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Waiving Sovereign Immunity in an Age of Clear Statement Rules

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ARTICLES

WAIVING SOVEREIGN IMMUNITY IN AN AGE OF CLEAR STATEMENT RULES

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I. INTRODUCTION

The Supreme Court has been creating clear statement rules faster than commentators can keep track of them. Clear statement rules now govern statutory interpretation questions involving congressional regulation of core state functions,[1] the abrogation of state Eleventh Amendment immunity,[2] the extraterritorial effect of a statute,[3] congressional interference with presidential powers respecting foreign

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1. *See* BFP v. Resolution Trust Corp., 114 S. Ct. 1757, 1764-65 (1994); Gregory v. Ashcroft, 501 U.S. 452, 464 (1991). *But see* County of Suffolk v. Long Island Lighting Co., 907 F.2d 1295, 1306-08 (2d Cir. 1990) (dubious effort to find the clear statement rule inapplicable to the extension of RICO to a public utility).

2. *See* Hilton v. South Carolina Public Rys. Comm'n, 502 U.S. 197, 204 (1991); *id.* at 205-14 (O'Connor, J., dissenting); Blatchford v. Native Village of Noatak, 501 U.S. 775, 786 (1991); Hoffman v. Connecticut Dep't of Income Maintenance, 492 U.S. 96 (1989); Dellmuth v. Muth, 491 U.S. 223, 227-28 (1989); Pennsylvania v. Union Gas Co., 491 U.S. 1, 7 (1989); Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 243 (1985). For a sympathetic account of the clear statement rules established by these cases and by the cases cited *supra* note 1, see Note, *Clear Statement Rules, Federalism, and Congressional Regulation of States*, 107 HARV. L. REV. 1959 (1994).

3. *See* EEOC v. Arabian Am. Oil Co., 499 U.S. 244, 248 (1991). *But see* Kollias v. D & G Marine Maintenance, 29 F.3d 67, 73 (2d Cir. 1994) (*EEOC* did not establish a clear statement rule); Environmental Defense Fund v. Massey, 986 F.2d 528 (D.C. Cir. 1993) (*EEOC* merely "reaffirmed the general presumption against the extraterritorial application of statutes").

affairs and national security,[4] and waivers of the federal government's sovereign immunity.[5] Judges have proposed (or commentators have identified) other clear statement rules for the retroactive application of statutes,[6] repeals by implication,[7] statutes significantly affecting the balance between Congress and the President,[8] the diminishment of Indian reservations,[9] the conveyance of federal public lands to private parties,[10] and a number of other actions.[11]

These rules are powerful. At their strongest, clear statement rules treat all statutes as maintaining the status quo unless Congress clearly states its contrary intention in the text of the statute. Because clear statement rules "foreclose inquiry into extrinsic guides of interpretation,"[12] they eliminate any need—or opportunity—to glean evidence from the structure, purpose, or history of a statute to inform a determination about congressional intent. But the Court has vacillated regarding precisely what Congress must do to satisfy clear statement rules. Sometimes broad general language suffices; sometimes only a statement targeted at a specific problem is demanded. Sometimes the Court considers the text alone; sometimes it looks at other evidence of congressional intent. The Court has not been consistent, nor has it explained its different approaches; thus, it is little wonder that some

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4. *See* Department of Navy v. Egan, 484 U.S. 518 (1988); United States v. Johnson, 481 U.S. 681 (1987).

5. *See infra* part II.B.

6. *See* Landgraf v. USI Film Prods., 114 S. Ct. 1483, 1522 (1994) (Scalia, J., concurring in the judgment) (criticizing the Court for applying a rule that would have permitted a finding of the clear statement of retroactivity in the legislative history).

7. *See* Astoria Fed. Sav. & Loan Ass'n v. Solimino, 501 U.S. 104, 109 (1991) (citing Morton v. Mancari, 417 U.S. 535, 551 (1974)).

8. *See* Armstrong v. Bush, 924 F.2d 282, 289 (D.C. Cir. 1991).

9. *See* Hagen v. Utah, 114 S. Ct. 958, 971 (1994) (Blackmun, J., dissenting) (arguing that precedent requires "clear and unequivocal evidence of congressional intent" to diminish an Indian reservation).

10. *See* Utah Div. of State Lands v. United States, 482 U.S. 193, 197-98 (1987).

11. For lists of clear statement rules and other canons of statutory interpretation applied by the Court, see WILLIAM N. ESKRIDGE, JR., DYNAMIC STATUTORY INTERPRETATION 323-33 (1994); William N. Eskridge, Jr. & Philip P. Frickey, *The Supreme Court, 1993 Term—Foreword: Law as Equilibrium*, 108 HARV. L. REV. 26, 97-108 (1994) [hereinafter Eskridge & Frickey, *Law as Equilibrium*]; William N. Eskridge, Jr. & Philip P. Frickey, *Quasi-Constitutional Law: Clear Statement Rules as Constitutional Lawmaking*, 45 VAND. L. REV. 593, 598-629 (1992) [hereinafter Eskridge & Frickey, *Clear Statement*]; David L. Shapiro, *Continuity and Change in Statutory Interpretation*, 67 N.Y.U. L. REV. 921, 927-41 & nn.98-100 (1992).

12. EEOC v. Arabian Am. Oil Co., 499 U.S. 244, 263 (1991) (Marshall, J., dissenting); *see infra* note 156 and accompanying text.

commentators now distinguish between ordinary clear statement rules and "super-strong" clear statement rules.[13]

Whatever their exact strength, the Court has relied on clear statement rules to serve the same purposes. The Court finds such rules necessary for "the protection of weighty and constant values, be they constitutional, or otherwise."[14] Ideally, this approach benefits both Congress and the courts. Congress knows which rules the courts will follow when they interpret a statute, and the courts know that Congress has reached a careful decision respecting an important public value.

But it does not always work that way. The Court's increased reliance on clear statement rules in statutory interpretation has received a generally unfavorable reaction. Critics of the Court's reliance on clear statement rules have questioned the Court's power to establish such rules and the Court's choice of which values to protect.[15] The Court has contributed to this uneasiness by its failure to explain when a clear statement rule governs a particular interpretive question.

I share many of the concerns that others have voiced, but for different reasons. Most of the academic critics of the Court's recent establishment of clear statement rules are generally dissatisfied with the Court's approach to statutory interpretation. The Court has been originalist at a time when dynamic theories are all the rage. I am generally supportive of many aspects of the Court's originalist approach,[16] but I share the skepticism about clear statement rules. I am especially concerned about the strongest clear statement rules that require specifically targeted statutory language and refuse to consider other indicia of legislative intent. Two originalist concerns animate my reaction: the Constitution does not entrust the judiciary with the responsibility for identifying which policy values merit greatest protection, and interpretive rules that Congress cannot satisfy when drafting a statute conflict with legislative supremacy.

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13. *See infra* note 154 and accompanying text.

14. Astoria Fed. Sav. & Loan Ass'n, 501 U.S. 104, 108 (1991) (citations omitted); *see also* Cipollone v. Liggett Group, Inc., 112 S. Ct. 2608, 2633 (1992) (Scalia, J., concurring in the judgment in part and dissenting in part) ("our jurisprudence abounds with rules of 'plain statement,' 'clear statement,' and 'narrow construction' designed variously to ensure that, absent unambiguous evidence of Congress's intent, extraordinary constitutional powers are not invoked, or important constitutional protections eliminated, or seemingly inequitable doctrines applied" (citing Will v. Michigan Dep't of State Police, 491 U.S. 58, 65 (1989))). *See infra* text accompanying notes 156-60.

15. *See infra* notes 157-65, 166-79 and accompanying text.

16. For a more thorough explanation of my attitude toward the Court's recent statutory interpretation decisions, see John Copeland Nagle, *Newt Gingrich, Dynamic Statutory Interpreter*, 143 U. PA. L. REV. 2209 (1995) (reviewing WILLIAM N. ESKRIDGE, JR., DYNAMIC STATUTORY INTERPRETATION (1994)).

The recent evolution of a clear statement rule for the interpretation of waivers of federal sovereign immunity illustrates these points. The federal government has won five of the last seven Supreme Court cases involving the sovereign immunity of the United States.[17] The Court has gone much further than simply rule for the government in these cases. In consecutive decisions in *Ardestani v. Immigration and Naturalization Service*,[18] *United States v. Nordic Village, Inc.*,[19] and *United States Department of Energy v. Ohio*,[20] the Court has held that the statutory purpose, the legislative history, or a plausible reading of an ambiguous statute carries no weight in the sovereign immunity inquiry if the text of a statute does not plainly waive federal sovereign immunity from the claim presented in the case.[21] These cases implicitly yielded another clear statement rule.

The Court has not explained why it created such a strong clear statement rule for waivers of federal sovereign immunity. None of the Court's opinions have defended sovereign immunity or explained the apparently increased need to protect the federal government from suit. The Court has not even seen it necessary to respond to Justice Stevens, who alone voted against the government in all seven cases.[22] In each case, and in an article entitled *Is Justice Irrelevant?*,[23] Justice Stevens has attacked the contemporary need for sovereign immunity and the

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17. The federal government prevailed in United States v. Idaho, 113 S. Ct. 1893 (1993); Smith v. United States, 113 S. Ct. 1178 (1993); United States Dep't of Energy v. Ohio, 503 U.S. 607 (1992); United States v. Nordic Village, Inc., 503 U.S. 30 (1992); and Ardestani v. INS, 502 U.S. 129 (1991). The government then lost in United States v. Williams, 115 S. Ct. 1611 (1995) and FDIC v. Meyers, 114 S. Ct. 996 (1994). I discuss each case *infra* part II.B.

18. 502 U.S. 129 (1991).

19. 503 U.S. 30 (1992).

20. 503 U.S. 607 (1992).

21. *See infra* part II.B.1-3.

22. *See* United States v. Williams, 115 S. Ct. 1611, 1614 (1995) (Ginsburg, J., opinion for the Court joined by Stevens, J.); FDIC v. Meyers, 114 S. Ct. 996, 999 (1994) (Thomas, J., opinion for the Court joined by Stevens, J.); United States v. Idaho, 113 S. Ct. 1893, 1898 (1993) (Stevens, J., concurring in part and dissenting in part); Smith v. United States, 113 S. Ct. 1178, 1183 (1993) (Stevens, J., concurring in part and dissenting in part); *Ohio*, 503 U.S. at 629 (White, J., joined by Blackmun & Stevens, JJ., dissenting); *Nordic Village*, 503 U.S. at 39 (Stevens, J., joined by Blackmun, J., dissenting); *Ardestani*, 502 U.S. at 139 (Blackmun, J., joined by Stevens, J., dissenting). Justice Stevens had criticized sovereign immunity before. *See* United States v. Dalm, 494 U.S. 596, 622 (1990) (Stevens, J., dissenting); Finley v. United States, 490 U.S. 545, 578 (1989) (Stevens, J., dissenting). The only two other justices to dissent in the most cases won by the government were Justice Blackmun, who dissented in *Ohio*, *Nordic Village*, and *Ardestani*, and Justice White, who dissented in *Ohio*.

23. John Paul Stevens, *Is Justice Irrelevant?*, 87 NW. U. L. REV. 1121 (1993).

Court's zeal to protect it. Almost all of the academic commentators agree with Justice Stevens,[24] but the Court remains unmoved. Perhaps there is something about being a law professor that evokes hostility to sovereign immunity: Professor Scalia had a much different attitude toward sovereign immunity than Justice Scalia (at least until 1995).[25]

The Court's embrace of a new approach to construing statutes that waive sovereign immunity affords a useful opportunity to examine the way in which and the reasons why the Court has increasingly turned toward clear statement rules to solve problems of statutory interpretation. Part II of this Article shows how the Court's latest federal sovereign immunity decisions represent a departure from the often conflicting jurisprudence that previously marked the field. The path has not been clear, and the lower courts have struggled to follow it, but the Supreme Court has decided sovereign immunity cases differently since 1991 than it did previously. Part III places the new sovereign immunity decisions in the context of other recent decisions announcing clear statement rules and the Supreme Court's general statutory interpretation decisions. The standard reaction to the new sovereign immunity decisions is that they are yet another example of the error in the Court's general approach to statutory interpretation. My reaction is different. The sovereign immunity decisions deserve reconsideration precisely because they depart from the Court's general approach. In most contexts, the Court asks "what does this statute mean?" Clear statement rules, by contrast, ask "does this statute mean *x*?" The premise of clear statement rules is that *x* should be treated in a special fashion.

What is missing, however, is a means of identifying which values deserve such treatment and when it is appropriate for the Court to

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24. "No scholar, so far as can be ascertained, has had a good word for sovereign immunity for many years." Roger C. Cramton, *Nonstatutory Review of Federal Administrative Action: The Need for Statutory Reform of Sovereign Immunity, Subject Matter Jurisdiction, and Parties Defendant*, 68 MICH. L. REV. 389, 392 (1970). And "nearly every commentator who considers the subject vigorously asserts that the doctrine of sovereign immunity must go." KENNETH CULP DAVIS, ADMINISTRATIVE LAW TREATISE § 25.01, at 435-36 (1958). More recently, Judge Selya observed that "the scholarly community has been overwhelmingly hostile to the doctrine." United States v. Horn, 29 F.3d 754, 762 n.7 (1st Cir. 1994). The general criticisms of sovereign immunity are listed *infra* part III.A.1. The most notable exception is the articulate defense of sovereign immunity offered in Harold J. Krent, *Reconceptualizing Sovereign Immunity*, 45 VAND. L. REV. 1529 (1992), which I discuss at length below. *See infra* part III.A.2.

25. *Compare* Antonin Scalia, *Sovereign Immunity and Nonstatutory Review of Federal Administrative Action: Some Conclusions from the Public-Lands Cases*, 68 MICH. L. REV. 867 (1970) *and Williams*, 115 S. Ct. at 1620 (Scalia, J., concurring) *with Nordic Village*, 503 U.S. at 32-38 (opinion of Scalia, J.).

unilaterally provide heightened protection to those values. In Part III, I propose two questions to evaluate the need for clear statement rules. First, are the values at stake worthy of the added protection provided by the requirement that the legislature speak to the issue with the utmost clarity? I conclude that the only values deserving of such protection are those constitutional commands that the Court has decided not to fully enforce through judicial review. Second, can Congress easily provide the requisite clear statement when it considers a subject for the first time? If not, then I conclude a clear statement rule fails because it conflicts with legislative supremacy.

Asking these questions in the context of waivers of federal sovereign immunity, particularly in light of the lessons of environmental law, I determine that the Court's new clear statement rule for federal sovereign immunity falls short of the goals for which clear statement rules are designed. The separation of powers values implicit in sovereign immunity are similar to constitutional values protected by other clear statement rules, although it is questionable whether the Court fails to fully enforce the constitutional separation of powers. But while it is easy for Congress to write a provision that waives sovereign immunity generally, it is hard for Congress to write a provision that specifies the *scope* of a waiver of sovereign immunity. The difficulty Congress experiences in satisfying a clear statement rule is intensified in the sovereign immunity context, where Congress has displayed an increased willingness to waive the federal government's immunity. As a result, the clear statement rule threatens legislative supremacy. The case for a clear statement rule for interpreting waivers of sovereign immunity thus fails for a simple reason: the justification for a clear statement rule must be clear; in sovereign immunity cases, it is not.

II. THE SUPREME COURT'S SOVEREIGN IMMUNITY JURISPRUDENCE

Most accounts trace the doctrine of sovereign immunity to the English notion that "the king can do no wrong."[26] The Framers of our Constitution knew better, and the Constitution itself is silent respecting the immunity of the federal government from suit.[27] Nonetheless, the

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26. 1 WILLIAM BLACKSTONE, COMMENTARIES *238-39. For lists of sources questioning the development of the English law itself, see Joseph D. Block, *Suits Against Government Officers and the Sovereign Immunity Doctrine*, 59 HARV. L. REV. 1060 n.2 (1946); John J. Gibbons, *The Eleventh Amendment and State Sovereign Immunity: A Reinterpretation*, 83 COLUM. L. REV. 1889, 1895-96 & n.24 (1983).

27. Alexander Hamilton asserted that "[i]t is inherent in the nature of sovereignty not to be amenable to the suit of an individual without its consent." THE FEDERALIST No. 81. The few efforts to give the doctrine a textual anchor in the Constitution locate it in

Supreme Court recognized the doctrine as early as 1821 and has continued to do so ever since.[28] It is also well established that Congress can waive the sovereign immunity of the federal government.[29] What remained unclear, at least until 1991, was precisely what Congress had to say in order to waive sovereign immunity.

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the Supremacy Clause. *See* WILLIAM N. ESKRIDGE, JR. & PHILIP P. FRICKEY, CASES AND MATERIALS ON LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY 653 n.2 (2d ed. 1995); Mike Rothmel, Note, *When Will the Federal Government Waive the Sovereign Immunity Defense and Dispose of its Violations Properly?*, 65 CHI.-KENT L. REV. 581, 582 n.7 (1989); J.B. Wolverton, Note, *Sovereign Immunity and National Priorities: Enforcing Federal Facilities' Compliance with Environmental Statutes*, 15 HARV. ENVTL. L. REV. 565, 577 (1991). Most writers simply attribute sovereign immunity to the constitutional structure. *See, e.g.*, Krent, *supra* note 24, at 1534. Since 1798, the Constitution has addressed the immunity of *states* from suit. *See* U.S. CONST. amend. XI. *See generally* Eskridge & Frickey, *Clear Statement*, *supra* note 11, at 608-09, 621-23 (describing the evolution of the clear statement rule for waivers of Eleventh Amendment immunity).

28. *See* Cohens v. Virginia, 16 U.S. (6 Wheat) 264, 411-12 (1821) (Marshall, C.J.) ("The universally received opinion is, that no suit can be commenced or prosecuted against the United States."). The leading nineteenth century case is United States v. Lee, 106 U.S. 196 (1882), where the heirs of General Robert E. Lee successfully sued the federal government for seizing the family's Arlington, Virginia, estate after the Battle of Gettysburg for use as a national cemetery. The Court admitted that the principle of sovereign immunity "has never been discussed or the reasons for it given, but it has always been treated as an established doctrine." *Id.* at 207. For general discussions of the history of sovereign immunity, see Chisholm v. Georgia, 2 U.S. (2 Dall.) 419, 435-45 (1793) (Iredell, J., dissenting); PAUL M. BATOR ET AL., HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 1108-29 (3d ed. 1988) [hereinafter HART & WECHSLER]; Edwin M. Borchard, *Government Liability in Tort*, 34 YALE L.J. 1 (1924); Cramton, *supra* note 24, at 396-417; Scalia, *supra* note 25, at 869-70.

29. The United States may be sued only if it has consented to be sued. *See* Library of Congress v. Shaw, 478 U.S. 310, 314 (1986); Block v. North Dakota, 461 U.S. 273, 280 (1983); United States v. Clarke, 33 U.S. (8 Pet.) 436, 444 (1834) (Marshall, C.J.) ("As the United States are not suable at 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."). Judge Selya has explained that the English tradition

> could not be transplanted root and branch into a system where sovereignty was diffused both vertically (by federalism) and horizontally (by the separation of powers). Accordingly, in regard to the federal government, the law adapted the doctrine in such a way that Congress inherited the king's sovereign role of granting consent to be sued.

United States v. Horn, 29 F.3d 754, 761-62 (1st Cir. 1994). Conversely, the President cannot waive sovereign immunity. *See, e.g.*, *id.* at 762; Susan L. Smith, *Shields for the King's Men: Official Immunity and Other Obstacles to Effective Prosecution of Federal Officials for Environmental Crimes*, 16 COLUM. J. ENVTL. L. 1, 19 & n.53 (1991); Charles W. Tucker, *Compliance by Federal Facilities with State and Local Environmental Regulations*, 35 NAVAL L. REV. 87, 98 (1986).

A. The Law Before 1991

The Supreme Court's sovereign immunity decisions before 1991 offered something for everyone. One line of cases established two rules of strict construction for waivers of sovereign immunity. The first rule governed the initial determination of whether a statute authorized any waiver of sovereign immunity. A waiver of sovereign immunity "cannot be implied but must be unequivocally expressed."[30] The second rule governed the interpretation of statutes that concededly waived sovereign immunity in some instances. Even when Congress enacts a statute that waives the sovereign immunity of the United States in some circumstances, such a statute must be construed narrowly and not enlarged beyond what its language requires.[31] Any conditions on a waiver must be strictly observed, and no exceptions to those conditions may be implied.[32] There is a further caution against subjecting the federal government to monetary claims, even under statutes which

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30. *See, e.g.*, Irwin v. Department of Veterans Affairs, 498 U.S. 89, 95 (1990); United States v. Dalm, 494 U.S. 596, 608 (1990); Army & Air Force Exch. Serv. v. Sheehan, 456 U.S. 728, 734 (1982); United States v. Mitchell, 445 U.S. 535, 538 (1980); United States v. Testan, 424 U.S. 392, 399 (1976); United States v. King, 395 U.S. 1, 4 (1969). This principle first appeared in The Davis, 77 U.S. (10 Wall.) 15, 19 (1869) ("the doctrine is well established that no suit can be sustained in which the United States is made an original defendant . . . without some act of Congress *expressly* authorizing it to be done") (emphasis added), and was repeated in several ensuing cases. *See* United States v. Michel, 282 U.S. 656, 659 (1931); Eastern Transp. Co. v. United States, 272 U.S. 675, 686 (1926); Price v. United States & Osage Indians, 174 U.S. 373, 375-76 (1899). For a general discussion of the Court's interpretation of waivers of sovereign immunity, see HART & WECHSLER, *supra* note 28, at 1157-58; *see also* Borchard, *supra* note 28, at 9-13.

