DOUBLE IMMUNITY

Aaron Tang*

The Rehnquist Court's so-called "Federalism Revolution" has received no shortage of scholarly attention. Under the conventional narrative, the Court pushed back against the encroaching tide of federal power in three spheres: it limited the scope of Congress's Commerce Clause authority, struck down laws infringing upon state sovereignty under the Tenth Amendment, and expanded the doctrine of state sovereign immunity to curtail federal power to subject unwilling states to private lawsuits. Yet in late 2010, the Court issued a decision that confirms the muted impact of the Rehnquist Court's rulings in the last of the three spheres. In Sossamon v. Texas*, the Court acknowledged that even though state sovereign immunity prevents Congress from unilaterally subjecting states to private suits without their consent, Congress retains substantial power to purchase the states' consent under the Spending Clause.*

The Court in Sossamon *proceeded to disallow a private damages action against Texas on different grounds, however. The Court held that even though the state had consented to be sued as a condition of its acceptance of certain federal funds, such a general waiver of immunity from suit was not enough to allow a damages action to proceed because the state had not expressly consented to be sued for monetary relief.*

This "double immunity" requirement—that a sovereign must not only waive its immunity expressly from suit but also from monetary claims—is of recent and undocumented vintage. Yet already it has had an enormous impact, barring private litigants from obtaining remedies for injuries visited upon them by a sovereign defendant even though the sovereign has already agreed to be sued. The rule's impact is trans-substantive too, insulating state and federal sovereign entities alike from monetary judgments in a wide spectrum of cases involving religious liberties, discrimination on the basis of disability, statutory privacy rights, and government destruction of private property. This Article explores the origins and effects of the Court's double immunity rule, and ultimately proposes a new

* Associate Fellow, Constitutional Law Center, Stanford Law School and Law Clerk to the Honorable J. Harvie Wilkinson III, U.S. Court of Appeals for the Fourth Circuit (2012-2013). I thank Pam Karlan for her guidance in this project, Kevin Russell for his encouragement developing many of the thoughts presented herein, and Jeffrey Fisher, Tom Goldstein, and Amy Howe for the opportunity to work on these issues through the Stanford Supreme Court Litigation Clinic and the matter of *Sossamon v. Texas* in particular. I also thank Michael McConnell for his support. Thanks in addition to the *Stanford Law Review* editing team for their outstanding feedback and assistance. Lastly, and most importantly, I thank Elizabeth Tang for her patience and kindness in all things.

approach to determining whether a private party may sue a sovereign for monetary relief.

> The exemption of the sovereign from suit involves hardship enough, where consent has been withheld. We are not to add to its rigor by refinement of construction, where consent has been announced.
>
> —Justice Benjamin Cardozo[1]

INTRODUCTION

When followers of the Supreme Court discuss the most prominent cases of the 2010 Term, the Court's relatively obscure decision in *Sossamon v. Texas* is

1. Anderson v. John L. Hayes Constr. Co., 153 N.E. 28, 29-30 (N.Y. 1926).

rarely mentioned.[2] At first glance, the omission is perhaps for good reason. The case involved an unexceptional (albeit serious) factual scenario: a prisoner who claimed that the state had prevented him from worshipping in a state prison chapel in violation of a federal statute, the Religious Land Use and Institutionalized Persons Act (RLUIPA).[3] The actual legal question presented in *Sossamon* was, moreover, a narrow matter of statutory interpretation: "[W]hether the States, by accepting federal funds, consent to waive their sovereign immunity to suits for money damages under [RLUIPA]."[4] And the answer may have seemed straightforward based on the text of the law alone, since the statute expressly provides that "[a] person may assert a violation of [RLUIPA] . . . in a judicial proceeding and obtain appropriate relief against a government."[5]

So what, then, was the fuss all about? In the aftermath of a series of controversial Rehnquist Court decisions limiting Congress's power to abrogate state sovereign immunity using its Commerce Clause and other various Article I powers,[6] the fuss *might* have concerned whether Congress has the power to circumvent those limits by purchasing a waiver of the very state immunity that it could not abrogate.[7] Many had reacted to the Rehnquist-era decisions limiting congressional power to abrogate state immunity with alarm—Justice Stevens, for example, famously complained that sovereign immunity had become "a mindless dragon that indiscriminately chews gaping holes in federal stat-

2. *See, e.g.*, Joan Biskupic, *Major Supreme Court Cases: 2010-11 Term*, USA TODAY, http://www.usatoday.com/news/washington/judicial/supremecourtopinions/case-log-2010-11.htm (last updated June 28, 2011) (listing ten major cases from the October 2010 Term including, for example, *Snyder v. Phelps*, 131 S. Ct. 1207 (2011), and *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011), but not *Sossamon v. Texas*, 131 S. Ct. 1651 (2011)).

3. *Sossamon*, 131 S. Ct. at 1655-56 (citing Religious Land Use and Institutionalized Persons Act of 2000, Pub. L. No. 106-274, 114 Stat. 803 (codified at 42 U.S.C. §§ 2000bb-2 to bb-3, 2000cc to cc-5 (2011))). As a rough proxy for the prevalence for such claims, a Westlaw search of federal district court opinions using both the terms "RLUIPA" and "prison" yielded over two thousand cases.

4. *Id.* at 1655.

5. 42 U.S.C. § 2000cc-2(a).

6. *See* Alden v. Maine, 527 U.S. 706, 712 (1999) (holding that state sovereign immunity prevents Congress from subjecting states to suit in the states' own courts without the states' consent); Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank, 527 U.S. 627, 636 (1999) (reaffirming that Congress's abrogation of states' sovereign immunity "cannot be sustained under either the Commerce Clause or the Patent Clause"); Seminole Tribe v. Florida, 517 U.S. 44, 47 (1996) (holding that Congress lacks the power to abrogate state sovereign immunity under the Indian Commerce Clause).

7. *See* Michael T. Gibson, *Congressional Authority to Induce Waivers of State Sovereign Immunity: The Conditional Spending Power (and Beyond)*, 29 HASTINGS CONST. L.Q. 439, 463-68 (2002) (noting that the Supreme Court had suggested in dicta, but never squarely held, that Congress might condition a state's receipt of federal funds upon a waiver of its sovereign immunity).

utes."[8] Allowing Congress to end-run those limits through its use of the Spending Clause power, then, would seem no small thing. But the Court in *Sossamon* found little difficulty on that point, confirming that a Spending Clause-induced waiver of state sovereign immunity is indeed permissible.[9]

The entire case turned instead on a particular rule: the requirement that, in order to sue a sovereign defendant for monetary damages, a private plaintiff must demonstrate not only that the sovereign has waived its immunity from suit by consenting to the action in the first instance, but also that the sovereign has unequivocally waived its immunity from a *damages remedy* in that suit.[10] As the Court put it in *Sossamon*, "[t]he waiver of sovereign immunity must extend unambiguously to . . . monetary claims."[11] Applying this rule, the Court held in *Sossamon* that even though the states, by accepting federal funding under RLUIPA, had plainly waived their immunity from suits in general, the statute's authorization of "appropriate relief" was insufficiently clear to permit claims for monetary damages.[12]

It turns out that this rule—which I call the doctrine of "double immunity"—is of a mysterious pedigree. The Supreme Court cited two cases for the proposition in *Sossamon*: *Lane v. Pena*[13] and *United States v. Nordic Village*.[14] But neither of those cases identifies a clear source for the rule.[15] And in fact, the Court's longstanding approach prior to cases like *Lane* and *Nordic Village* was to permit suits for money damages against a sovereign defendant so long

8. Linda Greenhouse, *States Are Given New Legal Shield by Supreme Court*, N.Y. TIMES, June 24, 1999, at A1 (internal quotation mark omitted), *available at* http://www.nytimes.com/1999/06/24/us/the-supreme-court-federalism-states-are-given-new-legal-shield-by-supreme-court.html; *see also* Katherine Florey, *Sovereign Immunity's Penumbras: Common Law, "Accident," and Policy in the Development of Sovereign Immunity Doctrine*, 43 WAKE FOREST L. REV. 765, 766 n.7, 767 (2008) (noting that *Seminole Tribe* launched a "sovereign immunity revolution" after which courts have created a "common law, 'penumbral' sovereign immunity that extends well beyond what are normally considered to be the doctrine's boundaries").

9. *Sossamon*, 131 S. Ct. at 1663 (Sotomayor, J., dissenting) ("Neither the majority nor respondents . . . dispute that, pursuant to its power under the Spending Clause, Congress may secure a State's consent to suit as a condition of the State's receipt of federal funding." (citation omitted)); *see also* Gibson, *supra* note 7.

10. *See* Lane v. Pena, 518 U.S. 187, 192 (1996) (holding that no monetary damages were available in a Rehabilitation Act suit because the statute's waiver did not "extend unambiguously to such monetary claims"); United States v. Nordic Vill., Inc., 503 U.S. 30, 34 (1992) (holding that no damages remedy was available against the IRS because the Bankruptcy Code's waiver of immunity does not "unambiguously . . . extend[] to monetary claims").

11. 131 S. Ct. at 1658 (quoting *Lane*, 518 U.S. at 192) (internal quotation marks omitted).

12. *Id.* at 1663.

13. *Id.* at 1658 (citing *Lane*, 518 U.S. at 192).

14. *Id.* (citing *Nordic Vill.*, 503 U.S. at 34).

15. *See infra* Part II.C.

as the defendant consented to be sued in general, irrespective of whether the waiver specifically mentioned monetary damages.[16]

Yet if the path that *led* to the double immunity rule is unclear, the aftermath of the rule has been anything but: the federal courts have applied it across a wide variety of contexts to insulate sovereign defendants from costly private litigation, even though those defendants have given their ex ante consent to be sued.[17] In this sense, the Court's decision in *Sossamon* is important not just because of the outcome of the case—state prisons can violate statutorily protected religious liberties without having to pay damages—but because it reflects the Court's growing solicitude for insulating culpable and consenting sovereign actors from liability. What is more, this solicitude has been fully embraced in the lower federal courts. In one case, a federal district court held that even though the State of Wisconsin was liable for $225,000 in monetary damages to a blind vendor's business, and even though Wisconsin had consented to be sued for its wrongful actions, the double immunity rule nevertheless shielded the state from having to pay the vendor a single dollar.[18]

Despite this result and others like it, the academy has yet to call attention to or analyze the development of the double immunity rule. This Article seeks to fill that gap by exploring the rule's origins, contours, and justifications. Part I begins with an examination of double immunity as it was created in *Nordic Village* and *Lane*, the two cases cited for the rule in *Sossamon*. I start with a brief overview of the first layer of immunity, the historically rooted precept that a court may not exercise jurisdiction over a state[19] or federal[20] defendant unless

16. *See, e.g.*, Franchise Tax Bd. v. U.S. Postal Serv., 467 U.S. 512, 519-20 (1984) (permitting private damages suit against sovereign defendant who had consented to "be sued" but without reference to monetary relief (internal quotation mark omitted)); Fed. Hous. Admin. v. Burr, 309 U.S. 242, 245 (1940) (permitting claims for monetary relief because once the sovereign's immunity from suit was waived, the sovereign became "no[] less amenable to judicial process than a private enterprise under like circumstances would be").

17. See Part I.B.3, below, for several examples of cases where the double immunity rule has insulated an otherwise culpable sovereign defendant from a proper monetary judgment.

18. Wis. Dep't of Workforce Dev. v. U.S. Dep't of Educ., 667 F. Supp. 2d 1007, 1011, 1015 (W.D. Wis. 2009).

19. The origin of the contemporary concept of state sovereign immunity in U.S. courts, though heavily debated, is commonly understood to be the Supreme Court's ruling in *Hans v. Louisiana*, 134 U.S. 1 (1890), which construed the Eleventh Amendment's textual grant of immunity to the states. *See* Carlos Manuel Vázquez, *What Is Eleventh Amendment Immunity?*, 106 YALE L.J. 1683, 1694 (1997) ("The Eleventh Amendment, the *Hans* Court held, served to restore and constitutionalize the original understanding that states would be immune from being sued by private individuals.").

20. The precept of federal sovereign immunity was first articulated by the Court in *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 411-12 (1821), wherein Chief Justice Marshall described the "universally received opinion" that "no suit can be commenced or prosecuted against the United States" without its consent.

the sovereign in question has waived its immunity by consenting to the suit.[21] Although this first layer of sovereign immunity is a settled norm that has been the topic of thorough attention in both its federal and state incarnations,[22] scant scrutiny has been paid to the second layer of immunity conferred in *Nordic Village* and *Lane*, which treats a sovereign as immune from monetary relief absent clear authorization of such a remedy—even if the sovereign has already consented to the suit.[23] The bulk of Part I is spent discussing this second layer of immunity and how it came into existence. Part I includes several examples of how federal courts have applied the double immunity rule across a variety of contexts to shelter even culpable federal and state defendants from monetary remedies.

After witnessing the broad impact of the double immunity rule, I explore the possible justifications for the rule in Part II. This is admittedly a difficult task, as the Court has never articulated a clear rationale for why the rule should exist. In the end, I argue that neither the Constitution nor the common law supports the notion that sovereign immunity should create an initial immunity from suit and, even once that immunity has been waived, a separate immunity from ordinary monetary remedies. Part II then suggests the actual origin of the double immunity doctrine: it is a mistaken extension of a line of cases properly denying plaintiffs monetary relief against a sovereign defendant where such relief is not traditionally available in ordinary private litigation either—for instance, attorneys' fees, reimbursement for costs, or other *atypical* monetary judgments.

If, as I argue, there is no sound common law, constitutional, or other doctrinal grounding for the double immunity rule, Part III explains why courts are ill advised to apply it as a policy matter. To begin with, by offering federal and state defendants double immunity, courts enable the improvident outcome whereby plaintiffs who have unquestionably been granted the right to sue a sovereign defendant by the sovereign itself might prevail on the merits of their

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21. *See infra* Part I.A.1. Note also that in certain circumstances, the federal government may abrogate the sovereign immunity enjoyed by states and subject the states to suit without their consent, pursuant to Congress's powers under the Fourteenth Amendment. Fitzpatrick v. Bitzer, 427 U.S. 445, 456 (1976).

22. For a discussion of some of the primary issues surrounding federal sovereign immunity, see Paul F. Figley & Jay Tidmarsh, *The Appropriations Power and Sovereign Immunity*, 107 MICH. L. REV. 1207 (2009); Louis L. Jaffe, *Suits Against Governments and Officers: Sovereign Immunity*, 77 HARV. L. REV. 1 (1963); and Gregory C. Sisk, *The Continuing Drift of Federal Sovereign Immunity Jurisprudence*, 50 WM. & MARY L. REV. 517 (2008). For a discussion of key issues related to state sovereign immunity, see generally Bradford R. Clark, *The Eleventh Amendment and the Nature of the Union*, 123 HARV. L. REV. 1817 (2010); Vázquez, *supra* note 19; and James Eugene Fitzgerald, Comment, *State Sovereign Immunity: Searching for Stability*, 48 UCLA L. REV 1203 (2001).

23. *See, e.g.*, Lane v. Pena, 518 U.S. 187, 197 (1996) ("[W]here a cause of action is authorized against the federal government, the available remedies are not those that are 'appropriate,' but only those for which sovereign immunity has been expressly waived." (internal quotation marks omitted)).

claims and yet still go without an appropriate remedy. Second, the judge-made rule frustrates the intent of the legislatures who have unequivocally consented to suit in the first place: it would be odd indeed to assume that lawmakers intend to create a right to suit but not a corresponding remedy, yet this is precisely what the double immunity rule presumes. Finally, the rule may not even achieve its ostensible goal of protecting sovereign dignity, since its practical impact is to make injunctive relief the default remedy—a form of relief that may well be more intrusive than damages.[24]

I conclude the Article by suggesting an alternative to the double immunity rule, which I believe the courts would do better to apply when considering what remedies ought to be available against a sovereign that has already waived its immunity from suit. Under my proposed rule, a plaintiff would be entitled to recover the same monetary remedies against a sovereign defendant that has waived its immunity from suit as would be available against an ordinary private defendant in similar circumstances, with the notable exception that a sovereign should be able to declare by clear statutory expression that particular remedies ought *not* to be provided. This rule, which flips the existing presumption on its head, is more in line with historical notions of sovereign immunity and, I argue, is more respectful of the needs of injured plaintiffs, the intent of legislatures, and the interests of the sovereigns themselves.

I. DOUBLE IMMUNITY

To understand the Court's double sovereign immunity rule is simply to understand the two intertwining layers of protection of which it is comprised. Accordingly, this Part begins with a brief analysis of the first layer of immunity, state and federal immunity from suit. It then explores the less-scrutinized second layer: the immunity against a monetary remedy that persists even after a sovereign defendant has already consented to the suit.

A. *The First Layer of Sovereign Immunity: Immunity from Suit*

It is indisputable as a descriptive matter that the federal and state governments enjoy immunity from private lawsuit absent their consent. But the consensus does not extend to the sources of this immunity or to the way in which each has been applied. What follows is a short overview of the origins of the first layer of immunity in the federal and state contexts, and a description of how the Court has applied this immunity using clear statement rules.

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24. *See* Pamela S. Karlan, *The Irony of Immunity: The Eleventh Amendment, Irreparable Injury, and Section 1983*, 53 STAN. L. REV. 1311, 1329 (2001) ("Injunctions are often *more* intrusive than damages remedies because they make it impossible for a state to decide that it is willing to pay for violating particular statutory rights in order to pursue goals it considers more important.").

