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## Sovereign Immunity and the Constitutional Text

William Baude\*

**Abstract:** This Term, in *Franchise Tax Board v. Hyatt*, the Supreme Court will decide whether to overrule *Nevada v. Hall*, which holds that state sovereign immunity need not be respected in another state's courts. Overruling *Hall* seems like one more logical extension of the Court's modern sovereign immunity cases, such as *Seminole Tribe* and *Alden v. Maine*, although those cases have been accused of being inconsistent with the constitutional text.

There is in fact a theory that explains how *Seminole Tribe* and *Alden* are consistent with the text. But under that theory, *Nevada v. Hall* may well be rightly decided. This Term may therefore present a test of whether the Court's sovereign immunity cases will finally break away from the text of the Constitution.

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“I am,” as David Currie once said, “that rara avis, a law professor who believes that *Hans v. Louisiana* was rightly decided.”<sup>1</sup> *Hans* holds that states have sovereign immunity from being sued without their consent.<sup>2</sup> And it so holds despite the absence of constitutional text that says so in so many words, and despite the *presence* of a constitutional amendment that seems to pointedly exclude it. The Eleventh Amendment gives states immunity to suit in federal court when sued “by citizens of *another* state, or by citizens or subjects of any foreign state.”<sup>3</sup> *Hans* found immunity even when the suit was by citizens of the *same* state, and hence beyond the text of the Eleventh Amendment.

State sovereign immunity has more apologists in the academy than it used to – quite a few more than in 1997 when David Currie wrote. That increase may owe partly to increased historical evidence or increased belief by law professors that the historical evidence matters. But it also owes in part to a new way of thinking about sovereign immunity – as what Stephen Sachs has called a “constitutional back-drop.”<sup>4</sup> That new understanding explains how sovereign immunity fits into the constitutional text and also makes sense of the Court’s sovereign immunity cases – for now. But all of that may change, depending on the disposition this term of *Franchise Tax Board v. Hyatt*.<sup>5</sup>

## I.

Sovereign immunity is a government’s right not to be haled into court without its consent. Whatever its theoretical provenance, it has been a part of American procedure for a long time. Read for all it is worth, it might be a bar to nearly all affirmative judicial relief against government action. But government officers have long been held to be suable in their own right, without the government’s immunity, meaning that in most cases sovereign immunity recedes into the background.<sup>6</sup>

But sometimes litigants and the federal government are not content with officer suits; they want to authorize lawsuits against the

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<sup>1</sup> David P. Currie, *Ex Parte Young After Seminole Tribe*, 72 N.Y.U. L. Rev. 547 (1997).

<sup>2</sup> *Hans v. Louisiana*, 134 U.S. 1 (1890).

<sup>3</sup> U.S. Const. amdt. XI (emphasis added).

<sup>4</sup> Stephen E. Sachs, *Constitutional Backdrops*, 80 Geo. Wash. L. Rev. 1813 (2012).

<sup>5</sup> 135 S.Ct. 2940 (2015) (No. 14-1175).

<sup>6</sup> *United States v. Lee*, 106 U.S. 196 (1882); *Ex Parte Young*, 209 U.S. 123 (1908); see also Pamela S. Karlan, *The Irony of Immunity: The Eleventh Amendment, Irreparable Injury, and Section 1983*, 53 Stan. L. Rev. 1311 (2001) (discussing tensions between sovereign immunity and officer suits).

state itself. To do that, the federal government needs to trump, or to “abrogate,” the state’s sovereign immunity. In a series of cases, the Supreme Court has made this very difficult, sometimes nearly impossible, for the federal government to do. These cases are a mainstay of federal courts classes today, widely criticized by professors and often puzzling to students. To figure out whether the cases are right we must figure out the legal status of state sovereign immunity. Consider the three main positions:

*Non-constitutional:* The first position, probably the most common one among law professors, is that state sovereign immunity simply has no constitutional protection at all. On this account, either state sovereign immunity was abrogated at the Founding, or else Congress is free to “abrogate” state sovereign immunity as much as it likes.

On one version of this theory, states forfeited any sovereign immunity upon their admission to the union. Perhaps they did so by ratifying a Constitution that contained the Article III judicial power, which extends generally to “all Cases” arising under federal law and also specifically to various “Controversies” to which the state is a party.<sup>7</sup> Or perhaps such forfeiture was simply implicit in the ratification of the Constitution itself, which created a new federal sovereign directly in the name of “We the People.”<sup>8</sup> Something like this was the theory of most of the Justices when they decided *Chisholm v. Georgia* in 1793, holding that Georgia had no immunity from an action of assumpsit by South Carolina citizens,<sup>9</sup> though *Chisholm* was soon surpassed by the Eleventh Amendment.

The alternative version is that sovereign immunity exists as a rule of *common law*. And like most rules of common law, it can be displaced by a statute. States might have sovereign immunity in cases like *Chisholm*, where nothing has been done to displace it. But as soon as Congress passes a federal statute regulating the state, it can also create a judicial remedy under the Necessary and Proper Clause. That statutory remedy displaces any common law rules to the contrary. Something like this was Justice Stevens’ theory in his dissent in *Seminole Tribe v. Florida*.<sup>10</sup>

*Quasi-textual:* Those who would deny the power to abrogate usually conclude that they must find some part of the Constitution that implicitly preserves state sovereign immunity. Currie seems to

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<sup>7</sup> U.S. Const. art. III, § 2.

