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# State Sovereign Immunity and the Roberts Court

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# STATE SOVEREIGN IMMUNITY AND THE ROBERTS COURT

*Stephen I. Vladeck\**

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## I. INTRODUCTION

It is now beyond question that one of the central themes to emerge from the jurisprudence of the Rehnquist Court was a newfound concern for the prerogative of the states vis-à-vis the federal government, whether aptly described as "federalism" or not.<sup>1</sup> Whether in the context of federal habeas review of state-

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\* Professor of Law, American University Washington College of Law. My thanks to Piper Reiff for inviting me to participate in this preview of the Supreme Court's 2010 Term. In the interest of full disclosure, I should note that I co-authored amicus briefs on behalf of federal courts professors and in support of the Petitioner at both the certiorari and merits stages in *Virginia Office for*

court convictions,<sup>2</sup> Congress's regulatory powers under the Commerce Clause<sup>3</sup> and Section Five of the Fourteenth Amendment,<sup>4</sup> the meaning and scope of the Tenth Amendment,<sup>5</sup> or any number of other doctrinal areas,<sup>6</sup> the Supreme Court under the sixteenth Chief Justice of the United States embraced a sweeping constitutional vision of states' rights that may well have been unparalleled in the Court's history.<sup>7</sup>

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*Protection & Advocacy v. Stewart*, one of the cases discussed herein that will be argued during the upcoming Term. Nevertheless, the views expressed in this essay are mine alone.

1. For more on the misappropriation of the term "federalism," see JUDITH RESNIK ET AL., *FEDERALISMS* (forthcoming 2011). See also Larry D. Kramer, *But When Exactly Was Judicially-Enforced Federalism "Born" in the First Place?*, 22 HARV. J.L. & PUB. POL'Y 123, 123 (1998) ("Aside from the fact that federalism means preserving Congress's power to act in areas properly subject to national regulation as much as it means protecting the sovereignty of the states, no one has ever really doubted that there are constitutional limits on the scope of federal power.").

2. See, e.g., *Coleman v. Thompson*, 501 U.S. 722, 726 (1991) (noting "[t]his is a case about federalism" in the opening line of a case about procedural default in post-conviction habeas cases).

3. See, e.g., *United States v. Morrison*, 529 U.S. 598, 627 (2000) (holding that Congress did not have the power under the Commerce Clause to enact the civil-remedy provisions of the Violence Against Women Act of 1994); *United States v. Lopez*, 514 U.S. 549, 568 (1995) (holding that Congress did not have the power under the Commerce Clause to enact the Gun-Free School Zones Act of 1990).

4. See, e.g., *City of Boerne v. Flores*, 521 U.S. 507, 511, 520 (1997) (adopting a "congruence and proportionality" standard for whether federal legislation is a permissible exercise of Congress's Section Five power, and holding that the Religious Freedom Restoration Act of 1991 did not meet that standard).

5. See, e.g., *Printz v. United States*, 521 U.S. 898, 935 (1997) (holding that the Tenth Amendment bars Congress from "conscripting" state executive officers into enforcing federal laws); *New York v. United States*, 505 U.S. 144, 176, 188 (1992) (holding that the Tenth Amendment bars Congress from "commandeering" state legislatures by imposing particular policy choices upon the states).

6. For helpful overviews of the Rehnquist Court's jurisprudence, see Daniel J. Meltzer, *The Supreme Court's Judicial Passivity*, 2002 SUP. CT. REV. 343 (2002); Judith Resnik, *Constricting Remedies: The Rehnquist Judiciary, Congress, and Federal Power*, 78 IND. L.J. 223 (2003); and Andrew M. Siegel, *The Court Against the Courts: Hostility to Litigation as an Organizing Theme in the Rehnquist Court's Jurisprudence*, 84 TEX. L. REV. 1097 (2006).

7. At the very least, the Rehnquist Court's vision of states' rights had no parallel in any of the Supreme Court's jurisprudence *subsequent* to the

Yet, for all the public and academic controversy that the Court's states' rights jurisprudence engendered in other contexts, no single doctrinal area better reflected this thematic trend (and its controversial consequences) than the jurisprudence surrounding the Eleventh Amendment<sup>8</sup> and state sovereign immunity.<sup>9</sup> Indeed, although much of today's state sovereign immunity jurisprudence had its foundations in pre-1986 decisions,<sup>10</sup> the Rehnquist Court dramatically expanded the scope of state sovereign immunity in at least three respects: First, it held in *Seminole Tribe of Florida v. Florida*<sup>11</sup> that Congress may not use its Article I powers to subject non-consenting states to suit in federal court.<sup>12</sup> Second, it expanded *Seminole Tribe* to also bar Congress from using its Article I powers to subject non-

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enactment of the post-Civil War amendments. Prior to the Civil War, little of the federal Constitution constrained the actions of states, and so the issue seldom arose. See, e.g., *Barron v. City of Baltimore*, 32 U.S. (7 Pet.) 243, 250–51 (1833) (holding that the Bill of Rights did not apply to the states).

8. U.S. CONST. amend. XI (“The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.”).

9. The Court's jurisprudence itself requires distinguishing between the Eleventh Amendment specifically and state sovereign immunity generally. As Justice Kennedy summarized, under the Rehnquist Court's approach, the idea of “Eleventh Amendment immunity . . . is convenient shorthand but something of a misnomer, for the sovereign immunity of the States neither derives from, nor is limited by, the terms of the Eleventh Amendment.” *Alden v. Maine*, 527 U.S. 706, 713 (1999). See generally Vicki C. Jackson, *The Supreme Court, the Eleventh Amendment, and State Sovereign Immunity*, 98 YALE L.J. 1 (1988).

10. As explained below, the current state of sovereign immunity jurisprudence owes much to the Court's decisions in *Louisiana v. Jumel*, 107 U.S. 711 (1882), and *Hans v. Louisiana*, 134 U.S. 1 (1890). For a concise overview of the Court's sovereign immunity jurisprudence, see Vicki C. Jackson & Judith Resnik, *Sovereignities—Federal, State, and Tribal: The Story of Seminole Tribe of Florida v. Florida*, in *FEDERAL COURTS STORIES* 329, 330–37, 354–57 (Judith Resnik & Vicki C. Jackson eds., 2009).

11. 517 U.S. 44 (1996).

12. *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44 (1996); see also *Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 691 (1999) (reaffirming that Congress may not use *any* of its Article I powers to abrogate the sovereign immunity of a non-consenting state); *Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank*, 527 U.S. 627, 648 (1999) (same).

consenting states to suit in state courts<sup>13</sup> and in federal administrative agencies<sup>14</sup> as well. Third, it articulated a previously unheard of exception<sup>15</sup> to the doctrine of *Ex parte Young*,<sup>16</sup> which otherwise recognizes the ability of plaintiffs to pursue injunctive relief against state officers for violations of federal law.<sup>17</sup> And although it is difficult to extract a clear rule from the fractured opinions of the Court in *Idaho v. Coeur d'Alene Tribe of Idaho*,<sup>18</sup> it cannot be gainsaid that federalism concerns had everything to do with the result.<sup>19</sup>

In addition, the Rehnquist Court's contemporaneous jurisprudence imposing tighter constraints on Congress's exercise of its power to enforce the Fourteenth Amendment also had a significant impact on state sovereign immunity law.<sup>20</sup> After *Seminole Tribe*, *Alden v. Maine*, and *Federal Maritime Commission (FMC) v. South Carolina State Ports Authority*, Section Five was the only means pursuant to which Congress *could* validly abrogate the sovereign immunity of non-consenting states.<sup>21</sup> Thus, in cases where the Court upheld federal statutes, but concluded that they were enacted pursuant to Congress's

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13. See *Alden*, 527 U.S. at 760.

14. See *Fed. Mar. Comm'n (FMC) v. S.C. State Ports Auth.*, 535 U.S. 743, 769 (2002).

15. See *Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261, 287–88 (1997).

16. 209 U.S. 123 (1908).

17. *Ex parte Young*, 209 U.S. 123, 167 (1908).

18. Although Justice Kennedy wrote the principal opinion, only Chief Justice Rehnquist joined the critical parts of his analysis. Justice O'Connor wrote separately, joined by Justices Scalia and Thomas, expressing disagreement with parts of Kennedy's analysis and articulating narrower grounds on which to base the result. See *Idaho*, 521 U.S. at 288–97 (O'Connor, J., concurring in part and concurring in the judgment).

19. See, e.g., *id.* at 274–80 (plurality opinion); *id.* at 296–97 (O'Connor, J., concurring in part and concurring in the judgment).

20. See, e.g., *FMC v. S.C. State Ports Auth.*, 535 U.S. 743 (2002); *Alden v. Maine*, 527 U.S. 706 (1999); *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44 (1996).

21. See *Fitzpatrick v. Bitzer*, 427 U.S. 445, 456–57 (1976) (holding that Title VII of the Civil Rights Act of 1964 was enacted pursuant to Congress's Section 5 power, and thereby could be used to obtain monetary relief against a state).