31. *See, e.g.*, *Shaw*, 478 U.S. at 318-19; Ruckelshaus v. Sierra Club, 463 U.S. 680, 685-86 (1983); McMahon v. United States, 342 U.S. 25, 27 (1951); United States v. Sherwood, 312 U.S. 584, 590 (1941). The rule appears to have originated in Schillinger v. United States, 155 U.S. 163, 166 (1894), where the Court stated that "[b]eyond the letter of such consent, the courts may not go, no matter how beneficial they may deem or in fact might be in their possession of a larger jurisdiction over the liabilities of the Government." *Price* was even more forceful:

> we cannot go beyond the language of the statute and impose a liability which the Government has not declared its willingness to assume. . . . The Government is not liable to suit unless it consents thereto, and its liability in suit cannot be extended beyond the plain language of the statute authorizing it.

174 U.S. at 375-76.

32. *See, e.g.*, *Irwin*, 498 U.S. at 97 (White, J., concurring); *Block*, 461 U.S. at 287; Lehman v. Nakshian, 453 U.S. 156, 161 (1981); United States v. Kubrick, 444 U.S. 111, 117-18 (1979); Soriano v. United States, 352 U.S. 270, 276 (1957); *Sherwood*, 312 U.S. at 590.

generally waive sovereign immunity.[33] A waiver must be read according to this second rule of strict construction even if it is contained in a remedial statute.[34]

Another line of cases instructed that waivers of sovereign immunity must be "liberally construed."[35] These cases, which interpreted waivers in New Deal legislation, characterized the doctrine of sovereign immunity as "disfavored."[36] The Court also developed an entirely different approach to clauses authorizing a federal instrumentality to "sue and be sued." There, rather than reading the statutory language narrowly and requiring clear proof that Congress intended to waive sovereign immunity in each particular circumstance, the Court adopted the opposite presumption, holding that a waiver exists absent a special showing to the contrary.[37] But the general liberal construction rule deflated into a principle of neutrality after the 1940s. In *United States v. Kubrick*,[38] for example, the Court said that "we should not take it upon ourselves to

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33. Judge Selya describes this as the "secondary principle" of sovereign immunity. *Horn*, 29 F.3d at 761. It applies to monetary penalties. *See* United States Dep't of Energy v. Ohio, 503 U.S. 607, 620-27 (1992); Missouri Pac. R.R. v. Ault, 256 U.S. 554, 563-65 (1921). It also applies to attorney's fees, see *Ruckelshaus*, 463 U.S. at 685; the garnishment of the wages of federal employees, see Automatic Sprinkler Corp. v. Darla Envtl. Specialists, Inc., 53 F.3d 181, 181-82 (7th Cir. 1995); and interest on otherwise authorized monetary awards, see *Shaw*, 478 U.S. at 314.

34. *See, e.g.*, *Irwin*, 498 U.S. at 98 (White, J., concurring); *Shaw*, 478 U.S. at 316-18; FMC Corp. v. United States Dep't of Commerce, 29 F.3d 833, 850 (3d Cir. 1994) (en banc) (Sloviter, C.J., dissenting); Monark Boat Co. v. NLRB, 708 F.2d 1322, 1327 (8th Cir. 1983).

35. *See* United States v. Shaw, 309 U.S. 495, 501 (1940); Federal Housing Admin. v. Burr, 309 U.S. 242, 245 (1940); Keifer & Keifer v. Reconstruction Fin. Corp., 306 U.S. 381, 388 (1939); *see also* Anderson v. John L. Hayes Constr. Co., 153 N.E. 28, 29-30 (N.Y. 1926) (Cardozo, J.) ("The exemption of the sovereign from suit involves hardship enough where consent has been withheld. We are not to add to its rigor by refinement of construction where consent has been announced.").

36. *See* Larson v. Domestic & Foreign Commerce Corp., 337 U.S. 682, 723 (1949) (Frankfurter, J., dissenting); Brady v. Roosevelt S.S. Co., 317 U.S. 575, 580 (1943); Reconstruction Fin. Corp. v. J.G. Menihan Corp., 312 U.S. 81, 84 (1941); *Burr*, 309 U.S. at 245.

37. *See* Loeffler v. Frank, 486 U.S. 549, 554-55 (1988); Franchise Tax Bd. v. USPS, 467 U.S. 512, 517-18 (1984); *Burr*, 309 U.S. at 244-46; *see also* International Primate Protection League v. Administrators of Tulane Educ. Fund, 500 U.S. 72, 86 n.8 (1991) (citing *Burr* for the proposition that agencies "authorized to 'sue and be sued' are presumed to have fully waived immunity"). The Court has never recognized that the justification for a liberal reading of "sue and be sued" clauses—the amenability to suit of corporate entities—may have broader ramifications given the similar corporate form of many of the original American colonies. *See* Akhil Amar, *Of Sovereignty and Federalism*, 96 YALE L.J. 1425 (1987); Gibbons, *supra* note 26, at 1896-99.

38. 444 U.S. 111 (1979).

extend the waiver beyond that which Congress intended. Neither, however, should we assume to narrow the waiver that Congress intended."[39] Toward that end, the Court frequently looked at the legislative history and statutory purpose to see if they supported a waiver.[40] And the Court sometimes found a waiver in ambiguous statutory language.

B. The Recent Supreme Court Decisions

Things began to change in 1991. In three consecutive decisions, the Court refused to consider the purpose of a statutory waiver, it refused to consider the legislative history of another provision, and it concluded that the existence of different possible constructions of a third provision doomed the case for a waiver. The next two decisions did not break any new ground, but they did not step backward either. The sixth decision involved a "sue and be sued" clause, a kind of waiver provision that the Court has long treated as unique. The final decision purported to follow the same rule announced in the first three decisions, but it applied the rule to find a waiver where the dissenters saw none in the text. I describe each decision in some detail, both to show the evolution of the Court's test and to illustrate some of the practical consequences of using a clear statement rule to decide questions of sovereign immunity.

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39. *Id.* at 117-18; *see also* Indian Towing Co. v. United States, 350 U.S. 61, 69 (1955). In both cases the Court was reading the waiver of sovereign immunity in the Federal Torts Claims Act (FTCA), which is discussed *infra* part II.B.4 and part II.B.6.

40. *See, e.g.*, United States v. Mitchell, 463 U.S. 206, 212-16 (1983) (reviewing the legislative history to determine the scope of the Tucker Act's waiver of sovereign immunity for suits against the government arising from liability in contract); Hancock v. Train, 426 U.S. 167, 188-90 (1976) (examining legislative history of the Clean Air Act in deciding scope of waiver of sovereign immunity); *Indian Towing Co.*, 350 U.S. at 69 (relying on the broad purposes of the FTCA to allow the United States to be sued for the negligent operation of a lighthouse); United States v. Yellow Cab Co., 340 U.S. 543, 549-50 (1951) (relying on the broad congressional purpose of the FTCA to extend the waiver to third-party claims for contribution as a joint tortfeasor); Canadian Aviator, Ltd. v. United States, 324 U.S. 215, 222-23 (1945) (relying on legislative history as an expression of congressional intent to provide a broad waiver of immunity in the Public Vessels Act).

Other cases examined legislative history but concluded that it did not support a waiver. *See, e.g.*, United States v. James, 478 U.S. 597, 606-09 (1986); United States v. Varig Airlines, 467 U.S. 797, 810-11 (1984); Block v. North Dakota, 461 U.S. 273, 288-89 (1983). Justice O'Connor, who joined all of the recent opinions establishing a clear statement rule and wrote the *Ardestani* opinion, earlier remarked that "[t]he Court must still consider all indicia of congressional intent." *Id.* at 294 (O'Connor, J., dissenting).

1. *ARDESTANI* AND THE IRRELEVANCE OF STATUTORY PURPOSE

The Equal Access to Justice Act (EAJA) requires "[a]n agency that conducts an adversary adjudication" to award attorney's fees and expenses to prevailing parties in most instances.[41] An "adversary adjudication" is "an adjudication under section 554 of [the Administrative Procedure Act (APA)] in which the position of the United States is represented by counsel or otherwise."[42] Rafeh-Rafie Ardestani prevailed before the Immigration and Naturalization Service (INS) in an administrative deportation proceeding, and she sought to recover attorney's fees. In *Ardestani v. INS*,[43] however, the Court ruled six to two that an INS deportation proceeding is not "an adjudication under section 554."

Ardestani principally relied on the functional argument that INS deportation proceedings fall "under section 554" of the APA because both types of proceedings are similar.[44] The Court looked at the statute's text instead of its purpose. The statutory term "an adjudication *under* section 554," said Justice O'Connor, unambiguously refers to proceedings "'subject to' or 'governed by' section 554."[45] The Court used two different, and sometimes conflicting, interpretive frameworks in reaching this conclusion. At first, the Court repeated its standard rule of statutory construction: statutory text is strongly presumed to express congressional intent except in exceptional circumstances where the legislative history (or other sources) reveal a contrary intent.[46] The legislative history lacked any evidence of legislative intent inconsistent with plain meaning of the statutory text. But the Court then judged the question in light of a second interpretive principle: waivers of sovereign immunity must be strictly construed in favor of the government.[47] Applying that principle, the

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41. 5 U.S.C. § 504(a)(1) (1994).

42. 5 U.S.C. § 504(b)(1)(C)(i) (1994).

43. 502 U.S. 129 (1991).

44. *Id.* at 134. Ardestani noted that INS proceedings and APA adjudications are "required by statute to be determined on the record after opportunity for an agency hearing." Before addressing that argument, and relying on its earlier decision in Marcello v. Bonds, 349 U.S. 302 (1955), the Court first held that the INS deportation proceedings were governed by the Immigration and Nationality Act, not the APA. *Ardestani*, 502 U.S. at 134.

45. *Ardestani*, 502 U.S. at 135 (emphasis added).

46. *Id.* at 135-36. For different views of the Court's consistency in following this approach, compare Frederick Schauer, *Statutory Construction and the Coordinating Function of Plain Meaning*, 1990 S. CT. REV. 231 (arguing that the Court has increasingly relied on a plain meaning approach) with Philip P. Frickey, *From the Big Sleep to the Big Heat: The Revival of Theory in Statutory Interpretation*, 77 MINN. L. REV. 241 (1992) (arguing that the Court has been inconsistent).

47. *Ardestani*, 502 U.S. at 137 (citing Library of Congress v. Shaw, 478 U.S.

Court candidly acknowledged that the purposes of the EAJA would be served by the liberal interpretation advanced by Ardestani, yet the Court considered itself constrained by "the plain language of the statute, coupled with the strict construction of waivers of sovereign immunity."[48]

Justice Blackmun, joined by Justice Stevens, dissented. They took issue with the Court's characterization of the statutory language as unambiguous and with its reliance on the rule of strictly construing waivers of sovereign immunity.[49] But their primary grievance concerned the Court's refusal to even try to articulate any way in which the ruling furthered the purposes of the EAJA. Justice Blackmun recounted those purposes at length, as demonstrated by the statutory text and the legislative history, and concluded that they supported a waiver.[50]

Ardestani thus indicated that the Court would look only at the plain language of the statute to find a waiver of sovereign immunity. Congress's purpose in enacting the statute became irrelevant if that purpose was not expressed in the statutory text. That conclusion irritated the dissenters, but the Court did not see fit to respond.

2. *NORDIC VILLAGE* AND THE IRRELEVANCE OF LEGISLATIVE HISTORY

Section 106(c) of the Bankruptcy Code provides that

> [e]xcept as provided in subsections (a) and (b) of this section and notwithstanding any assertion of sovereign immunity—(1) a provision of this title that contains 'creditor,' 'entity,' or 'governmental unit' applies to governmental units; and (2) a determination by the court of an issue arising under such a provision binds governmental units.[51]

Four months after Nordic Village, Inc. filed for bankruptcy, one of the company's officers used $20,000 of the company's funds to satisfy his individual tax liability to the Internal Revenue Service (IRS). The

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310, 318 (1986), and Ruckleshaus v. Sierra Club, 463 U.S. 680, 685-86 (1983)). The Court cited the *Kubrick* principle that waivers should not be read too narrowly, see *supra* note 32 and accompanying text, but the Court then distinguished *Kubrick* as a case in which Congress had waived sovereign immunity over an entire subject matter. The EAJA, by contrast, contains a limited waiver that only extends to proceedings that fall "under section 554" of the APA. *Ardestani*, 502 U.S. at 137. The Court's analysis begs the question of how broadly one defines the "subject matter" covered by a waiver of sovereign immunity.

48. *Ardestani*, 502 U.S. at 138.

49. *Id.* at 139-40 (Blackmun, J., dissenting).

50. *Id.* at 141-50.

51. 11 U.S.C. § 106(c) (1994).

bankruptcy trustee sought to recover that money, but the IRS refused to pay. In *United States v. Nordic Village, Inc.*,[52] the Court ruled seven to two that sovereign immunity barred the trustee's suit against the government.

Justice Scalia's opinion consciously sought to clarify the Court's prior conflicting statements regarding waivers of sovereign immunity. "[T]he traditional principle," he explained, was that "the Government's consent to be sued 'must be construed strictly in favor of the sovereign,' and not 'enlarge[d] . . . beyond what the language requires.'"[53] He distinguished the cases relied on by the bankruptcy trustee in support of a generally liberal construction of waivers of sovereign immunity because they involved "'the sweeping language' of the Federal Tort Claims Act" or "equally broad 'sue and be sued' clauses" which provided clear congressional intent to narrowly construe the exceptions to the waivers instead of the waivers themselves.[54]

Section 106(c) of the Bankruptcy Code failed the Court's test. The provision waived sovereign immunity in some instances, but it did not unambiguously waive sovereign immunity from monetary claims. Section 106(c) thus stood in contrast to its preceding subsections (a) and (b), which plainly waived sovereign immunity from certain monetary claims.[55] The Court propounded two possible interpretations of section 106(c) that would permit declaratory and injunctive, but not monetary, relief.[56] The mere existence of such "plausible" interpretations meant that, notwithstanding the bankruptcy trustee's interpretation favoring monetary relief, the statute was ambiguous.[57]

Once the Court found that the text of section 106(c) did not unambiguously waive sovereign immunity, it added that "legislative history has no bearing on the ambiguity point."[58] Justice Scalia explained that "the 'unequivocal expression' of elimination of sovereign immunity that we insist upon is an expression in statutory text. If clarity

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52. 503 U.S. 30 (1992).

53. *Id.* at 34 (quoting McMahon v. United States, 342 U.S. 25, 27 (1951), and Ruckleshaus v. Sierra Club, 463 U.S. 680, 685 (1983), which in turn quoted Eastern Transp. Co. v. United States, 272 U.S. 675, 686 (1927)).

54. *Id.* at 34 (quoting United States v. Yellow Cab Co., 340 U.S. 543, 547 (1951)). Justice Scalia added that a statutory provision may work an extensive waiver of sovereign immunity when it is "consistent with Congress's clear intent," *id.*, but his reaffirmation of the strict construction rule indicates that he thought such cases were the exception, not the rule.

55. *Id.* at 34.

56. *Id.* at 35-36.

57. *Id.* at 37.

58. *Id.*

does not exist there, it cannot be supplied by a committee report."[59] The Court thus refused to address the arguments based on legislative history.

Justice Stevens strongly objected to the Court's reading of section 106(c) as inconsistent with its natural meaning and its legislative intent.[60] He found the Court's "love affair with the doctrine of sovereign immunity" even more objectionable.[61] He derided the doctrine as "nothing but a judge-made rule" with little modern justification that posed a "persistent threat to the impartial administration of justice."[62] He also suggested that Congress shared his view.[63] Finally, taking particular issue with the Court's refusal to consider the legislative history, he wrote:

> Surely the interest in requiring the Congress to draft its legislation with greater clarity or precision does not justify a refusal to make a good faith effort to ascertain the actual meaning of the message it tried to convey in a statutory provision that is already on the books. The Court's stubborn insistence on "clear statements" burdens the Congress with unnecessary reenactment of provisions that were already plain enough when read literally. The cost to litigants, to the legislature, and to the public at large, of this sort of judicial lawmaking is substantial and unfortunate. Its impact on individual citizens engaged in litigation against the sovereign is tragic. The fact that Congress has ample power to correct the Court's fortunate error does not justify this refusal to obey its command.[64]

Again, however, the Court did not respond to Justice Stevens. *Nordic Village* thus built upon *Ardestani*: inquiries into the legislative history in *Nordic Village* were no more permissible then the inquiry into the statutory purpose barred in *Ardestani*. If a waiver exists, it must be found in the text of the statute.

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59. *Id.*

60. Justice Stevens argued that the United States is a "governmental unit," that the provision relied upon by the bankruptcy trustee "applies" to the United States "notwithstanding any assertion of sovereign immunity," and thus the federal government was bound by the bankruptcy court's adverse determination. *Id.* at 40 (Stevens, J., dissenting).

61. *Id.* at 42.

62. *Id.* at 42-43.

63. *Id.* at 43.

64. *Id.* at 45-46 (footnote omitted).

3. *OHIO* AND THE CONSEQUENCES OF STATUTORY AMBIGUITY

The next case presented three possible statutory sources for a waiver of sovereign immunity. The State of Ohio sued the U.S. Department of Energy (DOE) for violations of the Clean Water Act, the Resource Conservation and Recovery Act (RCRA), and state laws during the course of operating a uranium-processing plant in Fernald, Ohio. The DOE admitted its liability for violating the laws, but it argued that it retained sovereign immunity from the state's claim for civil penalties. *United States Department of Energy v. Ohio*[65] held six to three that none of the provisions of the Clean Water Act or RCRA waive the sovereign immunity of federal agencies from civil penalties for violations of state or federal water pollution laws. The state first cited the nearly identical citizen suit provisions of section 505(a) of the Clean Water Act[66] and section 7002(a) of RCRA.[67] The Clean Water Act citizen suit provision states that

> any citizen may commence a civil action on his own behalf . . . against any person (including . . . the United States . . .) who is alleged to be in violation of (A) an effluent standard or limitation under this chapter or (B) an order issued by the Administrator or a State with respect to such a standard or limitation . . . . The district courts shall have jurisdiction . . . to enforce such an effluent standard or limitation, or such an order . . . as the case may be, and to apply any appropriate civil penalties under [section 309(d)].[68]

The state reasoned that the incorporation of the civil penalties sections of each statute within their citizen suit provisions displayed a congressional intent to subject federal instrumentalities to civil penalties. Justice Souter, however, observed that the civil penalties provisions are applicable only to "persons," and neither act generally defines "person" to include the United States.[69] Accordingly, the Court held that while the United

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65. 503 U.S. 607 (1992).

66. 33 U.S.C. § 1365(a) (1994).

67. 42 U.S.C. § 6972(a) (1994).

68. 33 U.S.C. § 1365(a) (1994). Section 309(d), in turn, deseribes when and what civil penalties are appropriate. 33 U.S.C. § 1319(d) (1994).

69. *Ohio*, 503 U.S. at 619; *see* 33 U.S.C. § 1319(d) (1994) and 42 U.S.C. §§ 6928(a), (g) (1994) (civil penalty provisions applicable to "persons"); 33 U.S.C. § 1362(5) (1994) and 42 U.S.C. § 6903(15) (1994) (defining "persons").

States is a "person" subject to a citizen suit, the United States is not a "person" from which civil penalties may be collected.[70]

The state next relied on the federal facility provision of section 313(a) of the Clean Water Act, which provides:

> Each department, agency, or instrumentality of the executive, legislative, and judicial branches of the Federal Government (1) having jurisdiction over any property or facility, or (2) engaged in any activity resulting, or which may result, in the discharge or runoff of pollutants, and each officer, agent, or employee thereof in the performance of his official duties, shall be subject to, and comply with, all Federal, State, interstate, and local requirements, administrative authority, and process and sanctions respecting the control and abatement of water pollution in the same manner, and to the same extent as any nongovernmental entity including the payment of reasonable service charges. . . . [T]he United States shall be liable only for those civil penalties arising under Federal law or imposed by a State or local court to enforce an order or the process of such court.[71]

The state claimed that a civil penalty is a "sanction" within the meaning of section 313(a), but the Court concluded that "Congress was using 'sanction' in its coercive sense, to the exclusion of punitive fines" such as civil penalties.[72] The state also claimed that a civil penalty imposed for a violation of a state law permit program approved by the Environmental Protection Agency (EPA) is one "arising under Federal law" within the meaning of section 313(a). Again, the Court disagreed. The Court held that a fine for violating a state statute, even a state statute approved by a federal agency, is not a fine "arising under Federal law."[73] This left the Court uncertain of the meaning of "a seemingly expansive phrase like 'civil penalties arising under federal law.'" Without citing the canon that statutes should be read to avoid rendering any language superfluous,[74] the Court resolved the issue by relying on the rule that statutes waiving sovereign immunity must be construed narrowly—and ambiguous statutory language cannot support a waiver.[75]

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70. *Ohio*, 503 U.S. at 617-18.
71. 33 U.S.C. § 1323(a) (1994).
72. *Ohio*, 503 U.S. at 623.
73. *Id.*
74. *See, e.g.*, Ratzlaf v. United States, 114 S. Ct. 655, 659 (1994).
75. *Ohio*, 503 U.S. at 625-26.

The state's last argument relied on the federal facilities provision of section 6001 of RCRA,[76] which was nearly identical to section 313(a) of the Clean Water Act. The state claimed that the phrase "all Federal, State, interstate, and local requirements" encompassed civil penalties. The Court, however, adopted the Tenth Circuit's reading of "all . . . requirements" to include "'substantive standards and the means for implementing those standards, but excluding punitive measures.'"[77] Thus, the Court held that neither the Clean Water Act nor RCRA waives the sovereign immunity of federal agencies from civil penalties.

