

TEXTUAL RIGHTS, LIVING IMMUNITIES

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I. INTRODUCTION

Indisputably, one of the late Justice Scalia's most lasting imprints on American jurisprudence is his relentless advocacy for the interpretive methodologies of "textualism" in statutory interpretation and "originalism" in constitutional interpretation.¹ Although textualism and originalism are technically distinct methodologies,² numerous scholars, in recent decades, have analyzed the many similarities between the two.³ Due to these similarities, one would assume jurists utilizing these interpretive tools would do so uniformly. However, in regards to Eleventh Amendment jurisprudence, the United States Supreme Court appears to be abandoning this systematic expectation. Is the Supreme Court, especially, but not exclusively, in the Chief Justice Rehnquist through Chief Justice Roberts eras, applying the interpretive methods of textualism and originalism consistently in cases involving, on the one hand, the delineation of rights and remedies, and on the other, the development of defenses and

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1. See generally ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* (2012) (discussing Justice Scalia's view on statutory interpretation and arguing that textualism is the best method of interpretation).

2. See *id.* at 435–41.

3. See David M. Zlotnich, *Battered Women & Justice Scalia*, 41 ARIZ. L. REV. 847, 849–50 (1999) (discussing a similarity Justice Scalia has articulated between originalism and textualism, in that both restrict "the intrusion of judicial bias" whereas other canons, which require more "open-ended interpretation," can be used by judges to implement their own values); John F. Manning, *Textualism and the Role of the Federalist in Constitutional Adjudication*, 66 GEO. WASH. L. REV. 1337, 1355 (1998) ("[L]eading textualists typically subscribe to premises of originalism as well."); Frank H. Easterbook, *Alternatives to Originalism?*, 19 HARV. J.L. & PUB. POL'Y 479, 486 (1996).

Judicial review came from a theory of meaning that supposed the possibility of right answers—originalist theory rooted in text. . . . Any student of constitutionalism who cares about preserving a judicial role needs a way of reading the Constitution that can support that judicial role. Such a theory will be neither broad nor narrow, neither pro nor con state power. But it necessarily is textualist and originalist.

Id. Although the consequences of originalist constitutional interpretation severely outweigh the consequences of textual statutory interpretation, given the comparative difficulty of amending the constitution as opposed to a statute, for purposes of this article only, the distinctions between originalism and textualism are, for the most part, inconsequential to the analysis and thus, the terms are used largely interchangeably.

immunities? Conversely, does the Court selectively apply these methods asymmetrically?

Framed more provocatively, is the Court developing jurisprudence marked by limited originalist and textualist rights, but also malleable living immunities? Whether there is a definitive answer to that question is uncertain, but even assuming, *arguendo*, that such an answer exists, the aspiration is beyond the scope of this Article. Indeed, the goals of this Article are much more modest: to ask the question and to scratch its surface.

In posing the question, this Article intends to offer select instances that illustrate the dynamic in action. To be sure, selection bias and anecdote permeate the analysis herein. However, these transgressions may be inherent in the question—that is to say, the transgressions, which are here conceded, may be consistent with the Court’s less transparent, but similar selection bias in interpretive emphasis depending on the underlying rights-immunities divide in particular cases. In approaching the capacious question via this modest manner, this Article seeks to elevate the question itself, and in doing so, encourage more thorough future analysis by legal scholars, and more empirically, political scientists.

Part II offers an overview of both textualism and originalism to serve as a backdrop in analyzing the Court’s use of different methodologies of interpretation when presented with issues related to rights/remedies and defenses/immunities.⁴ This Part focuses on Justice Scalia’s and Bryan Garner’s book, *Reading Law: The Interpretation of Legal Texts* (“*Reading Law*”), which offers a case for textualism in the hopes of “persuad[ing] [its] readers that this interpretative method is the soundest, most principled one that exists.”⁵ This Part also details Judge Richard Posner’s criticisms of Justice Scalia’s attempts to reduce textualism to a series of rules and paradigms that Posner finds incomplete and inconsistent.⁶ Part III concentrates on *Hans v. Louisiana*,⁷ a case that predates Justice Scalia’s tenure on the Court by a mere ninety-six years.⁸ *Hans* marks a dramatic change in the course of Eleventh Amendment jurisprudence, an especially dramatic departure from the Amendment’s clear textual mandate, and, in later years, a precedential foundation for yet further departures. Additionally, this Part examines the work of ideologically diverse scholars ranging from noted textualism advocate, John Manning, who argues the

4. See *infra* Part II.

5. SCALIA & GARNER, *supra* note 1, at xxvii.

6. See *infra* Part II.B and notes 33–39.

7. *Hans v. Louisiana*, 134 U.S. 1 (1890).

8. See *infra* Part III.

Hans Court erroneously used its sense of “strong purposivism,”⁹ and in doing so, failed to respect the text of the Amendment and the political compromises that the text reflects,¹⁰ to Erwin Chemerinsky, who asserts not only that *Hans* is wrongly decided in departing from its textual application only to citizens of State A suing State B, but also that “[s]overeign immunity is an anachronistic relic and the entire doctrine should be eliminated from American law.”¹¹ While the latter assertion reaches beyond the scope of this Article, it is notable that the very word chosen by Chemerinsky—“relic”—plays a significant role in Justice Scalia’s approach to rights-based doctrines in cases following *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*.¹² Part IV pivots from *Hans* itself, to an illustration of how, via *stare decisis*, *Hans* became the cornerstone in the incremental development of sovereign immunity jurisprudence that, whatever its attributes, shows fidelity neither to textualism nor originalism and yet, remarkably, is embraced by the chief progenitors of both.¹³ Part V asserts that the “wink-wink” brand of textualism in *Hans* and later sovereign immunity cases has also seeped, and more recently, flowed, into an expanding development of doctrinal immunities and defenses.¹⁴ This Part analyzes a line of cases, which emphasize that expanding development, with particular emphasis on those that have enhanced defenses, while also examining and comparing cases where rights were interpreted more narrowly.¹⁵

II. TEXTUALISM AS A MODE OF INTERPRETATION

A. Textualism and *Reading Law*

In *Reading Law*, Justice Scalia and Brian Garner set out to convince readers that textualism, while not perfect, is the best method of legal interpretation.¹⁶ The authors argue that the use of many different methods of interpretation—for example, textualism, originalism, purposivism,

9. John F. Manning, *The Eleventh Amendment and the Reading of Precise Constitutional Texts*, 113 YALE L. J. 1663, 1666 (2004).

10. See *infra* Part III.C and notes 64–76 (arguing the *Hans* Court’s use of “strong purposivism” (relying on the perceived background purpose to establish a rule) went beyond the carefully drawn text of the Eleventh Amendment). The author contends that textualism, as opposed to purposivism, respects Congressional compromise that is, at times, unknowable.

11. Erwin Chemerinsky, *Against Sovereign Immunity*, 53 STAN. L. REV. 1201, 1201 (2001); see also *infra* Part III.D and notes 77–89.

12. See generally *Bivens v. Six Unknown Named Agents of the Fed. Bureau of Narcotics*, 403 U.S. 388 (1971).

13. See *infra* Part IV.

14. See *infra* Part V.

15. See *infra* Part V.

16. SCALIA & GARNER, *supra* note 1, at xxvii.

consequentialism—leads to confusion amongst: legislators while drafting legislation, parties during litigation, lawyers while drafting contracts, and, most importantly, amongst judges while interpreting texts before the court.¹⁷

Leaving the merits of textualism aside, *Reading Law* illustrates Justice Scalia's use of textualism, which is critical in understanding his view of sovereign immunity. Justice Scalia and Garner begin, as any good textualist would, by providing a definition of textualism: "In their full context, words mean what they conveyed to reasonable people at the time they were written—with the understanding that general terms may embrace later technological innovations."¹⁸ They assert that textualism is not designed to achieve ideological ends because it relies on the contextual meaning of words, irrespective of external considerations.¹⁹ In addition, they state that textualism, as an established and consistent method of interpretation, generates better legal drafting and better judicial decisions.²⁰ The authors then proceed to briefly describe the benefits of textualism and the shortcomings of other methods of interpretation.²¹ Additionally, *Reading Law* establishes fifty-seven canons of interpretation, some of which have differing levels of application.²² For example, some canons, such as the "supremacy of text principle," apply to all texts while others, such as the "presumption against waiver of sovereign immunity," only apply in limited circumstances.²³

Reading Law addresses different methods of interpretation and compares them to textualism.²⁴ First amongst the competing methods, and most importantly for analyzing Eleventh Amendment jurisprudence, is purposivism.²⁵ Purposivists attempt to determine what purpose the drafter(s) of the relevant legal text sought to accomplish.²⁶ This may include an inquiry into the legislative history, as well as other nontextualist materials of the text at issue, to determine the author's purpose.²⁷

Justice Scalia and Garner view purposivism, and all other interpretive methods aside from textualism, as escape hatches for judges to depart from

17. *See id.* at 9–28.

18. *Id.* at 16.

19. *Id.* ("Textualism is not well designed to achieve ideological ends, relying as it does on the most objective criterion available: the accepted contextual meaning that the words had when the law was enacted.").

20. *Id.*

21. *Id.* at 16–28.

22. *See generally id.* at 47–339 (providing various canons of construction to guide statutory and constitutional interpretation).

23. *See id.* at 56–58, 281–89.

24. *Id.* at 19–28.

25. *Id.* at 18.

26. *Id.*

27. *Id.*

the constraints of the applicable legal text and make decisions they, as individuals, feel should be reached.²⁸ “Although the problem of tendentiously variable readings is age-old, the cause is not: the desire for freedom from the text, which enables judges to do what they want.”²⁹ Professor Manning, a critic of the Court’s holding in *Hans*, argues that purposivism is actually the underlying rationale behind the *Hans* decision, and therefore, most of the subsequent Eleventh Amendment decisions.³⁰

As Justice Scalia and Garner state, the word “nail” has a different meaning in a law regulating beauty salons than it does in a law regulating building codes.³¹ Textualism considers the purpose of the legal text but only through the text itself.³² It is through the simple definition of textualism and the canons of interpretation that textualism is applied to cases. The question is whether textualism, as defined here, was followed in cases involving sovereign immunity. If this form of textualism was not followed, how would the results differ if textualism was applied to the cases addressed in this Article, to the sovereign immunity doctrine, and to litigants’ rights in general?

B. Judge Richard Posner’s Criticism of Justice Scalia

Seventh Circuit Judge Richard Posner³³ has been critical of *Reading Law* and Justice Scalia’s supposed use of textualism and originalism.³⁴ In *The Incoherence of Antonin Scalia*, Judge Posner highlights the inconsistencies in Justice Scalia’s argument in favor of textualism and critiques his claim that “ideology plays no role.”³⁵ Judge Posner argues that textualism “tilts” towards the “conservative preference” of “small government.”³⁶ Moreover, Judge Posner is critical of Justice Scalia’s misrepresentation of alternative means of interpretation.³⁷ According to Judge Posner, Justice Scalia and Garner mischaracterize the opinions cited

28. *Id.* at 22 (“Yet there is a world of difference between an objective test (the text) . . . and tests that invite judges to say that the law is what they think it ought to be.”).

29. *Id.* at 9.

30. See *infra* Part III.C and notes 64–76.

31. SCALIA & GARNER, *supra* note 1, at 20.

32. *Id.*

33. Judge Posner was appointed to the Seventh Circuit Court of Appeals in 1981 and is also a senior lecturer at the University of Chicago Law School. *Richard A. Posner*, U. CHI. L. SCH., <http://www.law.uchicago.edu/faculty/posner-r> (last visited Oct. 1, 2016).

34. See Richard A. Posner, *The Incoherence of Antonin Scalia*, NEW REPUBLIC (Aug. 24, 2012), <http://www.newrepublic.com/article/magazine/books-and-arts/106441/scalia-garner-reading-the-law-textual-originalism>.

35. *Id.* (“[T]ext as such may be politically neutral, but textualism is conservative.”).