Article I powers, rather than Section Five,<sup>22</sup> the practical result was to cut off the ability of plaintiffs to enforce those statutes directly against the states *qua* defendants. And like many of the Rehnquist Court's other federalism cases, virtually all of the state sovereign immunity decisions were 5–4,<sup>23</sup> with Justices Kennedy and O'Connor almost always joining the more conservative trio of Chief Justice Rehnquist, Justice Scalia, and Justice Thomas.<sup>24</sup>

For better or worse, the ideological lines did not move in any case implicating the core of the Rehnquist Court's approach to state sovereign immunity.<sup>25</sup> Instead, after Chief Justice Roberts replaced Rehnquist in 2005, and Justice Alito replaced Justice O'Connor in 2006, the question became whether the Roberts Court would show the same ideological fealty to the state sovereign immunity project as its predecessors.

Perhaps surprisingly, this question scarcely arose in the first

22. See, e.g., *Bd. of Trs. of the Univ. of Ala. v. Garrett*, 531 U.S. 356, 374 (2001) (holding that Title I of the Americans with Disabilities Act is not a valid Section 5 statute); *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 91 (2000) (holding that the Age Discrimination in Employment Act is not a valid Section 5 statute).

23. Increasingly, the Court's Section 5 jurisprudence—unlike its sovereign immunity-specific case law—did *not* hew to the traditional 5–4 split. See, e.g., *United States v. Georgia*, 546 U.S. 151, 159 (2006) (Scalia, J.) (holding, for a unanimous Court, that Title II of the Americans With Disabilities Act is a valid Section 5 statute); *Nev. Dep't of Human Res. v. Hibbs*, 538 U.S. 721, 740 (2003) (Rehnquist, C.J.) (concluding, for a 6–3 Court, that the Family and Medical Leave Act of 1993 was a valid exercise of Congress's Section 5 power).

24. To be sure, there were some sovereign immunity decisions where the Court did not split along ideological lines. See, e.g., *Tenn. Student Assistance Corp. v. Hood*, 541 U.S. 440, 454–55 (2004) (Rehnquist, C.J.) (holding, for a 7–2 Court, that an *in rem* bankruptcy proceeding does not implicate the Eleventh Amendment); *Lapides v. Bd. of Regents of Univ. Sys. of Ga.*, 535 U.S. 613, 624 (2002) (Breyer, J.) (concluding, for a unanimous Court, that a state waives its sovereign immunity by removing a case to federal court, where it would not have had immunity in state court).

25. One of the few counterexamples is itself telling: In *Central Virginia Community College v. Katz*, 546 U.S. 356, 379 (2006), Justice O'Connor provided the fifth vote (along with Justices Stevens, Souter, Ginsburg, and Breyer) for the proposition that Congress *could* abrogate the sovereign immunity of a non-consenting state pursuant to the Bankruptcy Clause of Article I, a result wholly inconsistent with *Seminole Tribe* and its progeny. *Katz* was one of four decisions handed down on Justice O'Connor's last day on the Supreme Court bench.

five Terms that the Court included Chief Justice Roberts and Justice Alito. Other than an entirely uncontroversial 2006 decision holding that counties were not protected by the Eleventh Amendment<sup>26</sup> and the Chief Justice's own dissent in a 2010 original jurisdiction dispute where the majority sidestepped the issue,<sup>27</sup> the five years since Justice Alito ascended to the bench have seen remarkably little opportunity for reconsideration of the Rehnquist Court's approach to state sovereign immunity, even as other federalism-laden topics—e.g., the Commerce Clause,<sup>28</sup> Section Five,<sup>29</sup> and the scope of post-conviction habeas corpus<sup>30</sup>—have routinely come before the Justices.

That may change during the coming Term, with two cases already on the docket that at least indirectly implicate the scope and implications of the Rehnquist Court's approach to state sovereign immunity. In the first case, *Virginia v. Reinhard*,<sup>31</sup> the Fourth Circuit held, for the first time, that state-created agencies may not invoke the doctrine of *Ex parte Young* as a means of avoiding the Eleventh Amendment in suits for injunctive relief against state officers.<sup>32</sup> In the Fourth Circuit's view, "federal

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26. See *N. Ins. Co. of N.Y. v. Chatham Cnty.*, 547 U.S. 189, 197 (2006).

27. See *Alabama v. North Carolina*, 560 U.S. \_\_\_, \_\_\_, 130 S. Ct. 2295, 2317–19 (2010) (Roberts, C.J., concurring in part and dissenting in part) (explaining that, because one of the plaintiffs was *not* a sovereign state, the defendant state's sovereign immunity was implicated—and barred at least some relief).

28. See, e.g., *United States v. Comstock*, 560 U.S. \_\_\_, \_\_\_, 130 S. Ct. 1949, 1951–53 (2010) (upholding a federal statute providing for civil commitment of dangerous sex offenders under the Commerce Clause and the Necessary and Proper Clause).

29. See, e.g., *Nw. Austin Mun. Util. Dist. No. One v. Holder*, 557 U.S. \_\_\_, \_\_\_, 129 S. Ct. 2504, 2523 (2009) (discussing, but not deciding, whether the preclearance requirements of Section 5 of the Voting Rights Act of 1965 are a valid exercise of Congress's authority to enforce the Fourteenth Amendment).

30. See, e.g., *Holland v. Florida*, 560 U.S. \_\_\_, \_\_\_, 130 S. Ct. 2549, 2553–54 (2010) (holding that equitable tolling is available for the one-year statute of limitations imposed on post-conviction habeas petitions by the Antiterrorism and Effective Death Penalty Act of 1996).

31. 568 F.3d 110 (4th Cir. 2009), *cert. granted sub nom.* Va. Office for Prot. & Advocacy (VOPA) v. Stewart, 560 U.S. \_\_\_, 130 S. Ct. 3493 (2010).

32. *Virginia v. Reinhard*, 568 F.3d 110, 124 (4th Cir. 2009), *cert. granted sub nom.* Va. Office for Prot. & Advocacy (VOPA) v. Stewart, 560 U.S. \_\_\_, 130 S. Ct. 3493 (2010).

court adjudication of an ‘intramural contest’ between a state agency and state officials encroaches more severely on the dignity and sovereignty of the states than an *Ex parte Young* action brought by a private plaintiff.”<sup>33</sup> The Virginia Office for Protection and Advocacy (VOPA) sought certiorari, and, whether on its own merits, because the federal government (whose views the Court requested<sup>34</sup>) recommended it,<sup>35</sup> or because in the interim, the en banc Seventh Circuit reached the diametrically opposite conclusion,<sup>36</sup> the Court granted certiorari, and the case is set to be argued on December 1.<sup>37</sup>

In the second case, *Sossamon v. Texas*,<sup>38</sup> the Fifth Circuit waded into a circuit split as to whether states knowingly waive their sovereign immunity when they accept federal funds under the Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA),<sup>39</sup> given that § 4(a) of the Act creates a cause of action for “appropriate relief” against “a government” for violations of the Act.<sup>40</sup> The Eleventh Circuit had previously answered that question in the affirmative,<sup>41</sup> whereas the Fourth Circuit had answered it in the negative.<sup>42</sup> Siding with the latter court of appeals, the Fifth Circuit reasoned that “RLUIPA is clear enough to create a right for damages on the cause-of-action analysis, but not clear enough to do so in a manner that abrogates state

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33. *Id.* at 119–20.

34. See *VOPA v. Stewart*, 560 U.S. \_\_\_, 130 S. Ct. 1166 (2010) (mem.).

35. See generally Brief for the United States as Amicus Curiae, *VOPA v. Stewart*, 560 U.S. \_\_\_, 130 S. Ct. 3493 (2010) (No. 09-529), 2010 WL 3426282.

36. See *Ind. Prot. & Advocacy Servs. v. Ind. Family & Soc. Servs. Admin.*, 603 F.3d 365, 367 (7th Cir. 2010) (en banc), *petition for cert. filed*, 79 U.S.L.W. 3063 (U.S. July 21, 2010) (No. 10-131); see also *id.* at 392 (Easterbrook, C.J., dissenting) (noting his agreement with the majority’s rejection of *Reinhard*).

37. *VOPA v. Stewart*, 560 U.S. \_\_\_, 130 S. Ct. 3493 (2010).

38. 560 F.3d 316 (5th Cir. 2009), *cert. granted*, 560 U.S. \_\_\_, 130 S. Ct. 3319 (2010).

39. Pub. L. No. 106-274, 114 Stat. 803 (codified at 42 U.S.C. §§ 2000cc to 2000cc-5 (2006)).

40. *Id.* § 4(a) (codified at 42 U.S.C. § 2000cc-2 (2006)); cf. *Sossamon*, 560 F.3d at 331.

