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A Primer on the Doctrine of Federal Sovereign Immunity

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A PRIMER ON THE DOCTRINE OF FEDERAL SOVEREIGN IMMUNITY*

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I. Introduction

Because it is the quintessential repeat-player in federal litigation, the federal government exerts a powerful influence on the federal courts and the development of legal doctrine. As political scientist Christopher J.W. Zorn has observed, because of its ubiquitous presence in federal litigation, "more than any other entity, the federal government plays a central role in the development of law and policy in the United States courts."[1] Both in terms of quantity (the federal government being a party to between one-fifth and one-quarter of all the civil cases filed in the federal courts[2]) and quality (many of these cases have a substantial impact upon the real lives of people and public policy) federal government litigation is distinctive in its importance. "[C]ourt cases involving the United States typically involve the most consequential issues for people's lives"[3] through claims involving personal injury; civil rights; social welfare benefits; health, safety, and environmental regulation; immigration; governmental expropriation of property; and contractual obligations.

Any lawyer who practices regularly in the federal courts eventually will encounter the federal government as a party and will learn, as the Supreme Court stated nearly sixty years ago, "[i]t is too late in the day to urge that the

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1. Christopher J.W. Zorn, U.S. Government Litigation Strategies in the Federal Appellate Courts 1 (1997) (unpublished Ph.D dissertation, Ohio State University) (on file with Main Library, Ohio State University).

2. For the first three years of the new century, the Administrative Office of the United States Courts (www.uscourts.gov) reports that the federal government was a plaintiff or defendant in 23.1% (2001), 20.7% (2002), and 18.8% (2003) of civil cases commenced in the United States District Courts. *See* statistics at http://www.uscourts.gov/judiciary2003/dectables/C01Dec03.pdf (2003); http://www.uscourts.gov/judiciary2002/dectables/c01dec02.pdf (2002); http://www.uscourts.gov/judiciary2001/dectables/c01dec01.pdf (2001). In addition, in certain specialized federal courts, most particularly the United States Court of Federal Claims and the United States Court of Appeals for Veterans Claims, the federal government is a party to every case on the docket.

3. Zorn, *supra* note 1, at 2.

Government is just another private litigant, for purposes of charging it with liability."[4] The United States is hardly a typical litigant, as it benefits from a plethora of special procedures, defenses, and limitations on liability not available to others. Indeed, the federal government may not be subjected to suit at all absent its own express consent pursuant to the doctrine of federal sovereign immunity. This article addresses that doctrine.

The concept of "sovereign immunity" — that is, the immunity of the government from suit without its express permission — underlies and permeates the field of litigation with the federal government. Sovereign immunity lies always in the background, even when Congress has granted consent to suit. As Justice Holmes admonished nearly a century ago, "[m]en must turn square corners when they deal with the Government."[5] Yet, far too often, attorneys representing clients against the government fail to heed — or even recognize — this classic proverb of federal government litigation, because they fail to appreciate the persisting influence of sovereign immunity. Even when the government has waived sovereign immunity through legislation, the doctrine influences the manner in which the courts interpret and apply such statutes.

As a threshold question, we should ask *why* the federal government should be treated differently from other litigants in the federal courts. This article presents that basic inquiry and summarizes the different answers that the courts and leading commentators have offered. May the sovereign government be sued without its consent?[6] Why or why not? What justification is there for holding the government immune from suit?[7] Is sovereign immunity an archaic remnant from the era of monarchy and the autocratic view that the king could do no wrong? Can the concept be defended in the context of a republican democracy? If so, how? What are the historical origins of the concept?[8] How has sovereign immunity evolved as a doctrine?[9] Are there any exceptions to immunity?[10] What are they and can they be justified? How does and should the doctrine of sovereign immunity affect the approach or attitude taken by the courts toward a statute that arguably authorizes governmental liability in a particular context?[11] Should such a statute be interpreted in the same manner as any other legislation or instead be construed strictly and narrowly?

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4. Fed. Crop Ins. Corp. v. Merrill, 332 U.S. 380, 383 (1947).
5. Rock Island, Ark. & La. R.R. v. United States, 254 U.S. 141, 143 (1920).
6. *See infra* Parts II, III.A.
7. *See infra* Parts I-II.
8. *See infra* Part II.A.
9. *See infra* Part II.B-E.
10. *See infra* Parts II.D, III.A.
11. *See infra* Part IV.

By looking at the concept of sovereign immunity and the circumstances under which the federal government has consented to suit against itself, we consider the legitimacy of governmental immunity in a democratic society and the proper role of courts in resolving policy issues raised in suits against the federal government. We also learn much about a system of government by examining when and how that government responds (or fails to respond) to injuries inflicted by its agents or activities upon its own citizens.[12]

Professor Vicki C. Jackson, in her analysis of the principled or prudential reasons for judicial recognition of the limitation on suits against the federal government, describes sovereign immunity as "a place of contest between important values of constitutionalism":

> On the one hand, constitutionalism entails a commitment that government should be limited by law and accountable under law for the protection of fundamental rights; if the "essence of civil liberty" is that the law provide remedies for violations of rights, immunizing government from ordinary remedies is in considerable tension with all but the most formalist understandings of law and rights. On the other hand, a commitment to democratic decisionmaking may underlie judicial hesitation about applying the ordinary law of remedies to afford access to the public fisc to satisfy private claims, in the absence of clear legislative authorization.[13]

Professor Kenneth Culp Davis was one of the nation's leading experts on administrative law — and a sharp critic of sovereign immunity. He characterized the concept as a medieval holdover from the English monarchy and said that the "strongest support for sovereign immunity is provided by that four-horse team so often encountered — historical accident, habit, a natural tendency to favor the familiar, and inertia."[14] He contended that the doctrine of sovereign immunity is unnecessary as a "judicial tool," because we may trust the courts to refrain from interfering in crucial governmental activities, such as the execution of foreign affairs and military policies, by limiting themselves to matters appropriate for judicial determination and within the competence of the judiciary.[15] Writing more recently, and similarly questioning the historical and constitutional justifications for federal sovereign immunity, Professor Susan

12. *See also infra* Part III.B.

13. Vicki C. Jackson, *Suing the Federal Government: Sovereignty, Immunity, and Judicial Independence*, 35 GEO. WASH. INT'L L. REV. 521, 521 (2003) (footnotes omitted) (quoting Marbury v. Madison, 5 U.S. (1 Cranch) 137, 163 (1809)).

14. Kenneth Culp Davis, *Sovereign Immunity Must Go*, 22 ADMIN. L. REV. 383, 384 (1970).

15. *Id.* at 395.