<sup>8</sup> U.S. Const. pmbl.

<sup>9</sup> *Chisholm v. Georgia*, 2 U.S. 419, 452 (1793) (Blair, J.); *id.* at 465-466 (Wilson, J.); *id.* at 467 (Cushing, J.); *id.* at 474-477 (Jay, J.).

<sup>10</sup> 517 U.S. 44, 78-82 (1996) (Stevens, J., dissenting). For a theory somewhat in between these two, see Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 Yale L.J. 1425, 1466-1484 (1987) (arguing that state sovereign immunity doesn’t apply if the rule of decision is federal law (as in federal question or admiralty cases)).

find it in the *intent* of the Framers without regard to any specific textual provision. Acknowledging that “it doesn’t say that,”<sup>11</sup> Currie lumps sovereign immunity with other seemingly non-textual rules like intergovernmental tax immunity, the ban on secession, the equal footing doctrine, official immunity, and executive privilege: “The Constitution cannot be construed by looking only at its words; history, tradition, consequences, and purpose help us to understand what the words of the Constitution mean.”<sup>12</sup>

Well, that’s one possibility. But several of the other doctrines Currie mentions have their critics too, and all of them are an embarrassment to those who claim that it is the written document, not its penumbras and emanations, that supplies our constitutional law.<sup>13</sup>

Michael Rappaport has argued that immunity can be found implicit in the definition of “state.” The term “creates a strong inference that there must be certain state immunities,” and also “is the source of these immunities. When the Framers invoked a traditional institution or power, they often intended that institution or power to possess certain of its traditional attributes. By calling the local governments ‘States,’ the Framers intended that these governments possess some of the traditional immunities that states enjoyed.”<sup>14</sup> This theory has the virtue of pointing to an actual textual provision, but it still requires packing a single word with an awful lot of freight.

*Constitutional Backdrops*: There is a third way. Sachs proposed that we can see sovereign immunity as a “constitutional backdrop”—something in between the previous two theories.<sup>15</sup> A constitutional backdrop is a common law rule like any other, with one key difference: some part of the Constitution insulates that rule from being changed. Sachs suggests that this category ranges from the trivial – e.g., the lawfulness of alcohol sales that took place in 1786 (shielded from change by the Ex Post Facto Clause) – to the fundamental – e.g., the law of state borders (shielded from change by Article IV and the ban on states’ “engag[ing] in war”).<sup>16</sup>

There are different ways to characterize the exact nature of this common law rule. Some would describe it as a common law principle of

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<sup>11</sup> David P. Currie, *Inflating the Nation’s Power*, 71 U. Chi. L. Rev. 1229, 1237 (2004); see also *id.* (“no, it doesn’t.”).

<sup>12</sup> *Id.*

<sup>13</sup> Cf. *Nevada v. Hall*, 440 U.S. 410, 430 (1979) (Blackmun J., dissenting) (defending “a constitutional source” for sovereign immunity by analogy to the unenumerated “guarantee of freedom of association” and “right of interstate travel.”).

<sup>14</sup> Michael B. Rappaport, *Reconciling Textualism and Federalism: The Proper Textual Basis of the Supreme Court’s Tenth and Eleventh Amendment Decisions*, 93 Nw. U. L. Rev. 819, 821 (1999).

<sup>15</sup> Sachs, *Backdrops*, *supra* note 4, at 1868-1875.

<sup>16</sup> *Id.* at 1816-1817, 1828-1834.

personal jurisdiction: states simply could not be haled into court without their consent.<sup>17</sup> Others would describe it as part of “the law of nations.”<sup>18</sup> But either way, it is a form of unwritten customary law deserving the label “common law.”<sup>19</sup>

If sovereign immunity is a constitutional backdrop, that means that the common-law theorists are right that it is not directly implied by the Constitution itself. It’s simply a background rule of procedure like waiver or precedent or capacity to sue. But unlike most common law rules of procedure, this one can’t be changed, because of the properly limited nature of Articles I and III. While this may be the least straightforward of the three theories, it is the only one that makes sense of both the text and the Court’s sovereign immunity cases.

## II.

*Hans*: In *Hans v. Louisiana*, a disappointed Louisiana bondholder tried to sue the state over its failure to pay a debt.<sup>20</sup> This, he said, violated the Federal Constitution’s injunction that: “No State shall ... pass ... any Law impairing the Obligation of Contracts.”<sup>21</sup> The Supreme Court barred the suit, concluding that “The suability of a state, without its consent, was a thing unknown to the law,” and that nothing about the Constitution had changed that.<sup>22</sup>

Under a backdrops theory this case makes sense. The key to the case is not the Eleventh Amendment, which *Hans* unfortunately cited,<sup>23</sup> but rather the limited nature of Article III. Article III’s grant of

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<sup>17</sup> Caleb Nelson, *Sovereign Immunity as a Doctrine of Personal Jurisdiction*, 115 *Harv. L. Rev.* 1559 (2002).

<sup>18</sup> James E. Pfander, *Rethinking the Supreme Court’s Original Jurisdiction in State-Party Cases*, 82 *Cal. L. Rev.* 555, 582 (1994).

