevada courts rationally could choose to apply California's waiver of immunity to California. This conclusion is underscored by the fact that California's waiver would serve Nevada's own compensatory and deterrent interests, as the place of injury

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may not be sued by its own workers in its own courts for violation of an act of Congress). Time-and-a-half pay, costly as it may be, nevertheless importantly preserves the hard-won eight-hour day, and with it helps to protect workers, by separating their private hours from their workday, and compensating them in recognition of the importance of the separation, if they must yield their private hours to their employer.

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

135. See *supra* text following note 61, suggesting constitutional theories for Hyatt's common-law case of intentional infliction of emotional distress.

and residence of the plaintiff. As the Supreme Court acknowledged in *Franchise II*,<sup>136</sup> Nevada, too, was an interested state because it was the place of both conduct and injury. Since Nevada's compensatory interests were not in conflict with the compensatory interests underlying California's waiver of sovereign immunity in tort cases, *Franchise Tax Board* was a no-conflict case. With the exception of the \$50,000 cap on waiver with which Nevada burdened its cases of government tort, the laws of both states were concerned with the same goal: the intelligent management of injurious torts committed by government personnel.

It is ironic, then, that the useful remedies the Supreme Court struck down in *Franchise III* were in a configuration in which *both* states' interests were advanced by the litigation. The Supreme Court succeeded only in frustrating the actual governmental interests shared not only by these two states but by virtually all states.

With Nevada's compensatory and deterrent interests in the case, the Nevada courts clearly had power simply to default to their own general tort law, as the Supreme Court, in effect, had held in *Franchise II*. Here, I should explain that it has been understood for almost a century that, when confronted with an apparent conflict of laws, the interested state always has power to vindicate its own interests in its own courts, notwithstanding the views of other concerned states. Democratic theory supports the primacy of the interested forum's own law. The citizens of the concerned state have not voted for other states' legislators, nor have they chosen, unless their elected representatives have done so, to be governed by other states' statutes and cases. In this perspective, common-law choice-of-law rules that would authorize departures from the law of the interested forum have been wrong in conception. Even enacted choice rules, when resulting in departures from the interested forum's own law, are questionable. They may become arbitrary and irrational in their disregard of the forum state's own substantive policies, and thus may raise constitutional concerns of due process.

Nor is there some general policy of interstate harmony and comity that could justify a court in an interested state in withholding its own law when its own law would otherwise furnish justice in the particular case. There is little interstate systemic value in excusing injustice and licensing wrongdoing.

Perhaps the preceding interest analysis of our two cases is an oversimplification. Sophisticated variations may be discoverable. But I think not.<sup>137</sup>

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136. *Franchise III*, 139 S. Ct. 1485, 1492 (2019).

137. For a reminder of the familiar reasons underlying the workarounds that defeat sovereign immunity in virtually every state, see *infra* Section III.C.1 and Part VI.

### III. CONSTITUTIONAL STRUCTURE, AMERICAN HISTORY, AND STATE SOVEREIGN IMMUNITY

#### A. *On Constitutional Structure*

*Nevada v. Hall is irreconcilable with our constitutional structure and with the historical evidence showing a widespread pre-ratification understanding that states retained immunity from private suits, both in their own courts and in other courts.*

—Justice Clarence Thomas<sup>138</sup>

*[I]f a federal court were to hold, by inference from the structure of our Constitution and nothing else, that California is not free in this case to enforce its policy of full compensation, that holding would constitute the real intrusion on the sovereignty of the states—and the power of the people—in our Union.*

—Justice John Paul Stevens<sup>139</sup>

In the Supreme Court's current view, as elaborated by Justice Thomas in *Franchise III*, state sovereign immunity is embedded in the "structure" of the Constitution.<sup>140</sup> This "structure" argument is essential to the Court's holding, given the complete absence of corroborative constitutional text. The "structure" to which the Court refers, of course, is federalism.<sup>141</sup> But our federalism does not make us a confederacy, intent on states' rights. We are a Union. We are also a Nation. And our governing charter is not the Articles of Confederation but the Constitution of the United States.

Certainly the Constitution assumes the *existence* of states, putting them under constraints and duties, and providing for their representation in Congress. It is from this existence of the states, an essential structural feature of the nation, that the Court leaps to the conclusion that state sovereign immunity is constitutionally required. But it is hard to see how the conclusion follows from the premise.

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138. *Franchise III*, 139 U.S. at 1498.

139. *Nevada v. Hall*, 440 U.S. 410, 446–47 (1979).

140. *Seminole Tribe v. Florida*, 517 U.S. 44, 47 (1996) (holding Congress without Article I power to abrogate state immunity).

141. For interesting perspectives on federalism as grounding state sovereign immunity, see Anthony J. Bellia Jr. & Bradford R. Clark, *The International Origins of American Federalism*, 120 COLUM. L. REV. 835 (2020). Bellia and Clark also comment on an earlier contribution by Ernest Young, Ernest A. Young, Alden v. Maine and the *Jurisprudence of Structure*, 41 WM. & MARY L. REV. 1601, 1625 (2000).



It is simply not true that the Constitution structures this country as a collection of “sovereign” states.<sup>142</sup> The further argument that the “sovereign” states require immunity from liability for actual wrongdoing has no foundation at all.

The shared values and experiences of government at all levels in the United States is that the cities, counties, states, and the nation as well—evidently all, as a matter of course, hold themselves responsible for the injurious misconduct of their officials.<sup>143</sup>

### 1. Justice Thomas’s Cleverest Argument

Justice Thomas’s cleverest structural argument in *Franchise III* is that the Constitution strips the states of various powers of interstate diplomacy. From this questionable observation, Justice Thomas leaps to a *non-sequitur*, the conclusion that this diplomacy-stripping implicitly also strips the states of their power to deny each other’s immunity. In Thomas’s words:

Article I divests the States of the traditional diplomatic and military tools that foreign sovereigns possess. . . . A State’s assertion of compulsory judicial process over another State involves a direct conflict between sovereigns. The Constitution implicitly strips States of any power they once had to refuse each other sovereign immunity, just as it denies them the power to resolve border disputes by political means. Interstate immunity, in other words, is “implied as an essential component of federalism.”<sup>144</sup>

Justice Thomas’s point that the Constitution strips the states of military power and international diplomacy has little relevance and is not even true. How about the National Guard, and the state troopers? How about the informal ambassadors the states send abroad to flog up some business? Texas, for example, has been

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142. See *infra* Section III.B.

143. See *infra* note 246 on the death of Sandra Bland; and *infra* Part VI on state provisions for management of torts occasioned by their employees and officers in the course of their employment.

144. *Franchise III*, 139 S. Ct. 1485, 1498 (2019) (citing Justice Blackmun’s dissent in *Nevada v. Hall*). See the fine analysis in Baude, *supra* note 27, explaining that sovereign immunity was a background postulate of the common law, not of the Constitution; interestingly comparing the states’ power to deny immunity to sister states with the now more limited power of Congress to abrogate state immunity; and concluding that *Nevada v. Hall* was rightly decided.

boosting itself abroad as a good sunny place in which to make movies.<sup>145</sup> Nothing in the Constitution strips Texas of power to do this.

Justice Thomas's conclusion that the Constitution strips the states of power to engage in interstate diplomacy has no objective correlative in actual experience. Interstate diplomacy is very active and successful. Cooperation among the Attorneys General is a familiar and impressive example,<sup>146</sup> and the National Governors Association meets twice a year.<sup>147</sup> The states have explicit constitutional power to reach interstate compacts, with the approval of Congress.<sup>148</sup>

But even if this were not the reality and the states really had been stripped of their powers of interstate diplomacy, it hardly follows that they must be immune when on trial in courts other than their own. Rather, the Constitution creates a particular jurisdiction, the Supreme Court's original jurisdiction, to *adjudicate* actual interstate controversies in a neutral forum. Where a suit against a state is at the instance of a private party in another state, the Constitution provides for federal adjudication of such a case in federal courts, a provision which would be honored and convenient, were it not for the Eleventh Amendment. As for private cases against a state in the courts of a sister state, the Fourteenth Amendment's concern is that the state be *liable*, not that it be immune. The Fourteenth Amendment is unconcerned with venue. Instead, the Fourteenth Amendment places an obligation on every state to adjudicate private suits against a state. The Fourteenth Amendment says, explicitly, that no state shall deprive any person of federal constitutional rights.

## 2. On the Source of Law

Justice Thomas's reasoning in *Franchise III*—that the Constitution strips a state court of the power to deny the immunity of a sister state—is not only demonstrably wrong; it also flies in the face of every rule of law on the subject of choice of law on sovereign immunity. Contrary to Justice Thomas's views, it is the universal rule

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145. See the history of the Texas Film Commission at *History: Texas Film Commission*, OFF. OF THE TEX. GOVERNOR, <https://gov.texas.gov/film/page/history> (last visited Nov. 26, 2020) [<https://perma.cc/53ZM-LQJK>].

146. See, e.g., Jason Mazzone & Stephen Rushin, *State Attorneys General as Agents of that, Police Reform*, 69 DUKE L.J. 999 (2020).

147. See *NGA Meetings*, NAT'L GOVERNOR'S ASS'N, <https://www.nga.org/about/meetings> [<https://perma.cc/9D35-RHRR>].

148. "No State shall, without the Consent of Congress, . . . enter into any Agreement or Compact with another State, or with a foreign Power. . . ." U.S. CONST. art. I, § 10, cl. 3.

that a sovereign defendant cannot be heard to declare itself immune from the consequences of its own wrongdoing when it stands before the tribunal of another sovereign.

Nations are true sovereigns, and, like the states, they can enjoy sovereign immunity in their own courts. But even a nation cannot determine its own immunity in the courts of *another nation*. That is the universal rule. The question of immunity *vel non* of a sovereign in another sovereign's court is one that only forum law can answer. Only in the absence of legislation at the forum, or absence of settled case law, will there be room to consider whether to grant immunity as a matter of comity.

For example, in American courts—federal or state—in a suit, let us say, against France, it is not for French law or for France to determine whether or not France is immune. American courts themselves, federal and state, have no power to consult French law on the question. In our courts, the national rules governing foreign immunities are codified in the Foreign Sovereign Immunities Act of 1976 (FSIA).<sup>149</sup> In the *Amerada Hess* case,<sup>150</sup> the Supreme Court held that the FSIA is the *exclusive* determinant of foreign sovereign immunity in all courts in this country, state or federal. For this reason, our courts have little power to exercise comity or to consent to the immunity of a foreign nation. They simply must do whatever the FSIA says to do on the given facts.

The American Law Institute's just-approved *Restatement (Fourth) of the Foreign Relations of the United States* could say little that is meaningful to add to this. As its reporters remark: "The project takes the general approach of *Restatement Third*. . . . *Restatement Fourth* also includes four new Sections, based on amendments to the Foreign Sovereign Immunities Act (FSIA). . . ." <sup>151</sup> The Institute's *Restatement*

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149. 28 U.S.C. §§ 1330, 1332, 1391 (f), 1441 (d), 1602–1611.

150. *Republic of Argentina v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 431 (1989) (holding that the Foreign Sovereign Immunities Act of 1976 is the exclusive referent on the question of foreign immunity *vel non* in either set of courts). The position is now under challenge in the Supreme Court. See *Simon v. Republic of Hungary*, 911 F.3d 1172 (D.C. Cir. 2018), *cert. granted*, No. 18-1447, 2020 WL 3578679 (2020).

151. See *Restatement of U.S. Foreign Relations Law: Sovereign Immunity*, THE ALI ADVISOR, <http://www.thealiadviser.org/us-foreign-relations-law> (last visited Aug. 31, 2020), referring to recent amendments of the Federal Sovereign Immunities Act of 1976, excepting from immunity, *inter alia*, state supporters of terrorism. This section provides:

§ 1605A. Terrorism exception to the jurisdictional immunity of a foreign state. (a) In general. (1) No immunity. A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case not otherwise covered by this chapter in which money damages are sought against a foreign state for personal injury or death that was caused by an act of torture, extrajudicial killing, aircraft sabotage, hostage taking, or the provision of material support or resources for such an act if such act or provision of material support or re-

(*Third*) on *Conflict of Laws*, now in its “Tentative Draft No. 6,” is silent on the issue of sovereign immunity.

The Nevada Court in the *Franchise Tax Board* litigation simply assumed the same position, in this interstate case, that has always obtained in international cases. This is the position that Congress and the ALI have taken and the civilized nations of the world have always taken, in transnational cases.

Although, in effect, Nevada accepted that, under California’s tort claims act, California’s tax officials were immunized and that the state waived its own immunity, an equally plausible reading is that Nevada’s law, like that of every other state, simply provided no immunity for sister states. Nevada had all the power it needed to choose to hold California liable whether California was immune under its own law or not. The effect, however, would have been precisely the same as it would have been under the California Tort Claims Act—that is, California would have shielded its *employees* and the *agency* from liability, but *waived its own* immunity.

### 3. The Constitution’s Actual Structure

The *actual* structure of our Constitution refutes the Court’s structural argument. In three majestic Articles, the Constitution sets out the *national* powers of Congress, of the President, and of the federal courts. The fourth Article is about the states, but it does not empower them. Rather, Article IV imposes duties upon them, in addition to the duties mentioned in Article I.<sup>152</sup> The fifth Article makes it extremely difficult to amend any of this. And the sixth Ar-

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sources is engaged in by an official, employee, or agent of such foreign state while acting within the scope of his or her office, employment, or agency.

28 U.S.C. § 1605A. Nevertheless, the Supreme Court, as a practical matter, manages to immunize state supporters of terrorism at will. *See, e.g.,* *Jesner v. Arab Bank*, 138 S. Ct. 1386, 1403 (2018) (holding corporations immune from actions under the Alien Tort Statute, and thus holding immune Jordan’s national bank, in a case brought by victims of Palestinian terror). The bank is basically a state instrument and a known supporter of terrorism. *See* Stephanie Clifford, *Arab Bank Liable for Supporting Terrorist Efforts, Jury Finds*, NY TIMES (Sept. 22, 2014), <https://www.nytimes.com/2014/09/23/nyregion/arab-bank-found-guilty-of-supporting-terrorist.html>. But it is also a major part of Jordan’s economy and thus important to stability in the volatile Middle East. Apparently for this reason Israel did not file a brief in the case. Moreover, the current Court does not approve adjudication of international tort cases that cannot plead injuries within the United States. *See, e.g.,* *RJR-Nabisco v. European Community*, 136 S. Ct. 2090, 2111 (2016); *Kiobel v. Royal Dutch Petrol. Co.*, 569 U.S. 108, 124 (2013).

