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# Three-Dimensional Sovereign Immunity

Sarah L. Brinton

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## THREE-DIMENSIONAL SOVEREIGN IMMUNITY

**Sarah L. Brinton\***

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## INTRODUCTION

The United States wears its sovereignty most uneasily at home. Abroad, U.S. sovereignty justifies a number of well-settled practices, including national self-determination, border control, and sovereign immunity in foreign courts. But domestic sovereignty can be tricky. In the United States, the people are the sovereign.<sup>1</sup> Yet the U.S. government regularly invokes sovereign privileges *against* its people.<sup>2</sup> One such privilege is the right to avoid suit. Unless it deigns otherwise, the federal government cannot be sued—even by citizens seeking redress for government-inflicted harms—a privilege belonging so clearly to the sovereign that it is labeled “sovereign immunity.”

The doctrine of sovereign immunity has met considerable public disfavor. One group of citizens recently harmed by the doctrine erected a plaque to memorialize their discontent. In the wake of the Hurricane Katrina litigation, a historical marker was added to the site of the 17th Street Canal Breach, reading in part: “In 2008, the US District Court, Eastern District of Louisiana placed responsibility for this floodwall’s collapse squarely on the US Army Corps of Engineers; however, the agency is protected from financial liability in the

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1. See, e.g., Akhil R. Amar, *Of Sovereignty and Federalism*, 96 YALE L.J. 1425, 1439 (1987) (“[T]he sovereignty of the people . . . informs every article of the Federalist Constitution” and that it is “no happenstance that the Federalists chose to introduce their work with words that ringingly proclaimed the primacy of that new understanding: ‘We the people of the United States . . . do ordain and establish this Constitution for the United States of America’” (quoting U.S. CONST. pmbl.)); Erwin Chemerinsky, *Against Sovereign Immunity*, 53 STAN. L. REV. 1201, 1214 (2001) (citing approvingly to Amar’s argument that “the first words of the Constitution, ‘We the People,’ . . . makes the people sovereign” (quoting U.S. CONST. pmbl.)). Moreover, the Supreme Court of the United States stated:

To the Constitution of the United States the term SOVEREIGN, is totally unknown. There is but one place where it could have been used with propriety. But, even in that place it would not, perhaps, have comported with the delicacy of those, who ordained and established that Constitution. They might have announced themselves ‘SOVEREIGN’ people of the United States: But serenely conscious of the fact, they avoided the ostentatious declaration.

*Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419, 454 (1793) (Wilson, J.).

2. Acting as a sovereign, the national government exclusively determines who is a citizen and who is not. See *Chirac v. Chirac’s Lessee*, 15 U.S. (1 Wheat.) 259, 269 (1817) (“That the power of naturalization is exclusively in congress does not seem to be, and certainly ought not to be, controverted.”). Moreover, it can conscript us via the draft. See 32 C.F.R. § 1615.1 (2014).

Flood Control Act of 1928” (a statute reaffirming the defense of sovereign immunity for certain flood-related claims).<sup>3</sup> This public dissatisfaction echoes the widespread academic critiques of the doctrine, which focus almost exclusively on the dissonance between basic constitutional values—democracy, justice, government redressability—and the virtually impenetrable citadel of sovereign immunity.<sup>4</sup> As Professor John Copeland Nagle relayed, “No scholar, so far as can be ascertained, has had a good word for sovereign immunity for many years<sup>5</sup> . . . . [N]early every commentator who considers the subject vigorously asserts that the doctrine of sovereign immunity must go.”<sup>6</sup>

Despite the academic encouragement to abandon the doctrine, the Supreme Court of the United States continues to reaffirm federal sovereign immunity.<sup>7</sup> As Justice Stevens wrote (apparently with some sadness), “the doctrine is unquestionably alive and well today.”<sup>8</sup>

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3. 33 U.S.C. § 702c (2013) (reaffirming the defense of sovereign immunity for certain flood-related claims). The plaque was posted by Levees.org, an organization created in response to the Hurricane Katrina levee failures. It was unveiled on August 23, 2010. See *Historic Plaque Program*, LEEVES.ORG, <http://levees.org/historic-plaque-program> (last visited Sept. 23, 2013).

4. See, e.g., Steven Menashi, *Article III as a Constitutional Compromise: Modern Textualism and State Sovereign Immunity*, 84 NOTRE DAME L. REV. 1135, 1138 (2009) (“[T]he American doctrine of sovereign immunity is indefensible upon both theoretical and pragmatic grounds. . . .” (quoting CLYDE JACOBS, *THE ELEVENTH AMENDMENT AND SOVEREIGN IMMUNITY* 160 (1972))); Gregory C. Sisk, *The Continuing Drift of Federal Sovereign Immunity Jurisprudence*, 50 WM. & MARY L. REV. 517, 525 (2008) (“From the founding of our nation, the mantle of sovereign immunity has rested uneasily on a government designed to be limited in powers and understood to draw its authority from the people.” (quoting *United States v. Lee*, 106 U.S. 196, 208–09 (1882))); Chemerinsky, *supra* note 1, at 1201 (“[S]overeign immunity is an anachronistic concept, derived from long-discredited royal prerogatives, and . . . it is inconsistent with basic principles of the American legal system.”).

5. John Copeland Nagle, *Waiving Sovereign Immunity in an Age of Clear Statement Rules*, 1995 WIS. L. REV. 771, 775 n.24 (1995) (quoting Roger C. Cramton, *Nonstatutory Review of Federal Administrative Action: The Need for of Sovereign Immunity, Subject Matter Jurisdiction, and Parties Defendant*, 68 MICH. L. REV. 389, 392 (1970)).

6. *Id.* (quoting KENNETH CULP DAVIS, *ADMINISTRATIVE LAW TREATISE* § 25.01, at 435–36 (1958)).

7. See, e.g., *United States v. Navajo Nation*, 556 U.S. 287 (2009); *Fed. Deposit Ins. Corp. v. Meyer*, 510 U.S. 471 (1994); *United States v. Mitchell*, 445 U.S. 535 (1980); *United States v. Sherwood*, 312 U.S. 584, 586 (1941).

8. John Paul Stevens, *Is Justice Irrelevant?*, 87 NW. U. L. REV. 1121, 1126 (1993). Stevens argues that sovereign immunity is a “judge-made doctrine” with “tentacles” that

This Article argues what none have before—that while the Court is right that federal sovereign immunity is not inherently unconstitutional, it is wrong that sovereign immunity is constitutional *in its current form*. The argument is as follows: the doctrine of federal sovereign immunity is constitutional inasmuch as it is a background principle upon which the Constitution was drafted and insofar as it is consonant with the Constitution. In articulating the doctrine, the Court has erred by ascribing to Congress the exclusive right to waive immunity. If Congress truly had this exclusive waiver authority, it could decide to disallow any suit against the government, including those for constitutional violations. This is impermissible. The Constitution requires that the Supreme Court serve as a check on the other two branches' general compliance with constitutional values.<sup>9</sup> Accordingly, it does not allow the Court to give Congress the power to prevent the Court from hearing constitutional cases; to do so would negate the Court's ability to monitor the constitutionality of Congress's behavior. Therefore, Congress cannot have exclusive control over sovereign immunity waiver. This authority must be shared by Congress and the Court.

This simple argument reveals that the waiver authority, properly construed, is constitutionally entrusted to not one, but at least two of the federal branches. That two branches can share the waiver authority raises another possibility: the waiver authority can be shared by all three branches.

This three-branch waiver configuration is based on the principle that each federal branch—legislative, executive, and judicial—can exercise only the powers and act only in the roles assigned to it by the sovereign people via the Constitution. Because of the derivative and limited nature of

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deposit their seeds of injustice not only in the numerous recreational facilities that are a by-product of our flood control legislation, in the waters that are polluted by illegally-operated federal facilities, and in the rising tide of bankruptcy proceedings in all parts of the country, but also, no doubt, in numerous areas of litigation that have not yet completely surfaced.

*Id.* at 1128. Moreover, the Supreme Court of the United States found in favor of the United States on sovereign immunity grounds as recently as 2012, when it held in *United States v. Bormes*, that sovereign immunity prevented the kind of suit the plaintiff had brought against the United States. *Id.* at 19–20 (discussing 133 S. Ct. 12 (2012)).

9. See *infra* Part II.A.

the federal government's sovereignty, the federal government is perhaps best viewed as holding *proxy sovereignty*. That proxy authority is divided among the branches; no one branch wields all of the proxy powers. As Congress and the Court each exercise one portion of the sovereign powers held by the federal government in proxy for the sovereign people, the President too acts as a partial proxy sovereign. It follows, then, that as Congress and the Court can waive immunity in certain circumstances, the President also has a proxy sovereign right to waive immunity.

The Court should adopt a three-dimensional form of immunity that recognizes each branch's limited proxy sovereign right to waive immunity. Doing so will accord the sovereign immunity doctrine with constitutional compliance. And it may ameliorate the most criticized feature of sovereign immunity—that it is a government defense virtually impenetrable by the people.

This Article proceeds as follows: Part I explores the central feature of the current sovereign immunity waiver doctrine—exclusive congressional waiver—traces the history of the doctrine, discusses how it is used today, and presents its scholarly defenses. Part II argues that exclusive congressional waiver is unconstitutional and explains that the Court must reconfigure the immunity doctrine to allow the Court to perform its necessary check on the political branches' general constitutional compliance. Part II concludes that immunity waiver power must be shared by at least Congress and the Court. Part III advances the shared waiver power idea to its next logical step—one that reflects our three-branch government—by advocating an interpretation of sovereignty and the Constitution that would grant each branch its own (limited) power to waive immunity. The Article concludes by discussing the advantages of an immunity-waiver authority shared among the federal branches.

#### I. ONE-DIMENSIONAL IMMUNITY: EXCLUSIVE CONGRESSIONAL WAIVER

The current federal sovereign immunity doctrine centers on Congress's exclusive right of waiver. Yet exclusive congressional waiver is a feature of the current sovereign immunity doctrine with dubious origins and few scholarly

defenses. Inspecting the shaky legs upon which exclusive congressional waiver wobbles is a first step to understanding why the doctrine is not a necessary feature of sovereign immunity—why, in fact, it is an unconstitutional one.

*A. The Origins of Exclusive Congressional Waiver*

Most origin stories of federal sovereign immunity are as follows: federal sovereign immunity is a long-standing legal principle, adopted by U.S. courts from early British jurisprudence, and affirmed by Congress, beginning first with its *circa* 1855 establishment of the United States Claims Court, which provided a judicial forum for contract claims against the government, and later with a host of statutory waivers of federal immunity.<sup>10</sup> In this regime, only Congress, and only via legislation, has authority to allow suit against the federal government. Exclusive congressional waiver is the linchpin of federal sovereign immunity waiver, consistently reinforced by Supreme Court jurisprudence and executive deference. As commonly understood, sovereign immunity waiver is exclusively a congressional matter.<sup>11</sup>

But a closer look at history reveals that the most important actor in the story of federal sovereign immunity waiver is neither the British crown<sup>12</sup> nor Congress—it is the United States Supreme Court. The following discussion differs from previous accounts of the origins of federal

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10. See, e.g., ARTHUR MILLER ET AL., FEDERAL PRACTICE AND PROCEDURE § 3654 (3d ed. 1998) (“The doctrine of sovereign immunity can be traced to the English concept that the king or queen, as the ultimate source of authority, could do no wrong and should not be disturbed in the exercise of his or her sovereign powers.”).

11. See, e.g., GARY LAWSON, FEDERAL ADMINISTRATIVE LAW 800 (5th ed. 2009) (“[Y]ou cannot sue the United States, for any reason or any form of relief, unless Congress has *expressly* consented by statute to be sued.”); GREGORY C. SISK, LITIGATION WITH THE FEDERAL GOVERNMENT 88 (4th ed. 2006) (“[T]he doctrine of federal sovereign immunity stands as a bar to the lawsuit unless and until Congress chooses to lift that bar and then only to the extent or degree that Congress chooses to do so.”).

12. Others have described the ways in which our previous thoughts about British sovereign immunity practice were based on misreadings of British legal history. Many have persuasively argued that British sovereign immunity did not prevent suit against the king. At least not in the ways traditionally thought. See, e.g., James E. Pfander, *Sovereign Immunity and the Right to Petition: Toward a First Amendment Right to Pursue Judicial Claims Against the Government*, 91 NW. U. L. REV. 899, 923 (1997); Louis L. Jaffe, *Suits Against Governments and Officers: Damage Actions*, 77 HARV. L. REV. 209, 210 (1963).

sovereign immunity by detailing the Court's role in the development of federal sovereign immunity and emphasizing the Court's unilateral decision to vest the waiver authority exclusively in Congress.

Very early in its jurisprudence, the Court was unsure about how sovereign immunity would apply, if at all, to the United States' unique federal system. When the Court heard *Chisholm v. Georgia* just a few years after Ratification, the Court was asked to address the question of whether sovereign immunity prevented the plaintiff, Mr. Chisholm, from suing the state of Georgia.<sup>13</sup> The Court decided that, in the new American nation, sovereign immunity was not a defense behind which states could hide.<sup>14</sup> Dissatisfied with the Court's decision, the states quickly worked to adopt a constitutional amendment that would codify the protection of states from private suits.<sup>15</sup>

What is often overlooked in *Chisholm* is the Court's earliest discussion of *federal* sovereign immunity. Although the *Chisholm* decision turned entirely on state sovereign immunity, two of the five justices mentioned the idea of federal sovereign immunity in seriatim opinions and both expressed disfavor with the doctrine as a matter of constitutional interpretation. Justice Cushing expressed doubt that an interpretation rendering the federal government suable was "necessary" as a matter of constitutional interpretation:

[w]hen speaking of the United States, the Constitution says 'controversies to which the United States shall be a party' not controversies between the United States and any of their citizens . . . [whereas] [w]hen speaking of States, [the Constitution] says, 'controversies between two or more states; between a state and citizens of another state.'<sup>16</sup>

Chief Justice Jay agreed with Cushing, further explaining this interpretation of Article III: "[I]f the word party comprehends both Plaintiff and Defendant, it follows, that the

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13. See *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419, 420, 469 (1793) (Jay, C.J.), *superseded by* U.S. CONST. amend. XI.

14. See *id.* at 479.

15. U.S. CONST. amend. XI.

16. *Chisholm*, 2 U.S. at 469 (Cushing, J.) (quoting U.S. CONST. art. III, § 2, cl. 1).



United States may be sued by any citizen, between whom and them there may be a controversy.”<sup>17</sup> Jay questioned whether the Court had the authority to enforce judgments against the other federal branches, but he expressed hope that suits against the United States would lead to meaningful government redress.<sup>18</sup> Despite their doubts about federal sovereign immunity, both Cushing<sup>19</sup> and Jay<sup>20</sup> agreed it was not necessary to decide the question in *Chisholm*. The other justices did not comment on the federal analog to the state sovereign immunity issue before them. Although the hasty passage of the Eleventh Amendment reinstated state sovereign immunity,<sup>21</sup> federal sovereign immunity was unaffected by the amendment process.

The Court did not address the question of federal sovereign immunity until almost two decades later,<sup>22</sup> but early cases such as *Marbury v. Madison* seemed to establish that citizens could seek redress against the government in federal courts without congressional approval.<sup>23</sup> The defendant in *Marbury* was James Madison in his role as Secretary of State. The plaintiff, William Marbury, felt himself injured by Madison’s official actions as a federal executive officer. In resolving their dispute, the Court reasoned through a federal sovereign immunity-type question: “[i]f he [Marbury] has a right, and that right has been violated, do the laws of his country afford him a remedy?”<sup>24</sup> After noting that “[i]n Great Britain the king himself is sued in the respectful form of a petition, and he never fails to comply with the judgment of his court,”<sup>25</sup> and quoting repeatedly from Blackstone’s Commentaries about the propriety of redress for all legal wrongs, the Court held that Madison’s role as government actor did not prevent

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17. *Id.* at 478 (Jay, C.J.).

18. *Id.* Chief Justice Jay opined: “I wish the State of society was so far improved, and the science of Government advanced to such a degree of perfection, as that the whole nation could in the peaceable course of law, be compelled to do justice, and be sued by individual citizens.” *Id.*

19. *See id.* at 469 (Cushing, J.).

20. *Id.* at 478 (Jay, C.J.).

21. U.S. CONST. amend. XI.

22. *Cohens v. Virginia*, 19 U.S. (1 Wheat.) 264 (1821).

23. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803).

24. *Id.* at 162.

25. *Id.* at 163.

suit.<sup>26</sup> When read as a sovereign immunity case—rather than merely a case about the constitutionality of judicial review—the Court’s famous words take on additional meaning: “[t]he government of the United States has been emphatically termed a government of laws, and not of men. It will certainly cease to deserve this high appellation, if the laws furnish no remedy for the violation of a vested legal right.”<sup>27</sup> Despite an absence of congressional authorization, the Court allowed the case against *Marbury* to proceed.<sup>28</sup>

Almost twenty years later, and without any intervening on-the-record discussion, the Court issued this statement: “The universally received opinion is, [sic] that no suit can be commenced or prosecuted against the United States . . . [because] the Judiciary Act does not authorize such suits.”<sup>29</sup> Apparently, between 1803 and 1821, the Court had made up its mind about federal sovereign immunity—in a way contrary to *Marbury*. The Court’s opinion in *Cohens v. Virginia* does not cite to any case (not even to the Justices’ discussions in *Chisholm*), statute, or constitutional provision as a source for an American federal sovereign immunity. The Court does not even discuss the doctrine’s origin. Rather, the Court merely asserts it, virtually *ex nihilo*, as a sort of default legal truism. It does the same for each of its subsequent nineteenth-century iterations of the doctrine.<sup>30</sup>

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26. *Id.* at 166.

