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2013 Honorable Betty Roberts Women in the Law Lecture

THE STRUCTURE OF SOVEREIGNTY

by
Diane P. Wood*

The concept of sovereignty is ubiquitous, but its complexities are often under-explored. A nuanced understanding of sovereignty is critical to answering the most fundamental questions of legal legitimacy. To truly understand what sovereignty is and the centrality of its role in legal systems, one must also examine the corollary doctrine of sovereign immunity. This lecture considers both doctrines, with a particular focus on the United States' domestic experiment in multi-layered sovereignty and its implications for the relationship between the federal and state governments. While there exists a rich literature on sovereignty and sovereign immunity, many important questions remain unresolved. This lecture aims to tease out those issues and to encourage further scholarship exploring the appropriate scope and content of modern sovereignty.

Sovereignty is a concept that everyone knows, or thinks she knows. But there is more to it than meets the eye, even within the United States. In this Essay, I would like to explore some of those complexities. Issues relating to sovereignty may be among the most important problems facing the legal community today: *who* makes laws, *what* laws legitimately may be enacted, and *where* can those laws be enforced. It is the concept underlying the clash between now-ousted Egyptian President Mohamed

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Morsi and Egypt's Constitutional Court,¹ as well as the tensions between former President Morsi and the Egyptian Army that eventually culminated in a military coup;² it is the concept that must be understood before the residents of Israel and the West Bank can decide what to do with Jerusalem.³ Closer to home, ideas of both full and limited sovereignty pervade legal debate within the United States. Do American Indian Tribes have the right to regulate the environment on their reservations?⁴ How, if at all, can states be held accountable for acts of discrimination, or patent infringement, or anticompetitive practices?⁵ Where do state instrumentalities fit into the picture, and why should we distinguish between a state university as an instrumentality of the state and a home-rule city as an instrumentality of the state (as we now do)?⁶

To answer those questions, it is necessary to dissect both the concept of sovereignty itself and the corollary doctrine of sovereign immunity. There is a rich scholarship, especially on the latter topic, that has appeared since the Supreme Court turned its attention to the topic of the sovereign status and immunity of the states in its path-breaking 1996 decision in *Seminole Tribe of Florida v. Florida*.⁷ Nevertheless, experience has shown that *Seminole Tribe* and the cases that have followed it have only succeeded in raising a new generation of questions about sovereignty and

¹ See, e.g., *Egypt's Parliament Convened Despite Dissolution*, BBC NEWS (July 10, 2012), <http://www.bbc.co.uk/news/world-middle-east-18777150>; *Egypt's Top Court Rebukes President's Decree*, ALJAZEERA (July 10, 2012), <http://www.aljazeera.com/news/middleeast/2012/07/201279124421528560.html>; Ernesto Londoño & Steve Hendrix, *Morsi Convened Egypt's Parliament in Defiance of Court and Military*, WASH. POST (July 10, 2012), http://www.washingtonpost.com/world/morsi-convenes-egypts-parliament-in-defiance-of-court-and-military/2012/07/10/gJQAGHr9ZW_story.html.

² See, e.g., *President Morsi Overthrown in Egypt*, ALJAZEERA (July 4, 2013), <http://www.aljazeera.com/news/middleeast/2013/07/20137319828176718.html>.

³ See, e.g., Calev Ben-David, *Palestinians Say New Israeli Homes in East Jerusalem Hurt Talks*, BLOOMBERG (Aug. 7, 2013), <http://www.bloomberg.com/news/2013-08-07/palestinians-say-new-israeli-homes-in-east-jerusalem-hurt-talks.html>; Oren Dorell, *East Jerusalem Thorniest of Issues Ahead of Peace Talks*, USA TODAY (July 29, 2013), <http://www.usatoday.com/story/news/world/2013/07/28/peace-talks-east-jerusalem-israel-palestine/2592291/>.

⁴ See *Brendale v. Confederated Tribes & Bands of the Yakima Indian Nation*, 492 U.S. 408, 425–28 (1989) (Indian tribe had authority to enact zoning regulations on some parts of its land, but not others).

