Florida Law Review

Volume 73 | Issue 3 Article 2

November 2021

Reconsidering Section 1983's Nonabrogation of Sovereign Immunity

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RECONSIDERING SECTION 1983'S NONABROGATION OF SOVEREIGN IMMUNITY

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Abstract

Motivated by civil unrest and the police conduct that prompted it, Americans have embarked on a major reexamination of how constitutional enforcement works. One important component is 42 U.S.C. § 1983, which allows civil suits against any "person" who violates federal rights. The U.S. Supreme Court has long held that "person" excludes states because Section 1983 flunks a condition of crystal clarity.

This Article reconsiders that conclusion—in legalese, Section 1983's nonabrogation of sovereign immunity—along multiple dimensions. Beginning with a negative critique, this Article argues that because the Court invented the crystal-clarity standard so long after Section 1983's enactment, the caselaw contravenes commonsense interpretive practice, works a methodological anomaly, and offends foundational democratic values. This Article also contends that the caselaw rests on inappropriate assumptions that members of Congress during Reconstruction thought about federalism the same way members of the Court a century later did.

Turning to an affirmative critique, this Article explores Section 1983's semantic meaning and expected applications. Among other things, this analysis uncovers evidence that some members of the public may have initially understood the statute to reach states—and that members of Congress inadvertently amended the default definition of "person" in 1874. The upshot is that despite credible counterarguments, the best reading of Section 1983 may make states suable.

Finally, this Article explores implications for reforming constitutional-tort law. In particular, it introduces the policy landscape and proposes a path forward with an initial focus on Fourth Amendment excessive force claims and a gradual extension to other contexts.

* Assistant Professor of Law, William & Mary Law School. For conversations that have inspired and improved this Article, thank you to Kent Barnett, Aaron Bruhl, Michael Collins, Evan Criddle, John Duffy, Richard Epstein, Tara Leigh Grove, John Harrison, Brandon Hasbrouck, Alli Orr Larsen, Bill Mims, Jim Pfander, Bob Pushaw, Richard Re, Steve Sachs, Rich Seamon, Glen Staszewski, and Ernie Young. For insightful comments, thank you also to participants in the Sixth Annual Civil Procedure Workshop hosted by the Northwestern University Pritzker School of Law, the 23rd Annual Federalist Society Faculty Conference Young Legal Scholars Paper Competition panel, the 2021 AALS New Voices in Administrative Law and Legislation panel, and a William & Mary law faculty winter workshop. For excellent research assistance, thank you to William & Mary law students Fiona Carroll, Byron Frazelle, and Melissa Ruby. And for tireless efforts helping track down and piece together obscure historical sources and much else, thank you to William & Mary law librarian Michael Umberger.

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INTRODUCTION

In its recent decision in *Tanzin v. Tanvir*,[1] the participating members of the Supreme Court unanimously said that "[a]lthough background presumptions can inform the understanding of a word or phrase" in a statute, "those presumptions must exist at the time of enactment."[2] Accordingly, the Court declared that "[w]e cannot manufacture a new presumption now and retroactively impose it on a Congress that acted [many] years ago."[3]

1. 141 S. Ct. 486 (2020).
2. *Id.* at 493. Justice Amy Coney Barrett did not participate in this decision.
3. *Id.*

But that is exactly what the Court has done in construing a critical aspect of 42 U.S.C. § 1983, a "most important, and ubiquitous, civil rights statute."[4] Section 1983 provides a cause of action for so-called constitutional-tort suits against every "*person*" who "subjects, or causes to be subjected" someone else "to the deprivation of [federal] rights, privileges, or immunities" while acting "under color of" state law.[5] The Court has long held that the key word "person" does not include state governments. Instead, the Court has concluded, it includes only state and local officials and local governments.[6]

The reason victims of constitutional-rights violations cannot sue state entities even when the government plainly bears fault, the Court says, is because Section 1983 flunks a condition of crystal clarity.[7] That standard, however, was crafted in the mid-1970's, more than a century after Section 1983's enactment in 1871.[8] The Court has implicitly attempted to justify this retroactive approach by assuming that the Reconstruction Congress understood state sovereign immunity the same way the post-Reconstruction Court did.[9] Never mind that at the time of Section 1983's passage, the so-called Dictionary Act provided that "the word 'person' may extend and be applied to bodies politic and corporate," which much evidence indicates may have included states.[10] Never mind that the purpose of Section 1983 was to compel southern states to respect the civil rights of their recently freed Black citizens.[11]

This Article asks how the Court's refusal to allow plaintiffs to bring constitutional-tort suits against states themselves—in legalese, Section 1983's nonabrogation of sovereign immunity—comports with sound statutory interpretation principles and a fresh look at the historical evidence. This Article then asks how this analysis could relate to conversations about improving legal protections for constitutional rights, especially in relation to the mass movement for racial justice and police reform following the death of George Floyd and many similar injustices.

This Article proceeds as follows. Part I offers a brief overview of precedent setting out who qualifies as a potential defendant in Section 1983 actions. Part II provides a negative critique of nonabrogation, contending that the Supreme Court's caselaw fails to justify its proscription of Section 1983 suits against states. Specifically, this Part shows how applying the crystal-clarity standard retroactively to interpret

4. Wilson v. Garcia, 471 U.S. 261, 266 (1985).
5. 42 U.S.C. § 1983 (emphasis added).
6. *See infra* Part I.
7. *See infra* Part II.A.
8. *See infra* Part II.B.
9. *See infra* Part II.C.
10. Act of Feb. 25, 1871, ch. 71, § 2, 16 Stat. 431, 431 (codified as amended at 1 U.S.C. § 1); *see infra* Part III.A.
11. *See infra* Part I.

Section 1983 contravenes commonsense interpretive practice, works a methodological anomaly, and offends foundational democratic values. This Part then contends that precedent in this area rests on anachronistic assumptions that members of Congress in 1871, the year Section 1983 was adopted, thought about state sovereign immunity the same way members of the Court a century later did. As things stood when Congress transformed the relationship between the federal and state governments during Reconstruction, the Court had never said that citizens could not sue their own states on the basis of federal question jurisdiction in federal court. In fact, Chief Justice John Marshall had declared the opposite, and it was not until 1890 that the Court embraced the broader understanding of state sovereign immunity that still controls today.

Part III presents an affirmative critique of nonabrogation, offering arguments (while recognizing counterarguments) for why one could view Section 1983 as allowing actions against states. This Part first explores the semantic meaning of the statute's reference to "person[s]," examining in particular the Dictionary Act's 1871 definition and 1874 amendment. This Part then considers Section 1983's expected applications around the time of enactment, as demonstrated with respect to members of Congress by the statute's legislative history and with respect to members of the public by its litigation history. This Part also touches on interpretive methodology more broadly, including the potential relevance of the Court's recent decision establishing statutory protections against employment discrimination on account of sexual orientation and transgender identity.

Part IV shifts the focus from the past to the future, briefly considering implications of reconsidering Section 1983's nonabrogation of sovereign immunity for potential reforms to the constitutional-tort system. This Part begins by providing an introduction to the policy conditions in play. This Part then proposes a path forward that focuses on Fourth Amendment excessive force claims, which have been central to the recent popular and political interest in improving constitutional enforcement, while preserving opportunities to expand state-government liability to other kinds of unconstitutional conduct.

I. A DOCTRINAL OVERVIEW

Section 1983 was originally enacted as Section 1 of a major piece of Reconstruction legislation known as the Civil Rights Act of 1871.[12] Also

12. *See* Civil Rights Act of 1871, ch. 22, § 1, 17 Stat. 13, 13 (codified as amended at 42 U.S.C. § 1983) ("Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That any person who, under color of any law, statute, ordinance, regulation, custom, or usage of any State, shall subject, or cause to be subjected, any person within the jurisdiction of the United States to the deprivation of any rights, privileges, or

called the Ku Klux Klan Act, the legislation "was passed by a Congress that had the Klan 'particularly in mind.'"[13] Accordingly, "The debates are replete with references to the lawless conditions existing in the South in 1871."[14] To quote one legislator:

> While murder is stalking abroad in disguise, while whippings and lynchings and banishment have been visited upon unoffending American citizens, the local administrations have been found inadequate or unwilling to apply the proper corrective. Combinations, darker than the night that hides them, conspiracies, wicked as the worst of felons could devise, have gone unwhipped of justice. Immunity is given to crime, and the records of the public tribunals are searched in vain for any evidence of effective redress.[15]

As another congressman said: "[M]en were murdered, houses were burned, women were outraged, men were scourged, and officers of the law shot down; and the State made no successful effort to bring the guilty to punishment or afford protection or redress to the outraged and innocent."[16]

As these quotations demonstrate, while "one main scourge of the evil—perhaps the leading one" underlying the Act's passage—was the Klan, "the remedy created was not a remedy against it or its members but against those who representing a State in some capacity were unable or unwilling to enforce a state law."[17] Accordingly, the target of Section 1983, like the target of the recently ratified Fourteenth Amendment it was enacted to enforce, was state action.[18]

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immunities secured by the Constitution of the United States, shall, any such law, statute, ordinance, regulation, custom, or usage of the state to the contrary notwithstanding, be liable to the party injured in any action at law, suit in equity, or other proper proceeding for redress; such proceeding to be prosecuted in the several district or circuit courts of the United States, with and subject to the same rights of appeal, review upon error, and other remedies provided in like cases in such courts, under the provisions of the act of [April 9, 1866], entitled 'An act to protect all persons in the United States in their civil rights, and to furnish the means of their vindication'; and the other remedial laws of the United States which are in their nature applicable in such cases.").

13. Monroe v. Pape, 365 U.S. 167, 174 (1961) (quoting J. G. RANDALL, THE CIVIL WAR AND RECONSTRUCTION 857 (1st ed. 1937)), *overruled in part by* Monell v. Dep't of Soc. Servs., 436 U.S. 658 (1978).

14. *Id.*

15. CONG. GLOBE, 42d Cong., 1st Sess. 374 (1871) (statement of Rep. Lowe).

16. *Id.* at 428 (statement of Rep. Beatty).

17. *Monroe*, 365 U.S. at 175–76 (emphasis omitted).

18. *See id.* at 176.

Modern constitutional-tort doctrine begins with the Court's 1961 decision in *Monroe v. Pape*,[19] which reinvigorated Section 1983 after decades of relative dormancy.[20] *Monroe* held that the language referencing conduct occurring "'under color of' enumerated state authority" reaches acts committed in the course of a state or local official's employment even if state law made them illegal.[21] Section 1983 was intended, the Court said, not only to "override certain kinds of state laws," but also to "provide[] a remedy where state law was inadequate" and "where the state remedy, though adequate in theory, was not available in practice."[22]

The Court quickly made clear, however, that sovereign immunity would preclude plaintiffs from using Section 1983 to sue states themselves. The Court first addressed the issue in the 1974 case *Edelman v. Jordan*.[23] In *Ex parte Young*,[24] the Court held that district courts could order state officials to conform their conduct to federal law, notwithstanding that state governments would end up shouldering the burden.[25] The district court in *Edelman* had entered a *Young*-style injunction, but it also went further by directing the defendants—who were state officials—to pay the plaintiff class what the court of appeals characterized as "equitable restitution."[26] The question before the Justices was whether the latter ran afoul of the state's sovereign immunity.[27] The Court said yes, articulating a distinction between prospective equitable relief, which was permissible under *Young*, and retrospective relief, which was not.[28] *Edelman* proceeded briefly to consider whether Section 1983 abrogated (or withdrew) the state's immunity protections, answering no.[29]

In *Quern v. Jordan*,[30] a 1979 "sequel" arising from the *Edelman* litigation, the Court reiterated that Section 1983 does not abrogate sovereign immunity.[31] But questions concerning state suability persisted. Why? In theory, *Quern* concerned not whether a state was a "person" pursuant to Section 1983 simpliciter, but whether an affirmative answer

19. 365 U.S. 167 (1961), *overruled in part by* Monell v. Dep't of Soc. Servs., 436 U.S. 658 (1978).
20. *See id.* at 171–72.
21. *Id.* at 172 (quoting 42 U.S.C. § 1983).
22. *Id.* at 173–74.
23. 415 U.S. 651, 675–77 (1974).
24. 209 U.S. 123 (1908).
25. *Id.* at 149, 155–56.
26. *Edelman*, 415 U.S. at 665.
27. *Id.* at 665–69.
28. *Id.* at 667–69.
29. *Id.* at 674–77.
30. 440 U.S. 332 (1979).
31. *Id.* at 333, 338–49.

was obvious enough to conclude that Congress meant to strip the states of immunity. The Court had established that Section 1983 actions were cognizable in both federal and state courts,[32] but when *Quern* was decided, constitutionalized sovereign immunity protections did not extend into state tribunals.[33] So some observers thought *Quern* left the door open to sue states in state courts.[34] The Court rejected this notion a decade after *Quern* in *Will v. Michigan Department of State Police*,[35] which came up through the Michigan judicial system.[36] "[A] State is not a person" within the text of Section 1983, *Will* held, finally settling the status of states in the constitutional-tort scheme.[37]

In sum, pursuant to *Monroe*, state and local officials qualify as "person[s]" under Section 1983. But pursuant to *Edelman*, *Quern*, and *Will*, states themselves do not. Importantly, *Monroe* also held that local governments were not "person[s],"[38] but the Court overruled that conclusion in the 1978 case *Monell v. Department of Social Services*.[39] The bottom line, therefore, is that state and local employees and local entities are all suable defendants under Section 1983, while state entities are not.

II. A NEGATIVE CRITIQUE

This Part examines how the Supreme Court has applied its sovereign immunity abrogation doctrine in the Section 1983 context, which turns out to be both anomalous and ahistorical. The upshot is that this caselaw disregards fundamental democratic values by holding a statute enacted in 1871 and adopted to expand civil rights against states to a clear-statement standard articulated in the mid-1970s and rooted in post-Reconstruction attitudes about federalism.

32. Felder v. Casey, 487 U.S. 131, 147 (1988).

33. *See* Maine v. Thiboutot, 448 U.S. 1, 9 n.7 (1980). Since then, the Court has held that constitutionalized state sovereign immunity *does* reach state courts. *See* Franchise Tax Bd. v. Hyatt, 139 S. Ct. 1485, 1490 (2019) (regarding suits against states in other states' courts); Alden v. Maine, 527 U.S. 706, 754 (1999) (regarding suits against states in their own courts).

34. *See, e.g.*, Karchefske v. Dep't of Mental Health, 371 N.W.2d 876, 880 (Mich. Ct. App. 1985) ("Not only are we persuaded that *Quern* does not hold that a state is not a § 1983 'person,' but we find within the *Quern* opinion some evidence that the state in fact is such a person."), *vacated*, 429 N.W.2d 866 (Mich. 1987).

35. 491 U.S. 58 (1989).

36. *Id.* at 63–64.

37. *Id.* at 64.

38. Monroe v. Pape, 365 U.S. 167, 191–92 (1961), *overruled in part by* Monell v. Dep't of Soc. Servs., 436 U.S. 658 (1978).

39. 436 U.S. 658, 663 (1978).

A. *Preliminary Points*

A few preliminary points about state sovereign immunity should prove useful. The Eleventh Amendment provides that "[t]he Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State."[40] The Amendment was put into place shortly after and in response to the 1793 case *Chisholm v. Georgia*,[41] in which the Supreme Court allowed a citizen of South Carolina to sue Georgia in federal court for a debt dating back to the Revolutionary War.[42]

Initially, the Court appeared to interpret the Eleventh Amendment as limited to the circumstances it expressly addresses[43]—suits "in law or equity," brought "against one of the United States," and filed "by Citizens of another State" (or country).[44] But since the 1890 case *Hans v. Louisiana*,[45] a suit filed against a state by one of its own citizens,[46] the Court "has repeatedly held" that the Constitution affords immunity protections "extend[ing] beyond the literal text of the Eleventh Amendment" and instead stemming from a broader historical model of sovereignty.[47]

Law professors love to hate the Court's caselaw on state sovereign immunity.[48] As Professor John Jeffries has explained, many academics "assert[] that the Eleventh Amendment limits only diversity jurisdiction, that it has no application in federal question cases, and that in constitutionalizing some form of state sovereign immunity, the Supreme Court has been on the wrong track" since *Hans*.[49] While the literature contains "rebuttals and contributions from other perspectives," the

40. U.S. CONST. amend. XI.

41. 2 U.S. (2 Dall.) 419 (1793), *superseded by constitutional amendment*, U.S. CONST. amend. XI.

42. *See id.* at 420, 479.

43. *See* RICHARD H. FALLON, JR., JOHN F. MANNING, DANIEL J. MELTZER, & DAVID L. SHAPIRO, HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 907–08 (7th ed. 2015).

44. U.S. CONST. amend. XI.

45. 134 U.S. 1 (1890).

46. *Id.* at 9.

47. Fed. Mar. Comm'n v. S.C. State Ports Auth., 535 U.S. 743, 754 (2002); *see* Hess v. Port Auth. Trans-Hudson Corp., 513 U.S. 30, 54 (1994) (Stevens, J., concurring) (stating that sovereign immunity arose "from the peculiarities of political life in feudal England" (citing 1 FREDERICK POLLOCK & FREDERIC WILLIAM MAITLAND, THE HISTORY OF ENGLISH LAW BEFORE THE TIME OF EDWARD I, at 515–18 (2d ed. 1909)).

48. *See* Ernest A. Young, *State Sovereign Immunity and the Future of Federalism*, 1999 SUP. CT. REV. 1, 7 ("The Court's state sovereign immunity jurisprudence is frequently convoluted, contradictory, and obscure. It is, in other words, something only a law professor could love.").

49. John C. Jeffries, Jr., *In Praise of the Eleventh Amendment and Section 1983*, 84 VA. L. REV. 47, 48 (1998).

predominant position has long been that sovereign immunity jurisprudence is an "intellectual disaster."[50]

One important approach at odds in some respects with the prevailing view comes from the work of Professors Will Baude and Steve Sachs,[51] which in turn builds on research by scholars including Professors Brad Clark, Kurt Lash, and Caleb Nelson and now-Judge Steve Menashi.[52] Baude and Sachs argue that "[s]tates are protected by *two* forms of sovereign immunity."[53] One, which predates the Constitution, "is a common-law immunity . . . that prevents states from being forced into court without their consent."[54] This is a relatively broad but weak immunity, subject to waiver and perhaps abrogation under certain congressional powers.[55] The other form of sovereign immunity comes from the Eleventh Amendment, which Baude and Sachs contend "limit[s] the subject-matter jurisdiction of the federal courts" in exactly the manner it says.[56] This is a relatively narrow but strong immunity, subject to neither waiver nor abrogation.[57]

Given the long-running controversy surrounding the basic sources and scope of state sovereign immunity, it bears emphasizing that the present project is largely agnostic (albeit somewhat skeptical) about whether the Court has been correct that the Eleventh Amendment evidences an expansive understanding of immunity protections incorporated into the Constitution itself. The analysis here has a different and more specific focus, homing in on Congress's authority to abrogate states' immunity and on how the Court has viewed that authority in the constitutional-tort context. For this project's purposes, then, one can assume that *Hans* was right about original understandings, especially to the extent one reads *Hans* as potentially consistent with Baude and Sachs's approach (a

50. *Id.* (footnote omitted).

51. *See* William Baude & Stephen E. Sachs, *The Misunderstood Eleventh Amendment*, 169 U. PA. L. REV. 609, 614 (2021); William Baude, *Sovereign Immunity and the Constitutional Text*, 103 VA. L. REV. 1, 4–9 (2017); Stephen E. Sachs, *Constitutional Backdrops*, 80 GEO. WASH. L. REV. 1813, 1868–75 (2012).

52. *See* Baude & Sachs, *supra* note 51, at 5 & nn.11–13 (citing Caleb Nelson, *Sovereign Immunity as a Doctrine of Personal Jurisdiction*, 115 HARV. L. REV. 1559 (2002); Bradford R. Clark, *The Eleventh Amendment and the Nature of the Union*, 123 HARV. L. REV. 1817 (2010); Kurt T. Lash, *Leaving the* Chisholm *Trail: The Eleventh Amendment and the Background Principle of Strict Construction*, 50 WM. & MARY L. REV. 1577 (2009); Steven Menashi, *Article III as a Constitutional Compromise: Modern Textualism and State Sovereign Immunity*, 84 NOTRE DAME L. REV. 1135 (2009)).

53. Baude & Sachs, *supra* note 51, at 5.

54. *Id.*

55. *See id.* at 17 (waiver); *id.* at 36–37 (abrogation).

56. *Id.* at 4–5.

57. *See id.* at 17–18 (waiver); *id.* at 37 (abrogation).

possibility they promote), which is agnostic about abrogation under the Section 5 of the Fourteenth Amendment.[58]

The Court has held that abrogation requires two elements: first, that Congress "'mak[e] its intention'" to subject states to suit "'unmistakably clear'" by "enact[ing] 'unequivocal statutory language,'" and second, that "some constitutional provision . . . allow[s] Congress" to do so.[59] *Quern* and *Will* say that Section 1983 fails this test at the first step—respectively, because using the general term "person[s]" to denote potential defendants does not disclose an "unmistakably clear" decision to make states suable and because "person[s]" as a category does not include states at all.[60] As the following discussion contends, however, the Court has failed to justify this logic for two important reasons. The first relates to retroactive reasoning, and the second, to anachronistic assumptions.

B. *Retroactive Reasoning*

The precept that courts will read congressional legislation as abrogating state sovereign immunity only if it contains unequivocal language to that effect is what the literature calls a federalism clear-statement rule. These canons of construction say that Congress "cannot intrude upon the usual balance of state and federal power" without including "a plain statement of legislative intent."[61]

As with other clear-statement rules, an important question about retroactivity arises here. To what extent is it appropriate for courts to apply this aspect of abrogation doctrine to statutes enacted before it was established? Three strands of discussion help answer this question in the context of Section 1983. The first concerns interpretive theory with regard to clear-statement rules at large. The second concerns the Supreme Court's retroactive application of the clear-statement concept in abrogation decisions in general. The third concerns the Court's reliance on the abrogation-related clear-statement rule in constitutional-tort cases in particular.

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58. *See id.* at 11 (arguing that "*Hans* can be read as an Article III case, rather than an Eleventh Amendment case").

59. Allen v. Cooper, 140 S. Ct. 994, 1000–01 (2020) (first alteration in original) (first quoting Dellmuth v. Muth, 491 U.S. 223, 228 (1989); and then quoting Seminole Tribe of Fla. v. Florida, 517 U.S. 44, 56 (1996)).

60. *See* Quern v. Jordan, 440 U.S. 332, 345 (1979) (stating that "§ 1983 does not explicitly and by clear language indicate on its face an intent to sweep away the immunity of the States"); Will v. Michigan Dep't of State Police, 491 U.S. 58, 65 (1989) (stating that "a State is not a 'person' within the meaning of § 1983"); *supra* Part I.