36. *Id.* (arguing that “textualism hobbles legislation”).

37. See *id.* (“Another problem with their defense of originalism is their *disingenuous characterization* of other interpretive theories.”) (emphasis added).

in *Reading Law* to highlight erroneous outcomes based on other methods of interpretation; Judge Posner argues that readers are susceptible to overlooking this mischaracterization because they will not “read the opinions cited in their footnotes and discover that in discussing the opinion they give distorted impressions of how judges actually interpret legal texts[.]”³⁸

Furthermore, Judge Posner appears to view Justice Scalia’s arguments in *Reading Law* as supporting a type of “textualism” that allows Justice Scalia to reach decisions that favor his own beliefs:

[Justice Scalia and Garner] endorse fifty-seven ‘canons of construction,’ or interpretive principles, and in their variety and frequent ambiguity these ‘canons’ provide them with all the room needed to generate the outcome that favors Justice Scalia’s strongly felt views on such matters as abortion, homosexuality, illegal immigration, states’ rights, the death penalty, and guns.³⁹

III. THE HISTORY OF *HANS V. LOUISIANA* AND COMMENTARY

In order to properly analyze the *Hans* decision, the subsequent decisions discussed in this Article, and the modes of legal interpretation utilized, it is necessary to understand the history leading up to *Hans*.

A. *Chisholm v. Georgia* and the Eleventh Amendment

Shortly after the Constitution was ratified, the Supreme Court addressed the issue of state sovereign immunity in *Chisholm v. Georgia*.⁴⁰ In *Chisholm*, a citizen of South Carolina sued the State of Georgia.⁴¹ Georgia refused to appear before the Court, arguing that it could not be

38. *Id.*

39. *Id.* (emphasis added).

40. See generally *Chisholm v. Georgia*, 2 U.S. 419 (1793). *Chisholm* was not the first case in which the issue of state sovereign immunity presented itself. See Kurt T. Lash, *Leaving the Chisholm Trail: The Eleventh Amendment and the Background Principle of Strict Construction*, 50 WM. & MARY L. REV. 1577, 1618 (2009). Notably, the first case, *Vanstophorst v. Maryland*, on the first docket of the newly created Supreme Court presented the issue of whether a state could be sued. *Id.* *Vanstophorst* involved a contract dispute between certain individuals and the State of Maryland. *Id.* Plaintiffs’ lawyers advised the plaintiffs to settle because a “suit against a state cannot avail . . . The State is not an individual—The States being individually sovereign.” *Id.* The State of Maryland also concluded that “allowing the case to go to trial ‘may deeply affect the political rights of this state, as an independent member of the union.’” *Id.* (quoting *Proclamation by John Hancock*, INDEP. CHRON., (July 9, 1793), reprinted in Maeva Marcus, 5 THE DOCUMENTARY HISTORY OF THE SUPREME COURT OF THE UNITED STATES 1789-1800: SUITS AGAINST THE STATES 34 (1994)). The case was settled out of court. *Id.*

41. *Chisholm*, 2 U.S. at 420.

sued by a citizen of South Carolina because it had sovereign immunity.⁴² The first issue discussed in *Chisholm* was:

Can the State of Georgia, being one of the United States of America, be made a party-defendant in any case, in the Supreme Court of the United States, at the suit of a private citizen, even although he himself is . . . a citizen of the State of South Carolina?⁴³

The Supreme Court answered the question affirmatively, holding that “[t]he Constitution vests a jurisdiction in the Supreme Court over a State, as a defendant, at the suit of a private citizen of another State.”⁴⁴ The holding, that a state could be haled into federal court by an individual, received a strong negative reaction.⁴⁵ Only a few days after the *Chisholm* decision, amendments were proposed to Congress.⁴⁶

In 1795, two years after *Chisholm*, the Eleventh Amendment was ratified by the requisite twelve states.⁴⁷ The text of the Eleventh Amendment provides that, “[t]he 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.”⁴⁸

At face-value, the text of the Eleventh Amendment seems clear. Especially in a Court that utilizes a textualist/originalist interpretive methodology, it appears that the words, themselves, leave little room for debate. However, less than 100 years after the Eleventh Amendment’s adoption, the Court interpreted the Eleventh Amendment in a way that goes beyond its clear textual meaning. The following subsection discusses the Court’s holding in *Hans v. Louisiana* and highlights the departure from the text of the Amendment.

42. See Lash, *supra* note 40, at 1631; see also *Chisholm*, 2 U.S. at 469 (“It is said, that Georgia refuses to appear and answer to the Plaintiff in this action, because she is a sovereign State, and therefore not liable to such actions.”).

43. *Chisholm*, 2 U.S. at 420.

44. *Id.*

45. Lash, *supra* note 40, at 1649–50; see also *id.* at 1678 (stating that “preserving the dignity of the states was the primary issue discussed in public calls for an amendment to the Constitution” to remedy the unpopular opinion in *Chisholm*).

46. *Chisholm*, 2 U.S. at 1678.

47. William A. Fletcher, *A Historical Interpretation of the Eleventh Amendment: A Narrow Construction of an Affirmative Grant of Jurisdiction Rather than a Prohibition Against Jurisdiction*, 35 STAN. L. REV. 1033, 1059 (1983).

48. U.S. CONST. amend. XI.

B. *Hans v. Louisiana*

The Court's decision in *Hans v. Louisiana*⁴⁹ marked a dramatic change in Eleventh Amendment doctrine, which this Article, among others, argues was a turn in the wrong direction.

In *Hans*, a citizen of Louisiana sued the State of Louisiana to recover monies on state bonds held by Hans, monies which Louisiana would not have to pay as per an 1879 amendment to its Constitution.⁵⁰ Hans filed suit in federal court alleging the 1879 amendment violated Article I, Section 10 of the U.S. Constitution.⁵¹ Louisiana's Attorney General challenged the Court's jurisdiction, arguing that the plaintiff could not hail Louisiana into court unless Louisiana consented.⁵² Plaintiff, utilizing an explicitly textual argument, contended the Eleventh Amendment "only prohibits such suits against a state which are brought by the citizens of another state, or by citizens or subjects of a foreign state."⁵³ To put plaintiff's argument succinctly, because he was *suing his own state*, his suit was not barred. The Court, however, rejected this argument, finding that the Amendment ultimately means *more* than it says.⁵⁴

Despite acknowledging the plaintiff's argument was consistent with the plain meaning of the Eleventh Amendment, the Court held that the immunity embraced by the Eleventh Amendment *extends* to the states in suits by their *own* citizens.⁵⁵ Grounding its decision in the circumstances surrounding the Amendment's enactment in the wake of *Chisholm*, the Court stated:

It is true the amendment does so read, and, if there were no other reason or ground for abating his suit, it might be maintainable; and then we should have this anomalous result, that, in cases arising under the constitution or laws of the United States, a state may be sued in the federal courts by its own citizens, though it cannot be sued for a like cause of action by the citizens of other states, or of a foreign state; and may be thus sued in the federal courts, although not allowing itself to be sued in its own courts. *If this is the necessary consequence of the language of the constitution and the law, the result is no less startling and unexpected than was the original decision of this court, that, under the language of the constitution and of the judiciary act of 1789, a state was liable to be sued by a citizen of another state or of a foreign country. That decision was made in the*

49. See generally *Hans v. Louisiana*, 134 U.S. 1 (1890) (holding that the Eleventh Amendment prohibits suits directly against a state by one of its own citizens).

50. *Id.* at 1–3.

51. *Id.* at 3.

52. *Id.*

53. *Id.* at 10.

54. *Id.* at 10–11.

55. *Id.* at 10.

*case of Chisholm v. Georgia, . . . and created such a shock of surprise throughout the country that, at the first meeting of congress thereafter, the eleventh amendment to the constitution was almost unanimously proposed, and was in due course adopted by the legislatures of the states. This amendment, expressing the will of the ultimate sovereignty of the whole country, superior to all legislatures and all courts, actually reversed the decision of the[S]upreme [C]ourt.*⁵⁶

As John Manning states in *The Eleventh Amendment and the Reading of Precise Constitutional Texts*, discussed further *infra*,⁵⁷ the *Hans* decision introduced the idea that “the Eleventh Amendment’s purpose was not merely to limit the federal judicial power in cases involving the party alignments described by the Amendment’s precise text, but also to repudiate *Chisholm* and all that it stood for.”⁵⁸ Despite the Amendment’s explicit exclusion of suits against states by their own citizens, the Court, relying on the views of Hamilton, Madison and Marshall, and on the Amendment’s swift enactment, refused to accept that this exclusion was done purposely.⁵⁹ According to the Court, states simply would not have ratified the Amendment if it subjected them to suit by their own citizens.⁶⁰ The Court stated:

Can we suppose that, when the [E]leventh [A]mendment was adopted, it was understood to be left open for citizens of a state to sue their own state in federal courts, while the idea of suits by citizens of other states, or of foreign states, was indignantly repelled? Suppose that congress, when proposing the [E]leventh Amendment, had appended to it a proviso that nothing therein contained should prevent a state from being sued by its own citizens in cases arising under the constitution or laws of the United States, can we imagine that it would have been adopted by the states? The supposition that it would is almost an absurdity on its face.⁶¹

With those words, the Court departed from the Amendment’s text, thus dramatically altering the future course of the doctrine. Quite frankly, and to use Justice Bradley’s own words, the Eleventh Amendment has reached such a point (through *Hans* and its progeny) at which it has become “almost an absurdity on its face.”⁶²

56. *Id.* at 10–11 (emphasis added).

57. *See infra* Part III.C and notes 64–76.

58. Manning, *supra* note 9, at 1682.

59. *Hans*, 134 U.S. at 12–14.

60. *Id.* at 15.

61. *Id.*

62. *Id.*

C. “Strong Purposivism” and the Need to Return to a Textualist Approach

The Court’s decision in *Hans* is perplexing and difficult to understand. The text of the Eleventh Amendment is clear: “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 one Citizens of another state, or by Citizens or Subjects of any Foreign State.”⁶³ The words “by Citizens of the State” or “by the State’s own Citizens” are noticeably, and explicitly, absent. Thus, one may logically conclude that a suit by a citizen against his or her own state is not within the confines of the Eleventh Amendment, and accordingly, not barred. As previously discussed, however, the *Hans* Court reached a different conclusion.

In attempt to explain the Court’s rationale, John Manning asserts that the Court used what he deems “strong purposivism”⁶⁴ to reach its conclusion.⁶⁵ Strong purposivism requires courts to interpret statutes in light of what they perceive the statute’s purpose to be.⁶⁶

Strong purposivists . . . believe . . . that even the clearest statutory language will sometimes contradict a statute’s apparent ‘purpose,’ as discerned from sources such as the statute’s overall tenor, the history of the era in which the statute was passed, society’s deeply held values, patterns of policy judgments in related statutes, and statements of legislative history. The distinguishing feature of strong purposivism is that when a specific statutory text produces ‘an unreasonable [result] ‘plainly at variance with the policy of the legislation as a whole,’” federal judges may (and must) alter even the clearest statutory text to serve the statutes ‘purpose.’⁶⁷

Judges are ultimately required to “enforc[e] the *spirit* rather than the letter of the law.”⁶⁸ Applying this theory to *Hans*, Manning asserts “the Court has relied on the Amendment’s perceived background purpose to establish broad state sovereign immunity that goes well beyond its carefully drawn text.”⁶⁹ Specifically, he states:

[T]he *Hans* Court’s “shock of surprise” theory maintained that the Amendment’s swift and emphatic adoption conveyed a purpose not only to deal with the precisely drawn classes of jurisdiction described by the

63. U.S. CONST. amend XI.

64. Manning, *supra* note 9, at 1666.

65. *Id.* at 1667.