⁵ See *Bd. of Trs. of the Univ. of Ala. v. Garrett*, 531 U.S. 356, 360 (2001) (states are immune from suits for damages brought under Title I of the Americans with Disabilities Act of 1990); *Florida Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank*, 527 U.S. 627, 647–48 (1999) (Congress cannot abrogate state sovereign immunity from claims for patent infringement); *Parker v. Brown*, 317 U.S. 341, 350–52 (1943) (federal antitrust laws do not apply to anticompetitive actions undertaken by states).

⁶ Compare *Garrett*, 531 U.S. at 360, 362 (state university is a state instrumentality and is entitled to sovereign immunity), with *Howlett ex rel. Howlett v. Rose*, 496 U.S. 356, 375–78 (1990) (municipalities are not entitled to the shield of sovereign immunity in actions under 42 U.S.C. § 1983).

⁷ 517 U.S. 44 (1996).

its corollary, sovereign immunity. These are questions that richly repay serious study.

What should such a study cover? One would begin, logically, by taking a look at what exactly sovereignty is, and who has some or all of it in the United States. Sovereignty is about power—political, or governing, power, to be specific. As recent Supreme Court decisions have noted, early theorists of sovereignty like Jean Bodin thought that it had to be a singular phenomenon.⁸ Bodin also argued that the sovereign could not be bound by the laws that he himself made—although he could be, and was, bound by a higher, more fundamental law.⁹ Later writers, including Thomas Hobbes, took a more pragmatic line, and argued that sovereign power resided in the most powerful actor on the scene.¹⁰

In time, the idea of a sovereign state was defined in terms of a number of characteristics: a specific territory; a defined population; external independence; and internal autonomy. But the Framers of the United States Constitution understood that forms of limited sovereignty could co-exist within or beside this more absolute model. They began with the elegant and simple proposition that ultimate sovereignty resided in the People, who then assigned various responsibilities to other actors, including the federal government and the state governments.¹¹ They then, to use Justice Kennedy’s memorable phrase from the *U.S. Term Limits* decision,¹² “split the atom of sovereignty” between the state and national governments. This much they did consciously and expressly in the Constitution.¹³ Yet there was more: as a few fleeting references in the Constitution demonstrate, the Framers were well aware of a third set of people who enjoyed some sovereignty—the Indian Tribes.¹⁴ The Supreme Court put it well in *Santa Clara Pueblo v. Martinez* when it described the Indians as “separate sovereigns pre-existing the Constitution”¹⁵

Our “atom” of sovereignty was thus divided into at least three different components. One, the national government, according to the constitutional plan, was the exclusive sovereign for purposes of the external re-

⁸ J. L. BRIERLY, *THE LAW OF NATIONS: AN INTRODUCTION TO THE INTERNATIONAL LAW OF PEACE* 8 (Sir Humphrey Waldock ed., 6th ed. 1963); see generally JEAN BODIN, *SIX BOOKS OF THE COMMONWEALTH* bk. I, ch. VIII (M. J. Tooley trans., Basil Blackwell 1955) (1576).

⁹ BRIERLY, *supra* note 8, at 9.

¹⁰ This, in any event, was Brierly’s account of Hobbes. See *id.* at 12–13; see generally THOMAS HOBBS, *LEVIATHAN* (J.C.A. Gaskin ed., Oxford University Press 1996) (1651).

¹¹ U.S. CONST. art. I, § 8; *id.* amend. X; see also THE FEDERALIST No. 39 (James Madison).

¹² *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 838 (1995) (Kennedy, J., concurring).

¹³ *E.g.*, U.S. CONST. art. I, §§ 8, 10; *id.* amend. X.

¹⁴ *E.g.*, *id.* art. I, § 8, cl. 3.

