

RETHINKING THE ELEVENTH AMENDMENT: SOVEREIGN IMMUNITY IN THE UNITED STATES AND THE EUROPEAN UNION

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INTRODUCTION

State sovereign immunity first appeared in the United States Constitution in 1795. As stated in the Eleventh Amendment, “[t]he Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.”¹ The doctrine as understood today extends to suits brought by in-state residents² and operates as a “specific constitutional bar against hearing even *federal* claims that otherwise would be within the jurisdiction of the federal courts.”³ While phrased as a limitation on federal judicial power, the doctrine also applies in state courts.⁴ Finally, states are free to waive their immunity, but Congress has limited power to abrogate it.⁵

Most scholars agree that the state sovereign immunity doctrine is inconsistent with the language of the Eleventh Amendment,⁶ but this

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1. U.S. CONST. amend. XI.

2. *Hans v. Louisiana*, 134 U.S. 1, 10, 15 (1890).

3. *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 120 (1984) (emphasis in original).

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

5. *Seminole Tribe v. Florida*, 517 U.S. 44, 59, 72–73 (1996) (holding that Congress may only abrogate state sovereign immunity under section 5 of the Fourteenth Amendment and that it may not do so pursuant to Article I of the U.S. Constitution).

6. See, e.g., Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 YALE L. J. 1425, 1480 and n.223 (1987) (describing the doctrine as “incoherent”); John C. Jeffries, Jr., *In Praise of the Eleventh Amendment and Section 1983*, 84 VA. L. REV. 47, 47 (1988) (describing the doctrine as “a mess”). But see Caleb Nelson, *Sovereign Immunity as a Doctrine of Personal Jurisdiction*, 115 HARV. L. REV. 1559, 1653

is not the key issue. The more important question is whether the doctrine is useful. Hence, this Note examines the degree to which state sovereign immunity is consistent with three basic values: popular sovereignty, cooperative governance, and state autonomy. Courts should take note of these considerations, particularly given the doctrine's faint resemblance to the constitutional text.

Identifying these values at the outset provides this Note with a clear normative focus that prevents it from becoming an abstract meditation on constitutional design. This Note focuses on how sovereign immunity relates to the ability to govern and asks whether the doctrine balances state and federal power in ways that are consistent with the values identified above. The short answer is that it does not. Creating barriers to the enforcement of federal law conflicts with popular sovereignty, compromises the ability of the state and federal governments to engage in cooperative governance, and fails to promote state autonomy. Using the European approach to sovereign immunity as a counterexample, this Note concludes that limiting Congress's ability to abrogate state sovereign immunity is problematic—deeply problematic—given the central role that these values play in the American system.

Part I describes the problems with state sovereign immunity in the United States. It begins with an overview of the doctrine, noting the doctrine's lack of foundation in the text of the Eleventh Amendment and its refuge in dual federalism, a vision of federal-state relations that imagines the federal and state governments as coequal and competing sovereigns. Dual federalism, however, sits uncomfortably with the idea of popular sovereignty. Moreover, it impedes effective governance in areas where federal-state cooperation is necessary, such as environmental law. Part I closes by showing that it is difficult to justify these concessions with the argument that they are necessary to protect state autonomy.

Part II discusses the European analogue to state sovereign immunity. The doctrine of member state liability as established in *Francovich v. Italy* provides that an individual citizen may sue a member state for damages for its failure to comply with a European Community directive.⁷ This rule stands in direct contrast to the Supreme Court's rulings in *Seminole Tribe v. Florida*⁸ and *Alden v.*

(2002) (arguing that the text is clear but that the current doctrine is inconsistent only because the Court has conflated personal and subject matter jurisdiction).

7. Joined Cases C-6/90 & C-9/90, *Francovich v. Italy*, 1991 E.C.R. I-5357, para. 39.

8. *Seminole Tribe*, 517 U.S. 44.

Maine,⁹ the combined effect of which is to limit Congress's ability to abrogate state sovereign immunity in state and federal court. Similar to Part I, Part II focuses on the degree to which *Francovich* encourages popular sovereignty, cooperative governance, and member state autonomy. Part II concludes that member state liability does a much better job of serving those values in Europe than state sovereign immunity does in the United States.

Part III suggests that the United States could adopt a European approach without destroying the balance between the states and the federal government. This Note does not simply assume that *Francovich* would operate in the United States in the same way that it has in Europe, given the structural characteristics that distinguish the two polities. Rather, it argues that allowing Congress to abrogate state sovereign immunity would be feasible because the Tenth Amendment limits the influence that the federal government can exert over the states. Courts could police Congress's exercise of its newfound abrogation power and invalidate any laws that encroached too far on the states' ability to participate in national governance. Thus, adopting *Francovich* would allow the American system to strike a balance between popular sovereignty and cooperation on the one hand, and state autonomy on the other.

I.

THE AMERICAN APPROACH

A. *Sovereign Immunity and the Eleventh Amendment*

Sovereign immunity predates the Constitution. The doctrine emerged from the English common law principle that "the King can do no wrong," traditions of governance in which feudal lords could not be sued in the courts they set up for their tenants, and a Westphalian theory of the state that coupled independence in international affairs with exclusive control over internal affairs.¹⁰ Each state was sovereign under the Articles of Confederation and could rely on the sovereign immunity doctrine.¹¹ However, the states gave up some of their sovereignty when they ratified the Constitution. Article III provided in part that the federal judicial power extends to controversies "between a State and Citizens of another State," and "between a State . . . and foreign . . . Citizens or Subjects."¹² This language, especially

9. *Alden*, 527 U.S. 706.

10. HAZEL FOX, *THE LAW OF STATE IMMUNITY* 24–25 (2002). See also Nelson, *supra* note 6, at 1588–92.

11. ARTICLES OF CONFEDERATION, art. II.

12. U.S. CONST. art. III, § 2, cl. 1.

when read in conjunction with the Supremacy Clause,¹³ suggested that states could not assert sovereign immunity in federal court.

This interpretation, although not uncontested,¹⁴ was endorsed by the Supreme Court in *Chisholm v. Georgia*.¹⁵ The State of Georgia had refused to appear as a defendant, claiming that the immunity doctrine barred a private citizen from South Carolina from bringing an assumpsit action to recover a debt.¹⁶ Justice Iredell, the lone dissenter, emphasized the common law origins of sovereign immunity and pointed out that neither Article III nor the Judiciary Act explicitly referred to the doctrine.¹⁷ Since federal law was silent, he argued, Georgia law controlled and the state could invoke the doctrine.¹⁸ The majority reached the opposite conclusion, holding that Article III eliminated the doctrine and specifically allowed nonresidents to sue individual states.¹⁹ As the Court recounted years later in *Hans v. Louisiana*, the decision in *Chisholm* created a “shock of surprise throughout the country.”²⁰ Congress responded and within two years passed the Eleventh Amendment.²¹

Chisholm does not necessarily lead to the conclusion that the Eleventh Amendment was about sovereign immunity. The disagreement between the majority and Justice Iredell boiled down to whether the Court should apply state common law of assumpsit, given that the case was in federal court.²² Some have argued that the Eleventh Amendment’s narrow language actually furnishes evidence of a limited intent to forbid federal court jurisdiction over diversity suits brought by non-citizen and foreign plaintiffs against states where there

13. U.S. CONST. art. VI, cl. 2 (“This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.”).

14. Some insisted that Article III did not address sovereign immunity and that the states retained full control over the doctrine pursuant to the Tenth Amendment. In reading Article III in accordance with the common law doctrine, proponents of this view saw the federal judicial power as extending only to suits where the state had consented to suit or where the state was the plaintiff. See *Welch v. Tex. Dep’t of Highways & Pub. Transp.*, 483 U.S. 468, 482–84 (1987) (discussing the various interpretations of Article III that emerged during the ratification debates).

15. *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419 (1793).

16. *Id.* at 420.

17. *Id.* at 437–49 (Iredell, J., dissenting).

18. *Id.* at 449–50 (Iredell, J., dissenting).

19. *Id.* at 420.

20. *Hans v. Louisiana*, 134 U.S. 1, 11 (1890).

21. *Id.*

22. See Amar, *supra* note 6, at 1472 (1987).

was no independent source of jurisdiction.²³ Nevertheless, the Supreme Court has pushed the sovereign immunity doctrine far beyond the constitutional text.²⁴ For example, although the Eleventh Amendment appears by negative inference to allow suits against a non-consenting state by its own residents, the Court described that argument as “an attempt to strain the Constitution and the law to a construction never imagined”²⁵

This Note focuses on two recent decisions. The first is *Seminole Tribe v. Florida*, which concerned a Native American tribe’s right to file suit against the State of Florida under the Indian Gaming Regulatory Act.²⁶ The Act, which Congress passed under the Indian Commerce Clause,²⁷ required states to negotiate in good faith and allowed tribes to sue noncomplying states in federal court.²⁸ The Court overruled precedent and held that Congress could not authorize suits against nonconsenting states under the Indian Commerce Clause.²⁹ The ruling meant that Congress could only abrogate state sovereign

23. For three classic arguments suggesting that the Eleventh Amendment was never meant to address state sovereign immunity, see Amar, *supra* note 6, at 1426–27 (arguing for a “neo-Federalist” reading of the Eleventh Amendment that recognizes state amenability to suit for cases arising under the Constitution); William A. Fletcher, *A Historical Interpretation of the Eleventh Amendment: A Narrow Construction of an Affirmative Grant of Jurisdiction Rather than a Prohibition Against Jurisdiction*, 35 STAN. L. REV. 1033, 1033–35 (1983) (claiming that the Eleventh Amendment was not intended to bar federal jurisdiction over suits arising from state violations of federal statutes); John J. Gibbons, *The Eleventh Amendment and State Sovereign Immunity: A Reinterpretation*, 83 COLUM. L. REV. 1889, 1934–35 (1983) (emphasizing the need for federal court jurisdiction over claims against states involving the failure to honor treaty obligations).

24. See *supra* notes 2–5 and accompanying text (providing an overview of the Court’s sovereign immunity decisions).

25. *Hans*, 134 U.S. at 15. See also *Ex parte New York*, 256 U.S. 490, 497 (1921) (“[T]he entire judicial power granted by the Constitution does not embrace authority to entertain a suit brought by private parties against a State without consent given: not one brought by citizens of another State, or by citizens or subjects of a foreign State, because of the Eleventh Amendment; and not even one brought by its own citizens, because of the fundamental rule of which the Amendment is but an exemplification.”); *Beers v. Arkansas*, 61 U.S. (20 How.) 527, 529 (1857) (“It is an established principle of jurisprudence in all civilized nations that the sovereign cannot be sued in its own courts, or in any other, without its consent and permission”). The Court has relied on this conception of the states even in the face of recognized exceptions to the sovereign immunity doctrine. See, e.g., *Idaho v. Coeur d’Alene Tribe*, 521 U.S. 261, 287–88 (1997) (holding inapplicable the *Ex parte Young* doctrine that allows suits against state officers because the requested injunctive relief would have intruded heavily on the “dignity” of the state).