27. *Marbury*, 5 U.S. 137 at 163. The Court’s reasoning on this issue was ultimately more nuanced than across-the-board government immunity waiver. The Court indicated that some actions by federal officials would be “examinable” but others would not, an issue determinable by examining conferred rights of discretion. *See id.* at 166. If, by the Constitution or by statute a government official is given discretion to perform acts, those acts are not reviewable by the courts. *See id.* Moreover, the Court stated:

[W]here the heads of departments are the political or confidential agents of the executive, merely to execute the will of the president, or rather to act in cases in which the executive possesses a constitutional or legal discretion, nothing can be more perfectly clear than that their acts are only politically examinable.

*Id.* The Court added, “[b]ut where a specific duty is assigned by law, and individual rights depend upon the performance of that duty, it seems equally clear that the individual who considers himself injured, has a right to resort to the laws of his country for a remedy.” *Id.*

28. *Id.* at 167.

29. *Cohens v. Virginia*, 19 U.S. 264, 410 (1821).

30. *See United States v. Lee*, 106 U.S. 196, 205 (1882) (“There is vested in no officer or body the authority to consent that the state shall be sued except in the law-making power, which may give such consent on the terms it may choose

The 1821 *Cohens* decision marked a second turn in the Court's jurisprudence. In addition to assuming that federal sovereign immunity exists as a protective doctrine, the Court also identified Congress as the sole authorized branch of government capable of waiving immunity. After noting that "no suit can be commenced . . . against the United States," the Court pointed out that "the judiciary act [presumably, the Judiciary Act of 1789] does not authorize such suits."<sup>31</sup> The Court did not discuss its assumption that Congress could waive the immunity, nor does it cite to authority for that principle. Rather, it assumed that whatever federal sovereign immunity would exist in a post-monarchical America, Congress would control it.

Once the Court decided federal immunity existed and that only Congress could waive it, the Court never wavered. It repeatedly asserted the doctrine of federal sovereign immunity throughout the nineteenth century, but those assertions were never accompanied by any explanation of the source of the doctrine or by supporting legal reasoning.<sup>32</sup>

When the Court finally issued an opinion addressing the origins of federal sovereign immunity and the arguments for its place in American jurisprudence, it was 1882, and the doctrine was, by then, well established as legal precedent.<sup>33</sup> In *U.S. v. Lee*, the Court nevertheless pointed out the poor fit between federal sovereign immunity and the United States' constitutional structure.<sup>34</sup> The Court further discussed—and

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to impose."); *The Davis*, 77 U.S. (1 Wall.) 15, 15 (1869) ("[The United States] cannot be subjected to legal proceedings at law or in equity without their consent, and that whoever institutes such proceedings must bring his case within the authority of some act of Congress."); *The Siren*, 74 U.S. (1 Wall.) 152, 154 (1868) ("[T]he United States . . . cannot be subjected to legal proceedings at law or in equity without their consent; and whoever institutes such proceedings must bring his case within the authority of some act of Congress."); *United States v. McLemore*, 45 U.S. (1 How.) 286, 288 (1846) ("[T]he government is not liable to be sued, except with its own consent, given by law"); *United States v. Clarke*, 33 U.S. (1 Pet.) 436, 443 (1834) ("As the United States are not suable of common right, the party who institutes such suit must bring his case within the authority of some act of congress, or the court cannot exercise jurisdiction over it."); *Cohens* 19 U.S. (1 Wheat.) at 410 ("The universally received opinion is, [sic] that no suit can be commenced or prosecuted against the United States; that the judiciary act does not authorize such suits.").

31. *Cohens*, 19 U.S. at 410.

32. See cases cited *supra* note 30.

33. *Lee*, 106 U.S. 196.

34. *Id.* at 208 ("But little weight can be given to the decisions of the English

rejected—a number of reasons for the doctrine, including the absurdity<sup>35</sup> and denigration<sup>36</sup> of requiring a sovereign to appear in its own court, and the potential for interference with the actions of a “supreme executive power” by individual citizens and the judicial branch.<sup>37</sup> The Court noted that “the principle [of federal sovereign immunity] has never been discussed or the reasons for it given.”<sup>38</sup> Despite this disapprobation and doubt, the Court nevertheless affirmed the doctrine on the grounds that it had “always been treated as an established doctrine,” citing to an 1834 Supreme Court opinion for authority.<sup>39</sup> The Court yielded to court precedent, and an unreasoned principle maintained its position in American jurisprudence.

*Lee* marks a brief detour in the history of federal sovereign immunity jurisprudence. The Court openly questioned the rationale for the doctrine in a way that it never had and never has since. But *Lee* is important, not because it questioned the rationale for federal sovereign immunity, but because, *despite* questioning the doctrine, the Court nevertheless affirmed the doctrine.<sup>40</sup> Thus, even at its most skeptical, the Court held the doctrine of federal sovereign immunity to be so fundamental that, despite its deep concerns, the doctrine sustained the viability of the principle.

Throughout history, the court treatment of sovereign immunity makes clear that the United States Supreme Court is the real father of modern-day federal sovereign immunity jurisprudence.<sup>41</sup> The Court articulated the notion of federal sovereign immunity. It then enunciated its exclusive reliance upon Congress for waiver (hereinafter “exclusive congressional waiver”), and reaffirmed this idea until the

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courts on this branch of the subject [national sovereign immunity], for [a] reason . . . found in the vast difference in the essential character of the two governments as regards the source and the depositaries of power. . . . Under our system the people, who are there called subjects, are the sovereign.”)

35. *Id.* at 206.

36. *Id.*

37. *Id.* (quoting *Briggs v. The Lights Boats*, 93 Mass. (1 Allen) 157, 162–63 (1865)).

38. *Id.*

39. *Lee*, 106 U.S. at 207.

40. *Id.*

41. For Justice Stevens’s discussion of the Court’s role in the creation of the federal sovereign immunity doctrine, see Stevens, *supra* note 8, at 1123–24.

other branches of government and the people adopted it too.

Today, federal sovereign immunity is a well-entrenched doctrine.<sup>42</sup> Although criticisms of its constitutionality abound,<sup>43</sup> a central feature of the doctrine—exclusive congressional waiver—has received no criticism. Few scholars have addressed it, and those who have expressed only partial defenses of its application.<sup>44</sup> These defenses cannot explain the application of exclusive congressional waiver to the entire current sovereign immunity landscape.

### *B. The Current Landscape*

Although Congress waited “[t]hree quarters of a century . . . after the ratification of the Constitution before . . . [enacting] the first significant grant” of sovereign immunity waiver,<sup>45</sup> after it did, it began to demonstrate an increased interest in legislating waiver laws.<sup>46</sup> Rather than waiving sovereign immunity once and for all—a total withdrawal of sovereign immunity’s “blanket exemption for the

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42. Susan Randall, *Sovereign Immunity and the Uses of History*, 81 NEB L. REV. 1, 6 (2002) (“Time and tradition have, of course, embedded the mistake of sovereign immunity in our legal culture.”).

43. See, e.g., Nagle, *supra* note 5, at 775 n.24 (noting that “[n]o scholar, so far as can be ascertained, has had a good word for sovereign immunity for many years”) (quoting Roger C. Cramton, *Nonstatutory Review of Federal Administrative Action: The Need for of Sovereign Immunity, Subject Matter Jurisdiction, and Parties Defendant*, 68 MICH. L. REV. 389, 392 (1970)); *id.* (stating that “nearly every commentator who considers the subject vigorously asserts that the doctrine of sovereign immunity must go”) (quoting KENNETH CULP DAVIS, *ADMINISTRATIVE LAW TREATISE* § 25.01, at 435–36 (1958)); Menashi, *supra* note 4 at 1138 (“[T]he American doctrine of sovereign immunity is indefensible upon both theoretical and pragmatic grounds. . . .”) (quoting CLYDE JACOBS, *THE ELEVENTH AMENDMENT AND SOVEREIGN IMMUNITY* 160 (1972)); Sisk, *supra* note 4, at 525 (“From the founding of our nation, the mantle of sovereign immunity has rested uneasily on a government designed to be limited in powers and understood to draw its authority from the people.”); Chemerinsky, *supra* note 1, at 1201 (“Sovereign immunity is an anachronistic concept, derived from long-discredited royal prerogatives, and . . . it is inconsistent with basic principles of the American legal system.”).

44. See *infra* Part I.C.

45. Sisk, *supra* note 4, at 530. The first waiver of sovereign immunity created limited liability for the federal government in a newly created Court of Claims. *Id.* at 530–31.

46. See, e.g., *Federal Housing Administration v. Burr*, 309 U.S. 242, 245 (1940); Gregory C. Sisk, *The Inevitability of Federal Sovereign Immunity*, 55 VILL. L. REV. 899, 922–23 (2010); Sisk, *supra* note 4, at 517–18; Floyd D. Shimomura, *The History of Claims Against the United States: The Evolution from A Legislative Toward A Judicial Model of Payment*, 45 LA. L. REV. 625, 690–91 (1985).

government”<sup>47</sup>—Congress has enacted various statutes waiving sovereign immunity for particular kinds of suits. The resulting sovereign immunity regime has been praised as a “broad tapestry of authorized judicial actions against the federal government”<sup>48</sup> and criticized as “a jerry-built structure, a patchwork, a doctrinal stew.”<sup>49</sup>

The heterogeneous nature of the current state of congressional waiver is illustrated by three of Congress’s most important statutory waiver creations: (1) the U.S. Court of Claims<sup>50</sup> and the Tucker Act<sup>51</sup>; (2) the Federal Tort Claims Act (FTCA)<sup>52</sup>; and (3) the Administrative Procedure Act (APA).<sup>53</sup> Congress created the U.S. Court of Claims in 1855 to permit the court to investigate and advise contract claims brought against the federal government.<sup>54</sup> But in 1863, Congress amended this organic act to give the court binding authority to resolve claims brought before it.<sup>55</sup> In 1887, the Tucker Act expanded the Court of Claims’s jurisdiction to hear constitutional and other non-tort claims for money damages in the U.S. Court of Claims.<sup>56</sup> Until the mid-twentieth century, the Tucker Act and the Court of Claims comprised the primary avenue for judicial redress against the federal government.

In the late 1940s, Congress passed two additional statutes—the FTCA and the APA—which soon became bulwarks of government immunity waiver.<sup>57</sup> The FTCA grew

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47. Sisk, *supra* note 4, at 538.

48. Gregory C. Sisk, *The Tapestry Unravels: Statutory Waivers of Sovereign Immunity and Money Claims Against the United States*, 71 GEO. WASH. L. REV. 602–03 (2003).

49. PETER H. SCHUCK, *SUING GOVERNMENT* 51 (1983).

50. Act of Feb. 24, 1855, ch. 122, 10 Stat. 612, 612 (codified as amended at 28 U.S.C. § 1491(a)(1)) (stating the Court of Claims “shall hear and determine all claims founded upon any law of Congress, . . . any regulation of an executive department, or . . . any contract, express or implied, with the government of the United States”).

51. Tucker Act of Mar. 3, 1887, ch. 359, 24 Stat. 505, 505 (codified as amended in scattered sections of 28 U.S.C. § 1491).

52. Federal Tort Claim Act, ch. 646, 62 Stat. 982, 983–85 (1948) (codified as amended at 28 U.S.C. § 1346(a)(2)).

53. Administrative Procedure Act, ch. 324, 60 Stat. 237 (1946) (codified as amended at 5 U.S.C. § 551).

54. *See* 10 Stat. 612.

55. Act of Mar. 3, 1863, ch. 92, 12 Stat. 765, 768 (amending 10 Stat. 612).

56. *See* 24 Stat. 505.

57. Sisk, *supra* note 48, at 603.

out of a growing congressional sentiment that “the Government should assume the obligation to pay for damages for the misfeasance of employees in carrying out its work.”<sup>58</sup> When an army plane crashed into the Empire State Building on July 28, 1945, engulfing two floors in flames, killing ten, and injuring others, Congress quickly acted to pass legislation that would allow suit against the government for these damages.<sup>59</sup> The FTCA waived immunity for most tort suits brought against the federal government under state law, and it was backdated to allow for claims accrued in 1945 (including the Empire State Building crash).<sup>60</sup>

Like the FTCA, the APA was enacted in 1946, but unlike the FTCA, it was codified without a clear sovereign immunity waiver. As originally enacted, the APA provided for suit against the government to “any person suffering legal wrong because of any agency action, or adversely affected or aggrieved by such action within the meaning of any relevant statute,”<sup>61</sup> but without any explicit waiver of sovereign immunity. Thus, courts were left to decide for themselves if Congress had intended to waive immunity for claims brought for equitable relief against the government. They did so inconsistently and with confusion.<sup>62</sup> Accordingly, Congress enacted an amended version of 5 U.S.C. § 702, this time including an explicit waiver of sovereign immunity:

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58. Dalehite v. United States, 346 U.S. 15, 24 (1953).

59. See Sisk, *supra* note 4, at 535–36.

60. Federal Tort Claims Act, ch. 753, 60 Stat. 842 (1946) (codified as amended in scattered sections of 28 U.S.C. § 2671).

61. Administrative Procedure Act, ch. 324, 60 Stat. 237, 243 (1946) (codified as amended at 5 USC § 702).

62. See, e.g., Schlafly v. Volpe, 495 F.2d 273, 282 (7th Cir. 1974) (stating that while the APA, alone may not represent a waiver of sovereign immunity, the passage of certain statutes qualify consent by the sovereign to be sued); Knox Hill Tenants Council v. Washington, 448 F.2d 1045, 1058 (D.C. Cir. 1971) (holding that district court erred in negating its own jurisdiction by reason of sovereign immunity); Littell v. Morton, 445 F.2d 1207, 1212 (4th Cir. 1971) (holding that APA does not constitute a waiver of sovereign immunity); Penn v. Schlesinger, 490 F.2d 700, 703 (5th Cir. 1974), *rev'd en banc*, 497 F.2d 970 (5th Cir. 1974) (holding that 42 U.S.C. § 1981 does not constitute a waiver because it “contains no *explicit* waiver of sovereign immunity by the federal government.”) (emphasis added); Am. Fed’n of Gov’t Emps. v. Callaway, 398 F. Supp. 176, 191 (N.D. Ala. 1975) (stating that waiver applies in suits where “the plaintiff seeks injunctive relief alone.”). See also H.R. REP. No. 94-1656, at 6 (1976) (discussing these cases and the difficulty courts had discerning the applicability of sovereign immunity to actions for equitable relief against the government).

An action in a court of the United States seeking relief other than money damages and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority shall not be dismissed nor relief therein be denied on the ground that it is against the United States or that the United States is an indispensable party.<sup>63</sup>

This provision supplies the waiver necessary for actions brought under the APA. The Supreme Court has further held that the section 702 waiver of sovereign immunity applies to all actions for equitable relief against the federal government, including constitutional claims.<sup>64</sup>

Together, the Tucker Act, the FTCA, and the APA comprise three of Congress's most important waivers of sovereign immunity. Although under these three statutes individuals can bring suits against the government for money damages arising from contract or tort or for equitable relief, limitations and exceptions cabin each waiver.<sup>65</sup> Additionally, Congress has enacted more than ten other major legislative waivers, each with its own exceptions and limitations.<sup>66</sup> Whatever the merits of these waivers, it is clear that Congress has believed the Court when it said Congress could act to waive immunity. And waive it has.

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63. Act of Oct. 21, 1976, Pub. L. No. 94-574, 90 Stat. 2721, 2721 (codified as amended at 5 U.S.C. § 702).

64. *Califano v. Sanders*, 430 U.S. 99, 105 (1977).

65. *E.g.*, Tucker Act of Mar. 3, 1887, ch. 359, 24 Stat. 505, 505 (codified as amended at 28 U.S.C. § 1500) (stating that the "United States Court of Federal Claims shall not have jurisdiction of any claim for or in respect to which the plaintiff or his assignee has pending in any other court any suit or process against the United States or any person who, at the time when the cause of action alleged in such suit or process arose, was, in respect thereto, acting or professing to act, directly or indirectly under the authority of the United States"). The FTCA does not allow suits against the United States for "[a]ny claim arising out of assault, battery, false imprisonment, false arrest, . . . libel, slander, misrepresentation, deceit, or interference with contract rights." 28 U.S.C. § 2680 (2000). The APA only allows suits for which there is "no other adequate remedy in a court." 5 U.S.C. § 704 (2006).

66. These include, among others, the Privacy Act, Title VII, Title IX, the Freedom of Information Act, the Americans with Disabilities Act, the Age Discrimination Act, the Family and Medical Leave Act, the Ethics in Government Act, and the Occupational Safety and Health Act. See Floyd D. Shimomura, *The History of Claims Against the United States: The Evolution from A Legislative Toward A Judicial Model of Payment*, 45 LA. L. REV. 625 (1985).



A review of administrative agency materials reveals that executive practice reinforces this notion of exclusive congressional waiver. Administrative documents make clear that executive agencies have refrained from acting when they believe doing so would expand waiver without congressional approval. For example, in a response to comments on a proposed regulation regarding the subpoena powers of the Provider Reimbursement Review Board (the Board), an administrative court for the Center for Medicare and Medicaid Services (CMS) asserted that it could not authorize the Board to subpoena documents from government agencies because Congress had not expressly waived immunity to that effect.<sup>67</sup> CMS explained:

[W]e believe there is no statutory basis for the Board to subpoena HHS and other Federal agencies. The United States and its agencies, as sovereign, are immune from suit, except to the extent to which they consent to be sued. . . . There is no indication in the language of sections 205(d) and 205(e) of the Act, or in the legislative history of those sections, that the Congress intended to effect a waiver of sovereign immunity. . . . Because only the Congress, and not Federal agencies, has the authority to waive sovereign immunity, (see *United States v. N.Y. Rayon Importing Co.*, 329 U.S. 654, 660 (1947)), we would be unable to subject HHS and other agencies to the Board's subpoena authority even if we were otherwise so inclined.<sup>68</sup>

To make absolutely clear that it would not act in a way that would appear to waive immunity without congressional authorization, CMS then opted to add clarifying language to the proposed regulation “in order to prevent any implication that the Board may issue a subpoena to CMS or to the Secretary.”<sup>69</sup>

Other administrative documents reveal similar and widespread executive deference to congressional waiver. Federal agencies regularly assert congressional failure to waive immunity as a reason not to promulgate certain regulations or take actions, including those requested or

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67. Medicare Program; Provider Reimbursement Determinations and Appeals, 73 Fed. Reg. 30190, 30223 (May 23, 2008) (to be codified at 42 C.F.R. pts. 405, 413, 417).