¹⁵ 436 U.S. 49, 56 (1978).

lations of the United States, but a limited sovereign for internal matters.¹⁶ Another, the states, retained (along with the people) the “powers not delegated to the United States by the Constitution, nor prohibited by it to the States”¹⁷ The status of the Indian Tribes was more complex. Chief Justice Marshall coined the phrase “domestic dependent nations” in *Cherokee Nation v. Georgia* to describe what the Indian Tribes were and to distinguish them from foreign nations.¹⁸ These “dependent nations” do not retain the “full attributes of sovereignty,” but they continue to enjoy a limited sovereignty, especially over civil matters, and especially with respect to tribal members acting within a reservation.¹⁹

It is critically important to understand exactly what sovereign powers each of these entities has in order to decide legal issues such as the legitimacy of legislation passed by any of them, which courts have jurisdiction to hear complaints, which tribunals (if any) can resolve disputes between one type of entity and another, and what measures protecting that sovereignty are either essential within the constitutional plan or desirable as a matter of legislative grace. Some of this work has moved forward as the Supreme Court has confronted case after case. For instance, *Nevada v. Hall* held that the constitutional plan does not *require* one state to respect the sovereign immunity of a sister state in its own courts.²⁰ The holding in *Seminole Tribe* indicates that for purposes of bringing suit in federal court, Indian Tribes are the equivalent of private persons, rather than the equivalent of states.²¹ At the same time, the Court has taken a more limited view of Congress’s powers under the Interstate Commerce Clause, in cases like *United States v. Lopez*,²² *United States v. Morrison*,²³ and most recently, *National Federation of Independent Business v. Sebelius*.²⁴ What has not happened yet is a more complete integration of these different faces of sovereignty into one unified theory.

This might not be of great consequence if it were not for the crisis in accountability of government that is brewing because of another aspect of sovereignty. The Court has been willing to assume, at least with respect to the states, that to call an entity “sovereign” automatically means that a particular version of the doctrine of sovereign immunity from suit in courts—

¹⁶ *E.g.*, U.S. CONST. art. I, §§ 8–9.

¹⁷ *Id.* amend. X.

¹⁸ 30 U.S. (5 Pet.) 1, 17 (1831).

¹⁹ *Martinez*, 436 U.S. at 55–56 (quoting *United States v. Kagama*, 118 U.S. 375, 381–82 (1886)).

²⁰ 440 U.S. 410, 426–27 (1979).

²¹ *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 47 (1996).

²² 514 U.S. 549, 561 (1995).

²³ 529 U.S. 598, 613, 617 (2000).

²⁴ 132 S. Ct. 2566, 2587 (2012).

the absolute type—applies.²⁵ The Justices who have forged this powerful doctrine have done so, undoubtedly, in the sincere belief that absolute sovereign immunity of the states is required by the constitutional plan. So understood, this doctrine appears to be one of those structural constitutional doctrines that is inferred from the overall Constitution itself, just like “separation of powers,” “rights of privacy,” or incorporation of critical provisions of the Bill of Rights into the Fourteenth Amendment.²⁶

In other contexts, however, it is not enough to say that a particular state is entitled to “sovereign immunity,” or immunity from suit in a given set of courts. The difficult question is what lies below the surface of the term “sovereign immunity.” No one would doubt that the other nation-states in the world—some 190 at last count—qualify as “sovereigns.” For almost 200 years, concepts of *foreign* sovereign immunity have also been evolving. In the 1812 decision of *The Schooner Exchange v. McFaddon*, Chief Justice Marshall (once again) described the basic rules for foreign sovereign immunity as it applied to an armed ship under the control of Napoleon, Emperor of France.²⁷ The ship had docked in the port of Philadelphia.²⁸ The Court held there that the degree of immunity to which the French sovereign was entitled was a question of United States law, but that there was a general understanding in the law of nations that each state would refrain as a matter of grace from exercising its rightful jurisdiction when a fellow sovereign appeared in its courts.²⁹ During that era, no one seems to have questioned the absolute nature of this immunity, at least in that peer-to-peer, international relations context.