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

27. U.S. CONST. art. I, § 8, cl. 3.

28. 25 U.S.C. § 2710(d)(3)(A), (d)(7) (2000).

29. *Seminole Tribe*, 517 U.S. at 47, 66.

immunity pursuant to section 5 of the Fourteenth Amendment.³⁰ The second case, decided three years later, is *Alden v. Maine*.³¹ *Alden* arose when a group of state probation officers brought an action under the Fair Labor Standards Act³² to collect unpaid overtime.³³ The officers sued in state court, claiming that the Eleventh Amendment only limited *federal* jurisdiction.³⁴ The Court disagreed, holding that “the sovereign immunity of the States neither derives from, nor is limited by, the terms of the Eleventh Amendment.”³⁵ The combined effect of these decisions is to limit Congress’s ability to abrogate state sovereign immunity, whether in federal or state courts.

Seminole Tribe and *Alden* exemplify the Supreme Court’s tendency to define sovereign immunity according to structural, rather than purely textual, arguments. *Seminole Tribe* speaks of the Eleventh Amendment as “an essential component of our constitutional structure.”³⁶ *Alden* reaches back to “fundamental postulates implicit in the constitutional design.”³⁷ Thus, the limitation on Congress’s authority to abrogate does not exist because of specific language in the Constitution. It exists because the Supreme Court has repeatedly held that sovereign immunity is a fundamental part of the American approach to federalism.

B. Popular Sovereignty

State sovereignty brings to mind dual federalism, the idea that the national and state governments, “although both exist and are exercised within the same territorial limits, are yet separate and distinct sovereignties, acting separately and independently of each other, within their respective spheres.”³⁸ Conceptualizing federalism in this manner justifies sovereign immunity by providing theoretical support for the claim that the states, as co-equal sovereigns to the federal government, should not have to countenance being sued in federal courts against their consent.³⁹

30. *Id.* at 59, 72.

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

32. 29 U.S.C. § 201 *et seq.* (2000).

33. *Alden*, 527 U.S. at 711–12.

34. *Id.* at 712.

35. *Id.* at 713.

36. *Seminole Tribe*, 517 U.S. at 56.

37. *Alden*, 527 U.S. at 729.

38. *Tarble’s Case*, 80 U.S. (13 Wall.) 397, 406 (1871).

39. *See, e.g., Idaho v. Coeur d’Alene Tribe*, 521 U.S. 261, 287–88 (1997) (stating that bringing state defendants into federal court would offend the “dignity” of the states).

Granting states such privileged status in order to safeguard federalism is problematic because it conflicts with popular sovereignty. Popular sovereignty is the idea that the people are “the only legitimate fountain of power and it is from them that the constitutional charter . . . is derived . . .”⁴⁰ It is an idea embedded deep in the history and structure of the American republic.⁴¹ For instance, the decision to reject the Articles of Confederation in favor of the Constitution indicates that the Framers intended sovereignty to vest not in the people of the several states, but in the people of the United States as a whole.⁴² The Constitution’s opening lines suggest further that the Revolutionary War was waged over the idea that sovereignty rested with “We the People” rather than with the Crown or Parliament.⁴³ Similarly, the system of checks and balances was designed to fragment governmental power in order to safeguard individual rights.⁴⁴

The upshot of popular sovereignty is that whatever incidents of sovereignty the state and national governments enjoy derive in fact from the people. It follows that the government ceases to represent the true sovereign—the people—when it acts outside the sphere of its delegated power.⁴⁵ Thus, immunizing state governments from liabil-

40. THE FEDERALIST NO. 49, at 245 (James Madison) (Terence Ball ed., 2003).

41. See Russell Patrick Plato, *Selective Entrenchment Against State Constitutional Change: Subject Matter Restrictions and the Threat of Differential Amendability*, 82 N.Y.U. L. REV. 1470, 1474 & nn.20–21 (2007); DONALD S. LUTZ, THE ORIGINS OF AMERICAN CONSTITUTIONALISM 10 (1988) (discussing the distinctly “American practice of popular sovereignty”).

42. See Amar, *supra* note 6, at 1446–51, 1455–62.

43. See *id.* at 1439.

44. See THE FEDERALIST NO. 51, at 254 (James Madison) (Terence Ball ed., 2003) (advocating separation of powers because “[i]f a majority be united by a common interest, the rights of the minority will be insecure”). See also Rebecca L. Brown, *Separated Powers and Ordered Liberty*, 139 U. PA. L. REV. 1513, 1531–40 (1991) (discussing the historical development of separation of powers as a method of protecting individual rights); Victoria Nourse, *Toward a “Due Foundation” for the Separation of Powers: The Federalist Papers as Political Narrative*, 74 TEX. L. REV. 447, 455 & n.37 (1996) (describing the separation of powers as being designed to promote the “rule of law, integrity, and individual liberty”).

45. Many are quick to point out that democratically elected governments represent the people, and so a suit against a State runs not against an institutional entity but against the sovereign people in their “collective capacity.” See, e.g., Nelson, *supra* note 6, at 1584 & n.115. But while it is true that subjecting the states to damages liability can have very real consequences on their ability to represent their constituents, it is also true that a particular plaintiff may not be a constituent of the defendant State. Indeed, in a federal regime, situations may routinely arise where State A has violated the federally protected rights of a resident of State B. Insofar as it might not be possible for State B residents to put electoral pressure on State A to discontinue the activity, the need to vindicate the sovereignty of the *federal* people becomes apparent. See also *infra* notes 196–197 and accompanying text (suggesting that Congress could

ity for constitutional violations is “wholly antithetical to the Constitution’s organizing principle of popular sovereignty.”⁴⁶

The common law exception to the prohibition on suits against non-consenting states does not resolve this contradiction. Under *Ex parte Young*, individual plaintiffs may sue state officials in their individual capacity on the theory that those officials could not have been acting on behalf of the state when they violated the law.⁴⁷ But while this doctrine restores some balance to the picture, its utility has diminished over time. The Supreme Court has prevented plaintiffs from seeking damages or retroactive relief when relief is in effect sought against the state,⁴⁸ and *Ex parte Young* actions are unavailable if the plaintiff is alleging a violation of state law rather than federal law.⁴⁹ The exception is also unavailable if the requested remedy, even if purely prospective, would offend “an essential attribute of sovereignty”⁵⁰ or if there is another remedy available under federal law.⁵¹ Thus, *Ex parte Young* does relatively little to salvage popular sovereignty.

Unfortunately, Congress has little power to correct for these deficiencies.⁵² That the federal government might have been able to limit

always minimize the impact of abrogation on a state’s ability to govern by limiting damages).

46. Amar, *supra* note 6, at 1466. See *Hans v. Louisiana*, 134 U.S. 1, 13 (1890) (“It is inherent in the nature of sovereignty not to be amenable to the suit of an individual *without its consent*. This is the general sense and the general practice of mankind, and the exemption, as one of the attributes of sovereignty, is now enjoyed by the government of every state in the Union.”) (quoting THE FEDERALIST No. 81 (Alexander Hamilton)). Amar focuses on constitutional violations, but this logic extends equally to statutory violations discussed in Part I.C.

47. *Ex parte Young*, 209 U.S. 123, 159 (1907) (“An injunction to prevent [an officer] from doing that which he has no legal right to do is not an interference with the discretion of an officer.”).

48. *Edelman v. Jordan*, 415 U.S. 651, 668 (1974) (barring restitution of unpaid benefits because it would have been “in practical effect indistinguishable in many aspects from an award of damages against the State”).

49. *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 106 (1984) (holding *Ex parte Young* inapplicable to vindicate violations of state law because *Ex parte Young* is designed only to help vindicate the authority of federal law).

50. *Idaho v. Coeur d’Alene Tribe*, 521 U.S. 261, 283 (1997) (quoting *Utah Div. of State Lands v. United States*, 482 U.S. 193, 195 (1987)) (applying sovereign immunity to bar a declaratory and injunctive suit in which the plaintiffs claimed ownership of submerged lands and lake beds because returning the lands implicated special sovereignty interests).

51. *Seminole Tribe v. Florida*, 517 U.S. 44, 74–76 (1996) (refusing to allow damage suits against state officials for failure to negotiate in good faith because the Indian Gaming Regulatory Act already allowed tribes to bring injunctive suits to enforce compliance).

52. 42 U.S.C. § 1983 authorizes damages suits against public officials who have deprived individuals of federal rights while acting under color of law, but it operates

state sovereign immunity is not entirely implausible, given the Court's prior indication that the parts—the states—must not interfere with the legitimate activities of the whole—the federal government.⁵³ The Court could have read the Constitution as authorizing the people to intrude upon state sovereign immunity via legislation passed at the national level. In fact, the Court actually did allow Congress to abrogate sovereign immunity pursuant to its Article I powers in *Pennsylvania v. Union Gas Co.*⁵⁴ The rationale for the decision was that by ratifying the Constitution, the states had consented to abrogation—an argument that was especially attractive with respect to the Commerce Clause, as Congress's authority to regulate interstate commerce generally preempts any state regulation thereof.⁵⁵ Nevertheless, the Court overruled itself several years later in *Seminole Tribe*, thereby permitting Congress to abrogate sovereign immunity only pursuant to section 5 of the Fourteenth Amendment.⁵⁶ As will be discussed below, this holding impacts a wide array of legislative activities.

In conclusion, Congress's limited power to abrogate sovereign immunity fails to compensate for the glaring contradiction between state sovereignty and popular sovereignty, the animating principle of the American Revolution and of the Constitution itself.

C. Cooperative Governance

Preventing individual plaintiffs from suing state governments to vindicate federal law is problematic from a second standpoint. Popular sovereignty aside, it is important that the federal government be

within sovereign immunity and does not abrogate it. *Quern v. Jordan*, 440 U.S. 332, 340–41 (1979). Furthermore, the qualified immunity doctrine holds § 1983 inapplicable to policy decisions that do not violate clearly established federal rights of which a reasonable person would have had knowledge. *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). Thus, § 1983 sounds in tort but does not vindicate the popular interest in suing state actors for their failure to implement general policy measures. For this, Congress must provide a separate cause of action, e.g., a citizen suit. *See infra* notes 76–81 and accompanying text (discussing the impact of sovereign immunity on citizen suits).

53. *See, e.g., McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 395–96 (1819) (“If Congress has power to do a particular act, no State can impede, retard, or burthen it.”).

54. *Pennsylvania v. Union Gas Co.*, 491 U.S. 1, 13–20 (1989) (holding that Congress has authority pursuant to the Commerce Clause to abrogate state sovereign immunity and render states liable for money damages in suit to recover hazardous waste cleanup costs).

55. *City of Philadelphia v. New Jersey*, 437 U.S. 617, 623–24 (1978).

56. 517 U.S. at 66, 72. *See also Fitzpatrick v. Bitzer*, 427 U.S. 445, 456 (1976) (holding that Congress may, “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”).

able to implement necessary policy measures. The conflict with sovereign immunity arises when national policymakers devise regulation that relies on the assistance of state and local authorities, but they encounter difficulty in holding states accountable.