66. John F. Manning, *Textualism and the Equity of the Statute*, 101 COLUM. L. REV. 1, 10–11 (2001).

67. *Id.*

68. Manning, *supra* note 9, at 1670 (emphasis added).

69. *Id.* at 1666.

text, but also to overturn *Chisholm* and its guiding premise that Article III made states suable in the first place. Although the Amendment's text could not bear that wider meaning, the Court concluded that reading it as written would produce an absurdity, given eighteenth-century American society's obvious support for broad sovereign immunity.⁷⁰

According to Manning, a potentially fatal flaw of the strong purposive approach is that interpreting a statute in light of its supposed "purpose," and not in light of the statute's text, disregards any legislative compromises embedded in the words of the statute.⁷¹ Textualism "rests on the idea that most statutes reflect compromise."⁷² This phenomenon can be attributed to the constitutional requirement of bicameralism and presentment—"an elaborately designed process [that] assigns political minorities the right to insist upon compromise at the price of assent to legislation."⁷³ However, these "hard-fought" compromises are lost when the Court strays from the text and uses other tools of interpretation.⁷⁴

[D]issatisfaction with a statute's final contours 'is often the cost of legislative compromise,' and '[t]he deals brokered during a Committee markup, on the floor of the two Houses, during a joint House and Senate Conference, or in negotiations with the President . . . are not for [the courts] to judge or second-guess.'⁷⁵

Ultimately, embracing a modern textualist viewpoint, Manning believes that "when interpreting a precisely worded constitutional provision like the Eleventh Amendment, the Court must adhere to the compromises embedded in the text."⁷⁶ The *Hans* Court, however, did not embrace such a view.

D. Chemerinsky and the Need to Abolish the Eleventh Amendment

While Manning asserts the Eleventh Amendment should be read as written, Chemerinsky goes further—he describes sovereign immunity as a "relic" and argues the Supreme Court should eliminate the doctrine.⁷⁷ He contends that the doctrine, which is "derived from the premise that 'the

70. *Id.* at 1667.

71. *Id.* at 1691.

72. *Id.* at 1694.

73. *Id.* Similarly, the supermajority requirements in the amendment process grant minority groups the power to demand compromise. *Id.*

74. *Id.*

75. *Id.* at 1691–92.

76. *Id.* at 1750.

77. See Chemerinsky, *supra* note 11, at 1201.

King can do no wrong[.]’ deserves no place in American law.”⁷⁸ The reason for Chemerinsky’s claim is rather obvious—America was “founded on a *rejection* of a monarchy and royal prerogatives.”⁷⁹ In theory, Chemerinsky argues that the viability of sovereign immunity doctrine declined dramatically when the colonies severed their ties with Britain.⁸⁰ There was simply no need for sovereign immunity, particularly in light of the new belief that America was a “government of laws,” and that governments must be held accountable.⁸¹ One method of accountability was permitting suits against states.⁸²

Sovereign immunity, however, undermines this goal.⁸³ States have used the doctrine as a shield to prosecution, ultimately eliminating not only a crucial check on their power, but also any remedy for injuries caused by their actions.⁸⁴ This is completely at odds with due process, which requires a process for redressing injuries caused by the government, and it renders hollow Chief Justice Marshall’s infamous claim that “for every right, there is a remedy.”⁸⁵

In addition to the issues of government accountability and due process, Chemerinsky also notes that sovereign immunity is at odds with the Supremacy Clause as it “allows a common law doctrine to reign supreme over the Constitution and federal law.”⁸⁶ A plaintiff cannot succeed in a suit against a state for a constitutional or statutory violation because the state will plead sovereign immunity.⁸⁷ The doctrine simply “frustrates the supremacy of federal law by preventing the enforcement of the Constitution and federal statutes,” thereby rendering the Supremacy Clause essentially obsolete.⁸⁸

Ultimately, according to Chemerinsky, in order to ensure the integrity and viability of our Constitution and the laws of the United States, the Court must abolish the sovereign immunity doctrine, and must do so soon.⁸⁹

78. *Id.* at 1202.

79. *Id.* (emphasis added).

80. *Id.* at 1201–02.

81. *Id.* at 1213.

82. *Id.* at 1214. The theory was that these suits would serve as a “check” on their power. *Id.* at 1208.

83. *Id.* at 1211–12.

84. *Id.*

85. *Id.* at 1215; *see also* *Marbury v. Madison*, 5 U.S. 137, 163 (1803) (“[W]here there is a legal right, there is also a legal remedy by suit or action at law, whenever that right is invaded.”).

86. Chemerinsky, *supra* note 11, at 1211.

87. *Id.*

88. *Id.* at 1211–12.

89. *Id.* at 1224.

IV. THE DEVELOPMENT OF SOVEREIGN IMMUNITY JURISPRUDENCE

In the wake of *Hans*, the Supreme Court repeatedly considered the limits of the Eleventh Amendment's newly expanded reach. Having determined that a state may waive sovereign immunity,⁹⁰ the Court considered the contours of this consent.⁹¹ The Court concluded that sovereign immunity was not limited to suits in law and equity.⁹² The Court also held that private citizens may circumvent the Eleventh Amendment by suing state officials—as individuals—for attempting to enforce laws that are in conflict with the U.S. Constitution.⁹³ However, in this scenario, only equitable relief would be available.⁹⁴

Likewise, the Court reaffirmed its pre-*Hans* stance that subdivisions of a state are not protected.⁹⁵ The Court further held that state sovereign immunity extends to suits brought by foreign states,⁹⁶ but not to suits brought by the United States⁹⁷ or by other States.⁹⁸ The Court also held that Section 5 of the Fourteenth Amendment, which provides that “Congress

90. *Clark v. Barnard*, 108 U.S. 436, 447 (1883).

91. *Compare* *Gunter v. Atl. Coast Line R. Co.*, 200 U.S. 273, 292 (1906) (holding that by waiving immunity to defend itself in a case, a State waives its right to invoke immunity in future cases that are ancillary to that decision), *with* *Smith v. Reeves*, 178 U.S. 436, 445 (1900) (holding that, by consenting to be sued in its own courts, a State does not automatically consent to be sued in federal court—but suggesting that “the final judgment of the highest court of the state in any action brought against it [in state court] with its consent may be reviewed or re-examined [by the U.S. Supreme Court] . . . if it denies to the plaintiff any right, title, privilege, or immunity secured to him and specially claimed under the Constitution or laws of the United States.”).

92. *See, e.g., In re State of New York*, 256 U.S. 490, 497-98 (1921) (“[T]he amendment speaks only of suits in law or equity [But *Hans*] cannot with propriety be construed to leave open a suit against a state in the admiralty jurisdiction by individuals, whether its own citizens or not.”).

93. *Ex parte Young*, 209 U.S. 123, 159–60 (1908).

If the act which the state attorney general seeks to enforce be a violation of the Federal Constitution, the officer, in proceeding under such enactment, comes into conflict with the superior authority of that Constitution, and he is in that case stripped of his official or representative character and is subjected in his person to the consequences of his individual conduct. The state has no power to impart to him any immunity from responsibility to the supreme authority of the United States.

Id.

94. *Edelman v. Jordan*, 415 U.S. 651, 666–70 (1974).

95. On the same day that it decided *Hans*, the Court decided a case in which Lincoln County, Nevada, attempted to claim sovereign immunity and held that *Cowles v. Mercer County*, which was decided twenty-two years earlier, was still controlling. *See* *Lincoln Cty. v. Luning*, 133 U.S. 529, 531 (1890) (“*Cowles* . . . is decisive . . . ‘The power [of counties] to contract with citizens of other States implies liability to suit by citizens of other States, and no statute limitation of suability can defeat a jurisdiction given by the Constitution.’” (quoting *Cowles v. Mercer Cty.*, 74 U.S. 118, 122 (1868))).

96. *Principality of Monaco v. Mississippi*, 292 U.S. 313, 330 (1934).

97. *E.g., United States v. Mississippi*, 380 U.S. 128, 140–41 (1965).

98. *See, e.g., South Dakota v. North Carolina*, 192 U.S. 286, 321–22 (1904) (entering judgment against North Carolina and ordering the state to pay \$27,400 plus court costs to South Dakota).

shall have power to enforce, by appropriate legislation, the provisions of this article,” permits Congress to pass laws that, “for the purpose of enforcing the provisions of the Fourteenth Amendment, provide for private suits against States.”⁹⁹

The most radical shift arguably occurred in 1964 with the Court’s decision in *Parden v. Terminal Railway of the Alabama State Docks Department*.¹⁰⁰ In *Parden*, the Court held that a state could waive sovereign immunity for suits brought under a congressional statute by choosing to engage in the activities that statute regulates; the Court introduced Article I’s Commerce Clause as a vehicle by which Congress could abrogate sovereign immunity.¹⁰¹ However, less than a decade later, the Court introduced a new limit to this type of consent.¹⁰² In *Employees of the Department of Public Health & Welfare v. The Department of Public Health & Welfare*, the Court held that Missouri *did not* waive sovereign immunity by engaging in activity regulated by a statute, passed under the Commerce Clause, because the statute failed to express “by clear language that the constitutional immunity was swept away.”¹⁰³

A. Sovereign Immunity Cases During Justice Scalia’s Tenure on the Court

The question of whether Article I granted Congress the power to abrogate sovereign immunity garnered a great deal of attention during Justice Scalia’s tenure. The first Eleventh Amendment case to reach the Court after Justice Scalia’s confirmation was *Welch v. Texas Department of Highways & Public Transportation*.¹⁰⁴ In *Welch*, the Court considered the Jones Act,¹⁰⁵ which made the remedial provisions of the Federal Employer’s Liability Act¹⁰⁶—the same statute at issue in *Parden*¹⁰⁷—applicable to seamen.¹⁰⁸ In the majority opinion, Justice Powell stated that the Court assumed, “without deciding or intimating a view of the question,

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

100. *See generally* *Parden v. Terminal Ry. of the Ala. State Docks Dep’t*, 377 U.S. 184 (1964).

101. *Id.* at 192-93 (stating the Commerce Clause’s role here was limited to the particular facts of the case: the Federal Employer’s Liability Act was an exercise of Congress’ power to regulate interstate commerce, and the employees who brought suit under the Act in *Parden* were employed by a railroad that was owned and operated by the State of Alabama—leading the Court to hold that, by choosing to own and operate a railroad engaged in interstate commerce, the State had waived its sovereign immunity in suits brought under the Act).

102. *See generally* *Emps. of the Dep’t of Pub. Health & Welfare v. Dep’t of Pub. Health & Welfare*, 411 U.S. 279 (1973) (holding that “congress did not lift the sovereign immunity of the States under the [Fair Labor Standards Act]”).

103. *Id.* at 285.

104. *See generally* *Welch v. Tex. Dep’t of Highways & Pub. Transp.*, 483 U.S. 468 (1987).

105. Jones Act, 46 U.S.C. § 688 (1970).

106. Federal Employer’s Liability Act, 45 U.S.C. §§ 51-60 (1994).

107. *Parden v. Terminal Ry. of the Ala. State Docks Dep’t*, 377 U.S. 184, 184 (1964).

108. *Welch*, 483 U.S. at 471.

that the authority of Congress to subject unconsenting States to suit in federal court is not confined to [Section] 5 of the Fourteenth Amendment.”¹⁰⁹ Further, Justice Powell stated “Congress has not expressed in unmistakable statutory language its intention to allow States to be sued in federal court under the Jones Act.”¹¹⁰

The majority, however, did not stop there—noting that *Parden* was “mistakenly” decided, the Court held “to the extent that *Parden* is inconsistent with the requirement that an abrogation of Eleventh Amendment immunity by Congress must be expressed in unmistakably clear language, it is overruled.”¹¹¹ Finally, Justice Powell noted *Welch* marks the fourth time in two years that a four-Justice decision advocated overruling *Hans* and its progeny.¹¹² He stated “the dissenters—on the basis of ambiguous historical evidence—would flatly overrule a number of major decisions of the Court,”¹¹³ without the special justification that a departure from *stare decisis* usually demands.¹¹⁴

Justice Scalia, in a brief concurring opinion, stated that *Hans* was correctly decided and that even if it had not been, he would be wary of overruling it, since it was the background rule upon which congressional lawmaking and Supreme Court jurisprudence were based for nearly a century.¹¹⁵ He further agreed that *Parden* should be overruled—without any mention of overruling it in a limited way, as the majority did.¹¹⁶

Interestingly, the Court’s next Eleventh Amendment case actually *expanded*, albeit briefly, Congress’s power to abrogate immunity under the Commerce Clause. In *Pennsylvania v. Union Gas Company*,¹¹⁷ the Court held that the Commerce Clause, like the Fourteenth Amendment, “expands federal power and contracts state power,” and therefore, it grants Congress the power to abrogate immunity when legislating pursuant to the Commerce Clause—whether states consent to waive immunity or not.¹¹⁸

109. *Id.* at 475.