<sup>19</sup> Ann Woolhandler argues that “[e]ven if the Court initially discussed state immunity as a matter of general law ... it likely would have eventually treated the law of state immunity as a form of either *federal* constitutional or subconstitutional law,” and argues that “the Court has long handled many other issues of interstate relations according to rules of *federal* common law.” *Interstate Sovereign Immunity*, 2006 *Sup. Ct. Rev.* 249, 261 & n. 50 (emphasis added). Under the backdrops approach, the label “*federal* common law” is confusing here. Both sovereign immunity and “other issues of interstate relations” are treated as common law, but one must then look to other legal provisions to see if those common law rules have been insulated from change. Sachs, *Backdrops*, *supra* note 4, at 1834-1838.

<sup>20</sup> 134 U.S. 1 (1890).

<sup>21</sup> U.S. Const. art. I, § 10 (cited in *Hans*, 134 U.S. 1, 3 (1890)).

<sup>22</sup> 134 U.S. at 16-18.

<sup>23</sup> *Id.* at 11-12 (suggesting that the ratification of the Eleventh Amendment demonstrated that “the highest authority of this country,” *i.e.*, the people, thought *Chisholm v. Georgia* was wrongly decided). See also *id.* at 21 (Harlan, J., concurring in the

jurisdiction is defeasible. It establishes the baseline categories of federal jurisdiction, but doesn't purport to sweep away literally every doctrine of procedure that might otherwise defeat a case.<sup>24</sup>

For instance, what about capacity?<sup>25</sup> Does the Constitution's authorization of suits by citizens mean that even infant children can sue? Does the Constitution's authorization of suits arising under federal law allow non-human entities, like whales or trees, to attempt to vindicate federal rights?<sup>26</sup> Maybe, but it's certainly not a necessary consequence of the text.

And most to the point, what about personal jurisdiction, which holds that the case can only be brought if the parties are properly haled before the Court? (Recall the theory that sovereign immunity *was* a doctrine of personal jurisdiction.)<sup>27</sup> No. The grants of jurisdiction are general provisions that are still subject to some of the more specific rules of the common law.

*Hans* alone might also square with a generous version of the common law theory, since Congress had not tried to abrogate the state's sovereign immunity in that case.<sup>28</sup> But about a century later the Supreme Court started carrying sovereign immunity further than the common law theory could sustain.

*Seminole Tribe*: In *Seminole Tribe* the Supreme Court held that the state of Florida had sovereign immunity from a lawsuit brought under the Indian Gaming Regulatory Act.<sup>29</sup> And the state had this immunity even though federal law explicitly authorized suit against the state, and hence abrogated the state's immunity. That is, the abrogation of the state's immunity was unconstitutional.

This is of course inconsistent with the common law theory. And under the quasi-textual theory it sends interpreters hunting for some word (like "state") that can be made to imply doctrines like sovereign immunity – or else forces interpreters to give up on the text altogether.

The backdrops theory, however, is consistent with both the case and the text: Sovereign immunity is a rule of common law, not a rule of constitutional law. But constitutional law sets the boundaries of Congress's powers under Article I and the federal judiciary's powers under Article III, and those powers do not include abrogating sovereign immunity.

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holding) ("I am of the opinion that the decision in [Chisholm] was based upon a sound interpretation of the Constitution as that instrument then was.").

<sup>24</sup> See generally Sachs, Backdrops, *supra* note 4, at 1863-66, 1870-72.

<sup>25</sup> See 3 Elliot's Debates 533 (statement of Madison).

<sup>26</sup> Cf. *Sierra Club v. Morton*, 405 U.S. 727, 741-745 (1972) (Douglas, J., dissenting).

<sup>27</sup> See generally Nelson, Personal Jurisdiction, *supra* note 17.

<sup>28</sup> *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 86-88 (Stevens, J., dissenting) (acknowledging this).

<sup>29</sup> *Id.* at 47.

We've already seen how *Article III* itself can be read to leave in place the common-law doctrine of sovereign immunity. For *Seminole Tribe* to be right, *Article I* must not give Congress the power to alter this immunity either. One could reach that construction of Article I in two ways:

One is to say that Congress lacks the power to add to the jurisdiction given by Article III (as the Court said in *Marbury v. Madison*, among many other places).<sup>30</sup> Suits barred by sovereign immunity are outside of Article III; Congress can't add to Article III; presumably it follows that Congress can't eliminate sovereign immunity.<sup>31</sup>

But note that this is stronger than the Marbury principle. *Marbury* said that Congress couldn't add to the *textual categories* of Article III (otherwise, said the Court, those textual enumerations would be pointless).<sup>32</sup> This theory would say that Congress can't even change the common-law rules that Article III left in place – presumably that means no changing the common-law rules of precedent, no changing the common-law rules of capacity, no changing the common-law rules of waiver, and no changing the common-law rules for service of process.<sup>33</sup> That could be right, but it doesn't have to be.

The second, and perhaps more promising, option is to focus on the limited nature of Congress's implied powers under the Necessary and Proper Clause.<sup>34</sup> This may seem counterintuitive: Nobody doubted that the Indian Gaming Regulatory Act itself was within Congress's power to "regulate Commerce ... with the Indian Tribes."<sup>35</sup> The lawsuit provision seemed to help enforce the Act, so it seemed to be "necessary and proper for carrying into Execution" the commerce power.<sup>36</sup> But it seemed that way only if one thinks that everything that is "helpful" is "necessary and proper." And that's not quite right.