On a conceptual level, the conflict is about two different visions of federalism. Governance through federal-state cooperation is best described by the model of intergovernmental relations known as “cooperative federalism.” Cooperative federalism allows the states, “within limits established by federal minimum standards, to enact and administer their own regulatory programs, structured to meet their own particular needs.”⁵⁷ It holds significant promise for areas such as environmental law, which have traditionally been hampered by an over-reliance on “top-down” enforcement at the federal level.⁵⁸ Thus the classic cooperative federalism statutes allow Congress to establish federal standards and then delegate authority to state and local actors to meet those standards through whatever regulatory approach is most appropriate.⁵⁹ Without this type of cooperation, environmental protection can be extremely difficult.⁶⁰

57. See *Hodel v. Va. Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 289 (1981).

58. See Robert L. Glicksman, *From Cooperative to Inoperative Federalism: The Perverse Mutation of Environmental Law and Policy*, 41 WAKE FOREST L. REV. 719, 720 (2006) (stating that cooperative federalism allows states to “fulfill their potential as ‘laboratories’ of experimentation in achieving environmental protection goals”); Donald F. Kettl, *Foreward to ENVIRONMENTAL GOVERNANCE: A REPORT ON THE NEXT GENERATION OF ENVIRONMENTAL POLICY* 3, 6 (Donald F. Kettl, ed., Brookings Inst. Press 2002); NAT’L ACAD. OF PUB. ADMIN., *TRANSFORMING ENVIRONMENTAL PROTECTION FOR THE 21ST CENTURY* 34 (2000), available at http://www.napawash.org/pc_economy_environment/recent_publications.html; THINKING ECOLOGICALLY: THE NEXT GENERATION OF ENVIRONMENTAL POLICY 4–6 (Marian R. Chertow & Daniel C. Esty, eds., Yale Univ. Press 1997); Richard B. Stewart, *A New Generation of Environmental Regulation?*, 29 CAP. U. L. REV. 21, 29 (2001).

59. See, e.g., Clean Air Act § 102, 42 U.S.C. § 7402 (2000) (allowing the federal Environmental Protection Agency (EPA) to set national ambient air quality standards, and allowing the states to devise their own implementation plans to meet those standards); Clean Water Act § 402, 33 U.S.C. § 1342 (allowing either the EPA or the states to issue discharge permits and providing that permits issued by states are federally enforceable). See also *Sweat v. Hull*, 200 F. Supp. 2d 1162, 1178 (D. Ariz. 2001) (“Like the [Clean Water Act], the [Clean Air Act] is a ‘program of cooperative federalism.’” (citation omitted)).

60. See, e.g., Alfred C. Aman, Jr., *Federalism Through a Global Lens: A Call for Deferential Judicial Review*, 11 IND. J. GLOBAL LEGAL STUD. 109, 109–22 (2004) (discussing the need for regulatory flexibility in light of the robust national economy, increased interconnectedness at the international level, and growing strength of multinational corporations, and arguing that the inability to coordinate among states makes it difficult to enact treaties at the global level); Glicksman, *supra* note 58, at 736 & nn.93–94 (discussing the argument that a lack of federal minimum standards leads to a “race to the bottom”); Robert V. Percival, *Environmental Federalism: His-*

The Rehnquist Court's approach to federalism favored state sovereignty at the expense of state-federal cooperation. In *New York v. United States*, for example, the Court struck down the take-title provision of the Low-Level Radioactive Waste Policy Amendments Act of 1985.⁶¹ Congress approved the Act because it saw the benefit of allowing states to play the lead role in protecting public health and safety.⁶² In finding the provision unconstitutional, the Court held that Congress could regulate interstate commerce directly but that it could not tell state governments how to regulate.⁶³ Similarly, in *Printz v. United States*, the Court held that Congress could not direct agents of a state's executive branch to implement federal policy on the grounds that "such commands are fundamentally incompatible with our constitutional system of dual sovereignty."⁶⁴ It could be that these cases, commonly referred to as the anti-commandeering decisions,⁶⁵ were good for intergovernmental relations.⁶⁶ Nevertheless, they raise a problem. As Daniel Halberstam points out, framing state autonomy as an end in itself can prevent a federal system from working as a "productive whole."⁶⁷ Rather than developing a coherent theory of fed-

torical Roots and Contemporary Models, 54 MD. L. REV. 1141, 1178 (1995) ("[E]ffective environmental protection policy requires some form of cooperative federalism in which federal and state authorities work together to achieve national goals" because, among other things, "the federal government simply does not have the capacity to regulate effectively without the cooperation of state and local governments."); Robert M. Sussman, *Should Environmental Laws Be Integrated?*, 15 PACE ENVTL. L. REV. 57, 63-64 (1997) (proposing an integrated environmental statute to improve the flexibility and effectiveness of existing environmental laws).

61. *New York v. United States*, 505 U.S. 144, 187-88 (1992).

62. *See id.* at 150-51; *id.* at 189-90 (White, J., dissenting).

63. *Id.* at 166.

64. *Printz v. United States*, 521 U.S. 898, 935 (1997).

65. *See* Daniel Halberstam, *Of Power and Responsibility: The Political Morality of Federalism*, 90 VA. L. REV. 731, 733 (2004) (citing *Printz*, 521 U.S. 898; *Seminole Tribe v. Florida*, 517 U.S. 44 (1996); and *New York*, 505 U.S. 144); Matthew D. Adler & Seth F. Kreimer, *The New Etiquette of Federalism: New York, Printz, and Yeskey*, 1998 SUP. CT. REV. 71, 71-72 (1998).

66. *See* Roderick M. Hills, Jr., *The Political Economy of Cooperative Federalism: Why State Autonomy Makes Sense and "Dual Sovereignty" Doesn't*, 96 MICH. L. REV. 813, 937-44 (1998) (criticizing the Supreme Court for its failure to conduct any empirical examination of federal-state partnerships but pointing out that the decisions are defensible from a policy perspective because they enable states to bargain and thereby take into account the costs and benefits of intergovernmental regulation).

67. Halberstam, *supra* note 65, at 794-95 ("[T]he Court refuses to appeal systematically to any generalized principle of making the federal system work as a productive whole. Instead, the Court frequently seems preoccupied with protecting state autonomy as an end in itself. In other words, the Court generally relies less on a vision of the legitimate role of the states within the overall system of democratic federal governance than on appeals to what the states did or did not 'surrender' upon joining the Union.").

eral-state relations that takes into account the need for cooperative governance, the Court conceptualized state sovereignty as an unfringeable entitlement.⁶⁸

Recognizing the importance of state sovereignty does not always lead to undesirable results. In *Massachusetts v. EPA*, the Supreme Court granted the State of Massachusetts standing to challenge the Environmental Protection Agency's failure to consider the effect of greenhouse gases in its regulation of new mobile sources of pollution.⁶⁹ The Court noted that Massachusetts was suing in its sovereign capacity on behalf of its citizens,⁷⁰ a fact that entitled the state to "special solicitude" in the Court's analysis.⁷¹ The decision was not unanimous,⁷² and it remains to be seen whether allowing the states to engage in more litigation will encourage more cooperative forms of governance. But at the very least, *Massachusetts v. EPA* provides an interesting counterpoint to the Court's sovereign immunity jurisprudence. Although state sovereignty apparently justifies granting the states standing to sue others on behalf of the people, it bars the states from being sued directly by the people themselves.⁷³

Sovereign immunity thus tends to discourage citizen suit provisions, which grant private citizens the right to sue state or federal agencies for failing to enforce the laws.⁷⁴ These suits are important for a number of reasons. Citizen suits further the decentralization of environmental law by wrenching exclusive control over enforcement away from the federal government.⁷⁵ They provide a crucial check in

68. *Id.*

69. *Massachusetts v. EPA*, 127 S.Ct. 1438, 1446, 1458 (2007).

70. *Id.* at 1454 ("This is a suit by a State for an injury to it in its capacity of quasi-sovereign. In that capacity the State has an interest independent of and behind the titles of its citizens, in all the earth and air within its domain. It has the last word as to whether its mountains shall be stripped of their forests and its inhabitants shall breathe pure air.") (quoting *Georgia v. Tenn. Copper Co.*, 206 U.S. 230, 237 (1907)).

71. *Id.* at 1454–55.

72. *Id.* at 1466–67 (Roberts, C.J., dissenting) ("It is not at all clear how the Court's 'special solicitude' for Massachusetts plays out in the standing analysis, except as an implicit concession that petitioners cannot establish standing on traditional terms. But the status of Massachusetts as a State cannot compensate for petitioners' failure to demonstrate injury in fact, causation, and redressability.")

73. Seeing no contradiction, the Court cited *Alden* for the simple proposition that the States "retain the dignity, though not the full authority, of sovereignty." *Id.* at 1454 (quoting *Alden v. Maine*, 527 U.S. 706, 715 (1999)). *Alden*, discussed *supra* notes 31–35, provides that the Eleventh Amendment bars Congress from creating private rights of action that are enforceable against the states in state courts. *Alden*, 527 U.S. at 712.

74. Sarah C. Rispin, *Cooperative Federalism and Constructive Waiver of State Sovereign Immunity*, 70 U. CHI. L. REV. 1639, 1644 (2003).

75. *Id.* at 1644–45.

instances when executive recalcitrance or special interest capture has weakened the enforcement process.⁷⁶ Allowing private suits through a decentralized judiciary also enables individual plaintiffs to shape the content of the law, thereby minimizing the danger that environmental protection will have to be done through nationally uniform laws that do not respond to local variation.⁷⁷ Finally, commentators suggest that the prospect of citizen suits can confer legitimacy to novel regulatory schemes that might not otherwise garner public approval.⁷⁸

Sovereign immunity even frustrates plaintiffs' *Ex parte Young* suits against state officials.⁷⁹ For example, at least one court has suggested that plaintiffs may not challenge state regulatory actions under *Ex parte Young*, since state implementation of federal standards is technically an issue of state law.⁸⁰ Other courts have barred suits where the plaintiff could not identify *specific* state officials responsible for the alleged violation.⁸¹ Finally, even if sovereign immunity does not foreclose *all* avenues for enforcement,⁸² the states' aggressive reliance on sovereign immunity as a defense to suit ultimately

76. *Id.* at 1645 & n.36. See also James R. May, *Now More Than Ever: Trends In Environmental Citizen Suits*, 10 WIDENER L. REV. 1, 1–8 (2003) (highlighting the ongoing importance of citizen suits).

77. See Peter H. Schuck, *Citizenship in Federal Systems*, 48 AM. J. COMP. L. 195, 219–20 (2000).

78. For example, an EPA “regulatory flexibility initiative” (Project XL) initially met fierce criticism because it allows regulated entities to contract with state officials to obtain exemptions from generally applicable laws in exchange for enhanced environmental performance in other areas. Thomas E. Caballero, *Project XL: Making It Legal, Making It Work*, 17 STAN. ENVTL. L.J. 399, 403, 451 (1998). Increased citizen participation in the approvals and enforcement process has since assuaged some of those concerns. See *id.* at 449 (stressing the importance of political support, which would be lacking if the EPA shielded Project XL from citizen enforcement).