61. John F. Manning, *Federalism and the Generality Problem in Constitutional Interpretation*, 122 HARV. L. REV. 2003, 2025 (2009).

1. Clear-Statement Rules

The Supreme Court has cast its use of federalism clear-statement rules in constitutional terms.[62] Consider *Atascadero State Hospital v. Scanlon*.[63] There, the Court said the abrogation-related clear-statement rule came from the idea that "the Eleventh Amendment implicates the fundamental constitutional balance between the Federal Government and the States."[64] The Court went on to declare that "our Eleventh Amendment doctrine is necessary to support the view of the federal system held by the Framers of the Constitution."[65] This view, the Court said, rested on the notion that "the States played a vital role in our system and that strong state governments were essential to serve as a 'counterpoise' to the power of the Federal Government."[66] Indeed, the Court said, "none of the Framers questioned that the Constitution created a federal system with some authority expressly granted [to] the Federal Government and the remainder retained by the several States."[67]

Now-Dean John Manning presents a compelling case that the connections between federalism clear-statement rules on the one hand and the Constitution's text, structure, and history on the other are too few and faint to support the Court's characterization.[68] As Manning explains, and as *Atascadero* exemplifies, the problem with this analysis is that the sheer existence of a federal system does not necessitate either broad-based sovereign immunity or high-hurdle abrogation rules.[69]

"Although certainly correct" that "the United States Constitution adopts a system of federalism, in which the states retain some attributes of sovereigns and cede others," Manning explains, "the structural insight at that level of generality is hopelessly uninformative."[70] For just as "the Constitution embodies federalism," Manning continues, it also "embodies the principles of personal privacy, private property, and . . . the separation of powers."[71] While "[e]ach assertion describes goals that the document's drafters set out to achieve, . . . each also abstracts the purpose underlying specific constitutional provisions to an unhelpful level of generality, one that disregards the specification of

62. *See id.* at 2004, 2025–29.

63. 473 U.S. 234 (1985), *superseded by statute in part*, Rehabilitation Act Amendments of 1986, Pub. L. No. 99-506, § 1003, 100 Stat. 1807, 1845 (codified as amended at 42 U.S.C. § 2000d-7), *as recognized in* Lane v. Peña, 518 U.S. 187 (1996).

64. *Id.* at 238–40.

65. *Id.* at 239 n.2.

66. *Id.*

67. *Id.*

68. *See* Manning, *supra* note 61, at 2004–09.

69. *See id.* at 2058.

70. *Id.*

71. *Id.*

means by which its adopters sought to achieve such purposes."[72] The Court's framing of the abrogation-related clear-statement rule thus rests on something of a non sequitur.

That the Constitution itself does not mandate the clear-statement component of abrogation doctrine, however, does not necessarily make the requirement illegitimate. Sometimes defenders of clear-statement and related rules contend that they accurately reflect congressional intent.[73] But that rationale seems dubious in many instances.[74] Somewhat related is the common suggestion that these doctrines improve the "interbranch dialogue" between the legislature and the judiciary.[75] But other commentators call this a "legal fiction."[76] Many interpretative principles stem not from constitutional directives, but from commitments to substantive ideals, including "judicially identified constitutional value[s]" like "federalism, nonretroactivity, or the rule of law."[77] But the fact that clear-statement rules privilege some ideals over others makes them susceptible to criticism. A piece by Professors Bill Eskridge and Phil Frickey, for instance, argues that clear-statement rules "are particularly countermajoritarian, because they permit the Court to override probable congressional preferences in statutory interpretation in favor of norms and values favored by the Court."[78]

At the very least, clear-statement rules' defenders argue that democracy comes out on top in the end because Congress can always rebut the underlying presumptions by using clear language to legislate in

72. *Id.*

73. *See, e.g.*, Cass R. Sunstein, *Interpreting Statutes in the Regulatory State*, 103 HARV. L. REV. 405, 468–69 (1989) (asserting that the avoidance canon, under which courts construe statutes to avoid constitutional doubts if possible, "responds to Congress' probable preference for validation over invalidation").

74. *See, e.g.*, Frederick Schauer, Ashwander *Revisited*, 1995 SUP. CT. REV. 71, 74 (as to the avoidance canon, observing that "it is by no means clear that a strained interpretation of a federal statute that avoids a constitutional question is any less a judicial intrusion than the judicial invalidation on constitutional grounds of a less strained interpretation of the same statute").

75. *See, e.g.*, Dan T. Coenen, *A Constitution of Collaboration: Protecting Fundamental Values with Second-Look Rules of Interbranch Dialogue*, 42 WM. & MARY L. REV. 1575, 1584–88 (2001); Antonin Scalia, *Assorted Canards of Contemporary Legal Analysis*, 40 CASE W. RSRV. L. REV. 581, 583 (1989) ("Once [rules of 'strict construction'] have been long indulged, they acquire a sort of prescriptive validity, since the legislature presumably has them in mind when it chooses its language . . . .").

76. Carissa Byrne Hessick & Joseph E. Kennedy, *Criminal Clear Statement Rules*, 97 WASH. U. L. REV. 351, 397 (2019).

77. John F. Manning, *Clear Statement Rules and the Constitution*, 110 COLUM. L. REV. 399, 399 (2010).

78. William N. Eskridge, Jr. & Philip P. Frickey, *Quasi-Constitutional Law: Clear Statement Rules as Constitutional Lawmaking*, 45 VAND. L. REV. 593, 638 (1992).

different directions.[79] This should mean that when a clear-statement rule has already been articulated at the time of a congressional action, the case for employing the rule to interpret the statute is relatively (even if not absolutely) strong. In theory, legislators should have been aware of the rule and known how to avoid its consequences. Likewise, litigants should be quick to test its application in court, supplying congresspeople an opportunity to amend the statute as necessary within a reasonable period after its passage—and potentially before the previous membership and political milieu have entirely dissipated.

The latter happened following *Atascadero*'s holding that Congress was not specific enough about whether the statute at issue abrogated state sovereign immunity. The statute was enacted in 1973; the plaintiff sued in 1979; the case was decided in 1985; and Congress amended the statute to provide expressly for suits against states in 1986.[80] The Senate Conference Report said *Atascadero* had "misinterpreted congressional intent."[81] And a primary proponent of the original bill was on hand to describe the later amendment as removing "the court-made barrier to effectuating" the legislature's initial desires.[82] So the Court–Congress feedback loop that clear-statement rules are said to facilitate actually worked.

By contrast, when a clear-statement rule has not already been articulated at the time of a congressional action, the case for using it starts to collapse, especially the further in time the litigation follows the legislation.[83] Congresspeople could not have foreseen the impediment

79. *See, e.g.*, Ernest A. Young, *Constitutional Avoidance, Resistance Norms, and the Preservation of Judicial Review*, 78 TEX. L. REV. 1549, 1552 (2000) (arguing that "a narrow construction of a statute designed to avoid constitutional doubts can be overcome by legislative action to clarify that the broader reading was what Congress really wanted," such that "[t]he avoidance canon . . . makes it harder—but still not impossible—for Congress to write statutes that intrude into areas of constitutional sensitivity").

80. *See* Dellmuth v. Muth, 491 U.S. 223, 240 (1989) (Brennan, J., dissenting) (discussing this history).

81. S. REP. NO. 99-388, at 27 (1986) (Conf. Rep.).

82. 132 CONG. REC. 28,623 (1986) (statement of Sen. Cranston).

83. For previous (often brief) observations about conceptual problems with applying clear-statement rules retroactively, see, for example, William Burnham, *Taming the Eleventh Amendment Without Overruling* Hans v. Louisiana, 40 CASE W. RSRV. L. REV. 931, 991–92 (1990) (arguing that the Supreme Court's retroactive imposition of the abrogation-related clear-statement rule "undercut[s] . . . longstanding . . . reliance interests" held by Congress about its ability to withdraw state sovereign immunity); Evan J. Criddle & Glen Staszewski, Essay, *Against Methodological Stare Decisis*, 102 GEO. L.J. 1573, 1594 (2014) (stating that evidence "suggests that the Supreme Court's retroactive application of clear statement rules . . . may be particularly problematic from th[e] perspective" of "upset[ting] the legitimate reliance interests of lawmakers or citizens" (citing Abbe R. Gluck & Lisa Schultz Bressman, *Statutory Interpretation from the Inside—An Empirical Study of Congressional Drafting, Delegation, and the Canons: Part I*, 65

they would have to navigate to put some objective into law. And by the time a plaintiff gets around to advocating or a court gets around to accepting a reading that runs counter to what a statute's enactors may have wanted, both the legislators themselves and the political circumstances that supported their cause may have passed on.

In this scenario, clear-statement rules based on substantive values can go from being arguably undemocratic to actually antidemocratic. The suggestion that a later Congress can simply change the statute if it disapproves of a court's construction overlooks the realities of the legislative process.[84] For "[t]here are a hundred ways in which a bill can

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STAN. L. REV. 901, 945 (2013)); William N. Eskridge, Jr., *The New Textualism*, 37 UCLA L. REV. 621, 683–84 (1990) (arguing that when "Congress enacts a statute against certain well-established background assumptions" and "[t]he Court then switches those assumptions and interprets Congress' work product in ways that no one at the time would have, or perhaps even could have, intended," "there is something of a 'bait-and-switch'"; that "[b]ait-and-switch is an unfair con game in general"; and that "when the victim of the con game is Congress it may be unconstitutional as well"); Martha A. Field, *The Eleventh Amendment and Other Sovereign Immunity Doctrines: Congressional Imposition of Suit Upon the States*, 126 U. PA. L. REV. 1203, 1272–73 (1978) (arguing that "[b]ecause it is unrealistic to expect Congress always to have expressed directly its intent to impose suit on states, especially in statutes enacted prior to [the rule's establishment], courts following such a clear statement rule would not find private causes of action even in instances in which 'all the circumstances' made clear that state suability was intended" and that "[w]hile the rule appears to be one of judicial restraint, it effectively gives courts a veto over congressional causes of action" (footnote omitted)); Erin Morrow Hawley, *The Supreme Court's Quiet Revolution: Redefining the Meaning of Jurisdiction*, 56 WM. & MARY L. REV. 2027, 2062 (2015) ("[A]lthough clear statement rules are often justified because they facilitate legislative and judicial communication, the Court's clear statement rule [that Congress must specify when a procedural requirement should be treated as jurisdictional] cannot be defended upon clarity grounds because it often applies retroactively, compromising the background expectations necessary for effective communication between Congress and the judiciary."); Stephen F. Ross, *Where Have You Gone, Karl Llewellyn? Should Congress Turn Its Lonely Eyes to You?*, 45 VAND. L. REV. 561, 567 (1992) (arguing that the abrogation-related clear-statement rule "may prove particularly offensive as applied to statutes enacted . . . when prevailing Supreme Court decisions suggested that less positive indicia of congressional intent would be sufficient"); Brian G. Slocum, *Overlooked Temporal Issues in Statutory Interpretation*, 81 TEMP. L. REV. 635, 663–64, 667–69 (2008) (arguing that "courts should consider prospective-only application of new or modified interpretive rules," including clear-statement rules, that "would require or allow courts to adopt a second-best statutory interpretation"); Amanda L. Tyler, *Continuity, Coherence, and the Canons*, 99 NW. U. L. REV. 1389, 1419–20, 1420 n.143 (2005) (arguing that "the often inconsistent application of canons undercuts th[e] objective" of "achieving predictability and continuity in the statutory regime" and that "[p]erhaps worst of all," the Court has demonstrated "a fondness for creating new and quite powerful canons and applying them retroactively," including in the abrogation-related clear-statement context).

84. *See, e.g.*, Note, *Clear Statement Rules, Federalism, and Congressional Regulation of States*, 107 HARV. L. REV. 1959, 1967 n.42 (1994) ("The difficulties associated with 'retroactive' applications of interpretive approaches might suggest that clear statement rules ought to be applied only to current legislation. It is unclear, however, why the inaccessibility of the enacting Congress would militate against the consistent application of a particular interpretive approach: the sitting

die even though there is no opposition to it"[85]—assuming someone introduces a bill in the first place. And the enacting Congress may have encountered a unique political moment to which its members wanted to respond in a specific and abiding way. Applying a clear-statement rule retroactively, and especially with a large time lag, can rob the previous legislature of its constitutional prerogative to do just that.

The concrete importance of these abstract arguments depends on the extent to which courts actually apply clear-statement rules retroactively in real-life cases. The Supreme Court recently repudiated this practice. In *Tanzin*, the participating Justices unanimously stated that "[a]lthough background presumptions can inform the understanding of a word or phrase, those presumptions must exist at the time of enactment," such that the Court "cannot manufacture a new presumption now and retroactively impose it on a Congress that acted [many] years ago."[86] But as the ensuing analysis shows, the Court has sometimes done just that, including in establishing Section 1983's nonabrogation of sovereign immunity.

2. Abrogation Decisions

With regard to abrogation, recall that the clear-statement rule is just the first part of a two-step framework. To withdraw sovereign immunity, Congress must also legislate under a constitutional provision empowering it to subject states to suit.[87] Nowadays, any such authority almost always comes from Section 5 of the Fourteenth Amendment.[88] Section 5 says that "[t]he Congress shall have power to enforce, by appropriate legislation, the provisions of this article"[89] (with such provisions including the Due Process Clause, the basis for the Court's incorporation of the Bill of Rights protections against the states[90]). The point of the analysis here is to show—by walking systematically through the relevant caselaw—that the Supreme Court appears never to have applied the abrogation-related clear-statement rule in a way that was both retroactive and dispositive when considering a statute deemed properly enacted under Section 5. The sole exception, and thus an important anomaly, involves cases concerning Section 1983.

The most relevant decisions are ones where the Court held that statutes represented a valid exercise of Section 5 authority but that Congress failed to speak clearly enough to strip states of their immunity. In both of

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Congress is capable of reforming old statutes that it feels have been misconstrued, just as with more recent legislation." (citation omitted)).

85. Frank H. Easterbrook, *Statutes' Domains*, 50 U. CHI. L. REV. 533, 538 (1983).

86. Tanzin v. Tanvir, 141 S. Ct. 486, 493 (2020).

87. *See supra* text accompanying note 59.

88. *See* Allen v. Cooper, 140 S. Ct. 994, 1003 (2020).

89. U.S. CONST. amend. XIV, § 5.

90. *See* Timbs v. Indiana, 139 S. Ct. 682, 687 (2019).

these cases not concerning Section 1983, the provision in question was enacted after the seeds of the clear-statement rule sprouted in the 1973 case *Employees of the Department of Public Health & Welfare v. Department of Public Health & Welfare*.[91] There, the Court said that "[i]t would . . . be surprising . . . to infer that Congress deprived Missouri of her constitutional immunity without . . . indicating in some way by clear language that the constitutional immunity was swept away."[92] *Atascadero*, the first of these cases, concerned the Rehabilitation Act,[93] which overcame two presidential vetoes and "was finally signed into law on September 26, 1973"[94]—more than five months after the *Employees* decision was published.[95] And *Dellmuth v. Muth*,[96] the second of these cases, centered around the Education of the Handicapped Act,[97] which was enacted in 1970 but amended in assertedly relevant ways in 1975 and 1986, along with a 1986 amendment to the Rehabilitation Act.[98]

Even cases where the Court concluded that the clear-statement rule was satisfied (meaning that retroactive application would have been harmless) have almost always involved statutes that became effective after *Employees* was decided in 1973. Some held that statutes passed both parts of the two-step abrogation test. *Pennsylvania v. Union Gas Co.*[99]

91. 411 U.S. 279 (1973).

92. *Id.* at 285.

93. Pub. L. No. 93-112, 87 Stat. 355 (1973) (codified as amended at 29 U.S.C. §§ 701–796*l*).

94. Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 255 n.7 (1985) (Brennan, J., dissenting), *superseded by statute in part*, Rehabilitation Act Amendments of 1986, Pub. L. No. 99-506, § 1003, 100 Stat. 1807, 1845 (codified as amended at 42 U.S.C. § 2000d-7), *as recognized in* Lane v. Peña, 518 U.S. 187 (1996).

95. Justice Brennan contended that the Court could not realistically have expected Congress to respond to the "clear language" standard from *Employees* (let alone to the tweaks from the case at bar) in a bill that had already advanced so far through the legislative process. *See id.* Regardless, *Parden v. Terminal Railway of the Alabama State Docks Department*—which predated *Employees* by nine years—should have provided legislators fair warning, as four Justices argued for a clear-statement approach there. *See* 377 U.S. 184, 198–99 (1964) (White, J., joined by Douglas, Harlan, & Stewart, JJ., dissenting), *overruled by* Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd., 527 U.S. 666 (1999).

96. 491 U.S. 223 (1989).

97. Pub. L. No. 91-230, Title VI, 84 Stat. 175 (1970) (codified as amended as the Individuals with Disabilities Education Act at 20 U.S.C. §§ 1400–1482).

98. *See Dellmuth*, 491 U.S. at 228–30. Justice Brennan again objected to applying the clear-statement rule on the ground that the Court "resort[ed] to an interpretative standard that Congress could have anticipated only with the aid of a particularly effective crystal ball." *Id.* at 241 (Brennan, J., dissenting). But rather than getting at retroactivity generally, he argued specifically that *Employees* and several successor cases indicated that "this Court would consider legislative history and make inferences from text and structure in determining whether Congress intended to abrogate Eleventh Amendment immunity." *Id.* He criticized the Court for abandoning that pattern in favor of requiring more pointed statutory language. *Id.* at 241–42.

99. 491 U.S. 1 (1989), *overruled in part by* Seminole Tribe of Fla. v. Florida, 517 U.S. 44 (1996).

involved the Comprehensive Environmental Response, Compensation, and Liability Act of 1980[100] and the Superfund Amendments and Reauthorization Act of 1986.[101] *Nevada Department of Human Resources v. Hibbs*[102] involved a family-care claim under the Family and Medical Leave Act of 1993 (FMLA).[103] *Tennessee v. Lane*[104] concerned Title II of the Americans with Disabilities Act (ADA),[105] enacted in 1990, as applied to claims for access to court buildings.[106] *United States v. Georgia*[107] also concerned Title II of the ADA, this time as applied to claims alleging cruel and unusual punishment in prison.[108]

Other cases in the same bucket held that statutes passed the clear-statement prong but failed the constitutional-authorization prong of the abrogation test. *Seminole Tribe of Florida v. Florida*[109] held that Congress could not withdraw state sovereign immunity when acting under the Commerce Clause[110]—or under any Article I power, according to a later case's gloss on the decision.[111] But *Seminole Tribe* first concluded that the Indian Gaming Regulatory Act,[112] passed in 1988, included "an 'unmistakably clear' statement of [Congress's] intent to abrogate."[113] Similarly, *Florida Prepaid Postsecondary Education Expense Board v. College Savings Bank*[114] held that Congress exceeded its authority under Section 5 by attempting to abrogate sovereign immunity in the Patent and Plant Variety Protection Remedy Clarification Act,[115] which was enacted in 1992.[116] But that was only after

100. Pub. L. No. 96-510, 94 Stat. 2767 (codified as amended in scattered sections of 26 U.S.C. and 42 U.S.C.).

101. Pub. L. No. 99-499, 100 Stat. 1613 (codified as amended in scattered sections of the U.S. Code); *Union Gas Co.*, 491 U.S. at 5.

102. 538 U.S. 721 (2003).

103. Pub. L. No. 103-3, 107 Stat. 6 (codified as amended in scattered sections of 5 U.S.C. and 29 U.S.C.); *Hibbs*, 538 U.S. at 724.

104. 541 U.S. 509 (2004).

105. Pub. L. No. 101-336, §§ 201–246, 104 Stat. 327, 337–53 (1990) (codified as amended at 42 U.S.C. §§ 12131–12165).

106. *Lane*, 541 U.S. at 513.

107. 546 U.S. 151 (2006).

108. *Id.* at 153, 155.

109. 517 U.S. 44 (1996).

110. *Id.* at 47.

111. Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank, 527 U.S. 627, 636 (1999). *But cf.* Cent. Va. Cmty. Coll. v. Katz, 546 U.S. 356, 379 (2006) (holding that the Bankruptcy Clause, an Article I provision, itself abrogates state sovereign immunity).

112. Pub. L. No. 100-497, 102 Stat. 2467 (1988) (codified as amended at 18 U.S.C. §§ 1166–1168 and 25 U.S.C. §§ 2701–2721).

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

114. 527 U.S. 627 (1999).

115. Pub. L. No. 102-560, 106 Stat. 4230 (1992) (codified as amended at 7 U.S.C. §§ 2541, 2570 and 35 U.S.C. §§ 271, 296).

116. *Coll. Sav. Bank*, 527 U.S. at 630–32.

concluding that Congress "made its intention to abrogate the States' immunity 'unmistakably clear in the language of the statute.'"[117]

Next came a pair of cases also holding that congressional attempts to subject states to suit were unsupportable under Section 5. But again, the decisions in both cases—*Kimel v. Florida Board of Regents*[118] and *Board of Trustees v. Garrett*[119]—began by determining that Congress spoke clearly in trying to withdraw sovereign immunity.[120] And again, both statutes—in *Kimel*, the Age Discrimination in Employment Act of 1967,[121] which was amended in relevant part in 1974,[122] and in *Garrett*, the ADA, which was enacted in 1990[123]—postdated *Employees*, where the Court articulated the clear-statement rule in 1973.

This trend has continued more recently too. *Coleman v. Court of Appeals*[124] held that Section 5 did not allow Congress to subject states to suit for FMLA self-care claims.[125] But the same FMLA provisions the Court said reflected an "unmistakably clear" aim to abrogate immunity in *Hibbs* did likewise in *Coleman*.[126] And in *Allen v. Cooper*,[127] decided just last year, the Court held that Congress could not make states liable in copyright-infringement actions under either Article I or Section 5.[128] But first it said that "[n]o one here disputes that Congress used clear enough language."[129]

In one instance, the Court applied the clear-statement rule retroactively to a valid exercise of Section 5 authority but found the rule satisfied, meaning that the post hoc approach did not affect the outcome.[130] That case, *Fitzpatrick v. Bitzer*,[131] came early in the abrogation line, before *Atascadero* tightened the requirement by stating that "Congress must express its intention to abrogate the Eleventh Amendment in unmistakable language *in the statute itself*" (as opposed

117. *Id.* at 635 (quoting Dellmuth v. Muth, 491 U.S. 223, 228 (1989)).

118. 528 U.S. 62 (2000).

119. 531 U.S. 356 (2001).

120. *Id.* at 363–64; *Kimel*, 528 U.S. at 73.

121. Pub. L. No. 90-202, 81 Stat. 602 (codified as amended at 29 U.S.C. §§ 621–634).

122. *See Kimel*, 528 U.S. at 68, 73–74.

123. *See Garrett*, 531 U.S. at 360.