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<sup>30</sup> *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 174 (1803); see also *Mossman v. Higginson*, 4 U.S. (4 Dall.) 12 (1800).

<sup>31</sup> See, e.g., John M. Rogers, *Applying the International Law of Sovereign Immunity to the States of the Union*, 1981 *Duke L.J.* 449, 455 (1981) (describing a version of this argument).

<sup>32</sup> 5 U.S. (1 Cranch) at 174 ("Affirmative words are often, in their operation, negative of other objects than those affirmed; and in this case, a negative or exclusive sense must be given to them or they have no operation at all.").

<sup>33</sup> I might have added "no changing the common law rules of standing" to my *reductio*, except that the Court appears tempted to take that position. See *Spokeo v. Robins*, No. 13-1339 (argued Nov. 2, 2015).

<sup>34</sup> It is a neat question whether Congress's implied powers *really* come from the Necessary and Proper Clause or whether the Clause is merely declaratory and so the implied powers come from the grants of power in the first place. But the analysis works the same either way, so I mention the Clause for ease of exposition to the modern eye.

<sup>35</sup> U.S. Const. art. I, § 8, cl. 3.

<sup>36</sup> U.S. Const. art. I, § 8, cl. 18.

The Necessary and Proper Clause includes a broad range of so-called “incidental” powers, but those incidental powers are subject to the important interpretive principle that the Constitution doesn’t hide elephants in mouseholes.<sup>37</sup> Or to put it in historical terms: James Madison said in opposing the national bank that more important powers, however useful, were less likely to “be left to construction,” and that the Clause should not be used to imply “a great and important power.”<sup>38</sup> And Chief Justice John Marshall agreed: in *upholding* the bank in *McCulloch v. Maryland* he conceded that “a great substantive and independent power ... cannot be implied as incidental to other powers, or used as a means of executing them.”<sup>39</sup>

So *Seminole Tribe* is right under the backdrop theory if abrogating sovereign immunity is one of the “great and important” or “great substantive and independent” powers that falls outside of the implied powers of Article I.<sup>40</sup> Defining those great powers is a tough question, but sovereign immunity seems to be a plausible candidate, in light of its deep historical rights, its connection to state sovereignty and (if you must) the evidence from the Eleventh Amendment itself that it is the kind of power that the Constitution takes very seriously.<sup>41</sup> Whether *Seminole Tribe* is right or wrong, the backdrops theory at least makes sense of what it’s saying.

*Alden*: If you subscribe to the common-law theory, it’s been downhill at least since *Seminole Tribe*. But if you subscribe to the quasi-textual theories based on the 11th Amendment or Article III, then the first big mistake would have been *Alden v. Maine*. In *Alden* the Court extended the non-abrogation rule of *Seminole Tribe* to state courts, saying that Congress can’t abrogate immunity in state court any more than in federal courts.<sup>42</sup> The great-powers/backdrops theory explains why.

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<sup>37</sup> See William Baude, Rethinking the Federal Eminent Domain Power, 122 Yale L.J. 1738, 1746-1755 (2013); see also The Origins of the Necessary and Proper Clause (Gary Lawson et al. eds., 2010).

<sup>38</sup> James Madison, Speech in the House of Representatives (Feb. 7, 1791), reprinted in Legislative and Documentary History of the Bank of the United States 39, 40, 43 (photo. reprint 2008) (1832). But see Robert Reinstein, The Great Power of the Necessary and Proper Clause (Aug. 10, 2015) available at <http://ssrn.com/abstract=2644326> (arguing that Madison’s views were rejected).

<sup>39</sup> *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 411 (1819).

<sup>40</sup> So far as I know, this point was first made by Nelson, Personal Jurisdiction, *supra* note 17, at 1640. See also Sachs, Backdrops, *supra* note 4, at 1875.

<sup>41</sup> A related possibility is that the broader category of “coercive power over states” was understood to be outside of Congress’s originally enumerated powers, see Bradford R. Clark, The Eleventh Amendment and the Nature of the Union, 123 Harv. L. Rev. 1817, 1851-1852 (2010), perhaps informing the great powers analysis.

<sup>42</sup> 527 U.S. 706 (1999).

In *Alden* a group of Maine employees sued the state for violations of the Fair Labor Standards Act. Once again, there was no doubt that the Act itself was constitutional – the Court had flirted briefly with the view that state employment was outside of Congress’s powers<sup>43</sup> but quickly retreated from it.<sup>44</sup> And once again a suit against the state seemed to follow naturally from the Act’s substantive requirements. And once again the Court said “no.”

This time, however, Article III and the Eleventh Amendment dropped out of the case entirely. Even if you think that the Eleventh Amendment should be read to ban federal suits by all citizens, it bans only federal suits. Even if you think that Article III preserves state sovereign immunity and that Congress can’t change Article III, suits in state court have nothing to do with Article III. So what is left to insulate common law immunity from change in *Alden*?

The answer is just Article I. Once we accept that abrogating sovereign immunity is a “great” power, it’s easy to see why abrogation is the same in both state and federal court. The immunity itself is just a common law rule, so it applies wherever it hasn’t been abrogated. The real question is Congress’s Article I power to abrogate, which is about the scope of the “necessary and proper” clause and state sovereignty, not the forum. Indeed Congress’s Article I powers are *no greater* when regulating state courts than federal courts,<sup>45</sup> making *Alden* follow *a fortiori* from *Seminole Tribe*.