41. See *Benning v. Georgia*, 391 F.3d 1299, 1305–06 (11th Cir. 2004).

42. See *Madison v. Virginia*, 474 F.3d 118, 131 (4th Cir. 2006).



sovereign immunity from suits for monetary relief.”<sup>43</sup> Put another way, the court of appeals concluded that the ambiguous language of § 4(a) provided insufficiently clear notice to states that they were subjecting themselves to monetary liability by accepting federal funds under the statute, and so could not constitute a valid waiver of sovereign immunity under the Supreme Court’s *Pennhurst I* decision.<sup>44</sup>

As in *Stewart*, the Supreme Court invited the views of the federal government,<sup>45</sup> which again, recommended a grant of certiorari.<sup>46</sup> The Court agreed, albeit reframing the question presented as: “Whether an individual may sue a State or state official in his official capacity for damages for violations of [RLUIPA].”<sup>47</sup> Argument in *Sossamon* is set for November 2.

Whatever might be said about the merits of either decision, it seems clear that both present questions as to the appropriate scope of state sovereign immunity on a scale heretofore unseen in the jurisprudence of the Roberts Court. Thus, the 2010 Term—as much as any of the Court’s previous five sessions—may provide crucial insight into whether the current Justices will embrace the approach of their predecessors and thereby follow the same ideological chasm that pervaded the Rehnquist Court’s state sovereign immunity jurisprudence, or whether something might change.

This preview essay does not attempt to predict what will happen in either *Stewart* or *Sossamon*. Instead, I aim to situate these two cases in their broader context—to explain both why they are such important bellwethers for the Roberts Court, and to suggest what, if anything, we might learn from their resolution. Thus, Part I begins by providing a brief overview of

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43. *Sossamon*, 560 F.3d at 331.

44. See *Pennhurst State Sch. & Hosp. v. Halderman (Pennhurst I)*, 451 U.S. 1, 17 (1981) (“There can, of course, be no knowing acceptance if a State is unaware of the conditions or is unable to ascertain what is expected of it. Accordingly, if Congress intends to impose a condition on the grant of federal moneys, it must do so unambiguously.” (footnote omitted)).

45. See *Sossamon v. Texas*, 130 S. Ct. 533 (2009) (mem.).

46. See Brief for the United States as Amicus Curiae Supporting Petitioner, *Sossamon*, 130 S. Ct. 3319 (No. 08-1438), 2010 WL 3167307.

47. *Sossamon*, 560 U.S. \_\_\_, 130 S.Ct. 3319 (2010).

the Supreme Court’s jurisprudence regarding state sovereign immunity prior to the Roberts Court. I by no means seek to be comprehensive, because forests can be—and have been—felled on the Court’s jurisprudence in this area,<sup>48</sup> which is, charitably, rather contentious. Rather, Part I aims only to provide the reader with enough background to understand the doctrinal issues that the Roberts Court has yet to address, and will likely confront in *Stewart* and *Sossamon*. Part II turns to *Stewart* and *Sossamon*, providing brief, capsule summaries of the proceedings in the lower courts and the issues presented before the Justices. Finally, the Conclusion explains why *Stewart* and *Sossamon* might go a long way in providing broader insight into the current Court’s approach not just to state sovereign immunity, but to the proper relationship between the states and the federal government more generally.

## II. THE SUPREME COURT AND STATE SOVEREIGN IMMUNITY TO 2006

### A. *Chisholm*, the Eleventh Amendment, *Jumel*, and *Hans*

As drafted, one of the nine heads of federal jurisdiction contained within Article III of the Constitution was jurisdiction over “[c]ontroversies . . . between a State and Citizens of another State.”<sup>49</sup> Whether or not the Framers thereby intended to subject non-consenting states to *any* suit by a citizen of another state, the Supreme Court in one of its first significant decisions so construed the provision, upholding jurisdiction in *Chisholm v. Georgia*<sup>50</sup> by a 4–1 vote with regard to an assumpsit claim by a South Carolina creditor who sought damages against Georgia for

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48. It is impossible adequately to account for the excellent—and voluminous—scholarship on the Court’s approach to state sovereign immunity. Where possible, I have tried to note particularly useful articles at specific points of this essay. Otherwise, though, interested readers can find useful citations in the notes and footnotes of RICHARD H. FALLON, JR. ET AL., *HART & WECHSLER’S THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 869–941 (6th ed. 2009).

49. U.S. CONST. art. III, § 2, cl. 1.

50. 2 U.S. (2 Dall.) 419 (1793).

goods obtained during the Revolutionary War.<sup>51</sup>

The decision in *Chisholm* led directly to the 1794 proposal (and 1798 adoption) of the Eleventh Amendment, which provides: “The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.”<sup>52</sup> And, although all agree that the purpose of the Eleventh Amendment was to overrule *Chisholm*, the issue that has plagued the Court’s subsequent state sovereign immunity jurisprudence is whether it meant to do anything *more*.<sup>53</sup> Four questions, at least, have dominated subsequent case law and commentary: (1) Because the Eleventh Amendment appears written in a manner so as to excise the “citizen-state” diversity provision of Article III, does it apply *only* to suits arising under that jurisdictional basis, or does it also apply to other jurisdictional categories, especially federal questions? Second, notwithstanding its language, does the Eleventh Amendment also apply to suits by individuals against their *own* state? Third, even if the Eleventh Amendment applies to suits arising under federal law, can Congress abrogate a state’s sovereign immunity if it does so expressly? Finally, does the Eleventh Amendment apply to suits against state officers, as opposed to the state itself?

Although the Eleventh Amendment scarcely arose in litigation prior to the Civil War,<sup>54</sup> a pair of cases arising out of

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51. *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419 (1793). Justice Iredell’s dissent would figure prominently in later Supreme Court decisions interpreting the Eleventh Amendment. *Id.* at 429–50 (Iredell, J., dissenting). For more on the opinion—and how it may have been misunderstood—see John V. Orth, *The Truth About Justice Iredell’s Dissent in Chisholm v. Georgia (1793)*, 73 N.C. L. REV. 255 (1994).

52. U.S. CONST. amend. XI.

53. See, e.g., *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976); *Hans v. Louisiana*, 134 U.S. 1 (1889); *Louisiana ex rel. Elliot v. Jumel*, 107 U.S. 711 (1883); *Osborn v. Bank of the U.S.*, 22 U.S. (9 Wheat.) 738 (1824).

54. In *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264 (1821), the Court held that the Eleventh Amendment did not bar an appeal to the Supreme Court by defendants convicted in state court. Although the state was nominally the “defendant” on appeal, the Court concluded that the appeal was not a “suit” within the meaning of the constitutional text. *Id.* at 412. Interestingly, as an

Louisiana's repudiation of its Civil War debts provided the Court with an opportunity to answer the first two questions concerning the Eleventh Amendment's scope. Thus, in *Louisiana ex rel. Elliott v. Jumel*,<sup>55</sup> the Court for the first time applied the Eleventh Amendment to bar a suit where the claim appeared to arise under federal law, to wit, the Contract Clause of Article I.<sup>56</sup> And, although *Jumel* was light on analysis as to this point,<sup>57</sup> the Court reiterated the conclusion seven years later in *Hans v. Louisiana*.<sup>58</sup> *Hans*, though, went an important step further, concluding that the provision also barred suits by citizens against their *own* states, notwithstanding the specific use of the word "another" in the Amendment's text. As Justice Bradley wrote:

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.<sup>59</sup>

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alternative holding, Marshall also noted that the Eleventh Amendment wouldn't apply anyway, since the appellants were citizens of Virginia. *See id.* In *Osborn v. Bank of the United States*, 22 U.S. (9 Wheat.) 738, 857 (1824), discussed *infra*, the Court held that the Eleventh Amendment did not bar suit where the real "party on the record" was a state officer, rather than the state itself. And in *Rhode Island v. Massachusetts*, 37 U.S. (12 Pet.) 657, 723–31 (1838), the Court held that the Eleventh Amendment did not bar a suit *by* a state against another state. Otherwise, there is little of significance in the Court's pre-Civil War Eleventh Amendment case law.

55. 107 U.S. 711 (1883).

56. U.S. CONST. art. I, § 10, cl. 1; *see also Jumel*, 107 U.S. 711.

57. For an argument that *Jumel*, like *Hans v. Louisiana*, 134 U.S. 1 (1890), did not *really* involve a federal question, see William Burnham, *Taming the Eleventh Amendment Without Overruling Hans v. Louisiana*, 40 CASE W. RES. L. REV. 931 (1989).

58. 134 U.S. 1, 10–11 (1890).

59. *Hans v. Louisiana*, 134 U.S. 1, 10 (1890); *see also id.* at 11 ("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 Supreme Court. It did not in terms prohibit suits by individuals

*Hans* thereby raised the spectacle of the Eleventh Amendment barring *any* suit against a non-consenting state, and also represented the beginning of a trend in which the Court would consistently adopt readings of the constitutional text that were at least superficially incompatible with its plain language.<sup>60</sup> As Justice Scalia would summarize in looking back at the Court's jurisprudence a century later:

Despite the narrowness of its terms, since *Hans v. Louisiana*, we have understood the Eleventh Amendment to stand not so much for what it says, but for the presupposition of our constitutional structure which it confirms: that the States entered the federal system with their sovereignty intact; that the judicial authority in Article III is limited by this sovereignty; and that a State will therefore not be subject to suit in federal court unless it has consented to suit, either expressly or in the "plan of the convention."<sup>61</sup>

That understanding would be at the heart of the Rehnquist Court's jurisprudence.