152. For example, the Constitution imposes upon the states the duty of running national elections. U.S. CONST. art. I, § 4. Article IV imposes duties of full faith and credit to judgments, of rendition, and of maintaining a republican form of government. Article VI imposes on every state official and judicial officer an oath of fealty to the Constitution. Article VI, paragraph 1, subordinates the states’ own constitutions, as well as their laws, to federal law.

ticle contains a ringing statement of the supremacy of federal law, “anything” in the state constitutions and laws to the contrary notwithstanding.<sup>153</sup> Not content with this assertion of national supremacy, the Framers introduced a separate paragraph in the sixth Article, forcing every state officer and judge to swear to support the Constitution.<sup>154</sup>

The Tenth Amendment is indeed a grant of power to the states, but it is a grant of undefined *residual* power only. Indeed, the Tenth Amendment repeats the residual quality of state power previously acknowledged even in the Articles of Confederation.<sup>155</sup> Under the Tenth Amendment, only those powers not delegated to the nation by the Constitution are left for the states. The extent of these crumbs, this residuum, is somewhat dependent on Congress, since Congress has the power to do anything that is “necessary and proper.”<sup>156</sup>

With the Supremacy Clause, these latter provisions, tempered by equality of state representation in the Senate, comprise the structure of federalism actually embedded in the Constitution. We cannot derive from this structure a license to injure persons with impunity in the courts at the state where the tort occurs.

Nor can state sovereign immunity be found in any part of the Constitution’s text. The Eleventh Amendment, presumably the *fons et origo* of state sovereign immunity, is literally, as we have seen, only a rule of construction for a federal court’s diversity jurisdiction.<sup>157</sup> The text of the Eleventh Amendment has no relation to the

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153. U.S. CONST. art. VI, cl. 2 (“This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding.”).

154. U.S. CONST. art. VI, cl. 3 (“The Senators and Representatives before mentioned, and the members of the several state legislatures, and all executive and judicial officers, both of the United States and of the several states, shall be bound by oath or affirmation, to support this Constitution; . . .”).

155. ARTICLES OF CONFEDERATION OF 1781, art. II. The delegation clause of the Articles of Confederation differs from the Tenth Amendment’s delegation clause in two respects. First, under the Articles, a delegation of power to the nation had to be express. And second, a delegation of power to the nation was to be made by Congress, not by the Articles of Confederation itself. Under the Tenth Amendment, it is the Constitution, not Congress, that delegates power to the nation, and there is no requirement of explicitness.

156. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 421 (1819) (Marshall, C.J.) (expansively describing the implied powers of Congress granted by the Constitution’s Necessary and Proper Clause, U.S. CONST. art. I, § 8: “Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional.”).

157. In its entirety, the Eleventh Amendment reads: “The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another state, or by citizens or subjects of any foreign state.” U.S. CONST. amend. XI.

classes of cases upon which the Court has been bringing it to bear for well over a century, a fact with which the Court seems increasingly comfortable, substituting for the Eleventh Amendment, when needed, an all-encompassing background principle.

I would venture to suggest that the Eleventh Amendment itself is unconstitutional, notwithstanding the apparent contradiction in terms. In support of this conclusion, I note that the Amendment discriminates against nonresidents in the matter of access to federal courts. That discrimination is at least problematic, and on that ground the Eleventh Amendment should have been declared obsolete and untenable long ago. That could have been done silently with simple disregard.

Justice Bradley, in doing away with one “anomaly” in *Hans* created two others. First, he extended the Eleventh Amendment from the diversity jurisdiction to the federal-question jurisdiction of federal courts, but failed to extend it to the original jurisdiction or the admiralty jurisdiction, thus creating gaps which had to be filled years later.<sup>158</sup>

Second, and worse, Justice Bradley in *Hans* left the Eleventh Amendment applicable in federal but not in state courts. We know now that such an arrangement is unconstitutional. One of our greatest cases, *Erie v. Tompkins*,<sup>159</sup> requires the identification of the sovereign whose law is applicable,<sup>160</sup> and whichever law, state or federal, is held applicable on any point must then be applied, no matter whether the question arises in a state court or a federal court. Governing law must apply in both sets of courts or it is likely to be unconstitutional. The Supreme Court, from this perspective, has resolved the latter problem presented by *Hans* with *Alden v. Maine* and *Franchise III*. That would be a commendable improvement but for the fact that what has been extended is universal federalized immunity. Although the extension of immunity to state courts puts paid to Justice Bradley’s anomalously narrow extension of the Eleventh Amendment, it does away with court access to justice for serious violations by a state of acts of Congress and even the Constitution.

The text of the Fourteenth Amendment, in its first Section, makes very clear that the states *shall* be liable, should they deprive

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158. See, e.g., *Ex parte New York*, 256 U.S. 490 (1921) (admiralty).

159. 304 U.S. 64 (1938).

160. *Id.* at 79 (Brandeis, J.) (quoting *Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co.*, 276 U.S. 518, 533 (1928) (Holmes, J., dissenting)) (“But law in the sense in which courts speak of it today does not exist without some definite authority behind it.”); see Louise Weinberg, *A General Theory of Governance: Due Process and Lawmaking Power*, 54 WM. & MARY L. REV. 1057 (2013); Louise Weinberg, *Federal Common Law*, 83 NW. U. L. REV. 805 (1989).

any person of life, liberty, or property without due process of law. The Fourteenth Amendment, Section 1, evidently would impose *liability* on the states, not immunity.

It would appear that the “structure of the Constitution” simply will not bear the weight of unreason the Supreme Court is heaping upon it.

### B. *On State Sovereignty*

Disambiguation might be helpful in examining the concept of state sovereign immunity. So, let us turn, first, to the question of state sovereignty, while we postpone the further question of state immunity.

To what extent, since the structure of the Constitution is unavailing, can the states nevertheless be found to be “sovereign” on some more persuasive basis? In *Alden v. Maine*,<sup>161</sup> Justice Kennedy, writing for the Court, stated unqualifiedly that the sovereignty of the states both preceded and survived the Constitution.<sup>162</sup> He referred vaguely to “structure” and “history” and “authoritative interpretations” by the Court.<sup>163</sup> In *Blatchford v. Native Village*,<sup>164</sup> Justice Scalia stated unequivocally: “The States entered the federal system with their sovereignty intact.” But he also cited no authority for this. Similar declarations *ex cathedra* are conspicuous among the sources of modern “authority” for a re-imagined history.<sup>165</sup> In this sort of pronouncement we see the modern Court painting a picture of sovereignty as an ancient and permanent attribute of every state. Is there any support for state sovereignty in our history?

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

162. *Id.* at 713. For the relation of this position to an opinion by Justice Brennan, see Louise Weinberg, *Of Sovereignty and Union: The Legends of Alden*, 76 NOTRE DAME L. REV. 1113, 1128–29 (2001).

163. *Alden*, 527 U.S. at 713.

164. *Blatchford v. Native Vill. of Noatak*, 501 U.S. 775 (1991).

165. The modern rewritten history of state sovereignty is laid out in *Fed. Mar. Comm'n v. South Carolina State Ports Auth.*, 535 U.S. 743 (2002) (Thomas, J.), which held that a state has sovereign immunity from suit by the Federal Maritime Commission; *Alden*, 527 U.S. 706, which held that a state has sovereign immunity from suit for violation of the Fair Labor Standards Act; *Seminole Tribe v. Florida*, 517 U.S. 44 (1996), which held that Congress has no Article I power to abrogate the Eleventh Amendment; that is, to require a state to comply with acts of Congress. (!)

## 1. Colonial Times

The colonies were hardly sovereign. The only “sovereign” the American colonists knew was the King, the “Crown.”<sup>166</sup> Even in the early years of the Revolution, the King was still appointing the colonial governors and paying the salaries of the colonial judges.<sup>167</sup> It is true that the colonies enjoyed a measure of self-governance, in part attributable to benign neglect by the Crown with respect to the colonies’ internal affairs. Some colonies had their own legislatures and their own courts. But the highest colonial courts, with the important jurisdiction over taxation and ships, remained the colonial courts of the Crown, and these had to yield final judicial review to the Privy Council in London.<sup>168</sup> The colonies’ most reliable currency was the British pound.<sup>169</sup> There could be no sovereignty for a former colony in these sorts of arrangements.

## 2. Union and Revolution

Although there probably never was full-bore popular enthusiasm for revolution, George Washington would come to use a colony’s local militia adroitly to report and acquire news, tend the crops, befriend defecting British soldiers, and do a little spying.<sup>170</sup> Despite the want of enthusiasm in the countryside, and notwithstanding the growing differences between North and South, there was a real and increasing union of feeling and purpose in the colonies, even as they became increasingly self-governing. We see their approach-

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166. GORDON S. WOOD, *THE AMERICAN REVOLUTION* 58 (2002).

167. See *THE GOVERNORS OF THE AMERICAN COLONIES PRIOR TO 1750: AND OFFICERS OF THE HEREDITARY ORDER OF DESCENDANTS OF COLONIAL GOVERNORS* (Franklin Classics 2018) (1890–1899).

168. See *1 ACTS OF THE PRIVY COUNCIL OF ENGLAND* (John Roche Dasent ed., Nabu Press 2011) (1894); CARL UBBELOHDE, *THE AMERICAN COLONIES AND THE BRITISH EMPIRE, 1607-1763* (John Hope Franklin & Abraham S. Eisenstadt eds., 1968); JOHN PALMER & BARON JOHN SINGLETON COPLEY LYNDHURST, *THE PRACTICE ON APPEALS FROM THE COLONIES TO THE PRIVY COUNCIL: WITH SOME ACCOUNT OF THE JURISDICTION OF THAT HIGH COURT* (BiblioLife 2015) (1831); JOSEPH HENRY SMITH, *APPEALS TO THE PRIVY COUNCIL FROM THE AMERICAN PLANTATIONS* (1965).

169. See generally JOHN WRIGHT, *THE AMERICAN NEGOTIATOR: OR, THE VARIOUS CURRENCIES OF THE BRITISH COLONIES IN AMERICA; AS WELL THE ISLANDS, AS THE CONTINENT* (Palala Press 2016) (1765) (describing the various currencies in common use in the first half of the eighteenth century in North America, and emphasizing throughout this extensive survey that the only currency acceptable everywhere was the British pound).

170. For recent colorful accounts, see STEPHEN R. TAAFFE, *WASHINGTON’S REVOLUTIONARY WAR GENERALS* (2019); and THOMAS B. ALLEN, *GEORGE WASHINGTON, SPYMASTER: HOW THE AMERICANS OUTSPIED THE BRITISH AND WON THE REVOLUTIONARY WAR* (2007).



ing Union in records of the Committees of Correspondence<sup>171</sup> and the widespread development of such common endeavors as the forming of Committees of Safety;<sup>172</sup> the storing of supplies; the digging of earthworks; the self-arming of the people; and the recruitment, training, and uniforming of regiments from each colony as it sought independence.

Above all, in Philadelphia the Continental Congress began sitting in the autumn of 1774, with delegates from twelve of the British colonies; this, our earliest Congress, reconvened the following spring with delegates from all thirteen colonies, to direct the conduct of the Revolution. And the colonies submitted to the sense of the Congress on the conduct of the War, throughout.<sup>173</sup>

The crucial point is that there were no “states,” whatever the unifying spirit reigning in the great rebellion, and however effectual the instruments of self-government in the colonies. The Union was coming into being long before the birth of the states and long before the birth of the Nation.<sup>174</sup> Abraham Lincoln said, “[t]he Union is older than the Constitution.”<sup>175</sup> He could have said as well that the Union is older than the states. There was no state sovereignty, intact or otherwise, because there were no states before 1776. There were only thirteen former colonies, each retaining the name of colony, plantation, or province.

### 3. The Birth of the States

We know when the states came into existence and came together as a nation, both events occurring at the same time. We celebrate this birthday every July 4. On that date, in 1776, a most consequential step for world history was taken. The Declaration of Independence was read aloud to the troops gathered in every city and town in the thirteen colonies and posted wherever the colonists gathered in every city and town. On that date, July 4, 1776, the colonies ceased to exist as appendages of the Crown. The United States of America was born, free and independent, and was given its name, and the states were given their names as “states”

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171. See generally EDWARD DAY COLLINS, COMMITTEES OF CORRESPONDENCE OF THE AMERICAN REVOLUTION (1902).

172. See generally AGNES HUNT, THE PROVINCIAL COMMITTEES OF SAFETY OF THE AMERICAN REVOLUTION (Wentworth Press 2019) (1904).

173. See, for a fine modern account, JACK N. RAKOVE, THE BEGINNINGS OF NATIONAL POLITICS: AN INTERPRETIVE HISTORY OF THE CONTINENTAL CONGRESS (1976).

174. See GORDON S. WOOD, THE RADICALISM OF THE AMERICAN REVOLUTION 95–168 (1992).

175. Abraham Lincoln, First Inaugural Address (Mar. 4, 1861), [https://avalon.law.yale.edu/19th\\_century/lincoln1.asp](https://avalon.law.yale.edu/19th_century/lincoln1.asp) [<https://perma.cc/7VQT-8YNJ>].

and were born that day as “states in Union,”<sup>176</sup> a coinage appearing in passing in the 1869 case of *Texas v. White*.<sup>177</sup>

Thus, there could have been no state sovereignty with which the states entered the Union in 1776, because there were no states. There was no law, before that date, endowing the British colonies with sovereignty, or with statehood. The first such usage in a constitutional sense occurs only with the Articles of Confederation of 1781.