124. 566 U.S. 30 (2012).

125. *Id.* at 43–44.

126. *Id.* at 35–36 (quoting Nev. Dep't of Hum. Res. v. Hibbs, 538 U.S. 721, 726 (2003)); *see supra* text accompanying note 103.

127. 140 S. Ct. 994 (2020).

128. *Id.* at 998–99, 1007.

129. *Id.* at 1001.

130. *See* Fitzpatrick v. Bitzer, 427 U.S. 445, 447–50, 452–53, 456 (1976).

131. 427 U.S. 445 (1976).

to, say, in the legislative history).[132] *Fitzpatrick* also involved recent legislation.[133] The Equal Employment Opportunity Act of 1972[134] predated *Employees* but postdated *Parden v. Terminal Railway of the Alabama State Docks Department*,[135] a 1964 case in which four Justices supported a clear-statement rule.[136] All these factors likely minimized any attention the anomalous approach might otherwise have drawn.

What is more, the assertion that the Court appears never to have retroactively applied the abrogation-related clear-statement rule in an outcome-dispositive way to a valid exercise of Section 5 authority accounts for *Employees* itself. The statute at issue there, the Fair Labor Standards Act of 1938,[137] was enacted under the Commerce Clause rather than under Section 5,[138] and the two sources of congressional power are different in relevant ways. As *Employees* explained, "It is not easy to infer that Congress in legislating pursuant to the Commerce Clause, which has grown to vast proportions in its applications, desired silently to deprive the States of an immunity they have long enjoyed under another part of the Constitution."[139] That logic falls away where Congress acts under the Fourteenth Amendment, which—unlike the Commerce Clause—is specifically directed at states.[140]

The Court relied on exactly this reasoning in a footnote in the 1978 case *Hutto v. Finney*.[141] *Hutto* said the abrogation-related clear-statement rule was irrelevant in determining whether state parties were subject to a statute providing for litigation cost-shifting. "Just as a federal court may

132. Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 243 (1985) (emphasis added), *superseded by statute in part*, Rehabilitation Act Amendments of 1986, Pub. L. No. 99-506, § 1003, 100 Stat. 1807, 1845 (codified as amended at 42 U.S.C. § 2000d-7), *as recognized in* Lane v. Peña, 518 U.S. 187 (1996).

133. *See* 427 U.S. at 447–48.

134. Pub. L. No. 92-261, 86 Stat. 103 (codified as amended in scattered sections of 5 U.S.C. and 42 U.S.C.).

135. 377 U.S. 184 (1964), *overruled by* Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd., 527 U.S. 666 (1999).

136. *See id.* at 198–99 (1964) (White, J., joined by Douglas, Harlan, & Stewart, JJ., dissenting).

137. Ch. 676, 52 Stat. 1060 (codified as amended at 29 U.S.C. §§ 201–219).

138. Emps. of the Dep't of Pub. Health & Welfare v. Dep't of Pub. Health & Welfare, 411 U.S. 279, 282 (1973).

139. *Id.* at 285. In addition, the Fair Labor Standards Act was amended in an assertedly relevant way in 1966, *see id.*, which was post-*Parden*.

140. *Compare* U.S. CONST. art. I, § 8, cl. 3 ("The Congress shall have Power . . . [t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes . . . ."), *with id.* amend. XIV, § 1 ("No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."); *id.* amend. XIV, § 5 "The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.").

141. 437 U.S. 678 (1978).

treat a State like any other litigant when it assesses costs" as part of its "'inherent authority,'" the Court said, "so also may Congress . . . have [a] . . . class of costs apply to the States, as it does to all other litigants, without expressly stating that it intends to abrogate the States' Eleventh Amendment immunity."[142] But "[e]ven if we were not dealing with an item such as costs," the Court continued, the clear-statement rule would not have applied.[143] For while *Employees* involved "a statute rooted in Congress' Art. I power," *Hutto* involved "a statute enacted to enforce the Fourteenth Amendment," which expressly "'embod[ies] limitations on state authority.'"[144]

It is important, therefore, that both *Employees* and what appears to be the only subsequent case where the clear-statement rule affected the outcome when applied retroactively, *Welch v. Texas Department of Highways & Transportation*,[145] involved statutes enacted under the Commerce Clause rather than under Section 5. In *Welch*, the Court refused to allow the plaintiff to sue state defendants under the Jones Act,[146] enacted in 1920, on the ground that "Congress has not expressed in unmistakable statutory language its intention to allow States to be sued in federal court."[147] *Welch* assumed a statute passed pursuant to the commerce power could abrogate sovereign immunity[148]—an assumption *Seminole Tribe* later held incorrect.[149] But *Welch* quoted *Employees* to indicate that because the commerce power "has grown to vast proportions in its applications," the case for requiring a clear statement of state suability was especially compelling.[150]

A few additional cases are pertinent to considering the retroactive application of the abrogation-related clear-statement rule outside of the Section 1983 context. In *Hoffman v. Connecticut Department of Income Maintenance*,[151] the Court held that Congress did not legislate with the requisite clarity in a bankruptcy provision enacted in 1978,[152] five years after *Employees* came down. In *Blatchford v. Native Village of Noatak*,[153] moreover, the plaintiffs argued that a statute extending federal-court

142. *Id.* at 696 (quoting Fairmont Creamery Co. v. Minnesota, 275 U.S. 70, 74 (1927)).

143. *Id.* at 698 n.31.

144. *Id.* (quoting Fitzpatrick v. Bitzer, 427 U.S. 445, 456 (1976)).

145. 483 U.S. 468 (1987).

146. Ch. 250, 41 Stat. 988 (1920) (codified at 15 U.S.C. § 38 and scattered sections of 46 U.S.C. as revised).

147. *Welch*, 483 U.S. at 475.

148. *Id.* at 475 & n.5.

149. *See supra* text accompanying note 110.

150. *Welch*, 483 U.S. at 478 (quoting Emps. of the Dep't of Pub. Health & Welfare v. Dep't of Pub. Health & Welfare, 411 U.S. 279, 285 (1973)).

151. 492 U.S. 96 (1989) (plurality opinion).

152. *Id.* at 101.

153. 501 U.S. 775 (1991).

jurisdiction to federal question cases brought by "Indian tribe[s] or band[s]" irrespective of the amount in controversy allowed them to avoid state sovereign immunity.[154] The Court disagreed, in part on the ground that the provision was not specific enough to make states suable.[155] Because the statute was enacted in 1966,[156] seven years before *Employees* was decided in 1973, this reasoning was retroactive. But the Court recognized as much—and therefore also analyzed the issue under the operative law when the statute came into being, concluding that the abrogation argument still failed.[157] Then, in *Raygor v. Regents of University of Minnesota*,[158] the Court relied on *Blatchford*'s reasoning to hold that the generally worded federal supplemental-jurisdiction statute, enacted in 1990, did not allow federal-court adjudication of claims against states.[159]

Finally, the Court expressed skepticism about viewing nineteenth-century events through a clear-statement lens, albeit in a less direct way, in *College Savings Bank v. Florida Prepaid Postsecondary Education Expense Board*.[160] In *College Savings Bank*, the majority criticized Justice Stephen Breyer's dissent for relying on the clear-statement rule to decline to treat *Hans*, which was decided in 1890,[161] as an abrogation case (although the majority would have reached the same result for a different reason).[162] The majority said Justice Breyer's suggestion that the statute providing federal-court jurisdiction in *Hans* "did not expressly 'purpor[t] to pierce state immunity'" was misguided because "[t]he so-called 'clear statement rule' was not even adumbrated until" *Employees* was decided in 1973.[163]

In all the precedent inspected here, the Supreme Court never applied the abrogation-related clear-statement rule retroactively to refuse to recognize a congressional withdrawal of state sovereign immunity in a

154. *Id.* at 783 (quoting 28 U.S.C. § 1362). At the time, and unlike now, federal question cases normally had to meet a monetary threshold to secure federal-court jurisdiction. *See* Federal Question Jurisdictional Amendments Act of 1980, Pub. L. No. 96-486, 94 Stat. 2369.

155. *Blatchford*, 501 U.S. at 786–88.

156. *See id.* at 787.

157. *See id.* at 787–88. Although the plaintiffs asked the Court to engage in this exercise, *see id.* at 787, that the majority did so is significant. The Justices who dissented, moreover, denied the clear-statement rule's relevance both because they believed the rule "ill-conceived" and because it had been "adopted so recently." *Id.* at 795 (Blackmun, J., dissenting).

158. 534 U.S. 533 (2002).

159. *Id.* at 540–42.

160. 527 U.S. 666 (1999).

161. *See supra* text accompanying note 46.

162. *Coll. Sav. Bank*, 527 U.S. at 687 n.5.

163. *Id.* (first alteration in original) (quoting *id.* at 700 (Breyer, J., dissenting)). In *College Savings Bank*, the Court held that the Trademark Remedy Clarification Act, enacted in 1992, was not a valid exercise of Section 5 authority and thus could not abrogate state sovereign immunity. *See id.* at 672–75. But it did not specifically address the clear-statement issue. *See id.*

statute supported by the prevailing understanding of Section 5. That brings the analysis to decisions involving Section 1983, where the Court has applied the abrogation-related clear-statement rule in just that way.

3. Constitutional-Tort Cases

Recall that the Court initially considered whether Section 1983 abrogated state sovereign immunity in *Edelman*, decided in 1974.[164] But *Edelman*'s analysis was exceedingly brief, with the first meaningful look at how the clear-statement rule might apply in this context coming in *Quern*, decided in 1979.[165] There, the majority proclaimed that it was "simply . . . unwilling to believe . . . that Congress intended by the general language of § 1983 to override the traditional sovereign immunity of the States."[166]

Disagreeing in a separate opinion, Justice William Brennan Jr. focused on how Section 1983 was enacted to enforce the Fourteenth Amendment, which was expressly "'directed to the States'" and "exemplifie[d] the 'vast transformation' worked on the structure of federalism in this Nation by the Civil War."[167] In light of the historical background and a general statutory definition of "person" in place when the Civil Rights Act of 1871 was adopted,[168] Justice Brennan argued, "the face of the statute" was "plain enough" to articulate a cause of action against state defendants.[169]

The majority invoked the clear-statement rule in response. "Our cases consistently have required a clearer showing of congressional purpose to abrogate Eleventh Amendment immunity than our Brother Brennan is able to marshal," the Court said.[170] For Section 1983, the majority reasoned, "does not explicitly and by clear language indicate on its face an intent to sweep away the immunity of the States."[171] In tracing the clear-statement rule's lineage, the earliest case to which *Quern* pointed was *Employees*.[172] The Court never explained why it might have been proper to apply a substantive canon adopted in 1973 to a statute enacted in 1871, more than a century earlier. Nor did Justice Brennan press the matter, despite making a plea for "the present Congress . . . to rectify this

164. *See supra* text accompanying notes 23–29.

165. *See supra* text accompanying note 31.

166. Quern v. Jordan, 440 U.S. 332, 341 (1979).

167. *Id.* at 354–55 (Brennan, J., concurring in the judgment) (first quoting *Ex parte* Virginia, 100 U.S. 339, 346–47 (1880); and then quoting Mitchum v. Foster, 407 U.S. 225, 242 (1972)).

168. *See infra* Part III.A.1.

169. *Quern*, 440 U.S. at 355 (Brennan, J., concurring in the judgment).

170. *Id.* at 343 (majority opinion).

171. *Id.* at 345.

172. *See id.* at 343–45.

erroneous misinterpretation" and noting that "[t]he 42d Congress, of course, can no longer pronounce its meaning with unavoidable clarity."[173]

Quern shows exactly why filtering a statute through a substantive canon established so long after the legislation's passage can have profoundly antidemocratic effects.[174] Obviously, none of the congressmen who served in 1871 were around Washington, D.C., when *Quern* was decided in 1979 (or even when *Employees* was decided in 1973) to help clarify and codify what they thought Section 1983 meant in light of the Court's new interpretive approach. And the Reconstruction Congress—more than almost any other in American history—faced unique conditions and pursued unique objectives that its members wanted to shape the nation for generations to come. So it would have been unrealistic for the Court to expect that later legislators, with their own political realities and priorities, would adopt their postbellum predecessors' anticipated provisions even if they agreed with them.

Stated differently, had the Court refrained from employing the clear-statement rule to interpret Section 1983 and held under an even-handed analysis that the 1871 statute abrogated state sovereign immunity, later Congresses would have faced an opt-*out* situation with regard to state suability rather than the opt-*in* situation that *Quern* put in place. Behavioral law-and-economics literature says enormous differences can flow from opt-out versus opt-in choices,[175] in important part because decisional inertia can have powerful effects.[176] And legislative-process theory says these differences are all the more consequential in the congressional context because of limited resources and facets like interest-group politics, agenda-setting prerogatives, and veto-gate prevalence.[177] Factoring in vastly dissimilar background conditions at Time *A*, when an option comes into existence, and Time *B*, when some choice architect imposes a default rule, the prospect that selecting an opt-in versus opt-out baseline will make little difference seems exceedingly small. So aside from fortuitously addressing state suability with extreme specificity, there was nothing Congress could have done in 1871 (or reasonably expected anyone else to do later) to effectuate an intent to hold states liable for constitutional violations.

Will's further ruling that Section 1983 does not include states within the word "person[s]" even beyond the abrogation context extended the

173. *Id.* at 365–66 (Brennan, J., concurring in the judgment).

174. *See supra* text accompanying notes 83–86.

175. *See, e.g.*, Wendy Netter Epstein, *Nudging Patient Decision-Making*, 92 WASH. L. REV. 1255, 1293–94 (2017) ("One study that compared rates of organ donation in opt-in countries with those in opt-out countries found that nearly 60 percentage points separated the two groups (the opt-ins versus the opt-outs)." (citing Eric J. Johnson & Daniel Goldstein, *Do Defaults Save Lives?*, 302 SCI. 1338, 1339 (2003))).

176. *See* Cass R. Sunstein, *Deciding by Default*, 162 U. PA. L. REV. 1, 17 (2013).

177. *See* Eskridge & Frickey, *supra* note 78, at 639–40.

flaws of the Court's retroactive reasoning.[178] *Will* said that requiring Congress to "make its intention . . . 'unmistakably clear in the language of the statute'" was not just an abrogation-related doctrine, but was instead an "ordinary rule of statutory construction" applicable wherever the "usual constitutional balance between the States and the Federal Government" was at stake.[179] But none of the cases *Will* cited reached back anywhere near 1871.[180] Most involved discussions confined to particular issues not involving the immunity-unrelated question whether a federal statute subjected states to suit.[181] And the one that framed the rule as a general principle itself cited cases stretching back no further than the mid-twentieth century.[182]

C. *Anachronistic Assumptions*

Related to but separable from its radically retroactive reasoning, as the following discussion details, the Supreme Court in *Quern* projected its current view of state sovereign immunity backward in time to say that when enacting Section 1983 in 1871, Congress knew that including states within the class of potential defendants would have transgressed usual structural constitutional limits. Accordingly, *Quern* reasoned, Congress would have made the desire to withdraw states' immunity protections more manifest—meaning that it must not have wanted to do so in the first place.[183] These assumptions were anachronistic and, like the Court's handling of the clear-statement rule, had the effect of denying the Reconstruction Congress's democratic authority.

The discussion that follows explores the historical conditions confronting the congressmen who passed the 1871 Civil Rights Act and then examines some possible explanations for the Court's muddled analysis.

178. *See supra* text accompanying notes 31–37. For a somewhat similar argument from Professor William Burnham, the plaintiff's attorney in *Will*, see William Burnham, *"Beam Me Up, There's No Intelligent Life Here": A Dialogue on the Eleventh Amendment with Lawyers from Mars*, 75 NEB. L. REV. 551, 568–72 (1996).

179. Will v. Mich. Dep't of State Police, 491 U.S. 58, 65 (1989) (quoting Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 242 (1985)).

180. *See id.* (collecting citations).

181. *See* South Dakota v. Dole, 483 U.S. 203, 206–07 (1987) (regarding conditioning federal grants); *Atascadero*, 473 U.S. at 242 (regarding abrogating sovereign immunity); Pennhurst State Sch. & Hosp. v. Halderman, 465 U.S. 89, 99 (1984) (regarding issuing *Young*-style injunctions to follow state law); Pennhurst State Sch. & Hosp. v. Halderman, 451 U.S. 1, 16–17 (1981) (regarding conditioning federal grants); Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947) (regarding preempting police powers).

182. *See* United States v. Bass, 404 U.S. 336, 349 & n.16 (1971) (collecting citations).

183. *See* Quern v. Jordan, 440 U.S. 332, 341–43 (1979).

1. Historical Conditions

The Eleventh Amendment responded precisely to the circumstances underlying *Chisholm*.[184] The provision's text makes clear that federal courts generally cannot decide cases (or at least cases premised on diversity jurisdiction, like *Chisholm* was) where citizens sue states that are not their own. But it makes clear little else. Multiple questions surrounding the Amendment and state sovereign immunity more generally—including "whether the Amendment barred a federal court suit against a state . . . by one of the state's own citizens" asserting a federal question claim—thus remained "open . . . nearly until the end of the nineteenth century."[185]

The Supreme Court did not definitively answer whether states were subject to suits filed in federal court by their own citizens until 1890, when it said no in *Hans*.[186] The delay makes sense. With the exception of a provision in place for a brief period between 1801 and 1802, Congress did not confer general federal question jurisdiction on federal courts until 1875[187]—which was, of course, after it adopted Section 1983 in 1871. Before that jurisdictional grant, citizens would have found few occasions to try to sue their own states in federal court.

Given all this, it seems quite possible that many members of Congress did not hold comprehensive views about sovereign immunity beyond the text of the Eleventh Amendment when enacting the Civil Rights Act of 1871—including about how the doctrine might have applied to claims arising under Section 1. But to the extent that members of Congress *did* have well developed thoughts about what the Eleventh Amendment or sovereign immunity more generally entailed, it at least seems questionable to what degree they adhered to traditional notions of a state's place vis-à-vis the federal government, especially insofar as individual rights were involved.[188]

Creating general federal question jurisdiction, after all, was just "part of a larger substantive law and jurisdictional revolution that was an outgrowth of the Civil War and Reconstruction."[189] Michael Collins summarizes these legislative innovations as follows:

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184. *See supra* text accompanying notes 40–42.

185. FALLON ET AL., *supra* note 43, at 908.

186. *See supra* text accompanying notes 43–47.

187. Michael G. Collins, *The Unhappy History of Federal Question Removal*, 71 IOWA L. REV. 717, 720 & n.19 (1986).

188. *See* Gene R. Nichol, Jr., *Federalism, State Courts, and Section 1983*, 73 VA. L. REV. 959, 1009 (1987) ("[T]he framers of the [Civil Rights Act of 1871] were far more concerned with achieving constitutional compliance than with respecting traditional notions of state sovereignty. . . . It is very unlikely, therefore, that they would have supported the recognition of the various immunities and shields from national intervention that litter the law of federal courts.").

189. Collins, *supra* note 187, at 720.

> Beginning in 1863, Congress greatly expanded the availability of the writ of habeas corpus by permitting defendants before or after trial to remove any state court civil or criminal action arising out of acts committed during the Civil War 'by virtue or under color of' any federal executive or legislative authority. Four years later, Congress permitted persons held under state authority 'in violation of the Constitution' or federal law to use the writ to challenge the constitutionality of their detention. The national legislature opened the doors of the federal courts at about the same time to state law actions in which litigants were denied or could not enforce statutorily guaranteed civil rights in state courts. During the further course of Reconstruction, Congress also created federal criminal sanctions and a variety of civil actions directly to vindicate newly created federal civil rights. Congress expanded removal on the basis of diversity of citizenship, and it enlarged the appellate jurisdiction of the Supreme Court and jurisdiction over other specialized areas of federal law outside the field of civil rights.[190]

While these contexts were all different, it seems sensible to suspect that at least some of the same legislators who passed these provisions could have believed that state sovereign immunity posed at most a common law barrier that Congress could overcome to a federal question suit against a state by one of its own citizens—or, again, that the matter remained up in the air.

Importantly, as of 1871, the only high-court decision analyzing a suit against a citizen's own state in light of the Eleventh Amendment had expressly held the provision's protections inapplicable. In 1821, *Cohens v. Virginia*[191] addressed whether what amounted to an *appeal* of a state criminal prosecution counted as a "suit in law or equity" against a state within the terms of the Amendment.[192] The Court said no.[193] But in an alternative holding, the Court—speaking through Chief Justice Marshall—said that "should we in this be mistaken, the error does not affect the case" at bar.[194] For "[i]f this writ of error be a suit in the sense of the 11th amendment, it is not a suit commenced or prosecuted 'by a citizen of another State, or by a citizen or subject of any foreign State.'"[195]

190. *Id.* at 720–22 (footnotes omitted) (first quoting Act of Mar. 3, 1863, ch. 81, § 5, 12 Stat. 755, 756; and then quoting Act of Feb. 5, 1867, ch. 28, § 1, 14 Stat. 385, 385).

191. 19 U.S. (6 Wheat.) 264 (1821).

192. *Id.* at 375–76, 405–12 (quoting U.S. CONST. amend. XI).

193. *Id.* at 412.

194. *Id.*; *see* FALLON ET AL., *supra* note 43, at 907 & n.6 (calling this reasoning an "alternative holding" in relation to the conclusion that "[b]ecause the defendants' petition for the writ of error was entirely defensive and sought no affirmative relief, . . . it was not a 'suit' within the meaning of the [Eleventh] Amendment").

195. *Cohens*, 19 U.S. at 412.

Instead, the Court said, it "is governed entirely by the constitution as originally framed, and we have already seen, that in its origin, the judicial power was extended to all cases arising under the constitution or laws of the United States, without respect to parties."[196] This conclusion, moreover, aligned with the Marshall Court's general view of the Eleventh Amendment as articulating a narrow exception to the scope of Article III jurisdiction.[197]

The picture *Quern* painted failed to account for these historical conditions. "[N]either logic . . . nor the legislative history of the 1871 Act compels, or even warrants, . . . the conclusion that Congress intended by the general language of the Act to overturn the constitutionally guaranteed immunity of the several States," the Court declared.[198] "Given the importance of the States' traditional sovereign immunity," *Quern* said, "if in fact the Members of the 42d Congress believed that § 1 of the 1871 Act overrode that immunity, surely there would have been lengthy debate on this point."[199] But "not one Member of Congress mentioned the Eleventh Amendment or the direct financial consequences to the States of enacting § 1" in the debates, the Court continued, concluding that "this silence on the matter is itself a significant indication of the legislative intent of § 1."[200]

This kind of reasoning assumed that the Congress of a century prior understood the Eleventh Amendment the same way the Court of the present did. But if there was no widespread and definitive belief that state sovereign immunity barred cases beyond the Amendment's textual ambit in 1871 (and in particular suits against a plaintiff's own state after *Cohens*), there would have been little cause to think congressmen would have felt compelled to use especially specific language to subject states to suit. The same would hold true if congressmen viewed state sovereign immunity outside of the Eleventh Amendment as a common law protection, which legislation could easily displace. And one cannot necessarily attribute much meaning to the absence of sovereign immunity references in the legislative record.[201] "Congress may have been silent on

196. *Id.*

197. *See* FALLON ET AL., *supra* note 43, at 907.