### B. Officer Suits and *Ex parte Young*

Juxtaposed against *Hans* and the increasing possibility that no judicial relief could be obtained against non-consenting states for violations of federal law was the Court's convoluted jurisprudence regarding suits against state *officers*. As early as 1824, Chief Justice Marshall had suggested in *Osborn v. Bank of the United States*<sup>62</sup> that the Eleventh Amendment did not apply to suits challenging the constitutionality of state action where

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against the States, but declared that the Constitution should not be construed to import any power to authorize the bringing of such suits.”).

60. See, e.g., *Monaco v. Mississippi*, 292 U.S. 313, 330 (1934) (holding that the Eleventh Amendment also bars suits by foreign countries against states); *Ex parte New York* 256 U.S. 490, 497 (1921) (holding that the Eleventh Amendment bars certain admiralty suits, even though its text refers only to suits “in law or equity”). For the Court's inconsistent subsequent jurisprudence with regard to the Eleventh Amendment and admiralty, see FALLON, *supra* note 48, at 882 n.10.

61. *Blatchford v. Native Village of Noatak*, 501 U.S. 775, 779 (1991) (citations omitted).

62. *Osborn v. Bank of the United States*, 22 U.S. (9 Wheat.) 738 (1824).

the state itself was not the “party on the record.”<sup>63</sup> As Marshall explained, “a void act [cannot] afford protection to the person who executes it.”<sup>64</sup>

But it was not as easy as simply naming a state officer, instead of the state. Instead, for the better part of the nineteenth century, the Court’s jurisprudence vacillated over the criteria for distinguishing between officer suits that *could* go forward and those that were really against the state—and which the Eleventh Amendment therefore barred. In the aftermath of *Hans*, the Court handed down a trio of decisions—*Pennoyer v. McConnaughy*,<sup>65</sup> *Reagan v. Farmers’ Loan & Trust Co.*,<sup>66</sup> and *Smyth v. Ames*<sup>67</sup>—that seemed to more categorically embrace the availability of officer suits for any constitutional claim.<sup>68</sup> But its 1899 decision in *Fitts v. McGhee*<sup>69</sup> again muddled the waters, with Justice Harlan holding that the Eleventh Amendment barred a constitutional challenge to a state bridge toll because the “state officers named held [no] special relation to the particular statute alleged to be unconstitutional. They were not expressly directed to see to its enforcement.”<sup>70</sup>

Then, in 1908, the Court bit the proverbial bullet, holding in *Ex parte Young* that the Eleventh Amendment generally interposes no barrier to suits against state officers alleging violations of the federal Constitution.<sup>71</sup> In what future scholars and jurists would often describe as a “fiction,”<sup>72</sup> the *Young* Court

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63. *Id.* at 797.

64. *Id.* at 839.

65. 140 U.S. 1 (1891).

66. 154 U.S. 362 (1894).

67. 169 U.S. 466 (1898).

68. *Pennoyer*, 140 U.S. at 19; *Reagan*, 154 U.S. at 389; *Smyth*, 169 U.S. at 518–19.

69. 172 U.S. 516 (1899).

70. *Fitts v. McGhee*, 72 U.S. 516, 530 (1899). For much more on this period and the Court’s doctrinal evolution, see BARRY FRIEDMAN, *The Story of Ex parte Young: Once Controversial, Now Canon*, in *FEDERAL COURTS STORIES*, *supra* note 10, at 247, 256–59.

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

72. Compare Ann Althouse, *When to Believe a Legal Fiction: Federal Interests and the Eleventh Amendment*, 40 *HASTINGS L.J.* 1123 (1989), with John Harrison, *Ex parte Young*, 60 *STAN. L. REV.* 989 (2008).

concluded that state officers, though “state actors” for purposes of the Fourteenth Amendment, were not in fact the “state” for purposes of the Eleventh Amendment *whenever* they acted in violation of the Constitution.<sup>73</sup> As Justice Peckham explained:

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.<sup>74</sup>

This animating principle of *Ex parte Young*—that “state officials do not employ the Eleventh Amendment as a means of avoiding compliance with federal law”<sup>75</sup>—has “become bedrock,”<sup>76</sup> with some scholars going so far as to suggest that it is “indispensable to the establishment of constitutional government and the rule of law.”<sup>77</sup> But it, too, has encountered subsequent judge-made limitations. Thus, in *Edelman v. Jordan*,<sup>78</sup> the Supreme Court limited relief under *Ex parte Young* to claims seeking prospective relief, reasoning that the Eleventh Amendment still barred any “suit by private parties seeking to impose a liability which must be paid from public funds in the state treasury.”<sup>79</sup> And in *Pennhurst State School & Hospital v.*

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73. See *Ex parte Young*, 209 U.S. at 159.

74. *Id.* at 159–60 (citing *In re Ayers*, 123 U.S. 443, 507 (1887)); see also *id.* at 159 (“The act to be enforced is alleged to be unconstitutional, and if it be so, the use of the name of the State to enforce an unconstitutional act to the injury of complainants is a proceeding without the authority of and one which does not affect the State in its sovereign or governmental capacity.”).

75. *Puerto Rico Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 146 (1993).

76. FRIEDMAN, *supra* note 70, at 247.

77. CHARLES ALAN WRIGHT & MARY KAY KANE, *LAW OF FEDERAL COURTS* § 48, at 314 (6th ed. 2002).

78. 415 U.S. 651 (1974).

79. *Edelman v. Jordan*, 415 U.S. 651, 663 (1974). To say that the prospective/retrospective distinction has proven elusive would be an epic understatement. See generally Carlos Manuel Vázquez, *Night and Day*: Coeur

*Halderman (Pennhurst II)*,<sup>80</sup> the Court held that *Ex parte Young* could not be invoked to pursue injunctive relief against state officers for violations of state law, reasoning that “[a] federal court’s grant of relief against state officials on the basis of state law, whether prospective or retroactive, does not vindicate the supreme authority of federal law.”<sup>81</sup>

Although *Edelman* and *Pennhurst II* together constrained the scope of *Ex parte Young* to suits seeking prospective relief for violations of federal law, they may have also strengthened its core. After all, both decisions suggested that the central principle underlying *Young* is the need to vindicate the supremacy of federal law—a need that is less pressing where the state’s violation occurred in the past, and that is altogether nonexistent in the context of violations of state law.<sup>82</sup> As then-Justice Rehnquist explained one year after *Pennhurst II*, “the availability of prospective relief of the sort awarded in *Ex parte Young* gives life to the Supremacy Clause. Remedies designed to end a continuing violation of federal law are necessary to vindicate the federal interest in assuring the supremacy of that law.”<sup>83</sup> Thus, when Rehnquist was promoted the following year to Chief Justice, the heart of *Ex parte Young* was unquestionably intact.

### C. The Rehnquist Court and *Ex parte Young*

Notwithstanding the vitality of *Ex parte Young*’s core principle circa 1985, two decisions issued by the Rehnquist Court one year apart called the 1908 decision’s continuing vitality into serious question. The first came in 1996 in *Seminole Tribe of*

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d’Alene, Breard, and the Unraveling of the Prospective-Retrospective Distinction in Eleventh Amendment Doctrine, 87 GEO. L.J. 1 (1998).

80. 465 U.S. 89 (1984).

81. *Pennhurst State Sch. & Hosp. v. Halderman (Pennhurst II)*, 465 U.S. 89, 106 (1984).

82. See, e.g., Vicki C. Jackson, *Principle and Compromise in Constitutional Adjudication: The Eleventh Amendment and State Sovereign Immunity*, 75 NOTRE DAME L. REV. 953, 990 (2000).

83. *Green v. Mansour*, 474 U.S. 64, 68 (1985).



*Florida v. Florida*.<sup>84</sup> In addition to holding that Congress could not use its authority under the Indian Commerce Clause to subject non-consenting states to suit (more on that in a moment), Chief Justice Rehnquist's opinion for the Court also rejected the Tribe's alternative argument that it could pursue an *Ex parte Young* remedy to enforce the Indian Gaming Regulatory Act (IGRA)<sup>85</sup> against the relevant Florida state officers.<sup>86</sup> Suggesting for the first time that the remedy under *Ex parte Young* might be discretionary,<sup>87</sup> Rehnquist's opinion emphasized the comprehensive nature of the remedial scheme created by the IGRA, and the incompatibility of such a scheme with a remedy under *Ex parte Young*.<sup>88</sup> In his words, "it is difficult to see why an Indian tribe would suffer through the intricate scheme of [the IGRA] when more complete and more immediate relief would be available under *Ex parte Young*."<sup>89</sup>

One year later, the Court appeared to take another step back from *Ex parte Young* in *Idaho v. Coeur d'Alene Tribe of Idaho*.<sup>90</sup> The Court held that the Eleventh Amendment barred a suit by a Native American tribe against a state and its officials, where the suit sought injunctive relief with regard to a claim of ownership to submerged lands and the bed of a lake arising out of an 1873 Executive Order that had established the boundaries of the tribe's reservation.<sup>91</sup> The Court fractured, though, as to why relief under *Ex parte Young* was unavailable.<sup>92</sup> In the "principal" opinion, Justice Kennedy (writing for only himself and Chief Justice Rehnquist on these points) suggested that injunctive

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84. 517 U.S. 44 (1996).