Justice Thomas, writing for the Court in *Franchise III*, also locates the birth of the states in the Declaration of Independence of 1776. But he characterizes the states therein as each fully sovereign and independent. He quotes the final paragraph of the Declaration as securing this sovereignty. According to Thomas, the Founders there declared all the states to be “Free and Independent states” with “full Power to levy War, conclude Peace, contract Alliances, establish Commerce, and to do all other Acts and Things which Independent states may of right do.”<sup>178</sup> Consulting international law, Justice Thomas concludes that independence from the Crown “entitled” the Colonies “to all the rights and powers of sovereign states.”<sup>179</sup> This is adroit, but it will not do. It has no referent in the body of the Declaration of Independence, which is in the form of a letter to the King. The language to which Justice Thomas refers appears in the closing salutation of that letter, the equivalent of “Sincerely yours,” always followed by a signature. But even in the salutation, the independence declared on July 4 was, explicitly, the independence of the “union of states,” not of each state. The salutation was offered by “the representatives” of the United States, by the authority of all its People, and in Congress duly assembled, not by the authority of the people of each state assembled in its individual state house:

We, therefore, the Representatives of the United States of America, in General Congress, Assembled, appealing to the Supreme Judge of the world for the rectitude of our intentions, do, in the Name, and by Authority of the good People of these Colonies, solemnly publish and declare, That these United Colonies are, and of Right ought to be Free and Independent States. . . .<sup>180</sup>

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176. *Texas v. White*, 74 U.S. (7 Wall.) 700, 726 (1869).

177. *Id.*

178. *Franchise III*, 139 S. Ct. 1485, 1493 (2019).

179. *Id.* (citing *McIlvaine v. Coxe's Lessee*, 8 U.S. (4 Cranch) 209 (1808)).

180. THE DECLARATION OF INDEPENDENCE para. 32 (U.S. 1776).

That salutation has been understood for 225 years, until Justice Thomas's selective reading of it, as introducing the signatories to the letter, even referring to themselves as "these Colonies." We know that the Declaration of Independence is the birth certificate of our independence as a nation from the mother country. We did not declare the independence of New Jersey.

Even Justice Kennedy, in his own ahistorical and regrettable opinions on sovereign immunity, *Seminole Tribe* and *Alden v. Maine*, did not cite the closing salutation of the Declaration of Independence in support of his views.

The obscure *McIlwaine* case<sup>181</sup> on which Justice Thomas also relies for his unique reading of the Declaration's salutation does not, in fact, support that reading. Several of the states had sought permission from the Continental Congress during the revolution to declare themselves independent, and Congress gave its approval or not to each such supplicant state, depending on the then progress of the war. New Jersey was among those which were permitted to declare their independence.<sup>182</sup> *McIlwaine* had nothing to say about the Declaration of Independence, because it really was about the independence of New Jersey. The case was not in the Supreme Court's important appellate jurisdiction, but only in its original jurisdiction for cases against a state. It was not about sovereignty. Rather, it was about a grant of land located in New Jersey. In the course of the opinion, casual reference is made, in dating an event, to the date of New Jersey's declaration of its own independence, by permission of the Continental Congress during the War.<sup>183</sup>

But *McIlwaine* does lend some support to Justice Thomas's argument. New Jersey's petition to Congress for permission to declare its own independence does mention sovereignty, and the terms of New Jersey's request were simply repeated in Congress's grant of such permission.<sup>184</sup> Justice Thomas goes very far in allowing us to suppose this permission in the words of this particular approval, with its rote mention of sovereignty repeating the word used by New Jersey, somehow applied to all the colonies.

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181. *McIlwaine v. Coxe's Lessee*, 8 U.S. 209 (1808) (cited in *Franchise III*, 139 U.S. at 1493).

182. See *Saving America's Treasures: The Revolution in New Jersey*, N.J. DEP'T OF STATE, <https://nj.gov/state/archives/eventsat.html> [<https://perma.cc/E9C5-46YE>] (last visited Nov. 26, 2020).

183. *McIlwaine*, 8 U.S. at 212.

184. See *Saving America's Treasures*, *supra* note 182.

#### 4. The Real Birth of State Sovereignty

The Articles of Confederation of 1781 was the first and only formal document that explicitly endowed the states with sovereignty. Article II of the Articles of Confederation provided:

Each state retains its sovereignty, freedom, and independence, and every power, jurisdiction, and right, which is not by this Confederation expressly delegated to the United States, in Congress assembled.<sup>185</sup>

Moreover, by use of the word “retains,” the reader is led to believe that the sovereignty here declared preceded the Articles of Confederation. This declaration of state sovereignty preceded the ratified Constitution of 1789 by eight years. Adding the five years between Independence and the Articles of Confederation to the eight years of the Articles of Confederation, we have thirteen years in all. This seems a rather slender reed on which to support the current weight of federal case law relying on “early understandings” of “state sovereignty.” But it is the eight years under the Articles that comprise the only years of constitutionally recognized state sovereignty in American history. That is, unless state sovereignty survived the Constitution.

#### 5. The Rollup of Conventions

The origins of the Constitution lie in a rollup of little “conventions” that led to the Constitutional Convention of 1787. The curtain opens on an interesting story. General George Washington, in retirement at his home at Mount Vernon, Virginia, is worrying about the increasing fractiousness among the states.<sup>186</sup> In 1785, Washington was concerned enough about a serious interstate water

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185. ARTICLES OF CONFEDERATION OF 1781, art. II. Notably, there is no mention in the Articles of Confederation of “immunity” from judicial process or anything else.

186. Back in 1754, Benjamin Franklin had invited delegates from the colonial assemblies to a convention at Albany to unify the colonists’ confrontation with the Indians and had there first proposed a continental Congress. When Franklin’s proposal came to nothing, he left for Great Britain where he served as an informal ambassador to the Crown for various American colonies. Twenty-five years later he returned in disgust with the Crown to back the Patriot cause. Franklin is sometimes credited with having brought the French and the French fleet to our shores, a decisive factor in the War. *E.g.*, RICHARD B. MORRIS, *THE FORGING OF THE UNION: 1781-1789*, 208–17 (1987); BERNARD BAILYN, *THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION 186–87* (enlarged ed. 1992). The following account of the rollup of conventions that led to the Constitutional Convention is drawn mainly from MORRIS, *supra*.

dispute to call a meeting at Mount Vernon, his house.<sup>187</sup> Washington sent invitations to distinguished delegates to represent each of the three states concerned. Of those, two, representing Virginia and Maryland, rushed to his side.

Under the Articles of Confederation, an issue such as a dispute over water rights could be brought in a state court. But it was self-evident that neither state could be content with litigation in the other's courts.<sup>188</sup> The Articles did provide for final independent determination of such a dispute, but only by Congress.<sup>189</sup> The Articles of Confederation made no arrangement for national courts.

At this "Mount Vernon Convention," George Washington backed James Madison's idea of a convention of delegates from all the states, to consider the inability of the nation under the Articles of Confederation to deal with interstate friction. Washington, more than ever the Father of our country, called for such a convention to be held at Annapolis the following year.

The "Annapolis Convention" was attended at the Colonial Court of Vice-Admiralty by invitees from five states.<sup>190</sup> Anti-Federalists at the time feared a stronger central government as threatening a renewal of their experiences under the Crown. But at Annapolis, it was noted and conceded that the states were interfering with each other's commerce, imposing their own tariffs, and authorizing their own currencies. Farmers in Western Massachusetts were even thought to be in rebellion.<sup>191</sup> It was understood more clearly than it had been that, under the Articles of Confederation, the Nation had inadequate means of restoring order to the Union.

At Washington's request, Alexander Hamilton prepared a report of the situation to be sent to Congress above Washington's signature. Washington's letter requested Congress to authorize a convention of all thirteen states to be held in Philadelphia the following summer. The convention was to be assembled for the purpose of amending the Articles of Confederation in order to impose

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187. On the Mount Vernon Convention, see MORRIS, *supra* note 186, at 249–52.

188. The Constitution provides the independent arbiter for interstate boundary and water disputes that was lacking in the Articles of Confederation. Such disputes are handled by the Supreme Court, in the original jurisdiction granted the Court in Article III. In suits against a state as defendant of record at the instance of a private party, the state is also afforded the dignity and impartiality of Supreme Court jurisdiction, but these sorts of cases are discretionary with the Court and are typically remanded to a federal district court for litigation. Both are to be distinguished from suits against a state officer at the instance of a private party, the typical shape of public-law litigation in courts of general jurisdiction.

189. ARTICLES OF CONFEDERATION OF 1781, art. IX, para. 2.

190. The attending delegates were from Delaware, New Jersey, New York, Pennsylvania, and Virginia. Maryland apparently did not choose to attend. See *Annapolis Convention*, BRITANNICA, <https://www.britannica.com/event/Annapolis-Convention>.

191. MORRIS, *supra* note 186, at 25–57.

greater national order upon the states.<sup>192</sup> All the state dignitaries attending the Annapolis Convention co-signed the Hamilton report and sent it on to the Confederation Congress, which was then sitting in New York. After some delay, Congress approved the proposal, with the understanding that the proposed Convention was to revise the Articles.

Thus, it was that the Constitutional Convention, with George Washington sitting at its head, was convened in Philadelphia in the hot July of 1787.<sup>193</sup> The ostensible purpose was to improve upon the existing Articles of Confederation. It is commonly said that, at the Philadelphia Convention, those attending—some of the finest political thinkers in the country—put themselves to the task of writing a new constitution. But that is not quite what happened. The Constitution in many ways is a child of the Articles of Confederation. Innumerable of the provisions of the Articles are preserved, often intact. But among the more drastic improvements is the Constitution's total erasure of the Articles' prime directive, endowing each state with "sovereignty."

From what has been said thus far, we can gather that the driving force behind George Washington's stewardship, and behind the Constitutional Convention, remained the perceived need to subordinate the states to the nation.<sup>194</sup> That the Constitution achieves this with every reference to national power, every reference to state duty, and every denial of state power, renders almost embarrassing the Supreme Court's efforts to bedizen the states with a sovereignty the Constitution clearly denies them.

The Constitution creates the separate federal judicial power. It establishes our one Supreme Court. And it creates the Supremacy Clause,<sup>195</sup> with the attendant duty of every state judge and officer to take an oath subordinating the state to the national will.<sup>196</sup> Under the Constitution, the states exist within the Union but must shoulder certain responsibilities. They retain power over whatever the Constitution does not delegate to the nation. But the Constitution strips away the power they had, under the Articles, when in Con-

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192. *Id.* at 277, 280–81.

193. For George Washington's roll-up of conventions, see Kate Mason Rowland, *The Mount Vernon Convention*, 11 PA. MAG. HIST. & BIOGRAPHY 369, 410–35 (1888); and Richard B. Morris, *The Mount Vernon Conference: First Step Toward Philadelphia*, THIS CONST.: A BICENTENNIAL CHRON., Spring 1985, at 38–40.

194. MORRIS, *supra* note 186, at 257.

195. U.S. CONST. art. VI.

196. *Id.* at cl. 3 ("The Senators and Representatives before mentioned, and the Members of the several state Legislatures, and all executive and judicial Officers, both of the United States and of the several states, shall be bound by Oath or Affirmation, to support this Constitution. . .," including, of course, the laws enacted thereunder, and the Supremacy Clause).

gress assembled, to delegate powers to the nation. Under the Articles, such delegations were not only to be made by the states through Congress, but must also be “express.” Under the Constitution, however, only the Constitution itself delegates power to the nation. Moreover, there is no requirement of explicitness. Implied powers, if their exercise is “necessary and proper,”<sup>197</sup> are not proscribed.

As for the sovereignty of the nation, Chief Justice Marshall explained, in the great case of *McCulloch v. Maryland*,<sup>198</sup> that the only sovereign that ordained and established the Constitution was “We, the People.” It certainly was not Them, the states. It is true, Marshall acknowledged, that, to ratify the Constitution, We, the People, assembled in our several states. But, he continued, “where else should [We] have assembled?”<sup>199</sup>

How could even the limited state sovereignty briefly and divisively imposed on our Union by the defective Articles of Confederation survive a Constitution authored with the express purpose of defeating it? The Constitution forbids the states to take actions that true sovereigns can take and do. Although the Articles also withheld some of those powers from the states, it is still worth noting that the Constitution prohibits states from entering treaties or alliances, coining money, impairing the obligation of contracts, and granting titles of nobility.<sup>200</sup> A state must obtain the approval of Congress before it can lay a tax on its own interstate or international trade, and it must turn over to Congress the revenue from any such tax.<sup>201</sup> States cannot take military action in times of war without the consent of Congress, unless there is some emergency.<sup>202</sup> Obligations that even the Articles imposed on the states are maintained.<sup>203</sup> The states must recognize and enforce each other’s judgments.<sup>204</sup> They must not discriminate against nonresidents.<sup>205</sup> And they must render up prisoners (and slaves) who are wanted in

197. U.S. CONST. art. I, § 8, cl. 18 (providing that Congress shall have power “[t]o make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof”). For Chief Justice Marshall’s description of the scope of this, the Necessary and Proper Clause, see *supra* note 156.

198. 17 U.S. (4 Wheat.) 316 (1819).

199. *Id.* at 403; see also WOOD, *supra* note 166 at 212 (suggesting that Chief Justice Marshall’s identification of “the People” as sovereign may have had its roots in the previous decade, with the colonists’ wrath against the Crown, and in their emerging belief that Parliament, being representative, might be the truer expression of popular will).

200. U.S. CONST. art. I, § 10.

201. *Id.*

202. *Id.*

203. U.S. CONST. art. IV.

204. *Id.* § 1.

205. *Id.* § 2.

another state on request.<sup>206</sup> What sovereign in the world would suffer such nullification of essential sovereign powers?

Nothing in our federalism or any other feature supposedly embedded in the Constitution's "structure" repeals the Constitution's actual structure.

In short, it is simply not possible to read state sovereignty into the Constitution. The Constitution overwhelmingly subordinates the states to the national will, as contemplated in the plan of the Convention.

## 6. The Death of State Sovereignty

The question, then, is whether state sovereignty, introduced by the Articles of Confederation, could have *survived* its apparent burial by the Constitution. The Supreme Court's answer today is an emphatic "Yes."<sup>207</sup> History's answer is an emphatic "No." The Constitution remains our fundamental law, and nothing that contradicts it can survive. Nor can ground rules more attributable to the Articles of Confederation than to the Constitution be validated by ritual incantation of the word "federalism." The historically accurate statement is that the states were to be more fully subordinated to the Nation in the plan of the Convention, and that intention is embodied in the Constitution of the United States. As We, the People, stated in our Preamble to the Constitution, at its very head, We ordained and established the Constitution "in Order to form *a more perfect Union*."<sup>208</sup> There is no intention to form more sovereign states. Nothing in our federalism erases this central purpose of our fundamental law, this essential nature of our federalism—that it is a *Union*, not a confederation. Which brings us to the Civil War.