68. *Id.*

69. *Id.*

suggested by the public. For instance, agencies have asserted Congress's failure to waive immunity as a reason they could not participate in "court-annexed" arbitration proceedings<sup>70</sup>; settle claims outside of court<sup>71</sup>; pay damages for failure to comply with legal process<sup>72</sup>; approve state programs that would require vehicles operated on federal installations to adhere to state vehicle regulations<sup>73</sup>; pay interest for back pay awarded in employment discrimination cases<sup>74</sup> or other judgments against the government<sup>75</sup>; and approve state regulations that would impose particular environmental compliance burdens on military munitions sites.<sup>76</sup> These refusals are unaccompanied by other supporting rationales; rather, the agencies rely solely on Congress's immunity decisions to justify their own inaction.<sup>77</sup>

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70. Policy Statements; Local Court Rules Requiring Mandatory Arbitration, 50 Fed. Reg. 40524, 40524 (Oct. 4, 1985) (to be codified at 28 C.F.R. pt. 50).

71. *Id.*

72. *See, e.g.*, Processing Garnishment Orders for Child Support and Alimony and Commercial Garnishment of Federal Employees' Pay, 62 Fed. Reg. 31763 (June 11, 1997) (to be codified at 5 C.F.R. pt. 581, 582); Garnishment of Postal Employee Salaries, 59 Fed. Reg. 45625 (Sept. 2, 1994) (to be codified at 39 C.F.R. pt. 491); Garnishment of Postal Employee Salaries, 63 Fed. Reg. 67403, (Dec. 7, 1998) (to be codified at 39 C.F.R. pt. 491).

73. *See, e.g.*, Approval and Promulgation of Implementation Plans; Nevada; Vehicle Inspection and Maintenance Program, 73 Fed. Reg. 55466 (Sept. 25, 2008) (to be codified at 40 C.F.R. pt. 52); Approval of Implementation Plans and Designation of Areas for Air Quality Planning Purposes; Nevada, 73 Fed. Reg. 1175 (Jan. 7, 2008) (to be codified 40 C.F.R. pt. 52, pt. 81); 74 Fed. Reg. 3975 (Jan. 22, 2009) (to be codified at 40 C.F.R. pt. 52) (same result); Privacy and Disclosure of Official Records and Information, 72 Fed. Reg. 20935, 20937 (Apr. 27, 2007) (to be codified at 20 C.F.R. pt. 401); Approval of Implementation Plans and Designation of Areas for Air Quality Planning Purposes; Nevada, 73 Fed. Reg. 38124 (Jul. 3, 2008) (to be codified at 40 C.F.R. pt. 52, pt. 81); Approval of Air Quality Implementation Plans; Delaware; Enhanced Motor Vehicle Inspection and Maintenance, 64 Fed. Reg. 52657 (Sept. 30, 1999) (to be codified at 40 C.F.R. pt. 52); Approval and Promulgation of Implementation Plans; State of Missouri, 68 Fed. Reg. 25414 (May 12, 2003) (to be codified 40 C.F.R. pt. 52).

74. *See, e.g.*, Federal Sector Equal Employment Opportunity, 57 Fed. Reg. 12634 (Apr. 10, 1992) (to be codified 29 C.F.R. pt. 1614); Administrative Practice and Procedure, 54 Fed. Reg. 24131, 24135 (Jun. 6, 1989) (to be codified 4 C.F.R. pts. 27, 28).

75. Obtaining Payments From the Judgment Fund and Under Private Relief Bills, 71 Fed. Reg. 60848 (Oct. 17, 2006) (to be codified at 31 C.F.R. pt. 256).

76. Military Munitions Rule: Hazardous Waste Identification and Management; Explosives Emergencies; Redefinition of On-Site, 60 Fed. Reg. 56468 (Nov. 8, 1995) (to be codified at 40 C.F.R. pts. 260–265, 270).

77. *See, e.g.*, Medicare Program; Provider Reimbursement Determinations and Appeals, 73 Fed. Reg. 30190, 30223 (May 23, 2008) (to be codified at 42

And, as discussed above, the Supreme Court still insists that Congress has the exclusive waiver authority.<sup>78</sup> Exclusive congressional waiver is the basis for the judicial doctrine that without an express statutory waiver of federal sovereign immunity, suits against the government must be dismissed. Exclusive congressional waiver also undergirds the Court's sovereign immunity interpretive canon, which directs courts to interpret strictly any statutory waiver of immunity in favor of the Government.<sup>79</sup> This interpretive canon is based on the judicial concern that Congress, not the courts, has authority for waiver.<sup>80</sup> In preserving the canon, the Court has preserved reliance on exclusive congressional waiver.

### C. *The Scholarly Defense*

Like the federal branches, legal academics, too, take for granted that the waiver authority resides with Congress.<sup>81</sup> Some state it quite strongly: “[Y]ou cannot sue the United States, for any reason or any form of relief, unless Congress

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C.F.R. pts. 405, 413, 417) (“Because only the Congress, and not Federal agencies, has the authority to waive sovereign immunity, . . . we would be unable to subject HHS and other agencies to the Board’s subpoena authority even if we were otherwise so inclined.” citing *United States v. N.Y. Rayon Importing Co.*, 329 U.S. 654, 660 (1947)).

78. See *supra* Part I.A.

79. See, e.g., *Fed. Aviation Admin. v. Cooper*, 132 S. Ct. 1441, 1448 (2012) (“We have said on many occasions that a waiver of sovereign immunity must be ‘unequivocally expressed’ in statutory text.” (quoting *Lane v. Pena*, 518 U.S. 187, 192 (1996))); *FDIC v. Meyer*, 510 U.S. 471, 474 (1994) (parsing statutory text to determine if sovereign immunity is waived); *United States v. Nordic Village, Inc.*, 503 U.S. 30, 39 (1992) (“Since Congress has not empowered a bankruptcy court to order a recovery of money from the United States, the judgment of the Court of Appeals must be reversed.”); *Irwin v. Dep’t of Veterans Affairs*, 498 U.S. 89, 95–96 (1990) (noting that Congress must create sovereign immunity waivers, which the Court then interprets); *United States v. Mitchell*, 445 U.S. 535, 538 (1980) (“In the absence of clear congressional consent [to suit], then, ‘there is no jurisdiction in the Court of Claims more than in any other court to entertain suits against the United States.’” (quoting *United States v. Sherwood*, 312 U.S. 584, 587–88 (1941))).

80. *United States v. King*, 395 U.S. 1, 4 (1969).

81. See, e.g., SISK, *supra* note 11, at 341 n.5 (“Such consent can be had only by formal legislative action.”); Vicki C. Jackson, *Suing the Federal Government: Sovereignty, Immunity, and Judicial Independence*, 35 GEO. WASH. INT’L. L. REV. 521, 570 (2003) (“What we call the ‘sovereign immunity’ of the United States in many respects could be described as a particularized elaboration of Congress’ control over the lower court’s jurisdiction.”); ALFRED C. AMAN, JR., & WILLIAM T. MAYON, *ADMINISTRATIVE LAW* 539 (2d ed. 2001) (“Sovereign immunity may be waived, but only by legislative act.”); Jaffe, *supra* note 12, at 2 (“If there was any successor to the King qua sovereign it was the legislature.”).

has *expressly* consented by statute to be sued.”<sup>82</sup> Or “the doctrine of federal sovereign immunity stands as a bar to the lawsuit unless and until Congress chooses to lift that bar and then only to the extent or degree that Congress chooses to do so.”<sup>83</sup> In fact, no scholars have questioned the validity of exclusive congressional waiver.

A few scholars have attempted to present a merited defense of the doctrine, however. The preeminent piece on exclusive congressional waiver is Harold Krent’s landmark *Reconceptualizing Sovereign Immunity*,<sup>84</sup> which explores the justifications for Congress’s primary role in the sovereign immunity waiver. Krent’s piece couches its argument as a defense of sovereign immunity, but it is at heart a defense of exclusive congressional waiver. He ably argues that because Congress is politically accountable both to the public and to the President (through the veto power), it is uniquely qualified to “determine when to rely on the political process to safeguard majoritarian policy.”<sup>85</sup> Krent worries that a legislative branch powerless to decide when to waive immunity will be bound inextricably to the policy preferences of judges, or will be afraid to act for fear of committing judicially cognizable torts.<sup>86</sup> Further, that a Congress unable to decide the immunity question might also be bound by the “dead hand of Congresses past,” whose decisions regarding contracts and other government obligations might “prevent[] contemporary Congresses from pursuing current concerns as effectively.”<sup>87</sup> Krent notes that the Executive also benefits from Congress’s waiver authority: “[s]overeign immunity, therefore, allows Congress to immunize the executive branch from any judicial review when the costs of such review are too great.”<sup>88</sup>

But Krent notes that these justifications for exclusive congressional waiver are more persuasive in the tort<sup>89</sup> and

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82. LAWSON, *supra* note 11, at 800.

83. SISK, *supra* note 11.

84. Harold J. Krent, *Reconceptualizing Sovereign Immunity*, 45 VAND. L. REV. 1529 (1992).

85. *Id.* at 1532.

86. *Id.* at 1530–31.

87. *Id.* at 1530.

88. *Id.* at 1536.

89. *Id.* at 1541.

contract<sup>90</sup> law. His arguments in favor of congressional waiver are developed exclusively in these common law areas. He intentionally omits from his defense of congressional waiver the issue of constitutional violations.<sup>91</sup> As Krent writes, “Indeed, there is presumably less justification for judicial review of policymaking in the tort and contract contexts than in the constitutional setting.”<sup>92</sup> Thus, Krent’s arguments in support of exclusive congressional waiver rivet to only a portion of current sovereign immunity practice.

Just as Krent cabins his arguments to areas in which exclusive congressional waiver makes most sense, Professors Paul Figley and Jay Tidmarsh also offer a limited defense of exclusive congressional waiver.<sup>93</sup> Although Figley and Tidmarsh couch their argument broadly—they claim to have located a constitutional source for sovereign immunity in the Appropriations Clause of the Constitution—their detailed historical justification of exclusive congressional waiver focuses solely on immunity against damages.<sup>94</sup> Tracing the history of the appropriations power in England, they argue that the Article I Section 9 Clause 7 granted legislative control over money as a mirror of parliamentary control over the purse.<sup>95</sup> Figley and Tidmarsh state their case strongly: “the history of the Appropriations Clause reflects, from the outset, that its meaning was never disputed as a matter of principle and its import was clear. Absent Congressional assent, the Clause precluded suits against the federal government for damages.”<sup>96</sup> They do not attempt to present a constitutional source—or historical justification—for Congress’s control of the waiver authority in cases against the government for equitable relief.<sup>97</sup>

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90. *Id.* at 1560.

91. *Id.* at 1535 (“There is no need here to replay the ongoing debate over a theory supporting judicial review of constitutional questions. Suffice it to say that the justification for judicial review is at its nadir when judges supplant the policymaking of the majority.”).

92. *Id.*

93. See Paul F. Figley & Jay Tidmarsh, *The Appropriations Power and Sovereign Immunity*, 107 MICH. L. REV. 1207 (2009).

94. See *id.* at 1209.

95. See *id.* at 1258.

96. *Id.* at 1264.

97. Figley and Tidmarsh refer to “suits brought against the United States for damages” as “the central category” of “eight distinct categories of immunity.” *Id.* at 1209. These categories are:

Unfortunately, these scholars' thoughtful defenses of exclusive congressional waiver in cases involving torts, contract, and damages do not account for the breadth of the sovereign immunity doctrine described in Part I.A above. Recall that each branch of the government accords to Congress the exclusive right to waive immunity—even in cases that are *not* tort, contract, or damages. For instance, in the APA, Congress has waived immunity for cases expressly not involving money damages.<sup>98</sup> The executive has declined to subpoena documents from the government, citing a lack of congressional waiver for injunctions of that kind.<sup>99</sup> And the Court has refused to find an exception to a statute of limitations, solely on the basis that doing otherwise would override congressional judgment about what equity requires<sup>100</sup>—*equity*, a quintessential element of judicial prerogative. Legal academia has yet to provide a coherent justification for these expressions of exclusive congressional waiver. Nor can it. As this Article will argue, the Constitution does not afford Congress a true exclusive waiver power.

## II. TWO-DIMENSIONAL IMMUNITY: WAIVER BY CONGRESS, WAIVER BY COURT

The argument that Congress *must* share the waiver authority is a simple one. The Constitution requires that the

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(1) sovereign immunity for the United States against suits seeking damages; (2) sovereign immunity for the United States against suits seeking injunctive relief; (3) sovereign immunity for federal officials against suits seeking damages; (4) sovereign immunity for federal officials against suits seeking injunctive relief; (5) sovereign immunity for a state against suits seeking damages; (6) sovereign immunity for a state against suits seeking injunctive relief; (7) sovereign immunity for state officials against suits seeking damages; and (8) sovereign immunity for state officials against suits seeking injunctive relief. In categories 3, 4, 7, and 8, a further division can be made between official-capacity suits and individual-capacity suits.

*Id.* at 1209 n.7. This Article assumes that a coherent account of the federal sovereign immunity doctrine must address both categories 1 and 2, at least. *Id.* at 1209.

98. 5 U.S.C. § 702 (2012).

99. *See* Medicare Program; Provider Reimbursement Determinations and Appeals, 73 Fed. Reg. 30190, 30223 (May 23, 2008) (to be codified at 42 C.F.R. pts. 405, 413, 417).

100. *United States v. Dalm*, 494 U.S. 596, 610 (1990).

Supreme Court serve as a check against the other branches' unconstitutional behavior.<sup>101</sup> Therefore, the Supreme Court cannot defer to Congress the exclusive ability to waive immunity. The Court must, at a minimum, retain the right to waive immunity in cases in which plaintiff(s) claim the government has acted unconstitutionally. Accordingly, the waiver power is one that must be shared by at least Congress and the Court.

*A. The Court and the Constitution*

The Court's power to review the constitutionality of other branch actions, even without congressional approval, is rooted in the Constitution. The debate surrounding this proposition is too extensive to repeat here. Suffice it to say, it is as old as *Marbury v. Madison*, in which the Court asserted its authority to review the constitutionality of legislation.<sup>102</sup> The Court has likewise claimed a right to review executive action, perhaps most famously in *Youngstown Sheet and Tube Co.*<sup>103</sup>

Of course, court assertions of power are themselves invalid unless they stem from actual constitutional grants. Professors Richard Fallon and Daniel Meltzer have defended court review of constitutional questions on the basis of constitutional structure: "Constitutional remedies serve . . . to reinforce structural values, including those underlying the separation of powers and the rule of law."<sup>104</sup> Because the framers feared the possibility of arbitrary and tyrannical political branches, Fallon and Meltzer argue, they created the judiciary "to represent the people's continuing interest in the protection of long-term values."<sup>105</sup> According to Fallon and Meltzer, the Court serves as this check, not by remedying every individual violation, but by "ensur[ing] that government generally respects constitutional values."<sup>106</sup>

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101. See Richard H. Fallon, Jr. & Daniel J. Meltzer, *New Law, Non-Retroactivity, and Constitutional Remedies*, 104 HARV. L. REV. 1731, 1787–88 (1991) ("The Constitution thus contemplates a judicial 'check' on the political branches not merely to redress particular violations, but to ensure that government generally respects constitutional values . . .").

102. 5 U.S. 137 (1 Cranch), 162 (1803).

103. 343 U.S. 579 (1952).

104. Fallon & Meltzer, *supra* note 101, at 1787.

105. *Id.* at 1788.

106. *Id.*

The Court's role as final constitutional arbiter derives from its place in the constitutional system. Its determinations of constitutionality are unreviewable by any other branch and are, in fact, only remediable by the hugely cumbersome amendment process.<sup>107</sup> The Court has a peculiar responsibility to monitor governmental action accountability, and it has the power to do so.<sup>108</sup> The Constitution expressly authorizes the Court to hear "controversies to which the United States shall be a party."<sup>109</sup> While this clause is open to interpretation, it is certainly arguable that within the Court's irreducible minimum of constitutional jurisdiction is the ability to hear claims against the federal government.<sup>110</sup> This is particularly true where constitutional questions are at issue, given the Court's "judicial power" to hear "all cases, in law and equity, arising under this Constitution."<sup>111</sup>

As the final constitutional arbiter, the Court must be able to hear claims against the government, even if Congress does not want judicial review. Allowing Congress to remove from the Court the power to hear constitutional questions, including those against the federal government, would remove from the Court the power to fulfill its constitutional responsibility to support "this Constitution" as the "supreme law of the land."<sup>112</sup> That is something neither the Constitution nor the Court may allow Congress to do.

The Court's ability to hear constitutional claims in the absence of congressional approval is fairly well established. The Court's creation of *Bivens* actions is an example of the Court's use of this constitutional gatekeeping power.<sup>113</sup> After

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107. U.S. CONST. art. V.