Randall contends that sovereign immunity should henceforth be viewed as "a prudential rather than a jurisdictional doctrine," under which "courts attempt to balance the needs of the political branches to govern effectively with the rights of the citizenry to redress governmental violations of law."[16]

In response, Dean Harold J. Krent contends that "[m]uch of sovereign immunity . . . 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."[17] He explains that, by making the federal sovereign amenable to suit only when it has consented by statute, society entrusts Congress as the representative of the people with determining the appropriate circumstances under which public concerns should bow to private complaints.[18] However, when government conduct becomes removed from policymaking, the arguments for sovereign immunity are at their weakest. Thus, when mundane government activity is involved, devoid of policy implications, the public should expect legislative waivers readily to be adopted. Reserving the authority to waive sovereign immunity to Congress does not mean that government is left without a check upon its conduct. Rather, the check is a political one — the potential displeasure of the electorate.[19]

Surely every reasonable person must agree that, because the federal government represents the whole community and thus often must act in ways that a private party cannot or should not, the government's exposure to liability must be controlled. A single individual cannot be permitted in every instance to obtain judicial relief that sets aside the decisions of the community duly made through the elected branches of government. Accordingly, the real question underlying sovereign immunity is who gets to decide what those limitations should be. The disagreement between those who decry the very existence of sovereign immunity, and those who accept it as an essential starting point, may come down to asking "who do you trust." Those who would abolish sovereign immunity outright trust the courts both to ensure a remedy and to refrain when it is imprudent for the judiciary to act. By contrast, those who defend the concept of sovereign immunity as a limitation on judicial inference of a cognizable cause of action against the government see this constraint as a reflection of trust in the political branches of government to determine the appropriate occasions for consenting to suit.

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16. Susan Randall, *Sovereign Immunity and the Uses of History*, 81 NEB. L. REV. 1, 6-7 (2002).

17. Harold J. Krent, *Reconceptualizing Sovereign Immunity*, 45 VAND. L. REV. 1529, 1530 (1992).

18. *Id.* at 1530-31.

19. *Id.* at 1532-33.

II. The History of Federal Sovereign Immunity

A. The Early Historical Origins of Federal Sovereign Immunity in the United States

Whether federal sovereign immunity and its jurisprudential cousin, state sovereign immunity, were accepted premises underlying — or instead intended casualties of — the ratification of the United States Constitution remains the subject of continued debate on the Supreme Court and among constitutional historians and scholars. The Supreme Court has adopted the former understanding as to both federal and state sovereign immunity, and federal sovereign immunity in particular has become a well-established and foundational doctrine in this field of law.

The conventional account of the pertinent history, and the one accepted by the majority of the present Supreme Court, holds that "[w]hen the Constitution was ratified, it was well established in English law that the Crown could not be sued without consent in its courts."[20]

As evidence that the framers deliberately preserved this English practice in the constitutional framework, prominent members of the founding generation, such as Alexander Hamilton, James Madison, and John Marshall, publicly endorsed the concept of sovereign immunity during the ratification process for the United States Constitution. In *The Federalist No. 81*, Hamilton wrote that "[i]t is inherent in the nature of sovereignty not to be amenable to the suit of an individual *without its consent*."[21] Madison, who played a leading role in the drafting of the Constitution at the convention, later told the Virginia ratification convention that Article III merely allowed a suit involving a state party, if initiated or permitted by the state, to be heard in federal court, but did not confer upon any individual the power "to call any state into court."[22] Marshall, who would later become Chief Justice of the United States, likewise assured the Virginia convention that "[i]t is not rational to suppose that the sovereign power should be dragged before a court."[23] In *Welch v. Texas Department of Highways & Public Transportation*,[24] the Supreme Court stated that "the representations of Madison, Hamilton, and Marshall that the Constitution did

20. Alden v. Maine, 527 U.S. 706, 715 (1999) (regarding sovereign immunity of the states).

21. ALEXANDER HAMILTON, THE FEDERALIST NO. 81, at 487-88 (Clinton Rossiter ed., 1961) (1788).

22. 3 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 533 (photo. reprint 1941) (Jonathan Elliot ed., 2d ed., Philadelphia, J.B. Lippincott 1836).

23. *Id.* at 555-56.

24. 483 U.S. 468 (1987).

not abrogate the States' sovereign immunity may have been essential to ratification."[25]

If the states were exempt from unconsented suit on this historical account, then all the more so was the federal government. When Justice Joseph Story wrote his famous treatise on the Constitution in 1840, he explained that the Article III grant of judicial power "to Controversies to which the United States shall be a Party,"[26] was designed only to allow the federal government to sue as plaintiff to enforce its own rights, powers, contracts, and privileges.[27]

By contrast, the minority position on the modern Supreme Court insists that "[t]here is almost no evidence that the generation of the Framers thought sovereign immunity was fundamental in the sense of being unalterable," and contends that a diversity of views regarding the concept were displayed during the ratification process.[28] These members of the Court need not be understood to deny the very concept of state sovereign immunity, but rather to dispute the circumstances under which that immunity may be overridden.[29] In their view, Congress, in creating a new federal cause of action, may preempt state sovereign immunity, just as Congress may pierce federal sovereign immunity by enacting a statutory waiver.[30] In other words, rather than disputing the existence of state sovereign immunity, these Justices contest the intensity or absoluteness of that immunity in the face of other considerations, especially intervening federal legislation.

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25. *Id.* at 483.

26. U.S. CONST. art. III, § 2.

27. JOSEPH STORY, FAMILIAR EXPOSITION OF THE CONSTITUTION OF THE UNITED STATES § 332 (New York, American Book Co. 1840).

28. Alden v. Maine, 527 U.S. 706, 764, 772-73 (1999) (Souter, J., dissenting).

29. *See* Kimel v. Fla. Bd. of Regents, 528 U.S. 62, 93-97 (2000) (Stevens, J., dissenting in part and concurring in part) (acknowledging the "judge-made doctrine of [state] sovereign immunity" and that Congress must "speak clearly when it regulates state action," but arguing that "once Congress has made its policy choice, the sovereignty concerns of the several States are satisfied" and federal law may be enforced against them); *Alden*, 527 U.S. at 762 (Souter, J., dissenting) (saying that at the time of the constitutional framing, "state sovereign immunity could not have been thought to shield a State from suit under federal law on a subject committed to national jurisdiction by Article I of the Constitution," and thus "Congress exercising its conceded Article I power may unquestionably abrogate such immunity"); Seminole Tribe of Fla. v. Florida, 517 U.S. 44, 101-68 (1996) (Souter, J., dissenting) (acknowledging that some form of state sovereign immunity as a continuing common-law doctrine had been established by precedent, but contending it may be overcome by federal legislative action creating federal rights and regulations). *But see Seminole Tribe*, 517 U.S. at 98 (Stevens, J., dissenting) (arguing more directly and forcefully that there is "no justification for permanently enshrining the judge-made law of sovereign immunity").

30. *See supra* note 29 and accompanying text.