79. See generally Rispin, *supra* note 76, at 1647–50; Glicksman, *supra* note 58, at 764–65 (discussing the impact of the Eleventh Amendment on environmental law and seven cases decided since 2001 that were dismissed because of a state’s immunity).

80. *Bragg v. W. Va. Coal Ass’n*, 248 F.3d 275, 297–98 (4th Cir. 2001).

81. See, e.g., *Peat v. EPA*, 175 F.3d 422, 429 (6th Cir. 1999); *Sweat v. Hull*, 200 F. Supp. 2d 1162, 1175 (D. Ariz. 2001).

82. Prospective and injunctive relief remains available through Congress’s reliance on the Spending Clause, constructive waivers, and conditional preemption. Ernest A. Young, *State Sovereign Immunity and the Future of Federalism*, 1999 SUP. CT. REV. 1, 60–62 (2001) [hereinafter Young, *State Sovereign Immunity*]; but see *Coll. Sav. Bank v. Fla. Prepaid Postsecondary Ed. Expense Bd.*, 527 U.S. 666, 678–84 (1999) (narrowing the scope of the constructive waiver doctrine); Rispin, *supra* note 76, at 1653–55 (pointing out that conditional preemption, or “regulation as waiver,” has not been accepted in all circuits). Finally, Congress may already have power to abrogate under Article I through the use of *qui tam* actions. See Jonathan R. Siegel, *The Hidden Source of Congress’s Power to Abrogate State Sovereign Immunity*, 73 TEX. L. REV. 539 (1995).

inhibits decentralized enforcement by raising costs for individual plaintiffs.⁸³

Although states are technically still subject to federal law, state sovereign immunity makes it difficult for individual citizens to participate in its enforcement. State sovereign immunity thus creates a disincentive for Congress to delegate policymaking authority to the states and impedes effective governance.

D. *State Autonomy*

The Court has justified its sovereign immunity decisions by arguing that the doctrine protects state autonomy.⁸⁴ Sovereign immunity's contradictions with popular sovereignty and the hurdles it creates for cooperative governance are tolerable, the argument goes, because it is necessary to control the growth of the national government.⁸⁵ But is this a worthy sacrifice?

The concern for state autonomy is legitimate given the expansion of federal power over issues previously governed solely by the states. The incorporation of the first eight amendments of the Bill of Rights through the Fourteenth Amendment,⁸⁶ taken with Congress's ability to enforce the Fourteenth Amendment with appropriate legislation, established the supremacy of the federal government.⁸⁷ Congress also

83. Rispin, *supra* note 76, at 1650. See also Glicksman, *supra* note 58, at 764 ("The expansive interpretation of the Eleventh Amendment [recent Supreme Court decisions] reflect, however, has induced the lower courts on many occasions to block suits against states or state agencies seeking compliance with their responsibilities under federal environmental legislation.").

84. See, e.g., *Fed. Mar. Comm'n v. S.C. State Ports Auth.*, 535 U.S. 743, 760 (2002) ("The preeminent purpose of state sovereign immunity is to accord States the dignity that is consistent with their status as sovereign entities."); *Hilton v. S.C. Pub. Rys. Comm'n*, 502 U.S. 197, 206 (1991) (recognizing the "federalism-related concerns that arise when the National Government uses the state courts as the exclusive forum to permit recovery under a congressional statute"); *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 406 (1821) (writing for the Court, Marshall, C.J., explained that the Eleventh Amendment was designed primarily to protect States from being sued for their debts).

85. See, e.g., *Alden v. Maine*, 527 U.S. 706, 751 (1999) ("When the Federal Government asserts authority over a State's most fundamental political processes, it strikes at the heart of the political accountability so essential to our liberty and republican form of government."); *Dellmuth v. Muth*, 491 U.S. 223, 227–28 (1989) (applying clear statement rule in order to "temper" Congress's abrogation powers with "due concern for the Eleventh Amendment's role as an essential component of [the] constitutional structure").

86. See, e.g., *Gideon v. Wainwright*, 372 U.S. 335, 342 (1963) (holding that the Fourteenth Amendment incorporates the Sixth Amendment along with all other "provision[s] which [are] essential to a fair trial" and applies it to the states).

87. See William J. Rich, *Taking "Privileges or Immunities" Seriously: A Call To Expand the Constitutional Canon*, 87 MINN. L. REV. 153, 168–73 (2002).

invoked the Commerce Clause⁸⁸ to pass civil rights legislation directed against private acts of discrimination that would not have been within the scope of the Fourteenth Amendment.⁸⁹ The Commerce Clause thus became an “engine of expansion of federal authority,”⁹⁰ curtailing state autonomy in the process.

The Rehnquist Court attempted to check that expansion by redefining the outer limits of congressional authority.⁹¹ However, it did relatively little to correct the relative ease with which Congress can direct and limit the power of state governments.⁹² Indeed, in none of its decisions did the Court actually *return* any power to the states or seriously challenge the doctrine of federal supremacy.

Still, sovereign immunity does promote state autonomy in a number of ways. The chief argument in favor of sovereign immunity is

88. U.S. CONST. art. I, § 8, cl. 3.

89. *See, e.g.*, *Heart of Atlanta Motel v. United States*, 379 U.S. 241, 360 (1964) (upholding a federal law forbidding discrimination in public accommodations as a proper exercise of Congress’s power to regulate interstate commerce); *Katzenbach v. McClung*, 379 U.S. 294, 304 (1964) (upholding law forbidding discrimination in restaurants). The justification for these decisions, stemming from *United States v. Darby*, was that the channels of interstate commerce must remain free. 312 U.S. 100, 119 (1941).

90. James F. Blumstein, *Federalism and Civil Rights: Complementary and Competing Paradigms*, 47 VAND. L. REV. 1251, 1274 (1994). *See also* Halberstam, *supra* note 65, at 793 (stating that the “era of dual federalism ended with the . . . New Deal”).

91. *See, e.g.*, *City of Boerne v. Flores*, 521 U.S. 507, 519–20 (1997) (holding that, since Congress can only enforce established constitutional rights, legislation under section 5 of the Fourteenth Amendment must be congruent and proportional to an established constitutional violation); *United States v. Morrison*, 529 U.S. 598, 613 (2000) (limiting Violence Against Women Act because no connection to interstate commerce); *New York v. United States*, 505 U.S. 144, 149 (1992) (holding that Congress cannot compel action by the states); *Printz v. United States*, 521 U.S. 898, 932–33 (1997) (holding that Congress may not direct the functioning of the state executive).

92. *See, e.g.*, Adler & Kreimer, *supra* note 65, at 72–74, 80–81 (suggesting that federalism is designed to prevent abuses of power by national officials but that recent limitations on federal power do not create consistent, workable, or persuasive barriers to federal intrusion on states); Richard H. Fallon, Jr., *The “Conservative” Paths of the Rehnquist Court’s Federalism Decisions*, 69 U. CHI. L. REV. 429, 441 & n.48, 469 (2002) (noting that “state and local governments function as counterweights to national power,” but that the Court has “proceeded with relative caution” in its cases that limit Congress’s regulatory power and its ability to directly regulate the states); Michael C. Dorf, *No Federalists Here: Anti-Federalism and Nationalism on the Rehnquist Court*, 31 RUTGERS L.J. 741, 744 (2000) (“Even if the Court occasionally strikes down an Act as beyond Congress’ enumerated powers, on the whole, it will continue to give Congress wide latitude.”).

that it protects taxpayer resources from civil damages suits.⁹³ Roderick Hills has suggested that state officials lack sufficient incentive to protect the public resources from damages awards due to their competing loyalty to their federal counterparts and because lawsuit liability is usually paid not from program budgets but from separate state funds.⁹⁴ The fact that government officials are not closely monitored necessitates a system that protects the public fisc from excessive payouts.⁹⁵ By way of analogy, he likens sovereign immunity to the rule that bars private individuals from obtaining adverse possession against the government.⁹⁶ In addition, Richard Fallon has pointed out that sovereign immunity is part of a larger picture: “Beyond the principal paths of the Court’s federalism revival lies a thickening underbrush of subconstitutional doctrines comprising clear statement rules, equitable doctrines restricting federal judicial power, statutory interpretations that shield local governments from liability, and official immunity doctrines.”⁹⁷ These subconstitutional doctrines amplify the effect of the Court’s sovereign immunity rules, imposing additional barriers to the enforcement of federal law.

On balance, however, sovereign immunity does little to protect state autonomy. The Court explains that sovereign immunity preserves state dignity,⁹⁸ but the concern for state dignity is misplaced, both as a premise and in its application.⁹⁹ Prohibiting damages suits does not completely protect state budgets, given that officers can be sued for damages in their individual capacities and that states typically

93. *Edelman v. Jordan*, 415 U.S. 651, 663 (“Thus the rule has evolved that a suit by private parties seeking to impose a liability which must be paid from public funds in the state treasury is barred by the Eleventh Amendment.”).

94. *See* Roderick M. Hills, Jr., *The 11th Amendment as Curb on Bureaucratic Power*, 53 *STAN. L. REV.* 1225, 1236, 1246 (2001).

95. *See id.* at 1234–35.

96. *Id.* at 1235.

97. Fallon, *supra* note 92, at 490.

98. *See, e.g., Fed. Mar. Comm’n v. S.C. State Ports Auth.*, 535 U.S. 743, 760 (2002) (“The preeminent purpose of state sovereign immunity is to accord States the dignity that is consistent with their status as sovereign entities.”); *Idaho v. Coeur d’Alene Tribe*, 521 U.S. 261, 287–88 (1997) (stating that bringing state defendants into federal court would offend the “dignity” of the states).

99. Sovereign immunity does not shield states entirely, given that *Ex parte Young* suits tend to run against high profile officials. *See Ex parte Young*, 209 U.S. 123 (1907). But more importantly, the term “dignity” is a misnomer. The starting premise of popular sovereignty and limited government is that governmental actors have dignity because they are vested with power by the people and are subject to the rule of law. Thus, suability does not compromise state dignity; it is its source. *See Young, State Sovereign Immunity, supra* note 82, at 52–53. In contrast, state dignity is compromised by injunctive suits forcing a state to alter its plans.

indemnify their officers.¹⁰⁰ The doctrine (and Hills's justification for it) also falls short to the extent that it does not apply to municipalities.¹⁰¹ This is important because municipalities spend almost as much money in the aggregate as do state governments and are typically responsible for such important functions as education, law enforcement, and housing.¹⁰² Finally, granting states immunity from suit does not expand the scope of their policymaking authority. It is the states' capacity to govern that prevents their descent into irrelevance. Autonomy would be better served by a doctrine that ensured the states' ability to play a meaningful role in the shadow of an ever-expanding federal government.¹⁰³

Ernest Young has suggested that sovereign immunity is actually counterproductive in three important respects. First, sovereign immunity harms the overall enterprise of restoring balance in American federalism by expending "political capital" that the Court could have used more productively.¹⁰⁴ Young concedes that political capital is a "pretty vague concept,"¹⁰⁵ but argues that the Court's institutional legitimacy depends partly on the importance of the policies it disapproves, the perceived correctness of its decisions, and the frequency of its attempts to go against public and legislative opinion.¹⁰⁶ A shortfall of political capital will tend to act as an "internal constraint" on the Court's ability to restrain the federal government.¹⁰⁷ Second, the federal government's ways of circumventing sovereign immunity might weaken the states in the process. Congress could pressure states to waive their immunity through increased reliance on conditional fund-

100. Jesse H. Choper & John C. Yoo, *Who's Afraid of the Eleventh Amendment?: The Limited Impact of the Court's Sovereign Immunity Rulings*, 106 COLUM. L. REV. 213, 226 (2006) ("State indemnification creates an obvious functional loophole to sovereign immunity."); Fallon, *supra* note 92, at 464.