85. Pub. L. No. 100-497, 102 Stat. 2472 (1988) (codified as amended at 25 U.S.C. §§ 2701–21 (2006)).

86. *Seminole Tribe*, 517 U.S. at 47.

87. *See Seminole Tribe*, 517 U.S. at 74 ("[W]here Congress has prescribed a detailed remedial scheme for the enforcement against a State of a statutorily created right, a court should *hesitate* before casting aside those limitations and permitting an action against a state officer based upon *Ex parte Young*." (emphasis added)).

88. *Id.*

89. *Id.* at 75.

90. 521 U.S. 261 (1997) (plurality opinion).

91. *Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261, 287–88 (1997).

92. *Id.* at 288.

relief for violations of federal law under *Ex parte Young* should only be available in two circumstances: (1) in the absence of a state forum that could provide relief for the violation of federal law; or (2) where a “balancing” of federal and state interests warranted a federal forum even where a state forum was also available.<sup>93</sup> As Kennedy concluded, “the *Young* fiction is an exercise in line-drawing. There is no reason why the line cannot be drawn to reflect the real interests of States consistent with the clarity and certainty appropriate to the Eleventh Amendment’s jurisdictional inquiry.”<sup>94</sup>

Writing for herself and Justices Scalia and Thomas, Justice O’Connor agreed with the result, but sharply disagreed with what she viewed as Justice Kennedy’s attempt to recast the test for the availability of relief under *Ex parte Young*. As she explained:

[T]he principal opinion replaces a straightforward inquiry into whether a complaint alleges an ongoing violation of federal law and seeks relief properly characterized as prospective with a vague balancing test that purports to account for a “broad” range of unspecified factors. In applying that approach here, the principal opinion relies on characteristics of this case that do not distinguish it from cases in which the *Young* doctrine is properly invoked, such as the fact that the complaint names numerous public officials and the fact that the State will have a continuing interest in litigation against its officials. These factors cannot supply a basis for deciding this case. Every *Young* suit names public officials, and we have never doubted the importance of state interests in cases falling squarely within our past interpretations of the *Young* doctrine.<sup>95</sup>

Because of the bad fracture between the two opinions supporting the result, it was unclear whether—and to what extent—Justice Kennedy’s attempted reformulation of *Ex parte Young* was anything more than *sui generis*. At the very least,

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93. *See id.* at 270–80.

94. *Id.* at 280.

95. *Id.* at 296 (O’Connor, J., concurring in part and concurring in the judgment) (citations omitted). Justice O’Connor nevertheless concurred because, as she explained, “[w]here a plaintiff seeks to divest the State of all regulatory power over submerged lands—in effect, to invoke a federal court’s jurisdiction to quiet title to sovereign lands—it simply cannot be said that the suit is not a suit against the State.” *Id.*

though, *Coeur d'Alene* opened the door to a reconsideration of the core of *Ex parte Young*—and to a states' rights-based reassessment of whether relief really *would* always be available whenever a litigant sought federal injunctive relief against a state officer.

#### D. The Rehnquist Court and Congress's Abrogation Power

The unprecedented nature of the Rehnquist Court's jurisprudence with regard to *Ex parte Young* paled in comparison to its jurisprudence with regard to Congress's power *vel non* to abrogate the sovereign immunity of a non-consenting state. In retrospect, then-Justice Rehnquist himself set the stage in 1976, in explaining for the Court in *Fitzpatrick v. Bitzer*<sup>96</sup> why Title VII of the Civil Rights Act of 1964 *could* validly subject non-consenting states (and their officials) to damages liability.<sup>97</sup> As he wrote:

[T]he Eleventh Amendment, and the principle of state sovereignty which it embodies, are necessarily limited by the enforcement provisions of [Section Five] of the Fourteenth Amendment. In that section Congress is expressly granted authority to enforce "by appropriate legislation" the substantive provisions of the Fourteenth Amendment, which themselves embody significant limitations on state authority. When Congress acts pursuant to [Section Five], not only is it exercising legislative authority that is plenary within the terms of the constitutional grant, it is exercising that authority under one section of a constitutional Amendment whose other sections by their own terms embody limitations on state authority. We think that Congress may, in determining what is "appropriate legislation" for the purpose of enforcing the provisions of the Fourteenth Amendment, provide for private suits against States or state officials which are constitutionally impermissible in other contexts.<sup>98</sup>

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96. 427 U.S. 445 (1976).

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

98. *Id.* (citations omitted).

Focusing on the uniqueness of Section Five of the Fourteenth Amendment begged the question whether Congress could similarly act pursuant to its *other* regulatory powers, especially those conferred by Article I of the Constitution. That question had been raised but arguably left unresolved in a 1964 case,<sup>99</sup> and it would not be until 1989 that a plurality of the Court, in *Pennsylvania v. Union Gas Co.*,<sup>100</sup> answered that question in the affirmative, sustaining a suit brought pursuant to two federal environmental statutes enacted under the Commerce Clause.<sup>101</sup> The theory underlying Justice Brennan's plurality opinion, mirroring parts of his opinion twenty-five years earlier in *Parden*, was that, as in *Fitzpatrick*, states had acceded to liability in the "plan of the convention."<sup>102</sup> Thus:

[T]o the extent that the States gave Congress the authority to regulate commerce, they also relinquished their immunity where Congress found it necessary, in exercising this authority, to render them liable. The States held liable under such a congressional enactment are thus not "unconsenting"; they gave their consent all at once, in ratifying the Constitution containing the Commerce Clause, rather than on a case-by-case basis.<sup>103</sup>

Justice White, who provided the crucial fifth vote in favor of the judgment, disagreed that the two statutes were sufficiently clear in abrogating the sovereign immunity of non-consenting states.<sup>104</sup> Because a majority of the Court (including the dissenters) concluded that they were, though, he joined cause with the plurality on the constitutional question, cryptically

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99. See *Parden v. Terminal Ry. of the Ala. State Docks Dep't*, 377 U.S. 184, 189, 196 (1964) (rejecting Alabama's claim of immunity in a suit under the Federal Employers' Liability Act, but leaving somewhat unclear whether the result rested on valid *abrogation* of sovereign immunity, or on Alabama's *waiver* of sovereign immunity).

100. 491 U.S. 1 (1989) (plurality opinion).

101. *Pennsylvania v. Union Gas Co.*, 491 U.S. 1, 23 (1989) (Stevens, J., concurring).

102. *Id.* at 19 (plurality opinion).

103. *Id.* at 19–20.

104. *Id.* at 55–56 (White, J., concurring in the judgment in part and dissenting in part).

noting that “I agree with the conclusion reached by JUSTICE BRENNAN in Part III of his opinion, that Congress has the authority under Article I to abrogate the Eleventh Amendment immunity of the States, although I do not agree with much of his reasoning.”<sup>105</sup>

Seven years later, the Court in *Seminole Tribe* overruled *Union Gas*, holding that states had *not* acceded to liability under the Indian Commerce Clause in the “plan of the convention.”<sup>106</sup> As Chief Justice Rehnquist explained:

Never before the decision in *Union Gas* had we suggested that the bounds of Article III could be expanded by Congress operating pursuant to any constitutional provision other than the Fourteenth Amendment. Indeed, it had seemed fundamental that Congress could not expand the jurisdiction of the federal courts beyond the bounds of Article III.<sup>107</sup>

Thus, because the Eleventh Amendment—as interpreted in *Hans*—limited the jurisdiction of the federal courts in any suit against a non-consenting state, Congress lacked the authority to restore that jurisdiction by providing for relief against a non-consenting state.<sup>108</sup> Put another way, the Court in *Seminole Tribe* “constitutionaliz[ed]” *Hans*,<sup>109</sup> holding that the Eleventh Amendment did not merely reaffirm a sovereign immunity on the part of the states that derived from the common law, but that it in fact codified as constitutional law a sovereign immunity that was not subject to congressional interference—except in the unique case of the Fourteenth Amendment.<sup>110</sup>

Indeed, although *Seminole Tribe* only expressly disavowed Congress’s power to abrogate the sovereign immunity of a non-consenting state pursuant to the Commerce Clause, later cases would emphasize that its logic compelled the conclusion that all Article I powers were equal—that the Eleventh Amendment effectively trumped all of Congress’s original regulatory

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105. *Id.* at 57.