Professor Susan Randall goes a step further and argues that, even prior to any statutory abridgment, "the founding generation did not intend state sovereign immunity and instead viewed the ratification of the Constitution as consent to Article III suits by the states individually and collectively for the United States."[31] With respect to federal sovereign immunity, Randall reads the Article III extension of judicial power over "Controversies to which the United States shall be a party," as a clear grant of judicial authority to hear suits against the federal government.[32] Rather than merely bestowing jurisdiction, she contends, "[t]he term 'judicial power' is a broad and encompassing term" that "extends to the national judiciary a fundamental governmental authority" that supersedes sovereign immunity.[33] Although she acknowledges the contrary statements of certain prominent members of the founding generation, Randall argues that "the interpretation advanced by Hamilton, Madison and Marshall is contradicted by the great weight of the historical evidence, including their own . . . statements" on other occasions, as well as by the text of Article III, by the reasons for the new national government and the creation of the judicial power, and by the opinions of other political leaders of the founding period.[34]

Professor Vicki C. Jackson, after a comprehensive historical study of federal government immunity, identifies three possible historical sources for "the remarkable staying power of the idea of federal sovereign immunity."[35] First, although perhaps misunderstood and too broadly applied, English law, which had so profound an influence on early American law, indeed did recognize some form of sovereign immunity.[36] Second, the Constitution commits the power to appropriate money to the Congress,[37] thereby "lend[ing] force to the argument that money judgments against the United States cannot be *paid* without an appropriation from Congress."[38] Third, "Congress's control over the jurisdiction of the federal courts gives it considerable powers simply to refuse to authorize suits against the government."[39] And, indeed, in the First Judiciary Act of 1789, Congress gave jurisdiction to the lower federal courts over cases in which the United States was plaintiff or petitioner, thus implicitly prohibiting

31. Randall, *supra* note 16, at 3.
32. *Id.* at 38 (quoting U.S. CONST. art. III, § 2).
33. *Id.* at 40.
34. *Id.* at 13.
35. Jackson, *supra* note 13, at 541-52.
36. *Id.* at 542-43. For recent scholarship on the English origins of sovereign immunity, see DONALD L. DOERNBERG, SOVEREIGN IMMUNITY OR THE RULE OF LAW: THE NEW FEDERALISM'S CHOICE 71-78 (2005); Guy I. Seidman, *The Origins of Accountability: Everything I Know About the Sovereign's Immunity, I Learned from King Henry III*, 49 ST. LOUIS U. L.J. 393 (2005).
37. U.S. CONST. art. I, § 9, cl. 7.
38. Jackson, *supra* note 13, at 545.
39. *Id.* at 546.

suits in which the federal government would be defendant.[40] Therefore, Jackson suggests, "some aspects of sovereign immunity doctrine — notably, those relating to judicially compelled payments from Treasury funds — are either required by, or consistent with, the U.S. Constitution at the federal level."[41] Moreover, she submits, "[w]hat we call the 'sovereign immunity' of the United States in many respects could be described instead as a particularized elaboration of Congress's control over the lower court's jurisdiction."[42]

As discussed below,[43] when the Supreme Court first gave considered attention to the concept of federal sovereign immunity and its application to allegations of injury by an agent of that federal sovereign, a majority of the Court was skeptical about the doctrine and open to alternative modes of action that drained much of the vitality from it. However, the Court subsequently reinvigorated the doctrine of federal sovereign immunity, and today it is well-ensconced within the legal structure of federal government civil liability.[44]

B. The Evolution of the Doctrine of Federal Sovereign Immunity in the Supreme Court

As Professor Vicki C. Jackson has noted, "[i]n 1882, . . . nearly a century after adoption of the Constitution, the [Supreme] Court was split five to four on the reasons for and scope of the doctrine of federal sovereign immunity."[45] At the same time, the Court had accepted federal sovereign immunity as a well-established premise by that point, even if its justifications and contours remained in doubt. This 1882 decision was that of *United States v. Lee*,[46] which is the first in a series of three landmark decisions stretching over eighty years that map the doctrine of federal sovereign immunity and its exceptions or limitations.[47]

Significantly, in none of these three cases was the government itself actually named as defendant to the action, at least by the time the case reached the Supreme Court. Rather, apparently recognizing sovereign immunity as an insuperable obstacle to a direct action against the United States, the plaintiffs in these actions attempted to avoid that bar by framing their complaints against individual government officers, notwithstanding that the government plainly would be affected as an entity by a judgment in the plaintiffs' favor. The

40. *Id.* at 546-47.
41. *Id.* at 538.
42. *Id.* at 570.
43. *See infra* Part II.C.
44. *See infra* Parts II.C-E, III.
45. Jackson, *supra* note 13, at 534.
46. 106 U.S. 196 (1882).
47. *See infra* Part II.C-E.

question in these three cases was whether this legal fiction — that a suit for affirmative relief against a government agent is not the equivalent of an action against the government itself and thus not barred by sovereign immunity — should be sustained.

C. United States v. Lee

The first in this series of three federal sovereign immunity decisions is the doctrinally important and historically interesting case of *United States v. Lee*.[48] The case arose from the seizure of the Arlington estate of Confederate General Robert E. Lee by Federal forces during the Civil War and the establishment of a military cemetery on the site.[49]

In 1778, John Parke Custis — the adopted son of George Washington (who married John's mother, Martha Custis, a widow) — purchased a tract of land along the Potomac River in Virginia. Upon John's untimely death as a young man, his six-month-old son — George Washington Parke Custis — was adopted by the grandparents, George and Martha Washington. At the age of twenty-one, young George assumed ownership of the land, which he named "Arlington," and built the family mansion upon it. In 1831, his daughter, Mary Anna, was married in the main hall of Arlington House to a young Army lieutenant named Robert E. Lee. Upon the death of George Washington Parke Custis in 1857, the estate was inherited by his daughter and became the Lee family home.

After General Lee accepted command of the Confederate Army of Northern Virginia upon the outbreak of the Civil War in 1861, the Lee family was forced to flee the Arlington estate. Federal troops occupied the estate and a Union general used the mansion as his headquarters. Unionists regarded the mansion looking down over the river toward Washington, D.C. as a defiant symbol of the confederate military leader whom they regarded as a traitor. In 1864, General Montgomery Meigs recommended that a portion of the property around the Arlington mansion be used as a military graveyard for Northern war dead, making the property uninhabitable should the Lee family ever return. Although it may be an apocryphal story, General Meigs — whose own son later was killed in the war and is buried at Arlington — is reported to have said that if Mrs. Lee returned to the house and looked out of her window, she would see

48. 106 U.S. 196 (1882).

49. For more on the historical background to this case, and from which the following narrative is drawn, see GREGORY C. SISK, LITIGATION WITH THE FEDERAL GOVERNMENT: CASES AND MATERIALS 117-19 (Foundation Press 2000 & Supp. 2004); Enoch Aquila Chase, *The Arlington Case: George Washington Curtis Lee Against the United States of America*, 15 VA. L. REV. 207 (1929); Jonathan R. Siegel, *Suing the President: Nonstatutory Review Revisited*, 97 COLUM. L. REV. 1612, 1634-36 (1997).

the graves of the Union soldiers her husband had killed, buried in her rose garden.

The Arlington estate had been transferred to the United States through purchase at a tax sale after the Custis-Lee family allegedly failed to pay taxes on the property. In fact, Mrs. Lee was quite willing to pay the taxes due on the property — only about $100 — and sent an agent with the necessary funds to the federal commissioners collecting the taxes. The federal commissioners refused to accept payment and insisted that the taxpayer must appear in person to pay the taxes. Not surprisingly, the wife of General Lee was unwilling to travel behind Union lines to appear before the federal commissioners. However, when this legal question had arisen in a previous case, the Supreme Court interpreted the pertinent statute to permit payment of the taxes by an agent, which accounts for the government's later loss on the merits regarding the validity of the transfer of the Lee Arlington estate at the tax sale. When the eldest son of General and Mrs. Lee ultimately filed the lawsuit for ejectment against an individual government officer that later came before the Supreme Court, the jury concluded that the tender of payment had been sufficient and thus the tax sale had been improper and failed to transfer title to the government. Following the Supreme Court's decision in *Lee*, the federal government legally purchased the property from Lee for the sum of $150,000, and today it remains a national military cemetery and military installation.