## 7. The Civil War

In the recent Court's discussions of the Founding, the Supreme Court reveals itself to be in a curious condition of forgetfulness. What about the Civil War? We had a great Civil War. Nostalgia for an antebellum period of states' rights is too casual about the taint of slavery that darkens our history. It is disregarding of the election

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206. *Id.*

207. This was a question of importance for Justice Kennedy in *Seminole Tribe v. Florida*, 517 US 44, 83 (1996). There, he insisted that preexisting state sovereignty, which Justice Brennan had declared trumped by the commerce power in *Pennsylvania v. Union Gas Co.*, 491 U.S. 1, 18–19 (1988), had both preceded and survived the Constitution.

208. U.S. CONST. pmb. (emphasis added).



of 1860. It is disrespectful of the sacrifice of those who gave “the last full measure of devotion” to save the Union and did save it. The result was a new, triply-amended Constitution.<sup>209</sup> This rebirth of the nation, a second Founding, should have informed the Supreme Court in its thinking about state responsibilities.

In the antebellum period, Southern states had amassed surprising political power in Washington—surprising, given the South’s much slower growth in immigration, industrial activity, and other indicia of likely political influence. Throughout the antebellum period, the South enjoyed seemingly inexplicable control of the Senate, the Presidency, and the Supreme Court. To Northerners, this was the mysterious “slave power” they could not fathom.<sup>210</sup> But, whatever the source of the antebellum Southern ascendancy, by the 1850s it should have become obvious that Southern dependency on slave labor, and consequent debasement of poor whites (who, being unneeded, were often uneducated and unemployed), was standing in the way of the kind of mass immigration and industrialization that Northern free states were experiencing. In consequence, and notwithstanding the stratagems that had kept the South’s grasp on power in Washington, D.C., the South was losing the political power that, in a democracy, population must provide.<sup>211</sup> The threat to the South of the loss of national political power became reality when Abraham Lincoln won the presidency in 1860, despite his absence from the ballot in ten Southern states. Southerners saw that they were losing control over national politics and feared that eventually the anti-slavery faction up North would destroy the Southern way of life.

The secession of the Southern states, half of our country, was not to be borne. The Nation fought back. Six hundred thousand Americans died. The United States of America won. The Confederate States of America lost. Nothing in the existence of our states or our federalism unwinds the Civil War.

But the Supreme Court can unwind it for us. The Supreme Court for some time has been laboring to subordinate the national will to the notion of “states’ rights” that the Civil War crushed, undermining the Constitution that the Court was created in large part to enforce, protect, and defend. Why should restoration of John C. Cal-

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209. For a fine recent account, see ERIC FONER, *THE SECOND FOUNDING: HOW THE CIVIL WAR AND RECONSTRUCTION REMADE THE CONSTITUTION* (2019).

210. For my analysis of the antebellum southern ascendancy, see Louise Weinberg, *Dred Scott and the Crisis of 1860*, 82 *CHI-KENT L. REV.* 97 (2007) [hereinafter Weinberg, *Dred Scott*]. For my explanation of the Southern ascendancy, see Louise Weinberg, *Luther v. Borden: A Taney-Court Mystery Solved*, 37 *PACE L. REV.* 700, 753–63 (2017).

211. Weinberg, *Dred Scott*, *supra* note 210, at 111–12.

houn's antebellum understandings—restoration, in effect, of the Articles of Confederation—be a project of our Supreme Court?

No state sovereignty could have or should have survived the nation's victory in the Civil War. The Fourteenth Amendment is the most precious fruit of that victory, and the Fourteenth Amendment says: "No state shall . . . ." No state shall deprive any person of life, liberty, or property, without due process of law, or of the equal protection of the laws, or of the privileges and immunities of citizenship. The logical implication of this, and it has been so understood since 1871 when Congress codified the understanding,<sup>212</sup> is that a state *shall be liable* for violation of the Constitution and laws.

The other mystery now is why impunity for government violations of the Constitution should ever have been assumed to be a conservative position. When government, state or federal, is the problem instead of the solution, a true conservatism would surely ensure responsibility, not impunity.

### C. *On State Immunity*

Having made our attempt to find a basis for state sovereignty in the Constitution, we can proceed to examine the Court's position on state immunity.

#### 1. The Court's Position and the Real Position

Justice Thomas's opinion in *Franchise III* seems written with confidence that the states should be able to violate law with impunity. He himself may believe that there is a pressing need for this immunity, so pressing that the states must be afforded a constitutionally required defense of federal immunity, even in state-law cases and even in state-law cases in state courts.

Yet the states are able to act only through their personnel. They routinely come forward and defend in suits against their personnel. The states settle ordinary tort claims against their workers and constitutional tort claims against their officials, or they appear, defend, and pay any judgments against them. They budget for these obligations.

To be sure, in courts of general jurisdiction, a state is almost always immune as a party of record. There is a party-of-record rule of

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212. Civil Rights Act of 1871, ch. 22 §1, 17 Stat. 13 (codified as amended at 42 U.S.C. § 1983).

ancient lineage, prominent in the early case of *Osborn v. Bank*,<sup>213</sup> a rule which precludes suits against a state as defendant of record. But suit against state officers and agencies has long been permitted.<sup>214</sup> The familiar mechanism, at law as in equity, is that of the Anglo-American “officer suit.” The action is brought against the responsible official or department, but not formally against the state. Nevertheless, the state settles or defends it and pays any judgment. Alternatively, the state simply indemnifies its employee, should she be held liable.

For this purpose, the states maintain civil litigation departments and employ trial lawyers. Most states have “little” tort claims acts. Some have “little” civil rights acts as well. In the absence of such legislation, a state will indemnify an official who has been held liable, just as a city will, sometimes insuring against the event. If the state does not come in and defend, the insurer will. We will be exploring this real-world experience in a later Part.<sup>215</sup>

## 2. State Immunity and the Constitution

State immunity has no more presence in the Constitution’s text than state sovereignty does. There are “immunities” in Article IV and in the Fourteenth Amendment, but those are the (privileges and) immunities of citizens, not of states.

The sovereign immunity the states can claim today has its origins wholly in the Supreme Court’s own untethered jurisprudence. The Court has extended the Eleventh Amendment and its supposed background postulates beyond all recognition in an unending line of startling cases,<sup>216</sup> and without regard to the Eleventh Amendment’s text.

It is common knowledge that the Eleventh Amendment was a reaction to *Chisholm v. Georgia*,<sup>217</sup> an ordinary contract case brought in the Supreme Court’s original jurisdiction over diversity cases against a state. It was a case seeking to make Georgia pay a debt to

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213. *Osborn v. Bank of the United States*, 22 U.S. (9 Wheat.) 739, 797 (1824).

214. *Cf. FDIC v. Meyer*, 510 U.S. 471 (1994) (holding that although a federal agency’s sovereign immunity had been waived, the needed *Bivens* action would not lie).

215. See *infra* Part VI.

216. For recent extensions of the Eleventh Amendment and state sovereignty, see *supra* note 30; and *infra* notes 260–61 and accompanying text. For earlier extensions see LOUISE WEINBERG, *FEDERAL COURTS: CASES AND COMMENTS ON JUDICIAL FEDERALISM AND JUDICIAL POWER* 779–846 (1994).

217. 2 U.S. (2 Dall.) 419 (1793).

a foreigner. As the first Justice Harlan would point out,<sup>218</sup> *Chisholm* was probably right when decided. Among other things, the Founders wanted our credit, public and private, to appear sound to the world.<sup>219</sup> But after *Chisholm*, there was a backlash, and the Eleventh Amendment was the result. Thus, the Eleventh Amendment simply overrides *Chisholm* on its facts. It is, read literally, only a rule of construction for Article III, limiting federal judicial power over a variety of diversity cases against a state. The Amendment provides that the judicial power shall not be “construed” to apply in diversity cases like *Chisholm*, cases enforcing a common-law commercial contract against a state.

An all-purpose federal immunity defense for the states nevertheless has long been attributed to the Eleventh Amendment. And now the defense is attributed vaguely to “the Constitution,” more vaguely to federalism, and even more vaguely to the “Constitution’s structure,” which is federalism plus a mysterious stripping of powers of diplomacy and negotiation.

A potent support for state immunity has also been found in the supposition of vague background “postulates.” These are the mysterious background understandings that the *Lochner*-era Court in its last discreditable years could discern back in 1934—background “postulates that limit and control.”<sup>220</sup> We now have arrived at the background “postulate” of an all-encompassing inviolable federalized state immunity in state courts, whether the states want it or not.<sup>221</sup>

Think about this. Here, in 2020, is a textualist Supreme Court insisting that a little postulate that is not there<sup>222</sup> is one of the most vital parts of the constitutional order. Yet nothing in American history or Anglo-American tradition commends lawless governance unchecked by courts when a private person is injured thereby and complains.

Reading blanket state sovereign immunity into a Constitution that is silent on the subject and, with its Fourteenth Amendment

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218. *Hans v. Louisiana*, 134 U.S. 1, 21 (1890) (Harlan, J., concurring) (“I am of opinion that the decision in [*Chisholm*] was based upon a sound interpretation of the constitution as that instrument then was.”).

219. See George Washington, Circular to the States (June 14, 1783), in *FRIENDS OF THE CONSTITUTION: THE WRITINGS OF THE “OTHER” FEDERALISTS 1787–1788*, 12–22 (Colleen A. Sheehan & Gary L. McDowell eds., 1998).

220. *Monaco v. Mississippi*, 292 U.S. 313, 322 (1934).

221. See *Alden v. Maine*, 527 U.S. 706, 719 (1999) (taking the position that it is a background understanding of the Constitution that, notwithstanding the Supremacy Clause, federal law cannot be enforced against a state in its own courts without its consent).

222. Hughes Mearns, *Antigonish*, reprinted in *BEST REMEMBERED POEMS* 107 (Martin Gardner ed., 1992) (“Yesterday upon the stair/ I met a man who wasn’t there. / He wasn’t there again today. / I wish, I wish he’d go away.”).

reads the other way, has been the Supreme Court's project for far too long. The Supreme Court has shielded the states from the national ideals of independent accessible courts and fair government, as though a state is too autonomous and dignified, or perhaps too broke,<sup>223</sup> to respond to tort claims. It is an all-encompassing jurisprudential régime of lawlessness, now fully applicable in both sets of courts, in both federal and state cases.

### 3. State Immunity and Federal Common Law

This paper has been arguing federalized state sovereign immunity is not to be found in the Constitution, or in the federalism embedded in the Constitution's "structure," as Justice Thomas attempted to argue in *Franchise III*. Rather, it is to be found only in Supreme Court opinions—over a century of them—including *Franchise III*. State sovereign immunity is simply a creature of federal common law.

There is a certain irony in this. Federal common law has been the Court's particular whipping-boy. Yet federal common law is simply the decision of federal cases, and the decision of federal cases is the business the Supreme Court is in. Moreover, the Constitution, Article III, extends the federal judicial power to every federal case and every federal question. Nevertheless, the Court opines that making a federal cause of action cognizable, and even utilization of existing federal causes of action, somehow lie beyond its ordinary adjudicatory powers. In the Court's view, only Congress can provide causes of action, even a cause of action for violation of the Constitution<sup>224</sup> or of Congress's own enactments.<sup>225</sup> The latter disrespect for acts of Congress is what the Supreme Court terms "deference to Congress" and to the "separation of powers."

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223. We will turn to the question of the impact of state tort liability on state budgets *infra* Part V.

224. See *supra* note 125 on the refusal of the Supreme Court in such cases as *Hernandez v. Mesa*, 140 S. Ct. 735 (2020), to approve a *Bivens* claim. See also, e.g., *Wilkie v. Robbins*, 545 U.S. 537 (2007) (Souter, J.) (holding that an action would not lie against federal agents for a decade of harassment destroying the plaintiff's business). In *Wilkie*, Justice Ginsburg, dissenting, characterized the agency's decade of outrageous attacks on Robbins' ranch as "death by a thousand cuts." *Id.* at 555 (Ginsburg, J., dissenting). Justice Souter, however, writing for the Court, characterized it as "hard bargaining." *Id.* at 554. Perhaps Justice Souter, if on the Court today, would characterize the Tax Board's outrageous misconduct in *Franchise III* as "zealous auditing."

225. See *RJR-Nabisco v. European Union*, 136 S. Ct. 2090 (2016) (Alito, J.) (holding that Congress failed to make plain the extraterritorial reach of federal anti-terror jurisdiction in part of an act of Congress that the Court itself read as instinct with extraterritorial intention).

On the other hand, the Court freely creates and insists upon federal common-law *defenses*, such as state sovereign immunity. In cases such as *Alden v. Maine*, we find the Court's textualist majority insisting that "federalism" somehow implies an atextual permission to the states to violate the Constitution and laws and to ignore the Supremacy Clause and the oath of office. In *Franchise III*, we find a federal common-law rule that a state be allowed to come into another state to violate the tort law of both states, even if suit is brought at the place of injury, where the plaintiff resides.

Original sin in this area lies in *Hans v. Louisiana*,<sup>226</sup> the case that first extended the Eleventh Amendment seriously beyond its express terms. We have seen that, to avoid one "anomaly," the *Hans* Court created another.<sup>227</sup> After *Hans*, immunity rules would apply in federal courts different from those applied in state courts. *Alden* and *Franchise III* share one virtue: they put paid to that further anomaly. The bad news is that in sustaining the states' immunity from suit in both judicial systems, *Alden* and *Franchise III* trash the ability of either judicial system to enforce law, any law, state or federal, enacted or customary, against any state. It is a régime of uncontrolled state government lawlessness.

Sometimes state immunity is framed as a rule that suit against a state can be maintained only if the state consents. Yet we sense, if only from the licensed wage theft in *Alden v. Maine*, that there is an unreality in conditioning suits against a state on the state's consent. How can a state decide for itself whether it is free to violate an act of Congress? Or the Constitution? Nevertheless this "consent" formula persists, notwithstanding the Fourteenth Amendment, which in terms emphatically does *not* condition on state consent the duties it magisterially imposes upon them.<sup>228</sup>

This concocted "consent" requirement does not earn points for any benefit it bestows. There should be no free pass for a state officer or worker to oppress any segment of its population or any person within or beyond the state. After all, We, the People, ordained and established the Constitution "in Order," we said, "to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defense, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our

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226. 134 U.S. 1 (1890).