106. *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 66 (1996).

107. *Id.* at 65.

108. *Id.* at 76.

109. *Id.* at 117 (Souter, J., dissenting).

110. *Id.* at 76 (majority opinion).

authority, if for no other reason than because it came later.<sup>111</sup>

Whereas the decision in *Seminole Tribe* was heavily criticized, the Court sparked even more controversy three years later, when it held in *Alden v. Maine*<sup>112</sup> that Congress was also barred from abrogating the sovereign immunity of a non-consenting state in *state* court as well, even though the Eleventh Amendment specifically refers only to *federal* jurisdiction.<sup>113</sup> In a similar vein as *Hans*, the Court relied on the potential “anomaly” that would result from a rule that differentiated between Congress’s power vis-à-vis the states in federal courts versus state courts,<sup>114</sup> suggesting that the Eleventh Amendment merely confirmed the background sovereignty that states necessarily enjoyed in their own courts at the time of the Founding, as protected by the Tenth Amendment—if not the Eleventh.<sup>115</sup> Leaving aside the Court’s disputed analysis of Founding-era history, the shift in analytical focus prompted Justice Souter’s sarcastic observation in dissent that, under the majority’s view:

*Seminole Tribe*’s contorted reliance on the Eleventh Amendment and its background was presumably unnecessary; the Tenth would have done the work with an economy that the majority in *Seminole Tribe* would have welcomed. Indeed, if the Court’s current reasoning is correct, the Eleventh Amendment itself was unnecessary. Whatever Article III may originally have said about the federal judicial power, the embarrassment to the State of Georgia occasioned by attempts in federal court to enforce the State’s war debt could easily have been avoided if only the Court that decided *Chisholm v. Georgia*, had understood a State’s inherent, Tenth Amendment right to be free of any judicial power, whether the court be state or federal, and whether the cause of action arise under

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111. See, e.g., *Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666 (1999) (reaffirming that Congress may not use *any* of its Article I powers to abrogate the sovereign immunity of a non-consenting state); *Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank*, 527 U.S. 627 (1999) (same).

112. 527 U.S. 706 (1999).

113. *Alden v. Maine*, 527 U.S. 706, 754 (1999).

114. See *id.* at 751–53.

115. *Id.* at 713–14.

state or federal law.<sup>116</sup>

Nevertheless, the Court took the anti-abrogation logic one final step afield three years later, holding in *Federal Maritime Commission v. South Carolina State Ports Authority*<sup>117</sup> that Congress similarly could not abrogate the immunity of a non-consenting state in a federal administrative agency.<sup>118</sup> Whatever the merits of these decisions, they at least had the effect of producing a clear, categorical rule: Congress could *never* subject non-consenting states to *in personam* liability pursuant to any of its Article I powers.

### E. *Verizon* and *Katz*: Two Chinks in the Federalism Armor?

Notwithstanding the decisiveness of the *Seminole Tribe* line of cases, and the crack in *Ex parte Young*'s façade suggested by *Coeur d'Alene*, the Court appeared to step back from the abyss in a pair of decisions in the early 2000s. The first decision was prompted by the Fourth Circuit's reliance on *Coeur d'Alene*—and, more specifically, Justice Kennedy's opinion therein—in precluding relief under *Ex parte Young* in a suit brought by a telecommunications carrier to enforce the federal Telecommunications Act against the Chairman of the Public Service Commission of Maryland.<sup>119</sup> Specifically, the court of appeals had stressed that “just because a private citizen's federal suit seeks declaratory injunctive relief against State officials does not mean that it must automatically be allowed to proceed under an exception to the Eleventh Amendment protection.”<sup>120</sup> Writing for an 8–0 Court in reversing the Fourth Circuit, Justice Scalia concluded precisely to the contrary.<sup>121</sup> Stressing the limited nature of *Coeur d'Alene*, his opinion reaffirmed the need to resolve only the “straightforward inquiry” at the heart of *Ex*

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116. *Id.* at 761 (Souter, J., dissenting) (citations omitted).

117. 535 U.S. 743 (2002).

118. *FMC v. S.C. State Ports Auth.*, 535 U.S. 743, 760 (2002).

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

120. *Bell Atl. Md., Inc. v. MCI WorldCom, Inc.*, 240 F.3d 279, 294 (4th Cir. 2001), *rev'd sub nom. Verizon Md. Inc.*, 535 U.S. at 635.

121. *Verizon Md., Inc.*, 535 U.S. at 648.

*parte Young*, i.e., “whether [the] complaint alleges an ongoing violation of federal law and seeks relief properly characterized as prospective.”<sup>122</sup> Justice Kennedy wrote separately to explain why the majority’s analysis was consistent with his approach in *Coeur d’Alene*, but his concurrence was only for himself.<sup>123</sup> Otherwise, the rest of the *Verizon* Court appeared to treat *Coeur d’Alene* as a one-off exception to *Ex parte Young*, and not as a reformulation of the doctrine in any material respect.<sup>124</sup>

The second decision represented perhaps an even greater broadside to the principles underlying the Rehnquist Court’s state sovereign immunity jurisprudence. Although the Court had already carved out an exception to the Eleventh Amendment for *in rem* proceedings before bankruptcy courts,<sup>125</sup> its January 2006 decision in *Central Virginia Community College v. Katz*<sup>126</sup> went a critical step further, holding that Congress *could* abrogate the sovereign immunity of a non-consenting state pursuant to the Bankruptcy Clause of Article I.<sup>127</sup> Even though the analytical core of *Seminole Tribe* and its successors was the proposition that *none* of Congress’s Article I powers could be used to subject a non-consenting state to suit, Justice Stevens wrote for a 5–4 majority to explain why bankruptcy was “different,” dismissing the Court’s earlier suggestions to the contrary as mere “dicta.”<sup>128</sup>

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122. *Id.* at 645 (quoting *Idaho v. Coeur d’Alene Tribe of Idaho*, 521 U.S. 261, 296 (1997) (O’Connor, J., concurring in part and concurring in judgment)) (alteration in original).

123. *Id.* at 649 (Kennedy, J., concurring).

124. *Id.* at 646 (majority opinion).

125. *See* *Tenn. Student Assistance Corp. v. Hood*, 541 U.S. 440, 451 (2004).

126. 546 U.S. 356 (2006).

127. *Cent. Va. Cmty. Coll. v. Katz*, 546 U.S. 356, 378 (2006).

128. *Id.* at 363

We acknowledge that statements in both the majority and the dissenting opinions in *Seminole Tribe of Fla. v. Florida*, reflected an assumption that the holding in that case would apply to the Bankruptcy Clause. Careful study and reflection have convinced us, however, that that assumption was erroneous. For the reasons stated by Chief Justice Marshall in *Cohens v. Virginia*, we are not bound to follow our dicta in a prior case in which the point now at issue was not fully debated.

*Id.* (citations omitted).



The majority's attempt to sidestep the issue notwithstanding, it is objectively impossible to reconcile *Katz* with *Seminole Tribe* and its progeny. The only real explanation is the composition of the majority: With Chief Justice Roberts embracing the same theory as his predecessor (and former boss), the Court split along the same traditional axis, except for Justice O'Connor. On the last day in which she participated in decisions (the Senate confirmed Justice Alito as her successor eight days later),<sup>129</sup> and with no separate statement explaining the change-of-heart, Justice O'Connor switched sides, abandoning the entire foundation on which the Rehnquist Court's anti-abrogation jurisprudence had been predicated.

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Given the decisions in *Verizon* and *Katz*, both of which suggested that the Justices were already retreating from the high-water mark of the Rehnquist Court's state sovereign immunity jurisprudence, it would have been entirely understandable for this body of cases to be one of the more closely watched areas for the Justices subsequent to Justice Alito's swearing in on January 31, 2006. And yet, even as the Court revisited a number of decisions in which Justice O'Connor had been the swing vote, state sovereign immunity stayed surprisingly off the radar, emerging only in uncontroversial cases or in dissent. More than just the usual curiosity over the extent to which new Justices will or will not follow in their predecessors' footsteps, the absence of meaningful jurisprudence with regard to state sovereign immunity means that it is still unclear whether the small but significant retreats in *Verizon* and *Katz* described above were the beginning of a larger trend, or rather bumps along an otherwise continuous road.

And that is where the 2010 Term might provide key insights.

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129. 152 CONG. REC. S340,348 (daily ed. Jan. 31, 2006).