In a closely-divided decision, with sharp disagreement among the Justices over the scope and the very legitimacy of sovereign immunity in a republic, the Court in *Lee* permitted the suit to go forward against the military officers occupying the land and ordered restoration of the property to General Lee's son. Justice Miller, writing for the majority in *Lee*, surveyed the history of sovereign immunity in the United States and its predecessor, Great Britain.[50] Acknowledging the English practice, by which an individual had to petition the crown for the right to sue, Justice Miller protested that no true analogy exists in the American republic, "as there is no such thing as a kingly head to the nation."[51] In sum, Justice Miller questioned the fitness of sovereign immunity as a legal doctrine in a republican state without a personal sovereign. Although federal sovereign immunity had become "established doctrine" in the United States, Justice Miller suggested it had assumed that position without careful analysis in prior decisions and without any principled basis.[52]

Still, even accepting per precedent the proposition that the sovereign United States itself may not be made the subject of suit without its consent, Justice

50. *Lee*, 106 U.S. at 205-08.
51. *Id.* at 205.
52. *Id.* at 207.

Miller declined to extend sovereign immunity to cover an action framed against an individual, even if that individual were an officer of the United States.[53] The doctrine, the majority ruled, "is not permitted to interfere with the judicial enforcement of the established rights of plaintiffs when the United States is not a defendant or a necessary party to the suit."[54] Because the United States is a republican state, Justice Miller insisted that the officers of the government cannot be treated as the embodiment of the sovereign in the manner of a queen and her court.[55] Moreover, in the United States, every person, even an officer near to the seat of power, remains subject to the rule of law:

> No man in this country is so high that he is above the law. No officer of the law may set that law at defiance with impunity. All the officers of the government, from the highest to the lowest, are creatures of the law, and are bound to obey it.[56]

As for the concern that the Executive's ability to exercise public duties would be impaired if his officers were subject to the harassment of litigation, the majority was not convinced that making the government amenable to suit would impair the workings of government.[57] Justice Miller dismissed as "imaginary" any fear that permitting suits against federal officers or agents would undermine the essential functions of government, such as that vessels of war or military forts might be invaded by citizen suits in times of peril.[58] The Court observed that properties held by the military had been recovered through legal action in the past without consequent disaster.[59]

That the case involved the seizure of property by the government from a private citizen provided an additional and constitutional justification for the majority's holding in *Lee*.[60] Indeed, this "taking" factor became the key to understanding and applying this precedent when the Supreme Court revisited it in the next century.[61] When the United States takes property without giving just compensation, the government's conduct offends the Takings Clause of the Fifth Amendment.[62] Justice Miller compared the Fifth Amendment protection of property to the use of the petition for habeas corpus to protect the individual's constitutional rights of life and liberty:

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53. *Id.* at 207-23.
54. *Id.* at 207-08.
55. *See id.* at 208-09.
56. *Id.* at 220.
57. *Id.* at 221-23.
58. *Id.* at 217.
59. *Id.* at 217-18.
60. *Id.* at 218-20.
61. *See infra* Part II.D-E.
62. U.S. CONST. amend. V.

> If this constitutional provision is a sufficient authority for the court to interfere to rescue a prisoner from the hands of those holding him under the asserted authority of the government, what reason is there that the same courts shall not give remedy to the citizen whose property has been seized without due process of law, and devoted to public use without just compensation?[63]

The majority thus strongly reaffirmed the role of the judicial branch as a guardian of the citizen from abuse of power by other branches of government.[64]

Four Justices dissented in *Lee*.[65] Justice Gray's dissenting opinion emphasized that the Arlington property had been held in the title of the United States for many years.[66] The case did not involve a recent seizure of the property, nor was the suit maintained against the government officer who actually seized it but rather against those officers presently holding it on behalf of the federal government.[67] Rejecting the majority's theory that this was a suit against individual officers and not against the sovereign, the dissent observed that the federal government can only hold property through its agents.[68] Thus a suit to recover property claimed by the United States that was brought against agents of the government was, in reality, a suit against the United States.[69] Furthermore, Justice Gray argued, the principle of sovereign immunity was necessary not only in a monarchy, but in any nation.[70] If the government were to survive, it must not be dispossessed of forts, ships of war, or other property without its consent.[71] The government could not conduct its vital affairs if it were made subject to unlimited lawsuits, whether or not those actions were styled as against its officers. Thus, the dissent believed, if the United States were to be sued, the waiver of sovereign immunity should come from Congress, which undoubtedly would develop appropriate procedures to protect government interests.[72]

In the end, the sovereign United States was directly affected by the outcome of the action in *Lee*; the government, and not the officers, suffered the (temporary) loss of the Arlington property. The majority's theory that this was merely a suit against federal officers, and not against the government itself,

63. *Lee*, 106 U.S. at 218.
64. *Id.* at 220-21.
65. *Id.* at 223-51 (Gray, J., dissenting).
66. *Id.* at 225-26.
67. *Id.*
68. *Id.* at 249-50.
69. *Id.* at 226, 250-51.
70. *Id.* at 226-27.
71. *Id.* at 226.
72. *Id.* at 227.

plainly rested upon a legal fiction. Given that the majority questioned the legitimacy of sovereign immunity as a threshold matter, those members of the Court understandably were not troubled that such an officer suit might prove to be an end-run around sovereign immunity. Did the *Lee* decision then set the stage for the abolition, or at least the curtailment, of sovereign immunity as a doctrine? As we will find, not in the end.

In your author's opinion, the *Lee* majority intended to open the door widely to citizen suits against government officers. Indeed, the Court was sufficiently dubious about the place of sovereign immunity in a republic as to be untroubled that the legal fiction of a direct officer suit might leave the governmental stronghold unsecured against judicial actions to redress government wrongdoing. While the *Lee* majority remarked that the challenged governmental misconduct in the case rose to a constitutional level, your author reads the opinion to offer this point as but merely one more reason to permit the suit, not as the sole or crucial reason. Nonetheless, as seen below, this constitutional dimension of *Lee* became the linchpin when the Supreme Court revisited this precedent in the twentieth century. As so reinterpreted, the *Lee* precedent leaves the door of sovereign immunity only slightly ajar.

D. Larson v. Domestic & Foreign Commerce Corp.

The second case in the sovereign immunity series is *Larson v. Domestic & Foreign Commerce Corp.*,[73] decided by the Supreme Court in 1949. After World War II, the War Assets Administration allegedly had entered into a contract to sell surplus coal to Domestic & Foreign Commerce Corp., the plaintiff.[74] Subsequently, the Administration refused to deliver the coal to Domestic and instead executed a new contract to sell it to someone else.[75] Plaintiff Domestic filed suit against Robert Littlejohn, the head of the War Assets Administration, seeking (1) an injunction preventing sale of the coal to anyone other than Domestic, and (2) a declaration that Domestic's contract with the government was valid and that the contract with the other buyer was invalid.[76]

In essence, the plaintiff Domestic sought to transform a contract grievance with the federal government into a dispute with an individual government officer who purportedly should be restrained from violating the law. The officer was not a party to the contract, nor could it be doubted that the relief sought would impinge directly upon the government itself. Of course,

73. 337 U.S. 682 (1949).
74. *Id.* at 684.
75. *Id.*
76. *Id.*

reframing a complaint with the government itself into a mere quarrel with an individual government agent is exactly what had occurred seventy years earlier in *Lee*, in which the suit was permitted to go forward notwithstanding sovereign immunity.[77] On this occasion, however, the outcome proved to be quite different.