Times changed, however, and along with the Industrial Revolution and changes in political theory came changes in the role that states played. Socialist and Communist states conducted significant parts of their economic activities through state-owned enterprises—if they drew a distinction at all between the state and a state-owned company.³⁰ Other states were more selective, but also chose to implement state policies in part through state ownership in areas like the financial services, natural resources (oil exploration and refining, diamonds, and copper, to name a few), and transportation (airlines, shipping companies, and railroads).³¹

²⁵ See, e.g., *Seminole Tribe*, 517 U.S. at 54 (citing *Hans v. Louisiana*, 134 U.S. 1, 13, 15 (1890)); see also *Hans*, 134 U.S. at 16–17.

²⁶ See, e.g., *Alden v. Maine*, 527 U.S. 706, 713 (1999); *Seminole Tribe*, 517 U.S. at 54.

²⁷ 11 U.S. (7 Cranch) 116, 117 (1812).

²⁸ *Id.*

²⁹ *Id.* at 144–46.

³⁰ China, for example, operated large sectors of its economy through state-owned enterprises throughout the second half of the 20th century and has continued to do so, even after implementing widespread market reforms. See CENT. INTELLIGENCE AGENCY, *China*, WORLD FACTBOOK, available at <https://www.cia.gov/library/publications/the-world-factbook/geos/ch.html>.

³¹ PRZEMYSŁAW KOWALSKI ET AL., OECD TRADE POLICY PAPERS NO. 147, STATE-OWNED ENTERPRISES: TRADE EFFECTS AND POLICY IMPLICATIONS 34–35 (2013), available at

By the early 1950s, this had become a matter of both political and economic concern to the United States. It was a political concern because it went against the grain of U.S. market capitalism to concede that the competitors of private sector U.S. firms—for instance, in the oil industry—were entitled to shield all their actions in the U.S. market under the cover of state immunity.³² It was an economic concern to the extent that it led to the proverbial “unlevel playing field” between the Americans and the state-owned foreigners.³³ Indeed, this concern remained active 25 years later, when I was involved as a junior attorney at the U.S. Department of State’s Office of the Legal Adviser in negotiations for an International Code of Conduct on the Transfer of Technology. Many developing and socialist countries pushed for special treatment for their state-owned enterprises, but the unwavering position of the United States was to insist on equal treatment—which meant equal accountability—between state-owned and privately owned enterprises.

This is what led, in 1952, to the State Department’s decision to rethink the *content* of sovereign immunity doctrine.³⁴ This was a question that had not arisen in the 18th century, but which had gradually evolved over the succeeding 150 years. In terms of the old distinction between *jure imperii* (sovereign or public acts) and *jure gestionis* (acts of a private or commercial character), on which Justice Souter relied in *Saudi Arabia v. Nelson*,³⁵ there was very little experience with lawsuits against states (either foreign or domestic) with respect to *jure gestionis* in the pre-constitutional period. The pendulum had swung far in the opposite direction by the early 1950s. This led to the famous Tate Letter in 1952, in which the State Department adopted the so-called restrictive view of immunity for all future assertions of foreign sovereign immunity in U.S. courts.³⁶ That view was later codified in the Foreign Sovereign Immunities Act of 1976,³⁷ and it continues to govern today. Most importantly, foreign states do not enjoy immunity from suit in U.S. courts with respect to their commercial activities, as long as those activities have the correct jurisdictional nexus to the U.S. market.³⁸ If an airline company owned by its national govern-

http://www.oecd-ilibrary.org/trade/oecd-trade-policy-working-papers_18166873 (select paper No. 147). Brazil, France, India, Japan, and the United Kingdom are all examples, though there are many more. *See id.* at 49.

³² See Letter from Jack B. Tate, Acting Legal Adviser of the Dep’t of State, to Philip B. Perlman, Acting Att’y Gen. of the U.S., *reprinted in* 26 DEP’T ST. BULL. 984, 985 (1952).

³³ *Id.*; *see also* 1 RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES pt. IV, ch. 5, subchapter A, introductory cmt., at 390, 390–91 (1987).