227. See *supra* notes 29, 158 and accompanying text.

228. This "consent" fiction is traced most familiarly to Alexander Hamilton's argument in *The Federalist No. 81*, attempting to defend the diversity jurisdiction of federal courts. See THE FEDERALIST NO. 81 (Alexander Hamilton). Hamilton was referring, as he had made clear in *The Federalist No. 32*, to ordinary contract cases—that is, to cases that would typically be governed by state law today. THE FEDERALIST NO. 32 (Alexander Hamilton).

Posterity.”<sup>229</sup> We did not ordain and establish the Constitution to give the states permission to violate it.

The saving message for us in all this is that the Court’s long battle for state official impunity is just federal common law. It can be overruled.

#### IV. ON THE PLACE OF TRIAL

It is singular, and worthy of note, that the Supreme Court, in *Franchise III*, held unconstitutional a taking of jurisdiction to adjudicate a tort occurring at the place of trial. Ironically, the Court has recently been holding in international cases that courts in this country may not adjudicate a common-law tort attributable to foreign government officials in the *absence* of injury here.<sup>230</sup> In another recent international case, involving an action authorized by an act of Congress without territorial limit, the Supreme Court held that to justify trial here, the United States must be the place of injury.<sup>231</sup> Clearly, all else equal, the place of injury is the one place that surely does have power to exercise “a jurisdiction given.”<sup>232</sup> Or so one would have thought, until *Franchise III*.

To the *Franchise III* Court, it made a difference that the defendant was a state. And indeed, the defendant state, California, was arguing, in effect, that it was immune in Nevada. But California would not have been immune at home. California had waived its immunity under its tort claims act. Notwithstanding the overwhelming support of the states in *Franchise III* for jettisoning *Franchise I* and overruling *Nevada v. Hall*, the jurisdiction the states threw away in *Franchise III* could hardly matter to them, if immunity is the issue. It is hard to see why a state needs to be more immune in interstate cases than it is in intrastate cases.

It also should have weighed more strongly with the Supreme Court in *Franchise III* that courts at the place of injury have adjudicatory and lawmaking power over that injury as a matter of course. The place of injury has legitimate governmental interests in compensation and deterrence. In addition, the place of injury is often the place where the plaintiff resides. In both *Franchise III* and in *Nevada v. Hall*, the plaintiffs were in their home states when officials from another state intruded themselves into the plaintiffs’

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229. U.S. CONST. pmb1.

230. See, e.g., *Personenverkehr v. Sachs*, 136 S. Ct. 390, 396 (2015).

231. *Kiobel v. Royal Dutch Petrol. Co.*, 569 U.S. 108, 124 (2013).

232. See *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 404 (1821) (Marshall, C.J.) (“We have no more right to decline the exercise of a jurisdiction which is given, than to usurp that which is not given.”).

home state and caused injury there. Government tort policies are not extinguished by the fact that the tortfeasor is a nonresident. State long-arm statutes exist to vindicate the state's own interests when the tortfeasor is a nonresident. In a just world, the further fortuity that the tortfeasor is a government employee would augment rather than diminish the rights of plaintiffs.

The irony of the Court's positions to the contrary in our two cases is underscored in cases in which the tort is also a crime. Recently the Supreme Court has offered a vigorous argument that when a tort is also a crime, prosecution is preferable to civil suit.<sup>233</sup> But if a state employee flees the place of her crime and is indicted at home (the suggested preferred venue in light of *Franchise III*), the place of the crime is very likely to demand rendition, and, under Article IV of the Constitution, the employee's home state would have to render him up to the place of the crime.<sup>234</sup> Yet, in cases like *Franchise III*, the place of the tort cannot take jurisdiction. This anomaly is just another example of the incoherence of the Court's recent thinking about the place of trial in cases of cross-border tort.

## V. THE COSTS OF LIABILITY

We know that there are very few cases of interstate government tort. But in thinking about the rare such case, it is helpful to remember that a large part of the costs of defending would be expended by the tortfeasor's home state even if the case were litigated there. And it *would* be litigated there if the law there were more favorable to the plaintiff. In short, if the state defendant is adjudged to be responsible, it is not unlikely that he would be so found by a jury at home as well as away. And damages, as sought by plaintiff's counsel, would tend to be similar in either state. To be sure, in interstate litigation there would have been the expensive nuisance of hiring local counsel, if desired, and of having home counsel travel to the neighboring state for hearings, if counsel so chooses. But such inconveniences are borne every day by private nonresident defendants in tort cases. For a state government these are not heavy costs.

It makes some economic difference, of course, just *where* litigation resources are expended. If money is to be spent, any state would rather have it spent at home. But, again, consider how easily

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233. For the Court's recent statement of this preference, see *RJR-Nabisco v. European Union*, 136 S. Ct. 2090, 2106 (2016) (Alito, J.).

234. U.S. CONST. art. IV § 2, cl. 2.



these costs can be borne. In the *Franchise Tax Board* litigation itself, California cheerfully paid its auditors' expenses as they encroached on Mr. Hyatt's peace and privacy. With equal equanimity California absorbed its lawyers' expenses as they defended with notable persistency against Hyatt's claims.

While I am saying all this, the reader has been thinking, "What about the fiscal crisis in some of the states. Don't the states *need* immunity? No matter where they are sued?" Especially in the wake of the economic damage sustained in the current pandemic, how can any of the states pay for the torts of their workers and employees, much less meet their pension and other obligations? Indeed, how can a state afford to hire back the part of its workforce that it has had to let go, much less defend suits against them?

Notwithstanding these important concerns, the states will continue, I believe, to answer to claims alleging injuries at the hands of their officers. In part, they will do so because liability is not as heavy a budget item as is supposed, and in part, for the same reason they continue to answer to contract claims and to pay bills as they come due.

A little thought will reveal why the states enact tort claims acts—or, by indemnifying employees who are found liable, act as if they have done so. Most pertinent to this inquiry is the actuality that, whatever immunities with which they are formally cloaked, most American states choose to settle claims for injuries caused by their employees. To the extent they have understood the wisdom of doing so, it cannot matter much just where they are sued. But let us pause to consider more closely the reasons state governments continue to answer to tort claims.

## VI. THE COSTS OF IMMUNITY:

### WHY STATES PROVIDE FOR PUBLIC-LAW LITIGATION

It becomes a matter of some interest to weigh the costs of liability against the costs of immunity. A state legislature might consider it advantageous to provide that the costs of a government tort be allowed to fall on the state worker occasioning it or, what amounts to the same thing, on the injured party, even in a wholly domestic case. But the broad consensus of opinion about best tort policy long ago reached contrary conclusions. It is widely assumed to be a superior allocation of the costs of injury to spread them broadly. Allowing disasters needlessly to affect the lives of individuals has never made sense and is injurious to society. At the extreme, the uncompensated tort plaintiff and unindemnified government worker, both will find it hard to return to productive work, and

their plight will make the lives of others less comfortable and less safe. And in a global pandemic the dysfunction associated with unmanaged liabilities is likely to be greatly magnified.

The point of public-law litigation against state officers is not to win cases but to protect state employees, while not allowing the costs of government tort to fall on the injured. But refusal to meet a state's tort liabilities will generate heavy consequential costs.

"Advantages" obtained by allowing the risks of employee tort to lie where they fall will incur their own costs. A state thinking to protect its fisc by declining to protect its workers from the costs of litigation and the burden of judgments may find itself struggling to recruit a workforce. A state unwilling to provide reasonable redress for injuries caused by its officers can appear lawless and unsafe. A state government that cares more for its immunities than for its responsibilities can present to visitors and investors a sorry picture of dysfunction.

One can see more clearly why states tend to take responsibility for their workers' torts when one considers the analogy of the federal Tucker Act.<sup>235</sup> By the Tucker Act, the nation guarantees its own contracts and waives its own sovereign immunity to contract claims, immunizing the responsible official for the breach, while relying on internal disciplinary measures for deterrence.<sup>236</sup> The nation provides the Court of Claims for most commercial claims against it. The nation does all this for the same reason it pays its bills as they come due. It is no more in the national interest than in a state's interest to stiff its suppliers or to steal the wages of its workers.<sup>237</sup> A nation seeking to protect its fisc in such ways may soon find itself unable to equip its armies. A state that does not pay its creditors will soon be unable to buy office supplies.

It might be supposed, these days, with some states under water for insufficiently funded pension liabilities, and their economies impacted by the coronavirus pandemic, that concern for a state's fisc does justify the Supreme Court's solicitude. However, the costs of maintaining a civil litigation division in a legal department, together with all the liabilities the state assumes, amount to a small part of a state budget.<sup>238</sup> California's annual state budget for 2019–

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235. 28 U.S.C. § 1449.

236. Concededly, such measures have not been very effective. See Editorial, *The Root of Impunity*, N.Y. TIMES, Oct. 4, 2020, at 8.

237. *But see Alden v. Maine*, 527 U.S. 706 (1999) (holding that a state cannot be sued in its own courts for failing to pay the overtime wage required by an act of Congress, the Fair Labor Standards Act, 29 U.S.C. § 207k); §203 C.F.R. §216(b) (providing an express right of action for violation of the Act, with concurrent jurisdiction in both sets of courts).

238. See *The 2019-20 Budget: California Spending Plan*, LAO (Oct. 17, 2019), <https://lao.ca.gov/Publications/Report/4097> [<https://perma.cc/B4GQ-Q32Z>].

2020 was the highest in the United States at \$214 billion.<sup>239</sup> Like other state budgets, it is focused on health and education.<sup>240</sup> California's civil litigation department and the liabilities settled or paid by it, even under California's liberal statutory arrangements for public-law litigation, amount at most to some small fraction of the state's budgetary allocation to its Justice Department, and that comprehensive budget is nowhere near the magnitude of the state's budget for education or health.<sup>241</sup> In short, the costs of civil litigation against California are vanishingly small as compared with California's total budget.

True, a rich state like California can more easily absorb costs than a less monied state. But the same analysis turns out to apply in states with very modest budgets, like Nevada. When rules of sovereign immunity—or unrealistic limits on recovery, like Nevada's—succeed in balking justice in cases of civil wrong, they save government from liabilities and inconveniences that are too minor to blame for threats to state workers' pensions or the state fisc generally.<sup>242</sup>

For orderly, sensible management of tort liabilities, the states, just as the cities and counties do, and just as the nation does,<sup>243</sup> al-

239. See *2019-20 State Budget: Enacted Budget Detail*, CALIF. DEP'T OF FINANCE (June 27, 2019), <http://www.ebudget.ca.gov/budget/publication/#/e/2019-20/BudgetDetail> [<https://perma.cc/T3H3-QNNT>].

240. See *id.* See generally *List of U.S. State Budgets*, Wikipedia, [https://en.wikipedia.org/wiki/List\\_of\\_U.S.\\_state\\_budgets](https://en.wikipedia.org/wiki/List_of_U.S._state_budgets) [<https://perma.cc/NFG7-EBGS>] (last visited Oct. 7, 2020) (showing California's budget for 2017 to have been \$214.8 billion and the next highest budget, New York's, at \$177 billion).

241. See California's *2019-20 State Budget: Enacted Budget Detail*, *supra* note 239.

242. It must be acknowledged that such estimates could be affected in unpredictable ways by the pandemic.

243. With respect to suit against the federal government, see, for example, Sarah Macraig, *Border Patrol Violence: U.S. Paid Millions to Settle Claims Against the Agency*, THE GUARDIAN (May 1, 2018), <https://www.theguardian.com/world/2018/may/01/border-patrol-violence-us-paid-60m-to-cover-claims-against-the-agency> [<https://perma.cc/Q4TA-VF4D>]. With respect to the states, see Iris Lewis, *State Settles with 5-hour Energy in False Advertising Lawsuit*, VT. DIGGER (Aug. 14, 2019), <https://vtdigger.org/2019/08/14/state-settles-with-5-hour-energy-in-false-advertising-lawsuit> [<https://perma.cc/GNS3-C9JF>]; Michelle Theriault Boots, *State Settles Suit by Inmate who Suffered Paralysis at Spring Creek Prison for \$1.8 Million*, ANCHORAGE DAILY NEWS (June 19, 2019), <https://www.adn.com/alaska-news/2019/06/20/state-settles-lawsuit-brought-by-inmate-who-suffered-paralysis-at-spring-creek-prison-for-18-million/> [<https://perma.cc/Q7TB-LZSP>]; Vickie Aldous, *State Will Pay Family After Deadly Drunk Driving Crash*, OR. MAIL TRIB. (Aug. 11, 2019), <https://mailtribune.com/news/top-stories/oregon-lawsuit-drunk-driving-crash-duii-fatal-karen-greenstein-jackson-county-wrong-way-driver> [<https://perma.cc/3DAG-N2KX>]; and Jeremy Bauer-Wolf, *Michigan State Settles Nassar Lawsuits for \$500 Million*, INSIDE HIGHER ED (May 17, 2018), <https://www.insidehighered.com/news/2018/05/17/michigan-state-settles-nassar-survivors-half-billion-dollar-payout> [<https://perma.cc/83YT-WE3J>] (regarding gymnasts abused by a University doctor). With respect to cities, see, for example, Adert Hassan, *Minneapolis to Pay \$20 Million to Family of Victim Shot by Police*, N.Y. TIMES, May 4, 2019, at A10.

ready maintain civil trial divisions in their legal departments.<sup>244</sup> The states, just as the cities and counties do and the nation does, defend actions against their officers and employees.