Chief Justice Vinson, writing for the Supreme Court majority in *Larson*, firmly rejected the argument that the denomination of the party defendant determined the applicability of sovereign immunity.[78] The Court was unwilling to countenance the fiction that a suit against an officer invariably may be distinguished from one against the United States simply by the arrangement of names in the pleading. Instead, Chief Justice Vinson said, the Court must look to the relief sought in the suit to determine whether, although nominally framed against an officer, the complaint in reality is pressed against the federal government itself:

> In each such case [where specific relief is sought] the question is directly posed as to whether, by obtaining relief against the officer, relief will not, in effect, be obtained against the sovereign. For the sovereign can act only through agents and, when an agent's actions are restrained, the sovereign itself may, through him, be restrained. . . . In each such case the compulsion, which the court is asked to impose, may be compulsion against the sovereign, although nominally directed against the individual officer. If it is, then the suit is barred, not because it is a suit against an officer of the Government, but because it is, in substance, a suit against the Government over which the court, in the absence of consent, has no jurisdiction.[79]

Beyond suits involving the personal activities of the officer, which obviously do not involve the federal government, the *Larson* Court articulated two instances in which an officer would be regarded as acting separately from the government and thus subject to individual suit without sovereign immunity implications.[80]

First, when an officer acts beyond his delegated authority under a statute, he then is not acting as an agent of the government; his actions beyond statutory limitations are considered "individual and not sovereign actions."[81] If the officer is "not doing the business which the sovereign has empowered him to

77. *See supra* Part II.C.
78. *Larson*, 337 U.S. at 686-89.
79. *Id.* at 688.
80. *Id.* at 689-91.
81. *Id.* at 689.

do or he is doing it in a way which the sovereign has forbidden," then his actions are *ultra vires* and a suit for specific relief against the officer may proceed.[82]

Second, when an officer acts pursuant to statutory authority, but his conduct breaches constitutional margins, the suit may proceed against the officer individually.[83] "Here, too," the Court held, "the conduct against which specific relief is sought is beyond the officer's powers and is, therefore, not the conduct of the sovereign."[84] A petition for habeas corpus, by which a court may order an officer to surrender a person who is being held unconstitutionally — even if held pursuant to the officer's statutory authority — was adduced by the Court as an illustration.[85]

As for the suggestion that *Lee* stands as precedent for a broader avenue of relief against government officers, Chief Justice Vinson characterized *Lee* as a particular example of a government officer acting in contravention of a constitutional limitation on authority, specifically the Fifth Amendment Takings Clause, and thus falling within the Court's articulation of a second category of permissible officer suits.[86] Because the holding of the property without compensation in *Lee* violated the Constitution, the officer in that case was acting without legitimate authority and the suit to regain the property therefore "was not a suit against the sovereign and could be maintained against the defendants as individuals."[87]

The Court then concluded that the claim pressed in *Larson* was not properly presented against an officer rather than the federal government, given that there was no assertion that the administrator of the War Assets Administration had violated some statutory limit on his authority or that his actions exceeded constitutional boundaries.[88] To be sure, it was alleged that the administrator's conduct was illegal, but that assertion went to the merits of the case; the claims of illegality were based upon substantive law, not the threshold question of the agent's authority.[89] There was no suggestion that the administrator acted beyond his delegated authority, the Court concluded.[90] Only conduct that exceeds delegated authority, statutory or constitutional, separates an individual officer from the sovereign government.[91]

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82. *Id.* at 689-90.
83. *Id.* at 690-91.
84. *Id.* at 690.
85. *Id.*
86. *Id.* at 696-98.
87. *Id.* at 697.
88. *Id.* at 691-95, 703.
89. *Id.* at 691-92.
90. *Id.* at 703.
91. *See supra* notes 79-82 and accompanying text.

Finally, the *Larson* Court turned back the argument that "the principle of sovereign immunity is an archaic holdover not consonant with modern morality and that it should therefore be limited whenever possible."[92] Although Chief Justice Vinson acknowledged that a damage claim may not much interfere with governmental prerogatives and observed that Congress increasingly had authorized such suits, public policy still precluded the government from being subjected to judicial actions for specific relief: "The Government, as representative of the community as a whole, cannot be stopped in its tracks by any plaintiff who presents a disputed question of property or contract right."[93] The Court concluded that, "in the absence of a claim of constitutional limitation, the necessity of permitting the Government to carry out its functions unhampered by direct judicial intervention outweighs the possible disadvantage to the citizen in being relegated to the recovery of money damages after the event."[94]

Justice Frankfurter, joined by one other member of the Court, dissented in *Larson*, directly disputing the very concept of sovereign immunity.[95] Justice Frankfurter argued that the Court needed to reconcile conflicting approaches reflected in its decisions, which sometimes said that the doctrine of sovereign immunity is disfavored, while at other times strictly applied the doctrine to bar suit.[96] In contrast with the majority, Justice Frankfurter cited *Lee* as standing for the general proposition that sovereign immunity does not shelter the governmental agent from suit, because the rule of law applies to all, including officers.[97] Arguing that sovereign immunity, as a discredited doctrine, should not be extended, Justice Frankfurter would have permitted direct officer suits unless and until Congress acted to create a separate judicial remedy directly against the federal government:

> [T]he policy behind the immunity of the sovereign from suit without its consent does not call for disregard of a citizen's right to pursue an agent of the government for a wrongful invasion of a recognized legal right unless the legislature deems it appropriate to displace the right of suing the individual defendant with the right to sue the Government.[98]

92. *Larson*, 337 U.S. at 703.
93. *Id.* at 704.
94. *Id.*
95. *Id.* at 705-29 (Frankfurter, J., dissenting).
96. *Id.* at 705-06.
97. *Id.* at 717-18, 723-24.
98. *Id.* at 724.

E. Malone v. Bowdoin

The final case in this series of landmark sovereign immunity decisions is that of *Malone v. Bowdoin*,[99] decided by the Supreme Court in 1962. *Malone* reinforced and extended the *Larson* rule and thus further solidified the doctrine of federal sovereign immunity. In *Malone*, plaintiffs claiming proper title to land occupied by the government brought an ejectment action against a Forest Service officer to recover the property.[100] In sum, the factual scenario was almost identical to that of *Lee*, as was the claimants' legal argument that a suit for specific relief against the officer should be permitted, notwithstanding sovereign immunity. However, the legal landscape had changed significantly with consolidation of the federal sovereign immunity doctrine in *Larson* and through the emergence of an alternative means for judicial relief afforded by Congress that had not been available eighty years earlier. Accordingly, the Supreme Court held sovereign immunity barred this officer suit.[101]

Justice Stewart, writing for the Court majority in *Malone*, stated that the Supreme Court in *Larson* had "thoroughly reviewed the many prior decisions, and made an informed and carefully considered choice between the seemingly conflicting precedents."[102] The *Larson* decision, Justice Stewart summarized,