108. U.S. CONST. art. III, § 2, cl. 1.

109. *Id.*

110. *See, e.g.,* Chisholm v. Georgia, 2 U.S. 419 (1 Dall.), 478 (1793) (Jay, C.J.).

111. U.S. CONST. art. III, § 2, cl. 1.

112. U.S. CONST. art. VI, cl. 2.

113. *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971). In *Bivens*, the Court held that a private citizen had a right to sue federal agents for damages when those agents had allegedly acted unconstitutionally, even though Congress had not authorized such a suit or remedy. *Id.* at 397. As the Court wrote,

it is well settled that where legal rights have been invaded, and a federal statute provides for a general right to sue for such invasion, federal courts may use any available remedy to make good the wrong done. The present case involves no special factors counseling hesitation in the absence of affirmative action by Congress.

*Id.* at 396 (quoting *Bell v. Hood*, 327 U.S. 678, 684 (1946)).



*Bivens*, an individual could file a claim for money damages against an individual officer, though only if there are not what the Court calls “special factors counseling hesitation in the absence of affirmative action by Congress,” and only if “Congress has [not] provided an alternative remedy which it explicitly declared to be a substitute for recovery directly under the Constitution and viewed as equally effective.”<sup>114</sup> *Bivens* counsels that courts hesitate to hear these constitutional money damages claims if Congress has acted, but *Bivens* actions themselves are authorized directly by the Court—not by Congress.<sup>115</sup>

Although *Bivens* actions are alleged against individual officers and not against the government itself—and therefore not a pure example of court-created sovereign immunity waiver—they exemplify the Court’s constitutionally conferred authority to independently authorize suits (1) despite the absence of congressional authorization if (2) constitutional challenges are raised.<sup>116</sup> The Court has resisted congressional attempts to divest the judiciary of jurisdiction to hear constitutional questions. For instance, in *Califano v. Sanders*, the Court found that it was uniquely qualified to hear constitutional questions, despite statutory review schemes that seemed to “effectively have closed the federal forum to the adjudication of colorable constitutional claims.”<sup>117</sup> The Court rejected a reading of the statute that would remove constitutional questions from its review because “access to the courts is essential to the decision of such questions.”<sup>118</sup> In other words, even if Congress wanted the Court to turn a blind eye to the constitutionality of a question, the Court would not. Constitutional review is its prerogative, and Congress (or, for that matter, the executive) lacks authority to amend or withdraw a delegation made by the people themselves.

Similarly, in *Larson v. Domestic and Foreign Commerce Corp.*, the Court expressly retained its authority to hear

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114. Michael A. Rosenhouse, Annotation, *Bivens Actions—United States Supreme Court Cases*, 22 A.L.R. Fed. 2d 159, § 2 (2007).

115. *Id.*

116. *See Bivens*, 403 U.S. 388 at 389.

117. *Califano v. Sanders*, 430 U.S. 99, 109 (1977).

118. *Id.*

constitutional claims against the government.<sup>119</sup> As the Court wrote, “[u]nder our constitutional system, certain rights are protected against governmental action and, if such rights are infringed by the actions of officers of the Government, it is proper that the courts have the power to grant relief against those actions.”<sup>120</sup>

Professor Walter Dellinger makes the point clearly: “[T]he failure of Congress to authorize suits against the Treasury may no more bar a judicially created remedy than the failure of Congress to create a cause of action against the officer barred the development of that particular remedy in *Bivens*.”<sup>121</sup> He explains that an often-cited justification for sovereign immunity—“there can be no legal right against the authority that makes the law upon which the right depends”—is inapposite.<sup>122</sup> Dellinger writes, “[I]n a constitutional case, the right involved does not ‘depend’ upon the government, but rather arises from the basic law which created and seeks to control that government.”<sup>123</sup>

Notably, the Court’s authority on constitutional text is greater than its authority on statutory or regulatory text. If Congress passes a law to mean X, and the Court interprets it to mean Y, then all that need happen to restore the law to its X meaning is for Congress to enact a new law (or an amendment) clarifying the law’s meaning as X. This new law may of course be subject to judicial review, but this scheme—as constitutionally envisioned—differs markedly from that involving constitutional texts. The same is true for cases involving regulations, although the subsequent clarification can either be adopted by Congress via statutory override or it can be promulgated by an Executive agency via the regulatory process.

For cases involving either statutory or regulatory questions, the Court’s interpretation can be overcome by subsequent branch action, without resort to popular involvement and the amendment process. The Constitution, then, creates a different relationship between the judiciary

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119. 337 U.S. 682, 704 (1949).

120. *Id.*

121. Walter E. Dellinger, *Of Rights and Remedies: The Constitution As a Sword*, 85 Harv. L. Rev. 1532, 1557 (1972).

122. *Id.*

123. *Id.*

and the Constitution than it does between the judiciary and statutes or regulations, regardless of the practical similarities among the tasks of interpreting each kind of text.

Thus, it becomes apparent—from constitutional structure, constitutional text, the Court’s own jurisprudence, and scholarship—that Courts have the authority to hear constitutional claims against the government, even without congressional approval. In fact, as discussed above, the Court itself articulates this right. But somehow, when it articulates the sovereign immunity doctrine, it ignores this reality and instead credits Congress with exclusive waiver power.

### *B. Sharing the Power*

The time has come for the Court to remedy its sovereign immunity rhetoric and, to some extent, its practice. While the Court may still look to Congress for the waiver authority in cases involving alleged statutory violations by or common law suits against the government, the Court should no longer spin the fiction that Congress is vested with the sole waiver authority. Rather, the Court should acknowledge its own inalienable power to waive immunity in cases in which plaintiffs have sued the federal government for constitutional violations. Importantly, the Court need not use its waiver authority in every case involving an alleged constitutional violation by the government. As Fallon and Meltzer argue, to serve as a meaningful constitutional check, the Court need only enforce general constitutional compliance, so the branches are on notice and are prepared for the possibility of judicial review: “[T]o keep the government generally within constitution bounds . . . does not depend on the provision of any single remedy, retroactive or prospective, but instead on the system of constitutional remedies as a whole.”<sup>124</sup> While selective waiver by the Court might prevent it from remedying every constitutional violation by the federal government,<sup>125</sup> selective waiver would allow the Court to weigh the factors that currently inform congressional waiver decisions—balancing the costs to the public of allowing litigation to proceed (e.g., court costs, attorneys’ fees, docket

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124. Fallon & Meltzer, *supra* note 101, at 1795.

125. This would underserve the first of the “two basic functions” of constitutional remedies, as described by Fallon and Meltzer: “to redress individual violations.” *Id.* at 1777.

load, the costs—either financial or effort—of any court-imposed remedies) with the costs to the plaintiff of preventing remedy to alleged injury. To that end, because the Court could make its waiver determinations on a case-by-case basis more effectively than Congress can, it might better be able to determine which cases are effective vehicles for monitoring government behavior and which are unnecessary or inadvisable to hear.

One might ask: But can the Court just up and change its sovereign immunity jurisprudence willy-nilly? Especially after almost two hundred years with this established legal doctrine? Although reasonable sounding, these questions misunderstand both the nature of the Court's relationship to the sovereign immunity doctrine and what changes a two-way sharing of the sovereign immunity would entail.

While it is true the Court had a primary role in the development of the sovereign immunity doctrine (as discussed in Part I), it is an overstatement to say that the Court *created* the doctrine. It is better to say the Court *enunciated* the doctrine. Because broad federal sovereign immunity is not an artifact of the Constitution, it is best justified as a background principle upon which the Constitution was formed. Constitutional background principles are by definition not explicit in the text of the Constitution; rather, they are unwritten tenets that, we assume, the Founders meant to inform our reading of the Constitution. Importantly, we rely upon the Supreme Court to articulate constitutional background principles.<sup>126</sup> Although the historical documents and logic the Court relies upon to suss out these principles are available to everyone, the Court is the one to enunciate—and fix—an authoritative account of the Founders' shared assumptions. When the Court must interpret the Constitution for a case before it, the Court may find that, although not codified, a pre-constitutional principle remains in force. In these cases, we may disagree with the

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126. See, e.g., *McCreary County, Kentucky v. Am. Civil Liberties Union of Kentucky*, 545 U.S. 844 (2005) (articulating the principle of religious neutrality as underlying the First Amendment based, in part, on intentions of "[t]he Framers and the citizens of their time"); *Neb. Press Ass'n v. Stuart*, 427 U.S. 539 (1976) (finding that the Framers did not intend for either the First or Sixth Amendments to be assigned priority over the other, despite the foreseeable tensions between freedom of the press and right to an impartial jury, and resolving the case upon that background principle).

Court's articulation of that principle, but we would be foolish to ignore the Court's reliance upon the principle.

Federal sovereign immunity is one such background principle. The Court has never located a constitutional provision for the doctrine. Instead, when it reaffirms the doctrine (as it has done repeatedly<sup>127</sup>), it cites only to its own precedent, which chains back to *United States v. Lee* and its reliance upon the early Court's (misguided) adoption of a doctrine "derived from the laws and practices of our English ancestors."<sup>128</sup> This reliance upon pre-constitutional history without a corresponding constitutional cite is strong evidence that the Court considers federal sovereign immunity an unwritten principle upon which the Founders agreed.

But the Supreme Court's role as background principle articulator does not allow the Court free rein to create any background principles it chooses. Rather, any Court-enunciated doctrine must comport with the Constitution, even if it comprises an underlay to the Constitution itself. An interpretive canon asserts that where a text contradicts the background on which that text was drafted, the express language of the text supersedes.<sup>129</sup> Accordingly, only textually consonant aspects of the underlay remain. Applying this canon to constitutional interpretation, it strains credulity to believe that the Constitution's express terms would not take precedence over pre-constitutional implied terms. To accept anything else would be to wrest the Constitution from

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127. See, e.g., *United States v. Navajo Nation*, 556 U.S. 287 (2009); *FDIC v. Meyer*, 510 U.S. 471 (1994); *United States v. Mitchell*, 445 U.S. 535 (1980); *United States v. Sherwood*, 312 U.S. 584, 586 (1941) (citing *United States v. Thompson*, 98 U.S. 486; *United States v. Lee*, 106 U.S. 196; *Kan. v. United States*, 204 U.S. 331; *Minn. v. United States*, 305 U.S. 382, 387; *Keifer & Keifer v. Reconstruction Fin. Corp.*, 306 U.S. 381, 388; *United States v. Shaw* 309 U.S. 495).

128. See *United States v. Lee*, 106 U.S. 196, 205 (1882). For an example of the Court's citation chain back to *Lee*, see, e.g., *United States v. Dep't of Energy v. Ohio*, 503 U.S. 607 (1992) ("[A]ny waiver of the National Government's sovereign immunity must be unequivocal, see *United States v. Mitchell*."); *United States v. Mitchell*, 445 U.S. 535 (1980) ("It is elementary that '[t]he United States, as sovereign, is immune from suit save as it consents to be sued . . . . *United States v. Sherwood*.'"); *United States v. Sherwood*, 312, U.S. 584, 586 (1941) (citing *United States v. Lee*, 106 U.S. 196) ("The United States, as sovereign, is immune from suit save as it consents to be sued . . . .").

129. *Radzanower v. Touche Ross & Co.*, 426 U.S. 148, 154 (1976); cf. *Hassan v. Colorado*, 870 F. Supp. 2d 1192, 1198–99 (D. Colo. 2012), *aff'd*, 495 F. App'x 947 (10th Cir. 2012), *cert. denied*, 133 S. Ct. 2769, 186 L. Ed. 2d 218 (U.S. 2013).

its most obvious meanings.

If this is true—that pre-constitutional background principles must necessarily be constitutionally consonant—then the Court’s current iteration of the federal sovereign immunity doctrine *is* unconstitutional, regardless of what the Court has said in the past. The current doctrine purports to vest in Congress exclusive waiver authority. That is, the Supreme Court has said that the Founders intended that Congress alone could decide whether the federal government’s actions could be subject to judicial review at the hand of the populace in all cases, at all times, no matter what the alleged injury or purported crime. No matter if the alleged grievance is a constitutional one. This version of the doctrine is unconstitutional because it violates the checks and balances embedded in the Constitution.

The Court not only can, but it *must* revise its articulation of federal sovereign immunity if the doctrine’s current form does not comply with the Constitution. The nature of discerning background principles is such that the Court may easily revise its previous understanding, with little more than a discussion of the evidence for its error and the correction. In articulating this provision of the doctrine of federal sovereign immunity waiver—that the Court retains waiver authority over cases involving claims of constitutional violations (what this Article calls “Court constitutional waiver”)—the Court would not be creating a new doctrine; rather, it would be ameliorating the doctrine, finally and at long last bringing it into constitutional compliance.

### III. THREE-DIMENSIONAL IMMUNITY: WAIVER FOR ALL BRANCHES

Recognizing that the sovereign immunity waiver power is necessarily shared by two of the federal branches—the legislative and the judiciary—raises the question: Why not the executive? A previously unconsidered but strong case exists for a waiver power that is shared by each branch of the federal government. In such a regime, each branch would hold a part of the waiver authority, subject to the roles and limitations imposed upon that branch by the Constitution’s separation of powers. This Part develops this triply-shared power and argues that it is this conception of sovereign immunity that is the most constitutionally consonant of all.

*A. A Proxy-Sovereign Government*

The argument that each branch of government shares in the federal immunity waiver authority begins with a recognition that, in the United States, it is the people—and not the government—who are sovereign. If one takes seriously the Federalist view that the Constitution contemplates sovereignty residing in the people,<sup>130</sup> then the federal government to which the Constitution gives form is merely a proxy—a holder and exerciser of derivative authority, subject to the constraints placed upon it by the authorizing sovereign.<sup>131</sup> Viewed in this way, the Constitution is a contract, designed to codify the terms on which the proxy sovereign will act in the place of the sovereign.<sup>132</sup>

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130. *Chisholm v. Georgia*, 2 U.S. 419, 454 (1793) (Wilson, J.)

To the Constitution of the United States the term SOVEREIGN, is totally unknown. There is but one place where it could have been used with propriety. But, even in that place it would not, perhaps, have comported with the delicacy of those, who ordained and established that Constitution. They might have announced themselves ‘SOVEREIGN’ people of the United States: But serenely conscious of the fact, they avoided the ostentatious declaration.

*Id.*; 10 ANNALS OF CONGRESS 128 (1800) (remarks of Sen. Pinckney) (“I suppose it will hardly yet be denied, that the people are the common fountain of authority to both the Federal and State Governments. . . .”); *see also* Chemerinsky, *supra* note 1, at 1214 (citing approvingly to Amar’s argument that “the first words of the Constitution, ‘We the People,’ . . . make the people sovereign”); Amar, *supra* note 1, at 1439 (arguing that the sovereignty of the people “informs every article of the Federalist Constitution” and that it is “no happenstance that the Federalists chose to introduce their work with words that ringingly proclaimed the primacy of that new understanding: ‘We the people of the United States . . . do ordain and establish this Constitution for the United States of America’”); *id.* at 1451–53 (“Nationalists and states’ rightists could offer complementary—indeed, virtually identical—accounts of how the sovereignty of the People enabled the Constitution to empower yet limit federal officers, to impose restrictions on state governments, and to separate and divide power within the federal government. On such questions, it did not much matter which People were sovereign, but only that ‘the People’ were and that governments were not.”).

131. A. Benjamin Spencer has explained the Framers’ approach to this proxy sovereign “assignment” of powers: “The Framers first had to agree on what powers the national government as a whole would have and then they had to decide to which department to assign such powers.” A. Benjamin Spencer, *The Judicial Power and the Inferior Federal Courts: Exploring the Constitutional Vesting Thesis*, 46 GA. L. REV. 1, 35 (2011). He further argued that because “[a]chieving this balance was a tricky matter,” and because of “what rested on these decisions,” “one is obligated to honor the decisions made and take seriously the allocations of power on which the Framers settled.” *Id.*

132. The proxy-sovereign framework advocates an approach similar in

The sovereignty arrangement formed by the Constitution is complicated. First, the Constitution assumes that the people will exercise their sovereignty through two levels of government—federal and state—which itself raises difficult questions of federalism, state rights, and the nature of dual sovereignty.<sup>133</sup> As Justice Kennedy has written: “The Framers split the atom of sovereignty. . . . Constitution created a legal system unprecedented in form and design, establishing two orders of government, each with its own direct relationship, its own privity, its own set of mutual rights and obligations to the people who sustain it and are governed by it.”<sup>134</sup> In addition to cutting the sovereign powers between state and federal governments, the Constitution divides the sovereign proxy powers at the federal level. For purposes of federal sovereign immunity, only the second cut matters: the assignment of the sovereign’s national powers to three branches, each branch exercising primary responsibility for one of three national sovereign authorities.

As discussed more fully below, Articles I, II, and III identify powers and limitations on each federal branch, which those branches are without power (and authorization) to unilaterally—or collectively—change.<sup>135</sup> The only way for the

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general, if not in detail, to Martin H. Redish and Elizabeth J. Cisar’s “pragmatic formalism.” See Martin H. Redish & Elizabeth J. Cisar, “*If Angels Were to Govern*”: *The Need for Pragmatic Formalism in Separation of Powers Theory*, 41 DUKE L.J. 449, 454 (1991). As Redish and Cisar describe it, to determine the “constitutional validity of a particular branch action, from the perspective of separation of powers,” a court should resort “solely [to] the use of a definitional analysis” by “determining whether the challenged branch action falls within the definition of that branch’s constitutionally derived powers—executive, legislative, or judicial.” *Id.* Like Redish and Cisar’s “pragmatic formalism,” the proxy-sovereign framework points to the constitutional account of separation of powers as a basis for determining what federal actions are constitutionally consonant. See also Odette Lienau, *Who is the “Sovereign” in Sovereign Debt?: Reinterpreting a Rule-of-Law Framework from the Early Twentieth Century*, 33 YALE J. INT’L L. 63, 76–77 (2008) (“Jean-Jacques Rousseau is perhaps the paradigmatic early political theorist in this vein, arguing that legitimate government must be grounded in a ‘social contract’ in which the force of the government or prince is merely the public force concentrated in him. As soon as he wants to derive from himself some absolute and independent act, the bond that links everything together begins to come loose.”) (internal quotation marks and citation omitted).