So *Alden* is not a weak link in the immunity cases but rather a keystone. More, one of *Alden*’s great virtues is that it makes the textual source of sovereign immunity more explicit. It specifically rejects the term “Eleventh Amendment immunity” as “something of a misnomer,”<sup>46</sup> and it instead calls out the limits of the Necessary and Proper Clause:

Nor can we conclude that the specific Article I powers delegated to Congress necessarily include, by virtue of the Necessary and Proper Clause or otherwise, the incidental authority to subject the States to private suits as a means of achieving objectives otherwise within the scope of the enumerated powers. ... As we have recognized in an analogous context:

“When a ‘Law for carrying into Execution’ the Commerce Clause violates the principle of state sovereignty reflected in the various constitution-

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<sup>43</sup> See *Nat’l League of Cities v. Usery*, 426 U.S. 833 (1976)

<sup>44</sup> See *Garcia v San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985).

<sup>45</sup> See Anthony J. Bellia Jr., *Federal Regulation of State Court Procedures*, 110 *Yale L.J.* 947, 963 (2001).

<sup>46</sup> *Alden*, 527 U.S. at 713.

al provisions it is not a ‘Law *proper* for carrying into Execution the Commerce Clause,’ and is thus, in the words of The Federalist, ‘merely an act of usurpation’ which ‘deserves to be treated as such.’”<sup>47</sup>

To be sure, not every sentence in *Alden* is consistent with the technicalities of the backdrop theory. For instance, after correctly accusing the dissenters of a “false dichotomy” and concluding that the common-law origins of sovereign immunity do not necessarily mean it can be abrogated, the Court analogizes sovereign immunity to a number of *enumerated* rights in the Constitution. It went on: “The common-law lineage of these rights does not mean they are defeasible by statute or remain mere common-law rights, however. *They are, rather, constitutional rights*, and form the fundamental law of the land.”<sup>48</sup> As a matter of backdrops, this is not quite right – sovereign immunity *does* “remain [a] common-law right,” but maybe not a “mere” one. It is insulated from abrogation by statute without *quite* becoming a constitutional right itself. Still, this is pretty close.

Similar analysis, for similar reasons, applies in federal administrative agencies, as the Court held in *South Carolina Ports Authority*.<sup>49</sup> Just as Congress lacks the Article I power to eliminate state sovereign immunity by forcing them into federal court, it lacks the Article I power to do the same thing by forcing them into administrative adjudications instead.

*Bitzer and Katz*: There are a few cases where the Court *has* permitted Congress to trump a state’s sovereign immunity without its consent.<sup>50</sup> These cases also make sense under the great-powers/backdrops theory.

While Congress cannot abrogate sovereign immunity using most of its Article I powers, in *Fitzpatrick v. Bitzer* the Court held that Congress *can* abrogate sovereign immunity when legislating under its

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<sup>47</sup> *Id.* at 732-33 (quoting *Printz*, 521 U.S. 898, 923-24 (quoting The Federalist No. 33, at 204) (ellipses and alterations omitted)). It’s not clear that the Court is right to treat “proper” as a separate requirement rather than part of a unitary phrase, see Samuel L. Bray, ‘Necessary and Proper’ and ‘Cruel and Unusual’: Hendiadys in the Constitution, available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2676347](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2676347), but it works out basically the same here.

<sup>48</sup> *Id.* at 733.

<sup>49</sup> *Fed. Mar. Comm’n v. South Carolina State Ports Auth.*, 535 U.S. 743 (2002).

<sup>50</sup> Spending Clause statutes can also create state liability, but that is because states *consent* to federal funds and the conditions on them, and for reasons *internal* to all major theories of sovereign immunity, it can be waived. *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 238, 246-247 (1985).

power to enforce the 14th Amendment.<sup>51</sup> What gives? Some people think that the cases are just inconsistent – *Bitzer* had the good fortune to be decided in the 1970s; *Seminole Tribe* came up after some new Justices were on the Court.<sup>52</sup> But the modern cases have not cast aspersions on *Bitzer*,<sup>53</sup> so it's worth seeing if there's a theory that makes sense of them both.

A second theory is that the 14th Amendment trumps sovereign immunity simply because it is structurally later in time to Article III and the Eleventh Amendment.<sup>54</sup> Even on its own terms, that theory seems fishy. The Fourteenth Amendment comes after the Fifth and the Eighth, but does anybody think it can be enforced through cruel and unusual punishments and without due process?<sup>55</sup> The Fourteenth Amendment comes after Article I, Section 7, too, but does that mean the President can't veto enforcement legislation? (That would have been news to Andrew Johnson.) And once we see sovereign immunity as a backdrop, we see that neither Article III nor the Eleventh Amendment are the source of it anyway.

But that leads us to a third approach. The question is not whether the 14th Amendment somehow supersedes other provisions of the Constitution; the question is whether the 14th Amendment enforcement power includes an abrogation power. That means the question is whether Congress's power to enact "appropriate" legislation to enforce the 14th Amendment is somehow broader than the powers recognized under the Necessary and Proper Clause.