> expressly postulated the rule that the action of a federal officer . . . can be made the basis of a suit for specific relief . . . only if the officer's action is "not within the officer's statutory powers or, if within those powers, only if the powers, or their exercise in the particular case, are constitutionally void."[103]

While *Lee* was not overruled in *Larson*, Justice Stewart acknowledged that the Court had interpreted *Lee* "as simply 'a specific application of the constitutional exception to the doctrine of sovereign immunity.'"[104] Moreover, at the time *Lee* was decided, a citizen who had suffered a seizure of property by the government had no judicial avenue for relief. Congress subsequently authorized compensation for such takings by a special tribunal.[105] In conclusion, Justice Stewart said, no claim of an unconstitutional taking without just compensation was or could be advanced in *Malone*, nor was there any other

99. 369 U.S. 643 (1962).
100. *Id.* at 643-45.
101. *Id.* at 648.
102. *Id.* at 646.
103. *Id.* at 647 (quoting *Larson*, 337 U.S. at 702).
104. *Id.* at 647-48 (quoting *Larson*, 337 U.S. at 696).
105. *Id.* at 647 & n.8. For further discussion of this remedy under the Tucker Act, 28 U.S.C. § 1491 (2000), for compensation for a governmental taking, which now is available in the United States Court of Federal Claims, see generally GREGORY C. SISK, LITIGATION WITH THE FEDERAL GOVERNMENT § 4.09(b), at 327-30 (4th ed., ALI-ABA 2006).

assertion that the government officer "was exceeding his delegated powers as an officer of the United States."[106]

Justice Douglas, joined by one other member of the Court, dissented,[107] in an opinion that proved to be something of a last gasp — on the Court — by the anti-sovereign immunity theorists. Justice Douglas viewed *Lee* as a sturdier precedent of continued broad application that should be read generally to remove sovereign immunity as an obstacle to suits against agents of the government for alleged unlawful conduct.[108] As had the *Lee* majority and Justice Frankfurter in his *Larson* dissent, Justice Douglas contended that the rule of law applies to all individuals, whether or not they are acting as agents of the federal government.[109] Justice Douglas directly urged the abandonment of sovereign immunity as a concept that "has become more and more out of date, as the powers of the Government and its vast bureaucracy have increased."[110] At least when a citizen claims legal title to property, Justice Douglas saw "[t]he balance between the convenience of the citizen and the management of public affairs" as coming down "on the side of the citizen."[111]

III. A Summary of the Current Doctrine of Sovereign Immunity and Statutory Waivers of Immunity

A. The Doctrine of Federal Sovereign Immunity and Direct Officer Suits

Following the landmark *Larson* and *Malone* decisions, the current doctrine of federal sovereign immunity may be summarized as follows: the United States may not be sued without its consent, that is, without a statutory waiver of sovereign immunity. Thus, if a civil action is pleaded directly against the government, or one of its departments or agencies, the doctrine of federal sovereign immunity stands as a bar to the lawsuit unless and until Congress chooses to lift that bar and then only to the extent or degree that Congress chooses to do so. Likewise, if a civil action is framed against a federal government officer or agent based on the performance of governmental duties, that officer or agent ordinarily will be regarded as having acted on behalf of the federal government. Thus, notwithstanding the denomination of an individual officer as the defendant, the lawsuit will be recognized in substance as one

106. *Malone*, 369 U.S. at 648.

107. *Id.* at 648-53 (Douglas, J., dissenting).

108. *Id.* at 648-50.

109. *Id.* at 651-52 (quoting *Larson*, 337 U.S. at 722-23 (Frankfurter, J., dissenting); United States v. Lee, 106 U.S. 196, 221 (1882)).

110. *Id.* at 652 (citing Keifer & Keifer v. Reconstruction Fin. Corp., 306 U.S. 381, 390 (1939)).

111. *Id.* at 653.

against the federal government and accordingly as subject to the constraints of federal sovereign immunity.

However, under the *Larson-Malone* sovereign immunity doctrine, a suit may be maintained directly against a governmental officer under two circumstances.[112] First, if the officer allegedly acted outside of the authority conferred upon his or her office by Congress, that is, beyond delegated statutory power, then his or her conduct will be treated as individual in nature and will be neither attributed to the sovereign nor barred by sovereign immunity.[113] Second, if the officer acted within the conferred statutory limits of the office, but his or her conduct allegedly offended a provision of the Constitution, then sovereign immunity again is lifted.[114] In sum, when a government officer acts beyond legitimate authority, in either statutory or constitutional terms, sovereign immunity will not be recognized as an obstacle to legal action — although, as mentioned below, Congress may adopt alternative means for remedying such legal complaints.

With respect to the second or "unconstitutional conduct" category, the *Larson* Court offered two alternative ways of understanding the principle behind the power to bring a suit against a government officer who has acted in an unconstitutional manner. First, the Court stated that a suit is permitted against a federal officer under this circumstance because "the powers [of the officer], or their exercise in the particular case, are constitutionally void."[115] This language suggests that *Larson*'s "unconstitutional conduct" rule is a species of the *ultra vires* concept. By this understanding, a government officer whose authority is not validly conferred or exercised because of a constitutional limitation is not truly acting as an agent of the government, because the government may not authorize an agent to violate the Constitution.[116] Second, the Court described the rule permitting suit against a government officer acting in violation of the Constitution as "the constitutional exception to the doctrine of sovereign immunity."[117] This statement appears to acknowledge that the actions of the agent indeed are attributable to the government principal, but that sovereign immunity should not be available to the government when it behaves

112. For post-*Larson* and -*Malone* scholarship on the question of when a suit is against a federal officer or really against the federal government, and on the more general issue of sovereign immunity, see generally Antonin Scalia, *Sovereign Immunity and Nonstatutory Review of Federal Administrative Action: Some Conclusions from the Public-Lands Cases*, 68 MICH. L. REV. 867 (1970); Kenneth Culp Davis, *Suing the Government by Falsely Pretending to Sue an Officer*, 29 U. CHI. L. REV. 435 (1962).

113. *See supra* text accompanying notes 81-82.

114. *See supra* text accompanying notes 83-85.

115. Larson v. Domestic & Foreign Exch. Corp., 337 U.S. 682, 702 (1949).

116. *Id.* at 690.

117. *Id.* at 696.

unconstitutionally through its agents. In other words, the first understanding preserves sovereign immunity inviolate, but only through the fiction that a government officer acting beyond constitutional parameters thereby loses his or her status as an agent of the sovereign and thus is acting *ultra vires*. The second understanding does treat the actions of the agent as those of the principal, but pierces through sovereign immunity to hold the government directly liable for unconstitutional actions.

The first understanding of the *Larson* "unconstitutional conduct" rule perpetuates an unnecessary legal fiction. If an officer acts pursuant to statutory authority but in derogation of the Constitution, the government itself acts unconstitutionally. Accordingly, the government should be held directly accountable as an entity. Moreover, when an agent acts within the scope of his or her office, but contravenes the Constitution, a litigation remedy, especially one for specific relief enjoining or mandating different action by the officer, almost certainly will impact the federal government itself and thus should be appreciated as a judicial decree against the government. Accordingly, this second category of permissible suits under *Larson* is best understood as a constitutional exception to the doctrine of sovereign immunity itself, rather than as a basis for bringing suit against an individual officer.