Justice White's dissent, joined by Justices Blackmun and Stevens, accused the Court of "adopting 'an unduly restrictive interpretation' of both statutes and writing the waivers out of existence."[78] He believed that the plain language of the waivers satisfied the Court's own test.[79] The crucial question for Justice White was whether the desired civil penalties arose under federal law as required by the Clean Water Act, and he concluded that the structure and plain language of the statute demonstrated that they did.[80]

Ohio completed the Court's move to find a waiver of sovereign immunity only in clear statutory text. While *Ardestani* and *Nordic Village* blocked the examination of the purpose and legislative history of the statute respectively, *Ohio* insisted that the statutory text itself must be clear. The existence of plausible alternative readings of the statute meant that the language was unclear, which meant that the statute was ambiguous, which meant that no waiver of sovereign immunity would be found.

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76. 42 U.S.C. § 6961 (1994).

77. *Ohio*, 503 U.S. at 627-28 (quoting Mitzelfelt v. Department of Air Force, 903 F.2d 1293, 1295 (10th Cir. 1990)).

78. *Id.* at 630 (quoting Canadian Aviator, Ltd. v. United States, 324 U.S. 215, 222 (1945)).

79. Justice White wrote that "[i]t is impossible to fathom a clearer statement that the United States may be sued and found liable for civil penalties," *id.* at 632, and that the Court failed to "read the [Clean Water Act] as Congress wrote it." *Id.* at 635. Moreover, "[t]he job of this Court is to determine what a statute says, not whether it could have been drafted more artfully." *Id.* at 636.

80. *Id.* at 636. Likewise, while Justice White agreed with the Court that the RCRA federal facilities provision did not work an unambiguous waiver, he thought that the RCRA citizen suit provision did achieve such a waiver. *Id.*

4. *SMITH* AND THE SHRINKING FTCA WAIVER

The Federal Torts Claims Act (FTCA) generally waives the sovereign immunity of the federal government from tort suits. However, it does not apply to "[a]ny claim arising in a foreign country."[81] John Emmett Smith died while on a hike at the McMurdo Station in Antarctica, and his widow sued the federal government in federal district court in her home state of Oregon alleging that the government negligently failed to warn of the dangers outside the hiking path. In *Smith v. United States*,[82] the Court held eight to one that the FTCA did not waive the government's sovereign immunity because Antarctica is a "foreign country" within the meaning of the exception.

Chief Justice Rehnquist's opinion acknowledged that the Court's prior cases contained conflicting statements about how the waiver of sovereign immunity in the FTCA should be construed.[83] Dicta in *Nordic Village* described the FTCA waiver as "sweeping,"[84] but the Court now reaffirmed the principle first stated in *Kubrick* that the waiver should neither be read too broadly nor too narrowly.[85] The Court then identified three reasons why the foreign country exception to the waiver should be read to include Antarctica—and why the Congress that enacted the FTCA would have reached the same result.[86]

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81. 28 U.S.C. § 2680(k) (1994). The general FTCA waiver extends to

> claims against the United States . . . for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

28 U.S.C. § 1346(b) (1994). For an overview of the FTCA, see HART & WECHSLER, *supra* note 28, at 1147-53.

82. 113 S. Ct. 1178 (1993).

83. *Id.* at 1182-83 (citing cases).

84. United States v. Nordic Village, Inc., 503 U.S. 30, 34 (1992).

85. *Smith*, 113 S. Ct. at 1183 (quoting United States v. Kubrick, 444 U.S. 111, 117-18 (1979)). Justice White used this language in his dissent in United States Dep't of Energy v. Ohio, 503 U.S. 607, 630 (1992).

86. The Court cited dictionary definitions of "country" (the FTCA itself does not define the term) and expressed its belief that Antarctica is a "country" within the ordinary meaning of the term. *Smith*, 113 S. Ct. at 1181. It next cited the reference in § 1346(b) of the FTCA to government liability "in accordance with the law of the place where the act or omission occurred" as "more than a choice-of-law provision: it delineates the scope of the United States' waiver of sovereign immunity." *Id.* at 1182. For, the Court feared, the FTCA would direct the court to apply "the law of a place that has no law" if Antarctica were within the scope of the FTCA waiver. *Id.* And the Court relied on the presumption against the extraterritorial application of federal statutes. *Id.* at 1183.

This time Justice Stevens dissented alone. He forwarded an altogether different general approach to interpreting the waiver of sovereign immunity in the FTCA. Indeed, describing the waiver as "broad" and "sweeping,"[87] Justice Stevens favored a presumption that a waiver exists and that exceptions to a waiver should be read narrowly.[88] He also explained at length the errors he perceived in the Court's understanding of the statutory structure.[89]

Smith did not add anything to what the Court had already said in *Ardestani, Nordic Village,* and *Ohio.* Indeed, the reference to *Kubrick* offered some indication that the old rule might still apply. The better reading of *Smith,* however, reflects the Court's longstanding (though inconsistent) special treatment of the broad language of the FTCA.

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87. *Id.* at 1184, 1186 (Stevens, J., dissenting) (quoting *Nordic Village*, 503 U.S. at 34).

88. *Id.*

89. Justice Stevens insisted that the foreign country exception and another statutory exception to the general waiver in the FTCA would have been unnecessary if the FTCA did not apply outside the United States. *Id.* at 1184-85. The majority did not even bother to respond to this argument. Justice Stevens also responded at length to the majority's contention that the choice-of-law provision supported its result. *Id.* at 1186-90.

5. *IDAHO* AND THE SEARCH FOR THE MIDDLE GROUND

The McCarran Amendment governs the participation of the federal government in state water law adjudications. It provides:

> Consent is hereby given to join the United States as a defendant in any suit (1) for the adjudication of rights to the use of water of a river system or other source, or (2) for the administration of such rights, where it appears that the United States is the owner of or is in the process of acquiring water rights by appropriation under State law, by purchase, by exchange, or otherwise, and the United States is a necessary party to such suit. The United States, when a party to any such suit, shall (1) be deemed to have waived any right to plead that the State laws are inapplicable or that the United States is not amenable thereto by reason of its sovereignty, and (2) shall be subject to the judgments, orders, and decrees of the court having jurisdiction, and may obtain review thereof, in the same manner and to the same extent as a private individual under like circumstances: *Provided*, That no judgment for costs shall be entered against the United States in any such suit.[90]

Idaho law, in turn, was amended in 1985 and 1986 to prohibit the filing of a notice of a claim in a water rights adjudication unless the notice "is submitted with a filing fee."[91] The United States submitted a notice of a claim without the required filing fee, the state refused to accept it, and the state courts upheld the state's action.[92]

The Supreme Court, reversing the state courts nine to zero in *United States v. Idaho*,[93] held that the United States did not have to pay the state filing fee because the McCarran Amendment did not waive sovereign immunity from the fee requirement. But Chief Justice Rehnquist's opinion lacked the sweeping nature of the recent opinions in *Ardestani*,

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90. 43 U.S.C. § 666(a) (1994).

91. IDAHO CODE § 42-1414 (1990).

92. Idaho Dep't of Water Resources v. United States, 832 P.2d 289 (Idaho 1992), *rev'd*, 113 S. Ct. 1893 (1993). Justice Boyle dissented from the Idaho Supreme Court's decision because the "'clear statement' rule" established by *Nordic Village* required that "[a] statutory waiver must be grounded exclusively upon the statutory text (the textual requirement) and the waiver must be 'unequivocal' (the unequivocal requirement)." *Idaho*, 832 P.2d at 301 (Boyle, J., dissenting). Thus, while acknowledging that "my heart is with the majority," *id.* at 306, Justice Boyle nonetheless concluded that the majority's finding of a waiver conflicted with *Nordic Village* and *Ardestani*. *Id.* at 305-06.

93. 113 S. Ct. 1893 (1993).

Nordic Village, and *Ohio*. The Court repeated its admonitions that waivers must be express, strictly construed, and not enlarged beyond the statutory language,[94] but it again quoted its statement in *Kubrick* that waivers should not be narrowed beyond congressional intent either.[95]

The Court struck a middle ground between the government's position and the state's position.[96] After rejecting the interpretations advanced by both parties, the Court concluded that Idaho law improperly characterized "costs" as "fees." Before 1986, the expenses of water rights adjudications were denominated "costs" that were paid by all parties at the conclusion of the suit. After 1986, the same expenses were denominated "fees" that were paid by all parties at the beginning of the suit. Idaho's argument that the McCarran Amendment proviso respecting "costs" did not extend to "fees" thus failed to impress the Court.[97] The McCarran Amendment's general reference to "the State laws" which the United States must heed was not sufficiently specific to satisfy the cases requiring a "specific waiver of sovereign immunity before the United States may be held liable for" monetary exactions.[98]

Idaho did not state any new principles, and the reference to *Kubrick* showed the continued pull of the neutrality view. The result, however, demonstrated that the Court demanded a clear statement of the scope of a waiver of sovereign immunity in the statutory text. As in *Ohio*, ambiguity meant continued immunity.

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94. *Id.* at 1896.

95. *Id.* (quoting United States v. Kubrick, 444 U.S. 111, 117-18 (1979)).

96. The United States argued that there was a differentiation between state substantive water law (with which the federal government must comply) and state laws governing procedures and fees (with which the federal government need not comply). *Id.* The Court dismissed this argument as "weak" for two reasons: it failed to account for the different references to "the State laws" in the second sentence and to "State law" in the first sentence, and it would undermine the undisputed consent to suit by permitting the federal government to demand special treatment with respect to pleading, discovery, evidence, or any other procedural matter. *Id.* at 1897. The Court also quoted an earlier decision "declin[ing] to confine [the McCarran Amendment] so narrowly." *Id.* (quoting United States v. District Court for Eagle County, 401 U.S. 520, 525 (1971)).

The state fared no better. It argued that the McCarran Amendment required federal compliance with all applicable state laws. The Court pointed to the proviso forbidding the assessment of costs against the United States, and noted its previous strict construction decisions rejecting efforts to impose monetary liability on the United States "for what are the normal incidents of litigation between private parties." *Id.*

97. *Id.*

98. *Id.* Justice Stevens concurred in the judgment only. He was "persuaded that these exactions are precisely what Congress had in mind when it excepted judgments for 'costs' from its broad waiver of sovereign immunity from participation in water rights adjudications." *Id.* at 1898.

6. *MEYERS* AND THE "SUE AND BE SUED" CLAUSE EXCEPTION

FDIC v. Meyers[99] came next, the first blemish (or bright spot, take your pick) in the Court's recent record. Congress empowered the Federal Savings and Loan Insurance Corporation (FSLIC), like many other government corporations and quasi-governmental bodies, "[t]o sue and be sued, complain and defend, in any court of competent jurisdiction in the United States."[100] John Meyers sued the FSLIC for depriving him of a constitutionally protected property right when it fired him from his management position with a savings and loan seized by the FSLIC. The Court unanimously rejected the government's claim of sovereign immunity from the suit.[101]

Justice Thomas analyzed the sovereign immunity issue in two parts. He first rejected the government's argument that the FTCA provided the exclusive source for Meyers' claim. Section 2679(a) of the FTCA provides that

> [t]he authority of any federal agency to sue and be sued in its own name shall not be construed to authorize suits against such federal agency on claims which are cognizable under section 1346(b) of this title, and the remedies provided by this title in such cases shall be exclusive.[102]

The Court characterized the FTCA waiver of sovereign immunity as "broad,"[103] and it pointedly refused to interpret the statute in a manner that would yield a narrower waiver of sovereign immunity than the broad jurisdictional grant.[104] The Court concluded that Meyers' claim was not

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99. 114 S. Ct. 996 (1994).

100. 12 U.S.C. § 1725(c)(4) (1994). That power vanished in 1989 when Congress abolished the FSLIC and transferred its functions to the FDIC. *See Meyers*, 114 S. Ct. at 999 n.1. Other federally-created bodies that can "sue and be sued" include the Tennessee Valley Authority, see 16 U.S.C. § 831c(b) (1994); the American Red Cross, see 36 U.S.C. § 2 (1994); and the United States Postal Service, 39 U.S.C. § 401(1) (1994).

101. The decision on the sovereign immunity issue produced a hollow victory for Meyers. The Court rejected his claimed right to an implied *Bivens* action against the Agency itself because such actions are only available against individual government officials. *Meyers*, 114 S. Ct. at 1004-06 (referring to Bivens v. Six Unknown Fed. Narcotic Agents, 403 U.S. 388 (1971)).

102. 28 U.S.C. § 2679 (1994).

103. *Meyers*, 114 S. Ct. at 1000 (quoting United States v. Nordic Village, Inc., 503 U.S. 30, 34 (1992)).

104. *Id.* at 1002.

"cognizable under section 1346(b)" of the FTCA, and thus, not precluded by section 2679(a).[105]

The Court then rejected the government's argument that the "sue and be sued" clause failed to waive sovereign immunity from Meyers' suit. The Court's discussion of the waiver worked by the "sue and be sued" clause was 180 degrees opposite its approach to other waivers of sovereign immunity: the "sue and be sued" clause was "simple and broad," "to be 'liberally construed,'" and created "the presumption that immunity has been waived."[106] That presumption of a complete waiver could be rebutted only by clear proof of a contrary congressional intent, a grave effect on governmental functions, or other specific indications supporting a narrower interpretation.[107] The government sought to engraft an unwritten exception to the waiver rather than satisfying one of the statutory exceptions,[108] so the Court held that the "sue and be sued" clause indeed waived sovereign immunity from Meyers' claim.

Meyers confirmed the existence of two different rules for interpreting waivers of sovereign immunity. The normal rule (applied in *Ardestani, Nordic Village, Ohio, Smith* and *Idaho)* required a clear statement of the waiver in the statutory text. The second, special rule governing the interpretation of "sue and be sued" clauses presumed the existence of a waiver absent a clear indication to the contrary. *Meyers* made no effort to reconcile these conflicting interpretive strategies, nor did it explain why "sue and be sued" clauses were so different from other kinds of broad statutory language.

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105. *Id.* at 1000-02.

106. *Id.* at 1003 (quoting Federal Housing Admin. v. Burr, 309 U.S. 242, 245 (1940)).

107. *Id.* (quoting *Burr*, 309 U.S. at 245).

108. With substantial precedent on its side, the government argued that "sue and be sued" clauses are designed to treat agencies like private parties, and since there are no implied *Bivens* claims against private parties, Meyers should not be allowed to bring such a claim against the government. The Court responded that its previous cases merely "looked to the liability of a private enterprise as a *floor* below which the agency's liability could not fall." *Id.* at 1004.

7. *WILLIAMS* AND THE RETURN TO COMMON SENSE

The last case may be the most interesting. Lori Williams and her husband, Jerrold Rabin, owned a house. Rabin also owned part of a restaurant, and he personally incurred and failed to pay federal taxes related to the restaurant. Then—in short succession—Williams obtained sole title to the house when she and Rabin divorced, the IRS filed a tax lien on the house to recover the taxes owed by Rabin, Williams entered into a contract to sell the house, and the IRS provided actual notice of the lien to Williams one week before the closing. When the buyer of the house threatened to sue Williams if she did not go through with the sale, Williams paid the IRS $41,937 to remove the tax lien. Williams then moved to recover the money, arguing that she had taken title to the house free of the lien because the IRS had not provided her with proper notice of the lien at the time of her divorce. In *Williams v. United States*,[109] the Court held six to three that Williams had standing to protest the lien even though the IRS had actually assessed the tax against her former husband.

Justice Ginsburg relied on *Ohio* and *Nordic Village* as stating the appropriate test: "we may not enlarge the waiver beyond the purview of the statutory language," and "[o]ur task is to discern the 'unequivocally expressed' intent of Congress, construing ambiguities in favor of immunity."[110] She found such a clear intent in 28 U.S.C. § 1346(a)(1), which creates federal jurisdiction over "*[a]ny* civil action against the United States for the recovery of *any* internal revenue tax alleged to have been *erroneously* or illegally assessed or *collected*."[111] The government, however, focused on three other provisions of the Internal Revenue Code (1) requiring the exhaustion of administrative remedies prior to instituting suit, (2) limiting administrative remedies to "taxpayers," and (3) defining "taxpayer" narrowly.[112] The Court responded that other parts of the Code indicated that refunds are available to parties who are not actually assessed the tax.[113] In any event, the Court added, Williams could be viewed as being "subject to any internal

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109. 115 S. Ct. 1611 (1995).

110. *Id.* at 1615-16 (citations omitted).

111. *Id.* at 1616 (quoting 28 U.S.C. § 1346(a)(1) (1994)).

112. *See* 26 U.S.C. § 6511(a) (1994) (providing that administrative claims "shall be filed by the taxpayer"); 26 U.S.C. § 7422 (1994) (requiring administrative exhaustion prior to suit); 26 U.S.C. § 7701(a)(14) (1994) (defining "taxpayer" as "any person subject to any internal revenue tax").

113. *Williams*, 115 S. Ct at 1617.

revenue tax," and thus a "taxpayer," by virtue of the lien placed on her house.[114]

But Justice Ginsburg did not end her analysis there. She expressed the Court's "preference for common sense inquiries over formalism."[115] She then detailed how Williams (and others in her position) would be denied any realistic remedies under a different reading of the Code.[116] Even the general principle that a party may not challenge the tax liability of another merited an exception in this case.[117]

Justice Scalia, the author of *Nordic Village*, agreed. He found the administrative exhaustion provisions "too remote" to limit the waiver of sovereign immunity stated in 28 U.S.C. § 1346(a)(1).[118] He acknowledged that the clear statement rule for waivers of sovereign immunity applied to the determination of the scope of such waivers, but he denied that the rule "require[d] explicit waivers to be given a meaning that is implausible."[119] Finally, quoting Justice Cardozo, Justice Scalia proclaimed that "'the exemption of the sovereign from suit involves hardship enough where consent has been withheld. We are not to add to its rigor by refinement of construction where consent has been announced.'"[120]

The dissenters—Chief Justice Rehnquist, joined by Justices Kennedy and Thomas—found it difficult to reconcile this decision with the Court's recent precedent. They characterized the decision as "an unusual departure from the bedrock principle that waivers of sovereign immunity must be 'unequivocally expressed,'" and they objected that the Court's discussion of the equities addressed "a factor not usually of great significance in construing the Internal Revenue Code."[121] They agreed with the government that Williams lacked standing because of the three provisions governing administrative exhaustion, noting that the Court's admission that those provisions were "inconsistent" with other parts of the Code should have meant that a waiver did not exist.[122]

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114. *Id.*

115. *Id.* at 1618.

116. *Id.* at 1618-20.

117. *Id.* at 1619-20.

118. *Id.* at 1620 (Scalia, J., concurring). He thus found it unnecessary to characterize Williams as a taxpayer, as the Court had done, but he joined Justice Ginsburg's opinion in every other respect. *Id.*

119. *Id.*

120. *Id.* (quoting United States v. Aetna Casualty & Sur. Co., 338 U.S. 366, 383 (1949), which quoted Anderson v. John L. Hayes Constr. Co., 153 N.E. 28, 29-30 (N.Y. 1926)).

121. *Id.* (Rehnquist, C.J., dissenting).

122. *Id.* at 1621 ("an 'inconsistency' is not enough to carry the day when dealing with a waiver of sovereign immunity; 'inconsistency' simply means ambiguity, and

They were right, or rather, they were right according to *Nordic Village, Ohio,* and *Idaho.* Only in *Williams* was the Court persuaded that Congress had waived sovereign immunity in the face of a statutory scheme whose provisions did not all point in the same direction. *Williams* thus calls into question the clear statement rule the Court had developed in its preceding five terms.

C. Making Sense of What the Supreme Court Has Done

These cases—especially *Ardestani, Nordic Village,* and *Ohio*—indicate that the Court has created a clear statement rule regarding waivers of federal sovereign immunity. This is new. The Court has often insisted that waivers of sovereign immunity must be unequivocally expressed in the statutory text, but the recent cases give that charge some extra teeth. *Ardestani* refused to consider the purpose of the statute in deciding whether the statute waived sovereign immunity. *Nordic Village* refused to consider the legislative history in deciding whether the statute waived sovereign immunity. *Ohio* held that an ambiguous statute does not waive sovereign immunity. Coupled with the results in *Smith* and *Idaho,* it appears that the Court has created a clear statement rule without clearly stating so.

But the lower federal courts and the state courts have struggled to make sense of these decisions—even before *Williams.* Justice Boyle's dissenting opinion from the Idaho Supreme Court decision in *Idaho* most clearly recognizes the creation of a clear statement rule[123]—and the U.S. Supreme Court unanimously vindicated his dissent. A number of other courts have read *Ardestani, Nordic Village,* and *Ohio* as limiting the search for a waiver of sovereign immunity to the unambiguous statutory text.[124] Some courts, however, have continued to apply the traditional

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because a waiver of sovereign immunity must be 'unequivocally expressed,' any ambiguity is construed in favor of immunity").

123. Justice Boyle observed that "to meet the textual requirement for a waiver under the United States Supreme Court's clear statement test, the legislative history of a statute, the purpose of a statute, and even equitable considerations are all irrelevant." Idaho Dep't of Water Resources v. United States, 832 P.2d 289, 302 (1992) (Boyle, J., dissenting) (citing United States v. Nordic Village, Inc., 503 U.S. 30, 37 (1992) and Ardestani v. INS, 502 U.S. 129, 137-38 (1991)), *rev'd,* 113 S. Ct. 1893 (1993).