The costs of maintaining civil litigation departments staffed with trial lawyers are sunk and continuing costs that are relatively inelastic to the heaviness or lightness of litigation in a particular year. These costs are estimated and budgeted for, just as are the costs of maintaining courts and judges, along with the costs of defending lawsuits, as well as of settlements and adverse money judgments. These costs, however heavy, are very small items in a state's overall budget. State budgets are measured not in millions, but in billions, largely devoted to education, health, and pensions.<sup>245</sup>

Consider, for example, the recent case of Sandra Bland in Texas.<sup>246</sup> Ms. Bland had been stopped by a state trooper for failing to signal a lane change. The trooper ordered her out of her car for insubordination and then had her jailed for resisting arrest. The young black woman had been on her way to a new job and a new life as a teacher. She was found hanged in her cell overnight while in state custody. Texas officials claimed it was suicide. One suspects that Ms. Bland was strung up in her cell for making inconvenient noise, but the family was unable to prove wrongful death and lodged an alternative claim for excessive force by the arresting officer. Texas has a typical tort claims act.<sup>247</sup> Texas settled the case, reportedly for \$1.9 million,<sup>248</sup> a fraction of what it might have had to pay had the family been able to prove wrongful death. Similarly, had Ms. Bland's car been struck accidentally by the trooper's car, an action for negligence would have been available against the officer. Texas would have defended the officer or indemnified him, up to the amount of its current dollar indemnification cap.<sup>249</sup>

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244. See generally MATTHIESEN, WICKERT & LEHRER, S.C., *State Sovereign Immunity and Tort Liability in All 50 States*, <https://www.mwl-law.com/wp-content/uploads/2018/02/STATE-SOVEREIGN-IMMUNITY-AND-TORT-LIABILITY-CHART.pdf> [<https://perma.cc/QT97-M64D>] (last visited Oct. 7, 2020) (describing the liability of each of the fifty states). The chart in MATTHIESEN, WICKERT & LEHRER, S.C., *supra*, does not include information about unenacted remedial policies and practices.

245. See *Policy Basics: Where Do Our State Tax Dollars Go?*, CTR. ON BUDGET & POL'Y PRIORITIES (July 25, 2018), <https://www.cbpp.org/research/state-budget-and-tax/policy-basics-where-do-our-state-tax-dollars-go> [<https://perma.cc/VXC5-4B8N>].

246. See David Montgomery, *The Death of Sandra Bland: Is There Anything Left To Investigate?*, N.Y. TIMES (May 8, 2019), <https://www.nytimes.com/2019/05/08/us/sandra-bland-texas-death.html> [<https://perma.cc/6UPU-E6D4>].

247. See TEX. CIV. PRAC. & REM. CODE ANN. § 101.001–109 (West 2018).

248. See Mary Huber, *Advocates Remember Sandra Bland's Legacy on Day Named in Her Honor*, AUSTIN AM.-STATESMAN, July 13, 2019, at B-1, B-7.

249. See Fernando C. Gomez, *A Primer on State Employee Liability*, SAM HOUSTON STATE UNIV. (2011), <https://www.shsu.edu/dotAsset/0b97f3e1-3d25-496d-9569-27a1cda534d4.pdf> [<https://perma.cc/Y5RX-7ARW>].

With the Supreme Court's blithe goodbye to both *Nevada v. Hall* and *Franchise Tax Board*, state governments now have a shiny new federal immunity in interstate cases. Apparently, they can add this meretricious federal defense to their armamentarium in intrastate and interstate cases alike, and in state and federal courts alike. All this federalized immunity may seem gratifying, like a cheap but glittering toy under the Christmas tree, to the immediate perception of the states' trial team. Yet, like the cheap toy to the hopeful child, none of this is what the states really want and need—the intelligent management of government tort.

#### VII. A POSSIBLE DIFFICULTY FOR TWENTY-NINE STATES

The traditional workaround that defeats government immunity has always been the officer suit. The plaintiff forgoes suit against the state and simply sues the individual government employee or official responsible for her injuries. The party-of-record rule suggests as much. In the long tradition of the common law, a government is not sued as party of record. The rule may reflect the irrational character of naming a non-person as if it were an individual. The workaround permits suit against the individual alleged to have been at fault.

In the wake of *Franchise III*, however, a new difficulty may have arisen for state management of government workers' torts. This is a difficulty affecting the states that have had the wisdom to enact tort claims acts. It is a particular concern for those among them that have permitted their tort claims acts to apply to intentional as well as unintentional torts, thus tending to bring the intentional government tort within the scope of the Fourteenth Amendment and the Civil Rights Act.<sup>250</sup>

The difficulty is that, after *Franchise III*, the mechanism of a tort claims act could defeat rather than facilitate the traditional officer-suit workaround for damages cases. Recall that, in the interest of protecting both the state worker and her tort victim, a state tort claims act works by waiving the immunity of the state but immunizing the state worker. This might become an issue in the states that have tort claims acts, when a plaintiff seeks to sue the very officer who injured her. Most judges, I think, would not be comfortable allowing a tort victim to sue an immunized worker, even though the worker's employer, the state, is also immunized.

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250. 42 U.S.C. § 1983 (Civil Rights Act of 1871).

After *Franchise III*, “the Constitution” requires that the state be immune. Under the same state’s tort claims act, the state officer is also immune. Where does that leave the plaintiff?

Consider the following scenario. Because a main purpose of the state tort claims act is to protect the plaintiff, a state court might permit an officer suit against the immunized employee to proceed, judicially nullifying the state’s tort claims act. The state would be very likely to come into court to defend its employee. The state cannot rely on the very statute the state judge has nullified. The state might try to argue that its appearance in court constitutes a waiver of immunity. But that would be the sort of “constructive” waiver that has been disapproved by the Court; the Court requires explicit waiver of federalized state immunity, unlike state-law immunity, in the clear language in a statute.<sup>251</sup> The waiver of state immunity, so helpful in suits under tort claims acts before *Franchise III*, now could be useless.

The problem may even be bigger than we have thus far imagined. Waiver may be off the table *even in wholly domestic cases*. Some of Justice Thomas’s language in *Franchise III* can be read to cover that ground. And the problem is not simply one of language. The fact is, *Franchise III* cloaked the states with a federal immunity that is *deeply embedded* in the federalism that is *deeply embedded* in the “structure” of the *Constitution*. This constitutionally-required immunity cannot rationally be confined to interstate cases, any more than the Constitution itself can be so confined. Will it ever be possible for a state to waive a *constitutional* requirement that is deeply embedded in our “constitutional structure”?<sup>252</sup>

The problem is not merely the technical problem that the Supreme Court requires explicit waivers of identified federal immunities, as well as explicit waivers of state immunity (recall that there is a clear statement rule).<sup>253</sup> It is not merely that a typically shortsighted state legislature might, against the state’s own actual interests, explicitly state that its waiver of state immunity is *not* a waiver of its federal immunity.<sup>254</sup> Consider a domestic case in which the

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251. *Id.* (imposing a clear statement rule now applied both to waivers of immunity by a state as well as to abrogations of immunity by Congress, and disapproving the doctrine of “constructive waiver” of *Parden v. Terminal Railway*, 377 U.S. 184 (1964)).

252. In interstate cases in the configuration seen in *Franchise III*, the problem of finding power to waive immunity may be even more perplexing than in domestic cases since the holding in *Franchise III* is not dictum with respect to interstate cases.

253. *See, e.g.*, *Sossamon v. Texas*, 563 U.S. 277 (2010) (holding that a state does not waive its sovereign immunity by accepting federal funds, and that waiver of state immunity does not waive federal immunity); *Atascadero v. Scanlon*, 473 U.S. 234 (1985) (creating a clear statement rule now applied to both waiver of immunity by a state or abrogation of immunity by Congress).

254. *See, e.g.*, GA. CODE ANN. § 50-21-23(b) (2019).

state has waived its federal immunity in the clear language of a state statute, and cheerfully submits to jurisdiction. An appellate court could well rule *sua sponte* that federal sovereign immunity is *jurisdictional*. Once taking on that color, federal immunity will almost certainly *not* be waivable. Jurisdiction is not waivable. Thus, even explicit state legislative waivers of federalized immunity for the states may well be beyond a state's power of waiver. And, *a fortiori*, waiver could not then reclaim the advantages, in a particular case, of adjudicatory power over government tort—intrastate as well as interstate.

It might be supposed that Congress could step in and relieve the states of this new helplessness. But there is a further difficulty. The Supreme Court, with bold improvidence, has stripped Congress of Article I power—*any* Article I power—to abrogate the immunities of the states. That was the holding of the *Seminole Tribe* case.<sup>255</sup> (Even with the passage of time one still shakes one's head in disbelief.) The Court has had to back down in bankruptcy cases,<sup>256</sup> but has drawn the line there. There can be no other exceptions.<sup>257</sup> Nothing can explain or justify *Seminole Tribe's* sledgehammer attack on the power of Congress and on federal supremacy.

*Franchise III* joins *Seminole Tribe* and *Alden v. Maine* as an extremist success in the Court's inexplicable struggle to lavish almost antebellum power on the states, putting it beyond the power of courts to impose the national will upon the states, and to diminish the powerful nationhood that the Framers left us and that the Civil War preserved and advanced.

### VIII. WHAT, THEN, IS TO BE DONE?

Broad language in *Franchise III*, although dictum (and lawyers should argue that it *is* dictum), can be taken to have bestowed universal federalized sovereign immunity on the states in domestic as

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255. *Seminole Tribe v. Florida*, 517 U.S. 44, 46 (1996).

256. *Cent. Va. Cmty. Coll. v. Katz*, 546 U.S. 356 (2006). *Katz* does not suggest clause-by-clause reconsideration of *Seminole Tribe*; the Court has just held that the *Katz* exception to *Seminole Tribe* is strictly limited to bankruptcy. *Allen v. Cooper*, 140 S. Ct. 994, 1002 (2020).

257. *Allen*, 140 S. Ct. at 1002. *Allen*, a copyright case, seems compelled by *Florida Prepaid Postsecondary Education Expense Board v. College Savings Bank*, 527 U.S. 627 (1999), a patent case to the same effect. Justice Kagan, writing for the *Allen* Court, made this point. *Allen*, 140 S. Ct. at 1002. What is particularly painful about such cases is that they strip Congress not simply of general Article I power, but of powers specifically granted in Article I—in this instance, the so-called Copyright [and Patent] Clause. U.S. CONST. art. I, § 8, cl. 8 (giving Congress power “[t]o promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries”).

well as interstate cases. It is not clear what the Court's intentions are for the traditional workaround of an officer suit. Even though tort claims acts may stand to lose effectiveness, there would seem to be no reason why traditional officer suits would not work in interstate as well as domestic cases. This would require not only that the responsible state officer become the named defendant of record but also that she be pleaded in her "individual capacity," rather than, or coupled with, an "official capacity" designation.

"Individual capacity" pleading is little more than a pleading device, but it has become a necessary and useful one. It is explicitly required in cases pleadable as violations of civil rights—required by the early case of *Scheuer v. Rhodes*,<sup>258</sup> as explained in *Hafer v. Melo*.<sup>259</sup> Justice O'Connor, writing for the *Hafer Court*, pointed out that individual-capacity pleading avoids the rule of *Will v. Michigan*,<sup>260</sup> which held that a state is not a "person" within the meaning of the Civil Rights Act. It should also avoid the imputation that the named defendant officer is the state itself. An officer joined as defendant in her official capacity *is* the "state."

This is what may have gone wrong in cases like the recent copyright case, *Allen v. Cooper*,<sup>261</sup> in which the defendant of record was the state governor. All state officials, including a governor, are "state actors," within the meaning of the Fourteenth Amendment and the Civil Rights Act. But they are best sued in their individual capacity. Since a government tort can neither be committed nor remedied except by the government, the individual held responsible is responsible in her *official* rather than individual capacity. Because of this dual nature of a government defendant, lawyers have adopted the expedient of pleading against such a defendant both in her individual capacity *and* in her official capacity,<sup>262</sup> and the de-

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258. 416 U.S. 232 (1974).

259. 502 U.S. 21, 29–30 (1991). It follows from *Hafer* that in cases pleaded in individual capacity, damages are awarded not against the state, but against the named defendant officer. However, for the reasons given here, the officer in such cases is almost always fully indemnified, and the state will furnish the legal defense as well. In this way the substantial equivalent of a tort claims act is achieved, notwithstanding the diligently maintained fiction that the state is immune.

260. 491 U.S. 58 (1989). *Will* is no longer strictly necessary to the Supreme Court's evident project of denying enforcement of constitutional rights against the states. A state cannot be sued in either set of courts, as defendant of record, under the Eleventh Amendment and its background propositions. *Alden v. Maine*, 527 U.S. 706 (1999) (extending a new federal defense of sovereign immunity to state courts in federal-law cases); *Franchise III*, 139 S. Ct. 1485 (2019) (extending *Alden's* federal immunity defense to *state-law* cases in state courts). Lawyers may try to limit *Franchise III* to state-law violations pleadable as constitutional torts, but I doubt with much success.

261. 140 S. Ct. 994 (2020). On *Allen v. Cooper*, see *supra* notes 4, 256–57 and accompanying text.

262. *Caveat*: One would not append the phrase "acting in her official capacity" to the officer's name in the caption but would confine that phrase to the allegations of the tort.



defendant rarely objects, for the same reason that it may have a tort claims act on the books. The government trial team takes over, or the government indemnifies in the absence of a tort claims act.

There is a familiar analogy to this problem of “individual capacity” versus “official capacity” in the Anglo-American officer suit in equity. The officer suit in equity was made fit for modern American use in the great case of *Ex parte Young* (1908).<sup>263</sup> There, the Supreme Court, by Justice Peckham, held that a state’s attorney general, defendant in an injunction case alleging a threatened or ongoing violation of the Constitution, is *not* the “state” for purposes of Eleventh Amendment immunity but remains a “state actor” for purposes of Fourteenth Amendment liability. Justice Peckham, in *Young*, declined to hold the Eleventh Amendment trumped by the after-enacted Fourteenth Amendment. He stated, impressively, that he intended to give each Amendment its full value.<sup>264</sup> He then explained that the responsible official, *for purposes of the Fourteenth Amendment*, is a state actor, and of course is a state actor in reality. But by his alleged infraction, *for purposes of the Eleventh Amendment*, the officer is “stripped” of the *state’s* cloak of immunity.<sup>265</sup>

Peckham was no liberal. Undoubtedly he intended the power he carved out for the courts<sup>266</sup> in *Young* to be deployed in enforcement of his opinion in *Lochner* and its new “liberty of contract,”<sup>267</sup> pro-

The phrase “in his individual capacity” is used in a case’s caption, to identify the capacity in which the officer is *sued*.