1. *Origins of the first layer of sovereign immunity*

As the Supreme Court announced more than a century ago, "It may be accepted as a point of departure unquestioned, that neither a State nor the United States can be sued as defendant in any court in this country without their consent . . . ."[25] Although the Court's summary declaration explains the profound *effect* of state and federal sovereign immunity, it elides some important questions about the origins of each immunity. I briefly review those questions now.

a. *Origins of federal immunity from suit*

The Supreme Court first recognized the existence of a federal sovereign immunity defense in 1821.[26] Yet from the Founding, the notion that the federal government should enjoy immunity from suit has stood on less-than-certain footing.[27] To begin with, there is no clear textual grant of sovereign immunity in the Constitution itself.[28] Supporters of federal immunity have instead generally relied on a combination of structural and historical arguments. For instance, the Framers often spoke of federal immunity as an unquestioned aspect of the new nation, perhaps drawing from the English common law and the oft-repeated Blackstonian maxim that, "the king can do no wrong."[29] Alexander Hamilton wrote in *The Federalist No. 81*, "[i]t is inherent in the nature of sovereignty not to be amenable to the suit of an individual *without its consent*."[30] Similarly, before his service as Chief Justice, John Marshall observed, "[i]t is not rational to suppose that the sovereign power should be dragged before a court."[31] Observations of this character tend to support the dominant view to-

25. Cunningham v. Macon & Brunswick R.R., 109 U.S. 446, 451 (1883).

26. *See* Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 411-12 (1821) (Marshall, C.J.) ("The universally received opinion is, that no suit can be commenced or prosecuted against the United States . . . .").

27. Gregory C. Sisk, *A Primer on the Doctrine of Federal Sovereign Immunity*, 58 OKLA. L. REV. 439, 443-45 (2005).

28. United States v. Nordic Vill., Inc., 503 U.S. 30, 42 (1992) (Stevens, J., dissenting) ("[T]he doctrine of sovereign immunity is nothing but a judge-made rule . . . ."). *But see* Figley & Tidmarsh, *supra* note 22 (arguing that the Appropriations Clause may serve as a textual source for federal sovereign immunity, at least from monetary claims).

29. 3 WILLIAM BLACKSTONE, COMMENTARIES *254. Some have argued, however, that "Blackstone's fictions have fooled a good many subsequent scholars (and the Supreme Court of the United States) into thinking that the Crown's immunity from suit was . . . applicable to republican institutions in America." James E. Pfander, *Sovereign Immunity and the Right to Petition: Toward a First Amendment Right to Pursue Judicial Claims Against the Government*, 91 NW. U. L. REV. 899, 926 n.96 (1997).

30. THE FEDERALIST NO. 81, at 486 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

31. 3 THE DEBATES IN THE SEVERAL STATE CONVENTIONS, ON THE ADOPTION OF THE FEDERAL CONSTITUTION 555 (Jonathan Elliot ed., Phila., J.B. Lippincott Co. 2d ed. 1891).

day that federal sovereign immunity was simply an "accepted premise[]" at the Founding, even if it lacks a textual toehold in the Constitution.[32]

On the other hand, the very structure and nature of the democratic republic created at the Founding might be understood to preclude the application of sovereign immunity to the national government.[33] The Supreme Court expressed some solicitude to this view in *United States v. Lee*, an 1882 case concerning the federal government's seizure of land from General Robert E. Lee's estate for a national cemetery, writing, "[u]nder our system the *people*, who are there called *subjects*, are the sovereign. Their rights . . . are not bound to give way to a sentiment of loyalty to the person of a monarch."[34]

Even still, a number of scholars have offered explanations for why federal immunity may be consistent with the Constitution. For example, some have argued that the Appropriations Clause implicates a degree of federal sovereign immunity: if Congress is vested with the sole authority to appropriate public money, perhaps no judgment can be paid without its initial consent.[35] Another argument is that "Congress' control over the jurisdiction of the federal courts gives it considerable powers simply to refuse to authorize suits against the government."[36] In the Judiciary Act of 1789, Congress expressly granted lower federal courts jurisdiction only over cases in which the United States was plaintiff or petitioner, implicitly barring suits in which the federal government was the defendant.[37] Therefore, "[w]hat we call the 'sovereign immunity' of the United States in many respects could be described instead as a particularized elaboration of Congress' control over the lower court's jurisdiction."[38] In any event, regardless of its shaky textual and historical grounding, the bottom line is that "the doctrine of sovereign immunity is in no danger of falling out of official favor any time soon."[39]

b. *Origins of state immunity from suit*

If the origins of federal sovereign immunity might be viewed as controversial, so much more could the same be said about the roots of state sovereign immunity. The simplest explanation is that states enjoy sovereign immunity

32. Sisk, *supra* note 27, at 443.

33. *See, e.g.*, AKHIL REED AMAR, AMERICA'S CONSTITUTION: A BIOGRAPHY 335 (2005) ("[I]n America, neither federal institutions nor state governments were truly sovereign," but rather "[o]nly the people were," so that a government "could not, properly speaking, claim a sovereign's immunity.").

34. 106 U.S. 196, 208 (1882).

35. *See* Figley & Tidmarsh, *supra* note 22, at 1258-59.

36. Vicki C. Jackson, *Suing the Federal Government: Sovereignty, Immunity, and Judicial Independence*, 35 GEO. WASH. INT'L L. REV. 521, 546 (2003).

37. *Id.* at 546-47.

38. *Id.* at 570.

39. LAURENCE H. TRIBE, 1 AMERICAN CONSTITUTIONAL LAW § 3-25, at 520 (3d ed. 2000).

from suit by virtue of the Eleventh Amendment, which was enacted in order to overturn the Court's infamous decision in *Chisholm v. Georgia*.[40] In *Chisholm*, the Court interpreted Article III, along with the Judiciary Act of 1789, to permit a citizen of South Carolina to sue the State of Georgia, rejecting the State's sovereign immunity defense.[41] The conventional view explains that state lawmakers immediately protested the *Chisholm* decision, quickly passing the Eleventh Amendment in order to restore the Framers' original understanding that states should be immune from private suits.[42]

The problem with this conventional narrative, of course, is that if the Eleventh Amendment was intended to enshrine a preexisting notion that states should enjoy sovereign immunity from private actions, it used awfully odd language to meet that task. The Amendment states, "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State."[43] Thus, if the Amendment is to serve as the source for state immunity, it is by its own terms underinclusive, since it only bars a suit against a state when it is brought by a citizen from *another* state. Yet the Court has roundly rejected that limited view of the Amendment ever since *Hans v. Louisiana*, where the Court considered and rejected a citizen's suggestion that "[t]he letter" of the Amendment did not preclude him from suing *his own* state, describing that argument as "an attempt to strain the Constitution and the law to a construction never imagined or dreamed of."[44]

The criticisms of state sovereign immunity extend beyond the ill-fitting text of the Eleventh Amendment. A number of scholars have taken umbrage with the logic of the Court's recent sovereign immunity decisions,[45] some have called for abolishing the immunity altogether as "inconsistent with basic principles of the American legal system,"[46] and even those who have spoken favorably of the Court's state sovereign immunity jurisprudence admit that "the Eleventh Amendment is a mess."[47] Yet notwithstanding this criticism, it is by

40. 2 U.S. (2 Dall.) 419 (1793).

41. *Id.*

42. Martha A. Field, *The Eleventh Amendment and Other Sovereign Immunity Doctrines: Part One*, 126 U. PA. L. REV. 515, 515-16 (1977).

43. U.S. CONST. amend. XI.

44. Hans v. Louisiana, 134 U.S. 1, 15 (1890).

45. *See, e.g.*, Vicki C. Jackson, *Principle and Compromise in Constitutional Adjudication: The Eleventh Amendment and State Sovereign Immunity*, 75 NOTRE DAME L. REV. 953, 953 (2000) ("The Court's Eleventh Amendment and sovereign immunity case law deserves the condemnation and resistance of scholars.").

46. Erwin Chemerinsky, *Against Sovereign Immunity*, 53 STAN L. REV. 1201, 1201 (2001) (italics omitted) (arguing that state sovereign immunity should be abolished).

47. John C. Jeffries, Jr., *In Praise of the Eleventh Amendment and Section 1983*, 84 VA. L. REV. 47, 47 (1998) (footnote omitted).

now beyond dispute that the states are immune from suit.[48] As Justice Kennedy wrote in *Alden v. Maine*:

> [S]overeign immunity of the States neither derives from, nor is limited by, the terms of the Eleventh Amendment. Rather, as the Constitution's structure, its history, and the authoritative interpretations by this Court make clear, the States' immunity from suit is a fundamental aspect of the sovereignty which the States enjoyed before the ratification of the Constitution, and which they retain today . . . .[49]

In the view of a majority of the Court today, then, state sovereign immunity is an incontrovertible aspect of our federal system, rooted not just in the Eleventh Amendment, but in a historical understanding of the nature and structure of our Union. And like its federal counterpart, state sovereign immunity certainly does not seem to be going anywhere—if anything, its reach has actually increased in recent years.[50]

2. *Applying the first layer: a jurisdictional defense subject to waiver by clear statement*

Separate from the degree of support that one believes the Court ought to show toward the existence of federal and state sovereign immunity given their contested origins is the question of just how strong the respective immunities should be in practice. That is, once the existence of a sovereign immunity defense is acknowledged, *how* and *when* should it apply? With respect to *how* it applies, there is widespread agreement that the sovereign immunity defense is a jurisdictional one.[51] If a sovereign is entitled to it, the immunity functions to bar the court's exercise of power over the defendant altogether and precludes an adjudication of the merits of the plaintiff's suit.[52]

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48. *See Ex parte* New York, 256 U.S. 490, 497 (1921) ("[I]t has become established by repeated decisions of this court that the 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 . . . .").

49. 527 U.S. 706, 713 (1999).

50. *See* Chemerinsky, *supra* note 46, at 1201 ("In recent years, the Supreme Court has substantially expanded the scope of state sovereign immunity."); *see also Alden*, 527 U.S. at 733 (holding sovereign immunity to protect states from being sued even in their own state courts absent consent); Seminole Tribe v. Florida, 517 U.S. 44, 65-66 (1996) (limiting Congress's power to abrogate state sovereign immunity to its use of its enforcement power under the Fourteenth Amendment).

51. *Seminole Tribe*, 517 U.S. at 73 (noting that the Eleventh Amendment imposes a "jurisdictional bar"); FDIC v. Meyer, 510 U.S. 471, 475 (1994) ("Sovereign immunity is jurisdictional in nature."); *see also* Caleb Nelson, *Sovereign Immunity as a Doctrine of Personal Jurisdiction*, 115 HARV. L. REV. 1559, 1608-17 (2002) (exploring the "hybrid nature" of sovereign immunity, which contains similarities both to personal and subject matter jurisdiction).

52. For an excellent account of the jurisdictional nature of the sovereign immunity defense, see Nelson, *supra* note 51, at 1608-17.

From the perspective of a plaintiff seeking to sue a government defendant, however, the jurisdictional nature of the sovereign immunity defense need not signal an absolute deathblow to the plaintiff's chances for redress. Some jurisdictional defenses, after all, may be waived, and sovereign immunity is one such defense.[53] Even as Hamilton wrote in *The Federalist No. 81* that a sovereign should not be amenable to suit, for instance, he also recognized that the immunity should cease to apply if the sovereign has granted its consent to be sued.[54]

Once it is accepted that the sovereign immunity defense is jurisdictional and waivable, the plaintiff who wishes to sue a state or federal government defendant naturally turns her focus to the question of how to know when a sovereign has waived its immunity.[55] Both the Court and the academic community have paid increased attention to this question of late, since much turns on it.[56] Loose interpretive rules regarding waiver will reduce the protective reach of sovereign immunity in a way that will advantage plaintiffs, whereas strict rules of waiver construction will protect the sovereign to the disadvantage of plaintiffs.

So on which side of the spectrum does the Court's waiver jurisprudence fall? The answer, especially in the past two decades, is that the Court has adopted a strict approach.[57] There are three primary ways that a sovereign may forego its immunity defense: a federal or state sovereign defendant may unilaterally and voluntarily waive its immunity; Congress can induce states to waive their immunity through the Spending Clause power; and Congress can abrogate

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53. Note that the waivable nature of the sovereign immunity defense in both the federal and state contexts is one reason why both the Supreme Court and Caleb Nelson have described it as more akin to a personal jurisdiction defense than a subject matter defense, since the former is waivable while the latter is not. *See* Wis. Dep't of Corr. v. Schacht, 524 U.S. 381, 394 (1998) (Kennedy, J., concurring) ("[T]he immunity bears substantial similarity to personal jurisdiction requirements, since it can be waived and courts need not raise the issue *sua sponte*."); Nelson, *supra* note 51, at 1565 ("For members of the Founding generation who believed in sovereign immunity, the concept was relevant to *personal* jurisdiction rather than *subject matter* jurisdiction.").

54. THE FEDERALIST NO. 81 (Alexander Hamilton), *supra* note 30, at 487 ("It is inherent in the nature of sovereignty not to be amenable to the suit of an individual *without its consent*.").

55. Note that there is an exception to this change of focus with respect to private plaintiffs who are suing a state defendant for prospective injunctive relief. Under the *Ex parte Young* doctrine, a private plaintiff may sue a state actor for prospective relief from an ongoing violation of federal law. *Ex parte* Young, 209 U.S. 123, 159 (1908). Since that doctrine does not permit retrospective monetary awards, however, it falls outside the concerns of the Court's double immunity doctrine.

56. *See, e.g.*, Jonathan R. Siegel, *Waivers of State Sovereign Immunity and the Ideology of the Eleventh Amendment*, 52 DUKE L.J. 1167, 1167-68 (2003).

57. *See* John Copeland Nagle, *Waiving Sovereign Immunity in an Age of Clear Statement Rules*, 1995 WIS. L. REV. 771, 780 (noting a difference between the Court's approach to sovereign immunity before and after 1991, with the latter period characterized by a stricter clear statement rule).

state immunity using its Fourteenth Amendment enforcement power.[58] The Court has applied the same strict interpretive approach to putative waivers of immunity across each of the three categories—a waiver of sovereign immunity will only be effectuated if it satisfies a strict clear statement requirement.[59]

John Copeland Nagle has described the impact of these clear statement requirements as "powerful."[60] And the Court has left little doubt that it feels the same way, holding that it would refuse to infer a waiver of immunity based on a general claim of statutory purpose or legislative history, looking instead only to the face of the statutory text itself.[61] This has led some in the academy to go so far as to distinguish between ordinary clear statement rules and "super-strong" clear statement rules such as the one that applies to waivers of sovereign immunity.[62]

One way to think about this clear statement waiver requirement is that it shields a sovereign from ever having to face a particular class of lawsuits unless the sovereign has expressly authorized the suit through a deliberate legislative decision. Of course, if a sovereign cannot be haled into court without its ex ante consent, then neither can a sovereign be forced to pay a monetary judgment without its ex ante consent—by preventing a sovereign from suffering the embarrassment of suit, the first layer of immunity necessarily protects the public fisc as well. Nevertheless, the Court has taken the additional step of protecting the sovereign treasury from even legitimate claims by citizen plaintiffs through its announcement of a second layer of sovereign immunity—an immunity against monetary relief that applies both in the federal context after

58. Note that there is a fourth way in which a state sovereign may forego its immunity from suit in federal court: the litigation conduct waiver. In this category, a federal court will not recognize a state's sovereign immunity defense if the state defendant has voluntarily availed itself of the federal forum. *See, e.g.*, Gunter v. Atl. Coast Line R.R., 200 U.S. 273, 284 (1906).

59. *See, e.g.*, Kimel v. Fla. Bd. of Regents, 528 U.S. 62, 73 (2000) (holding that Congress must "unequivocally express[] its intent" to abrogate state sovereign immunity under its Fourteenth Amendment enforcement power); Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 246 (1985) (requiring "unequivocal statutory language" before giving effect to a Spending Clause waiver of sovereign immunity); United States v. King, 395 U.S. 1, 4 (1969) (noting that a voluntary waiver of federal sovereign immunity "cannot be implied but must be unequivocally expressed").

60. Nagle, *supra* note 57, at 772.

61. *Id.* at 774; *see* U.S. Dep't of Energy v. Ohio, 503 U.S. 607, 619-20 (1992); United States v. Nordic Vill., Inc., 503 U.S. 30, 37 (1992); Ardestani v. INS, 502 U.S. 129, 136-38 (1991).

62. William N. Eskridge, Jr. & Philip P. Frickey, *Quasi-Constitutional Law: Clear Statement Rules as Constitutional Lawmaking*, 45 VAND. L. REV. 593, 595 n.4 (1992) (noting that a "super-strong clear statement rule" applies against waivers of federal sovereign immunity); *see also* Timothy J. Simeone, Comment, *Rule 11 and Federal Sovereign Immunity: Respecting the Explicit Waiver Requirement*, 60 U. CHI. L. REV. 1043, 1048 (1993) (noting that the Supreme Court had "toughened the 'unequivocal expression' standard" in recent decisions).

Nordic Village and in the state context after *Sossamon*.[63] I shift now to discuss this duplicate layer of immunity and the many cases in which it has prevented private plaintiffs from obtaining appropriate relief.

B. *The Second Layer of Sovereign Immunity: Immunity from Monetary Judgment*

Justice Frankfurter once cautioned that "when dealing with a statute subjecting the Government to liability for potentially great sums of money, this Court must not promote profligacy by careless construction. [But n]either should it as a self-constituted guardian of the Treasury import immunity back into a statute designed to limit it."[64] This Subpart explains how the Rehnquist and Roberts Courts have disregarded Justice Frankfurter's admonishment by creating a rule that imports a second layer of immunity against monetary judgments back into statutes that have plainly waived the sovereign's immunity to begin with.

1. *The Court's early approach to monetary claims against a sovereign*

Nordic Village, *Lane*, and *Sossamon* were not the first occasions on which the Court considered a private party's ability to sue a sovereign defendant for monetary relief where the sovereign had clearly consented to the suit but made no mention of the relief available in that suit. In fact, for a long period before these three cases, the Court routinely authorized monetary relief against sovereign defendants who had waived their immunity from suit in general terms without expressly declaring that the waiver extended to claims for monetary relief.

In 1940, for instance, the Court confronted the issue in *Federal Housing Administration v. Burr*.[65] The case involved an action against the Federal Housing Administration (FHA) for monetary relief in the form of garnished wages that it owed to one of its employees.[66] The FHA responded that it could not be subject to suit because it was "an agency of the United States Government and . . . therefore, not subject to garnishee proceedings."[67] The Court disagreed, noting that the statute authorizing the creation of the FHA had been amended to include a provision permitting the agency "to sue and be sued in any court of competent jurisdiction."[68] The Court therefore deemed the FHA's

63. *See infra* Part I.B.2.