124. *See* Department of Army v. FLRA, 56 F.3d 273, 277 (D.C. Cir. 1995); Moore v. United States Dep't of Agriculture, 53 F.3d 991, 994 (5th Cir. 1995); Beneficial Consumer Discount Co. v. Poltonowicz, 47 F.3d 91, 95 (3d Cir. 1995); Dorsey v. United States Dep't of Labor, 41 F.3d 1551, 1555 (D.C. Cir. 1994); Hensel v. Office of the Chief Admin. Hearing Officer, 38 F.3d 505, 509 (10th Cir. 1994); United States v. Horn, 29 F.3d 754, 762 (1st. Cir. 1994); Westlands Water Dist. v. Firebaugh Canal, 10 F.3d 667, 673 (9th Cir. 1993); Rospatch Jesseo Corp. v. Chrysler Corp., 829 F. Supp. 224,

rule of strict construction rather than a clear statement rule, thereby permitting the consultation of sources outside the statutory text.[125] A few courts insist that sources outside the statutory text may produce a waiver of sovereign immunity.[126]

To be sure, the Court's recent cases can be viewed as not establishing a new rule. Two opposite readings support this claim. On the one hand, the Court has long said that an unequivocal statement is necessary to produce a waiver of sovereign immunity. If that is true—if the evidence of a waiver must be clearly spelled out in the text—then no

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229 (W.D. Mich. 1993); Jones v. Brown, 6 Vet. App. 101 (1993) (en banc); *In re* Taylor, 148 B.R. 361, 363-64 (S.D. Ga. 1992); *In re* Shafer, 146 B.R. 477, 480 (D. Kan.), *rev'd*, 148 B.R. 617 (Bankr. D. Kan. 1992); Williams v. United States, Civ. No. 91-5286, 1992 U.S. Dist. LEXIS 13966, at *5, *11 n.6, *16 (C.D. Cal. Sept. 2, 1992).

125. *See* Quality Tooling, Inc. v. United States, 47 F.3d 1569 (1st Cir. 1995) (Sehall, J., dissenting); Edwards v. United States Dep't of Justice, 43 F.3d 312, 317 (7th Cir. 1994); United States v. Price, 42 F.3d 1068, 1071 (7th Cir. 1994); FMC Corp. v. United States Dep't of Commerce, 29 F.3d 833 (3d Cir. 1994) (en banc) (discussed *infra* notes 282-93 and accompanying text); *In re* University Medical Center, 973 F.2d 1065, 1085 (3d Cir. 1992); Maine v. Department of Navy, 973 F.2d 1007, 1010-11, 1015 (1st Cir. 1992); Sierra Club v. Lujan, 972 F.2d 312, 314 (10th Cir. 1992); United States v. Waksberg, 881 F. Supp. 36, 39-41 (D.D.C. 1995); Taborski v. IRS, 141 Bankr. L. Rep. 959, 963-64 (N.D. Ill. 1992); *see also In re Taylor*, 148 B.R. at 363-64 (relying on statutory purpose as alternative basis for finding waiver). *Maine* is particularly illuminating because then-Judge Breyer wrote the First Circuit's opinion. In *Maine*, the state sought to collect civil penalties from the Navy for environmental violations. The holding in *Ohio* blocked the state's effort to rely on the RCRA waiver, so the state tried § 120 of CERCLA, 42 U.S.C. § 9620 (1994). Judge Breyer found CERCLA's language no clearer than RCRA. But he then considered the legislative history of CERCLA for a possible means of distinguishing *Ohio*. He did not find any useful evidence in the legislative history, but the plain implication is that he would have relied on the legislative history to satisfy the test for a waiver. *Maine*, 973 F.2d at 1011. That approach is consistent with Justice Breyer's general view of legislative history. *See* Stephen Breyer, *On the Uses of Legislative History in Interpreting Statutes*, 65 S. CAL. L. REV. 845 (1992).

126. United States v. Oregon, 44 F.3d 758 (9th Cir. 1994), provides the best example. The court there acknowledged that "an examination of Congress' purposes and the historical context of the statute may not serve to waive immunity when the text of the statute fails to do so unequivocally." *Id.* at 763. But the court added that the "scope of such a waiver can only be ascertained by reference to underlying Congressional policy." *Id.* The court quoted Franchise Tax Board v. USPS, 467 U.S. 512 (1984), in support of this latter principle, but *Franchise Tax Board* involved a "sue and be sued" clause which the Court treats differently than any other provision waiving sovereign immunity. *See supra* note 37 and accompanying text. For other examples of courts refusing to believe what the Supreme Court has said in its most recent sovereign immunity cases, see Quality Tooling, Inc. v. United States, 47 F.3d 1569 (1st Cir. 1995) ("We must of course honor the Supreme Court's current view of the doctrine, but at the same time we may not ignore Congressional intent and purpose"); *Jones*, 6 Vet. App. at 108-10 (Kramer, J., concurring); *id.* at 117-19 (Steinberg, J., dissenting).

room exists for arguments about legislative history, statutory purpose, or anything else. The recent decisions may simply mean that the Court is finally taking its own rhetoric seriously. On the other hand, the Court has a history of announcing conflicting standards for interpreting waivers of sovereign immunity, and the latest decisions may only represent a temporary swing toward one of the two different lines of precedent described above.[127] The Court may continue to look at more than the unequivocal statutory text in determining whether a waiver has occurred. From this perspective, it remains to be seen whether the Court means what it says.

Perhaps. But the weight of the evidence suggests that the Court has done more. The recent decisions broke from the past both in their stated test and especially in their application of that test. Before *Ardestani*, the Supreme Court relied on the purpose of a statute in finding a waiver of sovereign immunity in a number of cases.[128] Likewise, before *Nordic Village*, the Supreme Court examined legislative history in the course of determining the existence or reach of a waiver of sovereign immunity in a number of cases.[129] And the Court read statutory language as working a waiver despite other possible readings of the statute before *Ohio*.[130]

I agree with the other commentators who conclude that the Court has established a new rule.[131] But the lower courts are confused, and the blame for that confusion rests on the shoulders of the Supreme Court. The conflicting statements in earlier sovereign immunity opinions, along with the absence of any explanation for the seeming creation of a new rule in the recent decisions, have left the lower federal courts with uncertain guidance on how to proceed. It has also left both private and government litigants uncertain of the proper standard and almost always in a position to make a good faith argument for the result they desire.

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127. *See supra* part II.A.

128. *See supra* note 40 and accompanying text.

129. *See supra* note 40 and accompanying text.

130. *See supra* note 40 and accompanying text.

131. *See* Eskridge & Frickey, *Clear Statement*, *supra* note 11, at 595 n.4, 643 (describing *Nordic Village* as creating "a new super-strong clear statement rule" against waivers of federal sovereign immunity); *see also* Stephen M. Feldman, *The Supreme Court's New Sovereign Immunity Doctrine and the McCarran Amendment: Toward Ending State Adjudication of Indian Water Rights*, 18 HARV. ENVTL. L. REV. 433, 460-61 (1994) (*Nordic Village* establishes a new two-part test for interpreting waivers of sovereign immunity that requires an "exclusively textual" examination and "no alternative interpretation"); Timothy J. Simeone, Note, *Rule 11 and Federal Sovereign Immunity: Respecting the Explicit Waiver Requirement*, 60 U. CHI. L. REV. 1043, 1048 (1993) (*Ardestani*, *Nordic Village* and *Ohio* "support the view that the Court has toughened the 'unequivocal expression' standard").

Moreover, Congress lacks the direction it needs to know how to write waivers of sovereign immunity. The benefits that would flow from an established, widely recognized clear statement rule have not been realized.

III. A THEORY OF CLEAR STATEMENT RULES APPLIED TO THE INTERPRETATION OF WAIVERS OF SOVEREIGN IMMUNITY

Commentators have not been kind to the Supreme Court's treatment of waivers of sovereign immunity.[132] For that matter, they have not endorsed the Court's general approach to statutory construction, either.[133] As David Shapiro has observed, "[w]hile academics

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132. *See supra* note 24 and accompanying text. Among the most recent decisions, *Ohio* has drawn the most academic attention. *See* Robert V. Percival, *Overcoming Interpretive Formalism: Legislative Reversals of Judicial Constructions of Sovereign Immunity Waivers in the Environmental Statutes*, 43 WASH. U. J. URB. & CONTEMP. L. 221 (1993); Nelson D. Cary, Note, *A Primer on Federal Facility Compliance with Environmental Laws: Where Do We Go from Here?*, 50 WASH. & LEE L. REV. 801 (1993); Rebecca Heintz, Note, *Federal Sovereign Immunity and Clean Water: A Supreme Misstep*, 24 ENVTL L. 263, 282-91 (1994); *see also* Stan Millan, *Federal Facilities & Environmental Compliance: Toward a Solution*, 36 LOY. L. REV. 319 (1990); Kenneth M. Murchison, *Reforming Environmental Enforcement: Lessons from Twenty Years of Waiving Federal Immunity to State Regulation*, 11 VA. ENVTL. L.J. 179 (1991-92); Margaret N. Strand & Stephen L. Samuels, *Federal Facilities' Liability for Civil Penalties Under RCRA and the Clean Water Act*, 2 FED. FACILITIES ENVTL. J. 307 (1991); Louise M. Gleason & Marie I. Goutzounis, Note, *Clearing the Air of Sovereign Immunity*: Ohio v. United States Department of Energy, 6 ST. JOHN'S J. LEGAL COMMENT. 287, 298-305 (1991); Rothmel, *supra* note 27, at 602-18; Wolverton, *supra* note 27, at 577-85; Corinne B. Yates, Note, *Limitations of Sovereign Immunity Under the Clean Water Act: Empowering States to Confront Federal Polluters*, 90 MICH. L. REV. 183 (1991).

For discussions of the other recent cases, see Peter H. Carroll III, *Literalism: The United States Supreme Court's Methodology for Statutory Construction in Bankruptcy Cases*, 25 ST. MARY'S L.J. 143 (1993); Feldman, *supra* note 131, at 43; Kevin R. Johnson, *Responding to the "Litigation Explosion": The Plain Meaning of Executive Branch Primacy Over Immigration*, 71 N.C. L. REV. 413, 479-87 (1993); Robert K. Rasmussen, *A Study of the Costs and Benefits of Textualism: The Supreme Court's Bankruptcy Cases*, 71 WASH. U. L.Q. 535 (1993); Mark Dean, Note, Smith v. United States: *Justice Denied under the FTCA "Foreign Country" Exception*, 38 ST. LOUIS U. L.J. 553 (1993-94); Simeone, *supra* note 131, at 1043.

133. The commentators have been prolific, too. I listed some of the most recent works in John Copeland Nagle, *Severability*, 72 N.C. L. REV. 203, 233 n.146 (1993). *See also* Earl M. Maltz, *Rhetoric and Reality in the Theory of Statutory Interpretation: Underenforcement, Overenforcement, and the Problem of Legislative Supremacy*, 71 B.U. L. REV. 767, 767-68 n.1 (1991) (listing articles); Shapiro, *supra* note 11, at 921-22 n.1 (listing more articles). *See generally* WILLIAM N. ESKRIDGE & PHILIP P. FRICKEY, CASES & MATERIALS ON LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY 513-879 (2d ed. 1995); ABNER J. MIKVA & ERIC LANE, LEGISLATIVE PROCESS 757-1049 (1995); WILLIAM D. POPKIN, MATERIALS ON LEGISLATION: POLITICAL LANGUAGE AND

vigorously debate the merits and applicability of deconstructionism, public choice theory, purposive analysis, and various theories of 'dynamic' statutory interpretation, Justices of the Supreme Court are attempting with missionary zeal to narrow the focus of consideration to the statutory text and its 'plain meaning.'"[134] I am more sympathetic to the Court's recent statutory construction decisions,[135] but for reasons that produce questions about the wisdom of employing a clear statement rule to interpret waivers of federal sovereign immunity.

The goal of the Court's general approach to statutory construction is to determine what Congress has done. That goal encompasses a number of divergent methods of statutory interpretation: searching for the original meaning of the statutory language;[136] relying on the plain meaning of the statutory language;[137] examining the text, purpose and history of the statute in an effort to ascertain legislative intent;[138] asking how Congress would have answered the particular question at hand;[139] or some combination of those approaches. Many of the Court's most recent decisions treat the statutory language as nearly conclusive when it is plain, but they are willing to consult secondary sources to interpret ambiguous statutory language.[140]

THE POLITICAL PROCESS 307-717 (1993).

134. Shapiro, *supra* note 11, at 921-22.

135. For a more thorough explanation of my attitude toward the Court's recent statutory interpretation decisions, see Nagle, *supra* note 16, at 2220-50.

136. "Theories of statutory interpretation in the United States have in this century emphasized the original meaning of statutes . . . ." ESKRIDGE, *supra* note 11, at 13. Judge Easterbrook defended this approach in *In re* Sinclair, 870 F.2d 1340 (7th Cir. 1989).

137. *See, e.g.*, Central Bank v. First Interstate Bank, 114 S. Ct. 1439 (1994); Good Samaritan Hosp. v. Shalala, 113 S. Ct. 2151, 2157 (1993); Estate of Cowart v. Nicklos Drilling Co., 112 S. Ct. 2589, 2594 (1992); United States v. Ron Pair Enters., Inc., 489 U.S. 235, 243-44 (1989).

138. *See, e.g.*, INS v. Cardoza-Fonseca, 480 U.S. 421 (1987).

139. *See, e.g.*, Alaska Airlines v. Brock, 480 U.S. 678, 684 (1987); Fishgold v. Sullivan Drydock & Repair Co., 154 F.2d 785, 789-93 (2d Cir. 1944) (Hand, J.), *aff'd*, 328 U.S. 275 (1946); RICHARD A. POSNER, THE FEDERAL COURTS: CRISIS AND REFORM 286-93 (1985).

140. *See, e.g.*, *Estate of Cowert*, 112 S. Ct. at 2594; Freytag v. Commissioner of IRS, 501 U.S. 868, 873 (1991). The point at which the Court will look beyond the statutory language remains in dispute. *Compare* Public Citizen v. United States Dep't of Justice, 491 U.S. 440, 453-54 n.9 (1989) (court may go beyond plain meaning in a number of circumstances) *with id.* at 473 (Kennedy, J., concurring) (court may go beyond plain meaning only if that meaning is absurd) *and* Chisom v. Roemer, 501 U.S. 380, 404 (1991) (Scalia, J., dissenting) (court may ignore plain meaning if "established canons of construction" require a different result). The use of legislative history has been especially controversial. *See, e.g.*, Nagle, *supra* note 133, at 249 n.225 (listing recent commentary on legislative history).

This is an originalist theory. In broad terms, it constitutes the approach to statutory interpretation traditionally employed in American courts,[141] and its various premises have been ably defended by writers such as Thomas Merrill, Martin Redish, Frank Easterbrook, and Frederick Schauer.[142] It presumes that the proper manner in which to interpret a statute is "archaeological"—to dig up evidence regarding the meaning, intention, or purpose of the enacting Congress.[143] The Court's originalist approach contrasts with other theories of statutory interpretation that support a more conscious effort to account for current societal preferences and to consider a broader range of evidence when interpreting a statute, and conversely, give less weight to the statutory text and the original legislative intent.[144]

The traditional canons of statutory interpretation fit within an originalist framework. These canons simply create presumptions of statutory meaning, allocate the burden for establishing statutory meaning, or operate as tiebreakers in close cases. The linguistic canons (e.g., ejusdem generis, inclusio unis) and a number of substantive canons (e.g., the rule of lenity, the presumption of consistency with international law) operate in this fashion.[145] The canons thus help Congress write legislation. As William Eskridge and Philip Frickey have observed, resource and time constraints prevent Congress from anticipating every issue raised by a proposed statute. By instructing Congress about the consequences of writing a statute in a particular manner, the canons

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141. *See* ESKRIDGE, *supra* note 11, at 13.

142. *See, e.g.*, Frank H. Easterbrook, *Text, History, and Structure in Statutory Interpretation*, 17 HARV. J.L. & PUB. POL'Y 61 (1994); Thomas W. Merrill, *Chief Justice Rehnquist, Pluralist Theory, and the Interpretation of Statutes*, 25 RUTGERS L.J. 621 (1994); Martin H. Redish & Theodore T. Chung, *Democratic Theory and the Legislative Process: Mourning the Death of Originalism in Statutory Interpretation*, 68 TUL. L. REV. 803 (1994); Schauer, *supra* note 46, at 250-56; W. David Slawson, *Legislative History and the Need to Bring Statutory Interpretation Under the Rule of Law*, 44 STAN. L. REV. 383 (1992).

143. *See* ESKRIDGE, *supra* note 11, at 13.

144. *See, e.g.*, GUIDO CALABRESI, A COMMON LAW FOR THE AGE OF STATUTES 7 (1982) (endorsing judicial updating of statutes); ESKRIDGE, *supra* note 11, at 48-80 (advocating "dynamic" statutory interpretation that considers a variety of factors, including current values, in addition to originalist sources); T. Alexander Aleinikoff, *Updating Statutory Interpretation*, 87 MICH. L. REV. 20, 21 (1988) (proposing a nautical metaphor of statutory interpretation in which a statute is a ship built by Congress whose voyage is charted by Congress but where subsequent navigators also play a role); Cass R. Sunstein, *Interpreting Statutes in the Regulatory State*, 103 HARV. L. REV. 407, 411-14 (1989) (rejecting traditional originalist understandings and proposing an approach that prevents irrational results or results that are inconsistent with modern government).

145. *See, e.g.*, Eskridge & Frickey, *Clear Statement*, *supra* note 11, at 600-01, 603-04; Shapiro, *supra* note 11, at 927-31; Sunstein, *supra* note 144, at 451-60.

provide common background rules that Congress can rely upon and need not repeat every time it enacts a statute. The cost of drafting legislation is reduced, and fewer holes are left unplugged.[146] In this way the canons operate as a short-hand understanding of what Congress probably intended when it used certain statutory language. The canons also further values that the courts find important, but the ease with which canons can be overcome by other evidence of statutory meaning—including evidence from outside the statutory text—demonstrates that the canons are subservient to legislative intent.[147]

The strongest clear statement rules conclusively presume that a statute maintains the status quo unless the statute very specifically says otherwise in the statutory text.[148] They begin the same way as the Court's general approach to statutory interpretation—by seeking to ascertain the plain meaning of the statutory text—but they treat ambiguous statutory language much differently. Ambiguity is decisive for such rules. A statute that is susceptible to more than one interpretation cannot satisfy a clear statement rule.[149] If the statute does not contain the requisite clear statement that, for example, the statute waives a state's Eleventh Amendment immunity, then the inquiry is finished and the party asserting that the statute waives such immunity has failed. *Nordic Village*, *Ohio*, and *Idaho* demonstrate that statutory ambiguity operates in the same

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146. Eskridge & Frickey, *Law as Equilibrium*, *supra* note 11, at 66.

147. The academic response to the canons has been critical, as best demonstrated by Karl Llewellyn's celebrated effort to show that each canon can be countered by an equal and opposite canon. Karl N. Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes Are to Be Construed*, 3 VAND. L. REV. 395, 401-06 (1950). *See also* Richard A. Posner, *The Jurisprudence of Skepticism*, 86 MICH. L. REV. 827, 852 (1988) ("Most political canons, such as the principle that . . . statutes waiving sovereign immunity should be narrowly construed, are arbitrary, premised on dubious extra-textual propositions, or selectively ignored."). Recently, however, the defenders of the traditional canons have spoken up. David Shapiro has argued that the canons of statutory interpretation preserve continuity in policymaking that serves as a good predictor of what Congress wanted and that is valuable in its own right. Shapiro, *supra* note 11, at 925, 942-45. As discussed below, Cass Sunstein and William Eskridge view canons positively, although they favor different canons than those employed by the Court. *See* William N. Eskridge, Jr., *Public Values in Statutory Interpretation*, 137 U. PA. L. REV. 1007, 1061-84 (1989); Sunstein, *supra* note 144, at 405. For a discussion of canons generally, see Symposium, *A Reevaluation of the Canons of Statutory Interpretation*, 45 VAND. L. REV. 529 (1992).

148. *See* Eskridge, *supra* note 147, at 1011 ("The substantive canons of construction tend to operate as clear statement rules or presumptions: Unless the legislature clearly intends to displace an established background understanding, the court will presume that the understanding is part of the statute.").

149. *See* Feldman, *supra* note 131, at 460; Shapiro, *supra* note 11, at 940, 959; Simeone, *supra* note 131, at 1051.

manner under the Court's clear statement rule for federal sovereign immunity.[150]

At times, however, the Court has applied clear statement rules that are satisfied by less than a specifically targeted statement in the statutory text. The Court found a waiver in the arguably ambiguous provisions of the Internal Revenue Code in *Williams*, and it even recited the equities of Lori Williams's case against the government—something that would appear to be anathema under *Ardestani*, *Nordic Village*, and *Ohio*.[151] The Court discussed the legislative history of the Civil Rights Act of 1991 at length before it held in *Landgraf v. USI Film Products*[152] that certain provisions of that Act do not apply retroactively, despite Justice Scalia's objection that nothing in a statute's legislative history could ever satisfy a clear statement rule.[153] William Eskridge and Philip Frickey thus have distinguished between clear statement rules that can be satisfied by evidence outside the statutory text and despite plausible alternative readings of the text, and "super-strong" clear statement rules that can only be satisfied by a specific statement in the statutory text indicating, for example, that sovereign immunity is waived in a particular circumstance.[154] The Court itself has never distinguished among clear statement rules, but Eskridge and Frickey's suggestion is useful. In particular, I rely upon it below to argue that the strongest clear statement rules must be supported by the strongest justifications.[155]

The strongest clear statement rules pursue a different objective than the canons and other originalist tools of statutory interpretation. "Such rules operate less to reveal actual congressional intent than to shield important values from an insufficiently strong legislative intent to displace them."[156] The establishment of clear statement rules protects certain

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150. *See supra* part II.B.2-3, 5; *see also* Idaho Dep't of Water Resources v. United States, 832 P.2d 289, 303-04 (Idaho 1992) (Boyle, J., dissenting) ("any reasonable statutory interpretation that does not entail a waiver of sovereign immunity is enough to illustrate that the statute is not an unequivocal waiver of a federal waiver"), *rev'd*, 113 S. Ct. 1893 (1993).