101. *See* *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 690 n.54 (1978).

102. Daniel J. Meltzer, *Member State Liability in Europe and the United States*, 4 INT'L J. CONST. L. 39, 45 & n.32 (2006).

103. *See* Young, *State Sovereign Immunity*, *supra* note 82, at 3 (2001) ("The greatest danger to federalism . . . is that the expanding regulatory concerns of the national government will leave the states with nothing to do."); Larry Kramer, *Understanding Federalism*, 47 VAND. L. REV. 1485, 1490 (1994) (recognizing the value of having "independent state and national governments competing for regulatory authority"). Granting states increased standing may be a step in the right direction. *See supra* notes 69–73 and accompanying text (discussing *Massachusetts v. EPA*, 127 S. Ct. 1438 (2007)).

104. Young, *State Sovereign Immunity*, *supra* note 82, at 59.

105. *Id.*

106. *Id.* at 58–59.

107. *See id.* at 58–60.

ing¹⁰⁸ and the conditional preemption doctrine.¹⁰⁹ Similarly, the executive branch could circumvent state immunity by bringing suits on its own, but doing so would encourage the growth of a federal bureaucracy and could discourage states from pursuing their own policy objectives for fear of incurring a federal lawsuit.¹¹⁰ Finally, sovereign immunity limits state autonomy by giving Congress a disincentive to devolve policymaking authority. This disincentive arises due to the fact that, where immunity applies, only the United States may file a suit to enforce a statute.¹¹¹ Immunity effectively prevents Congress from spreading the costs of enforcement on private litigants. Faced with the option of allowing conflicting state legislation and having to police it versus preempting it entirely, Congress might choose the latter.

These are grounds for concern. The Court has buttressed state autonomy by invoking dual federalism, a model that discourages cooperative governance and intrudes upon popular sovereignty.¹¹² While this resurrection could be strategic,¹¹³ it is surely misguided. Sovereign immunity does not increase the ability of states to govern, and it engenders legislative responses that limit state autonomy further. That the Court has gone down this road is surprising. After all, the importance of decentralized governance is perhaps the one point on which policymakers, proponents of federalism, and defenders of popular sovereignty might have actually reached agreement.

II.

THE EUROPEAN APPROACH

Part I argued that the Rehnquist Court's sovereign immunity decisions are problematic because they conflict with popular sovereignty, discourage cooperative governance and do little to promote

108. *Id.* at 60. Congress's authority to condition federal funding on state compliance could foreseeably result in a "proliferation" of conditional funding measures designed to expose states to private causes of action. *Id.*

109. *Id.* at 61–62 (discussing how Congress can use preemption to ban certain state activities unless the state accepts a condition such as amenability to suit, and noting that the breadth of the conditional preemption could "spur Congress to act in ways that leave the states less autonomy than before").

110. *Id.* at 62–63. *See also* Choper & Yoo, *supra* note 100, at 233–39.

111. The federal government cannot rely on waivers of sovereign immunity as a mode of uniform enforcement because states retain control over whether or not they seek a waiver. Young, *State Sovereign Immunity*, *supra* note 82, at 65.

112. *See supra* Parts I.B–C.

113. *See* Fallon, *supra* note 92, at 469 ("At least in part, the Court's heavy reliance on sovereign immunity reflects contingency and opportunism within a multifaceted effort to protect state and local governments from damages liability.").

state autonomy. It also noted that the anti-abrogation principle limits Congress's ability to compensate for these deficiencies by creating private rights of action.¹¹⁴ The following Part focuses on the differences between the American doctrine of sovereign immunity and its European counterpart. The European Court of Justice (ECJ), the highest court in the European Union,¹¹⁵ has held that an individual plaintiff may sue a member state for damages for failing to transpose a directive.¹¹⁶ The two polities have such divergent approaches for many reasons. Part II touches on these factors, but its primary purpose is to illustrate that the European approach upholds the same three values in Europe that state sovereign immunity in the United States does not.

A. Member State Liability in the European Union

Although the signatories in 1958 originally conceived of the Treaty of Rome¹¹⁷ as a compact between sovereign nations, major doctrinal shifts announced by the ECJ brought about a transformation that forever altered this relationship.¹¹⁸ This shift is evidenced by the doctrine of supremacy, which requires member states to integrate European Community (EC) legal norms into their own legal orders and acknowledge the supremacy of the EC legal norms in the event of a conflict.¹¹⁹ Similarly the doctrine of direct effect provides that legal norms at the Community level, if expressed clearly and uncondition-

114. *Supra* notes 76–77 and accompanying text.

115. CURIA, The Court of Justice of the European Communities, http://curia.europa.eu/en/instit/presentationfr/index_cje.htm (last visited Dec. 27, 2007). Since the ratification of the Treaty on European Union in 1993, the European Community (EC) and other organizations comprised of the same member nations have been called the European Union. European Union, THE COLUMBIA ENCYCLOPEDIA (6th ed. 2007), available at <http://www.bartleby.com/65/eu/EuropnUn.html> (referring to the EC as the “core” of the European Union).

116. Joined Cases C-6/90 & C-9/90, *Francovich v. Italy*, 1991 E.C.R. I-5357, paras. 37–41. Directives are issued by the European Council for the “approximation of such laws, regulations or administrative provisions of the member states as directly affect the establishment or functioning of the common market.” Treaty Establishing the European Community, at art. 94, 2002 O.J. (C 325) 33 [hereinafter EC Treaty]. Thus, a directive is a “flexible regulatory instrument” that effectively “binds Member States to a particular goal but leaves Member States to choose how to attain that goal.” See Rasmus Gokso, *Jurisprudence on Protection of Weaker Parties in European Contracts Law From a Swedish and Nordic Perspective*, 6 CHI.-KENT J. INT’L & COMP. L. 184, 186 n.5 (2006). A member state transposes the directive when national law guarantees that the member state will “effectively apply the directive in full.” Case C-144/99, *Comm’n v. Pays-Bas* [Neth.], 2001 E.C.R. I-3451 para. 17.

117. Treaty Establishing the European Economic Community, Mar. 25, 1957, 298 U.N.T.S. 3.

118. J.H.H. Weiler, *The Transformation of Europe*, 100 YALE L.J. 2403, 2405–07 (1991) [hereinafter Weiler, *Transformation*].

119. See *id.* at 2413–15.

ally, create private rights that are legally enforceable by other member states or private citizens against member states in national courts.¹²⁰

Working from these premises, the ECJ constructed an expansive theory of member state liability that it announced in *Francovich v. Italy*.¹²¹ The case arose when Italy failed to transpose an EC directive mandating that member states create a system to ensure that employees could collect unpaid wages from insolvent employers.¹²² The employees could not prevail under the direct effect doctrine because Italy's obligation was not clear and unconditional: the directive did not specify whether Italy should set up a public or a private system.¹²³ However, the ECJ held that the employees could prevail on the grounds that Italy had failed to comply with its obligation to implement the directive under the Treaty Establishing the European Community (EC Treaty).¹²⁴

Francovich stands for the proposition that a member state's non-implementation (or even mis-implementation) of a directive gives rise to an individual's right to sue.¹²⁵ In addition, the ECJ later ruled that member state courts must provide interim relief to prevent ongoing violations of Community law, even where such relief runs against national law¹²⁶ and even in the presence of alternate remedies.¹²⁷ Finally, liability can flow not only from legislative acts but also from executive or even judicial acts.¹²⁸

120. Case 26/62, *Van Gend en Loos v. Nederlandse Administratie der Belastingen* [Neth. Inland Revenue Admin.], 1963 E.C.R. 1. See also George A. Bermann, *Taking Subsidiarity Seriously: Federalism in the European Community and the United States*, 94 COLUM. L. REV. 332, 348–349 (1994); Weiler, *Transformation*, *supra* note 118, at 2413–14.

121. Joined Cases C-6/90 & C-9/90, *Francovich v. Italy*, 1991 E.C.R. I-5357.

122. *Id.* at paras. 1–3.

123. *Id.* at paras. 25–26.

124. *Id.* at paras. 40–45. The Treaty of Rome, *supra* note 117, was renamed the Treaty Establishing the European Community by the Treaty on European Union. Treaty on European Union, at art. G, Feb. 7, 1992, 1992 O.J. (C 191) 1, 31 I.L.M. 253.

125. Case 34/73, *Variola S.p.A. v. Amministrazione italiana delle Finanze* [Italian Fin. Admin.], 1973 E.C.R. 981, paras. 8–9. See also James E. Pfander, *Member State Liability and Constitutional Change in the United States and Europe*, 51 AM. J. COMP. L. 237, 251–52 (2003) [hereinafter Pfander, *Member State Liability*].

126. Case C-213/89, *The Queen v. Sec'y of State for Transp. ex parte Factortame Ltd.*, 1990 E.C.R. I-2433, paras. 19–23. Note that providing interim relief in this case required United Kingdom courts to overturn an act of Parliament.

127. Joined Cases C-46/93 & C-48/93, *Brasserie du Pêcheur SA v. Bundesrepublik Deutschland* [F.R.G.], 1996 E.C.R. I-1029, paras. 20–22, 74 (allowing member state liability even though the directives in question had direct effects and therefore were enforceable against private parties in member state courts).

128. *Id.* at para. 32 (stating that liability applies to “any case in which a Member State breaches Community law, whatever be the organ of the State whose act or omis-

This approach to member state liability is much broader than the American analogue. The fact that the European Union can create legally enforceable private rights against member states stands in sharp contrast to Congress's limited power to abrogate state sovereign immunity under *Seminole Tribe* and *Alden v. Maine*.¹²⁹ But just as the Supreme Court looked past the text of the Eleventh Amendment, so too did the ECJ decline to engage in rigorous application of the EC Treaty.¹³⁰ The *Francovich* opinion mentioned Article 5, under which member states are obliged "to take all appropriate measures . . . to ensure fulfillment of their obligations under Community law,"¹³¹ but *Brasserie du Pêcheur* conceded that "the Treaty contains no provision expressly and specifically governing the consequences of breaches of Community law by Member States."¹³² Furthermore, provisions authorizing "non-contractual" liability for Community institutions but recognizing only limited remedies against member states appear, by negative implication, to prohibit member state liability for damages.¹³³ Nevertheless, the ECJ formulated a broad theory of member state liability based on structural principles "inherent in the system of the Treaty"¹³⁴ that were necessary to ensure "the full effectiveness of Community rules."¹³⁵ Indeed, the Court never questioned whether damages were *necessary* in light of other remedies—it merely assumed that they were appropriate.¹³⁶

That the text plays a subordinate role brings us to a familiar set of questions: To what degree is member state liability consistent with

sion was responsible for the breach"). See also Pfander, *Member State Liability*, *supra* note 125, at 254–55.