198. Quern v. Jordan, 440 U.S. 332, 342 (1979).

199. *Id.* at 343.

200. *Id.*

201. Justice Antonin Scalia made a related point in *Welch*. Expressing doubt about whether Article III incorporated "a nearly universal 'understanding' that the federal judicial power could not extend to [suits brought by individuals against States]," Justice Scalia argued that "for nearly a century" *since* the decision in *Hans*, Congress had acted with the assumption of pervasive state immunity. Welch v. Tex. Dep't of Highways & Pub. Transp., 483 U.S. 468, 496 (1987) (Scalia, J., concurring in part and concurring in the judgment). "[I]f we were now to find that assumption to have been wrong," Scalia concluded, "we could not, in reason, interpret [post-*Hans*] statutes as though the assumption never existed." *Id.*

the subject" for many reasons, among them "because other parts of the bill"—which "included such invasions of state sovereignty as military takeovers of state and local governments and the suspension of the writ of *habeas corpus* for persons arrested by federal agents"—"were more controversial."[202]

Further undermining the Court's abrogation-related logic is the possibility that legislators in 1871 thought the recently ratified Fourteenth Amendment—which *Quern* also brushed aside[203]—at least potentially resolved any sovereign immunity problems. The Court would go on to declare a few years later, in the 1879 case *Ex parte Virginia*,[204] that because "[t]he prohibitions of the Fourteenth Amendment are directed to the States, and they are to a degree restrictions of State power," congressional enforcement under Section 5 "is no invasion of State sovereignty."[205] It made no difference, the Court said, that "such legislation is restrictive of what the State might have done before the constitutional amendment was adopted."[206]

It would have been logical, therefore, for members of Congress in 1871 to have adopted a posture toward state immunity protections that was quite different from the one *Quern* posited. In short, Reconstruction was an exceptional time in American political and constitutional life. Reconstruction radically reoriented the relationship between the federal government (including the federal court system) and state governments, especially when it came to the role of the former in defining and protecting citizens from civil rights abuses enabled by the latter. As Justice Harry Blackmun summed things up in a 1985 law review article: "Taken collectively, the Reconstruction Amendments, the Civil Rights Acts, and the[] new jurisdictional statutes, all emerging from the caldron of the War Between the States, marked a revolutionary shift in the relationship among individuals, the States, and the Federal Government."[207] The empirical question whether members of Congress actually took the position hypothesized here is explored below (as is the theoretical question to what extent the subjective intent of enacting

202. Burnham, *supra* note 83, at 993 n.259.

203. *See Quern*, 440 U.S. at 342 (stating that "the circumstances surrounding the adoption of the Fourteenth Amendment" did not support abrogation).

204. 100 U.S. 339 (1879).

205. *Id.* at 346.

206. *Id.*

207. Harry A. Blackmun, *Section 1983 and Federal Protection of Individual Rights—Will the Statute Remain Alive or Fade Away?*, 60 N.Y.U. L. REV. 1, 6 (1985); *see also* Edward A. Purcell, Jr., *The Particularly Dubious Case of* Hans v. Louisiana*: An Essay on Law, Race, History, and "Federal Courts,"* 81 N.C. L. REV. 1927, 2044 (2003) (arguing that *Hans*'s reasoning was "rooted in a pre-Fourteenth Amendment view of the federal courts' role, in the outmoded assumption that their primary purpose was to protect noncitizens and aliens, not a state's own citizens").

legislators should count in interpretation).[208] What matters for present purposes is that the Court's uncritical assumptions were not obviously correct.

Again, the point is not that *Hans* was wrong, at least insofar as the logic there focused on historical understandings at the time of the founding and the Eleventh Amendment's ratification. The point is instead that even if *Hans* was right about what people previously believed, understandings about state sovereign immunity—and especially about congressional abrogation—could have shifted in the decades afterward in light of factors like the Eleventh Amendment's enigmatic text and judicial treatment or all the reforms flowing from the Civil War. Or people could have understood a background principle of state sovereign immunity as a common law concept all along.[209] And the point is furthermore that regardless of what these possibilities might mean for constitutional construction, they are at least potentially relevant to what people might have thought about a statute enacted in the postbellum period.

Will piggybacked on *Quern* here too. "Given that a principal purpose behind the enactment of § 1983 was to provide a federal forum for civil rights claims," *Will* said, *Quern*'s holding that the statute preserved immunity protections in *federal* courts indicated that Congress did not subject states to suit in *state* courts either.[210] In a footnote, the Court briefly acknowledged but entirely evaded the anachronism issue. "Petitioner argues that Congress would not have considered the Eleventh Amendment in enacting § 1983 because in 1871 this Court had not yet held that the Eleventh Amendment barred federal-question cases against States in federal court," *Will* said.[211] But "[t]his argument is no more than an attempt to have this Court reconsider *Quern*," the majority declared, "which we decline to do."[212]

2. Possible Explanations

There are good reasons to suspect the Supreme Court understood the anachronistic nature of the narrative it told. *Fitzpatrick*, which came down in 1976, is particularly pertinent.[213] *Fitzpatrick* established that Congress could abrogate state sovereign immunity when acting pursuant

208. *See infra* Parts III.B.1 and III.C.

209. *See supra* text accompanying notes 51–58.

210. Will v. Mich. Dep't of State Police, 491 U.S. 58, 66 (1989).

211. *Id.* at 67 n.6.

212. *Id.*; *see* William Burnham & Michael C. Fayz, *The State as a "Non-Person" Under Section 1983: Some Comments on* Will *and Suggestions for the Future*, 70 OR. L. REV. 1, 19 (1991) (stating that *Will* did not "determine what the state of eleventh amendment immunity was in 1871").

213. *See supra* text accompanying note 130–31.

to Section 5 of the Fourteenth Amendment and upheld the extension of Title VII of the Civil Rights Act of 1964[214] to state governments through the Equal Employment Opportunity Act of 1972.[215]

In *Fitzpatrick*, the Court waxed poetic about how the Fourteenth Amendment had long been understood to expand congressional power at the expense of state sovereignty. In addition to repeating the notion that enforcing the Amendment works "no invasion of State sovereignty," the Court quoted *Ex parte Virginia* from 1880 for the proposition that "in exercising her rights," a state can neither "disregard the limitations which the Federal Constitution has applied to her power" nor "deny to the general government the right to exercise all its granted powers, though they may interfere with the full enjoyment of rights she would have if those powers had not been thus granted."[216] *Ex parte Virginia* and subsequent cases, the Court declared, left "no doubt" that the Constitution allowed "intrusions by Congress, acting under the Civil War Amendments, into the judicial, executive, and legislative spheres of autonomy previously reserved to the States."[217] Abrogation of state sovereign immunity, the Court concluded, was part and parcel of this larger principle.[218]

But in *Quern*, decided just three years later, the Court struck a decidedly different tone. What might explain the inconsistency? A couple doctrinal possibilities—which could dovetail with ideological, institutional, or other explanations—bear examining.

As an initial matter, consider that then-Justice William Rehnquist wrote the majority opinions in both *Fitzpatrick* and *Quern*. An intervening case shows that Justice Rehnquist at first failed to appreciate the full implications of *Fitzpatrick*'s seemingly permissive approach to abrogation. Dissenting in *Hutto*,[219] he wrote that while *Fitzpatrick* involved "a violation of the Equal Protection Clause which is contained *in haec verba* in the language of the Fourteenth Amendment itself," the case at bar involved "the infliction of cruel and unusual punishment, which is expressly prohibited by the Eighth but not by the Fourteenth

214. Pub. L. No. 88-352, §§ 701–716, 78 Stat. 241, 253–66 (codified as amended at 42 U.S.C. §§ 2000e to 2000e-17).

215. Fitzpatrick v. Bitzer, 427 U.S. 445, 447–48, 456 (1976).

216. *Id.* at 454–55 (quoting *Ex parte* Virginia, 100 U.S. 339, 346 (1880)).

217. *Id.* at 455.

218. *See id.* at 456 ("[W]e think that the Eleventh Amendment, and the principle of state sovereignty which it embodies, are necessarily limited by the enforcement provisions of § 5 of the Fourteenth Amendment. . . . We think that Congress may, in determining what is 'appropriate legislation' for the purpose of enforcing the provisions of the Fourteenth Amendment, provide for private suits against States or state officials which are constitutionally impermissible in other contexts." (citation omitted) (quoting U.S. CONST. amend. XIV, § 5)).

219. *See supra* text accompanying notes 141.

Amendment."[220] It was "not at all clear," Justice Rehnquist said, "that Congress has the same enforcement power under § 5 with respect to a constitutional provision which has merely been judicially 'incorporated' into the Fourteenth Amendment that it has with respect to a provision which was placed in that Amendment by the drafters."[221]

Justice Rehnquist's distinction between incorporated and innate Fourteenth Amendment rights never became part of constitutional-enforcement doctrine. But *Hutto* hinted at *Fitzpatrick*'s expansive capacity, suggesting not only that congressional abrogation of state sovereign immunity could stretch into the constitutional-tort sphere (given that the fee dispute under 42 U.S.C. § 1988 derived from a Section 1983 suit[222]), but that it could enfold the entire universe of claims found there.

Given that he had "serious reservations" about extending *Fitzpatrick*'s reasoning beyond the due-process and equal-protection guarantees,[223] Justice Rehnquist must have been all the more concerned about extending *Fitzpatrick*'s reasoning to *Quern*'s circumstances. *Quern* involved Illinois's withholding of benefits under a federal–state welfare program.[224] As *Edelman* explained, the program was organized under the Social Security Act,[225] which did not include a private cause of action, but the Court viewed Section 1983 as potentially providing an alternative path to relief.[226] For as the Court would later reason, the fact that Section 1983 supplies a cause of action for violations of "the Constitution *and laws*" of the United States means it can be construed to permit relief for federal constitutional *and statutory* claims.[227] A holding that Section 1983 abrogated state sovereign immunity in the context of *Quern*, therefore, could have opened up states to suit under all manner of congressional enactments.

There is also a notable degree of path dependence underlying this line of precedent. *Edelman* (which Justice Rehnquist also wrote) was the first decision to say that Section 1983 could not support suits against states themselves. But the substance of that discussion boiled down to two sentences. First, the Court stated that "it has not heretofore been suggested that § 1983 was intended to create a waiver of a State's Eleventh Amendment immunity merely because an action could be brought under that section against state officers, rather than against the

220. Hutto v. Finney, 437 U.S. 678, 717 (1978) (Rehnquist, J., dissenting).

221. *Id.* at 717–18.

222. *See id.* at 693 (majority opinion).

223. *Id.* at 717 (Rehnquist, J., dissenting).

224. *See* Quern v. Jordan, 440 U.S. 332, 333–34, 334 n.1 (1979).

225. Ch. 531, 49 Stat. 620 (1935) (codified as amended in scattered sections of 42 U.S.C.).

226. Edelman v. Jordan, 415 U.S. 651, 674–75 (1974) (citing Rosado v. Wyman, 397 U.S. 397 (1970)).

227. Maine v. Thiboutot, 448 U.S. 1, 4 (1980) (quoting 42 U.S.C. § 1983).

State itself."[228] Second, the Court restated the general test for determining whether a remedy contravened sovereign immunity principles, implicitly rejecting the abrogation argument. Specifically, the Court said that "[t]hough a § 1983 action may be instituted by public aid recipients . . . , a federal court's remedial power, consistent with the Eleventh Amendment, is necessarily limited to prospective injunctive relief, and may not include a retroactive award which requires the payment of funds from the state treasury."[229]

Edelman did not discuss whether states were "person[s]" within the meaning of Section 1983. It did not discuss the statute's roots in the Fourteenth Amendment. It did not even discuss the statute's role in vindicating constitutional rights. Instead, *Edelman* focused at length on whether Illinois "had waived its Eleventh Amendment immunity and consented to the bringing of such a suit by participating in the [welfare] program."[230] Answering no, the Court said that "the threshold fact of congressional authorization to sue a class of defendants which literally includes States [was] wholly absent," for the Social Security Act "by its terms did not authorize suit against anyone."[231] Only then did the Court briefly turn to Section 1983.[232]

Given this disposition, the Court in *Quern* framed the abrogation issue as whether subsequent decisions "cast . . . doubt on our holding in *Edelman*," as whether anything could "justify a conclusion different from that which we reached in *Edelman*," and as whether a "reaffirmance of *Edelman*" was in order.[233] *Edelman*'s idiosyncratic and essentially unreasoned discussion of Section 1983 thus allowed *Quern* to start from a strong presumption that immunity protections would persist, notwithstanding that *Fitzpatrick* had significantly elevated the Fourteenth Amendment's importance to abrogation doctrine in the interim. By reifying a decision that rested on air, *Quern* cut consideration of whether Section 1983 withdrew states' immunity off at the knees. And in an apparent effort to avoid allowing any daylight between Section 1983 suits in federal and state courts, *Will* perpetuated the path-dependency problem by straining to pack the entire universe of sovereign immunity jurisprudence into Section 1983's one-word reference to "person[s]."[234]

228. *Edelman*, 415 U.S. at 675–77.

229. *Id.* at 677 (citation omitted); *see supra* text accompanying notes 26–28.

230. *Edelman*, 415 U.S. at 671.

231. *Id.* at 672, 674.

232. *See id.* at 674.

233. Quern v. Jordan, 440 U.S. 332, 338, 341, 345 (1979).

234. *See* Burnham, *supra* note 178, at 569–71; Vicki C. Jackson, *One Hundred Years of Folly: The Eleventh Amendment and the 1988 Term*, 64 S. CAL. L. REV. 51, 96 n.183 (1990) (stating that "[t]he presumption relied on in *Will* . . . extends the (arguably) countermajoritarian effect of the clear evidence presumption of eleventh amendment cases").

In sum, a careful reflection on Section 1983 sovereign immunity decisions reveals that the Court's refusal to view states as cognizable defendants rests on retroactive reasoning and anachronistic assumptions that are faulty as a matter of interpretive logic and constitutional history.[235]

III. AN AFFIRMATIVE CRITIQUE

So far, the analysis has aimed at examining shortcomings in the Supreme Court's Section 1983 abrogation jurisprudence. The discussion has been *negative* in the sense that it picks apart the reasoning on which the Court has relied. But where does that leave things?

The preceding negative critique calls for a corresponding *affirmative* critique asking how an interpreter should have approached the issue of Section 1983 actions against states from the start. "[P]erhaps" the Court's rejection of state suability, while unconvincing as currently constructed, could "be *made*" convincing when rebuilt on some alternate foundation, to quote Will Baude's recent study of the related doctrine of qualified

235. As a response to both these conclusions, one could ask whether the concept of congressional abrogation and the clear-statement rule to overcome it arose in tandem around the time the Court decided *Parden* and *Employees* in 1964 and 1973, respectively. But if abrogation is a constitutionally permissible possibility, it should not necessarily matter when commentators or courts started writing about it. In any event, even a prominent abrogation skeptic acknowledges based on exhaustive historical research into congressional attitudes about abrogation during Reconstruction that "[p]robably some Republicans thought, or would have thought if they had thought about it, that Congress could create causes of action against nonconsenting states." John Harrison, *State Sovereign Immunity and Congress's Enforcement Powers*, 2006 SUP. CT. REV. 353, 388. And there is at least one early post-*Hans* instance of a court discussing the possibility of "abrogat[ion]" in what appears to be the context in question here. *See* Brown Univ. v. Rhode Island Coll. of Agric. & Mech. Arts, 56 F. 55, 58 (C.C.D.R.I. 1893) ("I shall assume, as contended by the respondents, that this action may not be maintained if it be, in substance, against the state. This proposition does not seem to me in any degree to depend on the allegation of 'sovereignty' in a state, in the strict sense of that word. Sovereignty is an indivisible, inherent attribute, incapable of any derogation by law, and doubtless involving an immunity from suits or legal proceedings of any sort. But under the constitution, as originally adopted, a state might be sued by a citizen of another state, and the eleventh article of amendment does not prohibit a suit by a foreign sovereign or state against a state of the Union; and it seems that such a suit might now be maintained. So, too, it is undoubted that a state may now be sued by another state; and, if it be said that the necessary consent to be sued was involved in the act ratifying the constitution, it may be replied that without the consent of some certain state the eleventh amendment may now be abrogated, and the judicial power of the nation may be restored as it was in the beginning, and still further extended; so that in this respect, as indeed in most, if not all, other respects, the supposed sovereign is in point of fact subject to a power superior to itself, and covering and including its whole territory. It may, however, be taken as the general law of the land that suits by private persons against a state may not be maintained. Into the origin and reason of this rule it is not necessary, for the present purpose, to inquire." (citations omitted)).

immunity.[236] Or perhaps the best interpretation of Section 1983 would abrogate sovereign immunity after all. And any real-world reconsideration of state suability in constitutional-tort suits would, to quote Baude again, "explicitly foreground" critical "policy" questions about whether sovereign immunity in this context "is wise or useful and about how it interacts with other aspects of our legal regime."[237]

Accordingly, this Part presents an affirmative critique of whether Section 1983 should have been read to abrogate sovereign immunity more or less from first principles. The purpose is not to advocate any overarching school of statutory interpretation—but rather to present evidence that may bear on state suability under different methodological approaches to greater or lesser degrees. This Part first considers Section 1983's semantic meaning at the time of its enactment and then explores its expected applications, both for members of Congress as indicated by the statute's legislative history and for members of the public as indicated

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236. *See* William Baude, *Is Qualified Immunity Unlawful?*, 106 CALIF. L. REV. 45, 78–79 (2018) (remarking that "it is possible that the Court could put forward an entirely new legal argument for qualified immunity," such that "perhaps qualified immunity doctrine c[ould] be *made* lawful").

237. *Id.* Previous scholarship has focused on the policy side of this issue, asking whether states should be subject to civil accountability for constitutional violations as a normative matter. *See, e.g.*, PETER H. SCHUCK, SUING GOVERNMENT 100–21 (1983). Work examining this issue based on a close look at the text and history of Section 1983 seems sparser. Perhaps the most thorough example presents a point-by-point critique of the *Will* majority opinion by Professor Burnham and another lawyer who worked on that case. *See* Burnham & Fayz, *supra* note 212, at 10–33. Other work includes shorter or narrower treatments of such issues, including several discussed here. *See, e.g.*, Englander, John, Note, *Amenability of States to Section 1983 Suits*, 62 B.U. L. REV. 731, 754–59 (1982) (relying on the purposes of the Reconstruction Amendments, the purposes and legislative history of Section 1983, the Dictionary Act, and statements in *Monell* and *Quern* to argue that states should be considered "persons" under Section 1983); Michael J. Gerhardt, *The Ripple Effects of* Slaughter-House*: A Critique of a Negative Rights View of the Constitution*, 43 VAND. L. REV. 409, 447 n.166 (1990) (stating that "[t]he legislative history of § 1983, as well as the plain language and understanding underlying the Dictionary Act of 1871 . . . demonstrate Congress . . . had the states' interest in mind when Congress decided to subject the states to damage actions in federal court through § 1983" and that "[t]he history of Reconstruction . . . demonstrates that Congress held the states responsible for the violence in 1871 against the newly freed slaves and their supporters and, therefore, made the states the primary target of § 1983"); Michael J. Gerhardt, *The* Monell *Legacy: Balancing Federalism Concerns and Municipal Accountability Under Section 1983*, 62 S. CAL. L. REV. 539, 561–62 (1989) (similar); John E. Nowak, *The Scope of Congressional Power to Create Causes of Action Against State Governments and the History of the Eleventh and Fourteenth Amendments*, 75 COLUM. L. REV. 1413, 1464–68 (1975) (concluding on the basis of legislative history that "section 1983 was not intended to create private causes of action against state governments"); Gene R. Shreve, *Symmetries of Access in Civil Rights Litigation: Politics, Pragmatism and* Will, 66 IND. L.J. 1, 18 & n.98 (1990) (briefly contending that "[b]oth sides in *Will* clothed their arguments in intentionalist language, yet as in *Quern*, neither side could muster convincing evidence about what Congress intended for section 1983 in damage actions" and stating that "[i]t seems doubtful whether adequate evidence exists").

by its litigation history. The subsequent Part then focuses on the policy side of the question.

A. *Semantic Meaning*

As the Supreme Court recently stated, "In the absence of an express statutory definition, the Court applies a 'longstanding interpretive presumption that "person" does not include the sovereign.'"[238] This presumption purportedly comports with the directive of the present-day Dictionary Act, which provides that "the word '"person" . . . include[s] corporations, companies, associations, firms, partnerships, societies, and joint stock companies, as well as individuals.'"[239] By negative implication, the Court says, this definition does not include governments themselves.[240]

Like most presumptions, this one is rebuttable.[241] The Dictionary Act provides that its definitions control "[i]n determining the meaning of any Act of Congress, *unless the context indicates otherwise*."[242] And the Court "normally interprets a statute in accord with the ordinary public meaning of its terms at the time of its enactment."[243] As the Court explained last year, this task requires the Justices to "orient [them]selves to the time of the statute's adoption . . . and begin by examining the key statutory terms."[244] The analysis here considers evidence consistent with that general approach and then discusses how a range of interpretive philosophies might apply to the issue of state suability under Section 1983.

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238. Return Mail, Inc. v. U.S. Postal Serv., 139 S. Ct. 1853, 1861–62 (2019) (quoting Vt. Agency of Nat. Res. v. United States *ex rel.* Stevens, 529 U.S. 765, 780–81 (2000)).

239. *Id.* at 1862 (alteration in original) (quoting 1 U.S.C. § 1). Of note, the Dictionary Act included the same definition of "person" when the Court decided *Edelman*, *Quern*, and *Will*. *See* Michael J. Gerardi, Note, *The "Person" at Federal Law: A Framework and a RICO Test Suite*, 84 NOTRE DAME L. REV. 2239, 2251 (2009) ("Congress restyled the language . . . in 1948 into the modern definition: '[U]nless the context indicates otherwise . . . the words "person" and "whoever" include corporations, companies, associations, firms, partnerships, societies, and joint stock companies, as well as individuals . . . .'" (alterations in original) (quoting Act of June 25, 1948, ch. 645, § 6, 62 Stat. 683, 859 (codified as amended at 1 U.S.C. § 1))).

240. *See* United States v. United Mine Workers, 330 U.S. 258, 275 (1947) ("The absence of any comparable provision extending the term to sovereign governments implies that Congress did not desire the term to extend to them.").