151. *See supra* part II.B.1-3.

152. 114 S. Ct. 1483 (1994).

153. *Id.* at 1522 (Scalia, J., concurring in the judgment).

154. See Eskridge & Frickey, *Clear Statement*, supra note 11, at 655; Eskridge & Frickey, *Law as Equilibrium*, supra note 11, at 82-83.

155. *See infra* part III.A.1.

156. EEOC v. Arabian Am. Oil Co., 499 U.S. 244, 262 (1991) (Marshall, J., dissenting). *But see* United States v. Lopez, 115 S. Ct. 1624, 1655 (1995) (Souter, J., dissenting) (asserting that the federalism clear statement rules "are rules for determining intent when legislation leaves intent subject to question"); Blatchford v. Native Village of Noatak, 501 U.S. 775, 790 (1991) (Blackmun, J., dissenting) ("the clear statement rule, at bottom, is a tool of statutory construction like any other" that is used to discover

constitutional or other values and requires Congress to specifically focus on those values before disturbing them.[157] These values may derive from the Constitution, other statutes, or common law;[158] often they are underenforced by the judiciary.[159] By contrast, values that lack the necessary "magnitude and constancy" will not be protected by a clear statement rule.[160]

William Eskridge has rightly observed that "the Anglo-American legal tradition has employed clear statement rules for as long as it has done statutory interpretation."[161] But the Court has never identified the source of its power to establish clear statement rules. Indeed, the Court has never fully explained the source of its power to announce any rules of statutory interpretation. The Constitution itself does not contain a list of directions for the judiciary (or others) to follow when interpreting statutes. Yet there is an increasing awareness that the choice of an interpretive framework is ultimately a question of constitutional law. One's understanding of constitutional theory, separation of powers, and democratic theory inevitably influences one's approach to statutory interpretation.[162]

The choice of interpretive frameworks affects one's view of clear statement rules. Eskridge, Frickey, and Cass Sunstein have examined clear statement rules and other canons of statutory interpretation from a perspective that questions critical premises of originalist theories. They endorse the judiciary's selection of particular substantive values to guide statutory interpretation, though they disagree with the substantive values currently advanced through the clear statement rules and canons followed by the Rehnquist Court.[163] By contrast, an originalist perspective views clear statement rules less favorably than it views weaker canons of

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legislative intent).

157. The Court recognized this idea in United States v. Bass, 404 U.S. 336 (1971), where it explained that "[i]n traditionally sensitive areas, such as legislation affecting the federal balance, the requirement of clear statement assures that the legislature has in fact faced, and intended to bring into issue, the critical matters involved in the judicial decision." *Id.* at 349. *See also* Eskridge & Frickey, *Clear Statement*, *supra* note 11, at 631; Shapiro, *supra* note 11, at 959.

158. *See* Astoria Fed. Sav. & Loan Ass'n v. Solimino, 501 U.S. 104, 108 (1991); Eskridge, *supra* note 147, at 1019-61.

159. Eskridge and Frickey have developed this argument, as discussed *infra* notes 180-205 and accompanying text.

160. *Astoria Fed. Sav. & Loan Ass'n*, 501 U.S. at 107.

161. Eskridge, *supra* note 147, at 1065.

162. For additional discussion of the influence that broader constitutional and democratic theory has on theories of statutory interpretation, see Nagle, *supra* note 16, at 2236-49.

163. *See infra* notes 168-79 and accompanying text.

statutory interpretation. As an originalist who is skeptical of entrusting the courts with choosing policy values and who is committed to legislative supremacy, I question the effect of clear statement rules in all but a few instances.

Consider two roles that clear statement rules can play in an originalist interpretive regime. The first role is instrumental. "[T]he requirement of a clear statement by Congress . . . ought to be of assistance to the Congress and the courts in drafting and interpreting legislation."[164] Canons of statutory interpretation can assist a court in understanding the meaning of statute or what Congress intended. Canons can also assist Congress as it drafts legislation by identifying *ex ante* how the courts will interpret particular statutory language. But a clear statement rule sometimes fails to perform this role. If a rule prevents a court from understanding the meaning of a statute or what Congress intended, or if Congress struggles to satisfy the rule even when it focuses on the issue, or if the Court applies the rule inconsistently, then the rule no longer benefits Congress and actually threatens legislative supremacy.

The second role is more substantive. Clear statement rules can guard values deserving special judicial protection. Such rules protect special values by requiring deliberate legislative consideration before a court will conclude that the legislature decided to act contrary to those values.[165] A court thus protects itself and Congress from charges of neglecting important public values by assuming that Congress does not intend to tread on such values unless it specifically says so. The justification for clear statement rules is that some values are deserving of heightened protection by the courts to assure that Congress does not inadvertently disturb them. That means that the converse is also true: a clear statement rule is unnecessary for a value unworthy of heightened judicial protection.

These two roles and their limitations suggest two questions that should guide the Court's establishment of clear statement rules. First, are the values at stake sufficiently important to justify the creation of a clear statement rule? Second, would Congress be easily able to provide the requisite clear statement? Both questions must be answered affirmatively in order to justify a clear statement rule.

The answers to these two questions in the context of waivers of sovereign immunity point against a clear statement rule. Sovereign immunity protects separation of powers values that are similar to the

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164. Hilton v. South Carolina Public Rys. Comm'n, 502 U.S. 197, 206 (1991); *accord* Note, *supra* note 2, at 1967 n.42. This role is similar to the role played by other, less powerful canons of statutory interpretation. *See supra* notes 145-47 and accompanying text.

165. *See* Eskridge & Frickey, *Law as Equilibrium*, *supra* note 11, at 66; Shapiro, *supra* note 11, at 959.

constitutional values protected by other clear statement rules. On the other hand, while it is easy for Congress to write a provision that waives sovereign immunity generally, it is difficult for Congress to write a provision that specifies the *scope* of a waiver of sovereign immunity. The scope of the waiver is the far more important issue, as evidenced by each of the Supreme Court's seven most recent cases. Moreover, a clear statement rule threatens legislative supremacy, especially because Congress does not share the same enthusiasm for sovereign immunity that the Court has demonstrated in its most recent decisions. Faced, then, with doubtful signals about the wisdom of employing a clear statement rule for interpreting the scope of waivers of sovereign immunity, the better course counsels against such a rule.

A. The Values Protected by a Clear Statement Rule

The Constitution empowers Congress to resolve competing public values. The courts should only displace the policies established in the legislative process if the resulting statute threatens constitutional values upon which Congress cannot infringe. Yet the presence of a constitutional norm does not necessarily justify the judicial creation of a clear statement rule. Because most constitutional provisions are enforced fully through judicial review, only a deliberate judicial decision *not* to strike down legislation as violative of a particular constitutional norm supports a judicial insistence on a clear statement as a matter of statutory interpretation. The constitutional separation of powers may be an example of such a deliberately underenforced constitutional norm, and federal sovereign immunity may rest on separation of powers principles, but the case for both propositions is tenuous. Thus, it is difficult to argue that a clear statement rule for interpreting waivers of sovereign immunity is needed to protect an underenforced constitutional norm.

1. IDENTIFYING THE VALUES DESERVING THE PROTECTION OF A CLEAR STATEMENT RULE

The Rehnquist Court has protected a broad range of values through its use of clear statement rules, presumptions, and other canons. The Court has drawn these values from the Constitution (e.g., federalism, separation of powers, and due process), statutes (e.g., rules for reading statutory exceptions and to avoid repeals by implication), and the common law (e.g., rules regarding governmental duties and adopting traditional

immunities).[166] The Court has also employed rules favoring certain groups, including veterans, Native Americans, and aliens.[167]

Eskridge and Frickey have criticized the Court's choice of preferred values. They see the Court favoring private elites over governmental regulation, state sovereignty over national regulation, and executive rulemaking over congressional lawmaking.[168] Eskridge has also criticized the Court for preferring obsolescent values and establishment values.[169] But they fault the Court only for the values it has chosen, not for its decision to protect preferred values. Indeed, Sunstein and Eskridge have proposed their own lists of values to be protected through canons of statutory interpretation. Sunstein has identified over two dozen canons that the Court should apply in the modern regulatory state. Many of the canons are designed to counteract perceived political and regulatory pathologies, including canons to alleviate collective action problems, canons to protect non-market values, and canons to minimize interest group transfers.[170] For example, Sunstein would read environmental statutes broadly to respond to "regulatory 'failure' resulting from collective action problems (not to mention unrepresented future generations, which cannot wield political power)."[171] Eskridge, in turn, would "decide close cases against politically salient interests that have been subordinated in the political process."[172] His aspirations

> are that statutes respect and protect individual rights, especially those of disadvantaged groups; that broad public interest statutes

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166. The Court's substantive rules are categorized in ESKRIDGE, *supra* note 11, at 325-28; Eskridge & Frickey, *Law as Equilibrium*, *supra* note 11, at 101-08.

167. *See, e.g.*, King v. Saint Vincent's Hosp., 502 U.S. 215 (1991) (statutes should be interpreted liberally to provide benefits to veterans); INS v. Cardoza-Fonseca, 480 U.S. 421, 449 (1987) (ambiguities in deportation statutes should be interpreted in favor of aliens); Montana v. Blackfeet Tribe of Indians, 471 U.S. 759, 766 (1985) (statutes are to be interpreted liberally to favor Indians). Eskridge finds the rule favoring aliens of questionable vitality in light of INS v. Elias-Zacarias, 502 U.S. 478 (1992). *See* ESKRIDGE, *supra* note 11, at 332 n.89.

168. Eskridge & Frickey, *Clear Statement*, *supra* note 11, at 640.

169. Eskridge, *supra* note 147, at 1086-91.

170. Sunstein, *supra* note 144, at 476-89. For a critical review of Sunstein's theory, see Eben Moglen & Richard J. Pierce, Jr., *Sunstein's New Canons: Choosing the Fictions of Statutory Interpretation*, 57 U. CHI. L. REV. 1203 (1990). For Sunstein's response, see Cass R. Sunstein, *Principles, Not Fictions*, 57 U. CHI. L. REV. 1247 (1990).

171. Sunstein, *supra* note 144, at 478. Moglen and Pieree question the application of this canon because of the difficulty (if not impossibility) of distinguishing between collective action problems and wealth transfers. *See* Moglen & Pierce, *supra* note 170, at 1236-39.

172. ESKRIDGE, *supra* note 11, at 149.

> not be eroded by rent-seeking exceptions; that special interest statutes be narrowly construed; and that statutory schemes be allowed to change over time to adapt their goals to new circumstances and political values.[173]

Perhaps the Court's choice of values is defensible. Thomas Merrill, for example, finds Chief Justice Rehnquist's tendency to promote majority rights over individual rights, and states rights over the interests of the federal government, to be grounded in a principled commitment to pluralism.[174] But the problem with any list of preferred values—the Court's, the Chief Justice's, Eskridge's, or Sunstein's—is that it permits the values of the Court to displace the values of Congress. This is less troubling to Eskridge and Sunstein because they envision a role for the courts in statutory interpretation beyond understanding the statutory text and legislative intent. Eskridge defends the judicial imposition of public values through rules of statutory interpretation unless the text and legislative history are clear (which, he adds, does not occur that frequently).[175] He recognizes the countermajoritarian problems of allowing judges to substitute their values for congressional policy judgments, but he argues that legislative supremacy is "subordinate, or not superior, to the precept that lawmaking is informed by values formed through a process of public discussion."[176] Sunstein purports to limit his canons to cases of statutory ambiguity, but he has been criticized for "us[ing] his canons both to find ambiguity where it does not otherwise exist and to resolve the ambiguity so found."[177] Eskridge and Frickey add that the Court signals its preferences to Congress in many ways, including through clear statement rules and other canons.[178]

From an originalist perspective, the role that Sunstein, Frickey, and Eskridge envision for clear statement rules is troubling. The Constitution empowers the political branches to choose among important public values, not the courts. Statutory interpretation, therefore, should seek to remain faithful to the resolution achieved in the political branches. An interpretive framework must constrain the permissible choices available to judges. By contrast, judicial selection and enforcement of the favorite values of the judiciary is countermajoritarian, a fatal flaw for an

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173. *Id.*; *see also id.* at 158-59.

174. *See* Merrill, *supra* note 142, at 622-25.

175. *See* Eskridge, *supra* note 147, at 1062-66; *see also* Nagle, *supra* note 16, at 2214 n.13 (collecting assertions by Eskridge that originalist sources are indeterminate).

176. *See* Eskridge, *supra* note 147, at 1072.

177. Moglen & Pierce, *supra* note 170, at 1221.

178. Eskridge & Frickey, *Law as Equilibrium*, *supra* note 11, at 81.

originalist. As Nicholas Zeppos reminds us, "textualism seeks to eliminate value choice in judging."[179]

Constitutional values are different. "We the People" made the judgment that constitutional values are especially important. The Constitution thus obliges each branch of the federal government to protect those values. The courts protect the values written into the Constitution through judicial review, the President faithfully executes the Constitution above all other laws, and Congress must act consistently with the provisions of the Constitution when it enacts legislation.[180] This constitutional obligation justifies a presumption that a congressional enactment is consistent with the Constitution.

That does not mean that a clear statement rule should protect all constitutional values. Such a rule would elevate the rule of reading statutes to avoid constitutional doubts to a firm command to read all ambiguous statutory language in a manner that avoids even raising a constitutional question. The Court's practice is different. It will invalidate a statute that conflicts with the Constitution, and it often requires clear statutory language before it will read a statute to produce an unconstitutional result.[181] Likewise, the Court often reads ambiguous statutes in a manner that entirely avoids a constitutional question, but that rule is even more limited. The Court will only read a statute in a way that avoids raising a constitutional question if the statute is ambiguous and the constitutional issue is serious.[182] Moreover, if the Court determines that the statute is constitutional, the Court will read the

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179. Nicholas S. Zeppos, *The Use of Authority in Statutory Interpretation: An Empirical Analysis*, 70 TEX. L. REV. 1073, 1081 (1992); *see also* Daniel B. Rodriguez, *The Presumption of Reviewability: A Study in Canonical Construction and Its Consequences*, 45 VAND. L. REV. 743, 777 (1992) ("The central question may remain one of legitimacy: do the courts, in our constitutional system, belong in the business of construing statutes to further important public values?"); Jane S. Schacter, *Metademocracy: The Changing Structure of Legitimacy in Statutory Interpretation*, 108 HARV. L. REV. 593, 600 (1995) ("The canons have always existed uneasily with the originalist imperative, for they are created by judges and frequently embody contested substantive norms.").

180. For a defense of the constitutional authority of each branch to independently interpret the Constitution, see Michael S. Paulsen, *The Most Dangerous Branch: Executive Power to Say What the Law Is*, 83 GEO. L.J. 217 (1994).

181. Even that rule may not require a clear statement. *See, e.g.*, Chapman v. United States, 500 U.S. 453, 464 (1991) ("The canon of construction that a court should strive to interpret a statute in a way that will avoid an unconstitutional construction is useful in close cases, but it is 'not a license for the judiciary to rewrite language enacted by the legislature'") (quoting United States v. Monsanto, 491 U.S. 605, 611 (1989)).

182. *See* Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council, 485 U.S. 568, 575 (1988).

statute regardless of the (now answered) constitutional question it raised.[183] In short, the Court has *not* employed a clear statement rule that would read all statutes to avoid raising a constitutional question unless the statutory text clearly forced the issue.[184] The criticisms of the rule of reading statutes to avoid a constitutional question (as opposed to an unconstitutional result) show that the Court has followed the proper approach.[185]

There is one exception. If the Court has decided not to enforce fully a constitutional command through judicial review, then a clear statement rule with respect to statutes that may violate that command is justified. This distinction presumes that when prudential reasons persuade the Court not to enforce certain constitutional norms through judicial review,[186] the Court may nonetheless give some weight to those norms in statutory interpretation. Eskridge and Frickey have described the case for protecting underenforced constitutional norms through clear statement rules as follows:

> [I]t is not ultimately undemocratic, because Congress can override the norm through a statutory clear statement; such rules still provide significant protection for constitutional norms, because they raise the costs of statutory provisions invading such norms; and ultimately such rules may even be democracy-

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183. *See* Rust v. Sullivan, 500 U.S. 173, 190 (1991); *Monsanto*, 491 U.S. at 611; *see also* ESKRIDGE, *supra* note 11, at 325.

184. Shapiro includes the rule against reading statutes to avoid constitutional questions on his list of clear statement rules followed by the Court, see Shapiro, *supra* note 11, at 940, as does Harold J. Krent in *Avoidance and Its Costs: Application of the Clear Statement Rule to Supreme Court Review of NLRB Cases*, 15 CONN. L. REV. 209 (1983), but *Rust*, *Monsanto*, and other cases suggest otherwise.

185. The rule is questioned in HENRY J. FRIENDLY, BENCHMARKS 211 (1967); RICHARD J. POSNER, THE FEDERAL COURTS 284-85 (1985); Henry H. Wellington, Machinists v. Street: *Statutory Interpretation and the Avoidance of Constitutional Issues*, 1961 SUP. CT. REV. 49, 67-71. The tendency to deploy the rule to overcome the natural force of the statutory language and evidence of legislative intent led Justice Scalia to characterize it as "the last refuge of many an interpretive lost cause." Reno v. Flores, 113 S. Ct. 1439, 1453 n.9 (1993). I hope to develop this argument in a forthcoming article. *See* John Copeland Nagle, Problems With Reading Statutes to Avoid Constitutional Problems (Oct.14, 1995) (unpublished manuscript, on file with the author).

186. Jesse Choper is the leading exponent of this view. *See* JESSE H. CHOPER, JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS (1980). I do not mean to endorse his theory here. Rather, assuming *arguendo* that the Court should refrain from adjudicating some constitutional conflicts, I believe that the Court may account for those constitutional norms through statutory interpretation.

> enhancing by focusing the political process on the values enshrined in the Constitution.[187]

Similarly, Justice O'Connor has linked the clear statement rule regarding congressional regulation of core state functions with the Court's inability to enforce the Tenth Amendment.[188]

That argument fails to convince Eskridge and Frickey. Using the federalism cases as an example, they assert that the very reasons the Court advanced for not adjudicating Tenth Amendment disputes in *Garcia* counsel against giving Tenth Amendment concerns special consideration in statutory interpretation.[189] If the courts are unable to develop principles by which to decide Tenth Amendment cases, as *Garcia* suggested, then it is easy to see why crafting a rule for interpreting statutes implicating the Tenth Amendment is difficult. Or, if the courts refuse to adjudicate Tenth Amendment cases because such issues should be left to the political processes, then the court has no role in enforcing the Tenth Amendment through statutory interpretation, either.

But the question regarding such a clear statement rule does not have to be posed in such all-or-nothing terms. The Court may lack the confidence in its ability to develop Tenth Amendment standards needed to justify invalidating legislation as unconstitutional, but it may feel sufficiently confident to develop a rule of statutory interpretation to protect Tenth Amendment values. Similarly, the Court may determine that its effect on the political process will be sufficiently less in statutory interpretation cases than in constitutional adjudication. Thus, even if the concerns about developing consistent principles and the general desire to leave certain issues to the political processes outweigh the benefits of judicial review of the Tenth Amendment, those concerns may themselves be outweighed by the benefits of a clear statement rule. The different result can be explained in part by the consequences of the Court's decision: Congress can overcome a clear statement rule by legislation; it need not amend the Constitution. The list of unenforced constitutional commands is limited. The federalism values implicit in the Tenth Amendment offer the most obvious examples,[190] and the Court has adopted clear statement rules to protect those values.[191] The republican

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187. Eskridge & Frickey, *Clear Statement*, *supra* note 11, at 631.

188. Gregory v. Ashcroft, 501 U.S. 452 (1991).

189. *Id.*

190. Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528 (1985), held that "[s]tate sovereign immunity interests . . . are more properly protected by the procedural safeguards inherent in the structure of the federal system than by judicially created limitations on federal power." *Id.* at 550.

191. *See supra* notes 1-2 and accompanying text.

form of government guarantee[192] and the nondelegation doctrine[193] also fall in this category, although the Court has not created any clear statement rules based on those constitutional commands. *Employment Division, Oregon Department of Human Resources v. Smith*[194] may be read as limiting judicial enforcement of the free exercise clause in the same way.[195]

The list does not grow much longer if it is expanded to include constitutional provisions that the courts intentionally *under*enforce.[196] It may, however, include the constitutional separation of powers. Jesse Choper, Judge Gibbons, and others have urged the Court to decline to adjudicate separation of powers controversies.[197] *Mistretta v. United States*[198] and *Morrison v. Olson*[199] provide the best evidence of a judicial determination not to enforce the constitutional values through judicial review. Eskridge and Frickey thus have observed that "separation of powers limits are rarely enforced."[200] But the decisions

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192. U.S. CONST. art. IV, § 4. Luther v. Borden, 48 U.S. (7 How.) 1 (1849), first held that the guarantee clause presents a nonjusticiable political question.