110. *Id.*

111. *Id.* at 476–78.

112. *Id.* at 478. Justice Brennan authored a dissenting opinion, joined by Justices Marshall, Blackmun and Stevens. *Id.* at 496.

113. *Id.* at 479.

114. *Id.* at 495.

115. *Id.* at 495–96.

116. *Id.*

117. *Pennsylvania v. Union Gas Co.*, 491 U.S. 1 (1989). *Union Gas* was born out of the nation’s first Superfund site: for years, Union Gas Co. and its predecessors had deposited coal tar near a creek bed. *Id.* at 6. Thirty years after the plant closed, Pennsylvania excavated the creek for flood control purposes, and struck the tar deposits. *Id.* at 5. The federal government reimbursed Pennsylvania for hundreds of thousands of dollars in cleanup costs, and then recouped these costs by fining Union Gas under CERCLA. *Id.* at 6; *see infra* note 121. Union Gas sued Pennsylvania in federal court, arguing that the Commonwealth had been negligent in its excavations and should therefore be responsible for at least some of the cleanup costs. *Id.*

118. *Id.* at 17–19.

In *Union Gas*, the Court addressed whether Congress could abrogate states' sovereign immunity by passing laws pursuant to the Commerce Clause.¹¹⁹ The Court first addressed, as in all abrogation of immunity cases, whether the abrogation of states' immunity was express.¹²⁰ The Court concluded that Congress expressly abrogated sovereign immunity under CERCLA and SARA.¹²¹ Justice Brennan, writing for a plurality, concluded that the Commerce Clause allows abrogation of state immunity because "the States surrendered a portion of their sovereignty when they granted Congress the power to regulate commerce."¹²² Thus, by voluntarily giving up rights relating to interstate commerce, the States have relegated the power to abrogate their immunity to Congress, at least with respect to laws passed pursuant to the Commerce Clause.

Justice Scalia, utilizing a textualist approach, concurred that Congress had clearly expressed its intent to abrogate state immunity under CERCLA.¹²³ However, relying on a purposivist analysis of the Eleventh Amendment, he wrote, in dissent, that Congress lacked the power to abrogate sovereign immunity under the Commerce Clause.¹²⁴ The dissenting portion of his opinion began by laying out the text of the Eleventh Amendment and noting that the text of the Amendment is not a comprehensive description of state sovereign immunity.¹²⁵ Justice Scalia suggested that if state sovereign immunity were solely based in the Amendment, then the most reasonable interpretation would be that sovereign immunity applies to the States "only when the sole basis of federal jurisdiction is the diversity of citizenship that it describes."¹²⁶ This means that suits are not barred by the text of the Eleventh Amendment unless there is an additional basis for sovereign immunity outside of the text of the Amendment.

119. *Id.* at 5.

120. *Id.* at 7–14.

121. *Id.* at 13. CERCLA is the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (42 U.S.C. §§ 9601-9628); SARA, the Superfund Amendments and Reauthorization Act of 1986 (PL 99-499, 100 Stat 1613), was passed while *Union Gas's* petition for certiorari was pending. *Id.* at 5–6.

122. *Id.* at 14. Justice White, in a separate opinion, agreed with the plurality's opinion that Article I grants Congress the authority to abrogate immunity, but disagreed that CERCLA evinced a clear intent to do so. *Id.* at 55-56.

123. *Id.* at 29–30 (Scalia, J., concurring).

It is our task, as I see it, not to enter the minds of the Members of Congress—who need have nothing in mind in order for their votes to be both lawful and effective—but rather to give fair and reasonable meaning to the text of the United States Code, adopted by various Congresses at various times.

Id.

124. *Id.* at 29.

125. *Id.* at 30–31.

126. *Id.* at 31.

For Justice Scalia, however, there is an additional basis. Citing to *Hans*, Justice Scalia argued that sovereign immunity—for both the federal and state governments—was “part of the understood background against which the Constitution was adopted, and which its jurisdictional provisions did not mean to sweep away.”¹²⁷ According to Justice Scalia, the Eleventh Amendment was enacted to repudiate *Chisholm* and the entire premise upon which that decision was based.¹²⁸ Justice Scalia argued the purpose and effect of the Eleventh Amendment goes beyond the meaning found in the limited wording of its text.¹²⁹ Rejecting the idea that the Amendment is the comprehensive source for immunity, Justice Scalia presumed that state immunity survived the enactment of the Constitution because the States act as sovereigns.¹³⁰ Justice Scalia, without providing textual support, read in a presumption that the Constitution was created with an assumed immunity for the States.¹³¹ Relying on *stare decisis*, Justice Scalia cited to *Hans* and other cases to express the idea that sovereign immunity was “inherent in the constitutional plan.”¹³² Because sovereign immunity was part of the constitutional plan, there was no “surrender of this immunity in the plan of the convention.”¹³³ Justice Scalia then readopted textualism and found that no text in Article III, or any other section of the Constitution, removed this pre-existing immunity.¹³⁴ He concluded that Article III’s jurisdictional grants of power to the federal courts did not eliminate the preexisting sovereign immunity, and that this “assumption was implicit in the Eleventh Amendment.”¹³⁵ In concluding his dissent, Justice Scalia once again urged overruling *Parden* in its entirety, and called for a return to the “genuine meaning” of *Hans*.¹³⁶

In *Union Gas*, Justice Scalia employed the type of purposivist analysis of the Eleventh Amendment that Professor Manning criticized when discussing *Hans*.¹³⁷ A textual reading of the Amendment, barring only diversity cases, would not have barred this case: the action was brought under a federal statute and was based on federal question jurisdiction. By reading the Amendment to include a broader purpose than the text supports, Justice Scalia would have extended immunity to a federal question case

127. *Id.* at 31–32.

128. *Id.* at 32.

129. *Id.* at 31.

130. *Id.* at 32–34.

131. *Id.* at 33–34.

132. *Id.* at 33 (citing *Principality of Monaco v. Mississippi*, 292 U.S. 313, 329 (1934)).

133. *Id.* at 33 (citing THE FEDERALIST No. 81).

134. *Id.*

135. *Id.*

136. *Id.* at 42–44.

137. See Manning *supra* note 66.

and, even then, find that Congress lacks the power to abrogate immunity under its broad Commerce Clause powers.¹³⁸

Union Gas, however, was short lived. In *Seminole Tribe of Florida v. Florida*, the Court considered whether Article I's Indian Commerce Clause granted Congress the authority to abrogate sovereign immunity.¹³⁹ Chief Justice Rehnquist, writing for the majority, which included Justices Scalia and Thomas, noted that *Union Gas* "created confusion among the lower courts" and "essentially eviscerated . . . *Hans*."¹⁴⁰ He went on to say "*Union Gas* was wrongly decided and that it should be, and now is, overruled."¹⁴¹

In *Seminole Tribe*, the Indian Gaming Regulatory Act¹⁴² provided that Indian tribes may conduct certain gaming activities in conformance with a compact¹⁴³ and imposed upon the States a duty to negotiate in good faith to create the requisite compact.¹⁴⁴ Section 2710(d)(3) described the process by which the parties would negotiate.¹⁴⁵ Congress was express in abrogating sovereign immunity under the Act.¹⁴⁶

The majority believed the Indian Commerce Clause was a greater transfer of power from the States to the federal government than the Interstate Commerce Clause.¹⁴⁷ As such, there was a lengthy discussion regarding the principle and policy of *stare decisis* before overruling *Union Gas*.¹⁴⁸

Chief Justice Rehnquist stated: "[g]enerally, the principle of *stare decisis*, and the interests that it serves," such as "the evenhanded, predictable, and consistent development of legal principles, . . . reliance on judicial decisions, and . . . the actual and perceived integrity of the judicial process,' . . . counsel strongly against reconsideration of our precedent."¹⁴⁹ But, he went on to say the Court has always treated *stare decisis* as a principle of policy and not as an inexorable command.¹⁵⁰ If precedent is "unworkable" or "badly reasoned," the Court is not afraid to stray from its previous rulings.¹⁵¹ However, the sentiment reads more like lip service than

138. *Union Gas*, 49 U.S. at 33-35 (Scalia, J., concurring).

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

140. *Id.* at 64.

141. *Id.* at 66.

142. *Id.* at 47. The Act was passed pursuant to Congress' Article I, Section 8 enumerated powers. *Id.*

143. *Id.* at 48. The Act divided gaming into three classes—I, II, and III—with a different regulatory scheme for each class.

144. *Id.*

145. *Id.* at 47.

146. *Id.* at 49.

147. *Id.* at 62.

148. *See generally id.* at 62-73.

149. *Id.* at 63 (citing *Payne v. Tennessee*, 501 U.S. 808, 827 (1991)).

150. *Id.*

151. *Id.*

true conviction. This is because Chief Justice Rehnquist went to great lengths to explain why *Union Gas* was—without expressed rationale—confusing, and a sharp deviation from established federalism jurisprudence.¹⁵²

In criticizing *Union Gas*, Chief Justice Rehnquist wrote that it was “well established in 1989 at the time *Union Gas* was decided the Eleventh Amendment stood for the constitutional principle that state sovereign immunity limited the federal courts’ jurisdiction under Article III.”¹⁵³ The text of the Amendment is clear: “[t]he Judicial power of the United States shall not be construed to extend to any suit” and decisions since *Hans* are equally clear that “the Eleventh Amendment reflects ‘the fundamental principle of sovereign immunity [that] limits the grant of judicial authority in Art. III.’”¹⁵⁴

The Court did not, however, limit its holding to Congress’ powers under the Indian Commerce Clause—never before had the Court suggested “that the bounds of Article III could be expanded by Congress operating pursuant to any constitutional provision other than the Fourteenth Amendment.”¹⁵⁵ This concept was a deviation from historical interpretation since there was a seemingly “fundamental [belief] that Congress could not expand the jurisdiction of the federal courts beyond the bounds of Article III.”¹⁵⁶ The plurality in *Union Gas* found support for “holding the unremarkable, and completely unrelated, proposition that the States may waive their sovereign immunity.”¹⁵⁷ Chief Justice Rehnquist continued, asserting that the plurality cited precedent propositions that were merely assumed *arguendo* in previous cases, such as *Fitzpatrick*.¹⁵⁸ The dissent in *Union Gas* also placed misguided reliance on the *Fitzpatrick* decision. The Court “conclude[d] none of the policies underlying *stare decisis* require[d] [their] continuing adherence to [*Union Gas*].”¹⁵⁹ This deviation was justified since the result and rationale of *Union Gas* departed from the Court’s “established understanding of the Eleventh Amendment and undermined the accepted function of Article III.”¹⁶⁰ Now, in *Seminole Tribe*, the Court was adhering to precedent, “not to mere *obiter dicta*, but rather to the well-established rationale upon which the Court based the results of its earlier decisions.”¹⁶¹

152. *Id.* at 63–64.

153. *Id.* at 64.

154. *Id.* (quoting *Pennhurst State Sch. v. Halderman*, 465 U.S. 89, 97–98 (1984)).

155. *Id.* at 65.

156. *Id.*

157. *Id.*

158. *Id.*

159. *Id.* at 66.

160. *Id.*

161. *Id.* at 66–67.