³⁴ *See* RESTATEMENT, *supra* note 33, at 391; *see also* Letter from Jack B. Tate, *supra* note 32, at 984.

³⁵ 507 U.S. 349, 359–60 (1993).

³⁶ *See* Letter from Jack B. Tate, *supra* note 32, at 984.

³⁷ Pub. L. No. 94-583, 90 Stat. 2892 (1976) (codified as amended 28 U.S.C. §§ 1602–1611 (2006)).

³⁸ 28 U.S.C. § 1605(a)(2).

ment defaults on a contract to purchase cleaning services for its aircraft at O'Hare Airport, it can be sued almost as easily as American Airlines, a private company.

The content of sovereign immunity is also less than absolute for the Indian Tribes, given their special status in the structure of the U.S. government. In *Montana v. United States*, the Court listed the powers of self-government that the tribes still enjoy.³⁹ The degree of sovereign *immunity* to which the tribes are entitled in state or federal courts is directly related to the degree of *sovereignty* they have retained.⁴⁰ So, for example, because it is clear that Congress has paramount authority over the tribes, it also follows that Congress is fully capable of passing legislation that abrogates their immunity from suit.⁴¹ This does not mean, however, that either states or private parties are entitled to sue tribes *qua* tribes.

Before turning to some of the questions now arising about sovereignty and the immunity that protects it—questions such as where the Supreme Court seems to have left things, what issues may still be open after the Court's decisions in the last 17 years, and how we ought to think about the content of state sovereign immunity—it is useful to pause for a moment to consider why this doctrine continues to exist with such force in the early 21st century. The answer has nothing to do with its origins, which were in the feudal system of the Middle Ages, when kings were thought to rule by Divine Right.⁴² The answer—both for sovereign immunity of the states and all the other forms of sovereign immunity we have considered, including that of the United States itself—also has nothing to do with constitutional text.⁴³ The current justification is instead an interesting—not to say odd—amalgam of intrinsic value and functional utility.

The Supreme Court, in most of its recent cases dealing with state sovereign immunity (using the Eleventh Amendment as a springboard, but no more than that), has stressed the *dignitary interests* advanced by the doctrine.⁴⁴ In the broader constitutional plan, it would simply have been

³⁹ 450 U.S. 544, 564–66 (1981).

⁴⁰ See *Kiowa Tribe of Okla. v. Mfg. Techs., Inc.*, 523 U.S. 751, 755–56 (1998).

⁴¹ *Id.* at 759.

⁴² See BODIN, *supra* note 8, at 34.

⁴³ See, e.g., *Fed. Mar. Comm'n v. South Carolina State Ports Auth.*, 535 U.S. 743, 751–53 (2002) (acknowledging that the text of the Eleventh Amendment does not in itself support the Court's broad interpretation of state sovereign immunity); *Kimel v. Florida Bd. of Regents*, 528 U.S. 62, 72–73 (2000) (same); *Alden v. Maine*, 527 U.S. 706, 713 (1999) (same).

⁴⁴ See, e.g., *Alden*, 527 U.S. at 714 (The Constitution “reserves to [the States] a substantial portion of the Nation’s primary sovereignty, together with the dignity and essential attributes inhering in that status. The States ‘form distinct and independent portions of the supremacy, no more subject, within their respective spheres, to the general authority than the general authority is subject to them, within its own sphere.’”) (quoting THE FEDERALIST No. 39, at 245 (James Madison) (Clinton Rossiter ed., 1961)).

too insulting to the states to have thought that they could be compelled to litigate in the national courts at the instance of anyone other than the federal government itself or a fellow state (in an original action in the Supreme Court). The Court has also referred to the *fiscal stability* of the states—a rationale that has more to do with the prohibition against suing states for money damages than with the broader immunity doctrine now recognized.⁴⁵ Blocking private litigation against a state means that it is solely up to the conscience of the state to decide whether it will honor its obligations under federal law. If the state wishes to assume the reputational harm that disability discrimination, age discrimination, failure to pay minimum wages, or flouting the duty to pay patent royalties entails, that is up to the state.⁴⁶ Finally, there is a rationale one might call the “*non-interference*” idea, perhaps expressed best in the now-overruled Tenth Amendment decision in *National League of Cities v. Usery*.⁴⁷ If states are indeed to be separate units of government, one of the best ways to assure their autonomy is through ensuring that they can be sued, if at all, only in their own courts, and only on claims created by their own laws.⁴⁸