193. Mistretta v. United States, 488 U.S. 361, 371-79 (1989), indicates that the nondelegation doctrine has become unenforced by the Court. *See* Eskridge & Frickey, *Clear Statement, supra* note 11, at 630; Lawrence Lessig & Cass R. Sunstein, *The President and the Administration*, 94 COLUM. L. REV. 1, 116 (1994). Justice Rehnquist would have imposed a clear statement rule to enforce the nondelegation prineiple in Industrial Union Dep't v, American Petroleum Inst., 448 U.S. 607 (1980) (Rehnquist, J., concurring in the judgment).

194. 494 U.S. 872 (1990).

195. *See* Ira C. Lupu, *Statutes Revolving in Constitutional Law Orbits*, 79 VA. L. REV. 1 (1993) (viewing *Smith* as "a deeision about institutional arrangements more than about substantive merits," so that *Smith* is a "political question ease, holding that judicially unmanageable standards for the Free Exercise exemption claims are lacking"). *But see* Eugene Gressman & Angela C. Carmella, *The RFRA Revision of the Free Exercise Clause*, OHIO ST. L. REV. (forthcoming 1996) ("The labeling of *Smith* as an 'institutional' decision is overblown. While its rationale may invoke notions of judicial limitations, *Smith* nonetheless defines and constitutes substantive free exercise doctrine.").

196. By "intentionally" underenforce, I include only those constitutional commands for which the Court expressly has decided that judicial review is inappropriate, at least in some circumstances, because of the nature of the command itself. I do *not* include constitutional commands that others insist the Court has not enforced fully because they disagree with the Court's substantive understanding of the command. A claim that the free speech clause is underenforced, for example, would fail to justify a clear statement rule beeause the Court has never indicated that the free speech guarantees of the First Amendment should not be judicially enforced.

197. *See* CHOPER, *supra* note 186, at 263; John J. Gibbons, *The Court's Role in Interbranch Disputes Over Oversight of Agency Rulemaking*, 14 CARDOZO L. REV. 957 (1993).

198. 488 U.S. 361 (1989) (upholding the federal sentencing commission).

199. 487 U.S. 654 (1988) (upholding the independent counsel statute).

200. Eskridge & Frickey, *Clear Statement, supra* note 11, at 633.

invalidating statutes on separation of powers grounds in *Plaut v. Spendthrift Farm, Inc.*,[201] *Metropolitan Washington Airports Authority v. Citizens for the Abatement of Aircraft Noise, Inc.*,[202] *Bowsher v. Synar*,[203] and *INS v. Chadha*,[204] indicate that the Court continues to actively police the separation of powers.[205] As I will show, the case for clear statement rules protecting separation of powers values depends on the correctness of the former view.

2. THE VALUES PROTECTED BY SOVEREIGN IMMUNITY

Notice that federal sovereign immunity does not appear on Sunstein's or Eskridge's list of values worthy of judicial protection. In fact, both have characterized federal sovereign immunity as obsolete.[206] None of the recent sovereign immunity decisions explains why the Court disagrees or what values a clear statement rule for sovereign immunity is designed to protect. The criticisms of sovereign immunity are powerful and many.[207] The historic English theory—"the king can do no wrong"—has always been anachronistic in the United States. Other proposed justifications—the indignity of subjecting the government to suit, the theory that there is no legal right against the lawmaker, and the flood of frivolous litigation against the government that could overwhelm the federal courts—fall far short of the unenforced constitutional values

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201. 115 S. Ct. 1447 (1995) (striking down a provision of the Securities Exchange Act because it instructed the courts to reopen a final judgment).

202. 501 U.S. 252 (1991) (invalidating the commission regulating National and Dulles Airports).

203. 478 U.S. 714 (1986) (invalidating part of the Gramm-Rudman budget act).

204. 462 U.S. 919 (1983) (holding legislative vetoes unconstitutional).

205. *See* FREDERICK SCHAUER, 1994 SUPPLEMENT TO GERALD GUNTHER, CONSTITUTIONAL LAW & INDIVIDUAL RIGHTS IN CONSTITUTIONAL LAW 36 (5th ed. 1994) (claiming that the Court continues to take separation of powers values seriously); Gibbons, *supra* note 26, at 968 ("Far from holding that [separation of powers] issues are nonjusticiable, the Court has, in reaching out for them, stretched the concept of justiciability close to the breaking point.").

206. Without further explanation, Sunstein included the Court's strict construction rule for waivers of sovereign immunity on a list of obsolete canons. Sunstein, *supra* note 144, at 506. Eskridge used sovereign immunity as an example of the Court's "bias for obsolescent values," arguing that the rule should be "rethought for this era when the government is our nation's leading contractor and tortfeasor and property owner." Eskridge, *supra* note 147, at 1093. Both Sunstein and Eskridge were writing in 1989, before the Court elevated the rule of strict construction of waivers of sovereign immunity into a clear statement rule. *See supra* part II.B.

207. *See infra* notes 221-232 and accompanying text.

necessary to support a clear statement rule.[208] The need to protect the public treasury has somewhat greater appeal and sometimes persuades Congress not to waive sovereign immunity,[209] but fiscal concerns alone cannot satisfy the unenforced constitutional value standard. Nonetheless, it is possible to construct a vision of federal sovereign immunity that approximates what is needed to justify a clear statement rule under my approach.

Sovereign immunity may be seen to protect the constitutional separation of powers. Harold Krent has advanced the most thoughtful exposition of this argument.[210] "Much of sovereign immunity," Krent argues, "derives not from the infallibility of the state but from a desire to maintain a proper balance among the branches of the federal government, and from a proper commitment to majoritarian rule."[211] Judicial review of government actions presents greater threats than judicial review of private actions. The threats result from judicial second-guessing of congressional and executive decisions. Absent sovereign immunity, Congress and the executive may feel pressured to conform to the judiciary's policy values or they may be fettered with contracts entered

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208. The sources of these arguments, and some of the responses to them, are collected in United States v. Horn, 29 F.3d 754, 762 (1st Cir. 1994); HART & WECHSLER, *supra* note 28, at 1108; Block, *supra* note 26, at 1060-61, 1081-86; Cramton, *supra* note 24, at 427; Stevens, *supra* note 23, at 1123-26; Heintz, *supra* note 132, at 272-74.

209. *See, e.g.*, Richard H. Fallon, Jr., *Of Legislative Courts, Administrative Agencies, and Article III*, 101 HARV. L. REV. 916, 937 (1988) (suggesting that sovereign immunity rests on the assumption that the government itself should decide whether the diversion of public funds to the cost of litigation outweighs the benefits obtained by waiving sovereign immunity). The appropriations clause provides constitutional support for this position. U.S. CONST. art. 1, § 9, cl. 7 ("No money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law . . . .").

210. Krent, *supra* note 24. Similarly, Justice Stevens has acknowledged that "there are certain situations in which the doctrine of sovereign immunity undeniably . . . limits the degree to whieh the judiciary can second-guess decisions made by the Executive." Stevens, *supra* note 23, at 1129. For other acknowledgements of this justification for sovereign immunity, see United States v. Varig Airlines, 467 U.S. 797, 814 (1984); Larson v. Domestic & Foreign Commerce Corp., 337 U.S. 682, 703-04 (1949); Decatur v. Paulding, 39 U.S. (14 Pet.) 497, 516 (1840); *Horn*, 29 F.3d at 767; Sea-Land Serv., Inc. v. United States, 919 F.2d 888, 890 (3d Cir. 1990), *cert. denied*, 500 U.S. 941 (1991); Gregoire v. Biddle, 177 F.2d 579, 581 (2d Cir. 1949) (Hand, J.); ERWIN CHEMIRINSKY, FEDERAL JURISDICTION § 9.2.1, at 545-46 (2d ed. 1994); Block, *supra* note 26, at 1061; Fallon, *supra* note 209, at 937. Cramton argued that these goals are already satisfied by the substantive law governing judicial review of government action. *See* Cramton, *supra* note 24, at 426.

211. Krent, *supra* note 24, at 1530; *see also id.* at 1531 (sovereign immunity is "not so much a barrier to individual rights as it is a structural protection for democratic rule").

into by past administrations.[212] This distinguishes judicial review of government action from judicial review of private actions because "we are logically more concerned when the judiciary secondguesses government policy than when it impinges on corporate expertise."[213]

Perhaps the starkest example of the manner in which sovereign immunity shields the government from judicial interference is *United States v. Horn*.[214] In *Horn*, the lead federal prosecutor in a criminal case engaged in particularly egregious prosecutorial misconduct. The district court sanctioned the government by, among other things, ordering the government to pay the fees and costs incurred by the defendants in litigating the issues raised by the prosecutor's misconduct. The district court relied exclusively on the judiciary's supervisory powers as authority for shifting the costs to the government. The First Circuit, however, held that sovereign immunity precluded the imposition of monetary sanctions against the government. Faced with a rare collision between sovereign immunity and the judiciary's broad supervisory powers, the court concluded that sovereign immunity easily prevails. Sovereign immunity "is mandatory and absolute," it "must be applied mechanically, come what may," and it "proceeds by fiat: if Congress has not waived the sovereign's immunity in a given context, the courts are obliged to honor that immunity."[215]

Judicial review of government actions also produces fewer benefits than judicial review of similar conduct by private parties. "As a non-profit-maximizing actor, the government does not respond as directly to monetary signals."[216] For example, litigation awards against the United States generally are paid not from the appropriation of the agency that engaged in the wrongful conduct, but from the Judgment Fund, a general

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212. *Id.* at 1530-31. Krent lists three reasons why Congress may want to retain sovereign immunity in contract suits: the judiciary may interfere with policy decisions entrusted to Congress or the executive, the judicial standard of review could permit second-guessing of congressional or executive choices, and the threat of liability could overdeter administrative decisionmakers. *Id.* at 1535-38. Likewise, "[i]n the absence of immunity, policymakers might attempt to bind their successors to prior policy . . . by entering into long-term contracts." *Id.* at 1538.

213. *Id.* at 1539.

214. 29 F.3d 754 (1st Cir. 1994).

215. *Id.* at 764. The court in United States v. Waksberg, 881 F. Supp. 36 (D.D.C. 1995), relied on *Horn* in holding that sovereign immunity prevails over inherent judicial power, though it complained that the Supreme Court's sovereign immunity precedents compelled such a "thoroughly distasteful result." *Id.* at 41.

216. Krent, *supra* note 24, at 1539. Krent later writes that "recent cases may be overprotective of the government from a process perspective, by failing to force the government to internalize the costs of its activities in situations in which government policy is less obviously threatened." *Id.* at 1549.

appropriation used solely to pay litigation awards.[217] The agency does not suffer any economic disincentive for its actions. But other mechanisms channel government conduct. "Unlike private entities," Krent notes, "the government acts subject to considerable political checks and balances."[218] These include elections, congressional oversight hearings, executive agency accountability to the President, and a number of other formal and informal restraints on government actors.[219] Thus, "[t]he political and administrative processes may serve as substitutes for private lawsuits to deter arbitrary government action."[220]

The constitutional separation of powers may qualify as a value worthy of the special protection of a clear statement rule to the extent that the Court is increasingly likely to decline to enforce those constitutional commands through judicial review.[221] But transposing Krent's analysis to provide a justification for a clear statement rule for waivers of sovereign immunity faces at least three obstacles. First, it proves too much. Krent's suspicion of judicial oversight of executive action calls into question a lot more than federal sovereign immunity. *Marbury v. Madison*[222] itself establishes the judicial role in reviewing executive and legislative actions. Courts permit injunctive relief against executive agencies and officials far more frequently than traditional sovereign immunity doctrine would suggest.[223]

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217. 31 U.S.C. § 1304 (1994). The Comptroller General recently decided that the Judgment Fund could be used to pay most CERCLA claims against the government. *In re* Judgment Fund and Litigative Awards Under the Comprehensive Envtl. Response, Compensation, and Liability Act, No. B-253179, 1993 WL 505822 (Comp. Gen. 1993). By contrast, President Bush ordered that civil penalties assessed against federal agencies for violations of state hazardous waste laws must be paid from the agency's own appropriated funds. *See* 28 WEEKLY COMP. PRES. DOC. 1868, 1869 (Oct. 12, 1992); *see also* Cary, *supra* note 24, at 839 n.239.

218. Krent, *supra* note 24, at 1540.

219. *Id.* at 1532.

220. *Id.* The evolution of the environmental laws, however, demonstrates an increasing reliance on private actions, especially citizen suits, to enforce federal and state environmental laws against federal facilities. *See, e.g.*, 33 U.S.C. § 1365 (1994) (Clean Water Act); 42 U.S.C. § 7604 (1994) (Clear Air Act). The independent counsel statute provides another example of dissatisfaction with historic procedures for governing the government itself. *See* 28 U.S.C. §§ 591-99 (1994). For differing views of the need for the independent counsel statute, see TERRY EASTLAND, ETHICS, POLITICS AND THE INDEPENDENT COUNSEL: EXECUTIVE POWER, EXECUTIVE VICE 1789-1989 (1989); Stephen L. Carter, *The Independent Counsel Mess*, 102 HARV. L. REV. 105 (1988); Peter W. Rodino, Jr., *The Case for the Independent Counsel*, 19 SETON HALL L. REV. 5 (1994).

221. *See supra* notes 196-205 and accompanying text.

222. 5 U.S. (1 Cranch) 137 (1803).

223. *See, e.g.*, HART & WECHSLER, *supra* note 28, at 1108-29.

Second, the values threatened by sovereign immunity are forceful in their own right. Sovereign immunity denies remedies to people wronged by the government.[224] This is contrary to "modern democratic notions of the moral responsibility of the State."[225] Sovereign immunity also "obfuscates the real issues, which are whether particular government activity should be subject to judicial review, and, if so, what form of relief is appropriate."[226] Akhil Amar has argued that the Court's sovereign immunity doctrine misperceives the very nature of sovereignty itself.[227] So why should the Court favor the values protected by sovereign immunity against the values threatened by sovereign immunity?

Third, Krent himself observes that the necessary implication of his justification for sovereign immunity is that Congress must decide whether the need to insulate government actions from judicial interference or the need to provide a judicial remedy for government wrongs prevails in a particular case. The values must be balanced,[228] and they must be balanced by Congress. "The dominant justification for sovereign immunity must be that we trust Congress, unlike any other entity, to set the rules of the game."[229] Several factors account for the unique

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224. *See, e.g.*, Chisholm v. Georgia, 2 U.S. (2 Dall.) 419, 478 (1793) (Jay, C.J.) ("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."); *see also* United States v. Nordic Village, Inc., 503 U.S. 30, 42-46 (1992) (Stevens, J., dissenting). Akhil Amar has written that "[f]ew propositions of law are as basic today—and were as basic and universally embraced two hundred years ago—as the ancient legal maxim, *ubi jus, ibi remedium*: Where there is a right, there should be a remedy." Amar, *supra* note 37, at 1485-86.

225. Great Northern Life Ins. Co. v. Read, 322 U.S. 47, 59 (1943) (Frankfurter, J., dissenting); *see also* National City Bank v. Republic of China, 348 U.S. 356, 359-60 (1955); Block, *supra* note 26, at 1062; Heintz, *supra* note 132, at 271 & n.55.

226. Cramton, *supra* note 24, at 425.

227. *See* Amar, *supra* note 37, at 1429-66. The Supreme Court remains sharply divided concerning the nature of sovereignty under the Constitution. *Compare* U.S. Term Limits, Inc. v. Thornton, 115 S. Ct. 1842 (1995) (opinion for the Court of Stevens, J.) (concluding that the people of the United States, as a whole, are sovereign) *and id.* at 1872-75 (Kennedy, J., concurring) (same) *with id.* at 1875-84 (Thomas, J., dissenting) (asserting that the people of each state are sovereign).

228. "Retained immunity thus makes sense when the political harm from judicial review—interference with government policymaking—outweighs any incremental gain from added deterrence of government tortious behavior and added efficiency in government contracting." Krent, *supra* note 24, at 1579.

229. *Id.* at 1531. In other words, "[t]he doctrine of sovereign immunity allows Congress to determine when the need for preserving majoritarian policy, set by Congress itself or its delegates in the executive branch, eclipses the need for private monitoring of governmental conduct." *Id.* at 1533. Krent writes elsewhere that "[a]lthough the case for blanket immunity is tenuous, our system of separated powers assigns Congress the

position of Congress to balance the competing values. It is politically accountable to the public. It possesses special resources for learning the practical consequences of whether to subject the government to suit.[230] And Congress can employ sovereign immunity "to protect majoritarian policy both from the horizontal pull of comparatively unaccountable judges, and from the temporal pull of now unaccountable government officials of the past."[231] Simply put, "Congress is the institutional entity best situated to assess waiver on a case-by-case basis."[232]

The central congressional role in balancing the values protected by sovereign immunity with the values disturbed by sovereign immunity undercuts the case for a clear statement rule. If the justification for sovereign immunity is to allow Congress to determine the appropriate balance between protecting government policymaking and providing remedies to those injured by government actions, then the object of interpreting statutory waivers of sovereign immunity should be to ascertain and implement the deliberate balance achieved by Congress. That is the goal of the Court's typical approach to statutory interpretation: to best understand the rules that Congress intended to establish. A clear statement rule thus fails on two counts. It forsakes a full examination of the balance Congress achieved, and it tips the balance by assuming that one of the two values always prevails absent an irresistible indication to the contrary.

But all clear statement rules are subject to this attack. The extraterritorial application of a statute must be stated clearly in order to "protect against unintended clashes between our laws and those of other nations which could result in international discord,"[233] but Congress is responsible for balancing that value against the benefits incident to applying domestic laws to conduct overseas. Waivers of the immunity of states from suit must be stated clearly to protect the commands of the Eleventh Amendment,[234] but Congress is responsible for balancing that

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power to determine when continued immunity is appropriate to protect the political process." *Id.* at 1580. The Court itself has made much the same point in the Eleventh Amendment context. *See* Hans v. Louisiana, 134 U.S. 1, 21 (1890) (because "the legislative department of a State represents its polity and its will," "the Legislature, and not the courts, is the judge" of when to waive sovereign immunity), *quoted in* United States v. Horn, 29 F.3d 754, 764 (1st Cir. 1994).

230. For an example of congressional hearings considering suits against the government, see *Environmental Compliance by Federal Agencies: Hearing Before the Subcomm. on Oversight and Investigations of the House Comm. on Energy and Commerce*, 100th Cong., 1st Sess. (1987).

231. Krent, *supra* note 24, at 1533.

232. *Id.*

233. EEOC v. Arabian Am. Oil Co., 499 U.S. 244, 248 (1991).

234. *See* Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 243 (1985).

value against the benefits of permitting such suits. The premise of clear statement rules is that one of those values is entitled to greater weight than the other even though we ultimately trust Congress to do the balancing. That is why the constitutional source of the value is necessary, and why even some constitutional values may be enforced more effectively through direct judicial review instead of through a clear statement rule of statutory interpretation.

B. Ability of Congress to Satisfy a Clear Statement Rule

The existence of an unenforced constitutional value worthy of special judicial protection is a necessary but not sufficient predicate for a clear statement rule. The second requirement for a clear statement rule is that it must be consistent with legislative supremacy. An examination of the application of waivers of sovereign immunity in two environmental statutes demonstrates that while Congress can easily write a statute that waives sovereign immunity, Congress has far more difficulty writing a waiver of sovereign immunity that targets a particular situation ahead of time. The inability of Congress to satisfy a clear statement rule even when it is focusing on the issue shows that such a rule violates legislative supremacy.

1. INTERPRETIVE REGIMES, LEGISLATIVE SUPREMACY, AND CLEAR STATEMENT RULES

Clear statement rules can help Congress when it drafts legislation. As Eskridge and Frickey have explained, clear statement rules (and other canons) are designed "to create a predictable interpretive regime."[235] Such a regime contributes to the rule of law "by rendering statutory interpretation more predictable, regular, and coherent."[236] Clear statement rules also lower the legislature's cost of writing statutes by providing gap-filling rules that the legislature knows ahead of time.[237]

But clear statement rules can produce results contrary to legislative intent. Congress faces both linguistic and institutional limits on its ability to write legislation that accurately resolves future events. "Not only is it too costly to address all foreseeable problems, but also some problems are unforeseeable at the time the legislation is written."[238] Congress may

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235. Eskridge & Frickey, *Clear Statement*, *supra* note 11, at 86.

236. *Id.* at 66.

237. *Id.* These and other benefits of clear statement rules and all canons of statutory interpretation are further discussed *supra* notes 145-162 and accompanying text.