64. Indian Towing Co. v. United States, 350 U.S. 61, 69 (1955).

65. 309 U.S. 242 (1940).

66. *Id.* at 243.

67. *Id.* at 244 (internal quotation marks omitted).

68. *Id.* (quoting Banking Act of 1935, Pub. L. No. 74-305, § 344, 49 Stat. 684, 722 (codified as amended at 12 U.S.C. § 1702 (2011))).

sovereign immunity to be waived and allowed the suit to proceed, notwithstanding that it was a claim for money damages and the waiver of immunity did not expressly provide such relief.[69] In reaching this result, the Court reasoned that once the sovereign defendant waived its immunity, it became "no[] less amenable to judicial process than a private enterprise under like circumstances would be."[70] Moreover, the Court explained, to rule otherwise and require an unequivocal expression about the availability of a particular monetary remedy would "deprive suits of some of their efficacy," since the effect would be to authorize a suit against the government without an appropriate remedy.[71]

The same single layer of immunity was applied again more than four decades later in *Franchise Tax Board v. U.S. Postal Service*.[72] In that case, the Court considered whether a statutory declaration that the Postal Service could "sue and be sued in its official name" constituted a waiver of the government's sovereign immunity such as would authorize the Franchise Tax Board of California to order the Postal Service to withhold delinquent taxes from the salaries of four employees and transfer the funds to the Board.[73] Without considering whether the text of the waiver expressly extended to monetary relief, the Court ruled—like it had in *Burr*—that the statutory language constituted a waiver of sovereign immunity and consequently that the sought-after monetary judgment was indeed available against the federal government.[74]

Although *Burr* and *Franchise Tax Board* were cases concerning the availability of money damages against *federal* sovereign defendants who had waived their immunity from suit without expressly mentioning monetary relief, the same approach applied historically in the state immunity context as well. In 1949, Missouri and Tennessee contracted to form the Tennessee-Missouri Bridge Commission, a joint corporate venture run by the two states together for the purpose of building a bridge and operating ferries along the Missouri River. Absent a waiver, the two states would enjoy sovereign immunity from lawsuits brought against the Commission.[75] The compact between the two states, however, authorized the Commission to be sued, although it did so without specifying what remedies the Commission could be sued for.[76] Nonetheless, in *Petty v. Tennessee-Missouri Bridge Commission*, the Supreme Court ruled that the compact waived the Commission's sovereign immunity and that the widow of a Commission employee who died in an accident aboard one of the Commission's ferry boats could obtain monetary relief from the joint state agency de-

69. *See id.* at 249.
70. *Id.* at 245.
71. *Id.* at 246.
72. 467 U.S. 512 (1984).
73. *Id.* at 514-16 (citing 39 U.S.C. § 401(1)).
74. *Id.* at 519.
75. Petty v. Tenn.-Mo. Bridge Comm'n, 359 U.S. 275, 276-77 (1959).
76. *See id.* at 277-78.

fendant in her tort action.[77] Thus, just as in *Burr* and *Franchise Tax Board*, the *Petty* Court permitted a monetary claim to proceed against a sovereign without requiring the sovereign to expressly mention the availability of such relief.

In summary, for the several decades before *Nordic Village*, *Lane*, and *Sossamon*, the Court applied what was in effect a straightforward single immunity rule to state and federal sovereign defendants: the government defendant could be held liable for a monetary remedy when the sovereign consented to be sued, without regard for whether the initial consent made express mention of such a remedy. That longstanding approach has changed considerably, however, as a result of three of the Court's more recent decisions, beginning with *Nordic Village*.

2. *The Court's new double immunity approach to monetary claims against a sovereign in* Nordic Village*,* Lane*, and* Sossamon

The circumstance before the Court in *Nordic Village* was not materially dissimilar from the circumstances in *Franchise Tax Board*, *Burr*, and *Petty* described above. As in the other cases, *Nordic Village* concerned a lawsuit brought by a private party against a sovereign entity for monetary relief, where the sovereign had consented to be sued.[78] In *Nordic Village*, the private lawsuit was initiated against the IRS by a bankruptcy trustee who represented creditors of a restaurant that had gone out of business and filed a Chapter 11 petition for bankruptcy.[79] After the restaurant filed for bankruptcy, the owner of the restaurant had withdrawn $26,000 from the company's account and used it to (among other things) write a $20,000 check to the IRS to satisfy his outstanding personal tax liability.[80] Upon learning about the restaurant owner's actions, the bankruptcy trustee initiated a proceeding in bankruptcy court to recover the $20,000 from the federal government, arguing that it was improper for the owner to transfer those funds from the company's accounts after the company had already filed for bankruptcy.[81] The bankruptcy court agreed, quickly voided the transfer, and entered a judgment against the federal government for $20,000, which the district court affirmed.[82]

On appeal to the Sixth Circuit, however, the government raised a jurisdictional defense for the first time, arguing that even though the owner's postpetition transfer was voidable and even though the trustee was entitled to the $20,000 on the merits, the federal government's sovereign immunity barred the monetary judgment. The Sixth Circuit rejected this argument and affirmed

77. *Id.* at 278-80.

78. *See* United States v. Nordic Vill., Inc., 503 U.S. 30, 31 (1992).

79. *Id.*

80. IRS v. Nordic Vill., Inc. (*In re* Nordic Vill., Inc.), 915 F.2d 1049, 1050-51 (6th Cir. 1990), *rev'd sub nom.* United States v. Nordic Vill., Inc., 503 U.S. 30 (1992).

81. *Id.* at 1051.

82. *Nordic Vill.*, 503 U.S. at 31.

the $20,000 judgment. The court agreed that the owner's use of the funds was voidable,[83] and that the trustee was entitled to recover the $20,000 pursuant to § 550 of the Bankruptcy Code, which governed transferee liability for voided transfers.[84] The court then explained that sovereign immunity did not bar the recovery action because the government had waived its immunity from such actions in § 106(c), which stated, "[*N*]*otwithstanding any assertion of sovereign immunity*[,] a provision of this title that contains [the term] '*entity*' . . . *applies to governmental units* . . . ."[85] In the view of the appeals court, § 106(c) waived the government's immunity from § 550 recovery claims because § 550 contained the term *entity*; it authorized recovery of improper transfers from any "*entity* for whose benefit such transfer was made."[86]

Despite this seemingly straightforward reasoning, the Supreme Court reversed the Sixth Circuit's ruling. Writing for the five-to-four majority, Justice Scalia noted the familiar adage that, in order to be effective, a waiver of the government's sovereign immunity "must be 'unequivocally expressed.'"[87] The Court then readily conceded that § 106(c) did indeed unequivocally waive the government's immunity from suit.[88] Nonetheless, Justice Scalia wrote, the IRS was judgment-proof because, "[t]hough [§ 106(c)] . . . waives sovereign immunity, *it fails to establish unambiguously that the waiver extends to monetary claims*."[89] The Court instead reasoned that § 106(c) might be read to "permit[] the bankruptcy court to issue 'declaratory and injunctive'—though not monetary—relief against the Government."[90]

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83. *IRS v. Nordic Vill., Inc.*, 915 F.2d at 1055. The transaction was voidable because it was executed *after* the company had already filed for bankruptcy, in violation of 11 U.S.C. § 549, which declares: "(a) Except as provided in subsection (b) or (c) of this section, the *trustee may avoid a transfer of property of the estate—(1) that occurs after the commencement of the case*; and (2)(A) that is authorized only under section 303(f) or 542(c) of this title; or (B) that is not authorized under this title or by the court." 11 U.S.C. § 549 (2011) (emphasis added).

84. *IRS v. Nordic Vill., Inc.*, 915 F.2d at 1055. Section 550 read as follows at the time of the proceedings: "(a) Except as otherwise provided in this section, to the extent that a transfer is avoided under section 544, 545, 547, 548, *549*, 553(b), or 724(a) of this title, the trustee *may recover*, for the benefit of the estate, the property transferred, or, if the court so orders, the value of such property, from—(1) the initial transferee of such transfer *or the entity for whose benefit such transfer was made*; or (2) any immediate or mediate transferee of such initial transferee." 11 U.S.C. § 550 (1988) (emphases added).

85. *IRS v. Nordic Vill., Inc.*, 915 F.2d at 1052 (quoting 11 U.S.C. § 106(c)).

86. *Id.* (emphasis added) (quoting 11 U.S.C. § 550).

87. *Nordic Vill.*, 503 U.S. at 33-34 (quoting Irwin v. Dep't of Veterans Affairs, 498 U.S. 89, 95 (1990)); *accord* United States v. Mitchell, 445 U.S. 535, 538 (1980); United States v. King, 395 U.S. 1, 4 (1969).

88. *Nordic Vill.*, 503 U.S. at 34.

89. *Id.* (emphasis added).

90. *Id.* at 35 (quoting Hoffman v. Conn. Dep't of Income Maint., 492 U.S. 96, 102 (1989)). See *infra* note 98 and accompanying text for a discussion of the Court's decision in *Hoffman*, which signaled the Court's ultimate holding in *Nordic Village*.

So it was in *Nordic Village* that a majority of the Court held for the first time that in order for a private plaintiff to be entitled to a monetary recovery against a sovereign defendant, it is insufficient for the sovereign to have enacted a statute that only waives its sovereign immunity from suit in general terms; instead, the statutory language must "establish unambiguously" that the waiver extends to the particular relief of monetary damages as well.[91] Disputes in bankruptcy rarely draw the ire of casual onlookers, but the direct result of the new double immunity rule's application in the case was severe: the decision prevented creditors of the bankrupt Nordic Village restaurant from recovering on their debts, while at the same time enriching the IRS and rewarding the restaurant owner who improperly took money from the bankrupt restaurant's corporate account for personal use.

Two years after *Nordic Village* was handed down in 1992, the First Circuit described the rule announced in *Nordic Village* as a newfound "secondary principle of sovereign immunity."[92] And although there was uncertainty at that time whether the Court might limit the application of this so-called secondary principle of sovereign immunity to the bankruptcy context—or whether it would instead view the rule as a trans-substantive requirement to be applied to every purported waiver of sovereign immunity—that uncertainty was clarified in 1996 when the Supreme Court applied the second layer of immunity again in *Lane v. Pena*.

In *Lane v. Pena*, the Supreme Court held double immunity to bar monetary relief against a federal defendant under section 504(a) of the Rehabilitation Act.[93] *Lane* involved a challenge brought by a diabetic first-year student who had been discriminated against and discharged from the United States Merchant Marine Academy on account of his medical condition.[94] The Court held that the Academy had clearly waived its sovereign immunity at least with respect to injunctive relief and therefore the Academy could be ordered to reinstate the cadet.[95] But because the statute did not expressly authorize monetary relief against the Academy, the Court held that sovereign immunity barred the cadet's claim for compensatory damages stemming from the wrongful discharge.[96] Quoting the government's brief and articulating the double immunity principle in its clearest form, the Court explained, "[w]here a cause of action is author-

91. *Nordic Vill.*, 503 U.S. at 34.

92. United States v. Horn, 29 F.3d 754, 761-62 (1st Cir. 1994).

93. 518 U.S. 187, 189, 192 (1996) (citing Rehabilitation Act of 1973, § 504(a), 29 U.S.C. § 794(a) (1988)). Lower federal courts have since followed *Lane*'s interpretation of the Rehabilitation Act. *See, e.g.*, Nickens v. Ashcroft, No. Civ. 3:CV-03-1797, 2006 WL 680877, at *4-5 (M.D. Pa. Mar. 16, 2006).

94. *Lane*, 518 U.S. at 189-90.

95. *Id.* at 196-97.

96. *Id.* at 192 ("The clarity of expression necessary to establish a waiver of the Government's sovereign immunity against monetary damages for violations of § 504 is lacking in the text of the relevant provisions.").

ized against the federal government, the available remedies are not those that are 'appropriate,' but only those for which sovereign immunity has been expressly waived."[97]

Nordic Village and *Lane* thus officially codified the second layer of immunity with respect to the *federal* government's sovereign immunity, but it was not until *Sossamon v. Texas* that the Supreme Court would confirm the applicability of the same rule to protect a *state* sovereign defendant from money damages in an otherwise-consented-to lawsuit.[98] *Sossamon* therefore settled not just one but two important questions relating to the Supreme Court's approach to state sovereign immunity: it confirmed, first, that Congress could easily purchase waivers of state immunity through its Spending Clause power,[99] and second, that the doctrine of double immunity shields state defendants just the same as federal defendants.

As briefly discussed above, *Sossamon* concerned the ability of private plaintiffs to sue state defendants under a federal statute, the Religious Land Use and Institutionalized Persons Act (RLUIPA). RLUIPA contains an express waiver of state sovereign immunity, authorizing a prison inmate whose religious liberties have been violated to sue and "obtain *appropriate relief* against a government," where "government" is defined to include states and state officials.[100]

The question presented in *Sossamon* was whether this textual waiver of immunity—and its authorization of "appropriate relief"—enabled prison inmate plaintiffs to sue state governments for monetary damages where the states operated their prisons in a manner that infringed on prisoners' religious liberties. Stories of such prison abuses abound; for instance in one case, a Jewish inmate went *eight days* without eating at a Michigan correctional facility because the facility refused to accommodate his religious duty to keep kosher.[101]

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97. *Id.* at 197 (alteration in original) (quoting the respondent's brief) (internal quotation marks omitted).

98. The Court had hinted that it would give effect to the double immunity principle for state defendants three years before *Nordic Village* in *Hoffman v. Connecticut Department of Income Maintenance*, a case that presented the same question as *Nordic Village*, except where the private party sued a *state* tax collection agency instead of the IRS. *See* 492 U.S. 96 (1989). In *Hoffman*, however, only a four-Justice plurality concluded that the plaintiff's suit should be dismissed on the basis of the double immunity rule. *See id.* at 98, 101. The fifth vote was cast by Justice Scalia, who did not consider the question of whether the waiver unmistakably extended to monetary relief. Justice Scalia instead voted to deny the trustee's claim on the ground that the Congress could not abrogate state sovereign immunity using its Article I powers to begin with. *Id.* at 105 (Scalia, J., concurring).

99. *See supra* note 9 and accompanying text.

100. 42 U.S.C. §§ 2000cc-2, cc-5(4) (2011) (emphasis added).

101. Cardinal v. Metrish, 564 F.3d 794, 797 (6th Cir. 2009), *cert. denied*, 131 S. Ct. 2149 (2011).

That inmate had made numerous requests, to no effect, for any kind of kosher food as simple as "an apple or some kind of vegetable."[102]

Nevertheless, the Court in *Sossamon* ruled that prisoner suits for monetary damages were barred by the doctrine of double immunity. The Court began by acknowledging that the statute unequivocally authorized suits for "appropriate relief against a government,"[103] such that the first layer of immunity had necessarily been waived.[104] The Court concluded, however, that the term "appropriate relief" does not "clearly and unambiguously waive sovereign immunity to private suits for damages" as would be required to authorize such suits under the second layer of sovereign immunity.[105] The Court explained further that even though the term "appropriate relief" *could* be read to encompass monetary damages—and even though prior Court decisions had construed the term "appropriate relief" precisely that way—the term was still "not so free from ambiguity that we may conclude that the States, by receiving federal funds, have unequivocally expressed intent to waive their sovereign immunity to suits for damages."[106] And just like that, the Court's creation of an additional layer of sovereign immunity from monetary relief for *federal* defendants who had already waived their immunity from suit (in *Nordic Village* and *Lane*) was extended to *state* defendants as well.

3. *Other applications of double immunity*

The impact of the Court's new double immunity doctrine has been felt across a variety of contexts, as evidenced by recent decisions in the lower federal courts and the Supreme Court itself. Not only has the doctrine prevented injured private citizens from obtaining redress against government defendants (who have agreed to be sued) in the already mentioned contexts of bankruptcy, disability discrimination, and religious liberties,[107] but so too have federal courts now applied double immunity against wronged persons in cases involving wrongful government destruction of private property and federal programs

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102. Petition for a Writ of Certiorari at 7, Cardinal v. Metrish, No. 09-109 2009 WL 2248364 at *7 (U.S. July 22, 2009) (internal quotation marks omitted) (citing Plaintiff's First Amended Complaint ¶¶ 15, 19-23, Cardinal v. Metrish, No. 2:06-cv-232, 2008 WL 696479 (W.D. Mich. Mar. 13, 2008)), *cert. denied*, 131 S. Ct. 2149.

103. *Sossamon*, 131 S. Ct. 1651, 1658 (quoting 42 U.S.C. § 2000cc-2(a)).

104. *See id.* at 1663 (Sotomayor, J., dissenting) ("No one disputes that, in accepting federal funds, the States consent to suit for violations of RLUIPA's substantive provisions; the only question is what relief is available to plaintiffs asserting injury from such violations.").

105. *Id.* at 1658-59 (majority opinion).

106. *Id.* at 1660.