133. See, e.g., Caleb Nelson, *Sovereign Immunity As A Doctrine of Personal Jurisdiction*, 115 HARV. L. REV. 1559, 1581–82 (2002).

134. U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779, 838 (1995) (Kennedy, J., concurring).

135. See U.S. CONST. art. VI, § 1, cl. 3 (requiring that all federal officials—



formal reordering or revision of this tripartite system of government is through the constitutional amendment process, which requires the approval of the sovereign people (either acting directly or through their state-elected representatives).<sup>136</sup> Thus, the Constitution makes clear that, despite the potency of the powers delegated to the federal branches, those powers are limited, and they must be exercised on behalf and with the approval of the people. As the Court wrote in *Loving v. United States*, “By allocating specific powers and responsibilities to a branch fitted to the task, the Framers created a National Government that is both effective and accountable.”<sup>137</sup>

This understanding of the proxy relationship between the federal government and the people comprises what this Article calls “the proxy-sovereign framework”—that is, a framework by which the constitutionally prescribed relationships and roles of the sovereign people and its proxy sovereigns (the federal branches) can resolve questions about the limits and contours of federal branch behavior. The proxy-sovereign framework allows a closer inspection of the so-called sovereign conduct of the federal government than current scholarship affords. Rather than allowing the United States to act domestically as a sovereign without limits, the proxy-sovereign framework requires that each expression of sovereign privilege by a branch of the federal government be supported by the specific terms upon which that branch was charged with exercising the people’s sovereignty.

As applied to sovereign immunity, the proxy-sovereign framework reveals that the Constitution requires a triply-shared waiver authority. It does so through a logical syllogism: If waiving sovereign immunity is the prerogative of the sovereign, then that prerogative runs with sovereignty. In a system with proxy partial sovereigns, some part of sovereign waiver prerogative runs with the proxy sovereign powers allocated to each branch, unless the waiver power has been exclusively consigned to one branch. Because the Constitution does not allocate the waiver power to one particular branch, each branch retains its portion of the

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legislative, executive, and judicial—must be “bound by Oath or Affirmation, to support this Constitution”).

136. U.S. CONST. art. V.

137. 517 U.S. 748, 757 (1996).

waiver power that is consonant with that branch's proxy sovereignty. Congress retains the waiver power as expressible by a legislature, cabined and shaped by Article I; the President retains the waiver power as expressible by Article II's terms on the executive; and the judiciary retains the waiver power as expressible by Article III courts. This argument and its implications will be briefly discussed below.

### *B. Congress and the Waiver Power*

Understanding how Congress can properly exercise its federal sovereign immunity waiver power first requires an understanding of Congress's constitutional role as a proxy sovereign. What the sovereign people tasked Congress with doing—and what they prohibited Congress from doing—defines what situations and via what processes Congress is authorized to waive sovereign immunity on behalf of the sovereign. Ultimately, this discussion should support a central claim of this Article: while the Constitution allows Congress broad authority to waive sovereign immunity via legislation, as Congress has done, the sovereign people have not vested exclusive waiver authority in Congress. While this claim does not disturb current congressional waiver practice, it should fundamentally alter our rhetoric about federal immunity waiver and give permission for the other federal branches to exercise their proxy waiver powers.

#### *1. Congress's Constitutional Role*

Although the debate about the proper role of Congress began well before Congress did,<sup>138</sup> the Constitution reveals, and most contemporary scholars agree, that Congress's constitutional role constitutes at least the following: (1) it is a policy-making body with (2) majoritarian representation and (3) enumerated (specific but arguably limited) powers.<sup>139</sup>

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138. See, e.g., *Debates in the Federal Convention of 1787*, in 5 ELLIOTT'S DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 139, 286, 317 (2d. ed. 1986).

139. See, e.g., Krent, *supra* note 84, at 1533 (discussing the applicability of Congress' role as a policy-making body with majoritarian representation to federal sovereign immunity); Steven G. Calabresi & Kevin H. Rhodes, *The Structural Constitution: Unitary Executive, Plural Judiciary*, 105 HARV. L. REV. 1153, 1176 (1992) (discussing Congress's constitutional power and noting that Congress' "legislative powers are limited to the specifically enumerated powers 'herein granted' by the Constitution").

Each of these facets of congressional identity has implications for Congress's ability to waive sovereign immunity; accordingly, it is valuable to review them at least briefly.

The Constitution ordained Congress to be a policy-making body. By virtue of Article I, Congress is the branch tasked with originating and authorizing national laws. Congress's policy choices are not subject to much second-guessing by the other branches.<sup>140</sup> With the exception of the presidential veto—which itself can be overcome by congressional override—and judicial review for unconstitutionality, a law Congress passes will remain law until a subsequent congressional majority changes policy direction and votes otherwise. The Constitution vests in Congress the responsibility for making mostly unreviewable choices to effect the ends they choose by the means they choose. Whether the term “legislative powers” itself comprises the discretionary nature of this rulemaking authority is an issue hotly contested by scholars,<sup>141</sup> but that debate needn't be resolved for purposes of this article. Here it is sufficient to argue that, at least as to the enumerated powers in Article I, Section 8, Congress alone retains the authority to make policy choices as a first actor.<sup>142</sup> This

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140. This is true insofar as constitutional text is concerned. In practice, the President can issue signing statements that indicate his disapproval of the legislation he is signing; he can direct executive agencies to refrain from implementing the laws created by Congress; and he can use his bully pulpit to speak out against congressional policy. Courts can, of course, find statutes unconstitutional. But, as discussed above, as a matter of constitutional text, when Congress makes policy decisions, the other branches are limited in their abilities to legally undo congressional policymaking.

141. See, e.g., Larry Alexander & Saikrishna Prakash, *Reports of the Nondelegation Doctrine's Death Are Greatly Exaggerated*, 70 U. CHI. L. REV. 1297, 1308 (2003); Thomas W. Merrill, *Rethinking Article I, Section 1: From Nondelegation to Exclusive Delegation*, 104 COLUM. L. REV. 2097, 2115 (2004); Eric A. Posner & Adrian Vermeule, *Nondelegation: A Post-Mortem*, 70 U. CHI. L. REV. 1331, 1332–33 (2003); Eric A. Posner & Adrian Vermeule, *Interring the Nondelegation Doctrine*, 69 U. CHI. L. REV. 1721, 1728 (2002).

142. Ascribing an exact denotation to the “legislative power” that is unique to Congress as among the federal branches and consonant with the text of the Constitution is difficult. As others have noted, even “historical evidence shows that ‘legislative power’ was not a term of art that was used in a single way.” Posner & Vermeule, *supra* note 141, at 1342. The central tenet of my effort here is that when Congress makes choices within constitutional limits, which choices become law that bind the nation, the only critique other branches or the populace can levy against Congress is that it used its discretion poorly, not that it used it unlawfully.

means that Congress can weigh public sentiment, costs and benefits, constitutional or other values, or even caprice and whim, to initiate domestic rules in certain areas, without much concern for the toes of other branches.<sup>143</sup>

Congress's responsibility to make national policy is coupled with its constitutional responsibility—or burden—of being responsive to the national polity.<sup>144</sup> The primary mechanism for this responsiveness is the manner of representative selection and removal, identified in Article I, Sections 2 through 5 (and, in 1913, the Seventeenth Amendment). This feature of congressional representation has been discussed in detail elsewhere,<sup>145</sup> but the effects of this fairly direct responsiveness to the people cannot be overstated. Because the Constitution tasked Congress with effecting the will of the people and subjected individual representatives to regular constituent reelections, it seems fair to say that the Framers established Congress as the most finely calibrated barometer of popular will of the three federal branches.

Charged with the task of national policymaking and chosen by local popular elections, Congress can only exercise certain powers. The nature of congressional power—its force as well as its scope—is defined by Article I, most importantly Section 8. Two points about Congress's Article I powers are necessary here. First, most scholars interpret Article I, Section 8 as giving Congress the “power of the fisc,” by which they mean plenary control over the federal government's money.<sup>146</sup> Congress's bundle of financial powers is identified

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143. See U.S. CONST. art. I, § 8.

144. See, e.g., David Schoenbrod, *Politics and the Principle That Elected Legislators Should Make the Laws*, 26 HARV. J.L. & PUB. POL'Y 239, 240 (2003) (“This Constitution required legislators to take responsibility not only for tax laws, but all other laws regulating the people, as well as all laws appropriating their money.”).

145. See, e.g., Daryl J. Levinson, *Rights and Votes*, 121 YALE L.J. 1286, 1293 (2012); Spencer Overton, *The Participation Interest*, 100 GEO. L.J. 1259, 1260 (2012); Cass R. Sunstein, *Interest Groups in American Public Law*, 38 STAN. L. REV. 29, 29 (1985).

146. See, e.g., Josh Chafetz, *Congress's Constitution*, 160 U. PA. L. REV. 715, 725 (2012); Figley & Tidmarsh, *supra* note 93, at 1252 (“First, the Convention never had in mind that the right of appropriation could be exercised by any branch other than the legislature.”); Todd David Peterson, *Protecting the Appropriations Power: Why Congress Should Care About Settlements at the Department of Justice*, 2009 B.Y.U. L. REV. 327, 329 (2009) (in particular, see string cites at footnote 17); Kate Stith, *Congress' Power of the Purse*, 97 YALE

in Section 8; it includes the power to tax, borrow money, pay debts, coin money, and prosecute counterfeiting.<sup>147</sup> If the very structure of the Constitution and its scheme of separation of powers does not make clear that the power of the purse is exclusively congressional, Section 9 itself imposes this limitation: “No money shall be drawn from the treasury, but in consequence of appropriations made by law.”<sup>148</sup> Although some dispute the reality of this sole control,<sup>149</sup> there is strong support that the Framers intended Congress to have plenary control over the federal government’s expenditures.<sup>150</sup>

A second point about Congress’s enumerated authority: nothing in Article I, which details all congressional authority, expressly gives Congress the authority to waive sovereign immunity.<sup>151</sup> If Article I included a clause like the following—“The power to allow suit in law or equity against the United States and its officials”—this article would be very different. But it does not. Nor do any of the enumerated powers clearly comprise a waiver authority. The repercussions of this will be discussed further below, but the point is necessary to make here as part of our discussion of Congress’s constitutional role. This lack of express authority matters. Article I’s first words—“[a]ll legislative powers herein granted”—coupled with the Tenth Amendment prohibit grafting onto Congress legislative powers not given it by Article I. If the Framers intentionally vested Congress with sole control over federal immunity waiver, then the waiver authority must be found within a provision of Article I. Because it is not, then either Congress does not possess the authority, or Congress shares it with other organelles under some other theory.

## 2. Congress’s Waiver Power

At least these features of Congress’s constitutional role—its role as policymaker, its responsiveness to popular will, and its limited but meaningful bundle of powers—have important

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L.J. 1343, 1344 (1988).

147. U.S. CONST. art. I, § 8.

148. U.S. CONST. art. I, at § 9, cl. 7; see Stith, *supra* note 146, at 1349–1350.

149. HAROLD J. KRENT, PRESIDENTIAL POWER 77–83 (2005).

150. See, e.g., Figley & Tidmarsh, *supra* note 93, at 1263.

151. *Cf. id.* at 1252 (arguing that the appropriations power implies exclusive congressional authority over waivers of federal sovereign immunity in cases for damages against the United States).

implications for our understanding of immunity waiver. Let's remember: when understood in context of the proxy-sovereign framework, Congress is the federal organelle charged with exercising one part of the people's sovereign powers: in particular, a subset of the people's sovereign legislative powers.<sup>152</sup> Therefore, if the authority to waive sovereign immunity is a feature of *sovereignty*, then insofar as Congress is expressing the people's sovereignty, it can exercise a concomitant power of sovereign immunity waiver.

With this backdrop, the three features of Congress's constitutional role discussed above largely support current congressional waiver practice. As noted earlier, Congress has exercised its authority to allow waiver of immunity in a variety of contexts. In each case, it did so after engaging in policy discussions informed by its political responsiveness. The FTCA is a notable example. Public outcry about the military plane crash into the Empire State Building prompted Congress to finally retract the federal government's immunity to tort suit, which it had been debating for more than twenty years.<sup>153</sup> The public outcry even prompted Congress to retroactively date the law, to allow some claims (including the plane crash) that had already occurred. Subsequent revisions to the FTCA were enacted after further political discussion, including a sharp response to a 1988 Supreme Court opinion interpreting the law to allow more individual official liability than Congress felt was appropriate.<sup>154</sup> These legislative acts were an entirely appropriate expression of Congress's waiver authority. As a matter of sovereignty, the people charged Congress with using its derivative legislative authority to enact legislation responsive to the public will. And, within constitutional constraints (via legislation, by duly elected representatives, not in violation of any substantive constitutional limitations), Congress did so.<sup>155</sup>

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152. See generally U.S. CONST. amend. X (providing that the remainder of the peoples' sovereign legislative powers is "reserved to the states respectively, or to the people.>").

153. See DANIEL A. MORRIS, FEDERAL TORT CLAIMS § 1:10 (2012).

154. See *id.*, § 7:4; *Westfall v. Erwin*, 484 U.S. 292 (1988).

155. In neither the FTCA nor the legislative documents issued contemporaneously with the first version does Congress articulate with which enumerated power it was enacting the law. This is no surprise—Congress routinely does not root its acts expressly in provisions of the Constitution—but I would argue that within most interpretations of the enumerated powers, the

The caveat: nothing about Congress's constitutional role—or its enumerated powers—restricts the waiver authority to Congress. Although a waiver of immunity *can* take the form of legislation, it need not (as will be discussed later). And nothing in Article I expressly allocates to Congress the authority to waive immunity. Even Krent's article justifying congressional waiver of federal immunity in cases of tort and contract<sup>156</sup> does not exclude the possibility that the waiver authority might be held simultaneously—although differently—by Congress and the other two branches. Certainly his analysis does not foreclose the possibility, as he justifies congressional waiver on grounds of institutional competency and policy rather than on constitutional text.<sup>157</sup> Even better, his article invites the possibility: first, by noting the role that courts play in protecting constitutional boundaries and rights<sup>158</sup>; second, by noting that the executive, like Congress, exercises “some of th[e] responsibility” to “formulate . . . national policy”<sup>159</sup>; and third, by noting that Congress monitors Congress, “[j]udges judge judges,” and “the executive branch enforces the law with respect to its own officers.”<sup>160</sup>

### C. *The Judiciary and the Waiver Power*

Like Congress, the judiciary's sovereign role affects how it can express its portion of proxy-sovereign power. But unlike Congress, the judiciary's role is not so clearly enumerated, at least not in the Constitution.<sup>161</sup> Rather, the Court's role has unfolded over time, as the Court and the

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FTCA is appropriate, as part of its powers to pay debts, provide for the general welfare, to make rules for the government, or to make laws that are necessary and proper. In any case, it was an uncontroversial expression of congressional authority.

156. *See generally* Krent, *supra* note 84.

157. *Id.* at 1533.

158. *Id.* at 1535.

159. *Id.* at 1537.

160. *Id.* at 1538.

161. “The judicial power of the United States, shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish.” U.S. CONST. art. III, § 1; *see also* Craig A. Stern, *What's a Constitution Among Friends?—Unbalancing Article III*, 146 U. PA. L. REV. 1043, 1043 (1998) (“Nine out of ten experts agree that a straightforward reading of the first section of the third article of the United States Constitution does not work.”).

other branches have operationalized the strictures imposed by the Constitution.<sup>162</sup> The Court now wields a few powers that are widely accepted in practice and, for the most part, in scholarship. This role justifies some ways in which the Court currently waives governmental immunity, and it explains what the Court does not—why those waivers are proper demonstrations of the Court’s constitutionally allocated proxy-sovereign power.

### 1. *The Judiciary’s Constitutional Role*

Academics have identified a host of court powers that might be part of the Court’s irreducible minimum of “judicial power.” Teasing through these proposals is beyond the scope of this article.<sup>163</sup> One power of the Court is its role as final constitutional arbiter, which is discussed in detail above.<sup>164</sup> The argument that the Court’s constitutional role gives rise to and shapes its sovereign immunity waiver authority is also made above, so it will not be repeated here.

A second relevant power set is also within the Court’s arsenal—the Court’s equitable powers to manage the cases before it. As part of its proxy-sovereign power to decide “cases” and “controversies,”<sup>165</sup> the Court actively uses its equitable powers—in particular, those that allow courts to manage the cases brought before them—in accordance with traditions of fairness or equity. These equitable powers are relevant to the Court’s role as a sovereign immunity waiverer because, as will be discussed later, they justify the Court’s use of its waiver power when doing so would serve the Court’s

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162. See, e.g., Evan Caminker, *Allocating the Judicial Power in a “Unified Judiciary”*, 78 TEX. L. REV. 1513, 1518 (2000) (“Of course, to say that the Vesting Clause devolves upon Article III courts a ‘nebulous grant[ ] of power’ is somewhat of an understatement; one must certainly go beyond that sparse phrase to discover the power’s specific attributes.”) (quoting Calabresi & Rhodes, *supra* note 139, at 1195.).