129. See *supra* notes 26–35 and accompanying text.

130. The ECJ's tendency to privilege a conception of relations between the Community and member states that favors the supremacy of Community law and institutions is widely recognized. See Meltzer, *supra* note 102, at 50 ("[T]he ECJ has created a new legal order based on the supremacy and direct effect of European law and state liability for its violation, in order to ensure a reciprocal respect by the member states for the rule of European law and to carry out the purposes of the treaty as construed by the ECJ."); Bermann, *supra* note 120, at 353 ("The Court of Justice has thus taken virtually every opportunity that presented itself to enhance the normative supremacy and effectiveness of Community law in the national legal orders."); Weiler, *Transformation*, *supra* note 118, at 2416 (discussing "the willingness of the Court to sidestep the presumptive rule of interpretation typical in international law, that treaties must be interpreted in a manner that minimizes encroachment on state sovereignty").

131. Joined Cases C-6/90 & C-9/90, *Francovich v. Italy*, 1991 E.C.R. I-5357, para. 36.

132. Joined Cases C-46/93 & C-48/93, *Brasserie du Pêcheur*, at para. 27.

133. Pfander, *Member State Liability*, *supra* note 125, at 256–57.

134. Joined Cases C-6/90 & C-9/90, *Francovich*, at para. 35.

135. *Id.* at para. 33.

136. Meltzer, *supra* note 102, at 50.

the values that constitute the European Union? And to the extent that popular sovereignty, cooperative governance, and state autonomy find expression in the law of the European Union, are those values well served?

B. Popular Sovereignty

Describing the European Union as an embodiment of popular sovereignty seems problematic in light of the ongoing debates as to who constitutes the European people. Proponents of the “No Demos” thesis claim that the EC/European Union suffers from a “democracy deficit” on account of the linguistic, cultural and ethnic fragmentation that characterizes Europe.¹³⁷ It is argued that, in the absence of an identifiable “nation” on whose basis state power is to be exercised, the European Union and its institutions lack both the legitimacy and authority of a democratic state.¹³⁸ Under this view, to argue that member state liability vindicates popular sovereignty is to assume that binding decisions pronounced at the Community level represented the people to begin with.¹³⁹

But the popular sovereignty label is appropriate. Animating the push towards European integration was the desire to limit the nationalist excesses that culminated in World War II.¹⁴⁰ Given this history, Joseph Weiler has argued, it is essential to develop a vision of supranationalism that decouples nationhood from membership in the broader European political community.¹⁴¹ This does not require the

137. See, e.g., J.H.H. Weiler & Joel P. Trachtman, *European Constitutionalism and Its Discontents*, 17 NW. J. INT'L L. & BUS. 354, 377–85 (1996–97).

138. *Id.* at 377 (“The authority and legitimacy of a majority to compel a minority exists only within political boundaries defined by a demos.”).

139. See, e.g., Bundesverfassungsgerichts [BVerfG] [Federal Constitutional Court] Oct. 12, 1993, 89 Entscheidungen des Bundesverwaltungsgerichts [BVerfGE] 155 (X) (F.R.G) (“Maastricht Decision”), available at <http://www.servat.unibe.ch/dfr/bv089155.html> (English translation available in *DAS MAASTRICHT-URTEIL DES BUNDESVERFASSUNGSGERICHTS VOM 12. OKTOBER 1993: DOKUMENTATION DES VERFAHRENS MIT EINFÜHRUNG 751–99* (Ingo Winkelmann et al. eds., 1994) (holding that the Treaty on European Union could not be recognized under German law because it was not a democratic expression of the people’s will).

140. See *From Milosevic’s Reign to the European Union: Serbia and Montenegro’s Stabilization and Association Agreement*, 21 TEMP. INT’L & COMP. L.J. 147, 149 (2007); Mark C. Anderson, *A Tougher Row to Hoe: The European Union’s Ascension as a Global Superpower Analyzed through the American Federal Experience*, 29 SYRACUSE J. INT’L L. & COM. 83, 92 (2001); Thomas Andrew O’Keefe, *Economic Integration as a Means for Promoting Regional Political Stability: Lessons from the European Union and MERCOSUR*, 80 CHI.-KENT L. REV. 187, 188–91 (2005).

141. See J.H.H. Weiler, *Does Europe Need a Constitution? Demos, Telos and the German Maastricht Decision*, 1 EUR. L.J. 219, 240–42 (1995) [hereinafter Weiler, *Demos*].

outright rejection of nationalism; after all, the EC Treaty speaks of the “peoples” of Europe.¹⁴² Instead, Weiler writes that their history should encourage Europeans to subscribe to an organizing myth based on pluralism, shared values and duties, and a culture of reason that (when necessary) transcends ethno-national differences.¹⁴³ Similarly, Jürgen Habermas’s theory of constitutional patriotism describes a European civil society bound by a common political fate.¹⁴⁴ His is an image of what Europe might become, and he emphasizes that the European Union and its institutions might play an important role in helping the peoples of Europe move beyond their differences.¹⁴⁵ These two approaches dispense with the “No Demos” thesis and sponsor the notion of a European democracy and the idea that the European peoples have in their sovereign capacities delegated authority to the European Union.

It follows that empowering individuals to enforce Community law against member states is a means of promoting popular sovereignty and a particularly appropriate one at that. After all, member state liability does more than provide the individual citizen with “make-whole” damages in the event of member state torts. It also enforces member state compliance, reflecting the post-war interest in safeguarding fundamental rights, which in turn legitimizes Community institutions and furthers the project of integration. Accordingly, there is a strong connection between member state liability and the supranationalist vision of popular sovereignty. By allowing plaintiffs to vindicate individual rights granted under Community law against member states, member state liability prevents the erosion of the peoples’ sovereign will.

C. Cooperative Governance

Member state liability also benefits the European Union by enabling the Community to enlist member state support in the implementation of policy measures. Similar to Part I.C, this Section proceeds with two observations: that the European Union and the member states recognize effective policymaking as a value in its own right, and that

142. See EC Treaty, *supra* note 116, at preamble (“DETERMINED to lay the foundations of an ever closer union among the peoples of Europe”).

143. Weiler, *Demos*, *supra* note 141, at 240–42, 256.

144. Jürgen Habermas, *Why Europe Needs a Constitution*, 11 *NEW LEFT REV.*, Sept.–Oct. 2005, at 5, 15–16, available at <http://www.newleftreview.org/A2343>.

145. *Id.* at 17–18 (“The function of the communicational infrastructure of a democratic public sphere is to turn relevant societal problems into topics of concern, and to allow the general public to relate, at the same time, to the same topics . . .”).

effective policymaking frequently requires cooperation between Community and national institutions.

Cooperative governance is an appropriate standard with which to judge the European Union, partly because the ideal of cooperation lies at the heart of European governance.¹⁴⁶ Whereas the U.S. Constitution forbids Congress from directing state legislatures to act,¹⁴⁷ the European system contemplates it quite explicitly.¹⁴⁸ This divergence of approaches stems from a variety of interpretive, structural, and institutional factors,¹⁴⁹ but one major consideration is the fact that many member states initially viewed their membership in the Community as a matter of self-interest and political expediency.¹⁵⁰ For example, the Treaty of Rome grew out of a desire to create a single economic market.¹⁵¹ The Community's growing list of competences may be justified retroactively by a similar desire for coordinated action. Thus, as a

146. See EC Treaty, *supra* note 116, at art. 10 ("Member States shall take all appropriate measures, whether general or particular, to ensure fulfillment of the obligations arising out of this Treaty or resulting from action taken by the institutions of the Community. They shall facilitate the achievement of the Community's tasks. They shall abstain from any measure which could jeopardise the attainment of the objectives of this Treaty."). See also Joined Cases 6 & 11/69, *Comm'n of the Eur. Cmty. v. France*, 1969 E.C.R. 523, para. 16 (urging member states to give due regard to "the solidarity which is at the basis . . . of the whole of the Community system . . ."). I stress the word "ideal" in recognition of the fact that securing cooperation has not always been easy.

147. *New York v. United States*, 505 U.S. 144, 178 (1992) ("No matter how powerful the federal interest involved, the Constitution simply does not give Congress the authority to require the States to regulate. The Constitution instead gives Congress the authority to regulate matters directly and to pre-empt contrary state regulation. Where a federal interest is sufficiently strong to cause Congress to legislate, it must do so directly; it may not conscript state governments as its agents.").

148. See EC Treaty, *supra* note 116, at art. 249 (providing explicitly for directives that "shall be binding, as to the result to be achieved, upon each Member State to which it is addressed, but [which] shall leave to the national authorities the choice of form and methods").

149. See Meltzer, *supra* note 102, at 65–66. See, e.g., Cliona J. M. Kimber, *A Comparison of Environmental Federalism in the United States and the European Union*, 54 MD. L. REV. 1658, 1685–88 (1995) (summarizing the causes for divergent forms of federalism in the context of problems of environmental law).

150. Weiler, *Transformation*, *supra* note 118, at 2481 ("The Community is conceived in this way of thinking not as a redefinition of the national self but as an arrangement, elaborate and sophisticated, of achieving long-term maximization of the national interest in an interdependent world. Its value is measured ultimately and exclusively with the coin of national utility and not community solidarity.").

151. Ilene Knable Gotts et al., *Nature vs. Nurture and Reaching the Age of Reason: The U.S./E.U. Treatment of Transatlantic Mergers*, 61 N.Y.U. ANN. SURV. AM. L. 453, 463 ("In 1957, the six countries that comprised the ECSC entered into the Treaty of Rome to expand their cooperation beyond the steel and coal industries. They agreed to work towards integration into a single economic community; over time, the community expanded, such that today the European Union includes 25 countries.").

practical matter, the European Union's continuing legitimacy depends on its ability to regulate effectively and efficiently.

This focus gave rise to a mode of Community-member state relations that Daniel Halberstam has characterized as a system of "liberal fidelity."¹⁵² Liberal fidelity, he argues, describes a system of federal relations that imposes "duties of assistance and restraint" on both the "central government and the constituent states" to ensure effective governance at both levels.¹⁵³ For example, a member state can plead impossibility as a defense to its failure to implement a directive, but it must take the additional step of cooperating with the Commission in order to find a solution.¹⁵⁴ Subsidiarity similarly codifies the principle that Community institutions should not aggrandize power but that they should instead devolve regulatory authority to national institutions where doing so would be more effective.¹⁵⁵

The *Francovich* decision supports cooperative governance in two ways. First, it allows individual plaintiffs to enforce the proper implementation of directives. Holding member states accountable in this respect is important, as the European Union relies heavily on member states to implement and enforce its regulations.¹⁵⁶ However, while an American court could treat the lack of enforcement as a question of state law and bar the individual's suit against the member state,¹⁵⁷ a member state court could not. Member states have a enforceable duty to ensure that all directives are properly implemented.¹⁵⁸ Second, enforcing the proper implementation of directives promotes subsidiarity. After all, a decision to pass a directive rather than a regulation reflects a judgment, as required by the subsidiarity principle, that allowing the member states to choose their own method of attaining a Community-wide standard would be more effective than the Community passing a law itself.¹⁵⁹ Discretion plays no small role in this judgment.¹⁶⁰ It is

152. Halberstam, *supra* note 65, at 737.

153. *Id.* at 765.