241. *See* United States v. Cooper Corp., 312 U.S. 600, 604–05 (1941) ("Since, in common usage, the term 'person' does not include the sovereign, statutes employing the phrase are ordinarily construed to exclude it. But there is no hard and fast rule of exclusion." (footnote omitted)), *superseded by statute*, 15 U.S.C. § 15a, *as recognized in* U.S. Postal Serv. v. Flamingo Indus. (USA) Ltd., 540 U.S. 736 (2004).

242. 1 U.S.C. § 1 (emphasis added).

243. Bostock v. Clayton Cnty., 140 S. Ct. 1731, 1738 (2020).

244. *Id.* at 1738–39.

1. The Dictionary Act's 1871 Definition

With respect to Section 1983, the time of the statute's adoption was Reconstruction, and the key statutory term for present purposes is "person." When the Civil Rights Act of 1871 was enacted, the Dictionary Act (in its very first iteration) defined "person" differently from how it does today, specifying that the word could "extend and be applied to *bodies politic and corporate* . . . unless the context shows that such words were intended to be used in a more limited sense."[245] Congress adopted this definition on February 25, 1871, less than two months before it adopted Section 1983 in April.[246] So absent some contraindication, the "person[s]" to whom Section 1983 referred would have included "bodies politic and corporate." The questions become, therefore, first, whether some contraindication surrounding Section 1983 existed and second, whether states fell within the class of "bodies politic and corporate."

As for the initial question, assuming for the moment that "bodies politic and corporate" would have included states, at least three semantic possibilities indicating that Section 1983 may have encoded a narrower meaning of "person" are apparent.[247] First, in both *Quern* and *Will*, the majority suggested that the 1871 Dictionary Act definition was unilluminating because it postdated the use of "person" in Section 2 of the Civil Rights Act of 1866,[248] which served as a model for the Civil Rights Act of 1871.[249] But the earlier statute used "person" to delineate the target of *criminal* sanctions,[250] and there appears to have been little if

245. Act of Feb. 25, 1871, ch. 71, § 2, 16 Stat. 431, 431 (codified as amended at 1 U.S.C. § 1) (emphasis added).

246. *See* Quern v. Jordan, 440 U.S. 332, 355–56 (1979) (Brennan, J., concurring in the judgment).

247. To dispose of an additional potential contraindication off the bat, the fact that Section 1983 targets violations of "the Constitution *and laws*" of the United States should not cause one to think the statute initially excluded states from its coverage. 42 U.S.C. § 1983 (emphasis added). For "[a]s originally enacted in 1871, the provision that is now § 1983 created a cause of action only for the deprivation of *constitutional* rights." FALLON ET AL., *supra* note 43, at 1009; *see supra* note 12. As it turns out, "[t]he phrase 'and laws' was added, without helpful explanation, as part of a revision of the statutes in 1874." *Id.*

248. Ch. 31, § 2, 14 Stat. 27, 27 (codified as amended at 42 U.S.C. § 1988 and 28 U.S.C. § 1443).

249. *See* Will v. Mich. Dep't of State Police, 491 U.S. 58, 69 (1989); *Quern*, 440 U.S. at 341 n.11.

250. § 2, 14 Stat., at 27 ("[A]ny *person* who, under color of any law, statute, ordinance, regulation, or custom, shall subject, or cause to be subjected, any inhabitant of any State or Territory to the deprivation of any right secured or protected by this act, or to different punishment, pains, or penalties on account of such person having at any time been held in a condition of slavery or involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, or by reason of his color or race, than is prescribed for the punishment of white persons, *shall be deemed guilty of a misdemeanor*, and, on conviction, shall

any doubt even then that states could not commit crimes.[251] It would have been immediately clear from the subject matter, therefore, that a state could not have counted as a "person." That was not true of the later statute, which used "person" to delineate the target of *civil* sanctions, so the subject matter said far less about whether a state could count as a "person."[252]

Indeed, the Supreme Court has repeatedly found cause to interpret statutes differently from prior statutes on which they were modeled.[253] *Monroe* provides an especially pertinent example, for there the Court concluded that provisions flowing from the 1866 Act and the 1871 Act encoded separate state-of-mind requirements in part because of their respective criminal and civil subject matters.[254] Also relevant is a recent case ascribing "person" divergent meanings. In *RJR Nabisco, Inc. v. European Community*,[255] the Court rejected the argument that because the private right of action provided by the Racketeer Influenced and Corrupt Organizations Act (RICO)[256] "was modeled after § 4 of the Clayton Act, which we have held allows recovery for injuries suffered abroad as a result of antitrust violations," RICO—in a provision "allow[ing] '[a]ny person injured in his business or property by reason of

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be punished by fine not exceeding one thousand dollars, or imprisonment not exceeding one year, or both, in the discretion of the court." (emphases added)).

251. *See* Kurt T. Lash, *Beyond Incorporation*, 18 J. CONTEMP. LEGAL ISSUES 447, 463 (2009) (discussing this understanding among Reconstruction congressmen).

252. *See* FALLON ET AL., *supra* note 43, at 907–08 (discussing how "[t]he Marshall Court generally construed the Eleventh Amendment narrowly" and how important "open questions about the Eleventh Amendment" existed "nearly until the end of the nineteenth century").

253. *See, e.g.*, Gross v. FBL Fin. Servs., Inc., 557 U.S. 167, 175 n.2 (2009) (rejecting the argument that "the Court must incorporate its past interpretations of Title VII [of the Civil Rights Act of 1964] into the [Age Discrimination in Employment Act (ADEA)] because 'the substantive provisions of the ADEA were derived *in haec verba* from Title VII' and because the Court has frequently applied its interpretations of Title VII to the ADEA" (quoting *id.* at 183 (Stevens, J., dissenting)); *id.* (reasoning that "the Court's approach to interpreting the ADEA in light of Title VII has not been uniform" and that "[i]n this instance, . . . textual differences between Title VII and the ADEA . . . prevent us from applying [Title VII precedent] to federal age discrimination claims").

254. *See* Monroe v. Pape, 365 U.S. 167, 187 (1961) ("In *Screws* [*v. United States*] we dealt with a statute that imposed criminal penalties for acts 'wilfully' done. We construed that word in its setting to mean the doing of an act with 'a specific intent to deprive a person of a federal right.'" (quoting Screws v. United States, 325 U.S. 91, 103 (1945))), *overruled in part by* Monell v. Dep't of Soc. Servs., 436 U.S. 658 (1978); *id.* ("We do not think that gloss should be placed on [Section 1983] which we have here. The word 'wilfully' does not appear in [Section 1983]. Moreover, [Section 1983] provides a civil remedy, while in the *Screws* case we dealt with a criminal law challenged on the ground of vagueness. Section [1983] should be read against the background of tort liability that makes a man responsible for the natural consequences of his actions.").

255. 136 S. Ct. 2090 (2016).

256. Pub. L. No. 91-452, Title IX, § 901(a), 84 Stat. 941 (1970) (codified as amended at 18 U.S.C. §§ 1961–1968).

a violation of [a specific section] to sue in federal district court"[257]—must have allowed suits for injuries suffered abroad too.[258] The Court explained that its holding about the Clayton Act[259] "relied first and foremost on the fact that the Clayton Act's definition of 'person'—which in turn defines who may sue under that Act—'explicitly includes "corporations and associations existing under or authorized by . . . the laws of any foreign country."'"[260] RICO, the Court said, "lacks the language" previously "found critical,"[261] notwithstanding (as a separate opinion pointed out) that "RICO's definition of 'persons' is hardly confining: 'any individual or entity capable of holding a legal or beneficial interest in property.'"[262]

A second issue concerns the appearance of the phrase "under color of state [law]" within the same sentence as the word "person" in Section 1983. As the majority put the point in *Will*, "if a State is a 'person' within the meaning of § 1983, the section is to be read as saying that 'every person, including a State, who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects . . . .'"[263] This, the Court said, "would be a decidedly awkward way of expressing an intent to subject the States to liability."[264] But to quote Justice Brennan's response, Section 1983 extends not only to states, but "as well to natural persons, who do not necessarily" act under color of state law.[265] "[T]o ensure that *they* would be liable only when they did so," Justice Brennan continued, "the statute needed the under-color-of-law requirement."[266] In other words, the choice to use "person" to include states was concise, not cumbersome.[267]

A third related issue involves the reoccurrence of "person" later in the same sentence under examination here. Recall that Section 1 of the Civil

257. *RJR Nabisco*, 136 S. Ct. at 2097 (second alteration in original) (quoting 18 U.S.C. § 1964(c)).

258. *Id.* at 2109 (citation omitted).

259. Ch. 323, 38 Stat. 730 (1914) (codified as amended at 15 U.S.C. §§ 12–27 and 29 U.S.C. §§ 52–53).

260. *RJR Nabisco*, 136 S. Ct. at 2109–10 (third alteration in original) (quoting Pfizer, Inc. v. Gov't of India, 434 U.S. 308, 313 (1978)).

261. *Id.* at 2110.

262. *Id.* at 2114 n.3 (Ginsburg, J., concurring in part and dissenting in part).

263. Will v. Mich. Dep't of State Police, 491 U.S. 58, 64 (1989) (alteration in original) (quoting 42 U.S.C. § 1983).

264. *Id.*

265. *Id.* at 83 (Brennan, J., dissenting).

266. *Id.*

267. *See id.* ("The only way to remove the redundancy that the Court sees would have been to eliminate the catchall phrase 'person' altogether, and separately describe each category of possible defendants and the circumstances under which they might be liable. I cannot think of a situation not involving the Eleventh Amendment, however, in which we have imposed such an unforgiving drafting requirement on Congress.").

Rights Act of 1871 provided for civil suit against "any *person*" acting under color of state law who violated the constitutional rights of "any *person*" in the United States.[268] One could argue that the latter reference to "person[s]" embraces individuals only,[269] such that the consistent-usage canon—that is, the presumption "that Congress uses the same words or phrases consistently across different parts of the same statute"[270]—means the former reference does too. But even assuming the premise, the conclusion does not necessarily follow. For the consistent-usage canon states a relatively weak presumption and seems relatively weak as a descriptive matter.[271] Moreover, there is little reason to think the latter appearance of "person" provided a better indication of what the former appearance of "person" meant than the actual statutory definition of that term did.

As for the next question outlined above (whether states counted as "bodies politic and corporate" when Section 1983 was enacted), the historical record suggests that the phrase was somewhat ambiguous but would probably have been widely understood to include states. In *Quern*, Justice Brennan argued that the 1871 Dictionary Act supported state suability under Section 1983, providing bare citations to thirteen judicial opinions coming mostly from the Supreme Court and clustered largely within a few decades of Section 1983's enactment.[272] Reviewing these opinions shows they all indeed refer to states as "bodies politic" and/or "corporate"—or describe them using language that seems functionally equivalent.[273] In *Quern*, Justice Brennan also cited the Preamble to the

268. Civil Rights Act of 1871, ch. 22, § 1, 17 Stat. 13, 13 (codified as amended at 42 U.S.C. § 1983) (emphases added); *see supra* note 12.

269. *See* Municipality of San Sebastian v. Puerto Rico, 89 F. Supp. 3d 266, 276 (D.P.R.) (explaining that "[s]ince *Monell*, the courts of appeals have been divided as to whether a municipality is a proper section 1983 plaintiff" and collecting citations), *on reconsideration in part*, 116 F. Supp. 3d 49 (D.P.R. 2015).

270. John F. Manning, Essay, *Inside Congress's Mind*, 115 COLUM. L. REV. 1911, 1938 (2015).

271. *See* Atl. Cleaners & Dyers, Inc. v. United States, 286 U.S. 427, 433 (1932) ("Most words have different shades of meaning and consequently may be variously construed, not only when they occur in different statutes, but when used more than once in the same statute or even in the same section. Undoubtedly, there is a natural presumption that identical words used in different parts of the same act are intended to have the same meaning. But the presumption is not rigid and readily yields whenever there is such variation in the connection in which the words are used as reasonably to warrant the conclusion that they were employed in different parts of the act with different intent." (citation omitted)).

272. Quern v. Jordan, 440 U.S. 332, 356–57 (1979) (Brennan, J., concurring in the judgment).

273. *See* Heim v. McCall, 239 U.S. 175, 188 (1915) ("The basic principle of the decision of the Court of Appeals was that the State is a recognized unit and those who are not citizens of it are not members of it. Thus recognized it is a body corporate and, like any other body corporate,

Massachusetts Constitution and the writings of Justice James Wilson,[274]

it may enter into contracts and hold and dispose of property." (quotation mark omitted)); McPherson v. Blacker, 146 U.S. 1, 24 (1892) ("The manner of the appointment of electors directed by the act of Michigan is the election of an elector and an alternate elector in each of the twelve Congressional districts into which the State of Michigan is divided, and of an elector and an alternate elector at large in each of two districts defined by the act. It is insisted that it was not competent for the legislature to direct this manner of appointment because the State is to appoint as a body politic and corporate, and so must act as a unit and cannot delegate the authority to subdivisions created for the purpose . . . ."); Poindexter v. Greenhow, 114 U.S. 270, 288 (1885) ("The State is a political corporate body, can act only through agents, and can command only by laws."); Keith v. Clark, 97 U.S. 454, 460–61 (1878) ("The political society which in 1796 became a State of the Union, by the name of the State of Tennessee, is the same which is now represented as one of those States in the Congress of the United States. Not only is it the same body politic now, but it has always been the same."); Munn v. Illinois, 94 U.S. 113, 124 (1876) (in discussing states' powers, stating that "'[a] body politic,' as aptly defined in the preamble of the Constitution of Massachusetts, 'is a social compact by which the whole people covenants with each citizen, and each citizen with the whole people, that all shall be governed by certain laws for the common good'"); Georgia v. Stanton, 73 U.S. 50, 76–77 (1867) (calling a state "an organized political body" and discussing its "corporate existence"); Cotton v. United States, 52 U.S. (11 How.) 229, 231 (1850) ("Every sovereign State is of necessity a body politic, or artificial person, and as such capable of making contracts and holding property, both real and personal."); Butler v. Pennsylvania, 51 U.S. (10 How.) 402, 416 (1850) ("[Contracts] are clearly distinguishable from measures or engagements adopted or undertaken by the body politic or State government for the benefit of all, and from the necessity of the case, and according to universal understanding, to be varied or discontinued as the public good shall require."); *id.* at 416–17 ("[I]n every perfect or competent government, there must exist a general power to enact and to repeal laws; and to create, and change or discontinue, the agents designated for the execution of those laws. Such a power is indispensable for the preservation of the body politic, and for the safety of the individuals of the community. It is true, that this power, or the extent of its exercise, may be controlled by the higher organic law or constitution of the State . . . ."); Penhallow v. Doane's Adm'rs, 3 U.S. (3 Dall.) 54, 93 (1795) (opinion of Iredell, J.) ("A distinction was taken at the bar between a State and the people of the State. It is a distinction I am not capable of comprehending. By a State forming a Republic (speaking of it as a moral person) I do not mean the Legislature of the State, the Executive of the State, or the Judiciary, but all the citizens which compose that State, and are, if I may so express myself, integral parts of it; all together forming a body politic." (emphasis omitted)); Chisholm v. Georgia, 2 U.S. (2 Dall). 419, 447 (1793) (opinion of Iredell, J.) ("Any body politic (sole or aggregate) whether its power be restricted or transcendant, is . . . 'a corporation.' . . . In this extensive sense, not only each State singly, but even the United States may without impropriety be termed 'corporations.'"), *superseded by constitutional amendment*, U.S. CONST. amend. XI; *id.* at 468 (opinion of Cushing, J.) ("[A]ll States whatever are corporations or bodies politic."); Utah State Bldg. Comm'n v. Great Am. Indem. Co., 140 P.2d 763, 766 (Utah 1943) (collecting definitions of "body politic," "body corporate," and "body corporate and politic" indicating that "the state" and other public entities could qualify); Comm'rs of Hamilton Cnty. v. Noyes, 5 Ohio Dec. Reprint 238, 240 (Super. Ct. 1874) ("In this state, we have but two classes of political corporations, the state of Ohio constituting the one and municipal corporations the other."), *aff'd sub nom.* Comm'r of Hamilton Cnty. v. Noyes, 5 Ohio Dec. Reprint 281 (Super. Ct. 1875), *aff'd sub nom.* Bd. of Comm'rs of Hamilton Cnty. v. Noyes, 35 Ohio St. 201 (1878).

274. *Quern*, 440 U.S. at 357 (Brennan, J., concurring in the judgment).

which characterize states in the same manner.[275] And Justice Brennan noted that "during the very debates surrounding the enactment of the Civil Rights Act [of 1871], States were referred to as bodies politic and corporate."[276] When the issue came up again in *Will*, moreover, Justice Brennan added two classic law dictionaries—which likewise include states within the scope of "bodies politic" and/or "corporate"[277]—and two cases (one written by Chief Justice Marshall) stating that "[t]he United States is a government, and, consequently, a body politic and corporate" to his list of citations.[278]

Independent research confirms that states were often called "bodies politic," with or without reference to "bodies corporate" or the like, between the mid-nineteenth and mid-twentieth centuries. A Senate resolution proposed in 1862 seeking to abolish slavery in states that had voted or otherwise acted to leave the Union, for example, said that "the treason" of secessionist conduct "works an instant forfeiture of all those functions and powers essential to the continued existence of the State as

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275. *See* MASS. CONST. pmbl. ("The end of the institution, maintenance, and administration of government, is to secure the existence of the body politic, to protect it, and to furnish the individuals who compose it with the power of enjoying in safety and tranquility their natural rights, and the blessings of life . . . . The body politic is formed by a voluntary association of individuals: it is a social compact, by which the whole people covenants with each citizen, and each citizen with the whole people, that all shall be governed by certain laws for the common good."); 1 JAMES WILSON & BIRD WILSON, THE WORKS OF THE HONOURABLE JAMES WILSON, L.L.D. 304–05 (Philadelphia, Lorenzo Press 1804) ("In order to constitute a state, it is indispensably necessary, that the wills and the power of all the members be united in such a manner, that they shall never act nor desire but one and the same thing, in whatever relates to the end, for which the society is established. It is from this union of wills and of strength, that the state or body politick results."); *id.* at 305 ("Smaller societies may be formed within a state by a part of its members. . . . To these societies the name of corporations is generally appropriated, though somewhat improperly; for the term is strictly applicable to supreme as well as to inferiour bodies politick."); *id.* at 306 ("[I]n the United States, transactions have happened, which bear the nearest resemblance to this political idea, of any, of which history has preserved the account or the memory.").

276. *Quern*, 440 U.S. at 357 (Brennan, J., concurring in the judgment) (citing CONG. GLOBE, 42d Cong., 1st Sess. 661–62 (1871) (statement of Sen. Vickers) ("What is a State? Is it not a body politic and corporate?"); *id.* at 696 (statement of Sen. Edmunds) ("A State is a corporation . . . .")).

277. *See* 1 JOHN BOUVIER, A LAW DICTIONARY, ADAPTED TO THE CONSTITUTION AND LAWS OF THE UNITED STATES OF AMERICA, AND OF THE SEVERAL STATES OF THE AMERICAN UNION 185 (11th ed., Philadelphia, George W. Childs 1866) (providing the following definitions, *inter alia*, of "body politic": first, "[w]hen applied to the government, this phrase signifies the *state*"; second, "[w]hen it refers to corporations, the term *body politic* means that the members of such corporations shall be considered as an artificial person"); WALTER A. SHUMAKER & GEORGE FOSTER LONGSDORF, THE CYCLOPEDIC DICTIONARY OF LAW 104 (1901) (defining "body politic" as "[t]he old term for a corporation" and noting that the term was also "[a]pplied generally to the state or nation"); *id.* (defining "body corporate" as "[a] corporation"); United States v. Maurice, 26 F. Cas. 1211, 1216 (C.C. Va. 1823) (Marshall, C.J.); Van Brocklin v. Tennessee, 117 U.S. 151, 154 (1886) (quoting *Maurice*, 26 F. Cas. at 1216).

278. Will v. Mich. Dep't of State Police, 491 U.S. 58, 78 (1989) (Brennan, J., dissenting).

a body politic, so that . . . the State . . . ceases to exist."[279] Another example comes from an 1897 decision of the Supreme Court of Indiana, which specifically held that the state was a "person" within the meaning of a statute providing that "the word 'person' extends to bodies politic and corporate."[280] Similar illustrations exist in a variety of sources.[281]

279. S. JOURNAL, 37th Cong., 2d Sess. 194–95 (1862) (emphasis omitted).

280. Ervin v. State *ex rel.* Walley, 48 N.E. 249, 251 (Ind. 1897) (noting that "Webster defines the words 'body politic' to be 'the collective body of a nation or state as politically organized, or as exercising political functions; also a corporation'").