### III. STATE SOVEREIGN IMMUNITY, THE ROBERTS COURT, AND THE 2010 TERM

#### A. *VOPA v. Stewart*: A Battle for *Ex parte Young*'s Analytical Core

In 1986, after public hearings uncovered widespread abuse and neglect in psychiatric facilities, Congress enacted the Protection and Advocacy for Individuals with Mental Illnesses (PAIMI) Act<sup>130</sup> to “ensure that the rights of individuals with mental illness are protected” and to “assist States to establish and operate a protection and advocacy system for individuals with mental illness which will . . . protect and advocate the rights of such individuals through activities to ensure the enforcement of the Constitution and Federal and State statutes.”<sup>131</sup> To that end, the Act provides funding for a state so long as the state designates a “protection and advocacy system” to accomplish these goals.<sup>132</sup> Under the Act, the state can choose whether the designated “P&A” system is an independent state agency or a private entity.<sup>133</sup> Either way, the Act vests the agency with the authority to access necessary patient records and, where appropriate, to “pursue administrative, legal, and other appropriate remedies to ensure the protection of individuals with mental illness who are receiving care or treatment in the State.”<sup>134</sup>

Virginia, like most states, chose to accept funds under the PAIMI Act and create a public agency—the Virginia Office for Protection and Advocacy (VOPA)—to administer the program.<sup>135</sup>

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130. Pub. L. No. 99-319, 100 Stat. 478 (1986) (codified as amended at 42 U.S.C. §§ 10801–10851 (2006)). The Act was originally captioned the “Protection and Advocacy for Mentally Ill Individuals Act,” but Congress amended the name to the “Protection and Advocacy for Individuals with Mental Illnesses Act” in 2000. *See Prot. & Advocacy for Persons with Disabilities v. Mental Health & Addiction Servs.*, 448 F.3d 119, 121 n.1 (2d Cir. 2006).

131. 42 U.S.C. §§ 10801(b)(1), (b)(2)(A) (2006).

132. *See id.* § 10803(2)(A).

133. *See id.* § 10802(2) (incorporating 42 U.S.C. § 15044(a), part of the Developmental Disabilities Assistance and Bill of Rights Act of 2000).

134. *Id.* § 10805(a)(1)(B).

135. VA. CODE ANN. § 51.5-39.2 (2009), <http://leg1.state.va.us/cgi-bin/>

In 2007, VOPA brought suit against James Reinhard, Commissioner of Virginia's Department of Mental Health, Mental Retardation, and Substance Abuse Services.<sup>136</sup> Specifically, VOPA sought injunctive relief requiring the production of records relating to three incidents resulting in death or serious injuries for patients in the Department's custody, claiming that the Department's failure to provide those records violated the PAIMI Act.<sup>137</sup> Reinhard, in turn, claimed that the records were protected by "peer review privilege," and that, in the alternative, the suit was barred by sovereign immunity.<sup>138</sup>

In July 2008, the district court rejected Reinhard's motion to dismiss, concluding that VOPA's complaint *did* state a viable cause of action under federal law, and that Reinhard was not protected by sovereign immunity.<sup>139</sup> In particular, the district court concluded both that VOPA's suit "falls within the purview of *Ex parte Young*," and that no "special sovereignty interests" precluded an *Ex parte Young* remedy.<sup>140</sup>

On appeal, the Fourth Circuit reversed.<sup>141</sup> Writing for a unanimous panel, Judge Wilkinson reasoned that VOPA's suit was *not* an ordinary *Ex parte Young* action, but rather an extraordinary suit by one state agency against the director of another. Invoking the spirit if not the text of Justice Kennedy's plurality opinion in *Coeur d'Alene*, Wilkinson concluded that:

VOPA seeks to expand *Ex parte Young* to allow a federal court, without the imprimatur of Congress or the consent of the state, to resolve a dispute between a state agency and state officials. Recognizing an inherent power in the federal courts to settle this sort of internecine feud—to turn the State against itself—would disparage the status of the states as sovereigns.

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legp504.exe?000+coh+51.5-39.2+500317.

136. *Virginia v. Reinhard*, No. 07-CV-734, 2008 WL 2795940 (E.D. Va. July 18, 2008), *rev'd*, 568 F.3d 110 (4th Cir. 2009), *cert. granted sub nom.* Va. Office for Prot. & Advocacy (VOPA) v. Stewart, 560 U.S. \_\_\_, 130 S. Ct. 3493 (2010).

137. *Id.* at \*1.

138. *See id.* at \*2 (summarizing the background).

139. *Id.* at \*6.

140. *See id.* at \*5–\*7.

141. *Reinhard*, 568 F.3d at 113.

Moreover, just as *Pennhurst* observed that states and their officials have an interest against appearing in federal court over issues of state law, states have a similar interest in not having a federal court referee contests between their agencies. Further, allowing a state agency to decide on its own accord to sue officials of another state agency and to obtain relief from an Article III judge would create difficult questions of political accountability. Where exactly could citizens dissatisfied with the outcome of such a federal court case turn for political redress? The answer is not obvious. For these reasons, granting a federal forum to “a state’s warring factions” based on alleged violations of federal law would be an unwarranted extension of *Ex parte Young*.<sup>142</sup>

Thus, despite *Verizon*’s reiteration that *Ex parte Young* requires only a “straightforward inquiry into whether [the] complaint alleges an ongoing violation of federal law and seeks relief properly characterized as prospective,” and conceding that, were VOPA a *private* agency, it would be able to pursue *Ex parte Young* relief,<sup>143</sup> the court of appeals concluded that, as a state-created agency, sovereign immunity barred its suit.<sup>144</sup>

Although there was no dissent in *Reinhard*, two counterarguments were offered by the en banc Seventh Circuit in its decision in a closely analogous case handed down while VOPA’s petition for certiorari was pending. First,

[A] closer look at the details of this case shows that the defendants’ effort to portray this case as an “intramural” dispute is not persuasive. While the defendant Secretary of the Family and Social Services Administration serves at the pleasure of the governor, plaintiff IPAS is not a traditional state agency. It is independent of the governor to a degree that is unusual and perhaps unique among Indiana agencies.<sup>145</sup>

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142. *Id.* at 120–21 (citations omitted).

143. *See id.* at 118–19.

144. *Id.* at 124–25.

145. *Ind. Prot. & Advocacy Servs. v. Ind. Family & Soc. Servs. Admin.*, 603 F.3d 365, 373 (7th Cir. 2010) (en banc), *petition for cert. filed*, 79 U.S.L.W. 3063 (July 21, 2010) (No. 10-131).

Second, as Judge Hamilton wrote for the unanimous court of appeals:

Congress gave each state the choice to establish a protection and advocacy system as either an independent state agency or a private not-for-profit entity. Indiana made the choice to set up IPAS as an independent state agency. If we gave that choice any weight in the Eleventh Amendment inquiry, we would be permitting Indiana to use its own choice to set up an independent state agency as a means to shield its state hospitals and institutions from the very investigatory and oversight powers that Congress funded to protect some of the state's most vulnerable citizens. That result would be strange indeed.<sup>146</sup>

In other words, the Seventh Circuit's disagreement with the Fourth Circuit was predicated on two distinct arguments: First, that lawsuits by P&A systems against state officials *do* resemble traditional *Ex parte Young* actions; and second, that states in accepting funds under the PAIMI Act and choosing to create a public, rather than private, agency, are effectively waiving their sovereign immunity in any event.

However convincing the Seventh Circuit's focus on waiver and the unique nature of P&A systems may be, it belies the extent to which the Fourth Circuit's decision is incompatible with one of the central tenets of the Supreme Court's *Ex parte Young* jurisprudence. After all, the underlying theory of the doctrine is that the defendant-officer is *not* acting as the state when he is continuing to act in violation of federal law,<sup>147</sup> which renders the identity of the plaintiff all-but irrelevant. At the same time, state-created agencies (like VOPA) may well be an "arm" of the

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146. *Id.*

147. *See, e.g., Ex parte Young*, 209 U.S. 123, 159 (1908) ("The act to be enforced is alleged to be unconstitutional; and if it be so, the use of the name of the state to enforce an unconstitutional act to the injury of complainants is a proceeding without the authority of, and one which does not affect, the state in its sovereign or governmental capacity.").

state for Eleventh Amendment purposes.<sup>148</sup> Thus, the irony of the *VOPA* litigation is that Judge Wilkinson may have been entirely correct that the special sovereignty interests of the states is implicated in suits like *VOPA*'s—but on the plaintiff's side of the “v.,” rather than the defendant's.<sup>149</sup>

## B. *Sossamon v. Texas*: Spending Conditions and/as “Waivers”

As noted above, waiver is also at the heart of the other state sovereign immunity case that the Court will be considering during the 2010 Term. Specifically, *Sossamon v. Texas* concerns a challenge by a state prisoner to a Texas policy of prohibiting prisoners on cell restriction from participating in certain religious services.<sup>150</sup> *Sossamon* brought suit, claiming that the Texas policy interfered with his rights under the Free Exercise Clause of the First Amendment, the Texas Religious Freedom Act, and RLUIPA, which provides that “[a] person may assert a violation of this chapter as a claim or defense in a judicial proceeding and obtain appropriate relief against a government.”<sup>151</sup>

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148. *Cf. Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 280 (1977) (noting that whether an entity is an “arm of the state” for Eleventh Amendment purposes “depends, at least in part, upon the nature of the entity created by state law”). To be sure, whether *VOPA* is an “arm of the state” is a complex question of both Virginia state and federal law. *See, e.g., Regents of the Univ. of Cal. v. Doe*, 519 U.S. 425, 429 n.5 (1997) (“Ultimately, of course, the question whether a particular state agency has the same kind of independent status as a county or is instead an arm of the State, and therefore ‘one of the United States’ within the meaning of the Eleventh Amendment, is a question of federal law. But that federal question can be answered only after considering the provisions of state law that define the agency’s character.”). But the complexity of that question only further underscores the notion that sovereignty concerns, to the extent they are even present, come on the plaintiff’s side of the case.