154. *Id.* at 769.

155. *See infra* Part II.D. *See also infra* note 166 and accompanying text (explaining the subsidiarity principle).

156. Bermann, *supra* note 120, at 399.

157. *See Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89 (1984) (holding that the Eleventh Amendment can be used to bar federal courts from ordering state officials to conform their conduct to state law).

158. *See* Halberstam, *supra* note 65, at 773 ("[M]ember states [must not only] pass formal implementing legislation, but also . . . ensure the directives' practical effectiveness." (citing Case C-336/97, *Commission v. Italy*, 1999 E.C.R. I-3771, para. 15)).

159. Bermann, *supra* note 120, at 382 ("Subsidiarity thus essentially describes a method of policy analysis that each participant in the Community's legislative process should follow in deciding whether to propose, endorse, or enact a given measure.").

160. *See id.*; *infra* notes 170–171 and accompanying text.

likely that the doctrine's role in ensuring that member states will not externalize the costs of regulation encourages Community actors to rely on directives in the first place.

This Note does not claim that *Francovich* corrects all of the structural deficiencies that may affect the European Union. To the extent that it does make a difference, however, allowing individuals to police member state implementation of Community directives has the tendency to improve member state compliance and helps the Community achieve its policy objectives.

D. Member State Autonomy

Part I.D argued that the Supreme Court sacrificed popular sovereignty at the altar of federalism, limiting the potential for cooperative governance in the hopes that granting the states immunity from suit would ensure their vitality. In *Francovich* and the cases that followed, however, the ECJ went in the other direction.¹⁶¹ It articulated a doctrine of member state liability that functions within a supranationalist vision of popular sovereignty and encourages member state accountability.

Whether *Francovich* actually *protects* member state autonomy is the wrong question. The case was argued and decided on the basis of its consistency with a vision of a unified, postwar Europe in which the Community was the preeminent source of authority.¹⁶² It clearly undermines member state autonomy to some extent, as it enables individual plaintiffs to disrupt national budgets by bringing damages suits against member states for their refusal to implement Community directives. Given the ECJ's emphasis on ensuring member state accountability,¹⁶³ it would have been ironic indeed if *Francovich* had resulted in an increase in member state power.

Instead, *Francovich* is important because it helped trigger the desire for subsidiarity.¹⁶⁴ Formally established in the Maastricht

161. See Joined Cases C-6/90 & C-9/90, *Francovich v. Italy*, 1991 E.C.R. I-5357, paras. 33, 35; Case C-213/89, *The Queen v. Sec'y of State for Transp. ex parte Factortame Ltd.*, 1990 E.C.R. I-2433, paras. 21–23; Joined Cases C-46/93 & C-48/93, *Brasserie du Pêcheur SA v. Bundesrepublik Deutschland* [F.R.G.], 1996 E.C.R. I-1029, paras. 25–31.

162. See John Temple Lang, *New Legal Effects Resulting from the Failure of States to Fulfill Obligations Under European Community Law: The Francovich Judgment*, 16 *FORDHAM INT'L L.J.* 1, 19–20 (1992) (arguing that even before *Francovich* the ECJ's decisions prioritized the Community's needs over those of the member state).

163. Joined Cases C-6/90 & C-9/90, *Francovich*, at paras. 38–46. See Lang, *supra* note 162, at 20–21.

164. Edward T. Swain, *Subsidiarity and Self-Interest: Federalism at the European Court of Justice*, 41 *HARV. INT'L L.J.* 1, 4–6 (2000) (“Subsidiarity is a critical reac-

Treaty,¹⁶⁵ the subsidiarity principle provides that in areas of concurrent authority, Community institutions should act “only if and insofar as the objectives of the proposed action cannot be sufficiently achieved by the Member States”¹⁶⁶ The Edinburgh Council similarly defined subsidiarity as allowing Community action *only* if its legislative “objectives ‘cannot be sufficiently achieved by Member State action’ and ‘can . . . be better achieved by action on the part of the Community.’”¹⁶⁷ Thus, the purpose of subsidiarity is to preserve the role of the member states.¹⁶⁸ Honoring the principle increases member state autonomy.

Francovich's value consequently lies in what it does *not* do—namely, that it encourages accountability without threatening subsidiarity. For example, *Francovich* does not enlarge Community competences. It also stays out of areas within the scope of national regulatory authority, provided that the alleged violations are divorced from a member state's transposition of a directive. As a result, national liability for governmental torts, breaches of contract, and property takings frequently remains within the discretion of the member states.¹⁶⁹

To the extent that member state liability does relate to subsidiarity, the impact is negligible. The task of weighing the benefits of acting locally versus at the Community level falls squarely on the political rather than the judicial branches,¹⁷⁰ as courts are ill-equipped to engage in the predictions and discretionary tradeoffs that the principle requires.¹⁷¹ As a result, subsidiarity tends to resurface in litigation only as a procedural norm obliging Community institutions to have

tion not only to the gradual shift in legislative authority from the Member States-dominated Council to more autonomous Community institutions, but also to the Court of Justice's expansive interpretation of Community powers against the apparent interest of Member States.”).

165. Treaty on European Union, Feb. 7, 1992, 1992 O.J. (C 191) 1, 31 I.L.M. 253.

166. EC Treaty, *supra* note 116, at art. 5. See Bermann, *supra* note 120, at 332–34.

167. Bermann, *supra* note 120, at 369.

168. See, e.g., *id.* at 339–43. Bermann argues that that subsidiarity is important because of the values it fosters, namely, self-determination and accountability, political liberty, flexibility, preservation of local identities, diversity, and respect for the internal divisions within component states. *Id.* Without subsidiarity, Community competences could preempt all member state action and foreclose the possibility of cooperative governance.

169. James E. Pfander, *Government Accountability in Europe: A Comparative Assessment*, 35 GEO. WASH. INT'L L. REV. 611, 636 (2003).

170. Bermann, *supra* note 120, at 382; see *supra* notes 159–160 and accompanying text.

171. *Id.* at 391.

considered subsidiarity during the legislative process.¹⁷² The legislative process itself likely benefits from member state liability. The process entails the political branches assessing whether the gains achieved through regulation at the Community level exceed the gains that could be achieved by the member states themselves.¹⁷³ Honest assessment of that gain requires policymakers to discount the rate of member state noncompliance with the future directive. By providing a right of action to enforce member state compliance with existing directives, *Francovich* minimizes the amount by which Community actors have to discount member state noncompliance and thus makes the subsidiarity calculation simpler.¹⁷⁴

Thus, the *Francovich* doctrine is entirely appropriate for the European Union. It asserts the ideological primacy of popular sovereignty by forcing individual member states to acknowledge the collective will of the peoples of Europe, and it encourages cooperative governance by allowing the Community to hold member states accountable for their failure to implement directives. Moreover, it accomplishes the above without significant detriment to member state autonomy.

III.

ADOPTING A EUROPEAN APPROACH TO LEGISLATIVE ABROGATION

This Note has examined the degree to which the American and European immunity rules serve the values identified at the outset: popular sovereignty, cooperative governance, and state autonomy. Unlike the American approach, the *Francovich* doctrine comports with all three values. The doctrine allows individual citizens to sue member states for failing to transpose Community directives. It realizes a supranationalist vision of popular sovereignty without threatening member state autonomy or undermining subsidiarity and in the process acts as a vehicle for Community policy measures and the project of integration as a whole. The conclusion thus far is that member

172. Ernest A. Young, *Protecting Member State Autonomy in the European Union: Some Cautionary Tales from American Federalism*, 77 N.Y.U. L. REV. 1612, 1680 (2002) [hereinafter Young, *Protecting Member State Autonomy*].

173. See Bermann, *supra* note 120, at 384 (“Determinations of this sort are of course profoundly political in that they entail judgments about how much each incremental gain in economic integration is worth in costs to certain other values, notably the values (for example, diversity) underlying subsidiarity itself.”).

174. See *id.* at 385 (describing the difficulty of practicing subsidiarity without being able to forecast whether member states will comply with a Community goal).

state liability succeeds in Europe but sovereign immunity fails in the United States.

Arguing that it would be feasible to import the doctrine of member state liability into the United States is an entirely different—and complicated—matter. From a purely doctrinal perspective, allowing Congress to abrogate sovereign immunity and authorize damages suits against states under its Article I powers would overrule, at the very least, *Seminole Tribe* and *Alden v. Maine*.¹⁷⁵ But adopting a functional perspective illustrates additional problems with respect to state autonomy. Given the historical, structural, and institutional differences that distinguish the American and European systems, there is reason to doubt whether member state liability would function in the United States in the same way that it has in Europe. To put it another way, state sovereign immunity is a cornerstone of the American approach to federalism, for better or for worse. Thus it would not be unreasonable to pause and question whether eliminating the anti-abrogation principle might somehow alter the larger federal-state balance.

Asking how *Francovich* would impact the American states leads us to a methodology that the Supreme Court endorsed in *Garcia v. San Antonio Metropolitan Transit Authority*.¹⁷⁶ Citing the “elusiveness of objective criteria for ‘fundamental’ elements of state sovereignty,”¹⁷⁷ Justice Blackmun suggested that state autonomy is “more properly protected by procedural safeguards inherent in the structure of the federal system than by judicially created limitations on federal power.”¹⁷⁸ This Note’s functional approach is a reflection of that observation, and the following discussion on whether the American system could adopt *Francovich* continues in that same mode. The question is assuredly not whether allowing for abrogation would erode the set of entitlements that the states retained at the time the Constitution was ratified.¹⁷⁹ Adopting *Francovich* will be feasible only if it can be shown

175. See *Seminole Tribe v. Florida*, 517 U.S. 44 (1996) (prohibiting Congress, pursuant to its Article I powers, from authorizing federal courts to hear damages suits against the states); *Alden v. Maine*, 527 U.S. 706 (1999) (prohibiting Congress from circumventing sovereign immunity restrictions by creating a cause of action that is enforceable in state courts).

176. *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985).

177. *Id.* at 548.

178. *Id.* at 552. See also *id.* at 554 (“[A]gainst this background, we are convinced that the fundamental limitation that the constitutional scheme imposes on the Commerce Clause to protect the ‘States as States’ is one of process rather than one of result.”).

179. See *Alden*, 527 U.S. at 713 (“[T]he States’ immunity from suit is a fundamental aspect of the sovereignty which the States enjoyed before the ratification of the Constitution”); *Seminole Tribe*, 517 U.S. at 54 (“The Amendment is rooted in a

that the American system provides adequate political safeguards of federalism *independent* of the state sovereign immunity doctrine. On the other hand, if allowing legislative abrogation would lead to an undesirable expansion in congressional authority at the expense of the states, then the current incursions on popular sovereignty and the government's interest in cooperative governance may well be justified.