107. In addition to curtailing private relief against state prisons, the double immunity rule was also applied to bar private damages actions against federal prison officials. *See* Webman v. Fed. Bureau of Prisons, 441 F.3d 1022, 1023 (D.C. Cir. 2006).

in support of the blind.[108] In addition, just last Term the Supreme Court relied on the double immunity rule in construing yet another statute, this time to preclude an award of monetary relief against the federal government despite the government's consent to be sued for its violation of rights guaranteed under the federal Privacy Act of 1974.[109]

With respect to the government's improper destruction of private property, the double immunity rule has been held to bar monetary remedies sought under Rule 41(g) of the Federal Rules of Criminal Procedure. Rule 41(g) states:

> A person aggrieved by an unlawful search and seizure of property or by the deprivation of property may move for the property's return. . . . If it grants the motion, the court must return the property to the movant, but may impose reasonable conditions to protect access to the property and its use in later proceedings.[110]

The question raised in the Rule 41(g) cases is whether a movant may be entitled to monetary relief in lieu of wrongfully seized property where the government has lost, transferred, or destroyed the property. Prior to the Court's decisions in *Nordic Village* and *Lane*, the Second, Eighth, and Ninth Circuit Courts of Appeals had each concluded that a party moving under Rule 41(g) *could* be awarded monetary relief if the government had lost, transferred, or destroyed the property that the party was entitled to have returned.[111] Indeed, in each of those pre-double immunity cases, the federal government apparently did not so much as attempt to claim a sovereign immunity defense from the sought-after monetary award, a reflection of the Court's traditional approach

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108. The cases involving destruction of private property and programs in support of the blind are discussed just below. Additionally, the Supreme Court has applied the double immunity doctrine in a case involving the propriety of compensatory damages awards issued by the Equal Employment Opportunity Commission under Title VII. West v. Gibson, 527 U.S. 212 (1999). In *West*, over a dissent written by Justice Kennedy (joined by Chief Justice Rehnquist and Justices Scalia and Thomas) arguing that the majority failed to apply the double immunity rule strictly enough, *see id.* at 224-25 (Kennedy, J., dissenting), the Court held that the statutory waiver of sovereign immunity at issue did in fact extend unequivocally to EEOC awards of monetary damages, *id.* at 222 (majority opinion). The Court reached this conclusion because monetary remedies were mentioned by name in a 1991 amendment to Title VII, which entitled a "complaining party" under Title VII to "recover compensatory . . . damages." *See West*, 527 U.S. at 215, 217-18 (citing 42 U.S.C. § 1981a(a)(1)).

109. *See* FAA v. Cooper, 132 S. Ct. 1441, 1453 (2012).

110. FED. R. CRIM. P. 41(g). Note that the present-day Rule 41(g) was previously codified in Rule 41(e), and that it was redesignated as Rule 41(g) and amended for style only in 2002. *See* Bertin v. United States, 478 F.3d 489, 492 & n.1 (2d Cir. 2007).

111. *See* Mora v. United States, 955 F.2d 156, 161 (2d Cir. 1992); Thompson v. Covington, 47 F.3d 974, 975 (8th Cir. 1995); Soviero v. United States, 967 F.2d 791, 792-93 (2d Cir. 1992); United States v. Martinson, 809 F.2d 1364, 1367-68 (9th Cir. 1987).

that a waiver of immunity from suit in general naturally extends to ordinary forms of relief.[112]

But the circuit courts took a striking U-turn regarding the availability of monetary awards under Rule 41(g) after *Nordic Village* and *Lane*, holding that because of those cases, Rule 41(g) movants would *not* be entitled to monetary relief since the rule does not expressly mention such relief.[113] The Eighth Circuit explained the reason for this sea change in the circuits powerfully, pointing directly to the Supreme Court's new double immunity jurisprudence:

> [Prior to *Nordic Village* and *Lane*,] some circuits have concluded (or at least strongly suggested) that federal courts may award money damages, pursuant to their inherent power to afford adequate equitable relief, when the moving party is entitled to the return of property the government has lost, destroyed, or transferred. . . .
>
> . . . But the sovereign immunity landscape has changed in the last ten years. . . .
>
> In the wake of *Nordic Village* [and] *Lane* . . . , three other circuits have concluded that Rule 41(e) does not contain the explicit waiver of sovereign immunity required to authorize monetary relief against the government when property cannot be returned. [Citing *Soviero*, *Mora*, *Thompson v. Covington*, and other cases.] We agree.[114]

Reading Rule 41(g) in light of the double immunity rule, however, produces an astonishing result. If the government carefully stores and monitors private property that it has wrongfully seized, it must return the property to its owner. But if the government sells, transfers, destroys, or otherwise loses control of the property, the individual owner is out of luck—and the government may even keep proceeds it has generated from the property.[115]

The second layer of sovereign immunity has also been applied against private citizens who seek damages from state defendants under the federal Randolph-Sheppard Act.[116] Congress passed the Act in 1936 to offer priority to blind persons seeking to operate vending facilities on federal property.[117] The

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112. United States v. Hall, 269 F.3d 940, 942 (8th Cir. 2001) (noting that "[a]pparently, the government did not raise the defense in [previous] cases" regarding government destruction of property).

113. *See, e.g.*, *id.* at 942-43; United States v. Jones, 225 F.3d 468, 470 (4th Cir. 2000); United States v. Bein, 214 F.3d 408, 415 (3d Cir. 2000); *see also* Peña v. United States, 157 F.3d 984, 986 (5th Cir. 1998); Munoz v. Attorney for U.S. Exec. Office, No. 4:03-CV-03-2293, 2006 WL 2246413, at *1, *6 (M.D. Pa. Aug. 6, 2006).

114. *Hall*, 269 F.3d at 942-43 (denying property owner's motion for the fair market value of his truck due to sovereign immunity after the government had transferred the vehicle to a towing service); *see also Munoz*, 2006 WL 2246413, at *1, *6 (denying property owner's Rule 41(g) motion for return of his property or its cash equivalent of $15,000 where government accidentally destroyed the property).

115. *See, e.g.*, *Hall*, 269 F.3d at 943-45 (Rosenbaum, J., concurring) (urging reconsideration of the Court's double immunity rule as "ill-considered" in light of the case's "bitter outcome").

116. *See generally* 20 U.S.C. §§ 107(b), 107a(b) (2011).

117. *See id.* § 107a(b).

Act has the declared purposes of "providing blind persons with remunerative employment, enlarging the economic opportunities of the blind, and stimulating the blind to greater efforts in striving to make themselves self-supporting."[118] Under the Act, a blind person who desires a position as a vendor applies for a license from a state agency, which in turn applies to the federal government for placement of the vendor on federal property. Once the state agency and federal government agree on a location for the vending facility, the agency administers the vending facility program and provides the vendor with an initial stock and inventory.[119] Importantly, the Act dictates that blind vendors shall have a right to take the state licensing agency to arbitration in order to remedy any claims they may have against the agency in relation to the agency's management of the program.[120]

In 2006, the district court for the Western District of Wisconsin heard a challenge brought by a blind vendor, Janet Dickey, against Wisconsin's state licensing agency under the Randolph-Sheppard Act, the Wisconsin Department of Workforce Development (DWD).[121] Dickey alleged that the DWD was "negligent in its oversight, responsibility of, and management of the Randolph-Sheppard Program" under which she had been hired, and that as a result of the state agency's negligence, her federal facility employer terminated her employment, resulting in substantial monetary damages.[122] A panel of three arbitrators—including one appointed by the DWD itself—ruled unanimously in Dickey's favor, awarding her $225,000 in lost income.

The district court invalidated the arbitration award.[123] The court recognized that the state clearly had consented to be bound by arbitration decisions as a condition of its participation in the Randolph-Sheppard program.[124] But it also reasoned that the statute's waiver of immunity from arbitration only meant that "states can be found liable for violations of the Act and subject to some form of relief; it does not mean that they are required to submit to awards of money damages."[125] In other words, despite the fact that the State of Wisconsin had plainly waived its immunity from suit in arbitration proceedings, and even though the arbitration panel unanimously agreed that Dickey was entitled to a judgment of $225,000 against the state agency whose negligence had caused

118. *Id.* § 107(a).

119. *Id.* § 107b.

120. *Id.* § 107b(6).

121. Wis. Dep't of Workforce Dev. v. U.S. Dep't of Educ., 667 F. Supp. 2d 1007, 1009 (W.D. Wis. 2009).

122. *Id.* at 1011.

123. *Id.* at 1019; *see also* New Hampshire v. Ramsey, 366 F.3d 1, 4, 21-22 (1st Cir. 2004) (applying double immunity to overturn damages award of $900,000 against state licensing agency under the Randolph-Sheppard Act).

124. *Wis. Dep't of Workforce Dev.*, 667 F. Supp. 2d at 1015.

125. *Id.*

her to lose her job, the double immunity rule sheltered the state from having to remedy its wrong.

Finally, the Supreme Court applied the doctrine of double immunity to bar a monetary award in its 2012 decision in *FAA v. Cooper*.[126] In that case, plaintiff Cooper was an airline pilot diagnosed with the human immunodeficiency virus (HIV). At the time, the Federal Aviation Administration (FAA) did not issue required medical certificates to persons with HIV, and so Cooper did not inform the FAA of his diagnosis.[127] In the meantime, Cooper applied for long-term disability benefits, disclosing in the process his HIV status to the Social Security Administration (SSA). The FAA subsequently launched a joint criminal investigation with the SSA seeking to identify medically unfit persons who had nonetheless obtained FAA flight certification. During the investigation, the SSA revealed Cooper's diagnosis to the FAA, which then revoked his license. Cooper was subsequently charged with making false statements to a government agency in violation of 18 U.S.C. § 1001.[128] Cooper responded by suing the FAA and SSA for damages for emotional and mental distress, arguing that the agencies had violated the Federal Privacy Act of 1974, which bars executive branch agencies from disclosing certain confidential records.

The district court ruled in Cooper's favor on the merits of that claim, holding that the Government had indeed violated the Act by disclosing Cooper's HIV status.[129] But the district court rejected Cooper's claim for monetary damages under the double immunity doctrine, ruling that although the Privacy Act waived sovereign immunity for "actual damages," that term did not unequivocally extend to suits for nonpecuniary emotional and mental harm.[130] The Ninth Circuit reversed, reasoning that the term "actual damages" actually does extend to damages for mental and emotional distress.[131]

The Supreme Court reversed again, agreeing with the district court that Cooper was not entitled to monetary relief because of the doctrine of double immunity.[132] The Court began by conceding that there was no doubt that "Congress ha[d] consented to be sued for damages under the Privacy Act. That much is clear from the statute, which expressly authorizes recovery from the Government for 'actual damages.'"[133] Citing the double immunity rule from *Lane* and *Nordic Village*, however, the Court explained that the relevant question was not simply whether the government had waived its immunity from suit, but *also* whether the Act's waiver "unambiguously" authorized Cooper's

126. 132 S. Ct. 1441, 1456 (2012).
127. *Id.* at 1446.
128. *Id.* at 1446-47.
129. *Id.* at 1447.
130. *Id.* (internal quotation marks omitted).
131. *Id.* at 1447-48 (internal quotation marks omitted).
132. *Id.* at 1456.
133. *Id.* at 1448.

particular suit seeking money damages for mental and emotional distress.[134] "Ambiguity exists" and no monetary award should be allowed, the Court reasoned, "if there is a plausible interpretation of the statute that would not authorize money damages against the Government."[135]

The Court thus placed the burden on Cooper to show that the term "actual damages" unambiguously encompasses damages for emotional or mental harms. The Court recognized that *Black's Law Dictionary* defines "actual damages" in a way consistent with such a reading, as "[r]eal, substantial and just damages, or the amount awarded to a complainant in compensation for his actual and real loss or injury, as opposed on the one hand to 'nominal' damages, and on the other to 'exemplary' or 'punitive' damages."[136] But the Court also noted an alternative plausible reading in which "actual damages" might instead mean "special damages" as understood in the context of certain common law torts where such damages are "limited to actual pecuniary loss."[137] Accordingly, although the Court acknowledged that Cooper's reading of the statute was hardly "inconceivable," it held that no monetary relief could be awarded under the double immunity rule because "it is plausible to read the statute, as the Government does, to authorize only damages for economic loss."[138]

* * *

The results produced by the application of the second layer of sovereign immunity in suits against both federal and state defendants are no doubt confounding. Because of it, persons in the many circumstances discussed above have been barred from recovering appropriate monetary remedies even though the sovereign in each case unambiguously consented to be sued. In all of these decisions, the courts have given effect to the second layer of immunity from monetary relief by using a strong clear statement rule: sovereign immunity bars a monetary judgment absent unambiguous statutory language authorizing the desired relief.[139]

Just as troubling as the results in these cases is the sudden manner in which the Supreme Court departed from its decades-old approach, exemplified in *Burr*, *Franchise Tax Board*, and *Petty*,[140] in which *only* the traditional first-layer principle of sovereign immunity from suit was given effect. In a pair of

134. *Id.*

135. *Id.*

136. *Id.* at 1449 (alteration in original) (internal quotation marks omitted) (citing BLACK'S LAW DICTIONARY 467 (rev. 4th ed. 1968)).

137. *Id.* at 1451 (internal quotation marks omitted).

138. *Id.* at 1453.

139. *See, e.g.*, Sossamon v. Texas, 131 S. Ct. 1651, 1658 (2011) (holding that in order for private plaintiff to sue sovereign defendant for money damages, the sovereign's "waiver of sovereign immunity must extend unambiguously to such monetary claims").

140. *See supra* Part I.B.1.

decisions over a four-year period, *Nordic Village* and *Lane*, the Court effectively overturned that longstanding approach and began applying the second layer of immunity from monetary judgments as well. Identifying this second layer has been my initial objective; my next task is to determine whether the double immunity rule has any merit. To know the answer to this question, though, one has to inquire into the sources and reasoning behind the Court's decision to adopt the rule in the first place. I engage in that inquiry now.

II. THE UNCERTAIN ORIGINS OF THE SECOND LAYER OF SOVEREIGN IMMUNITY

The various objections one might raise against the Court's double immunity doctrine[141] and the seemingly unfair results it produces might be overcome in two ways. First, perhaps the double immunity rule derives from a sacrosanct source of law such that failure to abide by it would do violence to our constitutional system or the common law tradition. Alternatively, even if double immunity's existence is based purely on policy considerations, it may be the case that there are countervailing considerations militating in its favor. This Part addresses the first possibility; Part III addresses the second.

So just where does the second layer of sovereign immunity come from? If it can be maintained that the second layer is enshrined in the Constitution or deeply rooted in common law tradition,[142] arguably like the first layer of immunity,[143] then perhaps any negative downstream effects of the rule are just a consequence of the Framers' vision. If that is true, then attacks on the rule would face the tall burden of overcoming the Framers' intent. After considering the arguments that the Constitution or the common law require adherence to the double immunity doctrine, however, it becomes clear that the doctrine is actually little more than a judge-made rule—and a misguided one at that.

A. *Constitutional Underpinnings for the Second Layer of Immunity?*

The contention that the Constitution provides express grounding for the rule that a waiver of sovereign immunity must extend unequivocally both (1) to the suit itself *and* (2) to the availability of monetary relief in that suit fails flatly with regard to state sovereign immunity, and fares only slightly better with respect to federal immunity.

The problem with the constitutional argument for the second layer of immunity as applied to state defendants is that it runs headlong into the plain text

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141. See Part III.B, below, for three principal objections to the rule.

142. *Cf., e.g.*, Lehman v. Nakshian, 453 U.S. 156, 160 (1981) (holding that common law as source of the presumption that the Seventh Amendment right to trial by jury does not apply against the federal government (citing Galloway v. United States, 319 U.S. 372, 388-89 (1943))).

143. *See supra* Part I.A.1.

of the Eleventh Amendment. The Amendment reads, "The Judicial power of the United States shall not be construed to extend to *any suit in law or equity*, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State."[144] The first thing to observe is that the Amendment focuses on prohibiting *suits* against the sovereign states, not on prohibiting particular kinds of remedies. The aim of the Eleventh Amendment is thus to guarantee the *first* layer of sovereign immunity to state defendants by barring suits without the states' consent because *it is the suit itself* that disparages the states' sovereign dignity. The form of relief sought (the second layer of immunity) is of no moment,[145] evidenced by the fact that suits in "law or equity" are both forbidden. The Supreme Court zeroed in on the Amendment's core concern for immunity from *suit* and not immunity from particular remedies in its 1887 decision *In re Ayers*, where it wrote, "The very object and purpose of the 11th Amendment were to prevent the indignity of subjecting a State to the coercive process of judicial tribunals at the instance of private parties."[146]

Moreover, by its very terms, once the first layer of immunity from suit is waived, the Amendment makes *no distinction* between suits for injunctive relief and suits for monetary relief: all relief in "law *or* equity" is denied to citizens absent a waiver of the state's sovereign immunity. Once a state consents to be sued, then, there is no reason to think that the consent should only extend to suits at law but not at equity. Put slightly differently, it would take a strained reading of the Eleventh Amendment to require a state to consent only once to suits at equity but twice for suits at law—yet this is precisely the reading that is needed to sustain the Court's double immunity principle as a constitutional rule vis-à-vis the states.

The constitutional claim for the second layer of *federal* sovereign immunity runs into a different kind of problem. Recall that, unlike state immunity, which is at least reflected in (if not totally encapsulated by) the Eleventh Amendment, there is no clear textual hook in the Constitution for federal sovereign immunity.[147] Paul Figley and Jay Tidmarsh have suggested the Appropriations Clause as one possible source,[148] which reads, "No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law . . . ."[149] As Figley and Tidmarsh explain, the debates surrounding the Appropriations Clause at the Founding, along with the English experience regarding government finance, demonstrate that the Framers envisioned legislative con-

144. U.S. CONST. amend. XI (emphasis added).

145. *See* Seminole Tribe v. Florida, 517 U.S. 44, 58 (1996) ("[T]he relief sought by a plaintiff suing a State is irrelevant to the question whether the suit is barred by the Eleventh Amendment.").

146. *In re* Ayers, 123 U.S. 443, 505 (1887).

147. *See supra* Part I.A.1.

148. *See* Figley & Tidmarsh, *supra* note 22, at 1209.

149. U.S. CONST. art. I, § 9, cl. 7.

trol over the public purse—and not control by the executive or judiciary.[150] That point seems on strong footing, but the key question for sovereign immunity purposes is whether the Framers also intended "constitutionally commanded legislative control over disbursements from the purse" to entail a constitutional command precluding the judiciary from even hearing monetary claims by private plaintiffs alleging government wrongs.[151] The evidence is less clear on that question, though Figley and Tidmarsh suggest that because the power to appropriate money was intended to lie exclusively in the hands of Congress, it follows as a "small, and logical, step" that the Framers also intended Congress (and not the courts) to have the sole power to adjudicate private lawsuits for money.[152]

Regardless of whether the Appropriations Clause is properly viewed as a constitutional source for the *first* layer of sovereign immunity, however, it could be argued that it contains precisely the kind of textual language one might desire to support the *second* principle of sovereign immunity, the immunity from monetary judgments absent express consent. "No money shall be drawn from the Treasury," including money for the purpose of paying a court-ordered monetary judgment, the argument could run, "but in Consequence of Appropriations made by law."[153] And where a statute only waives federal immunity from suit generally without mentioning monetary awards, perhaps there has been no appropriation "made by law" for such monetary relief—a failure to satisfy the clear statement requirement of the second layer of immunity.