263. 209 U.S. 123 (1908) (holding that neither the immunity of the Eleventh Amendment nor the principle underlying the Anti-Injunction Act, today found at 28 U.S.C. §2283, bars a federal injunction against a state official to block a threatened or ongoing violation of federal law). Justice Peckham points out that the federal court was first seized of the action—that no action was then pending in the state court.

When such indictment or proceeding is brought to enforce an alleged unconstitutional statute, which is the subject-matter of inquiry in a suit already pending in a Federal court, the latter court, having first obtained jurisdiction over the subject-matter, has the right, in both civil and criminal cases, to hold and maintain such jurisdiction, to the exclusion of all other courts, until its duty is fully performed. But the Federal court cannot, of course, interfere in a case where the proceedings were already pending in a state court.

209 U.S. at 161–62 (citation omitted).

264. *Id.* at 150 (“We think that whatever the rights of complainants may be, they are largely founded upon [the Fourteenth] Amendment, but a decision of this case does not require an examination or decision of the question whether its adoption in any way altered or limited the effect of the earlier [Eleventh] Amendment. We may assume that each exists in full force . . .”).

265. *Id.* at 160.

266. In *General Oil Co. v. Crain*, 209 U.S. 211 (1908), decided on the same day as *Ex parte Young*, the Court held, by Justice McKenna, that state courts were under like obligation to supply the federal injunctive remedy in federal-law cases in equity.

267. *Lochner v. New York*, 198 U.S. 45, 53 (1905) (Peckham, J.). Alas, this “liberty of contract” was the imagined “liberty” of an unemployed person to “agree” to inadequate wages, long hours, and unsafe and unhealthy working conditions, free from state regulation.

tected substantively by the Due Process Clause of the Fourteenth Amendment. But the common law grows and evolves, and the power carved out in *Young* to diminish protections for workers is the power that eventually became the federal structural injunction that enforced *Brown v. Board of Education*.

The suit against a named official in actions at law, although very different, gains force from the reasoning that sustains *Ex parte Young* actions in equity. *Young*'s immunity-stripping rationale sheds some light on the Supreme Court's insistence on individual-capacity pleading in an officer suit seeking damages. The Supreme Court explicitly relied on the analogy between the officer suit in equity and the action at law against an officer in holding, in *Hafer v. Melo* (a federal civil rights action for damages), that a state official is *sued* in her "individual capacity" for purposes of the Eleventh Amendment but is charged with violating federal law in her "official capacity"<sup>268</sup> for purposes of the Fourteenth Amendment.<sup>269</sup> The official, although "stripped" of her government employer's cloak of immunity, nevertheless is very much a government official—a state actor—when she stands accused of constitutional tort.

Nor do these contrasting statements together comprise a mere legal fiction, as is commonly supposed. Both statements can be read simply as true. Any logician will tell you that the answer to a question depends on the purpose for which it is asked.

In a sense, an *Ex parte Young* action is always necessarily one in "official capacity," yet it is equally true that equity can act only *in personam*. Again, both features of *Young* are instructive and correct. The defendant in a *Young* action must be the very official who can remedy the threatened tort by obeying the court's injunction. Of course he can do so only in his official capacity. On the other hand, if he fails to obey the injunction, it is his person, not his office, that is threatened with contempt and ultimately a period of detention or other penalty. It will be recalled that *Ex parte Young* itself was handed down while the attorney general of Minnesota was confined in federal custody for contempt of a federal injunction. As Justice Harlan put this, vigorously dissenting, federal authorities had laid "violent hands" on the state's attorney general.<sup>270</sup>

I state all this partly to raise the question whether relief from *Franchise III* might be available in equity. That is, can a court sitting

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268. *Hafer v. Melo*, 502 U.S. 21 (1991).

269. *Scheuer v. Rhodes*, 416 U.S. 232, 237–38 (1974).

270. *Ex parte Young*, 209 U.S. at 174 (Harlan, J., dissenting) ("There was no reason why [the trial court] should have laid violent hands upon the attorney general of Minnesota, and by its orders have deprived the state of the services of its constitutional law officer in its own courts."). Indeed, Attorney General Young was before the Supreme Court both on a grant of appellate review and by a prayer for a writ of *habeas corpus*—that, is, for release.

in equity order the payment of damages? The short answer is, “No.”<sup>271</sup> There are monetary equitable remedies—restitution and disgorgement come to mind—that might suggest the availability of monetary relief in equity. But it is a general requirement of injunctive relief that there be no adequate legal remedy. In cases against a state officer, a court cannot require a payment of money that could otherwise be an item of damages. The legal remedy, the action at law for damages, would be “adequate,” and the action for injunction would be dismissed.

The plaintiff seeking monetary relief would probably do better in an action at law for damages than an action in equity for an injunction. An action at law might lie if seeking damages from a named state officer in her individual capacity for unjust failure to provide support for which the plaintiff is fully eligible. This action can include claims for consequential damages beyond the payments themselves—harms to health, loss of a home, or other serious consequences—losses for which an injunction to make the payments due will not compensate.

In a case of intentional government tort, like *Franchise Tax Board*, a case which might be pleadable as a constitutional tort, there is some power in Congress to abrogate state immunity under Section 5 of the Fourteenth Amendment.<sup>272</sup> This power should have enabled Congress to abrogate a state’s immunity in constitutional cases. But the Supreme Court has curtailed the Section 5 power. The Section 5 power must be exercised in a manner that is “proportionate” to and has “congruence” with a perceived substantial pattern of known violations.<sup>273</sup> Even if our present gridlocked Congress were capable of enacting an explicit abrogation of state immunity in cases of interstate constitutional tort, the Supreme Court would strike down the effort as disproportionate for such a small number of cases. That was the problem in the case that itself invented the tests of proportionality and congruence. Religious freedom was argued to be at stake in the *Boerne* case,<sup>274</sup> but the

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271. See *Edelman v. Jordan*, 415 US 651 (1974). *Edelman*’s proscription, under the Eleventh Amendment, of an injunction for arrearages with respect to a *federal* statutory benefit is now somewhat tempered by a case on similar facts, *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976), which recognized a limited power of Congress in Section 5 of the Fourteenth Amendment to abrogate Eleventh Amendment immunity.

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

273. *City of Boerne v. Flores*, 521 U.S. 507, 520 (1997) (“There must be a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end.”). This late-blooming requirement of proportionality and congruence put the kibosh on intellectual property cases against a state. Until *Boerne*, those cases were relying on the Section 5 power of Congress to abrogate the Eleventh Amendment, although it would appear that misappropriation of intellectual property by state universities is substantial, particularly under “work for hire” and similar rationales.

274. *Id.*

*Boerne* Court, in striking down the sweeping Religious Freedom Restoration Act in its application to the states, read the language of Section 5 of the Fourteenth Amendment under this new federal stricture of proportionality and congruence, seeing no such pattern of violations as would justify the legislation.<sup>275</sup> *Boerne* was correctly decided, but the Court has used these vague standards to attack the power of Congress even in matters of national commercial concern, like the regulation of labor, and even in the field of civil rights.<sup>276</sup>

There may still be room for solutions in some cases of interstate government tort. Courts at the place of injury, wishing to secure needed remediation for their own residents, might have leeway to carve out exceptions to, or distinctions from, *Franchise III*. Exceptions might be found, for example, for cases in which the defendant nonresident official has deliberately inflicted physical injuries, or for cases pleaded as constitutional torts rather than as state-law torts.

In the end, however, we have to consider, notwithstanding the unlikelihood of success, the possibility of a frontal challenge to the régime of state sovereign immunity, from *Hans v. Louisiana* on down, including late-blooming federalized immunity. Peace to Justice Holmes, but the common law surely has the capacity to move by molar as well as molecular motions.<sup>277</sup> The day may come, a generation or two hence, when the Supreme Court, and the states that unthinkingly sought a diminution in their own powers, will come to see *Franchise III* for what it was—a mistaken accommodation to short-sighted impulses.

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275. *Id.* at 530.

276. *See, e.g.,* *Coleman v. Court of Appeals of Md.*, 566 U.S. 30 (2012) (striking down the Family Medical Leave act's self-care provision as applied to the states as employers, and holding that Congress had no power to abrogate the sovereign immunity of the state employers in such cases, citing *Seminole Tribe* and *Boerne*); *Bd. of Trs. of Univ. of Ala. v. Garrett*, 531 U.S. 356 (2001) (holding that Congress had no power to abrogate the sovereign immunity of the states as employers under the Americans with Disabilities Act, citing *Seminole Tribe* and *Boerne*).

277. *See* *S. Pac. v. Jensen*, 244 U.S. 205, 221 (1917) (Holmes, J., dissenting) ("I recognize without hesitation that judges do and must legislate, but they can do so only interstitially; they are confined from molar to molecular motions."). Although there is truth in Justice Holmes' observation, there are moments in legal history (*Jensen* is one of them) when the common law has not confined itself to incremental advances. Think, for example, of the judicial creation of product liability in *MacPherson v. Buick Motor Co.*, 111 N.E. 1050 (N.Y. 1916), which ruled that, if manufacturing negligence is reasonably certain to cause peril, knowing that others may use the product, the manufacturer is obligated to make the product carefully. In *Jensen*, the Supreme Court identified the common law applied in admiralty cases as that of the federal sovereign, implied national lawmaking power in Congress from Article III's grant of jurisdiction, and implied judicial lawmaking power from the implied power of Congress. 244 U.S. at 215–16. The *Jensen* Court held federal case law, sparse as it then was, supreme over a state statute, the New York workers' compensation law, ruling that federal admiralty law completely preempted the field. *Id.* at 218.

Challenges to the immunities of a state might not be without appeal to our textualist courts. As we have been reminded here, there is no language in the Eleventh Amendment or anywhere else in the Constitution requiring the blanket federalized immunity with which the states are now burdened. One need only re-read the Eleventh Amendment to see that it is irrelevant to the questions posed in modern immunity cases. State sovereign immunity is one of the many doctrines the Supreme Court has invented that turn out to have little use beyond stripping the nation and the states of needed adjudicatory powers.

Many of the Supreme Court's non-enforcement doctrines, although existing in large bodies of jurisprudence, are, after all, only federal case law. Since state sovereign immunity is a creature of case law, it can be overruled, just as *Nevada v. Hall* was overruled. Constitutional amendment should not be necessary.

In the long tradition of Anglo-American common law, "Freedom slowly broadens down / From precedent to precedent."<sup>278</sup> But that poetic insight views the judicial process in a top-down way, a way that is, in fact, unworkable and unreal. The "potted plant" theory,<sup>279</sup> which holds that lower courts must woodenly apply Supreme Court precedents and Courts of Appeals precedents, is simply wrong. Obviously, the argument for change must be made early in a litigation to ensure that it is not waived.<sup>280</sup>

In the last analysis, it is up to us in the profession to free ourselves from "potted plant" reliance on the existing legal order.<sup>281</sup> There is nothing wrong with the bold argument for salutary change. Counsel *can* argue that *Franchise III* was wrongly decided, and trial and appellate courts *can* reassess *Franchise III* and, indeed,

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278. Alfred, Lord Tennyson, *You Ask Me, Why, Tho' Ill at Ease*, reprinted in *V THE ENGLISH POETS* 116 (Thomas Humphry Ward ed., 1918) (poem, describing England as: "A land of settled government, / A land of just and old renown, / Where Freedom broadens slowly down / From precedent to precedent").

279. See Sanford Levinson, *On Positivism and Potted Plants: "Inferior" Judges and the Task of Constitutional Interpretation*, 25 *CONN. L. REV.* 843, 850–51 (1993) (criticizing the Supreme Court's view that lower courts should woodenly follow existing but outmoded Supreme Court precedent until such time as the Supreme Court changes the law itself); see, e.g., *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 484 (1989) ("We do not suggest that the Court of Appeals on its own authority should have taken the step of renouncing *Wilko*. If a precedent of this Court has direct application in a case yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions.").

280. Retired Justice Tom C. Clark once said: "In the final analysis, the nation's law is made in the trial court." Craig Alan Smith, *Sitting by Designation: Retired Justice Tom C. Clark's Federal Court Service*, 43 *J. SUP. CT. HIST.* 321, 322.

281. See Levinson, *supra* note 279.

all the immunity cases.<sup>282</sup> And after some decades of rejection, as the personnel on the Supreme Court shifts, the Court may come to see more clearly that, however vast the superstructure of state immunity the Court has labored to erect, state governments will continue to find it necessary and useful to work around that superstructure.

In the long run, it is possible that there will emerge a frank recognition in some future Supreme Court that public-law litigation, interstate as well as intrastate, federal as well as state, does go on, although requiring the pleading of archaic fictions. The Court may come to see that public-law litigation might as well take place upon more reasonable straightforward pleading. The complexities we have been examining should never have been imposed on cases of government tort.

New problems will no doubt generate new workarounds to overcome them, and more defenses will arise to block those expeditents. There is no good reason for any of this. The wisdom of compensatory and deterrent tort policy has been understood and widely shared and is hardly controversial. In a straight-thinking world, the fiction of government immunity, the superstructure of fictitious workarounds and pleading devices required to suppress it, and the morass of rules surrounding waiver and abrogation—all would have been put behind us long ago and exchanged for uncomplicated access to justice, in both interstate and domestic cases.<sup>283</sup>

While waiting for this to happen, the simplest way to achieve reasonable access now, consistent with widely shared tort law and policy, would be to substitute for the whole tottering edifice of sovereign immunity at all levels of American government the common law's functional equivalent of a good tort claims act—*respondeat superior*. When ordinary private workers' torts are administered, it is well understood that the ill-paid employee, or even the salaried executive, cannot pay damages for serious injuries that may have been caused by acts done within the scope of their employment. Thus, in private cases, no tort claims act is needed. The employer is pleaded in naturally, having spread the risk through insurance. The insurer comes in, defends, and pays any judgment.

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282. On the problem of remediation of federal government tort, see Vicki C. Jackson, *Suing the Federal Government: Sovereignty, Immunity, and Judicial Independence*, 35 GEO. WASH. INT'L L. REV. 521 (2003), which calls on the judiciary to move toward closing remedial gaps in suits against the United States. This is another fine addition to Professor Jackson's portfolio of work on sovereign immunity.

283. Accord Richard H. Fallon, Jr., *Bidding Farewell to Constitutional Torts*, 107 CALIF. L. REV. 933, 933 (2019).

The common wisdom grounding *respondeat superior* should be extended unambiguously to *intentional* torts. For government employees, this means coverage not only for their ordinary torts of negligence or recklessness but also their violations of civil rights legislation or of the Constitution.