163. See, e.g., Alex Glashausser, *The Extension Clause and the Supreme Court’s Jurisdictional Independence*, 53 B.C. L. REV. 1225 (2012); Spencer, *supra* note 131; Tara L. Grove, *The Structural Safeguards of Federal Jurisdiction*, 124 HARV. L. REV. 869 (2011); Stern, *supra* note 161; Calabresi & Rhodes, *supra* note 139; Daniel J. Meltzer, *The History and Structure of Article III*, 138 U. PA. L. REV. 1569 (1990); Akhil R. Amar, *Marbury, Section 13, and the Original Jurisdiction of the Supreme Court*, 56 U. CHI. L. REV. 443 (1989); Richard H. Fallon, Jr., *Of Legislative Courts, Administrative Agencies, and Article III*, 101 HARV. L. REV. 915 (1988);

164. See *supra* Part II.A.

165. U.S. CONST. art. III, § 2.



duty to manage cases equitably.

To understand the way this waiver might work, it is first necessary to understand the justification for the Court's having equitable case management powers. In *Hecht Co. v. Bowles*<sup>166</sup>, the Court explained its use of broad equitable powers, notwithstanding a statute that appeared to require the Court to impose a specific remedy.<sup>167</sup>

The Court's defense in *Hecht* of its equitable powers is more than an articulation of its (and the lower courts') continued reliance upon those powers; it is an exposition of the justification for that reliance and of the powers' defining nature. In *Hecht*, the Court relied upon "several hundred years of history" to justify and regulate "equity practice,"<sup>168</sup> suggesting that the Court does not consider the Constitution to have swept clean its equitable authority. Rather, the Court insisted it retained powers that were definitionally broad: "The essence of equity jurisdiction has been the power . . . to do equity and to mould [sic] each decree to the necessities of the particular case."<sup>169</sup> In these ways, *Hecht* supports a strong equity practice in American constitutional jurisprudence.

The Court's decision in *Hecht* suggests however, a possible limitation on those equitable powers. The Court did not assert that Congress is *unable* to modify the judiciary's use of equity practice. Rather, it found that, in that case, Congress did not sufficiently articulate its intent to alter the equitable scheme. This fact-specific holding left open the possibility that, with enough chutzpah and clarity, Congress could successfully amend or affect the Court's reliance on equity. Though only implied in *Hecht*, this possibility for amendment has found expression in subsequent Court cases.<sup>170</sup> It is now clear that when Congress wants to alter the Court's use of equity powers, it can do so. But it must do so clearly and unequivocally, lest an intransigent Court find reason to resist.

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166. 321 U.S. 321 (1944).

167. *Id.* at 329–30 (citation omitted).

168. *Id.*

169. *Id.*

170. *See, e.g.*, *United States v. Noland*, 517 U.S. 535, 540 (1996) (finding that a statutory codification of "principles of equitable subordination" allowed a court to make exceptions but not to generally reorder legislatively chosen priorities).

Congress's efforts to revoke or cabin the judiciary's equity practice have targeted some equity powers more than others. Equitable causes of action and remedies are often preempted by or explicitly incorporated into federal statutory schemes<sup>171</sup>; federal courts' efforts to assert these powers without statutory authorization are met with controversy and some disfavor by reviewing courts.<sup>172</sup> But another set of equitable powers—what I call “case management powers,” such as equitable tolling, waiver of affirmative defenses, waiver of claims, etc.—are fairly standard, are generally accepted, and, in some cases, are codified in court rules.<sup>173</sup> Like all equitable powers, these case management powers are affectable by Congress,<sup>174</sup> but I would argue that they are the ones least likely to be so, at least under past and current practice. It is not entirely apparent why the case management powers should be met with more favor than other equitable powers. Perhaps it is due to a commonly shared sense that strong fairness values underlie the use of these tools, or to Congress's relative inattention to legislatively modifying or prohibiting them. Whatever the reason, these equitable powers are, at present, the safest for the Court to exercise and are at the zenith of the Court's equitable powers.<sup>175</sup>

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171. I would argue that when an equitable power is codified legislatively, there is a strong argument that it loses its equitable nature and becomes statutory, even if Congress has expressly incorporated the traditions underlying the use of that equitable power.

172. *See, e.g.,* Grupo Mexicano de Desarrollo S.A. v. Alliance Bond Fund, Inc., 527 U.S. 308, 332–33 (1999) (holding that the courts do not possess the equitable authority to “create remedies previously unknown to equity jurisprudence” and commenting that “debate concerning this formidable [remedy] . . . should be conducted and resolved where such issues belong in our democracy: in the Congress”).

173. *See, e.g.,* Young v. United States, 535 U.S. 43, 50 (2002) (“It is hornbook law that limitations periods are customarily subject to equitable tolling.” (internal quotation marks and citation omitted)); FED. R. CIV. P. 13 (2011) (requiring parties to plead affirmative defenses in response to a pleading).

174. *See, e.g.,* Irwin v. Dep't of Veterans Affairs, 498 U.S. 89, 95–96 (1990) (“We therefore hold that the same rebuttable presumption of equitable tolling applicable to suits against private defendants should also apply to suits against the United States. Congress, of course, may provide otherwise if it wishes to do so.”).

175. For instance, in *Irwin v. Department of Veterans Affairs*, Congress had enacted a statute of limitations, which the Court construed to be a limitation on Congress's waiver of sovereign immunity. Notwithstanding this acknowledgment that Congress had specified timing requirements, that those timing requirements were jurisdictional (as part of the waiver of sovereign immunity), and that interpreting those timing requirements would require the

Traditionally, the Court has used its powers to equitably manage cases to provide for some kinds of judicial fair play. If a party has been unable to file its case within the appropriate statute of limitations—because, for instance, a timely-filed pleading was actually defective or because “the complainant has been induced or tricked by his adversary’s misconduct into allowing the filing deadline to pass”<sup>176</sup>—federal courts have sometimes found justice to be served by tolling the statute of limitations, allowing suit to proceed after the statutorily prescribed deadline.<sup>177</sup> If the defendant has failed to raise claims or affirmative defenses in a timely manner, though those claims and defenses be valid, federal courts routinely find that those claims and defenses are waived, even if they would have merited redress or prohibited suit, respectively.<sup>178</sup> Courts have reasoned that withholding consideration of late but otherwise valid claims or that keeping a defendant in a case, despite late but otherwise dispositive defenses, is fair, in that doing so incentivizes parties to act in ways that economize costs and provide fair play for all parties and the courts.<sup>179</sup> In these ways, federal courts routinely use their equitable powers to serve their constitutional responsibility to act as proxy for the people’s

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Court to interpret them narrowly in accordance with the Court’s sovereign immunity interpretive canon, the Court found that its equitable powers triggered tolling. The Court justified its ruling this way: “[W]e think that making the rule of equitable tolling applicable to suits against the Government, in the same way that it is applicable to private suits, amounts to little, if any, broadening of the congressional waiver. . . . Congress, of course, may provide otherwise if it wishes to do so.” *Id.* at 95–96. Compare this easygoing tone to the strict tone adopted by the Court in *Grupo Mexicano de Desarrollo S.A. v. Alliance Bond Fund, Inc.*, in which the Court was addressing the equitable power to craft a novel judicial remedy: “Even when sitting as a court in equity, we have no authority to craft a ‘nuclear weapon’ of the law like the one advocated here [a kind of preliminary injunction]. . . . The debate concerning this formidable power over debtors should be conducted and resolved where such issues belong in our democracy: in the Congress.” 527 U.S. 308, 332–33 (1999).

176. *Irwin*, 498 U.S. at 96.

177. *See, e.g., id.*

178. *See, e.g.,* *Boddy v. Dean*, 821 F.2d 346, 350 (6th Cir. 1987); *Martinez v. Orr*, 738 F.2d 1107 (10th Cir. 1984); *Milam v. United States Postal Service*, 674 F.2d 860 (11th Cir. 1982); *Saltz v. Lehman*, 672 F.2d 207 (D.C. Cir. 1982).

179. *See, e.g.,* *Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385, 398 (1982) (“By holding compliance with the filing period to be . . . a requirement subject to waiver as well as tolling when equity so requires, we honor the remedial purpose of the legislation as a whole without negating the particular purpose of the filing requirement, to give prompt notice to the employer.”).

sovereign power to finally resolve disputes, a unique role facilitated by the court's unique powers.

## 2. *The Judiciary's Waiver Power*

The Court's constitutional roles as final constitutional arbiter and equitable case manager define how it may appropriately use its sovereign immunity waiver power. One application of this waiver authority has implicitly been recognized by the Court, but more are available.

The primary way in which the Court has embraced its waiver authority relates to its use of equitable powers to allow apparently statutorily-barred suits against the government to nevertheless proceed. For instance, in the past, the Court has found its inherent equitable powers allow it to toll statutes of limitations that otherwise have precluded suit. As the Court stated in *Irwin v. Department of Veterans Affairs*: "Once Congress has made such a waiver [of immunity], we think that making the rule of equitable tolling applicable to suits against the Government, in the same way that it is applicable to private suits, amounts to little, if any, broadening of the congressional waiver."<sup>180</sup> The Court's "little, if any, broadening of . . . waiver" language is perhaps an equivocal way of indicating that, regardless of practical effect, the Court deemed itself justified in applying its equitable tolling practices to sovereign immunity waivers. And per the proxy-sovereign framework, it is. If applying traditional principles of tolling allows the Court to manage its cases in a way that serves equity, consonant with its constitutional role of adjudicating cases and controversies, then it has the proxy-sovereign authority to do so. This analysis lends credence to the Court's practice of making available some federal accountability in situations that have previously defied a coherent legal justification. But this discussion also raises questions about what the Court could be doing that it is not. For, in its efforts to sustain the legal fiction of exclusive congressional waiver, it has left unharnessed powers it could well exercise.

As noted above, the first thing the Court could (and should) do differently in a proxy-sovereign-framework era is to accurately describe the doctrines it has equivocally created.

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180. *Irwin*, 498 U.S. at 95–96.

But the Court has open to it more than a change in rhetoric. At least one concrete changes must follow: the Court could consider sovereign immunity as an affirmative defense, as is done at the state level, rather than as a jurisdictional bar, as is the current federal practice. The current practice of treating sovereign immunity waiver as a component of jurisdiction defies both sense and statutory construction. In accordance with its equitable powers, the Court should change this jurisdictional practice.

The Court's current approach to sovereign immunity—that it is jurisdictional, rather than an affirmative defense—exposes an inconsistency in the Court's jurisprudence. In theory, academics agree that Article III courts may only hear a case against a federal defendant if the plaintiff has a cause of action, the court has jurisdiction, and Congress has waived sovereign immunity. In practice, however, sovereign immunity has not been treated as an independent requirement; rather, sovereign immunity is treated as a component of the jurisdictional requirement. As Professor Vicki Jackson has argued, "What we call the 'sovereign immunity' of the United States in many respects could be described as a particularized elaboration of Congress' control over the lower court's jurisdiction."<sup>181</sup> As a result, courts must raise the question of sovereign immunity even if the parties fail to raise it.<sup>182</sup>

This view of sovereign immunity waiver—that it is a defining part of federal court jurisdiction and is only congressionally controlled—does not make much sense. First, it is not entirely clear in what sense sovereign immunity waiver is "jurisdictional." Jackson's argument suggests that it is a component of subject matter jurisdiction.<sup>183</sup> But, if this is true, then 28 U.S.C. § 1331, which grants district courts subject matter jurisdiction over "all civil actions arising under the Constitution, laws, or treaties of the United States," would seem to have already granted district courts all the original jurisdiction they need to hear claims against federal defendants brought under the Constitution or federal laws. Separate waivers of sovereign immunity would seem not to be

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181. Jackson, *supra* note 81, at 521.

182. See SISK, *supra* note 11, §1.05.

183. Jackson, *supra* note 81, at 570–71.

necessary, at least not as a *jurisdictional* matter.

Second, treating waivers as jurisdictional does not comport with the federal judiciary's expressed ability to shape waiver in constitutional cases. In these cases, the courts assert jurisdiction regardless of a lack of congressional waiver.<sup>184</sup>

Third—and perhaps most interestingly—treating federal sovereign immunity waiver as strictly jurisdictional diverges from state sovereign immunity practice.<sup>185</sup> State sovereign immunity is often classified, in both state and federal courts,<sup>186</sup> as an affirmative defense.<sup>187</sup> It is waivable by the defendant, according to equitable principles, and it need not be considered by the court *sua sponte*.<sup>188</sup> This state treatment of sovereign immunity waiver allows cases to be resolved with a greater degree of equity and deprives the government defendant from unfair gamesmanship. For instance, in

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184. See *supra* Part II.A.

185. For a thorough and thoughtful discussion of why state sovereign immunity is best understood as being nonjurisdictional, see Scott Dodson, *Mandatory Rules*, 61 STAN. L. REV. 1, 18 (2008).

186. Caleb Nelson has offered an explanation for federal court treatment of state sovereignty as an affirmative defense. It centers on the Article III “Case” or “Controversy” requirement: “[M]any members of the Founding generation thought that a ‘Case’ or ‘Controversy’ did not exist unless both sides either voluntarily appeared or could be hailed by the court. . . . Under background rules of general law, a state could not be compelled to answer an individual’s complaint. But if the state voluntarily appeared and submitted its dispute with the plaintiff to the court, it created a ‘Case’ or ‘Controversy’ and subjected itself to the federal government’s judicial power.” Caleb Nelson, *supra* note 133, at 1565–66.

187. Federal circuit courts have themselves split on how they treat this issue. See 13 RICHARD D. FREER & EDWARD H. COOPER, FEDERAL PRACTICE AND PROCEDURE § 3524.1 (3d ed. 2013) (identifying the Fifth, Ninth, Tenth, and Eleventh Circuits as courts that require “the immunity question, like one of Article III jurisdiction, [to] be resolved before addressing the merits;” the First, Third, Fourth, Seventh, Eighth, and D.C. Circuits as courts that have concluded “they are not required to address [sovereign immunity] before proceeding to the merits;” and the Second and Sixth Circuits have mixed law on the issue).

188. Notably, federal courts are allowed but not required to raise the issue of state sovereign immunity *sua sponte*. See, e.g., *id.* (“The Court has sent conflicting signals on the nature of the sovereign immunity defense. In some ways, it has treated the defense as jurisdictional and in others it has not. It is aware of this fact, and has forthrightly recognized that it has not definitively resolved the question.”) *Patsy v. Bd. of Regents of State of Fla.*, 457 U.S. 496, 515 (1982) (“[B]ecause of the importance of state law in analyzing Eleventh Amendment questions and because the State may, under certain circumstances, waive this defense, we have never held that it is jurisdictional in the sense that it must be raised and decided by this Court on its own motion.”).

*United States ex rel. Burlbaw v. Orenduff*,<sup>189</sup> upon appeal, the State defendant asserted their sovereign immunity *conditionally*. The State did not assert sovereign immunity at the district court level, and it won on the merits. When the plaintiff appealed, the State filed a brief requesting a review of the merits, while noting that the State would only assert its immunity if the court “reverse[d] the district court’s merits-related decision.” Because state sovereign immunity is an affirmative defense and not a jurisdictional one, the court had the power to decide whether the State had properly raised the sovereign immunity defense, rather than needing to resolve the sovereign immunity issue at the appeals stage.<sup>190</sup>

To resolve these conflicts and to bring federal waiver practice into accord with a better understanding of each branch’s constitutional role and powers, federal courts should treat federal sovereign immunity waiver as an affirmative defense.<sup>191</sup> At present, sovereign immunity waiver has been promoted to a jurisdictional issue without reasons that survive an analysis of sovereign immunity under the proxy-sovereign framework.<sup>192</sup> If Congress does not have exclusive

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189. 548 F.3d 931 (10th Cir. 2008).

190. The court affirmed the district court on the merits, thereby preempting the need to decide whether the State was properly defended by sovereign immunity. *Id.* at 960.

191. Arguably, Congress could write sovereign immunity into its jurisdictional constraints on the lower courts, but it has not. Although, I should point out that it is possible that article III precludes even this stripping of jurisdiction, since section 2 gives to the Supreme Court the authority to hear “controversies to which the United States shall be a party” and then later either gives the Supreme Court original jurisdiction of these cases (as ones “affecting . . . public ministers and consuls”) or appellate jurisdiction, which would imply that some lower court would need jurisdiction to hear “controversies to which the United States shall be a party” as a first matter. Admittedly this interpretation of article III is itself controversial, but it has a plausible textual basis upon which the Court could rely.

192. The Supreme Court and most federal circuit courts treat federal sovereign immunity as a jurisdictional issue. *See* SISK, *supra* note 11, § 6.08 (Supp. 2012). But, as the Seventh Circuit illustrates, they need not. The Seventh Circuit has adopted the position that sovereign immunity is not a jurisdictional issue. *See, e.g., United States v. County of Cook, Ill.*, 167 F.3d 381, 388–89 (7th Cir. 1999) (“For most purposes it overstates the strength of sovereign immunity to analogize it to a lack of jurisdiction.”). Writing for the circuit, Judge Easterbrook explained that sovereign immunity must not be treated as jurisdictional because doing so would allow the United States to have “as many bites at the apple as it finds necessary, until it has prevailed or exhausted all available lines of argument,” since “every statute authorizing the

control over waiver, then Congress's silence on sovereign immunity does not equate to a presumption of no waiver that can be interpreted as part of its jurisdictional grants to lower Article III courts. Instead, Congress's silence on waiver should trigger a look to the other federal branches, to see if they have waived immunity. And, insofar as the Court holds the equitable power to require parties to proceed when they have not adequately raised their affirmative defenses, the Court likewise holds the power to require a federal defendant to proceed, when it has not raised to the Court its immunity from suit.<sup>193</sup> Such a waiver of sovereign immunity is consonant with the Court's equitable case management powers, which it wields on behalf of the sovereign people who, without a constitutional court apparatus, would retain the rights to operate courts in equity and exercise those courts' inherent equitable authority.<sup>194</sup>

Cases in which courts have found state sovereign immunity defenses to have been waived are instructive. These give clues as to what kinds of behaviors from a federal defendant could prompt a court to exercise its equitable case management powers to waive immunity for a federal defendant that has not properly raised its immunity defense.