The majority continued, stating that for over 100 years, the Court based its decisions upon the understanding that state sovereign immunity was integral to the Eleventh Amendment.¹⁶² Although the words “a State may be sued without her consent” are absent from the Eleventh Amendment, the Court recognized that literal applications of the text of the Eleventh Amendment, as well as of Section 2 of Article III, would “strain the constitution and the law to a construction never imagined or dreamed of.”¹⁶³ Since “the federal courts did not have federal question-jurisdiction at the time the Amendment was passed . . . , it seems unlikely that much thought was given to the prospect of federal-question jurisdiction over the States.”¹⁶⁴

In overruling *Union Gas*, the Court reaffirmed the notion that state sovereign immunity, embodied in the Eleventh Amendment, is subjugated because the suit lies within the exclusive control of the Federal Government.¹⁶⁵ Furthermore, “even when the Constitution vests Congress with complete law-making authority, over a particular area, the Eleventh Amendment prevents congressional authorization of suits by private parties against non-consenting States; the Eleventh Amendment restricts power under Article III and Article I cannot be used to circumvent constitutional limitations to federal jurisdiction.”¹⁶⁶

The Court often applies *Ex parte Young* to suits which seek “only prospective injunctive relief in order to end a continuing violation of federal law.”¹⁶⁷ The good faith negotiation clause of the Indian Regulatory Gaming Act does not stand alone because Congress also crafted a lengthy and intricate remedial scheme.¹⁶⁸ Where Congress has created a remedial scheme, the Court has refused to implement its own.¹⁶⁹ In *Ex Parte Young*, the issue was whether sovereign immunity should be lifted to allow suits against a state officer.¹⁷⁰ Congress set forth modest sanctions, and allowing the suit to continue via *Ex parte Young* would trigger the full power of the Court.¹⁷¹ In other words, allowing suit under *Ex parte Young* would render the remedial scheme meaningless and be contrary to congressional intent.¹⁷²

Congress’ power to abrogate immunity was again challenged in *Florida Prepaid Postsecondary Education Expense Board v. College*

162. *Id.* at 67.

163. *Id.* at 67–69 (quoting *Principality of Monaco v. Mississippi*, 292 U.S. 313, 321, 326 (1934)).

164. *Id.* at 69–70.

165. *Id.* at 72.

166. *Id.* at 72–73.

167. *Id.* at 73 (citing *Green v. Mansour*, 474 U.S. 64, 68 (1985)).

168. *Id.* at 72 (discussing the remedial scheme in § 2710(d)(7)).

169. *Id.* at 74.

170. *Id.*

171. *Id.* at 75.

172. *Id.*

Savings Bank (“*Florida Prepaid*”)¹⁷³ and a concurrent action, *College Savings Bank v. Florida Prepaid Postsecondary Education Expense Board* (“*College Savings*”).¹⁷⁴ In the former, the Court ruled that Congress had expressly abrogated state immunity to patent claims in 1992 with the enactment of the Patent and Plant Variety Protection Remedy Clarification Act (“Patent Remedy Act”).¹⁷⁵ Section 296(a) of the Patent Remedy Act addresses the sovereign immunity issue specifically:

Any State, any instrumentality of a State, and any officer or employee of a State or instrumentality of a State acting in his official capacity, shall not be immune, under the eleventh amendment of the Constitution of the United States or under any other doctrine of sovereign immunity, from suit in Federal court by any person . . . for infringement of a patent under section 271, or for any other violation under this title.¹⁷⁶

College Savings filed a patent suit against Florida Prepaid Postsecondary Education Expenses Board, a Florida state entity, on the basis that it was infringing on College Savings’ patented financing methodology for building sufficient savings for college tuition.¹⁷⁷ The suit was filed in federal court because of the exclusive jurisdiction over patent claims granted by the Constitution.¹⁷⁸ Florida Prepaid, citing *Seminole Tribe*, argued the Patent Remedy Act, which is based in Congress’ Article I powers, was an unconstitutional infringement of sovereign immunity.¹⁷⁹ College Savings countered by arguing the Patent Remedy Act was an exercise of Congress’ power under Section 5 of the Fourteenth Amendment, because it was intended to enforce the Fourteenth Amendment’s due process guarantees.¹⁸⁰ Writing for the majority, Chief Justice Rehnquist concluded the Patent Remedy Act, and the abrogation clause contained within, are primarily rooted in Article I, not the Fourteenth Amendment.¹⁸¹ Relying on *stare decisis*, the Court quickly agreed with the Federal Circuit’s finding that abrogation under Article I’s Commerce and Patent Clauses is foreclosed by *Seminole Tribe*.¹⁸²

173. See generally *Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank*, 527 U.S. 627 (1999).

174. See generally *Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666 (1999).

175. *Fla. Prepaid*, 527 U.S. at 635.

176. Patent and Plant Variety Protection Clarification Act, 35 U.S.C. § 296 (2012).

177. *Fla. Prepaid*, 527 U.S. at 630–31.

178. U.S. CONST. art. I, § 8, cl. 8.

179. *Fla. Prepaid*, 527 U.S. at 633.

180. *Id.*

181. *Id.* at 648.

182. *Id.* at 636.

The Court then addressed whether the Patent Remedy Act abrogated immunity under the Fourteenth Amendment.¹⁸³ The Court agreed Congress can abrogate immunity under the Fourteenth Amendment, due to the nature and purpose of the Amendment.¹⁸⁴ This abrogation, however, must advance the goals of the Fourteenth Amendment;¹⁸⁵ it cannot be used to bypass Congress' lack of power to abrogate under Article I.¹⁸⁶ The Court continued by explaining that legislation passed pursuant to Section 5 of the Fourteenth Amendment must be "appropriate"¹⁸⁷ as per the Court's use of the term in *City of Boerne v. Flores*.¹⁸⁸ Under this standard, Congress can create laws to enforce rights under the Fourteenth Amendment, but Congress cannot expand the definition of those rights.¹⁸⁹ Thus, in order to invoke Section 5 properly, Congress "must identify conduct transgressing the Fourteenth Amendment's substantive provisions" and tailor the legislation to remedy or prevent such transgressions.¹⁹⁰ When Congress enacted the Patent Remedy Act, it did not establish any pattern of transgressive behavior—the House Report on the Patent Remedy Act only indicated two examples of patent infringement suits against the states.¹⁹¹ Even if Congress had established a pattern of such incidents, they spent little to no time addressing whether there were sufficient state statutes protecting patents, since addressing the issue as a due process violation would require there to be no (adequate) existing remedies available to a victim.¹⁹² Congress also failed to show a "widespread and persisting deprivation of constitutional rights," as it must in order to address a problem through its powers under the Fourteenth Amendment.¹⁹³ Because Congress failed in these tasks, it could not base the Patent Remedy Act in Section 5 of the Fourteenth Amendment, and thus, had no authority to overcome sovereign immunity.¹⁹⁴

This was a clear-cut *stare decisis* case under the current methods of interpreting sovereign immunity and the Eleventh Amendment. The outcome was not surprising after cases like *Seminole Tribe*, and it rejected

183. *Id.*

184. *Id.* at 637.

185. *Id.* at 639.

186. *Id.* at 636–37.

187. *Id.* at 637. It should be noted that Justice Stevens correctly points out that the standards for "appropriateness" designed in *City of Boerne* were made *years* after the Patent Remedy Act; thus, it is somewhat unfair to demand findings based on requirements that the Court had not yet invented. *Id.* at 654 (Stevens, J., dissenting).

188. *City of Boerne v. Flores*, 521 U.S. 507 (1996).

189. *Id.* at 519.

190. *Fla. Prepaid*, 527 U.S. at 638–39.

191. *Id.* at 640.

192. *Id.* at 643.

193. *Id.* at 645 (quoting *City of Boerne*, 521 U.S. at 526).

194. *Id.* at 647.

the Commerce Clause and Patent Clause bases for abrogating immunity. The Fourteenth Amendment basis seemed to be thrown in at the last minute by Congress, as they spent little, if any, time discussing the law from the due process angle. However, if a narrow, textual interpretation of the Eleventh Amendment were applied, such a case, based on a federal question (in an area with exclusive federal jurisdiction no less), would be allowed in federal court. The Manning view of the Eleventh Amendment, which restricts the Amendment's application to diversity cases, would permit a patent claim against a state.¹⁹⁵ Nevertheless, under the Court's current view of the Eleventh Amendment, this case leaves patent holders with no remedy against states that infringe upon their patents.¹⁹⁶

In addition to suing Florida Prepaid under the Patent Remedy Act, College Savings filed suit under the Lanham Act,¹⁹⁷ on the basis that Florida Prepaid had engaged in unfair competition by making misstatements about College Savings' tuition savings plans.¹⁹⁸ This case, known as *College Savings*, was decided by the Supreme Court on the same day as *Florida Prepaid*.¹⁹⁹ Justice Scalia, who authored a five-Justice majority opinion, which included Justice Thomas, wrote that the case may proceed only in two scenarios: (1) if the Lanham Act was a valid abrogation of state immunity under Section 5 of the Fourteenth Amendment, or (2) if Florida waived immunity.²⁰⁰ Upon reviewing College Savings' claim under the Lanham Act, Justice Scalia concluded the Fourteenth Amendment did not apply to the case at bar—while the Amendment provides that a state may not deprive any person of property without due process of law, Florida Prepaid's alleged misrepresentations would not have deprived College Savings of a property right.²⁰¹

The most notable aspect of *College Savings*, however, was the waiver section of Justice Scalia's analysis. Thirty-five years after it became the law of the land, twelve years after it was curtailed by *Welch*, and a decade after Justice Scalia called for doing away with it entirely, *Parden*—or at least what was left of it—was overruled.²⁰² Justice Scalia stated that *Parden* “stands at the nadir of [the Court's] waiver (and, for that matter,

195. See Manning, *supra* note 9.

196. Chemerinsky, in arguing against broad sovereign immunity, offers *Florida Prepaid* as an example of “[s]overeign immunity mak[ing] the laws of the United States subordinate to the will of the men and women making [State] government decisions.” Chemerinsky, *supra* note 11, at 1213.

197. Lanham Act, 15 U.S.C. § 1125(a) (2012).

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

199. *Id.* at 671. The Supreme Court also decided a third sovereign immunity case, *Alden v. Maine*, 527 U.S. 706 (1999), on that same day. See *infra* Part IV and notes 207–31.

200. *Coll. Sav. Bank*, 527 U.S. at 669.

201. *Id.* at 672–73.

202. *Id.* at 680.

sovereign-immunity) jurisprudence.”²⁰³ He further said that *Parden* was “ill conceived, . . . broke sharply with prior cases, and is fundamentally incompatible with later ones.”²⁰⁴ He concluded, “[t]oday, we drop the other shoe: Whatever may remain of our decision in *Parden* is expressly overruled.”²⁰⁵ The Court, through Justice Scalia, ultimately ruled, unsurprisingly, that Florida did not voluntarily waive its immunity by engaging in interstate commerce.²⁰⁶

In *Alden v. Maine*,²⁰⁷ another decision handed down by the Court on the same day as *Florida Prepaid*, state probation officers sued the State of Maine in state court for violating overtime provisions of the Fair Labor Standards Act.²⁰⁸ The trial court dismissed the claim on sovereign immunity grounds and Maine’s Supreme Court affirmed.²⁰⁹ The United States Supreme Court granted certiorari to determine if Congress had the power under Article I of the Constitution to subject non-consenting states to private suits for damages in their state’s courts.²¹⁰ The Court affirmed the dismissal, and noted the States had pre-constitutional sovereign immunity that “[t]he Eleventh Amendment confirmed, rather than established[;]” a principle that was inherent in the “structure of the original Constitution itself.”²¹¹ Sovereign immunity is derived from the common law tradition in England, but the immunity exists as part of the constitutional design.²¹² The Court found that the drafters could have abrogated state immunity in the Constitution, but they simply chose not to do so.²¹³

The federal system reserved the States’ sovereign status in two ways. First, the Constitution reserved a substantial portion of the Nation’s primary sovereignty and dignity to the States in their own sphere, where the States are no more subject to the federal government than the federal government

203. *Id.* at 676. This language is a marked departure from Justice Scalia’s descriptions of *Hans*, which he has called “a venerable precedent,” *id.* at 689, and a “landmark case.” *Pennsylvania v. Union Gas Co.*, 491 U.S. 1, 31 (1989).