Daniel Meltzer summarizes the reasons why courts should be cautious about introducing *Francovich* into the American system. First, the United States features a decentralized system of federal courts, with Supreme Court review of state court decisions. Creating federally enforceable causes of action could have a significant impact given the strength of the federal judiciary.¹⁸⁰ In contrast, Europe does not have any lower level Community courts.¹⁸¹ Suits must begin in national courts, and although judges are supposed to refer unsettled questions of Community law to the ECJ, failures to do so are "reasonably common and cannot be reviewed, no matter how serious."¹⁸² Second, the ability of public authorities to enforce federal law is already quite strong in the United States.¹⁸³ The European bureaucracy lacks the resources, investigative power, and ability to impose remedies enjoyed by its American counterpart.¹⁸⁴ Thus, member state liability is arguably more necessary in the European Union than in the United States.¹⁸⁵ Finally, Congress already has ways of implementing federal policy at the state level, such as through the Taxing and Spending Clause.¹⁸⁶ The Community, on the other hand, can neither withhold funding nor threaten to govern without the member states' assistance.¹⁸⁷ It would also be unlikely to impose coercive remedies due to the requirement that it negotiate possible outcomes under Article 228 and because of the member states' direct participation in the Council.¹⁸⁸ The result, Meltzer writes, is that whereas "[i]n the [Com-

recognition that the States, although a union, maintain certain attributes of sovereignty, including sovereign immunity.'" (quoting *Puerto Rico Aqueduct & Sewer Auth. v. Metcalf & Eddy*, 506 U.S. 139, 146 (1993))). *But see* Halberstam, *supra* note 65, at 800 (criticizing this aspect of the Court's jurisprudence on the grounds that it "fails to consider the states as part of the larger constitutional enterprise of effective democratic federal governance").

180. *See* Meltzer, *supra* note 102, at 62.

181. *Id.* at 63.

182. *Id.* at 63-64.

183. *Id.* at 64.

184. *Id.*

185. *Id.* at 64-65.

186. *See* U.S. CONST. art. I, § 8, cl. 1 (allowing Congress to direct state legislatures and executives through conditional funding).

187. *Id.* at 65-66.

188. *Id.* at 64-65 & n.151.

munity], state liability was a more essential tool for ensuring compliance by member states,” the more robust combination of private and public enforcement obviated the need for a similar doctrine in the United States.¹⁸⁹

It would follow that the core sovereign immunity decisions should stand because they are part of the delicate balance between state and federal power.¹⁹⁰ However, it is important to distinguish state autonomy from state lawlessness. The former is a legitimate concern of effective governance, but there are strong normative arguments against federalism doctrines whose primary effect is to limit state accountability.¹⁹¹ Thus, Meltzer’s argument is unappealing because it comes dangerously close to recognizing a state prerogative to disobey federal law. It is also unpersuasive. Since states are not protected from suits brought by the United States, blocking private enforcement encourages the growth of federal power by creating the need for a larger federal bureaucracy¹⁹² and by concentrating enforcement discretion in the national executive.¹⁹³

Meltzer’s argument is far more persuasive as it relates to Europe. Relying on member states to implement Community law creates the need for a mechanism to ensure member state accountability; member state liability fills that vacuum. However, the fact that the European Union requires abrogation to function does not necessarily mean that the United States would be at risk in adopting it as well. As Ernest Young points out, sovereign immunity actually has a somewhat modest impact on the balance of power between the state and federal governments.¹⁹⁴ This is because autonomy derives not from the states’ immunity from suit but from regulatory decentralization and the states’ ability to express their own policy preferences, devise unique solutions for local problems, and thereby compete with the federal government for the loyalty of their citizens.¹⁹⁵ It follows that if sover-

189. *Id.* at 66.

190. *Id.* at 67 (“I suggested earlier that a fragile polity—the United States of the 1790s—might hesitate to impose dramatic judicial remedies on member states. Here, however, I am suggesting that the strength of a polity—as measured by the availability of remedies, other than state liability, for the enforcement of federal law—may also lead to hesitation.”).

191. See *supra* Part I.B (arguing that limiting state accountability is inconsistent with popular sovereignty); Part I.C (describing how sovereign immunity frustrates cooperative governance).

192. See *Alden v. Maine*, 527 U.S. 706, 810 (1999) (Souter, J., dissenting).

193. See *supra* note 110 and accompanying text.

194. Young, *State Sovereign Immunity*, *supra* note 82, at 55–58.

195. *Id.* at 43 (arguing that “the most important interest of the states lies in making sure that, despite the proliferation of federal activity, they retain something to *do*”).

eign immunity has little effect on state autonomy, eliminating the doctrine will have a similarly negligible impact.

I do not mean to be glib in my assumption that allowing Congress to abrogate would make little difference, as it is possible that Congress could go quite far in abrogating state sovereign immunity. As an illustration, consider what could happen with damages. Whereas the relatively strict standing rules in the European Union limit the extent to which sovereign immunity can hurt a member state's vitality, the absence of such hurdles in the United States could seriously destabilize a state government. For example, a state's failure to honor a state implementation plan submitted under the Clean Air Act could theoretically subject the state to suits by many of its citizens, not to mention citizens of nearby states.¹⁹⁶ The sheer number of suits could overwhelm state resources. Even calculating damages would be hard in these cases, as it would be difficult to quantify the dollar value of the harm that a person suffered from breathing in unclean air.

The point to bear in mind, however, is that allowing Congress to create a private right of action does not exclude the possibility that Congress can shape the content of that right. Congress could decide, for example, not to authorize damages under the Clean Air Act at all. Alternately, it could authorize suits for damages but cap the states' liability or prevent repetitive suits by requiring claims to be consolidated and only allowing compensation from some sort of fund. Congress could also restrict the class of eligible plaintiffs by fashioning tighter standing requirements.¹⁹⁷ Indeed, adopting a European approach at this stage has the principal advantage of leaving sovereign immunity intact as a default option. Only where Congress affirmatively abrogated sovereign immunity would the states become subject to individual suit.

One can only speculate whether Congress would exercise its newfound abrogation power with restraint, but the fact that it could do so in any number of ways suggests that it would be possible for the

196. I assume for the purposes of this hypothetical that any such plaintiffs could meet the constitutional requirements for standing. *See* *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 577 (1992) (requiring, for the purposes of Article III standing, more than an "undifferentiated public interest in executive officers' compliance with the law").

197. Similar approaches have been proposed in the European Union. *See* Ari Afilalo, *How Far Francovich?: Effective Judicial Protection and Associational Standing to Litigate Diffuse Interests in the European Union* (Jean Monnet Ctr. for Int'l and Reg'l Econ. Law & Justice, N.Y. Univ. Sch. of Law, Working Paper No. 1, 1998), available at <http://www.jeanmonnetprogram.org/papers/98/98-1-.html>.

Court to decide whether a particular act of abrogation took power that was reserved for the states under the Tenth Amendment.¹⁹⁸ *Garcia* would generally allow Congress to abrogate sovereign immunity, provided that in doing so it had not effectively limited the states' role in the political process.¹⁹⁹ Additionally, the American political system features a variety of structural and behavioral safeguards of state interests.²⁰⁰ Thus, in many instances, limiting a state's immunity from suit would be acceptable because abrogation does not narrow the scope of a state's regulatory authority. On the other hand, the circumstances might be different if Congress had neglected to control the extent of state vulnerability and significant damages liability accrued—for example, if Congress authorized private suit under the Clean Air Act in the reckless manner suggested above. In that instance, the Court might recognize that the extent of the liability was not merely a function of the state's violation but was due to the nature of the private right that Congress had recognized. If that were the case, the state might be able to challenge the abrogation of its immunity by showing that the damages were so extensive as to limit its ability to participate in national governance.

CONCLUSION

Allowing Congress to abrogate state sovereign immunity is not without its drawbacks. The main problem is that the Court would have to police legislative abrogation from time to time and would have to resort to the sort of indeterminate balancing test that many justices and commentators do not like. The analysis it would have to undertake also lacks the apparent simplicity of cases like *Alden v. Maine*, where the Court was able to reach a holding, based on a historical

198. See U.S. CONST. amend. X. ("The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.")

199. See *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 556 (1985) ("But the principal and basic limit on the federal commerce power is that inherent in all congressional action—the built-in restraints that our system provides through state participation in federal governmental action."). See also *South Carolina v. Baker*, 485 U.S. 505, 513 (1988) (refusing to find that Congress exceeded its boundaries since "the national political *process* did not operate in a defective manner" (emphasis in original)).

200. Herbert Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 COLUM. L. REV. 543, 558 (1954). See also Larry D. Kramer, *Putting the Politics Back into the Political Safeguards of Federalism*, 100 COLUM. L. REV. 215, 278–79, 284–85 (2000) (describing how federalism is protected by decentralized operations of political parties and the interdependency of state and federal officials).

conception of what sovereignty meant, that established a bright-line rule for subsequent courts to follow.

This approach is necessary nonetheless because it is the only way to correct a doctrine of state sovereign immunity that is at odds with the most basic principles of our federal system. Sovereign immunity frustrates popular sovereignty—the principle that sovereignty resides in the people and that governments are subject to the rule of law—by forcing individuals to file often-ineffective suits against state officials rather than against the states themselves. Second, it limits the state and federal governments' attempts to legislate in concert in such areas as environmental law by reducing state accountability and undermining the reach of citizen suits. Reducing state accountability tends to create a disincentive for Congress to delegate regulatory authority to the states. Third, these drawbacks cannot be justified in the name of the federalist concern for state autonomy. The Eleventh Amendment only grants states immunity from suit; it does nothing to protect their ability to govern. Finally, it may even be counterproductive, as inconsistent enforcement gives the federal government incentive to consolidate, rather than delegate, power.

The European system tells a completely different story. Under *Francovich*, an individual may sue a member state in its own courts for damages in order to bring about the member state's compliance with a Community directive. This approach affirms the primacy of the individual plaintiff in a manner that underscores a supranationalist vision of popular sovereignty. It encourages member state accountability, which enables the Community and member states to engage in cooperative governance. *Francovich* also gives member state autonomy its due regard. It neither enlarges Community competences nor creates damages liability for violations of purely national law. It avoids conflict with subsidiarity, the principle that regulation should occur at the member state level whenever possible. Making member states accountable for their failure to implement Community directives simplifies the political branches' inquiry into whether regulation at the member state level would be more efficient and encourages the devolution of policymaking authority.

While acknowledging the difficulties involved in importing fragments of one political structure to another, this Note contends that it would be feasible for the Supreme Court to emulate *Francovich* and recognize Congress's power to abrogate state sovereign immunity. Some judicial oversight would be necessary given the variety of factors, relating primarily to the structure of enforcement, that distinguish the American and European systems. However, the existence of

methods through which Congress could mitigate state liability—for example, by limiting recoverable damages or by restricting standing—suggest that there are ways for Congress, and in turn the courts, to vindicate popular sovereignty and enhance state accountability while keeping the autonomy of the states intact.