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courts to adjudicate claims to property or funds of the United States is a waiver of sovereign immunity, and every argument that the United States makes (or omits) in defense is in the end an argument about sovereign immunity." *Id.* at 385–86 (emphasis in original).

193. *Cf.* *John R. Sand & Gravel Co. v. United States*, 552 U.S. 130, 133 (2008) (describing limitations on the Court's power to exercise its equitable authority in the face of particular kinds of congressional waiver). But at least one scholar has noted that *John R. Sand & Gravel Co.* is an aberration from the Court's sovereign immunity jurisprudence. *See* Sisk, *supra* note 4, at 606, (although the author believes the Court's primary error in the case is in interpreting a statute of limitations differently for the government than it would for a private party).

194. Perhaps a clarification about "waiver" is needed here. We talk about affirmative defenses being "waived" by defendants who do not raise them sufficiently or in time. We likewise use the term "waive" to mean the government's withdrawal of its shield of sovereign immunity. Here, I am arguing that where a federal defendant does not adequately raise its shield of sovereign immunity—thereby, incurring unnecessary costs to the plaintiff and the court and working hardship or inequity—that defendant may have "waived" an affirmative defense. But sovereign immunity is not itself "waived" until the Court finds that the defendant's failure to raise the defense merits the use of the Court's equitable power to pierce the shield of immunity and "waive" (for lack of a better word) immunity on behalf of the government party. *See* *United States v. County of Cook, Ill.*, 167 F.3d 381, 387 (7th Cir. 1999) ("It is the judgment of the court, and not of the attorneys, that has legal effect.").



Delay is a common reason for waiver.<sup>195</sup> For instance, the Supreme Court of South Carolina found that sovereign immunity did not protect a defendant who waited to raise the defense until appeal; in so doing, the Court even rejected the contention that such a delay need result in “plain error” to cause waiver.<sup>196</sup> Mere failure to plead was sufficient.<sup>197</sup> Likewise, Texas has established that where a governmental defendant “waited until after the case was tried to a verdict before asserting governmental immunity in a motion for judgment n.o.v.,” the defendant was “not entitled to avoid liability on the ground of governmental immunity.”<sup>198</sup> The Texas Supreme Court reasoned that this waiver was required by the Texas Rules of Civil Procedure, which require that parties plead affirmatively any avoidances or defenses so as to “put openly in issue on the trial of a case all of the reasons, in fact and in law, why the other party should not prevail.”<sup>199</sup>

Other jurisdictions predicate their finding of an immunity defense waiver on traditional prejudice considerations. Recently, the Alaska Supreme Court held that whether the state defendant had waived immunity required an analysis of whether “the adverse party is prejudiced by the moving party’s delay in raising the defense.”<sup>200</sup> The Court noted that while the trial court had properly considered the state’s ten-year delay in raising the defense, the trial court had not properly decided whether that delay itself prejudiced the plaintiff, or if the litigation had in fact been extended by “bankruptcy proceedings and several appeals.”<sup>201</sup> The Court remanded for trial court consideration of all the factors relevant to any “prejudicial effect of the State’s delay in raising the defense.”<sup>202</sup> Similarly, a New Jersey court found that where a governmental defendant had not specifically pled its immunity defense until more than two

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195. *See, e.g.*, *Washington v. Whitaker*, 451 S.E.2d 894, 898 (1994).

196. *Washington v. Whitaker*, 451 S.E.2d 894, 898 (1994).

197. *Id.*

198. *Davis v. City of San Antonio*, 752 S.W.2d 518, 519 (Tex. 1988).

199. *Id.* (citation omitted); *see also Gauvin v. City of New Haven*, 445 A.2d 1, 3 (1982) (finding that sovereign immunity is an affirmative defense, requiring affirmative pleading, in order “to apprise the court and the opposing party of the issues to be tried and to prevent concealment of the issues until the trial is underway”) (citing *Pawlinski v. Allstate Ins. Co.*, 327 A.2d 583, 586 (1973)).

200. *Sea Hawk Seafoods, Inc. v. State*, 215 P.3d 333, 340 (Alaska 2009).

201. *Id.*

202. *Id.* at 341.

years after the plaintiff filed her complaint, during which time the defendant sought complete discovery and otherwise fully participated in litigation, a sovereign immunity defense had been waived.<sup>203</sup> The court found that allowing the defense at this stage “would work injustice to another who, having the right to do so, has detrimentally relied” on the defendant’s implicit waiver.<sup>204</sup>

These cases illustrate two relevant points: (1) the treatment of sovereign immunity as an affirmative defense is a practice well within the power and expertise of courts, already accustomed to making case management determinations of equity and justice; and (2) allowing sovereign immunity to be a defense waivable by courts according to equitable considerations does not mean the gate to governmental liability will be thrown wide open. Federal courts are, like state courts, capable of making these equitable determinations, and state courts have shown themselves restrained in granting these equitable waivers.<sup>205</sup> There is no reason to expect that federal courts will grant waivers more broadly than states do, particularly in light of congressional power to legislate the federal courts’ powers away, if, for instance, courts grant equitable waivers too loosely. It would be reasonable to expect that, in some cases, federal courts will be confronted, as state courts have been, with bad government defendant behavior.<sup>206</sup> Like state courts, federal courts should be equipped to respond to case misconduct within its role as proxy-sovereign case manager, even if the offending party is the federal government. Courts should assert their equitable case management powers to treat federal sovereign immunity as an affirmative defense. Nothing but a misunderstanding of sovereign powers prevents them from doing so, and such a move would be in line with the Court’s slow drift toward finding that

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203. *Hill v. Bd. of Educ. of Middletown Twp.*, 443 A.2d 225, 228 (N.J. Super. Ct. App. Div. 1982).

204. *Id.*

205. *See, e.g., Fitzpatrick v. City of Chicago*, 492 N.E.2d 1292, 1294–95 (Ill. 1986) (finding immunity defense under state tort law waivable but not waived where pleaded—albeit imperfectly—in answer to complaint).

206. *See, e.g., John R. Sand & Gravel Co. v. United States*, 552 U.S. 130, 133 (2008) (at the trial level, federal government conceded the timeliness of certain plaintiff claims and then won on the merits; amicus brief raised the issue on appeal and the Court found claims barred by untimeliness).

“procedural rules . . . are to be applied in the same manner [against federal government defendants] as among private parties, with no special solicitude for the government.”<sup>207</sup>

#### *D. The Executive and the Waiver Power*

As Congress and the Court are partial proxy sovereigns, the Executive too serves as a partial proxy sovereign for the American people because, according to the Constitution, it wields one part of the people’s sovereign powers (i.e., the Executive power). The Executive’s proxy sovereignty is created by and detailed in Article II, which vests in the President “[t]he executive power” and specifies the President’s constitutional roles.<sup>208</sup> By identifying the President as a partial proxy sovereign, Article II grants the President (and the agencies he directs) a part of the sovereign waiver authority currently being exercised by Congress and the Court. But also like Congress and the Court, the President is constrained by his proxy sovereignty to exercise the sovereign waiver power in accord with his constitutional roles and powers.<sup>209</sup>

##### *1. The Executive’s Constitutional Role*

Article II is misty at best about what exactly the “executive power” entails.<sup>210</sup> Some have argued that the specific roles and tasks prescribed by Article II are the sum total of the President’s “executive power.”<sup>211</sup> Others have

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207. Sisk, *supra* note 4, at 522.

208. U.S. CONST. art. II.

209. *Id.*

210. See also KRENT, *supra* note 149, at I (“Understanding presidential powers from a constitutional perspective is . . . difficult. There is no readily definable list of attributes or authorities. Article II itself is quite vague, never defining the ‘executive’ power with specificity.”).

211. See, e.g., *id.* at 12 (quoting PACIFICUS NO. 1 (Alexander Hamilton); *id.* at I (“The discrete powers granted to the president, such as the authority to enter into treaties, serve as commander in chief, and appoint superior officers, do not define the precise contours of what presidents can or should do. . . . [M]ost are of the view that the constitutional language presents only a starting point that must be complemented by considerations of the overall structure of the Constitution, the underlying purposes of those who drafted Article II and ratified the Constitution, and historical practice.”); Calabresi & Rhodes, *supra* note 139, at 1177–78 (“[T]he status of the Vesting Clause of Article II as a substantive grant of power is hotly debated. . . . The non-unitarians read [the Article II Vesting Clause] as substantively meaningless because of the specific enumeration of presidential powers in Article II, Section 2.”).

argued that the “executive power” comprises more than the Article II articulations, with the outer limits of the executive power undefined by the Constitution itself.<sup>212</sup> Resolving the merits of these arguments is beyond the scope of this Article. It is sufficient to accept the following about the President’s constitutional roles: (1) he has a constitutional obligation to “preserve, protect and defend the Constitution of the United States”<sup>213</sup>; (2) he has a constitutional responsibility and the authority to “take care that the laws be faithfully executed”<sup>214</sup>; (3) he leads subordinate organelles within the executive branch<sup>215</sup>; and (4) he is elected in a way more responsive to popular will than to congressional control.<sup>216</sup> Whether these responsibilities and powers are within the “executive power” or outside of it, it is clear that these are within the President’s constitutional domain and they are only so because he was chosen by the sovereign people to exercise these sovereign powers in their stead.

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212. See, e.g., Calabresi & Rhodes, *supra* note 139, at 1177–78 (“The unitarians construe it as an affirmative grant of power to supervise and control all subordinate officials ‘executing’ existing constitutional and statutory provisions.”).

213. U.S. CONST. art II, § 1.

214. U.S. CONST. art II, § 3.

215. See U.S. CONST. art II, § 2 (“[The President] may require the opinion, in writing, of the principal officer in each of the executive departments. . . . [H]e shall nominate . . . [and] appoint . . . all other officers of the United States, whose appointments are not herein otherwise provided for, and which shall be established by law.”); see also Jerry L. Mashaw, *Recovering American Administrative Law: Federalist Foundations, 1787-1801*, 115 YALE L.J. 1256, 1270–71, 1275 (2006) (“Hence, the mere fact that the heads of departments would be appointed by the President, that Congress itself had no appointing power for administrative officials under the Constitution, and that ‘heads of Departments’ in the Appointments Clause seemed to presume single-headed administrative entities, would suggest to any proponent of the new Constitution’s executive arrangements a colossal improvement over the years of the Confederacy. There would indeed be a unitary ‘executive’ but what that meant for the organization of ‘administration’ remained to be determined.”) Cf. KRENT, *supra* note 149, at 20–23 (exploring the argument that “[a] strong conception of a unitary executive . . . runs afoul of historical precedent and Congress’s discretion under Article I to provide for what it determines is the best mechanism, consistent with other constitutional restraints, of implementing congressional directives,” in particular, Congress’s authority to delegate specific executive responsibilities to particular agency officials, rather than the to the President).

216. See, e.g., U.S. CONST. amend. XII; Christopher R. Berry & Jacob E. Gersen, *The Unbundled Executive*, 75 U. CHI. L. REV. 1385, 1391 (2008) (“One of the obvious defining features of the US Presidency is the national electoral constituency.”).

In practice, these presidential responsibilities, authorities, and roles are relevant to federal sovereign immunity practice in the following ways. Congress has created executive departments, which are under the President's control.<sup>217</sup> Each department<sup>218</sup> is governed by an organic statute, which is Congress's charge to the agency. The President and his executive officers are required to lead the agencies in accord with the Constitution and with the congressional laws they were created to execute. Thus, via these agencies, the President fulfills his constitutional responsibility to "take care that the laws be faithfully executed. . . ."<sup>219</sup>

Importantly, an agency and its officials cannot lawfully act outside of Congress's statutory charge to them.<sup>220</sup> To do so would be to act *ultra vires*; these actions consistently get struck down by the Court for being impermissible.<sup>221</sup> Also significantly, an agency and its officials cannot lawfully act contrary to statute.<sup>222</sup> Again, doing so would be *ultra vires*

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217. This is arguably true, even for independent executive agencies, over which the President does not have direct appointment or removal powers. See Peter L. Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 COLUM. L. REV. 573, 583 (1984) ("All agencies, whether denominated executive or independent, have relationships with the President in which he is neither dominant nor powerless. They are all subject to presidential direction in significant aspects of their functioning, and able to resist presidential direction in others (generally concerning substantive decisions.); KRENT, *supra* note 149, at 49 ("Although presidents can shape the exercise of power by heads of 'executive' agencies far more than 'independent' agencies, they can attempt to influence the exercise of delegated authority by all agency heads.").

218. With the possible exception of the military, which was constitutionally ordained. See U.S. CONST. art I, § 8; U.S. CONST. art II, § 2.

219. U.S. CONST., art. II, § 3.

220. Cf. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635–38 (1952) (Jackson, J. concurring) (explaining that the President's power flows and ebbs with congressional authorization and disapproval, respectively).

221. See, e.g., *Akram v. Holder*, 721 F.3d 853, 864 (7th Cir. 2013) (holding that the immigration regulation in question is *ultra vires* insofar as it requires that certain immigration petitioners adjust status only by way of a relationship to the petitioning citizen, a requirement not supported by statute); *EME Homer City Generation, L.P. v. EPA*, 696 F.3d 7, 11 (D.C. Cir. 2012) ("Absent a claim of constitutional authority (and there is none here), executive agencies may exercise only the authority conferred by statute, and agencies may not transgress statutory limits on that authority. Here, EPA's Transport Rule exceeds the agency's statutory authority in two independent respects.").

222. See 5 U.S.C. § 706(2)(C) (2012) ("The reviewing court shall . . . hold unlawful and set aside agency action, findings, and conclusions found to be . . . in excess of statutory jurisdiction, authority, or limitations, or short of statutory

and, moreover, would be a forsaking of the executive responsibility to faithfully execute the laws. But, within congressional and constitutional bounds, agencies are often able to act with wide latitude and discretion. Organic statutes are notoriously vague, appearing to give agencies broad authority to create regulations and take action, even though technically confined within a particular congressional purview.<sup>223</sup> In practice, agencies act as quasi-policymaking bodies, which can regulate broadly with little review.<sup>224</sup> Despite some private efforts to have this policymaking declared unconstitutional, the Court has long upheld the executive's authority to regulate in accordance with congressionally issued "intelligible principle[s]."<sup>225</sup> In addition to rulemaking, which is a major part of executive efforts to faithfully execute the laws, agencies act via investigations, licensing, sanctions, adjudications, grants, and other orders. They justify these actions as being necessary for fulfillment of their congressional and constitutional

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right."). *See, e.g.*, *City of Arlington, Tex. v. Fed. Comm. Comm'n*, 133 S. Ct. 1863 (2013) ("[F]or agencies charged with administering congressional statutes," "[b]oth their power to act and how they are to act is authoritatively prescribed by Congress, so that when they act improperly, no less than when they act beyond their jurisdiction, what they do is ultra vires.").

223. *E.g.*, Communications Act of 1934, ch. 652, 48 Stat. 1064 (codified at 47 U.S.C. § 151 (2006)) ("For the purpose of regulating interstate and foreign commerce in communication by wire and radio so as to make available, so far as possible, to all the people of the United States, without discrimination on the basis of race, color, religion, national origin, or sex, a rapid, efficient, Nationwide, and world-wide wire and radio communication service with adequate facilities at reasonable charges, for the purpose of the national defense, for the purpose of promoting safety of life and property through the use of wire and radio communications, and for the purpose of securing a more effective execution of this policy by centralizing authority heretofore granted by law to several agencies and by granting additional authority with respect to interstate and foreign commerce in wire and radio communication, there is created a commission to be known as the 'Federal Communications Commission', which shall be constituted as hereinafter provided, and which shall execute and enforce the provisions of this chapter."). Vague statutes such as these give rise to scholars' concerns about the nondelegation doctrine, which some believe to be the constitutional requirement that Congress—and not agencies—make the laws that bind citizens.

224. Agency regulations are generally open to public challenge in the courts via the Administrative Procedure Act. *See* 5 U.S.C. §§ 701–706 (2012). But insofar as legal challenges are merely efforts to second-guess agency policymaking, rather than to allege procedural violations or truly ultra vires actions, they are largely unsuccessful.

225. *J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 406 (1928).

obligations.<sup>226</sup>

## 2. *The Executive's Waiver Power*

The President's proxy-sovereign power to execute the laws created by Congress shapes his proxy-sovereign power to waive immunity. Once Congress has created a law and delegated it to an agency for execution, that agency can use all its powers (congressionally crafted or constitutionally inherent in the executive) to fulfill its faithful execution obligations.<sup>227</sup> As Professor Henry Monaghan has explained, "[U]nlike the legislature, administrative agencies can never pretend to an unlimited power to select among goals; the universe of each agency is limited by the legislative specifications contained in its organic act."<sup>228</sup>

Although Congress may prescribe the laws that the executive must execute, it is *the Constitution* that imposes upon the executive the obligation to faithfully execute the law. Accordingly, if an agency determines that to faithfully execute the law sovereign immunity should be waived, then, as part of the executive, it can exercise the President's proxy-sovereign authority to do so.<sup>229</sup> It must, however, act within the following constraint: an executive agency cannot waive immunity where Congress has expressly retained federal sovereign immunity. This constraint is a constitutional one. For the executive to waive immunity in contradiction to a congressional directive would be a violation of the executive's obligation to faithfully execute the law.<sup>230</sup> Therefore, if

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226. See, e.g., 5 U.S.C. §§ 551–559 (2011).