Although the *Larson-Malone* precedential pair continues to state the fundamentals of the sovereign immunity doctrine, the practical impact of these decisions has been both diminished and redirected as Congress has enacted a diverse set of sovereign immunity waivers and made alternative provision for certain types of claims against governmental officers or employees, as discussed below.

B. The Proliferation of Statutory Waivers of Sovereign Immunity

Over the past century and a half, Congress has gradually lowered the shield of sovereign immunity, making the United States amenable to suit in most areas of substantive law and covering most situations in which an injured party would desire relief.[118] "Congressional enactments thereby have woven a broad

118. *See, e.g.*, Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, § 11, 86 Stat. 103, 111-12 (codified as amended at 42 U.S.C. § 2000e-16 (2000)) (extending employment discrimination provisions of Title VII of the Civil Rights Act of 1964 to federal employees); Federal Tort Claims Act of 1946, ch. 753, 60 Stat. 842 (codified as amended at 28 U.S.C. §§ 1346(b), 2671-2680 (2000)) (authorizing common-law tort claims against the United States); Suits in Admiralty Act, ch. 95, § 2, 41 Stat. 525, 525-26 (1920) (codified as amended at 46 U.S.C. § 742 (2000)) (authorizing admiralty claims against the United States); Tucker Act, ch. 359, 24 Stat. 505 (1887) (codified as amended in scattered sections of 28 U.S.C.) (authorizing nontort money claims against the federal government based upon the Constitution, a statute, or a contract); Act of Feb. 24, 1855, ch. 122, § 1, 10 Stat. 612, 612 (authorizing the United States Court of Claims to hear statutory and contractual money claims against the United States; since

tapestry of authorized judicial actions against the federal government."[119] Although these statutory waivers of federal sovereign immunity have been enacted piecemeal by Congress over the course of 150 years, they nevertheless fit together into a reasonably well-integrated pattern of causes of action covering most subjects of dispute between the government and its citizens.

As for direct suits against individual government officers, the reader here may be curious as to how the plaintiffs' claims in the *Larson* and *Malone* cases would be resolved today. In *Larson*, the plaintiff sought something analogous to specific performance in contract against the government.[120] In *Malone*, the plaintiff sought to eject the government officer from land to which he claimed title.[121] In both cases, the plaintiffs thus sought specific or affirmative relief from the government. Although the Supreme Court held that the *Larson* and *Malone* lawsuits were barred by sovereign immunity, Congress of course may waive that immunity and consent to suit, subject to procedural and remedial limitations it thinks appropriate.[122] And, indeed, Congress generally has waived the sovereign immunity of the government to authorize suits against government officers for specific relief under the Administrative Procedure Act,[123] regardless of whether the governmental officer was acting within or without statutory and constitutional authority. However, specific relief is not available under all circumstances. In contract cases, such as *Larson*, specific performance traditionally may not be sought from the federal government; instead, an aggrieved party generally must maintain an action for damages for breach of contract.[124] Similarly, in cases involving a taking of private property by the government, such as presented in *Malone* (and earlier in *Lee*), a plaintiff generally is relegated to an action for compensation under the Tucker Act.[125]

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superseded by the Tucker Act). These statutory waivers are addressed in some detail in SISK, *supra* note 105.

119. Gregory C. Sisk, *The Tapestry Unravels: Statutory Waivers of Sovereign Immunity and Money Claims Against the United States*, 71 GEO. WASH. L. REV. 602, 603 (2003).

120. *See supra* Part II.D.

121. *See supra* Part II.E.

122. *See* Lehman v. Nakshian, 453 U.S. 156, 161 (1981) (observing that, when Congress has waived federal sovereign immunity, the Court nonetheless will "'strictly observe[]'" "'the limitations and conditions upon which the Government consents to be sued'" (quoting Soriano v. United States, 352 U.S. 270, 276 (1957)).

123. 5 U.S.C. §§ 701-706 (2000). *See generally* SISK, *supra* note 105, § 4.10, at 331-36.

124. *See generally* Richard H. Seamon, *Separation of Powers and the Separate Treatment of Contract Claims Against the Federal Government for Specific Performance*, 43 VILL. L. REV. 155 (1998); Krent, *supra* note 17, at 1566. On relief available for contract claims against the federal government, including the bar on specific performance, see generally SISK, *supra* note 105, § 4.08(b)(4), at 306-10.

125. 28 U.S.C. § 1491 (2000). On takings claims, see generally SISK, *supra* note 105, § 4.09(b), at 327-30.

Importantly, however, in these kinds of cases, Congress has afforded some remedy in court, even if it may not be the particular remedy an individual plaintiff might prefer.

Moreover, Congress, by means of legislation, has largely superseded the *ultra vires* basis for direct officer suits by providing an immediate remedy against the government itself and making that remedy against the government exclusive in some circumstances. If specific or equitable-type relief is sought, then the Administrative Procedure Act ordinarily provides the vehicle for judicial review, as noted. If monetary damages are sought through allegation of tortious wrongdoing, then Congress has directed substitution of the United States as the defendant whenever the government employee had been acting within the scope of employment — an inquiry that is not invariably identical to that of determining whether the employee complied fastidiously with every statutory directive.[126]

In sum, the battleground over sovereign immunity has shifted from common-law claims against government officers to statutory claims presented pursuant to congressional waivers of sovereign immunity. This article next addresses judicial construction of those statutory waivers.

IV. Judicial Construction of Statutory Waivers of Sovereign Immunity

A. The General Rule of Strict Construction

In addition to the foregoing summary of the concept of sovereign immunity, its historical origins, how it evolved as a doctrine in the Supreme Court, and the justifications for or critiques of the concept, one remaining aspect of federal sovereign immunity — the matter of statutory construction — should be addressed. Even when Congress has waived sovereign immunity by enacting legislation granting express permission to seek judicial relief against the federal government, the doctrine exerts a pervasive influence upon the statutory analysis. With the underlying legal environment framed by sovereign immunity, the omnipresence of this foundational doctrine significantly affects the manner in which the courts approach the task of construing statutory waivers. Congress's consent to suit for a particular type of claim does not wholly deprive the federal government of the protective benefits of the sovereign immunity.

For claims to be brought against and judgments to be paid by the United States, there must be an explicit waiver of sovereign immunity.[127] Even when the basic grant of legislative permission is sufficiently unambiguous, the

126. 28 U.S.C. § 2679(b)-(d). *See generally* SISK, *supra* note 105, § 5.06(c), at 362-73.

127. *Nakshian*, 453 U.S. at 160-61; United States v. Testan, 424 U.S. 392, 399 (1976).