The argument has a neat logic to it, but the problem is that it assumes the critical question: where Congress consents to be sued for a particular category of actions, is it proper to interpret that waiver as also including Congress's inherent consent to remedy the harms it has caused? That is, Congress's very act of waiving its sovereign immunity from suit could constitute the necessary "appropriation made by law" to pay a monetary award where one is owed. In order for that not to be the case, and in order for the Appropriations Clause to create an additional layer of immunity beyond the traditional immunity from suit, would require an assumption that Congress's consent to be sued represents a consent to the jurisdiction of a court that is separate (and separable to begin with) from its consent to actually be held liable for wrongdoing. But as I show below in the discussion of the common law view of sovereign immunity,[154] that assumption is contradicted by the prevailing view at common law that, in the eyes of a sovereign, "want of right and want of remedy are reciprocal."[155]

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150. Figley & Tidmarsh, *supra* note 22, at 1259.

151. *Id.*

152. *Id.*

153. U.S. CONST. art. I, § 9, cl. 7; *see* Figley & Tidmarsh, *supra* note 22, at 1259.

154. *See infra* Part II.B.

155. Ashby v. White, (1703) 92 Eng. Rep. 126 (K.B.) 136; 2 Ld. Raym. 938, 953 (Holt, C.J., dissenting), *rev'd*, (1703) 1 Eng. Rep. 417 (H.L.); 1 Bro. P.C. 62; *see also* 3 WILLIAM

In other words, the sovereign's acknowledgment that it should be amenable to judicial process for its wrongdoing necessarily includes the recognition that it will redress the harms it has caused—there is simply no need for the sovereign to affirmatively say both.

The Appropriations Clause account for the second layer of federal sovereign immunity fails for another reason: it proves too much. If the Clause is truly the source of federal sovereign immunity, it follows that claims for damages against the federal government may be pursued when the money being sought has been appropriated by law. Yet one of the most common classes of lawsuits against the federal government involves contract claims wherein private plaintiffs allege that the federal government has failed to make good on its end of a contractual bargain—claims that, in essence, seek the recovery of money that has *already* been appropriated by law when Congress authorized the contract in the first instance.[156] If the Appropriations Clause argument for a second layer of immunity is taken seriously, then no additional waiver of immunity should be required from the monetary judgments in such contract claims.

But Congress and the Supreme Court have rejected this approach. Congress did so in passing the Tucker Act, which waives the federal government's sovereign immunity in breach of contract claims,[157] and the Court has duly noted the necessary effect of the Tucker Act's waiver in a wide range of cases.[158] That waiver, though, would be redundant if Figley and Tidmarsh are correct about the Appropriations Clause, at least to the extent that plaintiffs in breach of contract claims are suing to compel the federal government to make good on payments that have already been appropriated per an approved federal contract.[159]

In the absence of *express* language that justifies the double immunity rule, perhaps support for the rule can be drawn from structural principles embodied

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BLACKSTONE, COMMENTARIES *255 ("[T]he law . . . presumes that to *know of* any injury and to *redress* it are inseparable in the royal breast.").

156. *See, e.g.*, United States v. Navajo Nation, 537 U.S. 488, 493 (2003) (claim against United States for breach of its fiduciary duties stemming from a coal lease contract); United States v. Sherwood, 312 U.S. 584, 585-86 (1941) (claim against United States for breach of contract regarding construction of a post office).

157. The Tucker Act states, in relevant part, that "The United States Court of Federal Claims shall have jurisdiction to render judgment upon any claim against the United States founded . . . upon any express or implied contract with the United States . . . ." 28 U.S.C. § 1491(a)(1) (2011).

158. *See, e.g.*, United States v. Mitchell, 463 U.S. 206, 215 (1983) ("[T]he Tucker Act effects a waiver of sovereign immunity."); Army & Air Force Exch. Serv. v. Sheehan, 456 U.S. 728, 734 (1982); Hatzlachh Supply Co. v. United States, 444 U.S. 460, 466 (1980).

159. To the extent that a private plaintiff sues the federal government for a monetary award that exceeds that which is authorized under the terms of the contract, perhaps it is true that a waiver of immunity would be required per the Appropriations Clause. But neither the Court nor Congress has taken the approach of drawing this fine distinction in interpreting the waiver of sovereign immunity in breach of contract claims.

in, if not expressly stated by, the Constitution.[160] One such possibility, although the Supreme Court certainly did not articulate this rationale in *Nordic Village*, *Lane*, or *Sossamon*, is that the rule represents a self-imposed restraint by the judiciary under separation of powers principles. The theory would run that requiring an express statement waiving both immunity from suit *and* immunity from damages is necessary to ensure that the judicial branch does not create remedies that were not envisioned by the legislative branch even though the suits themselves were. Yet to accept this explanation would be to accept a dangerously narrow view of the role of courts. For if courts that plainly have jurisdiction to resolve the merits of a dispute are deemed powerless to confer even the most ordinary of monetary remedies without prior legislative authorization, what other powers traditionally reserved to the courts may be cast by the wayside in the abstract pursuit of "separation of powers"?

Ultimately, the proof is in the pudding: the Court has never cited the Eleventh Amendment, the Appropriations Clause, separation of powers, or any other constitutional text or principle to justify the second layer of sovereign immunity. If double immunity is to be defended on the basis of some source, that source must be something other than the Constitution.

B. *Common Law Underpinnings for the Second Layer of Immunity?*

The Court has acknowledged the incompleteness of the argument that constitutional text alone serves as the wellspring of the traditional first principle of federal and state sovereign immunity from suit. Instead, both state and federal immunity appear to be rooted in a tradition that predates the Constitution. As Justice Kennedy observed with respect to state sovereign immunity, "the States' immunity from suit is a fundamental aspect of the sovereignty which the States enjoyed before the ratification of the Constitution, and which they retain today . . . ."[161] The Court remarked similarly that federal sovereign immunity may "rest[] on the theory that the United States is deemed the institutional descendant of the Crown, enjoying its immunity but not its historic prerogatives."[162] Thus, if the *first* principle of sovereign immunity derives ultimately from common law tradition that existed prior to the Founding, the question should be posed whether those same common law traditions warrant the Court's recent extension of the immunity to include an additional layer of protection against monetary judgments.

An analysis of the evidence concerning sovereign immunity at common law reveals, however, that the common law tradition is inconsistent with the

160. *See* E. Donald Elliott, *Why Our Separation of Powers Jurisprudence Is So Abysmal*, 57 GEO. WASH. L. REV. 506, 508 (1989); John F. Manning, *Separation of Powers as Ordinary Interpretation*, 124 HARV. L. REV. 1939, 1942 (2011).

161. Alden v. Maine, 527 U.S. 706, 713 (1999).

162. Keifer & Keifer v. Reconstr. Fin. Corp., 306 U.S. 381, 388 (1939).

idea of a latent secondary protection against monetary relief for sovereigns who have already consented to be sued. For starters, the notion that the first principle of immunity from suit is wholly supported by the common law is itself suspect. The Court recognized as much as early as 1880, where it considered the English common law maxim that the "king can do no wrong," and rejected it, writing, "[w]e do not understand that . . . the English maxim has an existence in this country."[163] As the Court reiterated nearly a century later, in *Nevada v. Hall*, the assertion that the king could do no wrong was simply a "fiction" that "was rejected by the colonists when they declared their independence from the Crown."[164]

Yet even if the historical-traditional claim to the first layer of sovereign immunity is to be taken at face value, there is additional evidence that the second layer immunity from monetary judgments would have been anathema at common law. After all, Blackstone himself wrote that once the sovereign recognizes its own wrongdoing and gives its consent to be sued, that consent inexorably extends to a remedy for the wrong: "[A]s [the law] presumes that to know of any injury and to redress it are inseparable in the royal breast, it then issues *as of course* in the king's own name, his orders to his judges to do justice to the party aggrieved."[165] Indeed, later English authorities on the common law expanded on Blackstone's *Commentaries* to emphasize that relief against the sovereign—specifically in the form of monetary damages—was essentially a matter of right by virtue of an elaborate system of private petitions of right to the King.[166] One update of the *Commentaries* described that petition system as follows:

> The prayer of this petition, which is really in the nature of an action against the sovereign for the recovery of debts, chattels real, or personal, and unliquidated damages, is grantable *ex debito justitiae* [as a matter of right, as opposed to ex gratia, as a matter of grace].[167]

English case law from the early eighteenth century confirms the availability of monetary relief against the Crown regardless of whether the sovereign gave its express consent. In *The Case of the Bankers in the Court of Exchequer*, creditors of the Crown sued the king without his approval to enforce payment of royal annuities.[168] The House of Lords determined that a monetary judgment

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163. Langford v. United States, 101 U.S. 341, 342-43 (1880).

164. 440 U.S. 410, 415 (1979).

165. 3 WILLIAM BLACKSTONE, COMMENTARIES *255 (original emphasis omitted and new emphasis added).

166. *See, e.g.*, SAMUEL WARREN, BLACKSTONE'S COMMENTARIES, SYSTEMATICALLY ABRIDGED AND ADAPTED TO THE EXISTING STATE OF THE LAW AND CONSTITUTION WITH GREAT ADDITIONS 231 (London, W. Maxwell 1855).

167. *Id.*

168. The Case of the Bankers in the Court of Exchequer, 1700, 2 W. & M., 12 Will. 3, *reprinted in* T.B. HOWELL, 14 A COMPLETE COLLECTION OF STATE TRIALS 1, 1-2 (London, T.C. Hansard 1816).

should lie even without the King's consent.[169] Crucially, Lord Chief Justice Holt pronounced, "[w]e are all agreed that they have a right; and if so, then they must have some remedy to come at it too."[170] In other words, right and remedy were coupled; once the sovereign was held amenable to suit, the remedy followed.

The fact that common law tradition was diametrically opposed to the Court's new second layer of sovereign immunity also makes sense as a simple structural matter. Up until the Judicature Acts of the 1870s, courts of equity and courts of law were separate at common law.[171] Thus, prior to this point, when the King consented to be sued at law,[172] it would have made no sense to require the King to give an additional express consent to monetary relief since such relief was *the only form of relief available at law*.[173] The sovereign's consent to be sued, in other words, was itself consent to a monetary damages remedy given the dual court system at common law.

At bottom, there is little support for the double immunity doctrine in either the common law or the American Constitution. The reality is that the historic practice of sovereign immunity was concerned not with shielding the sovereign from having to redress the injuries it caused, but rather with defining a particular process through which private citizens could obtain their rightful remedy.[174] And once the proper process was followed, the sovereign at common law could be held liable for monetary remedies as a matter of course, without its express consent.

C. *Double Immunity: A Judge-Made Rule*

With the Constitution and common law tradition off the table as a proper source for the second layer of sovereign immunity, the reality becomes clear: the requirement of an express waiver from monetary remedies is little more

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169. *Id.*

170. *Id.* at 34 (Holt, L.C.J.).

171. W.S. Holdsworth, *Blackstone's Treatment of Equity*, 43 HARV. L. REV. 1, 26 (1929).

172. As Lord Chief Justice Holt observed in the *Bankers' Case*, private petitions of right seeking redress from the king were commonly "sued to the court of King's-bench," a court of law. The Case of the Bankers in the Court of Exchequer, 1700, 2 W. & M., 12 Will. 3 (Holt, L.C.J.), *reprinted in* Howell, supra note 168, at 34.

173. Thomas O. Main, *Traditional Equity and Contemporary Procedure*, 78 WASH. L. REV. 429, 440 (2003) ("The only remedy that the law courts could award in personal actions was monetary damages.").

174. *See, e.g.*, Jackson, *supra* note 36, at 542 ("As many scholars have concluded, however, the common law doctrine of sovereign immunity was more about the mode for obtaining redress than a ban on redress of injury caused by the sovereign and his agents."). *See generally* David E. Engdahl, *Immunity and Accountability for Positive Governmental Wrongs*, 44 U. COLO. L. REV. 1, 12-21 (1972); Jaffe, *supra* note 22; Pfander, *supra* note 29, at 906-26.

than a judge-made rule. To be sure, commentators no less authoritative than Justice Stevens have lamented that even the first principle of sovereign immunity is a judge-made rule except as is actually reflected in the Eleventh Amendment,[175] but the traditional immunity of the states and the federal government from suit is at least firmly settled by more than a century's worth of decisions.[176]

The historic acceptance of the judge-shaped (if not altogether judge-made) first layer of sovereign immunity presents an interesting question: why is the Court's new second layer of immunity, so to speak, so late to the party? That is, in the absence of any new and groundbreaking understandings of the common law approach to sovereign immunity and without any changes to the Constitution itself, how and why did the Court come to create the second layer of immunity only in the early 1990s when it had for so long already recognized the first layer?

An analysis of the Court's own rationales in *Nordic Village* and *Lane*, along with the cases cited in the two decisions, is instructive, as it reveals that the double immunity rule is the result of the Court's mistaken extension of two otherwise sensible and longstanding lines of jurisprudence. The first line involves cases where the Court has correctly required an express statutory authorization for *atypical* forms of monetary relief against the government (including awards of attorneys' fees, costs, and interest), not because of sovereign immunity per se, but because such forms of relief are not traditionally understood to be available without the parties' agreement even in civil litigation between private, *non*sovereign parties.[177] Compensatory damages, by contrast, are the prototypical form of relief in civil litigation and thus should not require an additional express authorization beyond the waiver of immunity from suit—but the *Nordic Village* and *Lane* Courts failed to heed this distinction. Second, the Court derived the double immunity rule from a series of cases where the scope of a purported waiver of sovereign immunity was strictly construed in order to determine whether the waiver should extend to allow the plaintiff's suit to start with.[178] Although it is sensible to require a clear expression on this front (since to construe a statute as subjecting a sovereign to suit for, say, tort claims where the statute waives immunity only from contract claims would plainly contradict

175. Seminole Tribe v. Florida, 517 U.S. 44, 95 (1996) (Stevens, J., dissenting); *see also* Kenneth Culp Davis, *Sovereign Immunity Must Go*, 22 ADMIN. L. REV. 383, 384 (1970) ("Courts created sovereign immunity."); Florey, *supra* note 8, at 767 ("Sovereign immunity is a judge-made doctrine in its very origins . . . .").

176. *See supra* Part I.A.1.

177. *See* Arcambel v. Wiseman, 3 U.S. (3 Dall.) 306, 306 (1796) (overturning the inclusion of attorneys' fees as damages on the ground that "[t]he general practice of the United States is in op[p]osition to it" (italics omitted)).

178. *See, e.g.*, United States v. Williams, 514 U.S. 527, 531-32 (1995) (construing statutory waiver strictly to determine whether the particular plaintiff bringing the action against the federal government was included in the class of individuals for whom the statute was designed to waive immunity).

the sovereign's intent), the strict construction rule is simply not necessary to determine the availability of ordinary remedies once the sovereign has already granted its consent to be sued.

1. *The requirement of express statutory authorization for atypical monetary awards*

The first set of cases that *Nordic Village* and *Lane* cited in defense of the double immunity rule includes three decisions—*Ruckelshaus v. Sierra Club*,[179] *Ardestani v. INS*,[180] and *Library of Congress v. Shaw*[181]—where private plaintiffs requested untraditional monetary awards against the federal government in the form of attorneys' fees, costs, and interest on a monetary judgment. In all three cases, the Court held that the plaintiff was not entitled to the sought-after award because (1) an express statutory authorization was necessary for such awards to be available in light of their untraditional nature, and (2) the statute at issue in each case did not expressly authorize such an award.

In *Ruckelshaus*, which was cited in *Nordic Village*, the Court considered whether statutory language in the Clean Air Act conferring attorneys' fees to plaintiffs "whenever [the court] determines that such award is appropriate," authorized a fee award to a plaintiff who *lost* on the merits.[182] The Court answered in the negative, looking as a "basic point of reference" to the "American Rule" that in typical civil litigation, even "the *prevailing* litigant is ordinarily not entitled to collect a reasonable attorneys' fee from the *loser*."[183] The *Ruckelshaus* Court's decision thus relied primarily on the fact that attorneys' fees are not commonly available against *any* private defendant absent an express agreement between the parties; the fact that the defendant in the case at bar happened to be the sovereign federal government was merely a "relevant" but apparently not dispositive factor.[184]

Nordic Village also cited *Ardestani v. INS* to justify the second layer of sovereign immunity. That case, like *Ruckelshaus*, concerned an express statutory authorization of relief not traditionally available in normal civil litigation. In *Ardestani*, the Court addressed the question of whether the Equal Access to Justice Act, which permits a prevailing party to recover attorneys' fees and costs in an "adversary adjudication," authorized a court to award fees and costs

179. 463 U.S. 680 (1983).

180. 502 U.S. 129 (1991).

181. 478 U.S. 310 (1986).

182. *Ruckelshaus*, 463 U.S. at 681 (alteration in original) (quoting 42 U.S.C. § 7607(f) (internal quotation marks omitted)).

183. *Id.* at 683-84 (quoting Alyeska Pipeline Serv. Co. v. Wilderness Soc'y, 421 U.S. 240, 247 (1975)) (internal quotation marks omitted).