There are equally compelling reasons, however, to question the current justification for any kind of sovereign immunity doctrine. First, there is the indisputable tension between the theory of popular sovereignty that underlies most modern democracies and the idea that the agents of the sovereign people do not have an obligation to answer for their actions in a court of law. Second, sovereign immunity pulls in the opposite direction from the trend in public international law (which is the body of law from which all sovereign immunity doctrines have been derived) under which nations must answer to private individuals for their human rights violations, their expropriations, and other violations of international law.⁴⁹ Related to this are recent efforts in many countries to facilitate lawsuits against foreign sovereigns who sponsor terrorism, torture, take hostages, or otherwise violate fundamental rights.⁵⁰ Finally, the trend

⁴⁵ See *Edelman v. Jordan*, 415 U.S. 651, 665–68 (1974).

⁴⁶ See *Bd. of Trs. of the Univ. of Ala. v. Garrett*, 531 U.S. 356, 367–68 (2001) (disability discrimination); *Kimel*, 528 U.S. at 66–67 (age discrimination); *Florida Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank*, 527 U.S. 627, 647 (1999) (patent infringement); *Emps. of Dep’t of Pub. Health & Welfare v. Dep’t of Pub. Health & Welfare*, 411 U.S. 279, 285 (1973) (minimum wage).

⁴⁷ 426 U.S. 833, 849–52 (1976).

⁴⁸ See *Emps. of Dep’t of Pub. Health & Welfare*, 411 U.S. at 287.

⁴⁹ See, e.g., Patrick M. Norton, *A Law of the Future or a Law of the Past? Modern Tribunals and the International Law of Expropriation*, 85 AM. J. INT’L L. 474, 475, 503 (1991) (discussing the modern trend among international tribunals to hold states accountable for expropriations of foreign-owned property); Beth Stephens, *Translating Filártiga: A Comparative and International Law Analysis of Domestic Remedies for International Human Rights Violations*, 27 YALE J. INT’L L. 1, 17–20 (2002) (discussing various states’ mechanisms for holding nations accountable for human rights violations).

⁵⁰ See *Customary International Humanitarian Law*, ch. 42, *Responsibility and Reparations*, INT’L COMM. OF THE RED CROSS, <http://www.icrc.org/customary->

of increasing state proprietary activity undercuts both the dignitary and the non-interference arguments for sovereign immunity.

Concededly, we do not write on a clean slate. The Supreme Court has discerned the need to respect some form of state sovereign immunity in the broader structure of the Constitution. While its earlier discussions of that immunity arose in the context of defenses raised by states under the Eleventh Amendment, more recent decisions have made clear that this doctrine of state sovereign immunity is independent of the Eleventh Amendment. Justice Kennedy, for instance, in *Alden v. Maine* wrote that the phrase “Eleventh Amendment immunity” was “convenient shorthand but something of a misnomer,” because state sovereign immunity “neither derives from, nor is limited by, the terms of the Eleventh Amendment.”⁵¹ To similar effect, Justice Thomas wrote in *Federal Maritime Commission v. South Carolina State Ports Authority* that “the Eleventh Amendment does not define the scope of the States’ sovereign immunity; it is but one particular exemplification of that immunity.”⁵² So, with the need to worry about the narrow language of the Eleventh Amendment decisively out of the way, we are free to consider exactly what content must be attributed to this part of the constitutional design.

There are a number of questions that should be examined. The stakes are high, not only for the internal structure of American sovereignty, but also for the integrity of our markets and our position in international fora. Here are some of the points that a study of sovereignty and sovereign immunity might explore:

FIRST. What did sovereign immunity cover in the period leading up to the adoption of the Constitution of 1787? In particular, how many examples can be found of states or nations being sued for *jure gestionis*, or private commercial acts?