204. *Coll. Sav. Bank*, 527 U.S. at 680.

205. *Id.* Justice Scalia’s choice of words here seems to be a none-too-subtle allusion to his dissent in *Union Gas*. See *Union Gas*, 491 U.S. at 43.

[I]n *Welch*, we overruled *Parden* insofar as that case spoke to the clarity of language necessary to constitute [a demand for consent to a waiver of immunity]. We explicitly declined to address, however, the continuing validity of *Parden*’s holding that the Commerce Clause provided the constitutional power to make such a demand. I would drop the other shoe.

Id. (citations omitted).

206. *Coll. Sav. Bank*, 527 U.S. at 691.

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

208. *Id.* at 711.

209. *Alden v. Maine*, 715 A.2d 172 (Me. 1998).

210. *Alden*, 527 U.S. at 711.

211. *Id.* at 728–29.

212. *Id.* at 733.

213. *Id.* at 734.

is subject to the States.²¹⁴ Second, even where the federal government has authority or power, that power does not act through or upon the States.²¹⁵ Instead, both sovereigns can only act upon and regulate the people directly because the people are “the only proper objects of government” and one government cannot commandeer the other.²¹⁶ States, therefore, retain a pre-constitutional dignity or a “residuary and inviolable sovereignty” if not full sovereignty.²¹⁷ Immunity from private suits, therefore, is central to this sovereign dignity, and states cannot be sued in their own courts without their consent.²¹⁸ This sovereignty exists in the structure of the Constitution, and Article I powers delegated to Congress do not include that “large residuum of sovereignty which had not been delegated to the United States.”²¹⁹

In the Majority’s view then, the Eleventh Amendment was not passed to create state sovereign immunity but to confirm it in the constitutional design.²²⁰ Sovereign immunity, according to the Court, is not limited to the plain text of the Amendment, which was passed only upon the “profound shock” created by the Court’s decision in *Chisholm*.²²¹ In *Chisholm*, the majority was “more swayed by a close observance of the letter of the Constitution, without regard to former experience and usage” and subjected a state to a private suit for a debt.²²²

The States responded to the Court’s decision in *Chisholm* by promptly passing the Eleventh Amendment to overturn it.²²³ In *Alden*, the Court determined the Amendment was passed to restore state sovereignty as understood by the founders, being, the portion of sovereign immunity abrogated in *Chisholm*.²²⁴ *Chisholm* involved a suit against a state by a resident of another state—therefore, the Amendment, in the majority’s view, was ratified to patch that loophole.²²⁵ The swift passage of the Amendment, therefore, proves that *Chisholm* “was contrary to the well-understood meaning of the Constitution” regarding state sovereign immunity.²²⁶

214. *Id.* at 714 (quoting THE FEDERALIST No. 39, at 245 (James Madison) (Clinton Rossiter ed., 1961)).

215. *Id.* at 715.

216. *Id.* at 714 (quoting *Printz v. United States*, 521 U.S. 898, 919-20 (1997)).

217. *Id.* (quoting THE FEDERALIST No. 39, *supra* note 214).

218. *Id.* at 715.

219. *Id.* at 748.

220. *Id.* at 748–49.

221. *Id.* at 720 (quoting 1 C. WARREN, THE SUPREME COURT IN UNITED STATES HISTORY 96 (rev. ed. 1926)).

222. *Id.* (quoting *Hans v. Louisiana*, 134 U.S. 1, 12 (1890)).

223. *Id.* at 721–24.

224. *Id.* at 722–24.

225. *Id.*; see also *Chisholm v. Georgia*, 2 U.S. 419 (1793).

226. *Alden*, 527 U.S. at 727 (quoting *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 69 (1996)).

The Court, therefore, considered the Eleventh Amendment “shorthand” for sovereign immunity, and it did not look to the “mere letter of the Eleventh Amendment in determining the scope of the States’ constitutional immunity from suit.”²²⁷ In the Court’s view, because immunity is pre-constitutional, “blind reliance upon the text” would lead to “the type of ahistorical literalism . . . rejected . . . since the discredited decision in *Chisholm*.”²²⁸

In *Alden*, the plain text of the Amendment did not bar the suit because Maine was being sued by its own citizens in state court, and not by a citizen of another state in federal court.²²⁹ The Court determined it could not rely on the text of the Amendment, but it could, apparently, rely on pre-constitutional theories of sovereign immunity retained by the States.²³⁰ According to the majority, the only immunities the States surrendered upon entering the union were to be sued by the United States and by sister states—the States did not consent to suits by individuals.²³¹

In *Verizon Md., Inc. v. PSC*, Justice Scalia wrote for the majority.²³² “The Telecommunications Act of 1996 (Act) created a new telecommunications regime designed to foster competition in local markets.”²³³ Verizon sued the Maryland Public Service Commission (and its individual members in their official capacities), World Com, and other local exchange carriers, citing the Act, and alternatively federal-question as the basis for jurisdiction.²³⁴ As there was no evidence to suggest that Verizon’s claim was “immaterial” or “wholly insubstantial and frivolous” the issue was one of federal question.²³⁵ The Act “does not establish a distinctive review mechanism for the commission actions that it covers . . . and it does not distinctively limit the substantive relief available.”²³⁶

The Commission argued that the Eleventh Amendment barred Verizon’s claim against it and the individual commissioners.²³⁷ Here, however, the Court found *Ex parte Young* applied.²³⁸ To determine if the “doctrine avoids an Eleventh Amendment bar, the Court ‘need only conduct a “straightforward inquiry” into whether the complaint alleges an ongoing violation of federal law and seeks relief properly characterized as

227. *Id.* (internal quotations and citations omitted).

228. *Id.* at 730 (quoting *Hans v. Louisiana*, 134 U.S. 1, 15 (1890)).

229. *Id.* at 746–47.

230. *Id.* at 749–54.

231. *Id.* at 759–60.

232. See generally *Verizon Md., Inc. v. PSC.*, 535 U.S. 635 (2001).

233. *Id.* at 638 (citing 47 U.S.C. § 251(c) (1999)).

234. *Id.* at 640. Resolution of Verizon’s claim turns on whether the Act, or an FCC ruling issued thereunder, precludes the Commission from making a determination. *Id.* at 643.

235. *Id.* at 643.

236. *Id.* at 644.

237. *Id.* at 645.

238. *Id.*

prospective.”²³⁹ Here, Verizon sought injunctive and declaratory relief and its prayer for injunctive relief clearly satisfied the Court’s “straightforward inquiry.”²⁴⁰ Under similar circumstances, courts have approved injunction suits against state regulatory commissioners.²⁴¹ This case is distinguishable from *Seminole Tribe* because the Act displayed no intent to foreclose jurisdiction under *Ex parte Young*.²⁴² Here, the Act only provided that when the Commission makes certain determinations, the aggrieved party may bring suit in federal court; furthermore, there were no restrictions on relief that the court could grant.²⁴³

Consistent with Justice Scalia’s view that Congress has no power under Article I to abrogate state sovereign immunity, he dissented in *Central Virginia Community College v. Katz*, which addressed whether Congress could abrogate state sovereign immunity under the Bankruptcy Clause of the Constitution.²⁴⁴ Bernard Katz, the court-appointed bankruptcy trustee, attempted to recover preferential transfers the debtor made to Virginia colleges.²⁴⁵ The colleges, including Central Virginia, as “arms of the State,”²⁴⁶ moved to dismiss the recovery proceedings by invoking sovereign immunity.²⁴⁷ The majority began by noting bankruptcy jurisdiction is primarily *in rem*.²⁴⁸ Thus, bankruptcy proceedings “do[] not implicate States’ sovereignty to nearly the same degree as other kinds of jurisdiction”²⁴⁹ because bankruptcy jurisdiction is primarily over the debtor and the debtor’s estate, rather than the creditor’s.²⁵⁰ Additionally, Article I grants Congress the power to establish “uniform Laws on the subject of Bankruptcies throughout the United States.”²⁵¹ As the Court noted, this clause was intended to prevent people from being put in debtor’s prison in one state, when their debts had already been discharged in another state’s bankruptcy proceedings.²⁵² The Court concluded that “[i]n ratifying the Bankruptcy Clause, the States acquiesced in a subordination of whatever sovereign immunity they might otherwise have asserted in proceedings necessary to effectuate the *in rem* jurisdiction of the bankruptcy courts.”²⁵³

239. *Id.* (quoting *Idaho v. Coeur d’ Alene Tribe of Idaho*, 521 U.S. 261, 296 (1997)).

240. *Id.*

241. *Id.*

242. *Id.* at 647 (citing *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 116 (1996)).

243. *Id.*

244. *Cent. Va. Cmty. Coll. v. Katz*, 546 U.S. 356, 363 (2006).

245. *Id.* at 360.

246. *Id.* (quoting *Alden v. Maine*, 527 U.S. 706, 756 (1999)).

247. *Id.*

248. *Id.* at 362.

249. *Id.*

250. *Id.* at 370.

251. *Id.*

252. *Id.* at 363–69.

253. *Id.* at 378.

Thus, Congress has the power to abrogate sovereign immunity under the Bankruptcy Clause, because this power was “effected in the plan of the Convention, not by statute.”²⁵⁴

Justice Thomas, joined by Chief Justice Rehnquist, Justice Scalia, and Justice Kennedy, argued in dissent that Congress did not have the power to abrogate immunity under Article I.²⁵⁵ The dissent criticized the majority for failing to recognize two distinct attributes of sovereignty: (1) the authority of a sovereign to enact legislation regulating its own citizens, and (2) sovereign immunity against suit by private citizens.²⁵⁶ According to Justice Thomas, the text of the Bankruptcy Clause only addressed the first aspect of sovereignty, since it removed the States’ power to create their own bankruptcy laws to ensure uniform national bankruptcy laws.²⁵⁷ Citing to *Seminole Tribe*, among other cases, the dissent argued that nothing in Article I gives Congress the power to abrogate immunity.²⁵⁸ Justice Thomas noted that similar provisions, such as the Patent Clause and the Commerce Clause, share the necessity for uniformity—but do not provide Congress the power to abrogate immunity.²⁵⁹ There is no distinction in the text, or a clear intent from the founders, that differentiates the Bankruptcy Clause from the other Article I powers that, according to *stare decisis*, do not provide Congress the ability to abrogate immunity.²⁶⁰

V. THE *BIVENS* DECISION AND THE COURT’S NARROWING OF RIGHTS AND ENHANCEMENT OF DEFENSES

A. *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*

In 1971, the Court took a step in the right direction when it created a private right of action against federal officers in *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*.²⁶¹ In *Bivens*, the Supreme Court, per Justice Brennan, allowed a litigant to sue a federal officer for damages directly under the Constitution.²⁶² Federal agents, acting without a warrant or probable cause, arrested petitioner, invaded and searched his home, threatened to arrest his family, and then conducted a strip search of him at the courthouse.²⁶³ Petitioner sued the agents for violating his Fourth

254. *Id.* at 379.

255. *Id.* at 379 (Thomas, J., Rehnquist, C.J., Scalia, J., Kennedy, J., dissenting).

256. *Id.* at 384.

257. *Id.*

258. *Id.* at 393.

259. *Id.* at 384–85.

260. *Id.* at 384.

261. *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971).

262. *Id.* at 389.