184. *Id.* at 684-85.

to a party who prevailed in an administrative deportation proceeding.[185] The Court held that the Act did not expressly authorize the desired award because the Congress did not unambiguously intend for the statutory term "adversary adjudication" to extend to administrative deportation proceedings.[186]

Ruckelshaus and *Ardestani* were correctly decided because, in the absence of an express statutory authorization, the "basic . . . 'American Rule'" dictates that a plaintiff may not recover fees or costs from a defendant.[187] But the basic American rule with respect to monetary damages is precisely the opposite—damages are presumed to be the default remedy unless the parties agree otherwise.[188] The Supreme Court itself recognized the difference between damages and attorneys' fees more than two centuries ago in *Arcambel v. Wiseman*, where the Court rejected the notion that a claim for $1600 in attorneys' fees could be "included under the idea of damages."[189] In striking down the fee award, the Court noted in *Arcambel* that "the general practice of the United States is in opposition" to including fees as an element of damages against a defendant.[190] The *Nordic Village* Court thus erred in relying on *Ruckelshaus* and *Ardestani* for the proposition that an express statutory authorization is necessary for an ordinary award of monetary damages, because damages are fundamentally dissimilar from attorneys' fees and costs.

None of this is to challenge the holdings of *Ruckelshaus* and *Ardestani*; the Court was right in both cases to require an express statutory authorization of a sovereign's amenability to attorneys' fees and costs because a court would require the same express agreement in a case involving a private, nonsovereign defendant too.[191] If anything, the chief rationale behind the requirement of an express authorization for fees and costs against a sovereign defendant is thus not sovereign immunity, but rather the longstanding, default operation of the law of remedies in American courtrooms.[192] After all, in run-of-the-mill civil

185. *Ardestani*, 502 U.S. at 131-32 (1991) (quoting 5 U.S.C. § 504(a)(1)) (internal quotation marks omitted).

186. *Id.* at 139.

187. *Ruckelshaus*, 463 U.S. at 683-84.

188. *See, e.g.*, Franklin v. Gwinnett Cnty. Pub. Sch., 503 U.S. 60, 75-76 (1992) ("[I]t is axiomatic that a court should determine the adequacy of a remedy in law before resorting to equitable relief."); RESTATEMENT (SECOND) OF CONTRACTS § 346 (1981) ("The injured party has a right to damages for any breach by a party against whom the contract is enforceable . . . .").

189. 3 U.S. (3 Dall.) 306, 306 (1796).

190. *Id.*

191. *See, e.g.*, Alyeska Pipeline Serv. Co. v. Wilderness Soc'y, 421 U.S. 240, 247 (1975); Fletcher v. A.J. Indus., Inc., 72 Cal. Rptr. 146, 150 (Ct. App. 1968) (noting the general rule in "most American jurisdictions, [that] the party prevailing in an action [against a private defendant] may not recover attorneys' fees unless a statute expressly permits such recovery").

192. *See, e.g.*, RESTATEMENT (FIRST) OF TORTS § 914 cmt. c ("Aside from statutory provisions, a successful party in an action of tort is *not entitled* to compensation for loss of time, attorney fees or other expenses in the conduct of the litigation. He can recover only the

litigation cases where one private party sues another private party, a court's decision whether to award the plaintiff her costs and attorneys' fees against the defendant also hinges on a determination of whether the parties unequivocally agreed to such an arrangement, but no one would describe that inquiry as a manifestation of sovereign immunity.

In addition to citing *Ruckelshaus* and *Ardestani* in *Nordic Village*, the Court in *Lane* cited a third case, *Library of Congress v. Shaw*,[193] to support its double immunity rule. Like *Ruckelshaus* and *Ardestani*, *Shaw* concerned a dispute over an atypical monetary award: interest on a judgment against the government. The question in *Shaw* was whether Title VII's general waiver of sovereign immunity included a waiver of the sovereign's immunity from an interest award on top of any monetary judgment.[194] The Court ruled that Title VII included no such waiver, as the text of the statute did not expressly reference interest awards.[195] In explaining why an express waiver from interest awards was required in the first place, the Court began by noting that the requirement of an express waiver from interest awards "reflects the historical view that *interest is an element of damages separate from damages on the substantive claim*."[196] The Court's distinction between an interest award on the one hand and "damages on the substantive claim" on the other is crucial because it suggests that an express waiver is required for the former, but not the latter—that, in effect, the second layer of immunity should not exist at all because "damages on the substantive claim" can be presumed to be available where a sovereign waives its immunity from suit.[197]

The Court's explanation of its holding in *Shaw* follows this logic. The Court grounded its reasoning for why an express waiver was necessary for an award of interest against a sovereign in the tradition that "common-law courts in England allowed interest by way of damages only when founded upon agreement of the parties."[198] The Court noted that American courts adopted the same approach at the Founding.[199] Interest, like attorneys' fees and costs in other words, had long been a non-default remedy that was presumed to be una-

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statutory costs which are usually insubstantial and give reimbursement for only a small part of the actual expenditures of the litigant." (emphases added)).

193. Library of Congress v. Shaw, 478 U.S. 310 (1986).

194. *Id.* at 311.

195. *Id.* at 319. Note that *Shaw* was superseded by statute when Congress passed the Civil Rights Act of 1991, which among other things amended Title VII to authorize an award of interest against the federal government. *See* Civil Rights Act of 1991, Pub. L. No. 102-166, § 114, 105 Stat. 1071, 1079 (codified as amended at 42 U.S.C. § 2000e-16 (2011)) (providing the same interest as is available in claims against nonpublic parties).

196. *Shaw*, 478 U.S. at 314 (emphasis added).

197. The Court did not actually hold as much in *Shaw*, of course, as evidenced by its later rulings in *Nordic Village* and *Lane*.

198. *Shaw*, 478 U.S. at 314-15.

199. *Id.* at 315 (citing Reid v. Rensselaer Glass Factory, 3 Cow. 393 (N.Y. Sup. Ct. 1824) (reviewing treatment of interest in state courts)).

vailable unless the parties had explicitly agreed otherwise.[200] By contrast, where a remedy such as compensatory damages is traditionally available without an agreement between the parties, *Shaw* suggests—along with *Ruckelshaus* and *Ardestani*—that a sovereign defendant should be treated no differently than a typical private litigant and that no additional express statutory authorization should be required.[201]

2. *The strict construction rule for interpreting the scope of a waiver*

In addition to conflating the difference between ordinary monetary damages awards such as were sought in *Nordic Village* and *Lane* and the non-default costs, attorneys' fees, and interest awards sought in *Ruckelshaus*, *Ardestani*, and *Shaw*, the Court mistakenly drew on a second line of cases to support its double immunity rule. That line of cases concerns the proper boundaries of the *first* layer of sovereign immunity, where the Court has applied a rule of strict construction to ensure that the sovereign intended to consent to the legal action at issue to begin with.

The classical exposition of this rule is the Court's statement in *Lane* that "a waiver of the Government's sovereign immunity will be strictly construed, in terms of its scope, in favor of the sovereign."[202] The key word in this formulation is "scope." Does the strict construction requirement extend to the kind of remedy available in a suit against the sovereign, or does "scope" instead refer only to the preliminary inquiry of whether a particular action is included in the waiver of immunity from suit? As the four cases cited by *Lane* and *Nordic Village* in support of the rule demonstrate, the "scope" of the waiver that must be "strictly construed" was meant originally to encompass issues related only to the first-order question of whether a suit may proceed, and not to the second-order question of available relief.

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200. *Id.* at 314-15.

201. One should be careful not to draw too much from *Shaw* for several reasons. First, although the Court strongly implied that an express statutory authorization of particular monetary remedies is necessary only where the remedy is not traditionally available in civil litigation, it did not formally hold as such and in fact referenced sovereign immunity as part of its rationale. *See id.* at 315. Second, the particular remedy at issue in *Shaw* has actually become somewhat traditional in the American legal system such that interest is now generally presumed to be available in litigation between private parties. *See* CHARLES T. MCCORMICK, HANDBOOK ON THE LAW OF DAMAGES § 51, at 210 (1935). Third, the Court has appeared to distance itself from its ruling in *Shaw*, cabining the applicability of *Shaw*'s no-interest rule in a later case to the United States (but not to the states). *See* Missouri v. Jenkins *ex rel.* Agyei, 491 U.S. 274, 281 n.3 (1989) (internal quotation marks omitted). In the end though, my point here is merely to illustrate that the *Nordic Village* and *Lane* Courts improperly cited *Shaw* as support for the double immunity rule since *Shaw* concerned an atypical kind of monetary award, different from ordinary compensatory damages.

202. Lane v. Pena, 518 U.S. 187, 192 (1996).

The first case cited by both *Lane* and *Nordic Village* in support of their strict-construction rule is *Irwin v. Department of Veterans Affairs*.[203] The question presented in *Irwin* was whether a Title VII action against a federal sovereign defendant could proceed where the suit was brought outside of Title VII's thirty-day statutory filing deadline.[204] The Court strictly construed the language of the filing deadline and held that in light of the defendant's sovereign immunity from suit, the plaintiff's action was jurisdictionally barred.[205] The "scope" of the waiver that was construed strictly in *Irwin* was thus not whether the statute authorized a particular form of relief, but rather whether the terms of the statute allowed the action to proceed at all.

Lane also cited *United States v. Williams*[206] for the strict construction rule. But like *Irwin*, *Williams* did not apply the strict construction rule to a dispute over the availability of certain remedies; at issue instead was whether the plaintiff's suit against the government could proceed at all. In *Williams*, the plaintiff sued the IRS to recover money that she had paid under protest in order to remove a federal tax lien imposed against a different party on the plaintiff's property.[207] Although the Court construed the statutory waiver of immunity strictly, "construing ambiguities in favor of immunity," it nonetheless ruled that the plaintiff's suit could proceed because the statutory language was clear enough to waive immunity from lawsuits brought both by the actual party against whom a tax had been assessed and also by third parties like the plaintiff.[208]

Similarly, the Court's decision in *Nordic Village* cites two cases that strictly construed the scope of a waiver not with respect to the relief available, but rather with regard to whether the sovereign consented to the suit at bar. In *United States v. Mitchell*, the Court determined that an Indian tribe could not sue the federal government for breaching its fiduciary duties under the Indian General Allotment Act of 1887 because the Act did not unambiguously impose fiduciary duties on the government in the first place.[209] And in *United States v. King*, the Court held that the Declaratory Judgment Act did not expressly confer jurisdiction upon the Court of Claims as would be required to allow that court to hear the plaintiff's action for declaratory relief.[210] Thus, like *Irwin* and *Williams*, *Mitchell* and *King* are cases that applied a rule of strict construction to determine whether the sovereign had consented to the suit itself. None of the four cases stand for the proposition suggested in *Nordic Village* and *Lane* that

203. 498 U.S. 89 (1990).
204. *Id.* at 92.
205. *Id.* at 96.
206. 514 U.S. 527 (1995).
207. *Id.* at 529.
208. *Id.* at 531-32.
209. 445 U.S. 535, 542 (1980).
210. 395 U.S. 1, 5 (1969).

the scope of *relief* available in a suit against the government will be strictly construed even as concerns an ordinary monetary judgment.

The Court's pre-*Nordic Village* practice of applying the rule of strict construction to determine whether a particular lawsuit was intended to be within the scope of a waiver of immunity, but not to define the *remedial* scope of the waiver, makes sense in view of the Court's basic account of the core concerns underlying sovereign immunity. Sovereign immunity is, at bottom, concerned not with shielding the government from particular kinds of relief, but rather with protecting the government from the indignity of suit itself.[211] Oddly enough, the Court confirmed this point six years *after* it issued its decision in *Lane* (and ten years after *Nordic Village*) when it wrote:

> [T]he primary function of sovereign immunity is not to protect state treasuries, but to afford the States the dignity and respect due sovereign entities. As a result, we explained in *Seminole Tribe* that "*the relief sought by a plaintiff suing a State is irrelevant* to the question whether the suit is barred by the Eleventh Amendment."[212]

Employing strict construction with respect to the availability of the suit itself but not with respect to the scope of remedies is thus consistent with the primary function of sovereign immunity. The double immunity rule, in contrast, runs counter to the Court's articulation of sovereign immunity's core function, treating the sanctity of the treasury as a foremost objective despite the Court's declaration that the form of relief sought in a suit is irrelevant for immunity purposes.

The Court's reliance in *Nordic Village* and *Lane* on the line of cases involving atypical monetary awards and the line of cases strictly construing the scope of a waiver of sovereign immunity is misplaced not just because those cases involved significantly different legal contexts and legal issues, but also because of the strange results that the double immunity rule threatens to create. If the relevant "scope" of the waiver that must be strictly construed extends beyond the question of whether a particular suit is authorized and reaches to questions of remedies, where does the scope of the strict construction command stop? May the sovereign argue that absent a clear expression to the contrary, its waiver of immunity does not extend unambiguously to the rules of evidence and thus that it should be allowed to introduce hearsay evidence? Or that its waiver must be strictly construed to extend only to an initial adjudication such that, if victorious at trial, the sovereign is immune from an appeal? These suggestions would seem outside the bounds of possibility, but the reality is that there is little—except, perhaps, for judge-made rules—that separates those hy-

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211. *See supra* note 146 and accompanying text.

212. Fed. Mar. Comm'n v. S.C. State Ports Auth., 535 U.S. 743, 769 (2002) (emphasis added) (internal cross-reference omitted) (quoting Seminole Tribe v. Florida, 517 U.S. 44, 58 (1996)).

pothetical extensions of sovereign immunity from the very real extension to ordinary monetary relief effectuated in *Nordic Village* and *Lane*.

Moreover, what implications does the Court's double immunity doctrine have for jurisdictional defenses more broadly? If the sovereign immunity defense is truly "jurisdictional in nature,"[213] and if a defendant can waive that immunity at the outset of a proceeding only to claim it again after the merits are adjudicated in order to avoid a particular remedy, what prevents other waivable jurisdictional defenses from being used in the same uneven manner? The Court has suggested that sovereign immunity is akin to a personal jurisdiction defense,[214] but it is unthinkable that a private defendant who has voluntarily waived her personal jurisdiction defense in a foreign state would be allowed to then reassert a personal jurisdiction argument to evade a monetary remedy after losing on the merits.[215] Yet that is how federal courts have treated the sovereign immunity defense in the aftermath of *Nordic Village* and *Lane*.

In the end, by creating the doctrine of double immunity, the Court has taken what is already a convoluted area of its jurisprudence and left it even further riddled with uncertainty. In the sea of uncertainty, however, this much is clear: the doctrine of double immunity cannot be justified as a reasonable extension of pre-*Nordic Village* case law, and neither is it warranted by the Constitution or the common law.

III. THE ADVERSE IMPACTS OF SOVEREIGN DOUBLE IMMUNITY

If the second layer of sovereign immunity is not required by the Constitution or the common law and instead represents a misguided extension of other cases in the Court's immunity jurisprudence, the next question to ask is whether sound policy considerations nevertheless counsel in favor of the rule. Under this analysis, potential policy benefits from rule should be measured against potential harms. The two chief benefits, protecting the public fisc and deterring frivolous lawsuits against the government, are only weakly served by double immunity, however, and in any case are far outweighed by the harms that the

213. *See supra* note 51 and accompanying text.

214. Wis. Dep't of Corr. v. Schacht, 524 U.S. 381, 394 (1998) (Kennedy, J., concurring) ("[T]he immunity bears substantial similarity to personal jurisdiction requirements . . . ."); *see also* Nelson, *supra* note 51.

215. The obvious rejoinder to this dilemma—that a sovereign defendant is simply different from a private defendant and may enjoy special privileges in order to protect the public fisc—appears to be foreclosed by the Court's declaration in *Federal Maritime Commission* that "the primary function of sovereign immunity is not to protect [sovereign] treasuries," but rather to save the sovereign from the indignity of suit. 535 U.S. at 769. Moreover, while it may be true that there is some *secondary* purpose in sovereign immunity to safeguard the public fisc, it is hard to place too much stock in that purpose in light of statements by the Court to the effect that "the relief sought by a plaintiff suing a State is irrelevant to the question whether the suit is barred . . . ." *Seminole Tribe*, 517 U.S. at 58.

rule inflicts upon injured plaintiffs, notions of legislative supremacy, and the sovereign's own dignity.

A. *Policy Arguments in Support of Double Immunity*

There are two important policy interests that may be served by double immunity: protecting the public fisc and deterring frivolous lawsuits against government defendants. With respect to the public fisc interest, Justice Kennedy captured the point when he observed in *Alden v. Maine* that federal power to authorize private suits for money damages places a "strain on the States' ability to govern in accordance with the will of their citizens."[216] That is to say, requiring an express statutory authorization of monetary remedies (in addition to an express consent to suit) could ensure on the one hand that public taxpayers are not treated against their will as a de facto surety for the harms experienced by private plaintiffs. The second layer of immunity could also be viewed as furthering lawmakers' ability to set and stick to budget projections, since the only damages actions that would be permitted are those that the legislature explicitly agrees to beforehand. In the absence of the second layer of protection, by contrast, sovereign governments might be caught by surprise by private damages lawsuits to which they did not expressly consent—which in turn could jeopardize their ability to meet other commitments such as the provision of social services, fulfillment of contracts, and so on.

Although these are surely weighty interests in support of the double immunity rule, two points might be made in response. First, alternative judicial approaches exist that would serve the same public fisc interests just as powerfully, but with fewer adverse consequences. To begin with, the second layer of immunity is redundant: the first principle of immunity that prevents a suit against the sovereign absent the sovereign's consent already protects the public fisc against unwanted actions.[217] Thus, if a sovereign government is worried that certain types of private damages actions would frustrate its ability to meet other important financial obligations or would run contrary to the desires of taxpayers, it can simply invoke the first layer of immunity and refuse to consent to the suit at all. Moreover, even if the concern for the public fisc was severe enough to warrant an additional layer of protection beyond the first-principle immunity from suit, that extra protection could be provided through a rule under which a sovereign who consents to be sued may still expressly *renounce* the availability of monetary remedies using clear statutory language. That approach, in effect, would be to reverse the current default presumption from "no-damages" to "yes-damages" but to allow the legislature to opt out of the yes-damages default by clear statement.[218]

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216. 527 U.S. 706, 750-51 (1999).

217. *See supra* Part I.A.

218. *See infra* Part IV for a more detailed description of this alternative.