SECOND. Accepting the fact that state sovereign immunity is structurally part of our Constitution, what does that say about the propriety of taking an evolutionary approach toward the doctrine? Merely to label it as structural, or part of the constitutional design, is not enough. Separation of powers is also part of the constitutional design, yet the profound changes that the Administrative State has wrought to that part of the original document are well known.

THIRD. What presumption should govern our approach to assertions of sovereign immunity? The Supreme Court’s recent sovereign immunity decisions in cases such as *Sossamon v. Texas*⁵³ and *Coleman v. Court of Appeals of Maryland*⁵⁴ have generally embraced an expansive approach

ihl/eng/docs/v2_cha_chapter42 (discussing nations’ efforts to provide remedies for violations of humanitarian law).

⁵¹ 527 U.S. 706, 713 (1999).

⁵² 535 U.S. 743, 753 (2002).

⁵³ 131 S. Ct. 1651 (2011).

⁵⁴ 132 S. Ct. 1327 (2012).

to immunity defenses; this approach tends to resolve disputed questions in favor of the state. Can reasons be articulated to support a rule under which courts must give broad scope to immunity entitlements? Or ought they to construe such claims narrowly, just as they construe other efforts to avoid accountability narrowly? Does the answer to this question vary depending upon whose immunity is being considered—foreign sovereigns, the United States, the states, or Indian Tribes? If so, why? Does the answer depend on whether it is an “internal” claim of sovereign immunity (in the sovereign’s own courts) or an “external” claim of sovereign immunity (in another sovereign’s courts)?

FOURTH. Despite the brief attention paid in *College Savings Bank v. Florida Prepaid Postsecondary Education Expense Board* by both the majority and the dissenters to the analogy between state sovereign immunity and foreign sovereign immunity,⁵⁵ there is need for further study of this point. If, for example, the law of nations at the time of the adoption of the Constitution underlay the states’ immunity, then why should the evolving law of nations not continue to apply? The law of nations itself was well understood as a dynamic area of the law, given the changes the 18th century had seen in forms of governance and relationships among states. The current practice of placing foreign sovereign immunity in one silo and state immunity in another has not gone unnoticed: foreign nations find it anomalous that their companies and institutions receive less deference in U.S. courts than do the companies and institutions of the states of the United States.⁵⁶ And it is clear that the states now engage in a myriad of activities that would, if subject to the Foreign Sovereign Immunities Act, be reachable as “commercial” acts.⁵⁷

FIFTH. Are there points of tension between U.S. constitutional law, as the Supreme Court has defined it, and the international obligations of the United States? The case of *Breard v. Greene* invites this question,⁵⁸ in which no one managed to find a forum in which the Government of Paraguay could complain about the State of Virginia’s failure to follow the Vienna Convention on Consular Relations in Mr. Breard’s capital case. Paraguay could not sue Virginia in a federal court, under the holding of *Monaco v. Mississippi*.⁵⁹ Given the fact that Virginia also provided no means for Paraguay to complain in the Virginia state courts, the question arises whether the United States failed on the international level to carry out its obligations under the Convention. If such lacunae exist, then it is worth a serious look to see how they might be remedied.

⁵⁵ 527 U.S. 666, 686 n.4 (1999); *id.* at 692 (Stevens, J., dissenting); *id.* at 699 (Breyer, J., dissenting).

⁵⁶ *See id.* at 699 (Breyer, J., dissenting).

⁵⁷ *See, e.g., id.*

⁵⁸ 523 U.S. 371, 372–73 (1998) (per curiam).

⁵⁹ *Id.* at 377–78 (citing *Principality of Monaco v. Mississippi*, 292 U.S. 313, 329–30 (1934)).