149. *Cf. Massachusetts v. EPA*, 549 U.S. 497, 518, 520 n.17 (2007) (suggesting how special considerations may enter into play where states are *plaintiffs* in civil litigation).

150. *Sossamon v. Texas*, No. 06-CA-033, 2007 WL 7135950, at \*6 (W.D. Tex. Mar. 28, 2007), *aff’d in part, rev’d in part, dismissed in part*, 560 F.3d 316 (5th Cir. 2009), *cert. granted in part*, 560 U.S. \_\_\_, 130 S. Ct. 3319 (2010).

151. 42 U.S.C. § 2000cc-2(a) (2006); *cf. Sossaman*, 2007 WL 7135950, at \*6.

As to the RLUIPA claim, the district court concluded somewhat cursorily that (1) RLUIPA does not authorize a damages remedy against either individual officers or the state; and (2) to the extent that it does, such relief is barred by the Eleventh Amendment because RLUIPA does not include a valid waiver of sovereign immunity—that the statute is insufficiently clear that “appropriate relief” might include damages.<sup>152</sup> The Fifth Circuit agreed, noting that “[w]hen deciding the validity of a putative waiver of sovereign immunity through a state’s participation in a Spending Clause ‘contract,’ we ask whether Congress spoke with sufficient clarity to put the state on notice that, to accept federal funds, the state must also accept liability for monetary damages.”<sup>153</sup> Furthermore, the court stated:

[W]e must presume that Congress intended to afford all ordinary remedies not *expressly disclaimed* when we interpret the ambiguous language it uses to create a cause of action. We may not presume the same when we ask whether a state knowingly waived its immunity from damages when damages are not *expressly provided*. RLUIPA is clear enough to create a right for damages on the cause-of-action analysis, but not clear enough to do so in a manner that abrogates state sovereign immunity from suits for monetary relief.<sup>154</sup>

Thus, Texas did not waive its immunity to damages claims in accepting funds under RLUIPA.

In so holding, the Fifth Circuit joined cause with the Fourth Circuit, which had already so concluded in *Madison v. Virginia*.<sup>155</sup> The Eleventh Circuit, reasoning to the contrary in *Benning v. Georgia*,<sup>156</sup> focused not on the specific remedy RLUIPA provided, but on the clarity with which RLUIPA subjected states to “appropriate relief” for cases in which the statute was violated.<sup>157</sup> Thus, the circuit split turns almost

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152. *Sossaman*, 2007 WL 7135950, at \*8 (citing *Madison v. Virginia*, 474 F.3d 118 (4th Cir. 2006)).

153. *Sossamon*, 560 F.3d at 330.

154. *Id.* at 331 (footnotes omitted).

155. *Madison*, 474 F.3d at 122.

156. 391 F.3d 1299 (11th Cir. 2004).

157. *Benning v. Georgia*, 391 F.3d 1299, 1305–06 (11th Cir. 2004).

entirely on whether a Spending Clause statute must be unambiguous as to only the *existence* of liability, or specifically to the particular *mode* thereof.

### C. Why *Stewart* and *Sossamon* Matter

By now, it should hopefully be clear that neither *Stewart* nor *Sossamon* implicate the core of the Rehnquist Court's approach to state sovereign immunity. Neither raises fundamental questions about the particular nature of the "sovereignty" that states possessed prior to the Founding, nor does either case raise questions about the current scope of Congress's abrogation power along the lines of the *Katz* case in 2006. If anything, both cases may well be resolved on statutory construction grounds—focusing on whether the PAIMI Act and RLUIPA are sufficiently clear with respect to waiving the recipient states' sovereign immunity.

But lurking behind both cases, *Stewart* specifically, is just how far unique concerns over the sovereignty of the states should go in influencing otherwise clear doctrinal rules. Thus, in *Stewart*, there is no question that the exact same lawsuit *could* be pursued by a *private* P&A system, and so even if Virginia did not waive its immunity, the issue is whether there is a particular affront to Virginia's sovereignty to allow one of its officials to be sued by one of its (admittedly independent) agencies. Moreover, as noted above, it may be just as true that the state is present in the lawsuit only on the plaintiff's side, given the underlying rationale behind *Ex parte Young*.

And in *Sossamon*, the question is whether RLUIPA should be interpreted pursuant to ordinary principles of "waiver" and notice, or whether Congress has to be "super clear" when seeking to obtain waivers of state sovereign immunity—to specify not just that the states will be liable for "appropriate relief," but to delineate the precise forms of relief that will be available. In both cases, then, even if the specific conclusion doesn't turn on the central tenets of the Rehnquist Court's state sovereign immunity jurisprudence, we may learn quite a lot, indeed, about the extent to which a concern for states' rights tips the balance away from established doctrine.



To be sure, we may not learn these things, too. It is always a thorny proposition to try to predict how the Court will dispose of the cases on its docket, and *Stewart* and *Sossamon* are no different in that regard. But given that the Supreme Court that sits for the 2010 Term will have three Justices who have not yet had the opportunity to speak to state sovereign immunity in any meaningful fashion since joining the Court,<sup>158</sup> and a fourth Justice who only did so in a *sui generis* dissent, perhaps even the absence of interesting discussion will provide revealing clues going forward.

#### IV. CONCLUSION

There may be no area of the Supreme Court's jurisprudence in the past quarter-century that has generated such simultaneously one-sided and full-throated academic disapproval as the Court's various forays into the sovereign immunity of the states. I, for one, find much with which to agree in Justice Stevens's 1989 concurrence in *Union Gas*, where he observed that there are really "two Eleventh Amendments."<sup>159</sup> He explained "[t]here is first the correct and literal interpretation of the plain language of the Eleventh Amendment that is fully explained in JUSTICE BRENNAN's dissenting opinion in *Atascadero State Hospital v. Scanlon*."<sup>160</sup> Second, Stevens continued, "there is the defense of sovereign immunity that the Court has added to the text of the Amendment in cases like *Hans v. Louisiana*,"<sup>161</sup> and, since *Union Gas*, *Seminole Tribe*, *Coeur d'Alene*, *Alden*, and their offshoots. More succinctly, as Professor John Manning has pointed out, "at least where the Constitution

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158. As this essay went to print, the Court made clear that Justice Kagan would not participate in *Stewart*, presumably because of her involvement as Solicitor General in the government's amicus brief in support of certiorari. Although this development deprives observers of one chance to gain insight into the views of the newest Justice, it may simultaneously raise the case's stakes, since the Petitioner will need to find two votes, in addition to the likely support of Justices Ginsburg, Breyer, and Sotomayor, to reverse the Fourth Circuit.

159. *Pennsylvania v. Union Gas Co.*, 491 U.S. 1, 23 (1989) (Stevens, J., concurring).

160. *Id.*

161. *Id.*

speaks in precise rule-like terms, as the Eleventh Amendment does,” it is difficult to justify a “purposive,” rather than textual, approach to its interpretation.<sup>162</sup>

But there is a critical distinction between going back on decades of established case law (as many scholars repeatedly urge the Court to do) and declining to expand it. And that is why there may well be much to learn in how the Supreme Court resolves the two state sovereign immunity cases on its docket for the 2010 Term. Are the “special sovereignty interests” of the states enough to justify an unprecedented exception to relief under *Ex parte Young*, as Virginia is arguing for in *Stewart*, and to require a super-clear statement from Congress when subjecting states to liability in exchange for the recipient of federal funds, as Texas claims they should in *Sossamon*? Without question, we have already learned quite a lot about the Roberts Court and its approach to the relationship between the federal government and the states. What’s more, much of it has represented a retreat, however slightly, from the federalism jurisprudence of the Rehnquist Court.<sup>163</sup> But many of these decisions have come in the context of Congress’s regulatory power, a context in which there is necessarily less room for the sovereignty concerns that pervaded the Rehnquist Court’s approach in this area. As a result, how the Roberts Court answers the questions presented in *Stewart* and *Sossamon* may well tell us as much about the Court’s general approach to the relationship between the states and the federal government going forward as any case it has decided to date.

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162. John F. Manning, *The Eleventh Amendment and the Reading of Precise Constitutional Texts*, 113 YALE L.J. 1663, 1670 (2004).

163. See, e.g., *United States v. Comstock*, 560 U.S. \_\_\_, 130 S. Ct. 2295 (2010).