Second, even setting aside the fact that other approaches would accomplish the same public-fisc-protecting ends as the Court's double immunity rule, the exact nature of the public fisc interest is itself subject to debate. The premise of the public fisc argument is that there is a value in vesting decisionmaking authority over budget expenditures in the legislature, as opposed to placing such power in the hands of private plaintiffs who claim to have been injured by the government. Perhaps this is true in the aforementioned sense that setting and following government budgets is easier where lawmakers have control over the purse strings (though as already discussed, such control might be just as easily preserved without the second layer of immunity). But it is important to distinguish that *practical* concern over the public fisc from the *separation of powers* concerns that actually led to our system of legislative supremacy over appropriations. The Framers' primary motivation for granting Congress power over the purse was not a concern over unwanted private claims (or a concern that such claims would make it hard to run a balanced budget), but rather the desire to check *executive* power.[219] The colonial assemblies recognized that the best way to wrest control of their own destinies away from the Crown was to obtain and then never surrender the "Keys to unlock People[']s Purses."[220] Thus, in enacting the Constitution, the Framers located the power of the purse in Congress as a "counterweight to the President's 'power of the sword.'"[221]

Viewed in this light, allowing a private party to sue a consenting sovereign for a monetary remedy (even if the consent did not expressly identify such relief) does not disrupt the public fisc interest as the Framers would have understood it. That is because the effect of such suits is to transfer public dollars to citizens whom the government has wronged; taxpayer dollars are not being used to improperly advance the private motives of executive officials. In fact, allowing private suits for damages might actually *further* the Framers' interest in placing control over the public fisc in the Congress, since private lawsuits typically allege wrongful action on the part of the executive branch.[222] What better way for Congress to check the executive branch than to authorize the people themselves to sue the executive when it has done wrong?

The second public policy interest that might justify the second layer of immunity is the desire to reduce the amount of meritless litigation that private

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219. *See* Figley & Tidmarsh, *supra* note 22, at 1246 (observing that "the colonial assemblies had thoroughly internalized the lesson of the Glorious and Financial Revolutions: that a legislature's power to thwart an overbearing executive derived from its control over raising revenue and appropriating money").

220. JACK P. GREENE, NEGOTIATED AUTHORITIES: ESSAYS IN COLONIAL POLITICAL AND CONSTITUTIONAL HISTORY 197 (1994) (quoting HENRY CARE, ENGLISH LIBERTIES 164 (London, 4th ed. 1719)) (internal quotation marks omitted).

221. Figley & Tidmarsh, *supra* note 23, at 1210.

222. *See, e.g.*, Lane v. Pena, 518 U.S. 187 (1996) (action against federal executive agency); United States v. Nordic Vill., Inc., 503 U.S. 30 (1992) (action against IRS); United States v. Hall, 269 F.3d 940 (8th Cir. 2001) (action against federal law enforcement officials).

parties file against government defendants.[223] In this regard, the double immunity rule might be wise from a policy perspective insofar as it deters frivolous lawsuits, which are of course costly to defend even if the government ultimately prevails on the merits. By one count, more than 36,000 suits were filed involving the United States as a defendant in 2011 alone.[224] Proponents of double immunity could accordingly argue in support of the rule on the ground that it would reduce this exorbitant drain of government time and resources. After all, private plaintiffs would be significantly less likely to sue the government if they are foreclosed from obtaining a monetary remedy at the outset.

The initial response to this policy interest, however, is that the public policy interest in deterring frivolous lawsuits against the government is only weakly served by the double immunity rule. For starters, the second layer of immunity is overbroad, deterring not just frivolous attempts to reach the sovereign coffers but meritorious ones too.[225] Furthermore, the very premise of the argument—that there is a wave of meritless litigation targeting sovereign defendants—is subject to debate. Private suits for monetary damages against government defendants are fundamentally different from, say, private securities class actions where defendant corporate directors have an inherent incentive to settle even baseless suits in order to avoid personal liability, which in turn triggers the filing of more meritless suits.[226] Government defendants, by contrast, have no self-interested reason to settle a meritless claim,[227] and so it stands to reason that strike suits involving sovereign defendants may be less of a problem than strike suits involving corporate defendants.[228]

Moreover, just as is true of the public fisc interest, the second layer of immunity does not do anything to deter frivolous litigation that is not already accomplished by the first layer. A sovereign that believes, for example, that a certain class of private claims is so likely to be frivolous as to not warrant judicial

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223. *Cf.* Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 428 (1971) (Black, J., dissenting) (noting the "growing number of frivolous lawsuits" seeking damages against the government).

224. ADMIN. OFFICE OF THE U.S. COURTS, JUDICIAL BUSINESS OF THE UNITED STATES COURTS: 2011 ANNUAL REPORT OF THE DIRECTOR 125 tbl.C-2 (2012), *available at* http://uscourts.gov/uscourts/Statistics/JudicialBusiness/2011/JudicialBusiness2011.pdf.

225. *See, e.g.*, *Nordic Vill.*, 503 U.S. at 31, 39 (upholding plaintiff bankruptcy trustee's claim of $20,000 on the merits but nevertheless barring relief because of sovereign immunity).

226. *See* Dale A. Oesterle, *Limits on a Corporation's Protection of Its Directors and Officers from Personal Liability*, 1983 WIS. L. REV. 513, 580-81 (directors' incentives "encourage[] settlement" of derivative lawsuits).

227. This is true, of course, only insofar as individual government officials enjoy qualified immunity in the alleged claim. *See generally* Alan K. Chen, *The Ultimate Standard: Qualified Immunity in the Age of Constitutional Balancing Tests*, 81 IOWA L. REV. 261 (1995); Karlan, *supra* note 24, at 1322-23.

228. *Black's Law Dictionary* defines a "strike suit" as a suit that is "often based on no valid claim, brought either for nuisance value or as leverage to obtain a favorable or inflated settlement." BLACK'S LAW DICTIONARY 1572 (9th ed. 2009).

consideration can simply refuse its consent to those suits in the first place—which of course has the necessary effect of foreclosing the possibility of monetary relief. Furthermore, if the sovereign wishes to permit certain suits to proceed but just not for monetary damages, that goal could be accomplished by requiring the sovereign to expressly renounce the availability of monetary relief in the course of its consent to the suit—the inverse of the current double immunity presumption.[229]

B. *Policy Arguments Against Double Immunity*

Even if the foregoing policy arguments in favor of double immunity are accepted at face value, the main reason why the double immunity rule cannot be justified on policy grounds is the severely negative policy effects that the rule produces. The doctrine of double immunity produces three substantial harms: (1) it leads to grossly inequitable results for private plaintiffs, (2) it frustrates the intent of Congress and state legislatures that draft statutory waivers of immunity in the first instance, and (3) it impairs the dignity and authority of the very sovereign defendants that the rule seeks to protect.

1. *Harm to private plaintiffs*

We have already seen how double immunity functions to the detriment of private plaintiffs. Consider the position of the individual creditors represented by the bankruptcy trustee in *Nordic Village*, to whom the bankrupt restaurant owed money. If the restaurant's owner had improperly embezzled the $20,000 and transferred it to, say, his wife's private account, nothing would have barred the trustee and creditors from recovering the funds. Recognizing that the result should be no different where the improper transferee happens to be a governmental unit, the government voluntarily waived its sovereign immunity from suit in § 106(c) of the Bankruptcy Code.[230] Yet because that waiver did not expressly mention monetary remedies, the creditors were left without recourse even though they had prevailed on the merits of their action.

Or consider the plight of Roy Lee Hall, who sued the government for the return of his Chevy pickup when federal agents wrongfully seized it from him during the course of a drug conspiracy investigation.[231] When the government responded that it had lost track of the vehicle after transferring it to a towing service, the district court chose to award Hall $2100, the fair market value of the vehicle.[232] But the court of appeals overturned that award on the grounds that Federal Rule of Criminal Procedure 41(g) only constitutes a waiver of sov-

229. See *infra* Part IV for a more detailed description of this alternative.

230. *Nordic Vill.*, 503 U.S. at 34 (citing 11 U.S.C. § 106(c)).

231. United States v. Hall, 269 F.3d 940, 941 (8th Cir. 2001).

232. *Id.*

ereign immunity from actions for the return of actual physical property, and does not explicitly afford a monetary remedy in cases where the property is lost or destroyed.[233] The net result was that even though the government agreed to let the plaintiff sue over the wrong, and even though the district court ruled that he had prevailed on the merits, the double immunity rule denied him (and numerous other similarly situated litigants[234]) a meaningful remedy.[235]

Or, perhaps most starkly of all, recall Janet Dickey, who lost her job as a blind vendor at a federal army base when the base cancelled her food services contract because her state employee licensing agency had been "negligent in its oversight, responsibility of, and management" of the contract.[236] A panel of arbitrators unanimously agreed that she had sustained *a quarter million dollars*' worth of damages as a result of the state's negligence, and yet the court struck down the award because the Randolph-Sheppard Act only required the state to "agree to consent to . . . arbitration" without explicitly mentioning that the arbitrators could issue a monetary award.[237] Despite the extraordinary inequity of this ruling, Dickey is not alone in her plight: the First Circuit has also construed the Randolph-Sheppard Act to preclude monetary remedies in the same manner.[238]

There is no need to run through the entire laundry list of cases where the double immunity rule has functioned to deny plaintiffs monetary relief that courts agree they otherwise deserve. Suffice it to say that private plaintiffs in each of the statutory contexts discussed in this Article have experienced similar outcomes: a sovereign defendant has injured the private individual, the sovereign has unequivocally agreed to be sued, the plaintiff wins on the merits of her

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233. *See id.* at 943.

234. *See* United States v. Jones, 225 F.3d 468, 469-70 (4th Cir. 2000) (upholding plaintiff's Rule 41(g) motion but denying plaintiff monetary award in lieu of property the government accidentally destroyed); United States v. Bein, 214 F.3d 408, 410, 415 (3d Cir. 2000) (same); Peña v. United States, 157 F.3d 984, 986 (5th Cir. 1998) (same); Munoz v. Attorney for U.S. Exec. Office, No. 4:03-CV-03-2293, 2006 WL 2246413, at *1, *6 (M.D. Pa. Aug. 6, 2006) (same).

235. *See Hall*, 269 F.3d at 943. Note that a litigant in this posture *may* be able to state a claim under the Tucker Act or the Federal Tort Claims Act (FTCA), but that the burden of prevailing on such a claim is far more substantial given that the plaintiff must show that a contract existed such as would merit damages under the Tucker Act or that the government breached a duty of care under the FTCA. Since the cost and chance of loss in mounting such a challenge far exceeds the cost of a simple Rule 41(g) motion for return of property, it is of little comfort to persons whose property has been wrongfully seized and then lost or destroyed to say that they may be able to sue under different grounds. *See Hall*, 269 F.3d at 943 (noting the possibility that a Tucker Act or FTCA claim "may accrue" in light of the facts of the case).

236. Wis. Dep't of Workforce Dev. v. U.S. Dep't of Educ., 667 F. Supp. 2d 1007, 1011 (W.D. Wis. 2009).

237. *Id.* at 1010-11, 1015 (citing 20 U.S.C. § 107b(6)).

238. New Hampshire v. Ramsey, 366 F.3d 1, 4, 21-22 (1st Cir. 2004) (applying double immunity to overturn damages award of $900,000 against state licensing agency under the Randolph-Sheppard Act).

claim, and yet the second layer of sovereign immunity nevertheless precludes a meaningful remedy.

2. *Harm to legislative supremacy*

In addition to leaving injured plaintiffs without recourse, the judge-made doctrine of double immunity also contravenes notions of legislative supremacy by substituting the judgment of courts for the will of legislatures when it comes to interpreting statutory waivers of sovereign immunity. The harm to legislative supremacy may seem counterintuitive at first glance because clear statement rules like the one that the Court uses to give effect to the second layer of immunity—that the statutory text of a waiver of sovereign immunity must extend "unambiguously" to monetary claims[239]—are generally intended to aid Congress. As William Eskridge and Philip Frickey have suggested, clear statement rules are, at their best, designed to create a "predictable interpretive regime"[240] that provides Congress[241] with certainty over how particular statutory language (and gaps in the language) will be construed by the Court.[242]

Yet as other scholars have explained, the good judicial intentions undergirding clear statement rules do not always play out in practice because "clear statement rules can produce results contrary to legislative intent."[243] A clear statement rule may frustrate legislative supremacy if, among other things, the rule "prevents a court from understanding the meaning of a statute or what Congress intended."[244]

The double immunity clear statement rule has that exact effect for two reasons. First, the rule presumes that Congress intends to enact waivers of sovereign immunity in an internally inconsistent manner; that is, the rule presumes that Congress intended to grant a private plaintiff the right to sue while withholding the right to an appropriate remedy in that suit. This presumption runs counter to the backdrop of centuries' worth of traditional jurisprudence on rights and remedies[245] that Congress is surely aware of, not to mention the Court's own opinions dating as far back as *Marbury v. Madison*,[246] where

239. United States v. Nordic Vill., Inc., 503 U.S. 30, 34 (1992).

240. William N. Eskridge, Jr. & Philip P. Frickey, *The Supreme Court, 1993 Term—Foreword: Law as Equilibrium*, 108 HARV. L. REV. 26, 86 (1994).

241. Note that I reference Congress in this part but the same argument is true with respect to state legislatures.

242. Eskridge & Frickey, *supra* note 240, at 66-67.

243. Nagle, *supra* note 57, at 819.

244. *Id.* at 805.

245. *See, e.g.*, 3 WILLIAM BLACKSTONE, COMMENTARIES *23 ("[I]t is a general and indisputable rule, that where there is a legal right, there is also a legal remedy . . . ."); *see also supra* note 165 and accompanying text.

246. 5 U.S. (1 Cranch) 137, 163 (1803) ("The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury.").

Chief Justice Marshall approvingly cited Blackstone's maxim that "every right, when withheld, must have a remedy, and every injury its proper redress."[247]

Second, applying the clear statement rule to the second layer of immunity fails to do justice to congressional intent because the rule presumes that Congress intended to enact a waiver of sovereign immunity for the sole remedial purpose of authorizing nonmonetary, injunctive relief, even though Congress is fully aware that such relief may already be available from unconstitutional conduct in the state immunity context under the Court's *Ex parte Young* doctrine.[248] Giving effect to the second layer of immunity, in other words, assumes that Congress intends for certain waivers of state immunity to be mere surplusage—which is a strange approach to discerning congressional meaning, to say the least.

One way to see that the double immunity clear statement rule fails to do justice to congressional intent is to look at Congress's own response to a number of the Court's double immunity-based decisions. For instance, Congress acted promptly to overturn *Nordic Village*, the very case where the second-layer clear statement rule was first formulated, by enacting the Bankruptcy Reform Act of 1994.[249] The Bankruptcy Reform Act amended § 106 of the Bankruptcy Code and, in doing so, expressly stated the congressional purpose of overruling *Nordic Village* to ensure that monetary remedies would be available against government entities.[250] Similarly, Congress overturned the Court's ruling in *Library of Congress v. Shaw* that Title VII's waiver of immunity did not expressly extend to an award of interest against the federal government in its enactment of the Civil Rights Act of 1991.[251]

These congressional reactions to the double immunity rule do suggest a natural counterargument, however. Conceding that the rule may produce some short-term pain (that is, cases where monetary relief is denied despite Congress's original intent to the contrary), proponents of double immunity could argue that the rule works no frustration of legislative intent in the long run. For example, if Congress truly intended for RLUIPA and the Privacy Act to permit the types of private damages actions sought by plaintiffs Sossamon and Cooper, respectively,[252] Congress could simply amend both laws accordingly. And

247. *Id.* at 147 (quoting 3 WILLIAM BLACKSTONE, COMMENTARIES *109).

248. *See Ex parte* Young, 209 U.S. 123 (1908).

249. *See* S. Elizabeth Gibson, *Congressional Response to* Hoffman *and* Nordic Village*: Amended Section 106 and Sovereign Immunity*, 69 AM. BANKR. L.J. 311, 312 (1995).

250. *See* H.R. REP. NO. 103-835, at 42 (1994), *reprinted in* 1994 U.S.C.C.A.N. 3340, 3350-51.

251. *See supra* note 195. One response to this argument is that congressional action to overrule *Hoffman*, *Nordic Village*, and *Shaw* may reflect changed views regarding the underlying policies and not the original intent behind the laws. This is hard to refute conclusively, but Congress's rapid action to overrule these decisions suggests a preexisting belief about the relief that should have been available under each statute.

252. *See* Sossamon v. Texas, 131 S. Ct. 1651, 1656 (2011); FAA v. Cooper, 132 S. Ct. 1441, 1447-48 (2012).

looking prospectively, judicial enforcement of the double immunity framework would put Congress on notice that in order to authorize private monetary claims in new statutes, it simply has to do so expressly. Whatever legislative supremacy or other policy harms the rule creates, in other words, need not be perpetual in view of Congress's ability to serve as a responsive backstop.

The difficulties with this argument are manifold. To start, it is premised on the twin assumptions that Congress regularly monitors federal court decisions for mistaken exercises of statutory interpretation, and that it acts swiftly to correct any mistakes it discovers. Whether Congress is in fact responsive in this manner has been the subject of thorough debate in the academy, and I cannot give it due justice in this space. In general terms, however, the traditional view holds that Congress is by and large unaware of federal court statutory interpretation decisions, and unresponsive even to cases that come to its attention.[253] A groundbreaking empirical study by William Eskridge challenged this traditional view, at least with respect to Congress's responsiveness to Supreme Court statutory interpretation cases.[254] His analysis revealed that between 1967 and 1990, Congress overrode approximately five Supreme Court statutory interpretation decisions per year—a rate far higher than previously thought.[255] That rate of correction is still modest, however, especially when one also considers the sheer number of lower federal court decisions interpreting statutory enactments that Congress is much less likely to review. According to one study, even as the courts of appeals issued roughly 26,000 merits opinions per year between 1990 and 1998, Congress enacted statutory provisions in response to just sixty-five of them, or an average of eight per year.[256] In short, then, the idea that any policy harms from the double immunity rule—which, recall, has been applied in a variety of contexts by the Supreme Court and courts of appeals alike[257]—will be quickly resolved by an attentive Congress rests at best on unsettled grounds.