281. *See, e.g.*, S. JOURNAL, 14th Gen. Assemb., 2d Sess. 102 (Fla. 1866) (objecting to the Fourteenth Amendment's proposed ratification on the ground that "[f]rom the moment of its engraftment upon the Constitution of the United States, the States would in effect cease to exist as bodies politic"), *quoted in* Thomas B. Colby, *Originalism and the Ratification of the Fourteenth Amendment*, 107 NW. U. L. REV. 1627, 1650 (2013); C.C. Langdell, *The Status of Our New Territories*, 12 HARV. L. REV. 365, 369 (1899) ("The State of New York furnishes a good illustration of the two senses in which the term 'United States' is used under the Constitution; for the style of that State, as a body politic, is 'The People of the State of New York,' and the members of that body politic are the citizens of the State. The term 'people,' therefore, in that State, means, first, all the citizens of the State in the aggregate (*i.e.*, the members of the body politic), and, secondly, the body politic itself; and while in the former sense it is plural, in the latter sense it is singular."). The Rhode Island Royal Charter—which was dated July 8, l663, and remained "in force until the Constitution, adopted in November 1842, became operative on the first Tuesday of May, 1843"—also referred to the colony and its inhabitants by these terms. *See, e.g.*, R.I. DEP'T OF STATE, *Rhode Island Royal Charter Granted by King Charles II, 1663*, https://catalog.sos.ri.gov/repositories/2/archival_objects/2136 [https://perma.cc/9AE9-9LNJ] (allowing the people of the colony "to create and make them a body politic or corporate, with the powers and privileges hereinafter mentioned"); *id.* (declaring that a long list of individuals and "all such others as now are, or hereafter shall be, admitted and made free of the company and society of our colony of Providence Plantations . . . shall be, from time to time, and forever hereafter, a body corporate and politic, in fact and name, by the name of the Governor and Company of the English Colony of Rhode Island and Providence Plantations"). And given the Massachusetts Constitution's usage of "body politic," *see supra* note 275 and accompanying text, it may also be significant that a Massachusetts statute appears to have served as the template for the definition of "person" in the 1871 Dictionary Act. *See* GENERAL STATUTES OF THE COMMONWEALTH OF MASSACHUSETTS, ch. 3, § 7, at 50, 51 (William White, Boston 1860) ("In the construction of statutes the following rules shall be observed, unless such construction would be inconsistent with the manifest intent of the legislature or repugnant to the context of the same statute, that is to say: . . . [t]he word 'person' may extend and be applied to bodies politic and corporate." (citing Commonwealth v. Bos. & Me. R.R., 57 Mass. (3 Cush.) 25, 45 (1849) (relying on the fact that "the preamble of the constitution sets forth that instrument, as the mode of forming the inhabitants of the commonwealth into a body politic" to suggest that a previous statutory definition whereby "the word 'person'" could "extend and be applied to bodies politic and corporate, as well as to individuals" may have embraced Massachusetts), *overruled in part by* New Haven & Northampton Co. v. Northampton, 102 Mass. 116 (1869))); CONG. GLOBE, 41st Cong., 2d Sess. 2465 (1870) (statement of Rep. Poland) (remarking that "I believe I copied the section [in the 1871 Dictionary Act stating that 'words importing the masculine gender may be applied to females']"—which was the same as the section articulating the definition of "person," *see* Ch. 71, § 2, 16 Stat. 431, 431 (1871) (codified as amended at 1 U.S.C. § 1)—"literally from a general provision in the revised statutes of Massachusetts"); *see also* Aaron Xavier Fellmeth, *Cure*

The *Will* majority "disagree[d]" with Justice Brennan that "'the phrase "bodies politic and corporate" was understood to include the States.'"[282] Instead, the majority argued, "an examination of authorities of the era suggests that the phrase was used to mean corporations, both private and public (municipal), and not to include the States."[283] But while the sources the majority cited generally call municipalities "bodies politic" and/or "corporate" or, again, describe them using language that seems functionally equivalent,[284] they do not indicate that those terms were necessarily or even usually understood to exclude states.[285] Indeed, as Justice Brennan noted,[286] most specifically say that the terms *included* states.[287]

Without A Disease: The Emerging Doctrine of Successor Liability in International Trade Regulation, 31 YALE J. INT'L L. 127, 146 & n.90 (2006) (discussing this legislative history and stating that 1 U.S.C. § 1, "originally known as the Dictionary Act, was likely copied from a Massachusetts statute").

282. 491 U.S. at 69 (quoting *id.* at 78 (Brennan, J., dissenting)).

283. *Id.*

284. *See id.* at 69 n.9.

285. One case and one law dictionary the majority cited do not say the phrases can include states. *See* United States v. Fox, 94 U.S. 315, 321 (1876) ("The term 'person' as . . . used [in a New York statute] applies to natural persons, and also to artificial persons,—bodies politic, deriving their existence and powers from legislation,—but cannot be so extended as to include within its meaning the Federal government. It would require an express definition to that effect to give it a sense thus extended. And [according to the New York Court of Appeals,] the term 'corporation' in the statute applies only to such corporations as are created under the laws of the State."); 1 ALEXANDER M. BURRILL, A LAW DICTIONARY AND GLOSSARY 212 (2d ed., New York, Baker, Voorhis & Co. 1871) (defining "body corporate" as a "corporation" and "body politic" as a "term applied to a corporation, which is usually designated as a *body corporate and politic*" and a "body to take in succession, framed by *policy*"). But the law dictionary, as Brennan noted, *Will*, 491 U.S. at 79–80, says that "body politic" was "[p]articularly applied, in the old books, to a corporation sole," BURRILL, *supra*, at 212, which the same source indicates included "the sovereign in England" but was "rare" in the United States, *id.* at 383 (defining "corporation sole" as a "corporation consisting of one person only, and his successors in some particular station, who are incorporated by law in order to give them some legal capacities and advantages, particularly that of perpetuity, which in their natural persons they would not have had").

286. *See Will*, 491 U.S. at 79 (Brennan, J., dissenting) ("[E]ach and every dictionary cited by the Court accords a broader realm—one that comfortably, and in most cases explicitly, includes the sovereign—to th[e] phrase ['bodies politic and corporate'] than the Court gives it today.").

287. One dictionary on which the majority relied gives the first definition of "body politic" as "[t]he governmental, sovereign power: a city or a State." WILLIAM C. ANDERSON, A DICTIONARY OF LAW 127 (Chicago, T.H. Flood & Co. 1893). Later, it says that "'[b]ody corporate and politic' is said, in the older books, to be the most exact expression for a public corporation or corporation having powers of government." *Id.* It also defines "body corporate or corporate body" as "[a]n artificial body; a corporation." *Id.* Another dictionary to which the majority pointed begins its definition of "body politic" by saying that "[a] public corporation, or corporation having powers of government, is frequently spoken of as a body politic; and, in older books, 'body corporate and politic' is said to be the most exact expression for a corporation of this character." 1 BENJAMIN VAUGHAN ABBOTT, DICTIONARY OF TERMS AND PHRASES USED IN AMERICAN OR

What about the "longstanding interpretive presumption that 'person' does not include the sovereign," referenced above?[288] This came up in *Will* as well. "At the very least," the majority said, "reading [Section 1983 as including states] is not so clearly indicated that it provides reason to depart from the often-expressed understanding that 'in common usage, the term "person" does not include the sovereign, [and] statutes employing the [word] are ordinarily construed to exclude it.'"[289] This presumption, Justice Brennan responded, pertained "only to the 'enacting sovereign.'"[290] Both the cases Justice Brennan cited and other scholarship support this intuitive proposition,[291] although the majority was able to point to a recent case applying the presumption to the phrase "white

ENGLISH JURISPRUDENCE 155 (Boston, Little, Brown, & Co. 1879). But it then goes on to say that "body politic is often used in a general way, as meaning the state or the sovereign power, or the city government, without implying any distinct express incorporation." *Id.* This dictionary also defines "body corporate" as a phrase that "was formerly much used to mean an artificial person" but that had been "replaced" by "corporation." *Id.* A third dictionary the majority put forward—the first edition of what is now called *Black's Law Dictionary*—says that a "body politic" is "[a] term applied to a corporation, which is usually designated as a 'body corporate and politic'" and that "[t]he term is particularly appropriate to a *public* corporation invested with powers and duties of government." HENRY CAMPBELL BLACK, A DICTIONARY OF LAW 143 (West Publ'g Co. 1891). It proceeds to say, however, that "body politic" is also "often used, in a rather loose way, to designate the state or nation or sovereign power, or the government of a county or municipality, without distinctly connoting any express and individual corporate character." *Id.*

288. Return Mail, Inc. v. U.S. Postal Serv., 139 S. Ct. 1853, 1861–62 (2019) (quoting Vt. Agency of Nat. Res. v. United States *ex rel.* Stevens, 529 U.S. 765, 780–81 (2000)); *see supra* text accompanying note 238.

289. *Will*, 491 U.S. at 64 (second and third alterations in original).

290. *Id.* at 73 (Brennan, J., dissenting) (quoting United States v. California, 297 U.S. 175, 186 (1936)).

291. *See California*, 297 U.S. at 186–87 ("Respondent invokes the canon of construction that a sovereign is presumptively not intended to be bound by its own statute unless named in it . . . . We can perceive no reason for extending [this principle] so as to exempt a business carried on by a state from the otherwise applicable provisions of an act of Congress, all-embracing in scope and national in its purpose, which is as capable of being obstructed by state as by individual action. Language and objectives so plain are not to be thwarted by resort to a rule of construction whose purpose is but to resolve doubts, and whose application in the circumstances would be highly artificial."); Jefferson Cnty. Pharm. Ass'n v. Abbott Lab'ys, 460 U.S. 150, 161 n.21 (1983) (stating that previous cases "suggest that this sovereign-exception rule of statutory construction simply means that a government, when *it* passes a law, gives up only what it expressly surrenders"; citing the passage from *California* quoted *supra*; and refusing to apply the rule to exempt state activity from congressional regulation); Burnham & Fayz, *supra* note 212, at 11 (stating that "[i]n a consistent line of cases from the turn of the century through 1983, the Court relied on ordinary rules of statutory construction to find that states are 'persons' in a host of federal statutes" and collecting citations); *id.* at 13 ("The case law relied upon in *Will* does support a presumption against inclusion of 'the sovereign' in statutes. However, this rule has no applicability to states' inclusion in federal statutes such as section 1983, because the only 'sovereign' which it excludes is the enacting sovereign, e.g., the United States."); *id.* at 13 n.76 (tracing the rule's history).

person" to exclude a state.[292] In any event, Justice Brennan continued, the Court made clear just three years after Section 1983's passage that "even the principle as applied to the enacting sovereign" does not apply "'[w]here an act of Parliament is made for the public good, as for the advancement of religion and justice or to prevent injury and wrong.'"[293] As Justice Brennan concluded, "[i]t would be difficult to imagine a statute more clearly designed 'for the public good,' and 'to prevent injury and wrong,' than § 1983."[294]

On balance, the evidence that in 1871 states fit well within the phrase "bodies politic and corporate" appears to outweigh the evidence that they did not.[295] And that makes sense given that some uses of the word "person" in federal statutes simply must have included states—including in places where the word refers to parties in litigation. Take the judicial oath, for instance. Federal statutes have required judges to pledge that they "will administer justice without respect to *persons*" ever since the enactment of the Judiciary Act of 1789.[296] Surely the term "persons" in these statutes has always included states, which the Constitution has always envisioned appearing as litigants in federal court.[297]

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292. *See Will*, 491 U.S. at 64 ("In *Wilson v. Omaha Indian Tribe*, we followed this rule in construing the phrase 'white person' contained in 25 U.S.C. § 194 as not including the 'sovereign States of the Union'" (quoting 442 U.S. 653, 667 (1979)).

293. *Id.* at 73 (Brennan, J., dissenting) (quoting United States v. Herron, 87 U.S. (20 Wall.) 251, 255 (1874)); *see also* United States v. Knight, 39 U.S. 301, 315 (1840).

294. *Will*, 491 U.S. at 73 (Brennan, J., dissenting).

295. One could argue that "bodies politic and corporate" should be construed as a single term of art, not as a phrase comprising two separate concepts (bodies politic and bodies corporate). This seems possible, but contemporary evidence supports a contrary position. A set of commissioners tasked with codifying federal laws around that time wrote of the 1871 Dictionary Act definition that "if the phrase 'bodies politic' is precisely equivalent to 'corporations,' it is redundant; but if, on the contrary, 'body politic' is somewhat broader, . . . then the provision goes further than is convenient"—in both instances viewing "bodies politic" and "bodies corporate" as separate concepts (albeit ones that might be duplicative). 1 REVISION OF THE UNITED STATES STATUTES AS DRAFTED BY THE COMMISSIONERS APPOINTED FOR THAT PURPOSE 19 (1872); *see infra* text accompanying notes 300–311. And even if "bodies politic and corporate" was something like a hendiadys, the evidence does not necessarily show that it excluded states. *See* Samuel L. Bray, *"Necessary and Proper" and "Cruel and Unusual": Hendiadys in the Constitution*, 102 VA. L. REV. 687, 695 (2016) ("Hendiadys is a figure of speech in which two terms, separated by a conjunction, are melded together to form a single complex expression."). After all, several sources cited above refer to states as bodies "politic and corporate" or "corporate and politic." *See supra* notes 273, 276; *supra* text accompanying note 280.

296. *See* ch. 20, § 8, 1 Stat. 73, 76 (emphasis added). The current version of the judicial oath traces back to the enactment of the Judicial Code of 1948. *See* Act of June 25, 1948, ch. 646, § 453, 62 Stat. 869, 907 (codified as amended at 28 U.S.C. § 453).

297. *See* U.S. CONST. art. III, § 2 (providing that "[t]he judicial Power shall extend," *inter alia*, "to Controversies between two or more States; . . . between a State and Citizens of another State; . . . and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects"), *amended by* U.S. CONST. amend. XI.

2. The Dictionary Act's 1874 Definition

Justice Brennan's *Will* dissent briefly raises—and tries to deflect—another issue regarding the Dictionary Act. "[I]t is a matter of small importance," Justice Brennan argued, that the "definition of 'person' as including bodies politic and corporate was retroactively withdrawn when the federal statutes were revised in 1874."[298] For when "determining Congress' intent in using this term" in the Civil Rights Act of 1871 two months after including "bodies politic and corporate" within the Dictionary Act's description of "person," Justice Brennan continued, "it cannot be decisive that, three years later, it withdrew th[e] presumption" that such entities would qualify.[299]

Whatever the Dictionary Act in 1874 said "person" meant, that definition seems potentially more relevant to how one should read Section 1983 than Justice Brennan credited. For while Justice Brennan was focused on "Congress' intent," the amendment to the Dictionary Act in 1874 could say something about the meaning of the word "person" to wider audiences, including the general public in 1871 or afterward.

In fact, the story behind the 1874 shift in the federal statutory definition of "person" is a fascinating but confounding one—and with respect to this particular provision, a story that appears never to have been told before. In 1866, acting pursuant to congressional authorization, President Andrew Johnson "appoint[ed] three persons, learned in the law, as commissioners, to revise, simplify, arrange, and consolidate all statutes of the United States, general and permanent in their nature."[300] After toiling for years with several illustrious members, including a previous U.S. Attorney General and future Supreme Court nominee, the commission submitted its work to a joint congressional committee in early 1873.[301]

Unfortunately for the commissioners, "[i]t was the opinion of the joint committee that [they] had so changed and amended the statutes that it would be impossible to secure the passage of their revision."[302] Accordingly, the joint committee selected Thomas Jefferson Durant, "an accomplished member of the Supreme Court bar and Louisiana unionist during the War," to finish the codification project.[303] Durant reported

298. *Will*, 491 U.S. at 81 (1989) (Brennan, J., dissenting).

299. *Id.* at 81–82.

300. Revision of Statutes Acts of 1866, ch. 140, § 1, 14 Stat. 74, 74–75 (1866); *see* Ralph H. Dwan & Ernest R. Feidler, *The Federal Statutes—Their History and Use*, 22 MINN. L. REV. 1008, 1013 (1938).

301. Dwan & Feidler, *supra* note 300, at 1013; Robert D. Goldstein, Blyew*: Variations on a Jurisdictional Theme*, 41 STAN. L. REV. 469, 517 & n.196 (1989).

302. *Id.*

303. Goldstein, *supra* note 301, at 518.

back in December 1873,[304] and Congress ordered his work printed as the Revised Statutes of the United States in June 1874.[305] As part of this process, Congress repealed all preexisting public laws and enacted Durant's compilation in their place.[306]

The Dictionary Act that Congress had approved on February 25, 1871, said that "in all acts hereafter passed . . . the word 'person' may extend and be applied to *bodies politic and corporate* . . . unless the context shows that such words were intended to be used in a more limited sense."[307] The Dictionary Act in the 1874 revision, by contrast, said that "[i]n determining the meaning of the revised statutes, or of any act or resolution of Congress passed subsequent to February [25, 1871], . . . the word 'person' may extend and be applied to *partnerships and corporations* . . . unless the context shows that such words were intended to be used in a more limited sense."[308]

Who changed the relevant language from "bodies politic and corporate," which likely included states, to "partnerships and corporations," which less likely did so? The original commissioners. And for what reason? Notes the commissioners printed in 1872 disclose that they thought "that partnerships ought to be included; and that if the phrase 'bodies politic' is precisely equivalent to 'corporations,' it is redundant; but if, on the contrary, 'body politic' is somewhat broader, . . . then the provision goes further than is convenient."[309] Significantly, they identified their specific concern as the possibility that "body politic" could "be understood to include a government, such as a State."[310] This, they said, "requires the draughtsman, in the majority of cases of employing the word 'person,' to take care that States, Territories, foreign governments, &c., appear to be excluded."[311]

The commissioners' notes provide strong support for the notion that "bodies politic" in the specific setting of the 1871 Dictionary Act would have been regularly (even if not uniformly) understood to include states. That reading of the phrase was so natural, the commissioners thought,

304. *See* THOMAS J. DURANT, REPORT OF THE COMMITTEE OF THE SENATE AND HOUSE OF REPRESENTATIVES ON THE REVISION OF THE LAWS 1 (1873).

305. *See* Act of June 20, 1874, ch. 333, § 3, 18 Stat., pt. 3, 113, 113.

306. Dwan & Feidler, *supra* note 300, at 1012.

307. Ch. 71, § 2, 16 Stat. 431, 431 (1871) (codified as amended at 1 U.S.C. § 1) (emphasis added).

308. Revised Statutes of 1874, § 1, 18 Stat., pt. 1, 1, 1 (codified as amended at 1 U.S.C. § 1) (emphasis added).

309. 1 REVISION OF THE UNITED STATES STATUTES AS DRAFTED BY THE COMMISSIONERS APPOINTED FOR THAT PURPOSE 19 (1872).

310. *Id.*

311. *Id.*; *see also* Gerardi, *supra* note 239, at 2250–51 n.52. A year after *Will*, the Supreme Court relied on these notes to hold that territories are not suable "persons" under Section 1983. Ngiraingas v. Sanchez, 495 U.S. 182, 191–92 (1990).

that statutory drafters were "require[d]" to "exclude[]" states where Congress did not want them covered. That the commissioners believed such exclusions necessary "in the majority of cases of employing the word 'person'" speaks at least as much to the strength (rather than any weakness) of the connection between states and "bodies politic." For if states were not regularly understood to qualify, excepting them would have been unnecessary.

Critically, the commissioners' notes also help show that Congress almost certainly enacted the new definition of "person" by mistake—meaning with most (or maybe even all) members believing there was no new definition of "person" included in the revision at all. The notes show that the commission intentionally changed the Dictionary Act's entry for "person."[312] And the whole point of Congress "hand[ing] over" the project to Durant was "so that he might expunge all changes in the law made by the commission."[313] Durant said that he sought to do just that. In explaining his drafting process, for instance, Durant wrote to Congress that

> [e]very section reported by the commissioners has been compared with the text of the corresponding act or portion of the act of Congress referred to, and wherever it has been found that a section contained any departure from the meaning of Congress as expressed in the Statutes at Large, such change has been made as was necessary to restore the original signification.[314]

What is more, the members of the House Committee on the Revision of the Laws, who were checking over Durant's work, repeatedly reassured their congressional colleagues that "there is not known to the committee a change of a syllable or of a comma of the statutes so as to change their effect."[315]

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312. In the commissioners' defense, as the chairman of the House Committee on the Revision of the Laws explained, "[b]y the original law of 1866, under which the commissioners were appointed, they were authorized to make changes to some extent." 2 CONG. REC. 646 (1874) (statement of Rep. Poland). In the chairman's opinion, the commissioners "probably" did not "avail[] themselves" of that "liberty" more "than they were warranted in doing." *Id.* The joint committee, he said, simply "came to the conclusion that within the limited time that could be allowed for the work in th[e] House, it would be utterly impossible to carry the measure through, if it was understood that it contained new legislation." *Id.*

313. Dwan & Feidler, *supra* note 300, at 1013–14.

314. DURANT, *supra* note 304, at 1.

315. 2 CONG. REC. 820 (1874) (statement of Rep. Hoar); *see also, e.g.*, *id.* at 129 (statement of Rep. Butler) ("[Y]our committee felt it their bounden duty not to allow, so far as they could ascertain, any change of the law. This embodies the law as it is. The temptation, of course, was very great, where a law seemed to be imperfect, to perfect it by the alteration of words or phrases, or to make some change. But that temptation has, so far as I know and believe, been resisted. We

Nevertheless, Durant preserved the commission's change to the definition of "person," and the House committee seems not to have caught (or at least not to have drawn any attention to) the discrepancy with the Statutes at Large. Seemingly shorn of the commissioners' explanatory notes,[316] and seemingly with no clear indication that anything was amiss,[317] Durant's apparently erroneous rendering of the Dictionary Act was enacted by Congress.

As it turns out, Durant's compilation was riddled with problems that were not exposed until after it became law.[318] Within a few years, at least 252 defects were discovered,[319] requiring Congress to pass "constant[] correct[ions]."[320] In 1877, "a statute was approved authorizing the president to appoint a commissioner to prepare a new edition of the Revised Statutes, inserting the statutes amending, modifying, and affecting" Durant's original edition.[321] In 1878, Congress approved the new edition as "legal evidence" of the laws.[322] But once bitten, twice shy,

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have not attempted to change the law, in a single word or letter, so as to make a different reading or different sense. All that has been done is to strike out the obsolete parts and to condense and consolidate and bring together statutes *in pari materia*; so that you have here, except in so far as it is human to err, the laws of the United States under which we now live."); Goldstein, *supra* note 301, at 520 (explaining that "[a]fter each member of the joint committee on revision had reviewed for accuracy the particular titles allocated to him, he led the congressional review of those portions in a series of sixteen special nighttime sessions").

316. *See* Goldstein, *supra* note 301, at 518 (stating that Durant's draft "omitted all of the Commission's textual notes"); *see also id.* at 519 n.199 (stating that "the rare book room of the Library of Congress contains two almost identical copies of Durant's printed draft" and that "[a] third copy with different marginal notes, obscurely referred to in the Library of Congress card catalogue, could not be located"); *id.* ("During the debates, attempts were made to compare the Durant printed draft with the Commissioner's draft containing the marginal notes; but differences in section numbering and pagination, and limited numbers of copies, made this difficult."); 2 CONG. REC. 826 (1874) (statement of Rep. Lawrence) (leaving little doubt that the initial version of Durant's revision omitted all extraneous material from the commission's work, including citations to the Statutes at Large: "The commissioners, as the law under which they acted required of them, added 'side notes' or marginal references on the pages of their volumes to the original statute, giving the volume, chapter, page, and section 'from which each section is compiled and to the decisions of . . . courts, explaining or expounding the same' . . . . The statute under which Mr. Durant acted did not require any such reference, and he has, therefore, omitted all this.").

317. *See* 2 CONG. REC. 822 (1874) (seeming to show that no comments were made when the clerk apparently read the relevant part of the bill on the House floor).

318. Dwan & Feidler, *supra* note 300, at 1014.

319. *Id.*

320. 7 CONG. REC. 1,137 (1878) (statement of Sen. Christiancy).

321. Dwan & Feidler, *supra* note 300, at 1016 (citing Act of Mar. 2, 1877, ch. 82, 19 Stat. 268).

322. *Compare* Act of Mar. 2, 1877, § 4, 19 Stat. at 269 (stating that the new edition would be "legal and conclusive evidence of the laws . . . therein contained"), *with* Act of Mar. 9, 1878, ch. 26, 20 Stat. 27, 27 (striking out the word "conclusive" from the description of the new edition as evidence of the laws and adding that the new edition "shall not preclude reference to, nor

Congress declined to repeal the body of existing statutes or to enact the new edition as law itself.[323]

The Dictionary Act's entry for "person" stayed constant between the first and second editions of the Revised Statutes.[324] The final versions of both editions, moreover, contain a marginal annotation pointing to the provisions of the Statutes at Large purportedly incorporated into the definitions, and both annotations list the 1871 Dictionary Act as the most recent legislation reflected there.[325] So in 1874, the pertinent statutory language became "partnerships and corporations." But from all indications, it should have remained "bodies politic and corporate."