263. *Id.*

Amendment rights.²⁶⁴ The Fourth Amendment is a limitation on governmental authority, but “does not . . . provide for its enforcement by an award of money damages for the consequences of its violation.”²⁶⁵ The Court found petitioner was “entitled to redress his injury through a particular remedial mechanism normally available in the federal courts,”²⁶⁶ because it is “the very essence of civil liberty” for “every individual to claim the protection of the laws, whenever he receives an injury.”²⁶⁷ Other remedies traditionally available, such as the exclusionary rule, were irrelevant to petitioner because, for him, it was “damages or nothing.”²⁶⁸

The Court inferred both a cause of action and a remedy under the Constitution, rejecting the government’s objection that this type of suit was properly justiciable under state tort law.²⁶⁹ The government argued the Fourth Amendment is merely a limitation on what the agents could argue as a defense in state court, with a cause of action sounding in tort.²⁷⁰ Instead, because Congress had not explicitly declared such persons could not recover money damages, nor did they grant another remedy “equally effective in the view of Congress,” money damages were a permissible remedy.²⁷¹ Justice Harlan concurred that damages were “entirely appropriate” as a “traditional form of compensation for invasion of a legally protected interest” even if it would not deter other officers from unconstitutional conduct.²⁷² Justice Harlan, in choosing to grant this remedy, considered the same “range of policy considerations” as the legislature would in creating an “express statutory authorization.”²⁷³

Notably, the *Bivens* decision predated Justice Scalia’s tenure on the Court.²⁷⁴ Justice Scalia’s disapproval of the *Bivens* decision is well-documented, and Justices Scalia and Thomas, as strict constructionists, have refused to extend *Bivens* on the narrowest of rationales to any new context.²⁷⁵ According to Justice Scalia, “*Bivens* is a relic of the heady days

264. *Id.* at 389–91.

265. *Id.* at 396.

266. *Id.* at 397.

267. *Id.* (quoting *Marbury v. Madison*, 5 U.S. 137, 163 (1803)).

268. *Id.* at 410 (Harlan, J., concurring).

269. *Id.* at 390 (majority opinion).

270. *Id.* at 392.

271. *Id.* at 397.

272. *Id.* at 407–08 (Harlan, J., concurring).

273. *Id.*

274. *Bivens* was decided in 1971, whereas Justice Scalia’s tenure on the Court began in 1986. See *Biography of Associate Justice Antonin Scalia*, SUP. CT., <https://www.supremecourt.gov/about/biographyScalia.aspx> (last visited Oct. 1, 2016).

275. See *Minneeci v. Pollard*, 132 S. Ct. 617, 626 (2012); *Corr. Servs. Corp. v. Malesko*, 534 U.S. 61, 75 (2001) (Scalia, J., concurring); see also *Ashcroft v. al-Kidd*, 131 S. Ct. 2074 (2011) (involving a *Bivens* action, wherein Justice Scalia, writing for the majority, found respondent’s Fourth Amendment rights were not violated, and therefore, he was not due damages, but not eliminating *Bivens* as a remedy because it was clearly within the *Bivens* line of cases). In *Ashcroft v. Iqbal*,

in which [the Supreme] Court assumed common law powers to create causes of action—decreeing them to be ‘implied’ by the mere existence of a statutory or constitutional prohibition.”²⁷⁶

B. The Limiting of the *Bivens* Decision

Only nine months after taking his seat on the Supreme Court, Justice Scalia wrote the majority opinion in *United States v. Stanley*²⁷⁷—a case Chemerinsky referred to as a “tragic example” of the lack of government accountability caused by sovereign immunity.²⁷⁸ Stanley was a member of the United States Army who volunteered for a program to test the effectiveness of certain clothing and equipment against chemical warfare.²⁷⁹ During Stanley’s participation in the program, and unbeknownst to him, he was administered doses of LSD as part of an experiment to test its effects.²⁸⁰ Stanley was not made aware of this secret testing until nearly twenty years later.²⁸¹ After he was informed about this testing, Stanley sued the United States government. The Court determined, however, that the government was immune from suit and *Bivens* did not apply.²⁸² Justice Scalia stated there is “no *Bivens* remedy is available for injuries that ‘arise out of or are in the course of activity incident to service.’”²⁸³ In her concurrence, Justice O’Connor noted that, while she agreed “there is generally no remedy available[,] . . . [the] conduct of the type alleged in this case is so far beyond the bounds of human decency that as a matter of law it simply cannot be considered a part of the military mission.”²⁸⁴ However, Justice Scalia clearly disagreed.

In 2001, the Court decided *Correctional Services Corporation v. Malesko*.²⁸⁵ At issue in *Malesko* was whether the implied damages action the Court recognized in *Bivens*, “should be extended to allow recovery against a private corporation operating a halfway house under contract with

however, Scalia joined the majority in finding *Bivens* unavailable to a Free Exercise cause of action. See 556 U.S. 662, 676 (2009). Nor can superiors be held liable under respondeat superior; instead each official, through their own action, must have violated the Constitution. *Id.*

276. *Malesko*, 534 U.S. at 75 (Scalia, J., concurring).

277. See generally *United States v. Stanley*, 483 U.S. 669 (1987).

278. Chemerinsky, *supra* note 11, at 1213.

279. *Stanley*, 483 U.S. at 671.

280. *Id.*

281. *Id.*

282. *Id.* at 684.

283. *Id.* (citing *Feres v. United States*, 340 U.S. 135, 146 (1950)).

284. *Id.* at 708-09 (O’Connor, J., concurring in part and dissenting in part). The Court’s holding in *Stanley* relied on the Court’s previous decision in *Chappell v. Wallace*. *Id.* (“[U]nder *Chappell* . . . there is generally no remedy available under [*Bivens*] for injuries that arise out of the court of activity incident to military service.”).

285. *Corr. Servs. Corp. v. Malesko*, 534 U.S. 61 (2001).

the Bureau of Prisons.”²⁸⁶ In *Malesko*, a federal prisoner sued a private contractor for violating his Eighth Amendment rights.²⁸⁷ The majority refused to apply *Bivens* and instead, relegated the prisoner to administrative remedies and state tort law.²⁸⁸ Justice Scalia, who authored a concurring opinion, stated “a narrow interpretation of the rationale of [*Bivens*] would not logically produce its application to the circumstances of this case.”²⁸⁹ He went a step further by noting that even in the “narrowest” of circumstances, he would not extend the *Bivens* holding.²⁹⁰ He stated, “I would limit *Bivens* and its two follow-on cases to the precise circumstances that they involved.”²⁹¹

Justice Scalia’s concurrence relied on his decision in *Alexander v. Sandoval*,²⁹² for the proposition that the Court has refused to “invent implications” in deciding statutory rights.²⁹³ *Sandoval* concerned whether private individuals could sue to enforce disparate-impact regulations promulgated under Title VI of the Civil Rights Act of 1964.²⁹⁴ Justice Scalia found no private cause of action existed because “like substantive federal law itself, private rights of action to enforce federal law must be created by Congress,” and the only remedies available are those enacted into law.²⁹⁵ A state court, as a proper common law court, may create causes of action where a statute has not—federal tribunals, however, do not have that power.²⁹⁶ Moreover, Justice Scalia found the statute at issue in *Sandoval* did not focus on the individual being protected, but rather only focused on those being regulated.²⁹⁷ The Court, therefore, refused to infer a cause of action by the person being protected because they were too removed from the statute.²⁹⁸

286. *Id.* at 63.

287. *Id.* at 73.

288. *Id.* at 73–74.

289. *Id.* at 75 (Scalia, J., concurring).

290. *Id.*

291. *Id.* (citations omitted).

292. See generally *Alexander v. Sandoval*, 532 U.S. 275 (2001).

293. *Malesko*, 534 U.S. at 75.

294. *Sandoval*, 532 U.S. at 278.

295. *Id.* at 286 (quoting *Touche Ross & Co. v. Redington*, 442 U.S. 560, 578 (1979)).

296. *Id.* at 286–87.

297. *Id.* at 289.

298. *Id.* Additionally, in a pre-Scalia decision, *Pennhurst State Sch. Hosp. v. Halderman*, the Supreme Court refused to infer a cause of action under the Bill of Rights provision of the Developmentally Disabled Assistance and Bill of Rights Act. 451 U.S. 1, 2 (1981). Instead, the Court found the law to be merely “precatory,” and if Congress is to impose mandates or remedies, then Congress needs to “speak with a clear voice.” *Id.* at 17–18. The act while speaking of “rights,” “does no more than express a congressional preference for certain kinds of treatment.” *Id.* at 19. The Court must look at the whole law and not merely at “a single sentence or member of a sentence.” *Id.* at 18 (quoting *Philbrook v. Glodgett*, 421 U.S. 707, 713 (1975)).

Justice Scalia found it more dangerous to infer a constitutional cause of action than a statutory one because Congress cannot repudiate a Supreme Court holding on the Constitution.²⁹⁹ The problem with his argument, however, is that if Congress does provide a remedy, the Court will resort to the congressionally provided remedy and will not allow a *Bivens* suit.³⁰⁰ Therefore, Congress can effectively repudiate the Court's decision to infer a *Bivens* remedy by substituting their own, even if it is less effective. More importantly, Justice Scalia found it problematic that Congress would not be able to repudiate the Constitution, as the Supreme Court determines what the Constitution means.³⁰¹ The fundamental problem with his position is that Congress cannot unilaterally amend the Constitution.³⁰² If Congress is able to pass a law restricting a constitutional right, they are, in effect, unilaterally amending the Constitution.³⁰³

Congress has not explicitly created a cause of action for a *Bivens* remedy, but, by not abolishing the remedy inferred in *Bivens*, Congress has effectively ratified such.³⁰⁴ Justice Scalia endorsed the position rejected in *Bivens*—state tort law provides the remedy, and the Constitution is merely a limitation on what the government can argue in defense.³⁰⁵ In effect, Justice Scalia rejected settled law, as *Bivens* had stood for forty years, and revised the law to accord with his notions of sound policy, which is the very essence of common law authority that he chastised the Court in *Bivens* for exercising.³⁰⁶

Congress has acted in this area by passing the Federal Tort Claims Act (FTCA) and the Westfall Act.³⁰⁷ In response to government actions such as those seen in *Bivens*, Congress waived immunity from suits against the government for actions of its officers.³⁰⁸ The FTCA authorizes suits against the government directly for law-enforcement torts including assault, battery, false imprisonment, abuse of process, and malicious prosecution.³⁰⁹ Moreover, *Bivens* provides the only generally available remedy, “damages or nothing,” for individuals seeking an award for violations of federal

299. *Corr. Servs. Corp. v. Malesko*, 534 U.S. 61, 75 (2001) (Scalia, J., concurring).

300. *See Schweiker v. Chilicky*, 487 U.S. 412 (1988); Stephen I. Vladeck, *Bivens Remedies and the Myth of the “Heady Days”*, 8 U. ST. THOMAS L.J. 513, 524 (2011).

301. Vladeck, *supra* note 300, at 524.

302. *See* U.S. CONST. art. V.

303. Vladeck, *supra* note 300, at 513.

304. *Malesko*, 534 U.S. at 82–83 (Stevens, J., dissenting).

305. *See id.* at 75 (Scalia, J., concurring).

306. *See id.*

307. James E. Pfander & David Baltmanis, *Rethinking Bivens: Legitimacy and Constitutional Adjudication*, 98 GEO. L.J. 117, 121-22 (2009).

308. *Id.* at 134.

309. *Id.* at 132.

constitutional rights.”³¹⁰ Congress left *Bivens* in place for violations of the Constitution and did not make the government liable for constitutional violations by officers as it comparatively did for statutory violations.³¹¹ In 1988, Congress acted to protect government officials from state common law tort liability, thereby removing the approach favored by the dissenters in *Bivens* and Justice Scalia.³¹² Instead, under the FTCA, an individual could sue the federal government (which would be removed to federal court), but, this action would be unavailable if an officer violates an individual’s constitutional right.³¹³

The Court should find, as did the dissent in *Malesko*, that Congress has authorized and provided a cause of action for when an officer violates an individual’s federal constitutional rights.³¹⁴ The FTCA subjects the federal government only to common law tort liability and “does not extend or apply to a civil action against an employee of the Government—which is brought for a violation of the Constitution of the United States.”³¹⁵ The FTCA also provides several defenses not seen at common law, such as barring liability for exercising discretionary functions, and incorporating any applicable immunity of the officer.³¹⁶ Therefore under federal law, state laws may no longer provide a background remedy available for violating a federal right.