238. Abner S. Greene, *Checks and Balances in an Era of Presidential Lawmaking*, 61 U. CHI. L. REV. 123, 137 (1994). The problems are detailed in Richard A. Posner,

even intend that the courts resolve difficult, unexpected questions.[239] In such cases, the structure, history or purpose of a statute may provide evidence of legislative intent when the text itself is ambiguous. Clear statement rules ignore that evidence, and in doing so, they necessarily produce results which do not reflect accurately the legislative intent revealed by those sources. Indeed, a clear statement rule may produce a result contrary to the better reading of the statutory text itself because the existence of another, less plausible reading may create a fatal ambiguity under a clear statement rule.[240]

Perhaps a result inconsistent with legislative intent could be tolerated when an unenforced constitutional provision is at stake. If the Court decides not to enforce a constitutional norm through judicial review, it may nonetheless want an assurance that Congress breached the norm intentionally, not accidentally and without deliberation.[241] The effect is countermajoritarian because the congressional policy choice gives way to the judicial policy choice, but two factors mitigate that effect. First, the policy choice made by the judiciary springs from the Constitution, not from the personal biases of the Court. Second, Congress can always overcome the judicial standard by writing a statute that satisfies the demands of the clear statement rule. Congress incurs a cost whenever it is required to revisit a subject, and the imposition of a clear statement rule fundamentally affects the bargaining power of the members of Congress addressing the matter. Nonetheless, the admittedly imperfect ability to overcome the Court's clear statement rule presents an alternative

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Statutory Interpretation in the Classroom and in the Courtroom, 50 U. CHI. L. REV. 800, 811 (1983); Note, *Intent, Clear Statements, and the Common Law: Statutory Interpretation in the Supreme Court*, 95 HARV. L. REV. 892, 899 (1982). For concerns about the linguistic problems, see Jerry L. Marshaw, *Textualism, Constitutionalism, and the Interpretation of Federal Statutes*, 32 WM. & MARY L. REV. 827, 835 (1991) (suggesting that clear statement rules "[d]escribe a disfunctionally [sic] 'acontextual' view of the power of language").

239. Judge Easterbrook has written that

> the 'clear statement' principle usually fails as a useful tool of construction because it cannot demonstrate why the legislature would have wanted the court to hesitate just because the subject matter of the law is 'sensitive.' Likely it thinks that making hard decisions in sensitive areas is what courts are for.

Frank H. Easterbrook, *Statutes' Domains*, 50 U. CHI. L. REV. 533, 545 (1983) (footnote omitted).

240. *See supra* notes 148-50 and accompanying text; *see also* William D. Popkin, *Law-Making Responsibility and Statutory Interpretation*, 68 IND. L.J. 865, 881 (1993); Shapiro, *supra* note 11, at 940.

241. *See* Eskridge & Frickey, *Clear Statement*, *supra* note 11, at 631; Shapiro, *supra* note 11, at 959; Sunstein, *supra* note 144, at 458.

that is not available to Congress when the Court strikes down a statute as unconstitutional.[242]

If Congress cannot readily satisfy a clear statement rule *ex ante*, then the legislative supremacy barrier to such a rule becomes insuperable. A clear statement rule demands that Congress state its intention with special precision. Such rules are thus well suited for interpretive questions that can be answered with a simple "yes" or "no." Does this statute apply extraterritorially? Is the unconstitutional provision of this statute severable from the remaining provisions of the statute?[243] Conversely, interpretive questions that do not present two such sharp alternatives pose problems for clear statement rules. Who is entitled to receive social security disability benefits? Which parties are liable for hazardous waste contamination? A clear statement rule that Congress must struggle to satisfy even when it is focusing on the issue violates legislative supremacy.

2. THE LEGISLATIVE SUPREMACY EFFECTS OF A CLEAR STATEMENT RULE FOR WAIVERS OF FEDERAL SOVEREIGN IMMUNITY

Congress knows how to waive federal sovereign immunity. But there is a crucial difference between asking whether a statutory provision constitutes a waiver of sovereign immunity in *some* instances and whether that provision constitutes a waiver in a *particular* instance. The first question is much more easily answered and much more likely to be the subject of the kind of "yes/no" inquiry typical of clear statement rules. But if the answer is "yes," the additional question of the scope of the

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242. *See* Eskridge, *supra* note 147, at 1065; Eskridge & Frickey, *Clear Statement*, *supra* note 11, at 631; Shapiro, *supra* note 11, at 959.

243. I have previously suggested that a clear statement rule should govern the severability of unconstitutional statutes. *See* Nagle, *supra* note 133, at 254-56. To the extent that my earlier severability proposal is inconsistent with the general theory of clear statement rules developed here, I have also explained that the ideal solution would be for the legislature itself to establish a clear statement rule for severability. *Id.* at 256-58; *see also* Alan R. Romero, Note, *Interpretive Directions in Statutes*, 31 HARV. J. LEGIS. 211, 221 (1994) ("[l]egislators might want to create their own clear statement rules so that courts will not mistakenly decide that the legislature intended to take certain actions"). Alternately, "[l]egislators also might forbid courts to use clear statement rules. . . . If legislators disliked these added burdens or their unexpected retroactive application, they could pass interpretive laws forbidding clear statement rules in some or all areas." *Id.* at 221; *see also* Stephen F. Ross, *Where Have You Gone, Karl Llewellyn? Should Congress Turn Its Lonely Eyes to You?*, 45 VAND. L. REV. 561, 566 (1992) ("The only way for Congress to prevent the continued use of normative canons with which it disagrees is to enact an amendment to Title I of the United States Code that expressly provides for different rules of construction.") (footnote omitted).

waiver and its application to particular controversies is much more difficult to determine. And it is that question which has generated the recent litigation regarding waivers of sovereign immunity. These recent cases suggest that Congress struggles to specify the scope of a waiver of sovereign immunity, thus raising serious legislative supremacy concerns about a rule requiring a clear statement of the *scope* of the waiver.

Two environmental law examples illustrate the point. Most of the primary federal environmental statutes share the same general purpose: to treat polluting federal facilities the same as polluting private facilities.[244] This purpose is evident in the waiver provisions that Congress has written with increasing breadth.[245] The scope of those waivers, however, has proved difficult to determine.[246] The first historical example of that difficulty concerns the evolution of the waivers of sovereign immunity in the Clean Water Act, the Clear Air Act, and RCRA, culminating in the Supreme Court's decision in *Ohio* and the congressional reversal of part of that decision. The second example concerns ongoing litigation about the scope of the waiver of sovereign immunity in the Comprehensive Environmental Restoration, Cleanup and Liability Act (CERCLA). Both examples demonstrate the difficulty in writing a waiver of sovereign immunity that achieves all of the results that Congress intends.

3. THE LESSONS OF *OHIO*

As explained more fully by others,[247] the Clean Water Act and the

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244. *See, e.g.*, Murchison, *supra* note 132, at 223; Percival, *supra* note 132, at 223.

245. Murchison attributes the breadth of particular statutory waivers to the date on which they were enacted, rather than a judgment about the type of waiver appropriate for the particular statute. *See* Murchison, *supra* note 132, at 210-11; *see also* Percival, *supra* note 132, at 254-55 (agreeing with Murchison).

246. The qualifying language in the environmental waivers is emphasized in Yates, *supra* note 132, at 183, 186, and Tucker, *supra* note 29, at 94. The environmental statutes also empower the President to exempt projects from the substantive environmental requirements in special circumstances. *See, e.g.*, 33 U.S.C. § 1323(a) (1994) (authorizing presidential exemption from Clean Water Act if "in the paramount interest of the United States"). *See generally* David A. Koplow, *How Do We Get Rid of These Things?: Dismantling Excess Weapons While Protecting the Environment*, 89 NW. U. L. REV. 445, 512-13 (1995) (arguing that presidential exemption provisions should not apply to requirements imposed by arms control treaties); Tucker, *supra* note 29, at 101-06 (describing the limited experience with the exemption provisions).

247. The story is told by Murchison, *supra* note 132, at 180-201; Kenneth M. Murchison, *Waivers of Intergovernmental Immunity in Federal Environmental Statutes*, 62 VA. L. REV. 1177 (1976); Percival, *supra* note 132, at 222-32, 237-53; Tueker, *supra* note 29, at 88-93, 96-98; Cary, *supra* note 132, at 806-20; Gleason & Goutzounis, *supra*

Clean Air Act initially obligated federal agencies to simply cooperate with state and local pollution control agencies if possible.[248] The environmental problems at federal facilities persisted, so when Congress greatly strengthened the federal environmental laws beginning in 1970, it generally directed federal agencies to adhere to the same pollution control standards that private parties had to satisfy. The Clean Air Act, for example, required federal agencies to "comply with federal, state, interstate, and local requirements respecting control and abatement of air pollution to the same extent that any person is subject to such requirements."[249] At the same time, and for the first time, Congress authorized citizens to bring suit against federal agencies to enforce those commands.[250]

Federal agencies reacted by arguing that the new laws required them to comply with the substantive requirements of state pollution laws, but not the procedural requirements of those state laws. So viewed, federal agencies were not required to obtain state permits. The federal agencies based their argument on sovereign immunity, especially the doctrine that waivers of immunity must be construed narrowly. In *Hancock v. Train*[251] and *EPA v. California ex rel. State Water Resources Control Board*,[252] the Supreme Court agreed. Looking for a "clear and unambiguous" waiver, the Court concluded that the provision requiring compliance with "Federal, State, interstate, and local requirements respecting control and abatement of air pollution to the same extent that any person is subject to such requirements" applied only to substantive requirements because it failed to provide that federal agencies must comply with "all" state requirements.[253] The Court reminded Congress

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note 132, at 298-305; Heintz, *supra* note 132, at 274-76; Rothmel, *supra* note 27, at 586-98; Yates, *supra* note 132, at 187-89, 193-205.

248. *See* Clean Air Act, Pub. L. No. 86-365, § 2, 73 Stat. 646 (1959); Water Pollution Control Act, Pub. L. No. 84-660, § 9, 70 Stat. 498, 506 (1956) (federal agencies shall cooperate with state agencies "insofar as practicable and consistent with the interests of the United States and within any available appropriations").

249. Clean Air Act Amendments of 1970, Pub. L. No. 91-604, § 5, 84 Stat. 1676, 1689 (1970). Other federal environmental statutes of that era contained similar language. *See* Safe Drinking Water Act of 1974, Pub. L. No. 93-523, 88 Stat. 1660 (1974); Noise Control Act of 1972, Pub. L. No. 92-574, § 4, 86 Stat. 1234, 1235 (1972); Federal Water Pollution Control Act of 1972, Pub. L. No. 92-500, § 2, 86 Stat. 816, 875 (1972).

250. *See* Clean Water Act, Pub. L. No. 92-500, § 505, 86 Stat. 816, 888 (1972); Clean Air Act Amendments of 1970, Pub. L. No. 91-604, § 304, 84 Stat. 1676, 1706 (1970).

251. 426 U.S. 167 (1976) (Clean Air Act).

252. 426 U.S. 200 (1976) (Clean Water Act).

253. *See Hancock*, 426 U.S. at 179, 182-87; *California*, 426 U.S. at 211, 221-26.

that Congress could rewrite the waivers if that was what Congress intended.[254]

Congress rewrote the waivers. First, it added the word "all" before "requirements" in the federal facility provision of the new RCRA.[255] And, for good measure, Congress specified that federal agencies would no longer be immune "from any process or sanction of any State or Federal Court with respect to the enforcement of such injunctive relief."[256] Next, Congress made similar changes to the Clean Water Act and the Clean Air Act.[257] The purpose of these amendments, as stated in the legislative history, was to correct the Court's misinterpretation of congressional intent in *Hancock* and *California* and "to settle these matters once and for all."[258]

But that did not work either. Federal agencies insisted that while they were now obligated to comply with the substantive and procedural requirements of state pollution laws, they were not subject to civil penalties for violations of those laws. That argument failed in the lower courts under the Clean Air Act, and it met with mixed results under the

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254. *Hancock*, 426 U.S. at 200.

255. Pub. L. No. 95-580, § 2, 90 Stat. 2821 (1976).

256. *Id.*

257. *See* Clean Water Act, Pub. L. No. 95-217, §§ 60(b)(2), 61(a), 91 Stat. 1566, 1597-98 (1977); Safe Drinking Water Act Amendments of 1977, Pub. L. No. 95-190, 91 Stat. 1399 (1977); Clean Air Act, Pub. L. No. 95-95, § 116(b), 91 Stat. 685, 711 (1977). The Clean Water Act included the qualification that "the United States shall be liable only for those civil penalties arising under Federal law or imposed by State or local court to enforce an order or the process of such court." 33 U.S.C. § 1323(a)(2) (1994). *See supra* note 71 and accompanying text.

258. S. REP. NO. 370, 95th Cong., 1st Sess. 67 (1977), *reprinted in* 1977 U.S.C.C.A.N. 4326, 4371-75, 4392; H.R. REP. NO. 294, 95th Cong., 1st Sess. 12 (1977), *reprinted in* 1977 U.S.C.C.A.N. 1077, 1089-90; H.R. REP. No. 240, 95th Cong., 1st Sess. 67 (1977), *reprinted in* 1977 U.S.C.C.A.N. 1077, 1276-78.

Clean Water Act and RCRA.[259] The argument finally succeeded in *Ohio*.[260]

Congress rewrote the waiver again. Four months after *Ohio*, Congress amended RCRA to explicitly waive sovereign immunity from civil penalties for violating state hazardous waste laws.[261] Congress indicated that it had intended this result all along.[262] But Congress has not been so fast to change the Clean Water Act. Several proposed amendments have been introduced since *Ohio*, but none have been enacted.[263] For now, the Court's decision in *Ohio* that civil penalties

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259. The lower courts divided on the Clean Water Act. *Compare* Sierra Club v. Lujan, 931 F.2d 1421 (10th Cir. 1991) (waiver), *rev'd*, 504 U.S. 902 (1992) *with* California v. United States Dep't of Navy, 845 F.2d 222 (9th Cir. 1988) (no waiver); *and* Metropolitan Sanitary Dist. v. United States, 737 F. Supp. 51 (N.D. Ill. 1990) (same) *and* McClellan Ecological Seepage Situation v. Weinberger, 655 F. Supp. 601 (E.D. Cal. 1986) (same). On RCRA, compare Maine v. United States Dep't of Navy, 702 F. Supp. 322 (D. Me. 1988) (waiver), *vacated*, 973 F.2d 1007 (1st Cir. 1992) with Mitzelfelt v. Department of Air Force, 903 F.2d 1293 (10th Cir. 1990) (no waiver) and United States v. Washington, 872 F.2d 874 (9th Cir. 1989) (same) and Meyer v. United States Coast Guard, 644 F. Supp. 221 (E.D.N.C. 1986) (same). Three district courts held that the Clean Air Act waived sovereign immunity from civil penalties. *See* United States v. Air Pollution Control Bd., No. 3:88-1030, 1990 U.S. Dist. LEXIS 18996 (M.D. Tenn. Feb. 28, 1990); Alabama *ex rel.* Graddick v. Veterans' Admin., 648 F. Supp. 1208 (M.D. Ala. 1986); Ohio *ex rel.* Celebreeze v. United States Dep't of Air Force, 17 Envtl. L. Rep. (Envtl. L. Inst.) 21,210 (S.D. Ohio 1987). Each court relied on a clear statement to that effect in the legislative history of the Clean Air Act. *See* H.R. REP. NO. 294, 95th Cong., 1st Sess. 12 (1977), *reprinted in* 1977 U.S.C.C.A.N. 1077, 1089-90. *Nordic Village* calls those decisions into question. *See* United States v. Nordic Village, Inc., 503 U.S. 30, 37 (1992) (legislative history cannot be used to find a waiver of sovereign immunity); *see also* Cary, *supra* note 132, at 822-24 (noting that the Clean Air Act cases would probably be decided differently under *Nordic Village*).

260. 503 U.S. 607 (1992); *see supra* part II.B.3.

261. The Federal, State, interstate, and local substantive and procedural requirements referred to in this subsection include, but are not limited to, all administrative orders and all civil and administrative penalties and fines, regardless of whether such penalties or fines are punitive or coercive in nature or are imposed for isolated, intermittent, or continuing violations.

Federal Facility Compliance Act of 1992, Pub. L. No. 102-386, § 102(a)(3), 106 Stat. 1505 (1992).

262. The conference committee report stated that the purpose of the changes was to reverse *Ohio* and "reaffirm the original intent of Congress that each department, agency, and instrumentality of the United States be subject to all of the provisions" of hazardous waste laws. 138 CONG. REC. H8864 (daily ed. Sept. 22, 1992). Percival collects the similar statements of individual legislators. *See* Percival, *supra* note 119, at 245-46 & nn.143-44.

263. *See* H.R. 961, 104th Cong., 1st Sess. § 303(a) (1995) (amending § 313 of the Clean Water Act to provide that "the United States hereby expressly waives any immunity otherwise applicable to the United States . . . including . . . any civil or administrative penalty or fine"); H.R. 340, 103d Cong., 1st Sess. (1993); 139 CONG.

are unavailable against federal agencies under the Clean Water Act still stands.

One can view this history in three different ways. The first view is that the process worked. The second view is that the process most definitely did not work, and the saga demonstrates broader problems with the Court's statutory interpretation jurisprudence. The third view is that the clear statement rule inevitably frustrated the achievement of the congressional goals, but that a less drastic solution is available and desirable. These three views of these cases teach three different lessons.

Lesson # 1: Congress can specify precisely which activities are no longer protected by sovereign immunity, and the courts will give those decisions effect. If the courts wrongly interpret Congress' intentions, Congress can correct the misinterpretations. Indeed, such statutory responses to judicial decisions may become more common now that the House has instituted a regular "Corrections Day" to fix statutory mistakes.[264] *Ohio* then may be an example of the kind of helpful dialogue to which Congress and the courts should both aspire.[265]

If you believe that the Court misinterpreted Congress's intent at each step, as Congress repeatedly protested,[266] then a different picture emerges. In the environmental cases, it took over twenty years for the courts to give effect to what Congress intended all along. That gives one pause, especially when the institutional costs of requiring Congress to revisit a problem it thought it had solved are added to the equation.[267] Moreover, it is highly doubtful that the 1970 Congress could have written the statutory provision necessary to produce a waiver in *Ohio*. Congress would have had to anticipate that civil penalties would become a future

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REC. E1720-02 (1993) (statement of Rep. DeFazio) (introducing the Federal Facilities Clean Water Compliance Act).

264. For a description of the House's procedure and the issues it raises, see John Copeland Nagle, *Corrections Day*, 43 UCLA L. REV. (forthcoming June 1996).

265. *See generally* Deanell Reece Tacha, *Judges and Legislators: Renewing the Relationship*, 52 OHIO ST. L.J. 279 (1991).

266. *See supra* note 262. These claims probably should be taken with a grain of salt. In any event, I do not question the consistent rejection of subsequent legislative history as evidence of what Congress meant in the first instance. *See, e.g.*, United States v. Texas, 113 S. Ct. 1631, 1635 n.4 (1993) (quoting Pension Benefit Guar. Corp. v. LTV Corp., 496 U.S. 633, 650 (1990)); Continental Can Co. v. Chicago Truck Drivers, Helpers & Warehouse Workers Union Pension Fund, 916 F.2d 1154, 1157 (7th Cir. 1990).

267. *See* Eskridge & Frickey, *Law as Equilibrium*, *supra* note 11, at 66; Eskridge & Frickey, *Clear Statement*, *supra* note 11, at 639; Ira C. Lupu, *Statutes Revolving in Constitutional Law Orbits*, 79 VA. L. REV. 1, 51 (1993); Shapiro, *supra* note 11, at 959; Note, *supra* note 238, at 905-06. *See generally* William N. Eskridge, Jr., *Overriding Supreme Court Statutory Interpretation Decisions*, 101 YALE L.J. 31 (1991).

issue. The one-issue-at-a-time approach that flows from the Court's clear statement rule is less than satisfactory.

Lesson # 2: The second possible lesson of this history sees *Ohio* as symptomatic of a broader flaw in the Court's statutory interpretation jurisprudence. The critics of *Ohio* view the decision as "formalistic," and they advocate a more liberal rule for interpreting waivers of sovereign immunity in the environmental context and beyond.[268]

Both the diagnosis and the prescription are problematic. The problem is not a "formalistic" interpretive approach. Indeed, the Court's error may be in spending too little time looking at the statutory language, not too much. Clear statement rules are less concerned about what the statutory text says than what it does not say. They are indifferent about the meaning of the statutory text provided that it does not say "this statute applies extraterritorially" or "the Eleventh Amendment immunity of the states is waived in situations *x*, *y*, and *z*." *Ohio* and *Nordic Village* provide particularly striking illustrations of a clear statement rule's disinterest in the meaning of the statutory text. In each case, the Court described alternative interpretations of the statutes, but it made no effort to ascertain which interpretation was better.[269] Most originalist approaches to statutory interpretation, including the plain meaning rule and other "formalistic" approaches, would have actively sought to learn what the statute means.[270]

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268. *See* Murchison, *supra* note 132, at 210; Percival, *supra* note 132, at 221. Murchison finds the strict construction rule acceptable in other situations, but not in the environmental context. Murchison, *supra* note 132, at 206-07. He endorses a functional approach for judicial interpretation of waivers of sovereign immunity that emphasizes the statutory text and the legislative purpose, but avoids the legislative history and canons. *Id.* at 210-12, 223-26. Additionally, Murchison proposes a legislative directive to read waivers of sovereign immunity in environmental statutes liberally. *Id.*; *see also* Cary, *supra* note 132, at 840 (endorsing Murchison's proposal). Murchison further favors replacing the series of individual waivers with a general environmental waiver provision containing exceptions as needed. Murchison, *supra* note 132, at 207-08. I explain why a special rule for waivers in environmental statutes is unnecessary *infra* part III.B.4.

Percival would limit the strict construction rule even further. Relying on Sunstein, Percival argues that the strict construction rule should be limited to private law, and not extended to public law. Percival, *supra* note 132, at 253. He admits that requiring a clear statement is "a laudable goal," but the cost of delaying federal facility compliance with environmental standards is too high. *Id.* at 254. He advocates an interpretive rule presuming that a waiver takes place absent a contrary clear congressional intent. *Id.* at 255-56. But Percival's reliance on the list of values Sunstein wants to protect is problematic, as I have already explained. *See supra* notes 168-179 and accompanying text.

269. *See supra* notes 53-64, 72-75 and accompanying text.