That's a big question, but we can quickly see some ways the answer might be yes. First of all, the texts are different and "appropriate" might be a more generous grant of power than the fustier "necessary and proper."

Second, even if we think the clauses both communicate the great-powers/elephants-in-mouseholes concept, they might treat sovereign immunity differently *under that concept*. On some originalist understandings, for example, we'd presumably ask ourselves whether abrogation was a "great power" – hence, implicitly excluded – when the

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<sup>51</sup> 427 U.S. 445 (1976).

<sup>52</sup> See Daniel J. Meltzer, *The Seminole Decision and State Sovereign Immunity*, 1996 *Sup. Ct. Rev.* 1, 36-41.

<sup>53</sup> See, e.g., *Seminole Tribe*, 517 U.S. at 65 ("Fitzpatrick was based upon a rationale wholly inapplicable to the Interstate Commerce Clause.").

<sup>54</sup> See, e.g., Vicki C. Jackson, *Holistic Interpretation: Fitzpatrick v. Bitzer and Our Bifurcated Constitution*, 53 *Stan. L. Rev.* 1259, 1269 (2001); see also *Seminole Tribe*, 517 U.S. at 65 (noting, without explaining the point, that "the Fourteenth Amendment [was] adopted well after the adoption of the Eleventh Amendment and the ratification of the Constitution").

<sup>55</sup> Accord Currie, *supra* note 1, at 547 n.6.

constitutional power was enacted.<sup>56</sup> Because Article I and the 14th Amendment were enacted almost 80 years apart, the answer could well have changed in between.<sup>57</sup>

It's also possible that what is "great" is context-sensitive. For instance, the generally-great power of eminent domain may have been implied by Congress's military powers, but no others.<sup>58</sup> On this theory, because the Fourteenth Amendment directly confronts and constrains state power, it's less surprising for it to implicitly authorize abrogations of state sovereignty.<sup>59</sup>

The Supreme Court also held, in *Central Virginia Community College v. Katz*, that Congress may authorize jurisdiction over states when using its Article I bankruptcy power.<sup>60</sup> This is different from every other Article I power the Court has confronted. The argument for inconsistency seems stronger here, since the case was decided recently and only one Justice – Justice O'Connor – is responsible for the changed outcome.

But *Katz's* correctness is also consistent with – if orthogonal to – the great-powers/backdrops theory. Indeed, *Katz* concluded that the case didn't really implicate the abrogation power.<sup>61</sup> That was partly because "[b]ankruptcy jurisdiction, at its core, is in rem" and thus "does not implicate States' sovereignty to nearly the same degree as other kinds of jurisdiction."<sup>62</sup> And partly because the particular structure and history of bankruptcy law—including specific bankruptcy cases and statutes at and immediately after the Founding—suggested that states had "agreed in the plan of the Convention not to assert" their sovereign immunity.<sup>63</sup> This conclusion allowed the *Katz* Court to side-

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<sup>56</sup> Baude, Eminent Domain, *supra* note 37, at 1811 n.407.

<sup>57</sup> John Harrison argues that as an actual historical matter this isn't the case, but doesn't question the theory. John Harrison, State Sovereign Immunity and Congress's Enforcement Powers, 2006 Sup. Ct. Rev. 353, 354-69; see also John E. Nowak, The Scope of Congressional Power to Create Causes of Action Against State Governments and the History of the Eleventh and Fourteenth Amendments, 75 Colum. L. Rev. 1413, 1454 (1975).

<sup>58</sup> Baude, Eminent Domain, *supra* note 37, at 1799-1800. But see Saikrishna Bangalore Prakash, The Sweeping Domestic War Powers of Congress, 113 Mich. L. Rev. 1337, 1345 n. 43 (2015) (inferring from the history of military takings a more general takings power).

<sup>59</sup> Similarly, because the Fourteenth Amendment explicitly regulates the states and authorizes congressional enforcement of those provisions, it seems to authorize coercion of the states even if the Article I powers do not. Clark, *supra* note 41, at 1917.

<sup>60</sup> 546 U.S. 356 (2006).

<sup>61</sup> Cf. *Katz*, 546 U.S. at 361-62 (concluding that "Congress' attempt to abrogate state sovereign immunity in 11 U.S.C. § 106(a) ... was not necessary to authorize the Bankruptcy Court's jurisdiction.").

<sup>62</sup> *Id.* at 362.

<sup>63</sup> *Id.* at 373.

step the usual disputes about the status of sovereign immunity and the power to abrogate it.<sup>64</sup>

Theories that put sovereign immunity directly into the text or structure of the Constitution have a hard time explaining why different powers would relate to it differently. Theories that treat it as a backdrop – just a common law rule – can explain this, because they focus on the source of the power to abrogate. It’s therefore little surprise if different powers have ... different powers.

### III.

But there’s one last piece of the puzzle. What about sovereign immunity in the courts of *another state*? In *Nevada v. Hall*, decided in 1979, the Supreme Court held that states do not have immunity in each other’s courts.<sup>65</sup> This seems like an exception to the general pattern of immunity and has been criticized as an anomaly in the doctrine.<sup>66</sup> Indeed, many people have wondered whether *Alden v. Maine* can coherently be distinguished from *Nevada v. Hall*.<sup>67</sup>

What is more, it appears that some members of the Court agree and are out to correct the anomaly. In *Franchise Tax Board v. Hyatt*, argued this term, the Court granted certiorari to decide whether *Nevada v. Hall* should be overruled.<sup>68</sup> To ask the question is to suggest the answer might be “yes.” And indeed, at oral argument the Justices seemed prepared to overrule *Hall*, thus extending sovereign immunity to state courts.