It is quite possible, of course, that the apparent failures to notice the change to the definition of "person" were entirely inadvertent. That would make sense in light of the volume of alterations in the original commissioners' work, the process through which Durant drafted his compilation,[326] and the number of inaccuracies that escaped the oversight of the House committee and Congress at large.

But one could also ponder whether any of the failures might have been intentional. Professor Robert Goldstein, for instance, has pointed to the possibility that Durant purposely preserved a different change the original commissioners made: the removal of a Reconstruction provision "allowing federal courts to adjudicate causes 'affecting' persons unable to secure in state court the equal rights guaranteed to them by federal law," which Goldstein calls "the 'affecting jurisdiction.'"[327] Noting that

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control, in case of any discrepancy, the effect of any original act as passed by Congress since [December 1, 1873]").

323. *See supra* note 322; *see also* Dwan & Feidler, *supra* note 300, at 1016 & n.45.

324. *Compare supra* note 308 and accompanying text, *with* 1 Rev. Stat. § 1 (2d ed. 1878) (codified as amended at 1 U.S.C. § 1) ("In determining the meaning of the revised statutes, or of any act or resolution of Congress passed subsequent to February [25, 1871], . . . the word 'person' may extend and be applied to partnerships and corporations . . . unless the context shows that such words were intended to be used in a more limited sense . . . .").

325. *See* 1 Rev. Stat. § 1 (2d ed. 1878) (codified as amended at 1 U.S.C. § 1) (including "25 Feb., 1871, c. 71, s. 2, v. 16, p. 431" as the most recent enactment in the marginal annotation under "Definitions"); Revised Statutes of 1874, § 1, 18 Stat., pt. 1, 1, 1 (codified as amended at 1 U.S.C. § 1) (same).

326. Durant began not with the text of the Statutes at Large (which would have taken far longer than the nine-month maximum his assignment had been allotted, *see* 2 CONG. REC. 827 (1874) (statement of Rep. Lawrence)), but instead with the original commissioners' portfolio. DURANT, *supra* note 304, at 1. Based on Durant's description of this dossier, it is easy to see how he could have missed some modifications or introduced new ones while reworking it. "The draught on the revision of the laws of the United States accepted by you from the commissioners, and delivered by you to the undersigned, was a bundle of twenty-three hundred and ninety-eight sheets," Durant explained in his report to the joint committee. *Id.* These pages, he said, were "detached, partly printed, partly in manuscript, [and] profusely interspersed with interlineations and corrections." *Id.*

327. Goldstein, *supra* note 301, at 477 (describing the provision, which was part of the Civil Rights Act of 1866, ch. 31, § 3, 14 Stat. 27, 27).

"[t]he reasons for Durant's failure to rectify or report the Commission's elimination of the affecting jurisdiction . . . remain obscure," Goldstein—citing litigation work of Durant's—writes that "[o]ne may speculate that he was unsympathetic to the affecting jurisdiction and not predisposed to restoring it in his draft."[328]

A statutory amendment made inadvertently should still count as a statutory amendment.[329] Although the Court has sometimes endorsed the rebuttable proposition that "[i]t will not be inferred that the legislature, in revising and consolidating the laws, intended to change their policy,"[330] at least one prominent proponent of this presumption, Cass Sunstein, contends that because of the sweeping nature of the 1874 codification, interpreters must give it full effect.[331] The point here, however, is not that courts should have ignored the subtraction of "bodies politic and corporate" from the definition of "person." The point here, instead, is that this change provides little if any support for the notion that the public in 1871 would have understood the definition to exclude states—and in fact

328. *Id.* at 519.

329. *See* U.S. R.R. Ret. Bd. v. Fritz, 449 U.S. 166, 179 (1980) (stating that "we have historically assumed that Congress intended what it enacted," such that it is irrelevant whether "Congress was unaware of what it accomplished"). Professor Nelson points out that "[o]ne might sensibly debate whether the word 'person' in the current version of [Section 1983] draws its meaning from 1 U.S.C. § 1, as amended in 1948, or instead from Section 1 of the Revised Statutes of 1874." CALEB NELSON, STATUTORY INTERPRETATION 786 (2011). But he says "it is very difficult to defend Justice Brennan's view [in *Will*] that the meaning of the word 'person' in [Section 1983] comes *neither* from 1 U.S.C. § 1 *nor* from Rev. Stat. § 1, but instead from the *original* version of the Dictionary Act as adopted by Congress in 1871." *Id.* The argument here assumes that because of its broad language (directing that its definitions govern "[i]n determining the meaning of *any* Act of Congress"), the current Dictionary Act controls. 1 U.S.C. § 1 (emphasis added). But the argument here also assumes that the previous Dictionary Acts may be relevant to determining whether Section 1983's "context indicates" that a more expansive meaning than the default one applies. *Id.*; *see supra* text accompanying notes 241–244.

330. United States v. Ryder, 110 U.S. 729, 740 (1884).

331. *See* Cass R. Sunstein, *Section 1983 and the Private Enforcement of Federal Law*, 49 U. CHI. L. REV. 394, 407 (1982) ("[S]tatutory revisions undertaken by a commission created to compile and organize existing law should not lightly be understood as making major changes. In enacting statutory revisions submitted by such commissions, Congress is entitled to rely on their good faith and should not be forced to read every provision with care. . . . [A] revision of a statute, even if it appears to make a change in its text, should usually be interpreted conformably to preexisting law."); *id.* at 408 ("[T]he revision of 1874 was in many respects unique. Unlike more recent revisions, conducted as part of a continuing process of making the laws coherent and accessible, it involved the consolidation and clarification of numerous conflicting and ambiguous provisions. Its purpose was to bring all of these provisions together in a single authoritative volume. In the process, a number of changes were made. If these changes—even when unambiguous—were not given full effect, but instead were parsed by reference to pre-codification law, the principal purpose of the revision would be frustrated. The revision would not be authoritative, but a mere guide to congressional purposes expressed elsewhere, and the previous inconsistencies would be perpetuated.").

strengthens the possibility that the public in 1871 would have understood the definition to *include* states.

B. *Expected Applications*

Various interpretive methodologies place weight on a statutory term's expected applications among legislators.[332] So it is worth considering whether members of the Congress that enacted Section 1983 thought it made states susceptible to suit. And it is also worth considering whether members of the public soon after Section 1983's passage thought so, which sheds light on the statute's contemporary construction.[333] The analysis that follows takes up these questions in turn, focusing first on the statute's legislative history and then on its litigation history.[334]

1. Legislative History

As described earlier, the meaning of the Eleventh Amendment and its relation to any extratextual source of state sovereign immunity appear to have remained at least somewhat up in the air during Reconstruction.[335] Just as one can find support for a broad understanding of constitutionalized state sovereign immunity in the mid-nineteenth century,[336] one can also find support for a narrow understanding during this time period.[337] The Supreme Court would not decide *Hans*, and

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332. *See, e.g.*, STEPHEN BREYER, MAKING OUR DEMOCRACY WORK 102 (2010) ("A court that looks to purposes is a court that works as a partner with Congress."); John F. Manning, *The Absurdity Doctrine*, 116 HARV. L. REV. 2387, 2390 (2003) (describing "strong intentionalism" as "permit[ting] a court to adjust a clear statute in the rare case in which the court finds that the statutory text diverges from the legislature's true intent"). Even a dynamic approach to statutory interpretation may only come into play for "the hard cases in which ambiguous statutes must be interpreted in contexts not foreseen by the enacting legislature." Bertrall L. Ross II, *Against Constitutional Mainstreaming*, 78 U. CHI. L. REV. 1203, 1227 (2011).

333. *See* Tara Leigh Grove, Comment, *Which Textualism?*, 134 HARV. L. REV. 265, 283–86 (2020) (discussing the "focus on 'expected public meaning'" within "flexible textualism").

334. *See* Bostock v. Clayton Cnty., 140 S. Ct. 1731, 1750–51 (2020) (looking to a statute's early litigation history to assert that "at least *some* people foresaw this potential application"); Manning, *supra* note 332, at 2390 (stating that the "legislature's true intent" for purposes of strong intentionalism may be "derived from sources" including "the legislative history").

335. *See supra* notes 184–97 and accompanying text.

336. Justice Story's *Commentaries* are a favorite of this genre. *See* 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1669, at 538 (Boston, Hilliard, Gray, & Co. 1833) ("It is a known maxim, justified by the general sense and practice of mankind, and recognized in the law of nations, that it is inherent in the nature of sovereignty not to be amesnable [sic] to the suit of any private person, without its own consent. This exemption is an attribute of sovereignty, belonging to every state in the Union; and was designedly retained by the national government." (footnote omitted)).

337. *See supra* text accompanying notes 192–97 (discussing Chief Justice Marshall's opinion for the Court in *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264 (1821), and the Marshall Court's approach to state sovereign immunity more generally).

would not start down the path of profound state protectionism it still travels today, until 1890.[338]

Given this backdrop, it should come as little surprise that in debating the Civil Rights Act of 1871, several congressmen adverted to the possibility of holding states monetarily liable for constitutional violations. As John Harrison's masterful study of the Act's legislative history explains, though, none of these comments came in discussions about Section 1, the precursor to Section 1983.[339] Instead, they came in discussions about the so-called Sherman amendment, which sought to impose damages on localities for failing to prevent certain kinds of private violence.[340]

One Republican opponent of the amendment, for instance, argued that "this duty of protection, if it rests anywhere, rests on the State," such that "if there is to be any liability visited upon anybody for a failure to perform that duty, such liability should be brought home to the State."[341] He further remarked that

> this section would be liable to very much less objection, both in regard to its justice and its constitutionality, if it provided that if in any State the offenses named in this section were committed, suit might be brought against the State, judgment obtained, and payment of the judgment might be enforced upon the treasury of the State.[342]

Another example comes from a Democratic detractor, who said that in light of the Fourteenth Amendment's text, "there might be some plausible reasoning for saying that if the State did fail, then the State should be liable."[343] Employing that notion as a "reductio ad absurdum argument against Sherman's proposal" (to quote Harrison),[344] the legislator continued by contending that "upon the theory of this bill the capitol of the State might be sold out; its court-houses might be sold out, its lunatic asylums might be sold out, every institution of charity belonging to it might be sold out," and "all its funds in the State treasury might be seized," leaving it "without any means whatsoever to carry on the State government."[345]

So where do congressional comments concerning state suability in conjunction with the Civil Rights Act of 1871 leave things? No concrete evidence appears to indicate that legislators believed the measure, as

338. *See supra* text accompanying notes 46–47.
339. *See* Harrison, *supra* note 235, at 375–78.
340. *See id.* at 378–81.
341. CONG. GLOBE, 42d Cong., 1st Sess. 791 (1871) (statement of Rep. Willard).
342. *Id.*
343. *Id.* at 772 (statement of Sen. Thurman).
344. Harrison, *supra* note 235, at 380.
345. CONG. GLOBE, 42d Cong., 1st Sess. 772 (1871) (statement of Sen. Thurman).

enacted, would subject states to damages liability. (The Sherman amendment, it bears noting, eventually passed in a form that applied only to individuals.[346]) "[I]t is conceivable," of course, that Republicans "were pulling a Trojan Horse, supporting a measure that had far-reaching implications that they did not want to announce" (to quote Harrison again).[347] But it seems more likely that the congressmen "did not even fully appreciate" the potential "implications" of their own use of the word "person" in Section 1.[348]

Harrison argues that "most probably a substantial and decisive bloc of Republicans, indeed, probably a majority of them" thought abrogating sovereign immunity was constitutionally impossible.[349] The use of hedge words seems appropriate. But even if Harrison is right about the overarching belief of Republican congressmen, the repeated references to state suability in the legislative record demonstrate that the matter—both as to constitutional understandings and legislative attitudes—was by no means as clear-cut as the Court would later assume.

Given the lack of strong evidence that congressmen intended to include states in Section 1983's ambit, one could ask whether the retroactive application of the abrogation-related clear-statement rule is actually antidemocratic in this context. The answer is yes. As an initial matter, some schools of statutory interpretation care little if at all about the subjective thoughts of specific congresspeople, largely severing congressional intent from democratic legitimacy.[350] More broadly, the antidemocratic effect of applying a clear-statement rule based on substantive values inheres in the later judicial denial of earlier legislative authority to select among the full range of available interventions: the problem is the risk of requiring second-best statutory interpretations, not the result.[351]

2. Litigation History

Turning from congressmen to the public they served, the statute's early litigation history provides additional support for the notion that Section 1 of the Civil Rights Act of 1871 could have been interpreted to cover states. Section 1983 is famous for how infrequently plaintiffs

346. *See* Harrison, *supra* note 235, at 382.

347. *Id.* at 388. The specific Trojan Horse to which Harrison refers is the possibility that Republicans smuggled abrogation authority into Section 5 of the Fourteenth Amendment without saying anything about it in the Amendment's legislative history. *See id.* But the same logic could apply to state suability under Section 1983.

348. *Id.*

349. *Id.* at 385.

350. *See infra* Part III.C.

351. *See* Slocum, *supra* note 83, at 639 (describing "second-best interpretations" as ones "that would not have been chosen if not for the application of" a particular "rule[] of interpretation").

appear to have relied on it before the Court decided *Monroe* in 1961[352]—and for the wide variety of possible reasons why.[353] So it should come as little surprise that the pool of cases from which the inquiry started was small. But research revealed two cases from the 1870's where individuals apparently attempted to hold states accountable for constitutional violations in federal court under Section 1983—and that neither case failed on the ground that a state was an improper party.

Consider first the 1874 case *Illinois v. Chicago & A.R. Co.*[354] Illinois brought a prosecution in state court against a railroad for violating a state rate statute.[355] Relying on the statute now called Section 1983, the railroad sought and obtained a writ of certiorari from a federal court to remove the case from the state judicial system to the federal judicial system.[356] The state moved to quash the writ.[357] The federal court addressed two issues—first, whether the railroad company could claim the protections of Section 1983, and second, whether Section 1983 granted the federal courts removal jurisdiction in addition to original jurisdiction.[358] The court assumed that the answer to the former question was yes and held that the answer to the latter question was no.[359]

Chicago & A.R. Co. matters for present purposes because (while not expressly discussed in the decision) it seems that the railroad's theory of the case must have depended on Illinois being a "person" within the meaning of Section 1983, which would have been necessary to allow the railroad to remove to federal court a case in which the state was the only adverse party.[360] This suggests that regardless how congressmen thought the statute would work, litigants around the time of its adoption thought it at least potentially applied to states. The court, moreover, raised no doubts about this aspect of the case. The court wrote that if the railroad was right that it could claim the protections of Section 1983 and "if it be conceded, further, that the state was prosecuting an action of debt for a penalty which could not be imposed without causing the company to be

352. *See, e.g.*, Alexander A. Reinert, *Measuring the Success of* Bivens *Litigation and Its Consequences for the Individual Liability Model*, 62 STAN. L. REV. 809, 819 n.37 (2010) ("For nearly one hundred years after its enactment, [Section 1983] was rarely used . . . . Thus, between 1871 and 1920, only twenty-one section 1983 actions were decided by federal courts . . . ."). Figures like these may be limited by the available evidence, for courts did not always recount the precise statutory basis for their authority to decide cases. But figures like these still provide a general indication of the scarcity of Section 1983 litigation.

353. *See, e.g.*, Blackmun, *supra* note 207, at 7–20.

354. 12 F. Cas. 1197 (C.C.S.D. Ill. 1874).

355. *Id.* at 1197.

356. *See id.* at 1197–98.

357. *See id.*

358. *See id.* at 1198.

359. *See id.* at 1198–99.

360. *See id.* at 1198.

subjected to the deprivation of rights, privileges and immunities granted by the constitution," the operative issue was removal—and, by implication, removal alone.[361]

A second early instance in which a party invoked Section 1983 in a suit against a state was somewhat similar. Like *Chicago & A.R. Co.*, the 1878 case *Ex parte Wells*[362] seems to have presented a question about Section 1983 and removal.[363] Three individuals, all of whom were "returning officers" of the 1876 presidential election, all of whom were Republicans, and two of whom were Black, were charged by the Louisiana attorney general with falsifying vote tallies.[364] The petitioners sought a writ of certiorari to remove the prosecution to federal court under Section 3 of the Civil Rights Act of 1866.[365] In its codified form, this statute provided that any state civil or criminal suit "against any person who is denied or cannot enforce in the judicial tribunals of the State . . . any right secured to him by any law providing for the equal civil rights of citizens of the United States" could be removed to federal court.[366] The petitioners' attorneys appeared to have argued that Section 1983 qualified as a law providing for equal civil rights within the meaning of this provision—such that their clients' potential loss of the Sixth Amendment impartial-jury right because of racial prejudice, among other potential deprivations, secured them a spot in federal court.[367]

The federal court—speaking through Justice Joseph Bradley, who would later write the majority opinion in *Hans*, riding circuit—rejected the plea for removal on the ground that the constitutional violations the petitioners alleged were not constitutional violations at all.[368] The procedure for selecting jurors by commissioners, the court said, was above reproach.[369] And while "[t]he commissioners, it is true, may abuse their trust[,] . . . no system can be devised that will not be liable to abuses."[370] The court reasoned similarly with respect to the Civil Rights Act of 1866. "It is only when some . . . hostile state legislation can be shown to exist, interfering with the party's right of defense, that he can

361. *Id.*

362. 29 F. Cas. 633 (C.C.D. La. 1878).

363. *See id.* at 634 (background information preceding opinion).

364. *Id.* at 633 (synopsis).

365. Ch. 31, § 3, 14 Stat. 27, 27 (codified as amended at 42 U.S.C. § 1988 and 28 U.S.C. § 1443); *see Wells*, 29 F. Cas. at 633 (synopsis).

366. 1 Rev. Stat. § 641.

367. *See Wells*, 29 F. Cas. at 633–34 (synopsis and background information preceding opinion).

368. *Id.* at 634–35 (opinion).

369. *See id.*

370. *Id.* at 635.

have his cause removed to the federal court."[371] The court held that the petitioners' "allegations with regard to the manipulation of the law in such manner as to secure a jury inimical to [them], and with regard to the existence of a general prejudice against them in the minds of the court, the jurors, the officials and the people," did not qualify.[372]

Again, therefore, litigants relied on Section 1983 in an attempt to get a case against a state into federal court. And again, the attempt failed for reasons having nothing to do with whether Section 1983 applied to states. To be sure, Section 1983 was not as central in *Wells* as it was in *Chicago & A.R. Co.* But the "right secured" by Section 1983 was the right to seek redress against any "person" who violated someone's federal legal protections. To the extent the petitioners sought to vindicate this right by removing their state-court prosecution to federal court, the "person" available to be held accountable would appear to have been the state itself. So *Wells*, too, suggests that some members of the public interpreted Section 1983 to operate against states themselves.

To be sure, these cases do not provide unassailable proof that Section 1983 was initially understood to cover states. The parties seeking federal-court review may have been grasping at jurisdictional straws; the analysis here may overread the litigation strategies; or both. But these cases offer some early potential evidence in favor of the interpretation explored here.

C. *Methodological Matters*

Sometimes statutes can entail "unexpected consequences."[373] So begins Justice Neil Gorsuch's pioneering and provocative majority opinion in *Bostock v. Clayton County*,[374] decided last year. *Bostock* held that the prohibition on sex discrimination in Title VII forbids adverse employment actions on the basis of sexual orientation or transgender identity—notwithstanding, as Gorsuch observed, that "[t]hose who adopted the Civil Rights Act [of 1964] might not have anticipated their work would lead to this particular result."[375]

The outlook here is meant to be ecumenical among interpretive methodologies (while admittedly emphasizing the kind of textualist considerations stressed by the current Supreme Court). But for someone who follows an approach similar to *Bostock*'s, what could amount to the best interpretation of "person" in Section 1983 might have surprised many of the legislators who adopted the Civil Rights Act of 1871. For under that approach, "the limits of the drafters' imagination supply no

371. *Id.* (possibly suggesting this removal provision was limited to rights secured by the same act).

372. *Id.*

373. Bostock v. Clayton Cnty., 140 S. Ct. 1731, 1737 (2020).

374. 140 S. Ct. 1731 (2020).

375. *Id.* at 1737.

reason to ignore the law's demands."[376] To the contrary, the Court said: "When the express terms of a statute give us one answer and extratextual considerations suggest another, it's no contest. Only the written word is the law . . . ."[377]

Professor Tara Grove has explained that "*Bostock* revealed . . . important tensions *within*" the textualist school of thought.[378] On the one hand, Justice Gorsuch's majority opinion employed what Grove calls "formalistic textualism," which "instructs interpreters to carefully parse the statutory language, focusing on semantic context and downplaying policy concerns or the practical (even monumental) consequences of the case."[379] On the other hand, Justice Samuel Alito's and Justice Brett Kavanaugh's dissents (with the former joined by Justice Clarence Thomas) employed what Grove calls "flexible textualism," which "attends to text but permits interpreters to make sense of that text by considering policy and social context as well as practical consequences."[380] In *Bostock* itself, these extratextual concerns centered around arguments about how members of the enacting Congress assumed the statute would apply.[381]

The issue of state suability under Section 1983 presents a fascinating case study in formalistic versus flexible textualism. Indeed, much of the Court's language in *Bostock* favoring semantic meaning over expected applications could map directly onto the present discussion. The statute in question "is a major piece of federal civil rights legislation"; "[i]t is written in starkly broad terms"; "[i]t has repeatedly produced unexpected applications, at least in the view of those on the receiving end of them"; and "Congress's key drafting choices . . . virtually guaranteed that unexpected applications would emerge over time."[382] To the extent that Section 1983 may be best read as withdrawing states' sovereign immunity, one could say just as in *Bostock* that "[t]his elephant has never hidden in a mousehole; it has been standing before us all along."[383]

There are, of course, many schools of statutory interpretation besides different forms of textualism. A few prominent alternatives include intentionalism, purposivism, imaginative reconstruction, dynamic

376. *Id.*

377. *Id.*

378. Grove, *supra* note 333, at 266.

379. *Id.* at 267.

380. *Id.*

381. 140 S. Ct. at 1750.

382. *Id.* at 1753.

383. *Id.*; *see* Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 468 (2001) ("Congress . . . does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions—it does not, one might say, hide elephants in mouseholes.").

statutory interpretation, and practical reasoning.[384] "Nor do these exhaust the list," as one scholar puts it.[385] How would the considerations fleshed out here bear on understandings of Section 1983 under these other approaches?