What is more, Congress's ability to override mistaken decisions (however potent that ability may be) is far from a sufficient antidote anyhow. Even the fastest-acting Congress that quickly recognizes and corrects judicial errors could not order lower courts to reopen and fix final judgments handed down

253. *See, e.g.*, Abner J. Mikva, *How Well Does Congress Support and Defend the Constitution?*, 61 N.C. L. REV. 587, 609 (1983) (surmising that "most Supreme Court decisions never come to the attention of Congress").

254. William N. Eskridge, Jr., *Overriding Supreme Court Statutory Interpretation Decisions*, 101 YALE L.J. 331, 335-36 (1991).

255. *Id.* at 338 & tbl.1. By contrast, a 1958 *Harvard Law Review* note had found a total of just twenty-one instances of congressional reversals between 1945 and 1957, or fewer than two per year. Note, *Congressional Reversals of Supreme Court Decisions: 1945-1957*, 71 HARV. L. REV. 1324, 1324 & n.3, 1326 (1958).

256. *See* Stefanie A. Lindquist & David A. Yalof, *Congressional Responses to Federal Circuit Court Decisions*, 85 JUDICATURE 61, 64-65 & tbl.1, 68 (2001).

257. *See supra* Part I.B.3.

under the prior incorrect rule of decision.[258] Judicial decisions that incorrectly withhold monetary relief from private plaintiffs who have been wronged by sovereign defendants will therefore always cause some harm, even if Congress acts swiftly to correct them. And reliance on the salve of congressional correction can of course be overstated: *any error* in judicial interpretation of a statute can theoretically be fixed by legislative amendment, but that is hardly a reason to excuse courts from trying to decide cases correctly under the law. The question that should guide courts is thus not whether their mistakes of statutory interpretation can be fixed by Congress (the answer is always yes), but rather whether their approach to interpreting a particular statute best captures the intentions of Congress. Double immunity fails this basic test for the aforementioned reasons: it conflicts with longstanding understandings regarding the nexus between right and remedy, and it presumes that certain waivers of sovereign immunity are intended to be surplusage in light of *Ex parte Young*.

3. *Harm to the sovereign itself*

The third harm engendered by the Court's double immunity jurisprudence is an affront to the very party whose interests are supposed to be served by the rule: the sovereign itself. On its face, of course, the rule would appear to benefit sovereign defendants since its ultimate impact is to foreclose monetary judgments that would otherwise come out of the sovereign's coffers. The problem is that in barring private plaintiffs' access specifically to monetary judgments, the natural consequence of the rule is to leave injunctive relief as the default remedy against a sovereign defendant that has waived its immunity.[259]

As an initial matter, this default presumption in favor of injunctive relief runs counter to the standard approach per the age-old law of remedies. As the Court explained just three Terms ago in *Monsanto Co. v. Geertson Seed Farms*,

> An injunction is a drastic and extraordinary remedy, which should not be granted as a matter of course. If a less drastic remedy . . . [i]s sufficient to redress respondents' injury, no recourse to the additional and extraordinary relief of an injunction [i]s warranted."[260]

The doctrine of double immunity is inconsistent with this approach, as it takes the "less drastic" monetary damages remedy off the table as a matter of

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258. *See* Plaut v. Spendthrift Farm, Inc., 514 U.S. 211, 240 (1995) (holding that Congress may not require federal courts to reopen final judgments).

259. *See, e.g.*, United States v. Nordic Vill., Inc., 503 U.S. 30, 35 (1992) (explaining that the statute may be read to permit "declaratory or injunctive relief but not an affirmative monetary recovery"); Sossamon v. Texas, 560 F.3d 316, 326, 331 (5th Cir. 2009) (observing that "RLUIPA unambiguously creates a private right of action for injunctive and declaratory relief" but not monetary damages), *aff'd*, 131 S. Ct. 1651 (2011); Lane v. Pena, No. 95-5006, 1995 WL 418635, at *1 (D.C. Cir. June 5, 1995) (per curiam) (summarily affirming district court's decision to award injunctive but not compensatory relief), *aff'd*, 518 U.S. 187 (1996).

260. 130 S. Ct. 2743, 2761 (2010) (internal citations omitted).

course, regardless of whether such an award might be perfectly sufficient to redress the plaintiff's injury. As Justice Sotomayor aptly explained in her dissent in *Sossamon*, "[u]nder our traditional approach to deciding what remedies are available for violation of a federal right, damages are the default—and equitable relief the exception . . . ."[261]

Yet even if the double immunity rule's backward approach to remedies is to be excused, a more fundamental question nonetheless remains: does restricting the remedial scope of lawsuits against state and federal sovereign defendants to injunctive relief offer any more respect to the sovereigns' dignity interests than simply allowing monetary damages? The answer may well be no. Injunctions, after all, are "often more intrusive than damages remedies because they make it impossible for a state to decide that it is willing to pay for violating particular statutory rights in order to pursue goals it considers more important."[262]

Consider, by way of example, the federal defendant in *Lane v. Pena*, the Merchant Marine Academy. The Academy decided to discharge a cadet on the basis that the cadet's diabetic condition would prevent him from serving in an armed forces reserve unit upon graduation—a result that would constitute a basic failure of the Academy's educational mission.[263] The cadet sued under the Rehabilitation Act for both compensatory damages and injunctive relief in the form of reinstatement.[264] Applying the doctrine of double immunity, the Supreme Court held that the Rehabilitation Act did not waive sovereign immunity from a damages award, and that as a result injunctive relief was the default remedy.[265]

But from the federal government's perspective, forcing the Academy to reinstate a cadet who could not serve in a reserve capacity during a time of conflict would undermine the Academy's goal of preparing cadets "for the safe and efficient operation of the merchant marine . . . as a naval and military auxiliary in time of war or national emergency."[266] The double immunity rule thus had the perverse effect of depriving the sovereign of its choice to "violat[e] particular statutory rights in order to pursue goals it considers more important."[267] If given that choice, the Academy might well have elected to exclude the plaintiff from the Academy, pay damages for his loss, and provide the valuable training

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261. 131 S. Ct. at 1665 (Sotomayor, J., dissenting) (internal quotation marks omitted) (quoting Franklin v. Gwinnett Cnty. Pub. Sch., 503 U.S. 60, 75-76 (1992)).

262. Karlan, *supra* note 24, at 1329 (emphasis omitted).

263. Lane v. Pena, 867 F. Supp. 1050, 1052-53 (D.D.C. 1994), *vacated in part*, No. 94-1608 (D.D.C. Dec. 22, 1994) (vacating award of compensatory damages, but leaving intact injunctive relief), *aff'd*, No. 95-5006, 1995 WL 418635, at *1 (D.C. Cir. June 5, 1995), *aff'd*, 518 U.S. 187 (1996).

264. *Lane*, 867 F. Supp. at 1052.

265. *Lane*, 518 U.S. at 196-97.

266. 46 U.S.C. § 51103 (2011).

267. Karlan, *supra* note 24, at 1329.

opportunity to another cadet instead. Far from protecting the sovereign's interests, then, the double immunity rule may actually undermine sovereign authority by denying the sovereign the discretion to weigh the importance of its policy goals against the cost of a monetary damages award and choose its preferred outcome.

It is hard to make much of a case for a rule that harms rather than helps its intended beneficiary and that, in the meanwhile, injures private plaintiffs and substitutes judge-made interpretive values in place of congressional intent. The Court can—and should—do better. I offer a suggestion as to how next.

IV. A BETTER RULE: REVERSING THE PRESUMPTION IN THE SECOND LAYER OF IMMUNITY

The doctrine of double immunity encompasses two core propositions. First, the doctrine holds that the sovereign should have the power to waive its immunity from a class of suits without opening itself to liability for monetary damages in those suits.[268] Second, the doctrine commands that the sovereign should be *presumed* to have done exactly that—that is, a waiver of sovereign immunity is presumed (subject to a clear statement rule) to authorize the particular suit but not liability for monetary damages.

The Court is surely correct in the first proposition, that a sovereign is free to consent to a suit without consenting to a monetary damages remedy. After all, private parties routinely do so in the form of no-damages clauses,[269] and there is no compelling reason why the federal government should not be afforded the same sort of freedom.

The trouble with double immunity, then, comes from the second proposition: the default assumption that a waiver of immunity does not extend to monetary remedies. That proposition, however, can be severed from the first: the Court can preserve the sovereign's discretion to withhold its consent to a monetary damages remedy without presuming that it has always done so. In other words, the Court should treat a sovereign defendant like any other party who has consented to be sued[270]: if the sovereign defendant wishes for no damages

268. *See Lane*, 518 U.S. at 196 ("It is plain that Congress is free to waive the Federal Government's sovereign immunity against liability without waiving its immunity from monetary damages awards.").

269. *See, e.g.*, Pellerin Constr., Inc. v. Witco Corp., 169 F. Supp. 2d 568, 583-84 (E.D. La. 2001) (upholding contractual no-damages clause that declared, "[Plaintiff] shall not be entitled to, and hereby expressly waives recovery of, any damages suffered by reason of delays of any nature, and extension of time shall constitute the . . . sole remedy for delays" (internal quotation marks omitted)); Peter Kiewit Sons' Co. v. Iowa S. Utils. Co., 355 F. Supp. 376, 396, 400-01 (S.D. Iowa 1973) (upholding no-damages clause limiting relief available in a particular action to requests for additional time to complete a contract).

270. The Court has suggested its approval of this approach—treating a sovereign defendant like an ordinary private defendant once it has consented to suit—in prior cases involving the relationship between waivers of sovereign immunity and statutes of

to be available in the suit, it must say so in clear language.[271]

This approach, in effect, flips the existing double immunity rule on its head by reversing the rule's "no monetary damages" presumption and replacing it with a "yes-damages" presumption, subject to the condition that a sovereign defendant can always undo the "yes-damages" presumption by using express statutory language. Just how clear must that language be? Clear enough to satisfy a clear statement rule—or, to borrow the standard used in the lower federal courts concerning no damages clauses between private parties, "when the language contained in no damage clauses, is *clear and without ambiguity*, such clauses will be regarded as valid, and enforced according to their terms."[272]

Applying this alternate rule instead of the double immunity doctrine is consistent not only with judicial treatment of no-damages clauses between private parties, but also with the Supreme Court's own case law regarding sovereign defendants in certain contexts. In *Wells Bros. Co. v. United States*, for example, the Court considered a claim by a private construction company against the United States for damages stemming out of delays that the government had ordered during the building process.[273] Although the Tucker Act effectuated a waiver of the government's sovereign immunity from the suit, the Court nonetheless held that no damages award would be available because of an express no-damages clause in the contract, which read "no claim shall be made or allowed to the contractor for any damages which may arise out of any delay caused by the United States."[274]

While *Wells Bros.* involved the Court finding that a "yes-damages" presumption had been reversed through use of clear and express language in a one-off federal contract, the Court has also upheld generally applicable *statutory* language expressly disclaiming a damages remedy. The Administrative Procedure Act (APA) is a perfect example.[275] The APA waives the federal government's immunity from suit using the following language:

> A person suffering legal wrong because of [the federal government's action] is entitled to judicial review thereof. An action in a court of the United States seeking relief *other than money damages* . . . shall not be dismissed nor

limitations. As the Court wrote in *Franconia Associates v. United States*, "[statute of] limitations principles should generally apply to the Government 'in the same way that' they apply to private parties . . . ." 536 U.S. 129, 145 (2002) (quoting Irwin v. Dep't of Veterans Affairs, 498 U.S. 89, 95 (1990)).

271. Note the advantage that the sovereign has over a private defendant even under this proposed rule: unlike a private defendant who must obtain a no-damages agreement from the plaintiff, the sovereign is able to take damages off the table unilaterally via statute, without the consent of the opposing party.

272. *Peter Kiewit Sons' Co.*, 355 F. Supp. at 396 (emphasis added).

273. 254 U.S. 83, 84-85 (1920).

274. *Id.* at 86-87 (emphasis omitted) (internal quotation mark omitted).

275. 5 U.S.C. §§ 551-559, 701-706 (2011).

> relief therein be denied on the ground that it is against the United States . . . .[276]

Thus, in *Department of Army v. Blue Fox, Inc.*, the Court addressed the question of whether the APA's waiver of immunity authorized a plaintiff subcontractor to sue the government for an equitable lien on funds owed to the prime contractor, as the prime contractor had failed to pay the subcontractor.[277] The Court held that plaintiff's sought-after relief, although equitable in nature, still had the "goal" of seizing "money in the hands of the Government as compensation."[278] Accordingly, the suit could not proceed because it in essence sought the very money damages expressly precluded under the APA.[279]

Blue Fox thus stands in stark relief against *Nordic Village* and *Lane*. In *Nordic Village* and *Lane*, the Court determined that no monetary damages would be available because the statute was silent or ambiguous as to monetary claims. In *Blue Fox*, by contrast, the Court ruled that no monetary damages would be available because the statute *expressly forbade* such damages. Of course, if *Nordic Village* and *Lane* are correct, then the APA's express language precluding relief in the form of monetary damages would be unnecessary; simply waiving immunity without any mention of monetary relief would be enough. Yet my core argument here is that the APA's express preclusion of monetary relief *ought* to have been necessary to the outcome in *Blue Fox*—indeed, the APA's text (waiving immunity from actions "seeking relief other than money damages") is precisely the kind of language that Congress should use if it seeks to waive its immunity from suit without opening itself to monetary relief.

Accordingly, under this alternative approach, if a statute unambiguously forecloses monetary relief using clear language like the APA, then no damages will be available even though the sovereign has consented to be sued. But if the statute waives the sovereign's immunity from suit using language that is silent or ambiguous as to monetary relief, then monetary damages should be available against the sovereign as would be true against an ordinary private defendant.[280]

This rule—call it the "opt-in approach" to immunity from monetary claims[281]—resolves several of the problems posed by the double immunity rule that it would replace. First, the opt-in approach preserves a sovereign's ability

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276. *Id.* § 702 (emphasis added).

277. 525 U.S. 255, 256-57 (1999).

278. *Id.* at 263.

279. *Id.*

280. Note that this alternate rule would still require an express statutory authorization of *unusual* monetary awards such as attorneys' fees and costs, since those awards would not be available against an ordinary private defendant without an express agreement either. *Ruckelshaus*, *Ardestani*, and similar cases are thus untouched by the new rule. *See supra* Part II.C.1.

281. So called by virtue of its contrast to the double immunity rule, which requires sovereign defendants to explicitly opt *out* from their presumed immunity against monetary claims.

to safeguard the public fisc and deter unwanted lawsuits by allowing the sovereign to enact an affirmative no-damages rule in a statute so long as it does so using clear language.[282] Second, by treating monetary damages as available against the sovereign by default, the opt-in rule affords greater relief to private plaintiffs whom the government has wronged,[283] respects congressional intent,[284] and better preserves the sovereign's choice to pay damages in order to violate a statutory right and pursue a more important policy objective.[285] Third, the presumption that monetary damages are available against the sovereign is more consistent with common law understandings of a sovereign's obligation to remedy wrongs that it has caused, since the opt-in approach accepts as a default Blackstone's maxim that "to *know of* an injury and to *redress* it are *inseparable* in the royal breast . . . ."[286]

Finally, the approach I have suggested as an alternative to double immunity is sensitive to the bigger-picture democratic theory-based critiques of sovereign immunity expressed by scholars such as Erwin Chemerinsky.[287] If, as Dean Chemerinsky has suggested, "government accountability is inherent in the structure of the Constitution" and our democratic system,[288] then at least the opt-in rule allows the people to hold their government accountable for monetary harms by default.

To be certain, getting rid of the judge-made double immunity rule does not salvage the *first* principle of sovereign immunity from these same kinds of criticisms, since leaving the government's initial-layer immunity from suit intact will often render the will of the American people subordinate to the will of government officials who commit unredressed wrongs. But replacing the doctrine of double immunity with the opt-in approach is at least a step in the right direction—a direction that Justice Cardozo signaled long ago when he observed, "The exemption of the sovereign from suit involves hardship enough, where consent has been withheld. We are not to add to its rigor by refinement of construction, where consent has been announced."[289]

CONCLUSION

In his dissenting opinion in *Nordic Village*, Justice Stevens described the Court's sovereign immunity jurisprudence with characteristic candor, observing that "[d]espite its ancient lineage, the doctrine of sovereign immunity is nothing

282. *See supra* Part III.A.
283. *See supra* Part III.B.1.
284. *See supra* Part III.B.2.
285. *See supra* Part III.B.3.
286. 3 WILLIAM BLACKSTONE, COMMENTARIES *255 (third emphasis added).
287. *See* Chemerinsky, *supra* note 46.
288. *Id.* at 1213.
289. Anderson v. John L. Hayes Constr. Co., 153 N.E. 28, 29-30 (N.Y. 1926).

but a judge-made rule that is sometimes favored and sometimes disfavored."[290] It appears now that the age of *dis*favor is well behind us; over the past three decades the Court has steadily tightened its rules for determining when a sovereign has waived its immunity,[291] and has even gone so far as to create an entirely new incarnation of the immunity defense, the double immunity doctrine described heretofore.

But it is not too late in the day to arrest at least this most recent extension of the sovereign immunity defense, unmoored as it is from the Constitution, a meaningful common law source, or sound public policy. As I have argued, doing so can be as simple as reversing the current clear statement presumption that requires an unequivocal expression to *waive* immunity from an ordinary monetary remedy, and demanding instead that a sovereign use unequivocally clear statutory text to *claim* immunity from an ordinary monetary judgment. Until the Court reverses course in this fashion, private plaintiffs who have been harmed by state and federal government action—creditors in bankrupt estates, individuals who have seen their property seized and wrongfully destroyed, government employees who have suffered disability discrimination or violations of their statutory privacy rights, and prisoners whose religious liberties have been infringed—will continue to enjoy a right that the double immunity doctrine renders hollow: the right to sue a sovereign by the sovereign's own consent without the ability to obtain a meaningful remedy.

290. United States v. Nordic Vill., Inc., 503 U.S. 30, 42 (1992) (Stevens, J., dissenting) (footnote omitted).

291. *See supra* Part I.A.2.