Part of Justice Stevens’s majority opinion in *Hall* rested on a distinction between “two quite different concepts, one applicable to suits in the sovereign’s own courts and the other to suits in the courts of another sovereign.”<sup>69</sup> Immunity in one’s own courts, the Court wrote, “has been enjoyed as a matter of absolute right for centuries,” while immunity in another sovereign’s courts was a matter of mutual agreement or comity.<sup>70</sup>

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<sup>64</sup> As with Bitzer, *supra* note 57, one might well think the Court misinterpreted the specific history of the Bankruptcy Clause or that it simply reflected Justice O’Connor’s cold feet. But the *theory* of Katz still remains consistent with the general great-powers/backdrops approach that underlies the other cases.

<sup>65</sup> 440 U.S. 410 (1979).

<sup>66</sup> Woolhandler, *supra* note 19, at 250-51.

<sup>67</sup> See, e.g., Richard H. Fallon, Jr., John F. Manning, Daniel J. Meltzer, David L. Shapiro, Hart & Wechsler’s *The Federal Courts and the Federal System* 975-976 (7th ed. 2015).

<sup>68</sup> See 135 S.Ct. 2940 (2015) (Mem).

<sup>69</sup> *Nevada v. Hall*, 440 U.S. at 414.

<sup>70</sup> *Id.* at 416.

This distinction might indeed distinguish *Alden*, which featured a state's own courts, but it still leaves *Hall* harder to reconcile with *Seminole Tribe*, which protected sovereign immunity in the "courts of another sovereign" – the federal government. But even if one lumps these two kinds of sovereign immunity together,<sup>71</sup> there is another way to approach *Hall*: the backdrops theory, which seems to be the best account of the Court's cases so far.

The backdrops theory suggests that the two cases are quite distinguishable. As the reader will by now understand, in every backdrop case there are really two questions: First, is there a common-law rule? Second, how much has it been insulated from change? And in the modern sovereign immunity cases the key question is usually the second one, which usually reduces to *what is the power to abrogate?*

It is the answer to that second question that potentially distinguishes *Alden* from *Hall* and *Franchise Tax Board*. The federal government's powers are pervasively limited by the Constitution. When Congress tries to abrogate immunity in federal court, it's limited by the scope of Articles I and III. When Congress tries to abrogate immunity in state court, it's limited by the scope of Article I. But in *Franchise Tax Board*, the attempted abrogation has come from the *state* of Nevada. So the question is: what part of the Constitution limits *state* authority to abrogate? The Constitution doesn't limit states to enumerated powers and imposes relatively few constraints on their treatment of one another.<sup>72</sup>

Yes, the states must give "Full Faith and Credit ... to the public Acts, Records, and judicial Proceedings of every other State,"<sup>73</sup> but nothing in this clause requires them to award other states sovereign immunity. At oral argument Justice Breyer toyed with using the Full Faith and Credit Clause to restrict state abrogation,<sup>74</sup> but the Court's previous cases have read the Clause to give a state broad discretion to choose to apply its own law to a controversy,<sup>75</sup> and the original meaning of the Full Faith and Credit Clause is probably more deferential

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<sup>71</sup> For an argument that the two immunities should be distinguished, and are distinguished by some of the Court's cases, see Brief of Professors of Federal Jurisdiction as Amici Curiae in Support of Respondent, *Franchise Tax Bd. v. Hyatt* (No. 14-1175).

<sup>72</sup> See *Alden*, 527 U.S. at 739 (distinguishing *Hall* because "The Constitution, after all, treats the powers of the States differently from the powers of the Federal Government.").

<sup>73</sup> U.S. Const. art. IV, sec 1.

<sup>74</sup> Transcript of Oral Argument at 18-19, *Franchise Tax Board v. Hyatt*, 135 S.Ct. 2940 (2015) (No. 14-1175).

<sup>75</sup> See, e.g., *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 313(1981); *Franchise Tax Bd. of California v. Hyatt*, 538 U.S. 488, 494-499 (2003).

still.<sup>76</sup> This rationale would be an even bigger change to the Full Faith and Credit Clause than to sovereign immunity.

The states are also forbidden by the Constitution to “engage in War, unless actually invaded or in such imminent Danger as will not admit of delay.”<sup>77</sup> It’s not inconceivable that this clause could limit state abrogation authority, though it seems like a stretch. Treating abrogation as a form of war would also have odd effects on other sovereign immunity jurisprudence, such as the Foreign Sovereign Immunities Act.<sup>78</sup> And it also might oddly suggest that Congress has an Article I abrogation power after all, thanks to its own power to “declare War.”<sup>79</sup>

In the leading critique of *Nevada v. Hall*, Ann Woolhandler suggests that states ability to sue one another was instead implicitly disabled by Article III: its “provision for state/citizen diversity and the original jurisdiction of the Supreme Court in state-as-party cases meant that any aboriginal power in the state courts to hold each other involuntarily liable to individuals’ suits had been ceded to the federal courts.”<sup>80</sup> But if Article III did not strip states’ pre-existing immunities, despite creating jurisdiction over states, it seems even more unlikely that it implicitly stripped their pre-existing power to *abrogate* those immunities, despite saying nothing about it.