"Intentionalists attempt to draw interpretive inferences from the legislature's stated goals and from a statute's legislative history."[386] Because of the tight connection between a provision's meaning and the enacting legislators' expressions, intentionalism would likely look dimly on the possibility of including states within Section 1983's scope. Purposivists believe that "[b]ecause 'every statute . . . has some kind of purpose or objective,' identifying that purpose and deducing the interpretation with which it is most consistent resolves interpretive ambiguities."[387] Given this more capacious lens, purposivism would probably look more favorably on the possibility of including states within Section 1983's scope, especially in light of arguments that accomplishing Congress's overarching goal of promoting constitutional enforcement through enacting Section 1983 as part of the exceptional Reconstruction era requires the availability of entity liability. Imaginative reconstruction says that "the judge should imagine that she is talking to the legislators at the time of enactment and should reconstruct how the legislators would have answered the interpretive question, given their values and their concerns."[388] As something of a middle ground between intentionalism and purposivism, either answer to the question about Section 1983 and state suability seems conceivable under this approach.

That leaves dynamic statutory interpretation and practical reasoning. "Academic advocates of 'dynamic' interpretation argue that it is perfectly legitimate for statutory meanings to evolve to reflect current circumstances and contemporary mores," which may include "ideas of sound policy" that "can change over time."[389] The practical-reasoning model posits that "statutory interpreters . . . are normally not driven by any single value . . . but are instead driven by multiple values," including "finding the best answer according to modern policy."[390] These theories are multitextured and irreducible to simplistic applications. But to the extent that they include present policy considerations more than the

384. Morell E. Mullins, Sr., *Tools, Not Rules: The Heuristic Nature of Statutory Interpretation*, 30 J. LEGIS. 1, 17–18 (2003).

385. *Id.* at 18.

386. Richard J. Pierce, Jr., Symposium, *Justice Breyer: Intentionalist, Pragmatist, and Empiricist*, 8 ADMIN. L.J. AM. U. 747, 747 (1995).

387. William N. Eskridge, Jr. & Philip P. Frickey, *Statutory Interpretation as Practical Reasoning*, 42 STAN. L. REV. 321, 333 (1990) (quoting 1 HENRY M. HART, JR. & ALBERT M. SACKS, THE LEGAL PROCESS 166–67 (tentative ed. 1958)).

388. *Id.* at 329.

389. NELSON, *supra* note 329, at 945.

390. Eskridge & Frickey, *supra* note 387, at 348.

frameworks discussed above do, their adherents may be especially likely to support including states as Section 1983 defendants for the normative reasons introduced below.[391]

Even setting aside the ultimate answer (perhaps because one would weigh the evidence differently), the analysis here shows that whether an interpreter should understand Section 1983 as covering states qua states is a far closer question than the Court and previous commentary have acknowledged. One could, therefore, view the caselaw in this area as an instance of the Court imbuing indeterminate language with ideological content—which, as in the context of so-called common law statutes, could in theory point in opposite directions when it comes to pursuing an alternative course within the judicial system.[392] Either way (whether the Court made a debatable call on interpretive grounds or a discretionary call on ideological grounds), the policy debate behind and possibility of political reform becomes quite important.

IV. IMPLICATIONS FOR REFORM

The preceding Parts have revealed substantial arguments for reading Section 1983 to abrogate sovereign immunity, which would make state governments susceptible to damages actions for violating constitutional rights. A decision like *Bostock*—which surprised many observers because of both the outcome and the majority opinion's author[393]—may provide a bit of reason to think the Supreme Court could someday reconsider its caselaw in this area. But the evidence remains equivocal and may not be strong enough to justify overruling otherwise settled precedent. And while stare decisis stands as an obstacle to reassessing

391. *See infra* Part IV.

392. *See* Guardians Ass'n v. Civ. Serv. Comm'n, 463 U.S. 582, 641 n.12 (1983) (Stevens, J., dissenting) (stating that "Congress phrased some older statutes in sweeping, general terms, expecting the federal courts to interpret them by developing legal rules on a case-by-case basis in the common law tradition" and citing Section 1983 as an example). On the one hand, some would reject dubious interpretation (at least as a textual matter) as a reason for the judiciary to move away from prior decisions establishing the meaning of common-law statutes because even "[t]extualists concede that text is not controlling" here. Margaret H. Lemos, *Interpretive Methodology and Delegations to Courts: Are "Common-Law Statutes" Different?*, in INTELLECTUAL PROPERTY AND THE COMMON LAW 89–106, 89 (Shyamkrishna Balganesh ed., 2013). On the other hand, common-law statutes are said to license courts to employ a "relaxed" form of stare decisis by allowing them to "rescind[]" decisions "that over time prove unworkable or inconsistent with general policy." William N. Eskridge, Jr., *Overruling Statutory Precedents*, 76 GEO. L.J. 1361, 1377 (1988).

393. *See, e.g.*, *Duke Law Faculty React to Landmark Supreme Court Decision in* Bostock v. Clayton County, Ga., DUKE LAW (June 17, 2020), https://law.duke.edu/news/duke-law-faculty-react-landmark-supreme-court-decision-bostock-v-clayton-county-ga/ [https://perma .cc/ZJ7F-U24H] (quoting Professor Trina Jones as stating that "[t]his is an extraordinarily wonderful—and somewhat surprising—outcome" and reporting that "there was widespread surprise that Justice Gorsuch not only joined his liberal colleagues, but wrote the opinion").

caselaw in any context, the Roberts Court, building on the work of the Rehnquist Court,[394] has fortified and forwarded states' immunity protections with hardly a look back.[395] The Court's recent decisions, moreover, have displayed a similar trend favoring government defendants on a range of civil rights questions.[396]

Nevertheless, encouraging the legal community to reconsider Section 1983's nonabrogation of sovereign immunity holds relevance not only for the unlikely prospect of judicial change, but also for the possibility of legislative reform. For just as "[e]xposing the Court's choices lets us make a clearer and more responsible decision about whether those choices are the right ones or whether, having given us such a categorical immunity doctrine, the Court should now take some of it back,"[397] exposing the Court's choices can also highlight the desirability of legislative intervention.

Fully exploring the critical questions concerning the normative value of state sovereign immunity in the current constitutional-tort system lies beyond the scope of the present project. But introducing the conditions confronting congresspeople and sketching a possible path forward helps lay the foundation for follow-on work where I address the possibility of political reform in greater detail.[398]

A. *The Policy Landscape*

Over time, various commentators have advocated the availability of entity accountability for constitutional torts.[399] As now-Judge Nina

394. *See, e.g.*, Alden v. Maine, 527 U.S. 706, 754 (1999) (declaring that "the States retain immunity from private suit in their own courts"); Seminole Tribe of Fla. v. Florida, 517 U.S. 44, 72–73 (1996) (declaring that "Article I cannot be used to circumvent the constitutional limitations placed upon federal jurisdiction" under the Eleventh Amendment).

395. *See, e.g.*, Allen v. Cooper, 140 S. Ct. 994, 1007 (2020) (concluding that "Article I's Intellectual Property Clause [can]not provide the basis for an abrogation of sovereign immunity" and that "Section 5 of the Fourteenth Amendment [can]not support an abrogation on a legislative record like the one here"); Franchise Tax Bd. v. Hyatt, 139 S. Ct. 1485, 1490 (2019) ("This case . . . requires us to decide whether the Constitution permits a State to be sued by a private party without its consent in the courts of a different State. We hold that it does not . . . .").

396. *See, e.g.*, Ziglar v. Abbasi, 137 S. Ct. 1843, 1863 (2017) (holding that "the Court of Appeals erred by allowing respondents' detention policy claims to proceed under *Bivens*," which provides a mechanism for suing federal officials for certain constitutional violations); *id.* at 1869 ("Petitioners are entitled to qualified immunity with respect to the claims under 42 U.S.C. § 1985(3)."). There are, however, some deviations from this trend. *See* Katherine Mims Crocker, *The Supreme Court's Reticent Qualified Immunity Retreat*, 71 DUKE L.J. ONLINE (forthcoming 2021).

397. Baude, *supra* note 236, at 78 (discussing qualified immunity).

398. *See* Katherine Mims Crocker, *Qualified Immunity, Sovereign Immunity, and Systemic Reform*, 71 DUKE L.J. (forthcoming 2022), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3796337.

399. *See, e.g.*, SCHUCK, *supra* note 237, at 100–21.

Pillard has observed, "A range of rationales can be cited for government liability."[400] In addition to agency-level deterrence arguments, for instance, the fact that "constitutional violations require state action" means that "the government that made an abuse of its official power possible should arguably be held accountable for that abuse."[401] There are compelling reasons to believe that states almost always indemnify their employees—who are already subject to Section 1983 actions for damages under *Monroe*—from constitutional-tort litigation costs and judgments.[402] And in the event that "individual officials are judgment-proof" and complete indemnification is unavailable, "only governmental liability can provide full compensation."[403] What is more, while local governments can be made to answer in damages for some unconstitutional acts, state governments can facilitate unlawful conduct to the same extent without direct monetary consequences.[404] And these are only a sampling of the reasons why state-government liability in Section 1983 suits could make good sense.

Until very recently, however, both commentators and policymakers seemed to have resigned themselves to viewing sovereign immunity as a permanent part of constitutional enforcement. In 1999, Judge Pillard noted that while the period between 1973 and 1985 saw twenty-one bills "introduced in Congress seeking to replace individual liability" for constitutional violations by federal officials "with direct governmental liability," no such bill "ha[d] been introduced since."[405] A decade later, Aziz Huq declared the constitutional-tort regime "stable," noting that "it is hardly clear how the diffuse class of possible constitutional tort plaintiffs could overcome evident transaction costs to collective actions to seek legislated change."[406]

Things are shifting. Spurred by the murder of George Floyd and countless other acts of police violence captured on cellphone video and

400. Cornelia T.L. Pillard, *Taking Fiction Seriously: The Strange Results of Public Officials' Individual Liability Under* Bivens, 88 GEO. L.J. 65, 74 (1999).

401. *Id.* at 75.

402. *See* Joanna C. Schwartz, *Police Indemnification*, 89 N.Y.U. L. REV. 885, 890 (2014) (focusing on law enforcement officers).

403. Pillard, *supra* note 400, at 75.

404. *See* Monell v. Dep't of Soc. Servs., 436 U.S. 658, 663 (1978) (holding that local governments are not wholly immune from suit under § 1983). It stands to reason that more constitutional violations happen under local control than under state control. But state officials are still regularly accused of violating people's constitutional rights, including in the police use-of-force context on which the discussion below focuses. *See, e.g.*, Hannah Knowles, *Body-Cam Video Shows Louisiana Troopers Stunned, Hit and Dragged Black Man Before His Death*, WASH. POST, May 20, 2021, 12:33 PM, https://www.washingtonpost.com/nation/2021/05/20/ronald-greene-louisiana-police-video/ [https://perma.cc/5YDD-42TJ].

405. Pillard, *supra* note 400, at 98.

406. Aziz Z. Huq, *Against National Security Exceptionalism*, 2009 SUP. CT. REV. 225, 261 & n.157.

echoed around the Internet, "collective actions to seek legislated change" have been gathering steam. And congresspeople have been responding, with multiple bills and resolutions aimed at altering constitutional-tort law proposed over the last couple years. So far, these legislative efforts have largely focused on revising or rejecting *qualified* immunity,[407] which shields police officers and other government officials sued for violating federal constitutional rights from having to pay money damages unless their conduct's unlawfulness was "clearly established" at the time it occurred.[408] Calls to restrain or reject qualified immunity are well founded,[409] and other potential reforms (like expanding municipal liability) are important as well. But the relative lack of attention to *sovereign* immunity has represented an unfortunate oversight that the policy path sketched here could help remedy.[410]

B. *A Possible Path Forward*

There are good reasons for Congress to make states suable in damages for constitutional-tort claims across the board. But there are also good reasons for Congress to start with Fourth Amendment excessive force

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407. *See* George Floyd Justice in Policing Act of 2021, H.R. 1280, 117th Cong. § 102 (2021) (as passed by House, Mar. 3, 2021); Ending Qualified Immunity Act, S. 4142, 116th Cong. (2020); Reforming Qualified Immunity Act, S. 4036, 116th Cong. (2020); George Floyd Justice in Policing Act of 2020, H.R. 7120, 116th Cong. § 102 (2020) (as passed by House, June 25, 2020); Ending Qualified Immunity Act, H.R. 7085, 116th Cong. (2020); Restoration of Civil Rights Act of 2019, H.R. 7115, 116th Cong. (2020); S. Res. 602, 116th Cong. (2020); H.R. Res. 702, 116th Cong. (2019).

408. Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982).

409. *See* Katherine Mims Crocker, *Qualified Immunity and Constitutional Structure*, 117 MICH. L. REV. 1405, 1457–58 (2019).

410. The Restoration of Civil Rights Act of 2019 did seek to address state sovereign immunity, H.R. 7115, but attracted less notice and support than qualified immunity reform efforts did. And recent media reports indicate that Senator Tim Scott is pursuing a compromise on qualified immunity that may involve increased entity liability. *See* Seung Min Kim, Annie Linskey, & Marianna Sotomayor, *Chauvin Verdict Injects a Fresh Jolt of Momentum into Police Overhaul Efforts*, WASH. POST, Apr. 21, 2021, 7:58 PM, https://www.washingtonpost.com/politics/chauvin-verdict-police-overhaul/2021/04/21/fa47d65c-a2a0-11eb-85fc-06664ff4489d_story.html [https://perma.cc/UU2K-HLHW] ("Republicans have especially balked at dumping the 'qualified immunity' standard, which they say allows police officers to do their job without the threat of potentially frivolous lawsuits. Scott said Wednesday one potential compromise is holding liable police departments, rather than individual officers."). The details remain sketchy, however, and it is not clear that *state*-government liability—as opposed to only *local*-government liability—is on the table. *See* Manu Raju, Jessica Dean, & Ted Barrett, *GOP Senator Floats Compromise on Policing Legislation as Bipartisan Talks Pick Up Pace*, CNN, Apr. 21, 2021, 6:20 PM, https://www.cnn.com/2021/04/21/politics/policing-reform-talks-congress-latest-negotiations/index.html [https://perma.cc/NY5Q-EREK] ("'We need the individual officers and the agencies to be accountable,' [Representative Karen] Bass said after talking on the Senate floor with key Democrats on the Senate Judiciary Committee. 'Because I think if the agencies, the cities, if they're concerned about lawsuits, they will not want to have problem officers.'").

claims while keeping an eye toward gradually removing sovereign immunity protections for other constitutional violations in the future.

1. Focusing on Excessive Force

Excessive force is neither the only kind of government conduct nor the only kind of constitutional violation that calls out for deep and wide reform. But excessive force is of paramount importance in the present moment. Evidence indicates that law enforcement officers use deadly force with alarming frequency and that they use it against different racial groups with alarming asymmetry.[411] It is no surprise, therefore, that police violence, especially toward communities of color, has spurred the protests that have pushed the nation into an extended period of collective soul-searching.

On a community level, rooting out unjustified uses of force is essential to improving relationships between law enforcement agencies and the citizens they serve, particularly in localities facing years of abuse.[412] On an individual level, physical violence implicates a person's constitutional interest in bodily integrity in an elemental way.[413] Policymakers can no longer overlook how current practices reflect a "history of state over-policing and brutalization of Black bodies dating back to slavery and Reconstruction" and continue to produce injuries that are uniquely harmful in collective and personal senses alike.[414] Excessive force claims are, therefore, an obvious starting point for any project seeking to increase accountability for constitutional wrongs.

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411. *See* Lynne Peeples, *Brutality and Racial Bias: What the Data Say*, 583 NATURE, July 2, 2020, at 22–23 (discussing the available data and stating as follows: "About 1,000 civilians are killed each year by law-enforcement officers in the United States. By one estimate, Black men are 2.5 times more likely than white men to be killed by police during their lifetime. And in another study, Black people who were fatally shot by police seemed to be twice as likely as white people to be unarmed.").

412. *See* Debo P. Adegbile, *Policing Through an American Prism*, 126 YALE L.J. 2222, 2225–27 (2017).

413. The Supreme Court has repeatedly focused on bodily integrity in the search side of Fourth Amendment jurisprudence. In *Missouri v. McNeely*, for instance, the Court recognized that "an invasion of bodily integrity implicates an individual's 'most personal and deep-rooted expectations of privacy.'" 569 U.S. 141, 148 (2013) (quoting Winston v. Lee, 470 U.S. 753, 760 (1985)). And in *Schmerber v. California*, the Court said that "[t]he integrity of an individual's person is a cherished value of our society." 384 U.S. 757, 772 (1966).

414. Erika Wilson, Response, *The Great American Dilemma: Law and the Intransigence of Racism*, 20 CUNY L. REV. 513, 518 (2017); *see also* Brandon Hasbrouck, Essay, *Abolishing Racist Policing with the Thirteenth Amendment*, 68 UCLA L. REV. DISCOURSE 200, 206 (2020) (presenting a historical overview to argue that "[i]n both the North and the South, formal policing in America has racist roots").

2. Taking a Gradual Approach

From a political perspective, proceeding in a gradual fashion should prove more successful than seeking rapid change. Problems of police violence underlie the current legislative interest in constitutional-tort law, and Congress has thus chosen to concentrate on proposals targeted at policing while sidelining legislation aimed at wider-ranging concerns.

On June 4, 2020, for instance, Representatives Justin Amash and Ayanna Pressley introduced the Ending Qualified Immunity Act, which would have abolished qualified immunity from Section 1983 suits for any and all officials.[415] Less than a week later, Representative Karen Bass introduced the George Floyd Justice in Policing Act of 2020,[416] the primary Democratic proposal responding to Floyd's killing and the ensuing unrest. Among other measures, this bill would have ended qualified immunity in Section 1983 suits for "investigative" and "law enforcement" officials only.[417] While no proposal cutting back on qualified immunity was expected to advance in the Senate last year because of Republican opposition,[418] the latter bill fared far better than the former one did. The Ending Qualified Immunity Act drew only a few dozen co-sponsors and never made it out of committee.[419] The George Floyd Justice in Policing Act of 2020 garnered more than 200 co-sponsors and passed the full House.[420] Critically, the George Floyd Justice in Policing Act of 2021 has also passed the House and has momentum heading into the Senate.[421]

Of course, any attempt to establish government liability for constitutional torts would generate pushback, especially in today's exceptionally polarized political climate. But President Joe Biden has signaled a desire to prioritize police reform, including by endorsing the

415. Ending Qualified Immunity Act, H.R. 7085, 116th Cong. (2020).

416. George Floyd Justice in Policing Act of 2020, H.R. 7120, 116th Cong. § 102 (2020) (as passed by House, June 25, 2020).

417. *Id.*

418. *See* Jamie Ehrlich, *Democrats Team for Effort to End Doctrine Shielding Police as GOP Backs Off*, CNN (July 1, 2020, 9:50 PM), https://www.cnn.com/2020/07/01/politics/qualified-immunity-senate-markey-warren-sanders/index.html [https://perma.cc/NF8G-C4P5].

419. *H.R.7085 – Ending Qualified Immunity Act*, CONGRESS.GOV, https://www.congress.gov/bill/116th-congress/house-bill/7085?q=%7B%22search%22%3A%5B%22hr7085%22%5D%7D&r=1&s=3 [https://perma.cc/P8R7-Y9Q7].

420. *H.R.7120 – George Floyd Justice in Policing Act of 2020*, CONGRESS.GOV, https://www.congress.gov/bill/116th-congress/house-bill/7120?q=%7B%22search%22%3A%5B%22hr7120%22%5D%7D&s=4&r=1 [https://perma.cc/5CV3-SA8K].

421. *See* George Floyd Justice in Policing Act of 2021, H.R. 1280, 117th Cong. § 102 (2021) (as passed by House, Mar. 3, 2021); Kim, Linskey, & Sotomayor, *supra* note 410; Raju, Dean, & Barrett, *supra* note 410. Representative Pressley recently reintroduced the Ending Qualified Immunity Act, but it remains in committee. *See* Ending Qualified Immunity Act, H.R. 1470, 117th Cong. (2021).

George Floyd Justice in Policing Act.[422] And Senator Tim Scott, a Republican, has worked hard with colleagues to try to forge bipartisan compromise in this Democratic-dominated area.[423] At the least, pursuing a piecemeal approach should lower the amplitude of some arguments against broad-based interventions. And it could allow Congress to use early measures as case studies to fine-tune and effectuate further-reaching changes in the future.

Admittedly, this brief sketch of the policy landscape and a potential path through it provokes questions to a greater degree than it provides answers. How would state-government liability affect the public fisc? Or the volume of constitutional-tort litigation? Would increasing the scope of constitutional remedies paradoxically encourage courts to decrease the scope of substantive rights? And what about the federal government: should it also face damages judgments for violating people's constitutional protections? What standard should govern the imposition of government liability, anyway, especially since the Supreme Court has long rejected a respondeat superior model for municipalities sued under Section 1983?[424]

These questions, along with any number of related inquiries, are enormously important. They all emerge at the intersection of myriad legal doctrines and practices, implicating a constellation of concerns that scholars often discuss under the rubric of "remedial equilibration."[425] With the discussion here setting the stage, forthcoming work of mine offers a fuller look at fundamental issues like these.[426]

CONCLUSION

This Article has reconsidered Section 1983's nonabrogation of sovereign immunity from multiple standpoints. Proceeding from a negative perspective, the analysis has shown how the Supreme Court's caselaw rests on dubious interpretive decisions and historical assumptions. Adopting a more affirmative approach, the analysis has also

422. Catie Edmondson & Nicholas Fandos, *Buoyed by Floyd Verdict, Congress Eyes New Bid to Overhaul Policing*, N.Y. TIMES, Apr. 28, 2021, https://www.nytimes.com/2021/04/21/us/politics/congress-police-reform.html [https://perma.cc/SXP5-XAMX].

423. *See id.*; *see also supra* note 410.

424. *See* Monell v. Dep't of Soc. Servs., 436 U.S. 658, 691 (1978) (holding that "Congress did not intend municipalities to be held liable unless action pursuant to official municipal policy of some nature caused a constitutional tort" and that "[i]n particular, . . . a municipality cannot be held liable solely because it employs a tortfeasor—or, in other words, a municipality cannot be held liable under § 1983 on a respondeat superior theory").

425. *See* Daryl J. Levinson, *Rights Essentialism and Remedial Equilibration*, 99 COLUM. L. REV. 857, 858 (1999) (describing remedial equilibration as the theory that "rights and remedies are inextricably intertwined," with rights "dependent on remedies not just for their application to the real world, but for their scope, shape, and very existence").

426. *See* Crocker, *supra* note 398.

offered evidence in favor of reading Section 1983 to allow civil actions against states, while carefully considering counterevidence too. The upshot is that the case for state suability is stronger than the Court or previous commentary has credited. Lastly, this Article connected this backward-looking discussion to the possibility of forward-looking improvement of the American constitutional-tort system, especially in relation to the present movement for racial justice and police reform.