227. See Henry P. Monaghan, *Marbury and the Administrative State*, 83 COLUM. L. REV. 1, 14 (1983).

228. *Id.*

229. Or the President himself could direct the agencies via executive order to adopt regulations waiving sovereign immunity where Congress has not otherwise done so. See KRENT, *supra* note 149, at 57 (“[P]residents enjoy the discretion under Article II—at least in the absence of congressional indication to the contrary—to mold the rulemaking of executive agencies as long as agency heads retain the formal right to issue the final rule.”).

230. I acknowledge that this point is arguable. The Constitution may identify some areas of control in which the President can act, regardless of contradictory congressional mandate: e.g., direction of the military, some aspects of foreign relations, appointment of officers, etc. But I’d argue that his actions in these areas would not be in furtherance of his constitutional obligation to faithfully execute the law but in furtherance of his other constitutional obligations, so he is not bound to congressional will in the same way. And too, if we take a Justice Jackson *Youngstownian* approach, the

Congress has enacted statutes that explicitly raise the shield of immunity, then the executive cannot act to lower that shield. For example, because the Flood Control Act of 1928 expressly dictates that “[n]o liability of any kind shall attach to or rest upon the United States for any damage from or by floods or flood waters at any place,”<sup>231</sup> the executive could not act to waive sovereign immunity in the Katrina litigation,<sup>232</sup> even if the President or his administrators had wanted to.<sup>233</sup>

Understanding that the executive can waive immunity as part of its larger efforts to faithfully execute the law illuminates the forms that executive waiver can take. Like other executive efforts to implement statute, agencies can waive immunity to execute statutes through (1) rulemaking and (2) other agency action. This means that an agency can promulgate a regulation through its regular means—subject to the procedural constraints of the Administrative Procedure Act or other legal direction—that waives immunity.<sup>234</sup> This would allow agencies to do more than adopt regulations waiving immunity for suits. Insofar as executive agencies currently claim that congressional failure to waive sovereign immunity limits them from adopting regulations that would allow settlement of cases, payment of interest and back pay, etc. (see discussion above), they would no longer be so limited. Rather, they could adopt these regulations if they, by exercising their proxy-sovereign authority to waive sovereign

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President may not be *without* power to act in contradiction to congressional approval; his authority may just be at its *lowest* ebb. See *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635–38 (1952).

231. Flood Control Act of 1928, 33 U.S.C. § 702c (“No liability of any kind shall attach to or rest upon the United States for any damage from or by floods or flood waters at any place . . .”).

232. *In re Katrina Canal Breaches Litigation* (Katrina Levees), 533 F. Supp. 2d 615, 643 (E.D. La. 2008) (finding that sovereign immunity prevented suit against the federal government for injuries related to the levee failures during Hurricane Katrina).

233. President Obama may have considered waiving immunity in the Katrina litigation had the option been open to him. At an October 2009 meeting with New Orleans residents to discuss the government’s participation in the Katrina clean-up, President Obama is reported to have said, “[W]e are working as hard as we can, as quickly as we can,” and then added, “I wish I could just write a check.” To which someone called out, “Why not?” President Obama responded, “There’s this whole thing about the Constitution.” Peter Baker & Campbell Robertson, *Obama Meets Critics in New Orleans*, NY TIMES (Oct. 15, 2009), <http://www.nytimes.com/2009/10/16/us/politics/16obama.html>.

234. 5 U.S.C. §§ 551 *et seq.* (2012).



immunity, deem such regulations would allow them to faithfully execute the law.

In addition to acting by regulation, it seems likely that executive agencies could act to waive immunity on a case-by-case basis. Their authority to do this stems from one of two sources: (1) judicial authority to waive immunity for equitable purposes, or (2) the agency's own authority to act instantially. The first source of the authority is really the flip-side of the court's authority to waive immunity for case management purposes. If an agency or federal official is sued and chooses to respond without raising the defense of sovereign immunity, then, as discussed above, the Court could choose to require the federal defendant to participate in the suit, even without another applicable legislative, regulatory, or judicial waiver. This of course puts the ultimate decision about waiver in the hands of the Court, but at least it suggests one way in which an agency could choose to act to increase the likelihood of its being subject to suit.

The second source of an agency's authority to waive immunity on an ad hoc basis is its administrative power to decide between acting by rulemaking or by adjudication.<sup>235</sup> Current administrative law principles hold that agencies have largely unreviewable authority to decide whether to act by promulgating regulations—that is, by issuing broad-based, law-type rules that bind those to whom they apply—or by acting ad hoc—i.e., issuing orders, imposing sanctions, deciding individual cases, etc.<sup>236</sup> Agency authority to act in this ad hoc way is not clean or uncontroversial, but it is fairly well established.<sup>237</sup> Courts are very unlikely to reprimand an agency that has acted without having first established a regulation that would inform the public as to the direction of

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235. *SEC v. Chenery Corp. (Chenery II)*, 332 U.S. 194, 203 (1947) (“[T]he choice made between proceeding by general rule or by individual, ad hoc litigation is one that lies primarily in the informed discretion of the administrative agency.”).

236. *Id.* at 202 (“Not every principle essential to the effective administration of a statute can or should be cast immediately into the mold of a general rule. Some principles must await their own development, while others must be adjusted to meet particular, unforeseeable situations. In performing its important functions in these respects, therefore, an administrative agency must be equipped to act either by general rule or by individual order.”).

237. *LAWSON*, *supra* note 11, at 364–68 (noting that the *Chenery II* holding “remains a bedrock principle of federal administrative law—though . . . it displays a few fault lines”).

and purpose behind that agency action.<sup>238</sup> If an agency wanted to respond to suit in a given case, it could likely do so, even without a regulation expressly waiving immunity. The court would likely allow the case to proceed, unless doing so would violate a contrary regulation or statute.<sup>239</sup>

Understanding that the executive can act to waive immunity means that the President and his agencies are no longer prevented by congressional silence from authorizing suits against federal agencies or federal officials.<sup>240</sup> Some may wonder why an agency would *want* to authorize suits against it or its officials. For good reasons, agencies may choose to not exercise their waiver powers in most circumstances. But politics itself may present the executive with occasions in which it wants to open itself to potential liability and court review.<sup>241</sup> A presidential administration may want to allow suit for actions taken or regulations instituted by a previous administration. Or it may want to compensate the injured for political good will: to be seen as fair, benevolent, or publicly responsive. Less cynically, a sense of justice itself might prompt an agency to waive immunity for its own actions, as might a realization (either internally or special-interest-group driven) that allowing citizen suits could be a real mechanism for checking agency behavior, during the current administration or in the future.

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238. *Chenery II*, 332 U.S. at 202–03 (“[P]roblems may arise in a case which the administrative agency could not reasonably foresee, problems which must be solved despite the absence of a relevant general rule. . . . In those situations, the agency must retain power to deal with the problems on a case-by-case basis if the administrative process is to be effective.”).

239. 5 U.S.C. § 706(2)(C).

240. Notably, at this time, any judgment rendered against an administrative agency would be recoverable. As discussed below, because of the Judgment Fund, *see infra* note 246, any damage judgments issued against an administrative agency would be payable without further congressional authorization. Of course, in cases for declaratory or injunctive relief, the executive does not need congressional authorization to comply with court judgments against it.

241. Others have recognized that politics might motivate agency participation in granting monetary settlements against an agency, as authorized in some cases by the Judgment Fund. *See Peterson, supra* note 146, at 331 (“[W]hen the Department defends cases brought against the federal government, it may wish to compensate plaintiffs for political reasons or because the administration favors the plaintiff’s cause, even though the plaintiff’s legal claim is weak.”).

*E. The Problem of the Purse*

There is one important caveat: money. As discussed above, Congress has plenary authority over federal money.<sup>242</sup> Therefore, absent legislation authorizing the payment of money damages in suits against the government, the Court has no way to make Congress pay damages. This is true, even in cases for governmental wrongs. This concern is less important than it seems at first glance. As a first matter, the issue of payment is one that regularly plagues plaintiffs seeking damages. In most civil suits, when plaintiffs awarded damages, they must then proceed to try to collect. Courts do not usually withhold judgment or otherwise prevent suit, merely because they foresee that plaintiffs are unlikely to get payment. They allow suit to proceed regardless, issue a judgment, and, if the plaintiffs are successful, allow the plaintiffs to seek payment according to law. While some have argued that federal defendants are different, I would argue that they are not.

First of all, the Court can limit its court-created constitutional waivers to cases in which plaintiffs sue individual federal officials; in these cases, seeking payment of money judgments would proceed as they would in typical civil cases.<sup>243</sup> But second, should the Court decide to create a constitutional cause of action for money damages against the United States itself (or one of its organs, rather than one of its officers), a successful plaintiff is not categorically barred from receiving payment. Like plaintiffs in typical civil suits, a victorious plaintiff in such a case has a legal method to seek payment—merely the method differs. With a money judgment in hand, he or she can petition Congress to authorize the payment of that judgment via a special bill or some relevant general legislation. This may not be easy, sure—but money collection rarely is. And Congress may sometimes be willing to pay.<sup>244</sup> The possibility that a

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242. U.S. CONST. art. I, § 9, cl. 7; see Figley & Tidmarsh, *supra* note 93.

243. Notably, executive agencies often indemnify individual officials in these suits. Whether they do this is a policy decision, up to the particular agency; whether they have money to pay for it is similarly a question for the agency and its congressional authorization. The Court need not be concerned with the existence of these arrangements, but it might validly consider them as part of its weighing of the benefits or costs of creating a constitutional legal remedy against individual federal officials.

244. Consider Congress's efforts to retroactively take responsibility for the

defendant may not make good on a judgment should not prevent a plaintiff from obtaining that judgment.<sup>245</sup>

As a second matter, Congress has already statutorily authorized the payment of money damages against federal government defendants.<sup>246</sup> Not since the middle of the twentieth century has Congress been required to appropriate funds for every individual claim made payable against the government.<sup>247</sup> In 1956, Congress enacted the Judgment Fund Act, creating a fund allowing for the payment from the Treasury for most damage awards issued against the federal government.<sup>248</sup> The fund was created without monetary limit and without the need for recurring appropriations.<sup>249</sup> Soon, Congress amended the act to allow for payment out of the Judgment Fund for settlements in “actual or imminent” litigation.<sup>250</sup> And in 1977, Congress eliminated the previous cap of \$100,000 payment per judgment.<sup>251</sup> The Judgment Fund still exists today, as an essentially limitless, pre-authorized appropriation for the payment of money damages awarded in federal court or otherwise authorized by the Department of Justice for settlement.<sup>252</sup> The Judgment Fund,

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military plane crash into the Empire State Building. *See supra* Part I.B (discussion of the passage of the FTCA). Congress created a law—a broad, liability-inviting, tort reform law—in response to public sentiment that the government should pay for some of its tortious actions. It is possible to imagine Congress again being willing to curry public favor by fulfilling a court-imposed obligation to pay damages for an executive action the judiciary has found faulty. Authorizing a payment on a politically popular court judgment may make Congress look like the hero.

245. Addressing the question of unenforceability in a similar context (whether unenforceability renders a judgment against the United States an advisory opinion and therefore impermissible), Judge Easterbrook wrote in *United States v. County of Cook, Ill.*, “Although the raw power of Congress to withhold appropriations means that a given judgment requiring the United States to pay money may be unenforceable, this remote possibility does not render all judgments advisory.” 167 F.3d 381, 386 (7th Cir. 1999).

246. 31 U.S.C. § 1304 (2012).

247. *See* Act of July 27, 1956, ch. 13, 70 Stat. 694 (codified at 31 U.S.C. § 1304); Peterson, *supra* note 146, at 349; Lowell E. Baier, *Reforming the Equal Access to Justice Act*, 38 J. LEGIS. 1, 9 (2012).

248. 31 U.S.C. § 1304.

249. *Id.*

250. Act of Aug. 30, 1961, Pub. L. No. 87-187, 75 Stat. 415–16 (1961) (codified as amended at 28 U.S.C. § 2414 (2006)); Peterson, *supra* note 146, at 349; Baier, *supra* note 247, at 9.

251. Supplemental Appropriations Act of 1977, Pub. L. No. 95-26, § 101, 91 Stat. 61, 96; Peterson, *supra* note 146, at 349.

252. 31 U.S.C. § 1304; *see* 31 C.F.R. § 256.1 (2012) (“The Judgment Fund is a

therefore, represents Congress's acquiescence to payment of money damages from the Treasury in cases against the federal government. Congress could, of course, repeal the Judgment Fund Act, but so far, it has shown no interest in doing so. Until then, however, the Court should not worry about ordering the government to pay money damages in cases.<sup>253</sup> Legally, the awards can be honored, via the processes established by the Financial Management Service, the arm of the U.S. Treasury tasked with administering the legislatively created Judgment Fund.<sup>254</sup>

### CONCLUSION

Sovereign immunity as a defense against government liability is notoriously unpopular. It is one of the rare legal doctrines that draw outrage (rather than mere ambivalence or apathy) from the public. As the recent Hurricane Katrina litigation reminded us, when members of the public are denied redress for governmental grievances on the sole basis

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permanent, indefinite appropriation which is available to pay many judicially and administratively ordered monetary awards against the United States. In addition, amounts owed under compromise agreements negotiated by the U.S. Department of Justice in settlement of claims arising under actual or imminent litigation are normally paid from the Judgment Fund, if a judgment on the merits would be payable from the Judgment Fund.”). *See also The Judgment Fund: Common Questions*, FIN. MGMT. SERV., <https://www.fms.treas.gov/judgefund/questions.html>. The mass appropriation of Judgment Fund money is consistent with Congress's practice of “granting lump sum appropriations” due to Congress's inability to “foresee every particular expenditure necessary.” KRENT, *supra* note 149, at 78.

253. Some might argue that a resort to petitioning of the legislative process would transform the court's judgment into an advisory opinion. I see the reasoning behind such an argument—without legal authority to formally fix repayment, the Court is merely issuing position statements on situations it cannot meaningfully redress—but I think it oversimplifies the difficult questions raised by redressability, and it misapprehends the current legal landscape. As discussed above, Congress has already authorized payment of most money damages against the government and a simplified, streamlined process for requesting payment exists. *See* 31 C.F.R. § 256. For the time being, this should largely settle the matter. But second, individuals will always be able to petition for private relief; Congress might well be more inclined to honor the payment demands of individuals who have won a judgment in a court, after the vetting inherent in a formalized fact-finding, claim resolution process. While this may be a less direct form of redress, it is not necessarily the kind of unredressability that should preclude Article III courts from hearing these claims as “cases” or “controversies.”

254. *See id.* *The Judgment Fund: Common Questions*, FIN. MGMT. SERV., <https://www.fms.treas.gov/judgefund/>.

of federal sovereign immunity, the public response is not positive. Scholars, too, criticize the doctrine, arguing for its demise on the grounds that it is undemocratic, illogical, and unfair. Perhaps this widespread negative sentiment could be ameliorated if people felt the doctrine (a) allowed more access to government liability, and (b) operated in a way that more clearly and rationally served the interests of the true sovereign, rather than the interests of self-interested, lazy, or ineffectual congressmen.

A two-dimensional version of the waiver power, in which Congress and the Court share authority to waive immunity, is constitutionally mandatory. It is time for the Court to recognize the critical role it does and should play in checking the constitutional behavior of the other branches. But a three-dimensional form of the waiver power is also constitutionally possible.

Either of these multi-dimensional understandings of the waiver power would not necessitate an expansion of waiver, but they certainly make it more possible. And individuals seeking redress or a chance for redress for government grievances would have more opportunities to persuade federal authorities to waive immunity in the ways they can. At present, the only way to meaningfully seek waiver where there is none is to lobby Congress to adopt legislation to that end—an expensive and herculean task, one not well suited to the needs of the small populations likely to be hurt by any particular act of government wrongdoing. But acknowledging that each branch has its own access to waiver, subject to its constitutionally imposed sovereign limitations, would allow the injured the opportunity to petition Congress, agencies, and courts to consider lowering the shield of sovereignty in the ways the branches can. The aggrieved may not receive the redress or opportunity for suit they desire, but at least they have multiple points of more localized entry to rally for the waiver they seek.

This expanded potential for federal liability might raise concerns for those focused on limiting government expenditures. Let Congress keep control over the waiver power, they say, lest the will of the few overwhelm the resources of the many. But those concerned that Congress is uniquely suited to make decisions regarding competing political interests cannot deny that Congress shares that

institutional competency, at least in part, with the agencies to whom it currently delegates a lot of policymaking. In countless ways, it already recognizes that policymaking is a domain it can share with another branch. Further, to those who would entrust waiver decisions exclusively to congressional expertise, I say that sovereign immunity waiver is not purely a policy issue. It is fundamentally rooted in notions of supreme control, nationhood, and governmental soundness. While federal immunity waiver has policy implications, it also has deep legitimacy consequences.<sup>255</sup> The federal government's ability to take any action—to exist, even—is a luxury provided it by the founding people. And whether it uses that derivative authority to serve the people in ways that are not just prudent, but are constitutional and proper, will render the federal government faithful to its sovereign or will show it to be a bad proxy.

Yes, keeping the federal government in line with its charging orders is a task Congress should, as a policy matter, share with its fellow branches. But policy considerations aside, the Constitution makes clear: sovereign immunity and sovereign immunity waiver are concerns Congress already shares with the executive and the judiciary—the other branches the true sovereign chose to wield its proxy federal sovereignty. Federal agencies and courts need now only wake up, act, and, as necessary, save the people from the unitary tyranny of a sovereign Congress.

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255. Odette Lienau describes the “school of popular sovereignty” as acknowledging that “the ultimate power and autonomy associated with sovereignty does not lie in the mere fact of governmental control” but “with a ‘sovereign people,’ whose consent provides legitimacy to the government and authority for its decision.” Lienau, *supra* note 132, at 76–77.