This list hardly exhausts the subjects worthy of study. Some others relate to how one might work within the existing system. What mechanisms for obtaining valid waivers have been recognized so far? Are more necessary? Does the Court's recognition in *Central Virginia Community College v. Katz* that Congress's specific Article I bankruptcy power reflects a decision by the states to limit their own sovereignty in that particular field, as part of the original constitutional plan,⁶⁰ create a space for the recognition of similar carve-outs in Congress's other specific Article I powers, such as its patent and copyright power and its power to prevent counterfeiting? How far, after *Seminole Tribe*,⁶¹ *Coeur d'Alene*,⁶² and *Verizon*,⁶³ does *Ex parte Young* go to ensure accountability?⁶⁴ And does language in the Supreme Court's recent decision in *Douglas v. Independent Living Center of Southern California, Inc.*⁶⁵ hint that the Court is likely to impose additional restrictions on *Young* suits in the future? Is it fair or efficient to subject state officials to an endless stream of *Young* lawsuits, with the burdens those entail, when it is really state policy that is being challenged? Which problems does the Spending Clause answer, and which new ones does it create? How readily, or grudgingly, should courts find that states have waived a claim of sovereign immunity through litigation conduct, in the light of decisions like *Lapides v. Board of Regents of University System of Georgia*, in which the Court held that a state's removal of a suit from state court to federal court amounts to a waiver of immunity on state law claims to which the state had waived its immunity in the state courts?⁶⁶

The American experiment in multiple layers of sovereignty began on the first day the Constitution entered into force, and it has continued up

⁶⁰ 546 U.S. 356, 375–78 (2006).

⁶¹ *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44 (1996).

⁶² *Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261 (1997).

⁶³ *Verizon Md. Inc. v. Pub. Serv. Comm'n*, 535 U.S. 635 (2002).

⁶⁴ 209 U.S. 123 (1908).

⁶⁵ *See* 132 S. Ct. 1204, 1213 (2012).

⁶⁶ 535 U.S. 613, 624 (2002). The lower courts have varied in their reading of *Lapides*. Several circuits have held that a state waives only its immunity from *suit* when removing a case to federal court, and not any immunity from *liability* to which it is otherwise entitled, while others have found that the rule in *Lapides* applies only if the state would not be immune from the claims at issue in its own courts. *Compare* *Lombardo v. Pa. Dep't of Pub. Welfare*, 540 F.3d 190, 198 (3d Cir. 2008) ("We hold that while voluntary removal waives a State's immunity from suit in a federal forum, the removing State retains all defenses it would have enjoyed had the matter been litigated in state court, including immunity from liability."), *and* *Meyers ex rel. Benzing v. Texas*, 410 F.3d 236, 254–55 (5th Cir. 2005) (same), *with* *Bergemann v. Rhode Island Dep't of Envtl. Mgmt.*, 665 F.3d 336, 342 (1st Cir. 2011) ("Rhode Island's sovereign immunity defense is equally as robust in both the state and federal court. Consequently, there is nothing unfair about allowing the state to raise its immunity defense in the federal court after having removed the action. Simply put, removal did not change the level of the playing field."), *Stewart v. North Carolina*, 393 F.3d 484, 490 (4th Cir. 2005) (same), *and* *Watters v. Washington Metro. Area Transit Auth.*, 295 F.3d 36, 42 n.13 (D.C. Cir. 2002) (same).

until today. While the Supreme Court in recent years has done much to define, or to redefine, the relationship between the federal government and the states, there is still much to do. Distortions have been created between state institutions and private institutions with respect to the likelihood that they will be required to comply with a wide array of federal laws. An odd distinction has arisen between the subordinate state sovereigns and our co-equals on the world stage, under which the former appear to enjoy greater sovereignty than the latter. If this is constitutionally compelled, then there is little that lawyers and judges can do. But if there is still room for exploring the content and necessary scope of modern sovereignty and the related immunities that go along with it, then we should begin that project forthwith. The task of finding the right scope of sovereignty and the right balance among the various sovereigns that make up the American system of government is a worthy one for all who share the Framers' aspiration to ensure that, in the end, we serve only one sovereign: the People.