In *Wilkie v. Robbins*, the Supreme Court held, again, that an individual does not have a private action against government employees for damages under *Bivens*.³¹⁷ *Wilkie* involved a landowner who claimed employees of the Bureau of Land Management used extortion to force him to grant the Bureau an easement on his land.³¹⁸ Similar to *Malesko*, Justices Scalia and Thomas joined in the majority opinion, but also authored a concurring opinion.³¹⁹ In their concurring opinion, Justices Scalia and Thomas

310. See *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 410 (1971) (Harlan, J., concurring); Pfander & Baltmanis, *supra* note 307, at 123.

311. See 28 U.S.C. § 2679 (b)(2)(A) (1988).

312. Pfander & Baltmanis, *supra* note 307, at 133.

313. *Id.* This is due to the uniquely federal interests in such an action, and therefore, federal courts, federal law, and federal common law should pre-empt and replace any state law that would be in conflict between federal interests and state law. Cf. *Boyle v. United Tech. Corp.* 487 U.S. 500 (1988).

314. *Corr. Servs. Corp. v. Malesko*, 534 U.S. 61, 83 (2001) (Stevens, J., dissenting).

315. 28 U.S.C. § 2679 (b)(2)(A).

316. Pfander & Baltmanis, *supra* note 307, at 138. Of course before the FTCA, under existing sovereign immunity doctrine, the federal government is immune from suit, and the FTCA only waives that immunity in enumerated cases. See *Boyle*, 487 U.S. at 528 (Brennan, J., dissenting). Now, under the FTCA, the government is immune from actions based on discretionary functions; however, as they were immune before the FTCA they remain immune because the FTCA did not subject the government to liability. *Id.*

317. *Wilkie v. Robbins*, 551 U.S. 537, 541 (2007).

318. *Id.* at 542–43.

319. *Id.* at 568 (Thomas, J., concurring).

reiterated that “*Bivens* is a relic of the heady days in which this Court assumed common law powers to create causes of action.”³²⁰ And again, they went further to say the *Bivens* decision should be limited to its “precise circumstances.”³²¹

Justice Scalia has refused to find inferred causes of actions for statutory or constitutional rights; he has not, however, shown similar hesitation in inferring defenses.³²² Justice Scalia’s majority opinion in *Boyle v. United Technologies Corp.* established an inferred defense in an action against a military contractor.³²³ Boyle, a United States Marine helicopter pilot, drowned in a helicopter crash after an escape hatch would not open.³²⁴ Boyle’s heirs sued the contractor on a state tort theory in federal court based on diversity jurisdiction, alleging defective product design.³²⁵ Here, Justice Scalia, inferred a defense—the military contractor defense—premised partially on statute, and partially on uniquely federal interests counseling using federal common law.³²⁶

Justice Scalia rejected *Bivens* as “a relic of the heady days” in *Malesko*, where he deemed the “Court assumed common law powers to create causes of action—decreeing them to be ‘implied’ by the mere existence of a statutory or constitutional [provision][.]”³²⁷ Alternatively, he freely crafted such a defense in *Boyle* to a traditional tort cause of action.³²⁸ Justice Scalia found some support in a statutory provision of the FTCA, where Congress authorized some suits against the federal government for the negligent or wrongful actions of its officers.³²⁹ The law, however, exempts some actions from suit based on a discretionary function of an officer, whether or not the discretion involved abuse.³³⁰ Notwithstanding the action being based on state tort law against a private party and not the federal government, Justice Scalia determined the “selection of the appropriate design for military equipment to be used by our Armed Forces is assuredly a discretionary function within the meaning of the provision.”³³¹ Therefore, the contractor is immune from liability so long as “(1) the United States approved reasonably precise specifications; (2) the equipment conformed to those specifications; and (3) the supplier warned

320. *Id.* (citing *Corr. Servs. Corp. v. Malesko*, 534 U.S. 61, 75 (2001)).

321. *Id.*

322. *See Boyle v. United Techs. Corp.*, 487 U.S. 500 (1988).

323. *See generally id.*

324. *Id.* at 502.

325. *Id.* at 503.

326. *See id.* at 504.

327. *Corr. Servs. Corp. v. Malesko*, 534 U.S. 61, 75 (2001).

328. *See Boyle*, 487 U.S. at 504.

329. *Id.* at 511.

330. *Id.* (citing 28 U.S.C. § 2680(a)).

331. *Id.*

the United States about the dangers in the use of the equipment that were known to the supplier but not to the United States.”³³²

Justice Scalia refused to infer causes of actions under the Constitution in *Malesko*³³³ and under statutes in *Sandoval*,³³⁴ but freely inferred a defense in *Boyle*.³³⁵ In *Sandoval*, Justice Scalia emphasized that absent congressional enactment of a private right of action, “a cause of action does not exist and courts may not create one, no matter how desirable that might be as a policy matter, or how compatible with the statute.”³³⁶ He stated that if a law addresses only those who are “doing” the regulating, in this case a government agency, as opposed to the individual persons the statute was designed to protect, the Court would not infer a private cause of action or remedy for those individuals because they were too far removed.³³⁷ Justice Scalia saw this degree of separation as indicative of the lack thereof congressional intent to create a private right of action.³³⁸ The FTCA focused on regulating government action and suits against the government.³³⁹ In *Boyle*, Justice Scalia used the FTCA, without clear support, to infer a defense not for the government, but for a contractor who is at least one step removed from the statute.³⁴⁰

As Justice Stevens pointed out in his dissent, the Court may have the power of “interstitial lawmaking,” but it completely lacks the power to “create an entirely new doctrine—to answer ‘questions of policy which Congress has not spoken.’”³⁴¹ Justice Stevens cited cases regarding *Bivens* doctrine for the proposition that such a decision should be left to Congress, who has the experience and expertise to set policy.³⁴² For instance, just three days before the *Boyle* decision, the Court in *Schweiker v. Chilicky*, with Justice Scalia in the majority, found *Bivens* unavailable for an improper denial of Social Security benefits.³⁴³ The Court held Congress, and not the Court, was in a better position to decide on the proper administrative and judicial remedies available.³⁴⁴ Similarly, Justice Stevens pointed to his unanimous decision in *Bush v. Lucas*, which rejected a *Bivens* remedy, for the proposition that if Congress has the experience and expertise in an area,

332. *Id.* at 512.

333. *See* *Corr. Servs. Corp. v. Malesko*, 534 U.S. 61, 75 (2001) (Scalia, J., concurring).

334. *See* *Alexander v. Sandoval*, 532 U.S. 275, 286–87 (2001).

335. *See* *Boyle*, 487 U.S. at 504.

336. *Sandoval*, 532 U.S. at 286–87.

337. *Id.* at 289.

338. *Id.*

339. *Boyle*, 487 U.S. at 509–12.

340. *Id.* at 509–12.

341. *Id.* at 531 (Stevens, J., dissenting) (quoting *United States v. Gilman*, 347 U.S. 507, 511 (1954)).

342. *Id.* at 532 (citing *Bush v. Lucas*, 462 U.S. 367 (1983); *Schweiker v. Chilicky*, 487 U.S. 412 (1988)).

343. *Schweiker*, 487 U.S. at 423, 429.

344. *Id.*

and creates an elaborate and adequate remedy, then the Court will not augment that remedy.³⁴⁵

Justice Brennan, in his dissent, found that Justice Scalia created a “sweeping” new defense, just as federal courts would engage in general federal common law in the time before *Erie*.³⁴⁶ Unlike the *Bivens* remedy, which merely supplemented state tort law, the military contractor defense pre-empted and displaced state tort law.³⁴⁷ Congress was urged to adopt such a law, but remained conspicuously silent.³⁴⁸ The majority, however, operating “unelected and unaccountable to the people—has unabashedly stepped into the breach to legislate a rule denying Lt. Boyle’s family the compensation that state [tort] law assures them.”³⁴⁹

In *Board of Trustees of the University of Alabama v. Garrett*, state employees sued the State of Alabama in federal court, seeking money damages under the Americans with Disabilities Act (ADA).³⁵⁰ The District Court granted the petitioners’ motions for summary judgment,³⁵¹ and the Eleventh Circuit Court of Appeals reversed.³⁵² The Supreme Court granted certiorari to determine whether an individual may sue a state for money damages in federal court under the ADA.³⁵³

The Court reversed the Eleventh Circuit, finding Congress does have the final authority as to desirable public policy, but in order to authorize private individuals to recover money damages against the States, there must be: (1) a pattern of discrimination by the States which violates the Fourteenth Amendment, and (2) the remedy imposed by Congress must be congruent and proportional to the targeted violation.³⁵⁴ Adverse, disparate treatment does not amount to a constitutional violation where rational-basis scrutiny applies.³⁵⁵

First, the majority cited *Cleburne v. Cleburne Living Center* to reject the notion that protections for those with disabilities are in any way demanded by the Equal Protection Clause.³⁵⁶ Under rational-basis review, when groups possess distinguishing characteristics relevant to interests a

345. *Id.* at 436 (Stevens, J., concurring) (citing *Bush*, 462 U.S. at 388) (“[R]ecognition of any supplemental judicial remedy for constitutional wrongs was inappropriate.”).

346. *Boyle*, 487 U.S. at 516-17 (Brennan, J., dissenting) (citing *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938)).

347. *Id.* at n.3.

348. *Id.* at 515-16.

349. *Id.*

350. *Bd. of Trs. of the Univ. of Ala. v. Garrett*, 531 U.S. 356, 362 (2001).

351. *Id.*

352. *Id.* at 363 (citing *Garrett v. Univ. of Ala. at Birmingham Bd. of Trs.*, 193 F.3d 1214 (11th Cir. 1999)).

353. *Id.*

354. *Id.* at 374.

355. *Id.* at 370.

356. *Id.* at 366-7 (citing *Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432 (1985)).

state has the authority to implement, a state's decision to act on the basis of those differences does not amount to a constitutional violation.³⁵⁷ The result in *Cleburne*, which *Garrett* followed, declared:

States are not required by the Fourteenth Amendment to make special accommodations for the disabled, so long as their actions toward such individuals are rational ... If special accommodations for the disabled are to be required, they have to come from positive law and not through the Equal Protection Clause.³⁵⁸

Unlike in *Florida Prepaid*, the legislative record of the ADA assembled by Congress included “many instances to support” the general finding in the ADA that individuals with disabilities are often isolated or segregated by society and discriminated against.³⁵⁹ The record included several incidents that “undoubtedly evidence an unwillingness on the part of state officials” to accommodate individuals as required by the ADA.³⁶⁰ Respondents argued that the inquiry as to unconstitutional discrimination should extend beyond the States themselves to units of local governments, such as cities and counties.³⁶¹ The Eleventh Amendment, however, does not extend immunity to units of local government.³⁶²

VI. CONCLUSION

On day two of her Senate confirmation hearing, then-nominee Elena Kagan, referencing the framers, stated, “[s]ometimes they laid down very specific rules. Sometimes they laid down broad principles. Either way, we apply what they tried to do. In that way, we are all originalists.”³⁶³ Limited to that extent, Justice Kagan's assertion applies equally to both textualism and originalism. The question posed by this Article, however, is whether these methodologies are being asymmetrically applied depending on whether rights or immunities are at issue. Further, if the application of these methodologies is dependent upon the situation, as this Article suggests, is there a plausible inference as to what the larger consequences and implications of that asymmetrical application are? The untimely passing of originalism's chief progenitor, Justice Antonin Scalia, and the likely specter of three or more new Supreme Court appointees in the next

357. *Id.*

358. *Id.* at 367–68.

359. *Id.* at 369.

360. *Id.* at 370.

361. *Id.* at 368.

362. *Id.* at 369.

363. See Kagan: 'We Are All Originalists,' BLT: BLOG LEGALTIMES (June 29, 2010, 9:22 AM), <http://legaltimes.typepad.com/blt/2010/06/kagan-we-are-all-originalists.html>.

few years, makes these questions critically important, both in terms of the confirmation hearings and for determining the enduring legacy of the Roberts Court.