A private college responds naturally, in every case, to tort claims against its professor or president or dean or mailroom clerk, for torts within the scope of their employment. The state university should similarly respond to tort claims against its employees. There is no defense of private employer immunity,<sup>284</sup> and there should be none when the employer is the state. On the other hand, the immunity of every *worker* should be absolute, whether she is employed by government or a private company. She will be within the disciplinary measures of her department or agency or company. The measure of liability is actual damages, emotional as well as monetary, tangible or intangible, economic or personal, past or future—excepting only punitive damages.<sup>285</sup> The state employer will have insurance, spreading the costs of liability broadly.

Prosecutors and judges already have absolute “official” immunity. So should every police officer and schoolteacher. It is a form of employee/worker immunity that should extend to everyone who works and in the course of doing so causes an injury. A government, like a company or organization, cannot act except by its personnel. Litigation against government for the torts of government workers and officers should be as commonplace as litigation against employers for the torts of privately employed workers.

The use of *respondeat superior* in cases of government tort would require overrule of the principle of the *Monell* case, denying *respondeat superior* in actions against a city,<sup>286</sup> a rule now commonly applied at all levels of government. Tort claims acts should be ad-

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284. The exception is in the case of injury to the worker herself, in which case workers' compensation statutes usually remove the worker completely from the tort system. These statutes typically provide only a fraction of lost wages for a limited time and out-of-pocket medical expenses. There is no compensation for pain, or loss of limb or health, or grief therefor.

There is also considerable legislative interference with general tort law. Particularly unjust may be the consequences of state legislation limiting tort recoveries to economic losses only. Future economic losses may be discounted as speculative. And economic losses may be insufficient to justify a lawyer's taking the case.

285. For the general rule of sovereign non-liability for punitive damages, see *supra* notes 78, 114 and accompanying text. Extending the rule against punitives to private employers would be protective of the employer and, indirectly, of other employees.

286. *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658 (1978) (holding that, in actions against a municipality, there can be no *respondeat superior*). A city is liable only for its own tort. This means that municipal liability is proved by a showing of city policy attributable to officials at a high level of authority.

ministered with the understanding that they simply codify common-law *respondeat superior*.

Other writers are suggesting the expedient of *respondeat superior*, moved by the same concern for widely shared tort policies expressed here.<sup>287</sup> Arguing for *respondeat superior* in civil rights cases, Professor Fallon writes, “An ideal regime would substitute entity [for example, government or administrative agency] liability for officer liability and afford fairer opportunities for victims . . . .”<sup>288</sup> *Respondeat superior* is a traditional concept comfortable to American judges and lawyers.

### IX. CHANGING PLACES, SHIFTING POSITIONS

In our time a new “conservative” idea is attracting attention. Younger conservatives are talking about reining in the bureaucracy, “taking back the administrative state,” and reducing the size of government.<sup>289</sup> (The point of much of this, apparently, is to reduce the taxes that pay for social programs.) This revived conservative project requires putting paid to such doctrines as “*Chevron* deference”<sup>290</sup>—and other forms of deference to the political branches.

Deference to the political branches until very recently had been encouraged by conservatives who were angered by the perceived judicial activism of the Warren Court’s liberals back in the middle of the twentieth century. This anger has fed into modern doctrines of separation of powers, deference to the legislature, federalism, states’ rights, and a supposed impotence of the judiciary to fashion remedial law.

Liberals, for their part, with their old New Deal faith in government, now seem increasingly to take the reactionary position that even bad government should be left unfettered.<sup>291</sup> In other words,

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287. See Fallon, *supra* note 283 and accompanying text.

288. *Id.* at 933.

289. See Justin Walker, *The Kavanaugh Court and the Schechter-to-Chevron Spectrum: How the New Supreme Court Will Make the Administrative State More Democratically Accountable*, 95 IND. L.J. 923 (2020); Gillian E. Metzger, *1930s Redux: The Administrative State Under Siege*, 131 HARV. L. REV. 1 (2017). For book treatment, see, for example, ADRIAN VERMEULE, *LAW’S ABNEGATION: FROM LAW’S EMPIRE TO THE ADMINISTRATIVE STATE* (2016), which distinguishes argument, urging the importance of a judicial check on the administrative state; and CARL HULSE, *CONFIRMATION BIAS: INSIDE WASHINGTON’S WAR OVER THE SUPREME COURT, FROM SCALIA’S DEATH TO JUSTICE KAVANAUGH* (2019), which advocates the appointment of an activist federal judiciary that will “deconstruct” the administrative state and ease burdensome regulation. See generally, e.g., Symposium, *Thirty-Seventh Annual Federalist Society National Student Symposium on Law and Public Policy*, 42 HARV. J.L. & PUB. POL’Y 1 (2019).

290. See *Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984) (proposing that courts defer to the institutional competence of the administrative agencies).

291. See *supra* note 97 on *Astrue v. Capato*, 566 U.S. 541 (2012).



the post-Warren Court political positioning of the Justices is reversing, or at least shifting, in cases presenting the question of state responsibility. And this suggests that changes of heart are occurring on the rôle of courts in cases challenging official wrongdoing.

It will be interesting to see if regret for doctrines of deference comes to suggest a similar regret for our overwrought Eleventh Amendment jurisprudence. Why would today's small-government conservatives want to remove government from judicial oversight? For that matter, why would today's liberals want to avoid instantiating the Bill of Rights and justice in the individual case?<sup>292</sup>

That the Court's conservative majority would imagine blanket state impunity to be a conservative position and should struggle to fit the position into our federalism and the Constitution is, in my view, incomprehensible. A rethinking of true conservative values in this context—instantiation of the rule of law, domestic peace, and protection against overweening or abusive governance—is long overdue.

It may seem fanciful to suggest that the newly potent conservative Court could turn the Court's long hostility to federal common law *actions* toward reconsideration of federal common law *defenses*. Yet the new conservative Court has an opportunity to become the Court of enforcement of the Constitution and laws. Chief Justice Earl Warren, the author of one of our proudest cases, *Brown v. Board of Education*,<sup>293</sup> was a Republican, and the Warren Court oversaw a new birth of freedom. The first Justice Harlan, who dissented so eloquently in *Plessy v. Ferguson*,<sup>294</sup> was a conservative Southerner.

I would guess that our conservative Justices, some now in the prime of their lives, having been put to the task of writing unconvincing opinions to justify decisions in cases like *Hernandez v. Mesa*<sup>295</sup> and *RJR-Nabisco v. European Community*,<sup>296</sup> are ready to oversee a more lawful nation—ready to enforce the Constitution and laws, and ready for actual textualism and zealous insistence on the rule of law.

Especially at this moment in history, a time of ignorant and divisive attacks on our national traditions and ideals—on civil society itself—the Court, under the leadership of Chief Justice Roberts, could come into its own as a saving custodian of our rights, our laws, our national ideals, and our domestic peace.

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292. For example, see *supra* note 97 on *Astrue*.

293. 347 U.S. 483 (1954).

294. 163 U.S. 537, 552 (1896) (Harlan, J., dissenting).

295. 140 S.Ct. 735 (2020).

296. 136 S.Ct. 2090 (2016).

## CONCLUSION

State immunity has been building and expanding in the Supreme Court for more than a century. Yet it seems obvious that sovereign immunity defeats justice. As Justice Miller put it in 1882, in a famous opinion on federal<sup>297</sup> sovereign immunity:

Looking at the question upon principle, . . . we think . . . the defense [of sovereign immunity] cannot be maintained. It seems to be opposed to all the principles upon which the rights of the citizen, when brought in collision with the acts of the government, must be determined. In such cases there is no safety for the citizen, except in the protection of the judicial tribunals, for rights which have been invaded by the officers of the government, professing to act in its name. . . . No man in this country is so high that he is above the law.<sup>298</sup>

Civil society rests, for foundation, on the rule of law. And the rule of law rests, for foundation, on a judiciary sufficiently independent to ride herd on government. A democracy is only as good as its judiciary is empowered to protect the rights of persons as against the majoritarian branches. As Chief Justice Marshall said in our greatest case,<sup>299</sup> *Marbury v. Madison*, “The government of the United States has been emphatically termed a government of laws, and not of men. It will certainly cease to deserve this high appellation, if the laws furnish no remedy for the violation of a vested legal right.”<sup>300</sup>

These legacies of rule of law and judicial independence are bequeathed us in our founding Constitution, the Bill of Rights, and the Civil War Amendments. The Fourteenth Amendment explicitly imposes upon the states the duty of enforcing the rights of individuals. We rely on the courts to expound these legacies. “It is emphatically the province and duty of the judicial department to say what the law is.”<sup>301</sup>

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297. The two bodies of jurisprudence on sovereign immunity, federal and state, are substantially congruent and cases are often cited interchangeably.

298. *United States v. Lee*, 106 U.S. 196, 218–21 (1882) (dealing with the Union’s appropriation of Arlington, the Lee family’s homestead, for alleged incorrect proffer of a tax due). After the *Lee* opinion was handed down, the United States settled with the Lee family for some \$200,000. *See Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803) (Marshall, C.J.).

299. *See* Louise Weinberg, *Our Marbury*, 89 VA. L. REV. 1235, 1412 (2003) (rebutting revisionist attacks on *Marbury* and Chief Justice Marshall).

300. *Marbury*, 5 U.S. (1 Cranch), at 163.

301. *Id.* at 177.

Had the Court in *Franchise III* clearly stated that it was simply deploying a party-of-record rule, shielding the states from being sued as named defendants, I would not have written this paper. But the *Franchise III* Court attempted to embed immunity so deeply in the Constitution that in an action against an injured party's own state worker or agency, his own state courts would be helpless to furnish justice under his own state's law.

In the fact situation in *Nevada v. Hall*—negligence by a state worker causing personal injuries in another state—the case filled a remedial gap, ensuring that in our federal interstate system the basic workings of sound tort law would be accessible when, had the defendant been a private party, the plaintiff would have been permitted to proceed. The risk of personal injury or death at the hands of a state worker should not fall on the injured party simply because of the mischance that the injuror was a government worker from another state.

On the broad issue of state sovereign immunity for *deliberate* injuries inflicted by government officials from another state, the Supreme Court in *Franchise III* was even more gravely mistaken. *Franchise I* had filled an even more consequential remedial gap. The *Franchise III* Court should have paused to consider whether the requisites of a civil society and interstate peace outweigh the desire of government trial teams to win cases. We cannot license the states to intrude on each other's territory to harass or attack each other's residents. It should have been obvious to the whole Court, and to the states themselves, that the opportunity presented in *Franchise III* was to secure a needed state power of territorial governance and to put that power at the option of every state.

The Supreme Court threw away these salutary options, giving the appearance of a willful exercise of a secured political power. This, in the dubious interest of creating a constitutional shield against remediation of government lawlessness. The Court's majority has entangled itself in its own rewriting of history and in an obsolescent (and irrelevant<sup>302</sup>) critique of judicial review that younger theorists are coming to regret.<sup>303</sup>

There are institutions without which our federalism, our Union, and our democracy cannot thrive. These surely include access to courts, judicial oversight of government, remedies for wrongs, and

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302. Judicial review of government tort is to be distinguished from judicial review of legislation. This paper is not an argument for return of the *Lochner* era, during which the Supreme Court was striking down useful laws, federal and state, as violating the Constitution. I am grateful to my colleague Sanford Levinson for raising this possibility of a revival of *Lochner*-style judicial review at my faculty colloquium of November 15, 2019.

303. For the changing positions, for example, of the Federalist Society, see *supra* note 289 and works there cited.

justice in the individual case. These must and will be restored to us in full. Only case law stands in the way, and cases can be overruled.

The long reign of “general common law” under *Swift v. Tyson*<sup>304</sup> was undone by *Erie v. Tompkins*,<sup>305</sup> and the long reign of racial segregation under *Plessy v. Ferguson*<sup>306</sup> was undone by *Brown v. Board of Education*.<sup>307</sup> Let us be confident that, however long we may have to wait, in good time the long reign of *Hans v. Louisiana*<sup>308</sup> will be undone in the same way, with the stroke of a pen. With *Hans* the obsolescent Eleventh Amendment itself will fall into deserved desuetude, together with its background “postulates.”<sup>309</sup> The long reign of manifold missteps that have led us to blanket federal immunity for the misconduct of government personnel<sup>310</sup> will be undone. *Seminole Tribe*<sup>311</sup> will be undone, so that at long last the power of Congress to deal with state misgovernance will be revived and honored. Under this new dispensation, the Supreme Court’s long abnegation of its basic duty to enforce the Constitution in actions against *federal officials*<sup>312</sup>—that, too, will be undone.

Even if we must wait a hundred years, conservatives and liberals together can look forward to that better day. Together, sharing our “decent respect for the opinions of mankind,”<sup>313</sup> we can succeed. Our shared national traditions can and will be restored to us, and civil governance under the rule of law<sup>314</sup> will take on renewed vigor and meaning.

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304. 41 U.S. (16 Pet.) 1 (1842) (holding that federal courts can find better rules of general common law to govern state-law cases).

305. 304 U.S. 64 (1938) (holding that application of law unidentified to some sovereign is unconstitutional).

306. 163 U.S. 537 (1896) (holding that racial segregation is constitutional as long as the two races are treated equally, although separated).

307. 347 U.S. 483 (1954) (holding that in matters of race, separate can never be equal).

308. 134 U.S. 1, 10 (1890).

309. *Monaco v. Mississippi*, 292 U.S. 313 (1934).

310. These events culminate in *Franchise III*, 139 S. Ct. 1485 (2019), which ruled, in extended dictum, that a blanket federalized sovereign immunity of the states in all cases in all courts requires non-enforcement, absent state consent, of all law, federal and state, that would otherwise govern a state as defendant.

311. *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996) (stripping Congress of all its Article I powers to impose liabilities upon the states).

312. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803).

313. THE DECLARATION OF INDEPENDENCE para. 1 (U.S. 1776).

314. See *United States v. Lee*, 106 U.S. 196, 218–21 (1882); *Marbury*, 5 U.S. (1 Cranch) at 163; Prohibitions Del Roy, 12 Co. Rep. 64, 77 Eng. Rep. 1342 (KB 1607).