Finally, and most speculatively, one could hold state sovereign immunity beyond other states’ power to abrogate through a somewhat complicated theory of international law. If one believes (1) that sovereign immunity was part of the *law of nations*,<sup>81</sup> (2) that states lack the power to enact statutes that violate the law of nations (even when there is no treaty or federal law embodying them),<sup>82</sup> and (3) that both these rules carry over to the interstate context, then one might conclude that states lack the power to abrogate one another’s sovereign immunity. These limitations also take us well beyond the text, since the Constitution never *says* that states can’t violate international

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<sup>76</sup> David E. Engdahl, *The Classic Rule of Faith and Credit*, 118 *Yale L.J.* 1584, 1632, 1655 (2009); see also Stephen E. Sachs, *Full Faith and Credit in the Early Congress*, 95 *Va. L. Rev.* 1201, 1208, 1230-1231 (2009).

<sup>77</sup> U.S. Const. art. I, § 10.

<sup>78</sup> 28 U.S.C. §§ 1330, 1391(f), 1441(d), 1602-11.

<sup>79</sup> U.S. Const. art. I, § 8.

<sup>80</sup> Woolhandler, *supra* note 19, at 265.

<sup>81</sup> See Pfander, *supra* note 18.

<sup>82</sup> Compare Pfander, *supra* note 18, at 582 n. 102, with Anthony J. Bellia Jr. & Bradford R. Clark, *The Federal Common Law of Nations*, 109 *Colum. L. Rev.* 1, 25 n. 99 (2009); Curtis A. Bradley & Jack L. Goldsmith, *Customary International Law as Federal Common Law: A Critique of the Modern Position*, 110 *Harv. L. Rev.* 815 (1997).

law,<sup>83</sup> especially interstate international law (if there is such a thing), but at least they would maintain the structure of the current backdrops approach – by focusing on the question of the power to abrogate, not trying to elevate the common-law principle of sovereign immunity to an unenumerated constitutional right.<sup>84</sup>

If, as seems most likely, there are no limits on the state power to abrogate other states' immunity, then the Court should leave *Nevada v. Hall* in place. This would recognize sovereign immunity as a common law rule – part of the common law or law of nations background before the ratification of the Constitution – but one that *states* can still abrogate. Just as states can abrogate the common law rules of privity, and indeed just as states can (likely) abrogate customary international law, states can abrogate the common law rule of sovereign immunity. That might be a bad idea, but the Constitution lets states do lots of things that are bad ideas.

#### IV.

Counsel for the Franchise Tax Board repeatedly stressed that to allow immunity to be abrogated in the courts of other states would create a practical and historical anomaly: “I mean, Chisholm can’t sue Georgia in a perfectly neutral Federal court; Chisholm can’t sue Georgia in Georgia court; but Chisholm can sue Georgia in the [e]ast neutral court available, the State of South Carolina. That doesn’t make any sense.”<sup>85</sup> But this argument assumes that the doctrine of sovereign immunity is the only rule of procedure that protects state interests. That isn’t so.

For instance, the fact that Nevada courts can hear a claim against California does not necessarily mean that Mr. Hyatt will actually be able to collect his money. Once the Nevada courts issue a judgment, it still needs to be enforced. To be sure, if the Tax Board has its own assets in Nevada, or if the Tax Board later wants to go after Hyatt in Nevada, a Nevada judgment may award him all the relief he seeks. But if the California Franchise Tax Board doesn’t have massive assets in Nevada, then Hyatt will have to collect somewhere else, like Cali-

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<sup>83</sup> See Michael D. Ramsey, *The Constitution's Text in Foreign Affairs* 348-355 (2007) (making textual argument); but see Carlos M. Vázquez, *Customary International Law As U.S. Law: A Critique of the Revisionist and Intermediate Positions and A Defense of the Modern Position*, 86 *Notre Dame L. Rev.* 1495, 1519-20 (2011) (arguing that “the text neither establishes nor rebuts the modern position”).

<sup>84</sup> The same is true of Woolhandler’s suggestion that “[e]ven if” sovereign immunity is a form of common law, it should be seen as “federal common law, and ... not subject to change by the legislative power of any individual state.” Woolhandler, *supra* note 19, at 266 n. 59.

<sup>85</sup> Transcript of Oral Argument at 16, *supra* note 74.

fornia. Having abrogated California's sovereign immunity in Nevada, the state might discover that its judgments encounter serious legal and practical obstacles elsewhere.<sup>86</sup>

More generally, maintaining the rule of *Nevada v. Hall* means that solutions to some interstate conflicts will have to be found outside of the law of sovereign immunity – such as in the law of judgments, diversity jurisdiction, and so on.<sup>87</sup> Those are important challenges for both constitutional law and conflicts of law. But the most important question at issue in *Franchise Tax Board* is not the fate of Hyatt's judgment, or even the fate of interstate tax conflicts. It is whether the Court will cast away the best modern account of state sovereign immunity.

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<sup>86</sup> Steve Sachs is responsible for every good idea in this paragraph.

<sup>87</sup> See also *Wooldhandler* at 266-272 (discussing possible limits on judgment enforcement and the Full Faith and Credit Clause).