270. Or meant to the legislature or should mean now—the differences are real but irrelevant to my point here.

Further, the case for a special rule for waivers of sovereign immunity in the environmental context is unconvincing. Strong arguments exist for permitting the federal government to be sued for its own environmental violations—but they do not seem stronger than the arguments for permitting the government to pay its way in state water law adjudications (as in *Idaho*) or to pay tort judgments (as in *Smith*) or to be treated like any other creditor in a bankruptcy proceeding (as in *Nordic Village*). Moreover, Krent's theory of sovereign immunity shows that arguments about the need for a waiver of sovereign immunity should be directed to Congress so that it can balance the injuries caused by special treatment for the government with the interference in government policymaking that immunity is designed to prevent.[271] Once Congress has done so, then the task of the courts is to ascertain Congress's intent.

Lesson # 3: *Ohio* offers a third lesson. The courts rightly focus on the statutory text to find a waiver of sovereign immunity, as they do to answer most other interpretive questions. The benefits of encouraging Congress to specify its waiver decision in the statutory text include: (1) the notice provided to federal agencies and individuals affected by government conduct; (2) the assurance that Congress specifically considered the matter; (3) satisfaction of the Article I bicameralism and presentment requirements governing the creation of federal law; (4) the electoral accountability of representatives who voted for or against certain statutory language; and (5) the legislative supremacy value of faithfulness to the statutory text.[272] But a clear statement rule is not needed to achieve the first two benefits so long as the courts still emphasize the primacy of the statutory text. And a clear statement rule actually disserves legislative supremacy if Congress must struggle to write a statutory provision that satisfies such a rule.[273]

The manner in which a waiver of sovereign immunity is interpreted thus should depend on the manner in which it is written. Some waivers are broad, others are narrow. Thus, the explanation for reading environmental waivers more broadly lies in the broad language of those statutes, not in any unique characteristics of environmental law. Further, when the statutory text is unclear, general principles of statutory construction direct the interpreter to secondary sources to ascertain what Congress meant. That is the step a clear statement rule prohibits, but it is precisely the step needed to fulfill the obligation to remain faithful to

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271. *See supra* notes 228-32 and accompanying text.

272. These points are made in Murchison, *supra* note 132, at 224; Redish & Chung, *supra* note 142, at 862; Sunstein, *supra* note 144, at 416.

273. *See* Shapiro, *supra* note 11, at 926. *See generally* William N. Eskridge, Jr., *Spinning Legislative Supremacy*, 78 GEO. L.J. 319 (1989); Daniel A. Farber, *Statutory Interpretation and Legislative Supremacy*, 78 GEO. L.J. 281 (1989).

the immunity decision Congress made. For example, *Ardestani* prohibits reliance on a statute's purpose to demonstrate a waiver of sovereign immunity,[274] while many commentators have urged that ambiguous statutory waivers should be interpreted consistent with the purpose of the statute.[275]

This approach raises questions about the result in *Ohio*. The Court found the Clean Water Act ambiguous because it was susceptible to a reading that Congress had not waived immunity from civil penalties imposed for punitive reasons. That reading, however, violated another of the Court's established canons of statutory construction: a statute should not be read in a manner that renders part of the statute superfluous.[276] As such, that reading should have been rejected. The government still may have been able to provide an alternative reading in support of its position that would have yielded an ambiguity, but unless the government did so, the Court should have concluded that the statutory language could bear only the reading that resulted in a waiver. So viewed, *Ohio* may be no more than an instance of improperly applying the correct test.[277]

The focus on statutory language also eliminates the need for a special rule for "sue and be sued" clauses. The Court follows the precise opposite presumption when reading "sue and be sued" clauses: it reads them as waiving sovereign immunity in all instances unless there is a compelling justification for a narrower reading.[278] The different rules produce strange results when both types of waivers are present. For example, although *Ohio* established that the Clean Water Act does not subject federal agencies to civil penalties, the United States Postal Service must pay such penalties because it may "sue and be sued."[279] Moreover, the dramatically different rules are hard to explain when looking at the statutory text. A congressional directive that a federal instrumentality can "sue and be sued" seems no broader than a command

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274. *See* Ardestani v. INS, 502 U.S. 129 (1991).

275. *See* Murchison, *supra* note 132, at 212, 226; Percival, *supra* note 132, at 256; Shapiro, *supra* note 11, at 940; Note, *supra* note 238, at 906.

276. *See supra* note 74 and accompanying text.

277. That was Justice White's dissenting view. United States Dep't of Energy v. Ohio, 503 U.S. 607, 631-37 (1992); *see also* Gleason & Goutzounis, *supra* note 132, at 294 (arguing that the Court used the right test but applied it improperly). Given that *Ohio* was the only recent decision that provoked Justice White to dissent, and remembering that he wrote the decisions in *Hancock* and *California*, his position is noteworthy. Murchison, however, views the Clean Water Act as the "most unclear statute" regarding permissible sanctions. Murchison, *supra* note 132, at 221.

278. *See supra* note 37 and accompanying text.

279. *See* Pennsylvania Dep't of Envtl. Resources v. USPS, 13 F.3d 62 (3d Cir. 1993).

that a federal agency shall be subject to all laws in the same manner and to the same extent as a nongovernmental entity. The "sue and be sued" language may have a slight edge for being unqualified, but the precision of the latter waivers suggests that Congress actually gave more thought to all of the ramifications of a waiver of sovereign immunity. The current clear statement rule and opposite presumption for "sue and be sued" clauses misses all of these nuances.

4. THE LESSONS OF CERCLA

The second example involves the scope of a waiver of sovereign immunity that the Supreme Court has never considered. The Comprehensive Environmental Restoration, Cleanup and Liability Act (CERCLA) imposes liability on nongovernmental parties in four instances: (1) they are the current owner or operator of a facility where there has been a release or threatened release of hazardous substances; (2) they were the owner or operator of such a facility at the time of the disposal of the hazardous substances ("owners" and "operators"); (3) they arranged to dispose of the hazardous substances at the site ("arrangers" or "generators"); or (4) they transported the hazardous substances to the site ("transporters").[280] Section 120 of CERCLA provides that the federal government shall be liable "in the same manner and to the same extent as any nongovernmental entity."[281] That directive seems clear in situations involving a federal government facility such as a military base or nuclear waste disposal site where the government disposed hazardous substances. But where the government engages in activities that lack such a clear private counterpart, the application of the waiver is less clear. Ongoing litigation over government involvement in wartime industrial activities illustrates the interpretive difficulty.

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280. 42 U.S.C. § 9607 (1994). I described CERCLA's liability scheme in more detail in John Copeland Nagle, *CERCLA, Causation, and Responsibility*, 78 MINN. L. REV. 1493, 1504-16 (1994).

281. 42 U.S.C. § 9620 (1994). Waivers in other statutes use nearly identical language. *See, e.g.*, 17 U.S.C. § 501(a) (1994) (states subject to copyright laws); 42 U.S.C. § 300j-6(a) (1994) (federal agencies subject to safe drinking water requirements); 42 U.S.C. § 7418(a) (1994) (federal agencies subject to Clean Air Act); *see also* Murchison, *supra* note 132, at 203 nn.178-79 (citing statutes); Rothmel, *supra* note 27, at 609 (same). For examples of cases interpreting CERCLA's other waiver of sovereign immunity from state laws, see Rospatch Jessco Corp. v. Chrysler Corp., 829 F. Supp. 224 (W.D. Mich. 1993) (waiver of sovereign immunity in CERCLA § 120(a)(4) does not extend to facilities no longer owned or operated by the federal government); United States v. Pennsylvania Dep't of Envtl. Resources, 778 F. Supp. 1328, 1330-32 (M.D. Pa. 1991) (waiver of sovereign immunity in CERCLA § 120(a)(4) extends to federal liability under state hazardous waste statute).

Historically, the federal government has had an altogether different relationship with the private industrial economy during times of war than during times of peace. This was most true during World War II, but also was evident during the Korean War, the Vietnam War, and even during the Cold War period of the 1950s. During World War II, for example, the government controlled wages and prices, coordinated industrial output to assure that goods needed for the war effort were being produced, and retained the ultimate power to seize a private industrial plant that failed to produce adequately. With few exceptions, however, industrial production remained in private hands.

Fifty years later, we know that the industrial processes of the 1940s generated hazardous wastes that are causing environmental problems today. The companies that were involved in wartime industrial production are plainly liable under CERCLA as past owners, operators, and generators of hazardous substances. Likewise, the current owners and operators of those facilities are liable under CERCLA even if they had no involvement at the site during the war when the contamination occurred. Both groups of private companies are pointing to the government as the true responsible party, and specifically, as a past "operator" of facilities by virtue of the extensive government involvement in the manufacturing enterprise during World War II.

FMC Corporation v. United States Department of Commerce[282] held that CERCLA's waiver of sovereign immunity extends to such claims. The situation in *FMC* is typical: the government contracted with a private company to produce high tenacity rayon needed as a synthetic substitute for rubber supplies controlled by the Japanese. The government engaged in a broad variety of activities to support the company's efforts, but the company retained control of its plant.[283] When EPA ordered FMC, a past owner of the site, to clean up the contamination resulting from the wartime manufacturing processes fifty years before, FMC sued the government alleging that the government was an "operator" and "arranger" based on its activities during the war. The government responded that CERCLA's waiver of sovereign immunity did not apply to government activities with no private counterpart, such as regulatory activities incident to the prosecution of the war.

The Third Circuit, sitting *en banc*, held eight to four that the government had waived its sovereign immunity and was liable as an operator.[284] The majority acknowledged that waivers of sovereign

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282. 29 F.3d 833 (3d Cir. 1994) (en banc), *aff'g* 786 F. Supp. 471 (E.D. Pa. 1992).

283. The court's opinion describes the facts in more detail. *Id.* at 835-38.

284. *Id.* at 838-45. The court split six to six on the government's liability as an arranger, thereby affirming without the district court's holding that the government was

immunity must be narrowly construed, but it made no mention of the clear statement rule implicit in *Ardestani, Nordic Village,* and *Ohio.*[285] That omission was telling, for the majority's reasoning contradicts the teaching of each of those cases. The majority read the waiver to mean that "when the government engages in activities that would make a private party liable if the private party engaged in those types of activities, then the government also is liable."[286] CERCLA's language permits the majority's interpretation, but it is hard to insist that CERCLA only can be interpreted in that fashion. The government proffered an alternative interpretation: CERCLA waives immunity when the government "is acting or has acted like a 'nongovernmental entity,' such as by owning facilities, but not when it is conducting a sovereign's purely regulatory actions in connection with the operations of a private, for-profit entity."[287] Under *Ohio*, the existence of two plausible interpretations of the statute dooms the case for a waiver.[288] Similarly, the majority emphasized that CERCLA is a remedial statute that should be read broadly to achieve its purposes.[289] *Ardestani* teaches that the purpose of a statute is irrelevant in the search for a waiver, remedial or not.

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liable as an arranger. *Id.* at 845-46; *see also id.* at 854 n.7 (Sloviter, C.J., dissenting).

285. The majority stated the strict construction rule applied by the Supreme Court before 1991, though it cited *Meyer* with a "but see" without elaboration. *Id.* at 839. The majority also justified its conclusion as "consistent with our approach to statutory construction in general, and to CERCLA in particular, which is to read plain language to mean what it says." *Id.* at 840. That is a different question than whether the statute contains a clear statement waiving sovereign immunity. Actually, the majority's best argument rested on stare decisis. Indian Towing Co. v. United States, 350 U.S. 61 (1955), held that nearly identical language in the FTCA waived sovereign immunity with respect to the government's negligent operation of a lighthouse. The majority found *Indian Towing* controlling, see *FMC*, 29 F.3d at 840, and Judge Stapleton believed that *Indian Towing* supported the majority's conclusion regarding sovereign immunity even though he disagreed with the majority's ensuing holding that the federal government was an "operator" of the site for purposes of CERCLA. *Id.* at 854 (Stapleton, J., dissenting).

286. *FMC*, 29 F.3d at 840. The majority added that "[t]his is true even if no private party could in fact engage in those specific activities." *Id.* Thus, the government could be required to clean up a military base even though no private party could operate a military base. This analysis is flawed. As the dissent responded, "[t]hat construction of the statute is illogical, not much different than saying that birds are required to have passports to fly across the borders of nations that require people to have passports." *Id.* at 847 (Sloviter, C.J., dissenting).

287. *Id.* at 847 (Sloviter, C.J., dissenting).

288. *Ohio, Nordic Village*, and *Idaho* all teach that the existence of two plausible interpretations of a statute prevents finding a waiver of sovereign immunity in that statute. *See supra* at part II.B.3-5. Chief Judge Sloviter relied on this principle in dissent. *FMC*, 29 F.3d at 847; *see also* Van S. Katzman, Note, *The Waste of War: Government CERCLA Liability at World War II Facilities*, 79 VA. L. REV. 1191, 1205-06 & n.4 (1993).

289. *FMC*, 29 F.3d at 840-41.

Finally, and contrary to *Nordic Village*, the majority relied on a statement in the legislative history to inform its understanding of the purpose of the statute.[290]

FMC is thus wrongly decided under a clear statement rule for waivers of sovereign immunity. But absent such a rule, the case becomes more difficult. CERCLA was enacted by a lame-duck Congress in December 1980 after President Reagan and a Republican Senate were elected but before they took office. The resulting legislative compromise produced much ambiguous language and little helpful legislative history.[291] CERCLA is designed to make "polluters pay" and to identify as many polluters as possible,[292] and that statutory purpose supports the *FMC* majority's conclusion that holding the government liable is consistent with the law. On the other hand, the government sometimes acts in fundamentally different ways than private entities, even when the government is involved in the marketplace. The clear statement rule skips these difficult interpretive issues because CERCLA does not say "the government has waived its sovereign immunity from claims for assisting industrial activities during the war."[293]

One concern remains. The *Ohio* and CERCLA examples demonstrate the difficulty of crafting a waiver that will cover all of the situations Congress wants to address. Writing a waiver is easy; writing a waiver of a particular scope is hard. But it may be no more difficult to define the scope of a waiver of sovereign immunity than it is to define the scope of other statutes that are subject to clear statement rules. For example, Congress must state clearly that a statute applies

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290. *Id.* The majority resisted the temptation to quote Senator Stafford's 1986 criticism of federal facility compliance with CERCLA that "no loophole, it seems, is too small to be found by the Federal Government." 3 SENATE COMM. ON ENVTL. & PUB. WORKS, LEGISLATIVE HISTORY ON THE SUPERFUND AMENDMENT AND REAUTHORIZATION ACT OF 1986, 101st Cong., 2d Sess. 5177 (1990).

291. *See* Nagle, *supra* note 280, at 1494 & n.6.

292. *See id.* at 1493 & n.2.

293. The Clinton Administration's CERCLA reform proposal proceeds from the exact opposite direction. Faced with litigants and the *FMC* court who read the current CERCLA waiver of sovereign immunity as extending to government wartime activities, the Administration's proposed legislation specifically exempts such activities from the general waiver of sovereign immunity. *See* Superfund Reform Act of 1994, S. 1834, 103d Cong., 2d Sess. § 403(d) (1994); *see also* 140 CONG. REC. S1081 (1994) (describing Administration proposal). The result is akin to the law governing that "sue and be sued" sovereign immunity is presumed waived unless Congress specifically says otherwise. *See supra* note 37 and accompanying text; *see also* United States v. Iron Mountain Mines, Inc., 881 F. Supp. 1432, 1441 (E.D. Cal. 1995) (reading § 120 of CERCLA to waive the federal government's sovereign immunity except in those cases specifically identified in the statute).

extraterritorially.[294] Surely Congress does not need to state "section 1 of this Act applies to conduct occurring in Armenia, Australia, Austria . . .," "section 2 of this Act applies to conduct occurring . . . ." The requirement of clear statement is not one of a particular formula. But suppose an American corporation doing business in Saudi Arabia faces local opposition to its employment of women. Although Title VII states that "it shall apply extraterritorially,"[295] the corporation argues that the statute does not apply because Congress failed to clearly state that Title VII applies in countries that view sex discrimination in a much different light. The broad language should suffice even though Congress did not list the specific situations in which it could apply. If that is so, then perhaps the difficulty in ascertaining the scope of a waiver of sovereign immunity is unique. If not, and if Congress cannot simply say "this statute applies extraterritorially," then the case for other clear statement rules suffers as well.

The legislative supremacy concern becomes even greater when Congress routinely displays less concern for the value the courts are so eager to protect with a clear statement rule. Sovereign immunity seems to be such a case. Congress has waived federal sovereign immunity in a wide range of areas.[296] Many state legislatures have enacted statutes repudiating the strict construction of waivers of sovereign immunity.[297] The Supreme Court justified the liberal construction rule it applied in the 1940s by reference to the increasing trend toward waiving sovereign immunity.[298] Congress alone, however, cannot dictate the importance of the value to be protected by a clear statement rule. Reliance on congressional attitudes is especially suspect when the separation of powers is at issue because Congress by definition has a different institutional interest than the courts or the executive. But legislative supremacy suffers when Congress repeatedly works to achieve a result within its constitutional power, only to have the Court employ an interpretive rule that causes each effort to fail.

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294. *See* EEOC v. Arabian Am. Oil Co., 499 U.S. 244, 248 (1991).

295. This is a hypothetical. *See id.* (holding that Title VII does not apply extraterritorially).

296. For lists of statutes waiving sovereign immunity, see United States v. Yellow Cab Co., 340 U.S. 543, 550 n.8 (1951); United States v. Horn, 29 F.3d 754, 762 (1st Cir. 1994); Heintz, *supra* note 132, at 271.

297. *See generally* 3 NORMAN J. SINGER, SUTHERLAND'S STATUTES AND STATUTORY CONSTRUCTION § 62.04 (5th ed. 1992) (citing state statutes).

298. *See* Great Northern Life Ins. Co. v. Read, 322 U.S. 47, 59 (1944) (Frankfurter, J., dissenting) ("courts reflect a strong legislative momentum in their tendency to extend the legal responsibility of Government"); United States v. Shaw, 309 U.S. 495, 501 (1940) ("A sense of justice has brought a progressive relaxation by legislative enactments of the rigor of the immunity rule.").

C. A Presumption of Sovereign Immunity

The two questions examined above advise against a rule requiring a clear statement of the *scope* of the waiver of federal sovereign immunity. The constitutional separation of powers may be characterized as a constitutional norm that the Court deliberately underenforces, but both that characterization and the assertion that sovereign immunity rests on the separation of powers are problematic. Even if sovereign immunity passes that hurdle, writing a waiver of sovereign immunity that satisfies a clear statement rule is a daunting task, so a clear statement rule for interpreting the scope of a waiver of sovereign immunity threatens legislative supremacy.

A weaker presumption respecting sovereign immunity would be more appropriate. Krent suggests in passing that "[i]t may be that our system, at least in the torts context, would benefit if Congress were required affirmatively to legislate immunity, instead of enjoying immunity as a default rule."[299] The better course, however, would be a presumption that sovereign immunity has *not* been waived.[300] A presumption that sovereign immunity has been waived conflicts with the historic context in which Congress has written waivers of sovereign immunity and upon which federal agencies and others have relied. Justice Breyer has questioned the Court's authority to establish a rule that breaks so sharply from the past.[301] By contrast, a presumption against a waiver of sovereign immunity would give weight to the values protected by sovereign immunity. It would protect the separation of powers from unintended judicial interference, while permitting Congress to waive immunity whenever it desires. It would recognize that favoring continuity "is one of the major tasks of the judiciary in our complex democracy."[302] It would also permit a court to examine more closely cases where the statutory language is ambiguous but where there is other evidence of what Congress meant. In effect, a presumption would operate like the rule that the Court applied before it began to create a clear statement rule in 1991.

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299. Krent, *supra* note 24 at 1531 n.7.

300. Whether such a presumption should impose a burden of persuasion, a burden of proof, or simply operate as a tiebreaker or in some other fashion need not be resolved here. The point is simply that there is another way to protect the values inherent in sovereign immunity besides the establishment of a clear statement rule.

301. Stephen Breyer, *On the Uses of Legislative History in Interpreting Statutes*, 65 S. CAL. L. REV. 845, 870 (1992).

302. Shapiro, *supra* note 11, at 925.

IV. CONCLUSION

The case for a clear statement rule for waivers of sovereign immunity snaps from the tension between the goals of a clear statement rule and the goals of the Court's typical originalist approach to statutory construction. Usually the Court tries to determine what Congress meant by particular statutory language, and if the examination of the text itself comes up short, the Court turns elsewhere for help. Clear statement rules are always in tension with this approach because they begin the examination of the statutory language with a skeptical eye and they refuse to look elsewhere if the text does not overcome that skepticism. When the reasons for the skepticism are strong—when the values protected by a clear statement rule derive from the Constitution and are deliberately underenforced by the Court—and when Congress can easily write a waiver that overcomes the Court's skepticism, then the case for a clear statement rule is strongest. When the values at stake are less weighty or Congress must struggle to accomplish the result it desires, a clear statement rule is inappropriate.

Waivers of federal sovereign immunity fall in the latter category. The separation of powers values inherent in sovereign immunity may deserve special protection. Yet the very justification for sovereign immunity points toward an interpretive framework that focuses on the statutory text, and secondary sources if necessary, to ascertain the decision Congress made. And while it is not difficult to determine whether a statutory provision waives sovereign immunity generally, the *scope* of a statutory waiver as applied to particular claims presents a much harder question. The answer lies in the Court's general approach to determining Congress's intent, aided by a presumption against a waiver, but not the clear statement rule fashioned by the Court.