Supreme Court has directed that the contours of a statutory waiver of sovereign immunity are to be construed strictly and narrowly.[128] Because Congress alone may waive the sovereign immunity of the United States, the codified terms of such waivers define the jurisdiction of the courts to entertain an action against the government.[129] The Supreme Court has solidified this rule of strict construction by refusing to extend the scope of a waiver of sovereign immunity when the language of the statute leaves any ambiguity and by declining to look beyond the text to legislative history or statutory purpose.[130]

Commentators have described the Court's decisions as establishing a "clear statement" rule, that is, demanding a plain and unequivocal expression by Congress in the text of the statute concerning the scope of any waiver of federal sovereign immunity.[131] Professor John Copeland Nagle explains that the Supreme Court requires "specifically targeted statutory language and refuse[s] to consider other indicia of legislative intent" in the construction of a statutory grant of judicial relief against the federal government.[132] Nagle criticizes the requirement of a "clear statement," complaining that "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."[133] He argues that "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."[134]

With respect to the statutory interpretation dimension of the sovereign immunity question, Professor Vicki C. Jackson argues that, in an era of greater acceptance of the government's amenability to suit and of judicial independence, the "dynamic [should] move back towards more restrictive

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128. Library of Cong. v. Shaw, 478 U.S. 310, 318 (1986); Ruckelshaus v. Sierra Club, 463 U.S. 680, 685-86 (1983).

129. Block v. North Dakota, 461 U.S. 273, 287 (1983); *Testan*, 424 U.S. at 399.

130. *See, e.g.*, Dep't of the Army v. Blue Fox, Inc., 525 U.S. 255, 261 (1999); Lane v. Pena, 518 U.S. 187, 192 (1996); United States v. Nordic Vill., Inc., 503 U.S. 30, 34 (1992); U.S. Dep't of Energy v. Ohio, 503 U.S. 607, 615 (1992); Ardestani v. Immigration & Naturalization Serv., 502 U.S. 129, 137 (1991).

131. William N. Eskridge, Jr. & Philip P. Frickey, *Quasi-Constitutional Law: Clear Statement Rules as Constitutional Lawmaking*, 45 VAND. L. REV. 593, 595 n.4, 642-43 (1992); 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); John Copeland Nagle, *Waiving Sovereign Immunity in an Age of Clear Statement Rules*, 1995 WIS. L. REV. 771, 773-98, 806 (1995).

132. Nagle, *supra* note 131, at 773.

133. *Id.* at 806.

134. *Id.*

understandings of the doctrine's scope" so as to enhance the "courts' capacities to provide individual justice."[135] Even though the doctrine may never actually be abolished, Jackson argues that the "abstract idea of sovereign immunity" should not be invoked to deny "remedies to address violations of legal rights" in cases in which "there is room for interpretation on questions of jurisdiction and remedies."[136] In sum, Jackson also would favor a more generous construction of scope and remedy when Congress waives immunity to suit.

Nonetheless, commentators concede, under the Supreme Court's "clear statement" approach, doubts about the textual meaning of a statute are resolved in favor of the preservation of sovereign immunity. Moreover, as the strict construction rule for waivers of sovereign immunity is not a recent innovation, Congress has legislated for many decades against this well-understood backdrop.

While the Supreme Court generally adheres to a narrow interpretation approach and regularly recites that standard, the Court's opinions concerning statutory waivers of sovereign immunity are not entirely of one unbroken piece. There are small cracks in the edifice of strict construction. Although no Supreme Court Justices have directly questioned the doctrine of sovereign immunity in recent years, their conflicting attitudes toward the concept may be revealed by their citation of contrasting standards of statutory construction, or at least contrasting applications of such standards in some cases.

B. A Pair of Contrasting Decisions Involving the Same Statutory Waiver

As an illustration of the tension that continues about the appropriate manner in which to interpret a statutory waiver of sovereign immunity, we may compare two Supreme Court decisions that interpret the same statutory waiver of sovereign immunity — the provision of Title VII of the Civil Rights Act of 1964 that prohibits employment discrimination by federal employers.[137] These two decisions point in somewhat opposite directions in terms of underlying presumptions for interpretive analysis:

First, in *Library of Congress v. Shaw*,[138] the Supreme Court strictly construed the amenability to suit of the United States under Title VII and refused to hold the government responsible for prejudgment interest on attorney's fees[139] — even though private defendants long had been liable for such interest and Title

135. Jackson, *supra* note 13, at 522.

136. *Id.* at 609.

137. 42 U.S.C. §§ 2000e to 2000e-17 (2000). For further discussion of Title VII, see generally ERNEST C. HADLEY, A GUIDE TO FEDERAL SECTOR EQUAL EMPLOYMENT LAW & PRACTICE (16th ed. 2003); SISK, *supra* note 105, §§ 3.12-.13, at 194-98.

138. 478 U.S. 310 (1986).

139. *Id.* at 317-19.

VII defined the liability of the United States to be "the same as a private person."[140] Stating that waivers of sovereign immunity are to be strictly construed in favor of the sovereign, the Court demanded that Congress affirmatively and separately declare liability for interest before such a remedy will be held available against the federal government.[141] Subsequently, in the Civil Rights Act of 1991,[142] Congress carefully used literal language to expressly allow awards of prejudgment interest in Title VII employment discrimination suits against the federal government, thereby overturning *Shaw* in the specific context of that particular statutory cause of action. Nonetheless, *Shaw* remains important as a statement of the general rule of strict construction for waivers of sovereign immunity. And the "no-interest rule" stated in *Shaw* remains the rule in other contexts where Congress has not enacted specific statutory provisions to the contrary.[143]

Second, but in contrast with *Shaw*, the Supreme Court in *Irwin v. Department of Veterans Affairs*[144] held that the limitations period on claims against the United States arising under that same statute — Title VII — need not be strictly enforced; the Court allowed the Title VII limitations period to be subject to equitable tolling in exceptional circumstances, just as with claims against private parties.[145] A concurring opinion objected to equitable tolling against the federal government, citing longstanding precedents establishing that conditions on waivers of sovereign immunity — specifically including statutes of limitations — must be strictly observed.[146] The majority opinion simply responded that "making the rule of equitable tolling applicable to suits against the Government, in the same way that it is applicable to private suits, amounts to little, if any, broadening of the congressional waiver."[147]

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140. 42 U.S.C. § 2000e-5(k).

141. *Shaw*, 478 U.S. at 317-19.

142. Civil Rights Act of 1991, Pub. L. No. 102-166, § 114, 105 Stat. 1071, 1079.

143. *See, e.g.*, Adams v. United States, 350 F.3d 1216, 1229-30 (Fed. Cir. 2003) (holding that Border Patrol employees who were awarded overtime pay could not obtain prejudgment interest); Smith v. Principi, 281 F.3d 1384, 1387 (Fed. Cir. 2002) (holding that a veteran who was awarded past-due compensation after successfully challenging disability rating could not recover interest because the statutes did not mention interest and thus did not expressly waive the no-interest rule); Newton v. Capital Assurance Co., 245 F.3d 1306, 1310-12 (11th Cir. 2001) (holding that prejudgment interest could not be awarded to successful claimant for flood insurance benefits where insurer was subsidized by the Federal Emergency Management Agency and any interest payment would be a direct charge against the public treasury). On the availability of interest on judgments against the federal government, see generally SISK, *supra* note 105, § 1.10(c), at 70-72.

144. 498 U.S. 89 (1990).

145. *Id.* at 93-96.

146. *Id.* at 97-100 (White, J., concurring in part and concurring in the judgment).

147. *Id.* at 95 (majority opinion).

Thus, in *Shaw*, the Supreme Court held that the government was not liable for an award of interest — absent an express statutory provision — under a general waiver of sovereign immunity, even if a private person would be so liable.[148] But then in *Irwin*, the Court held that a limitations period was subject to equitable tolling even in the absence of an express statutory provision, because equitable tolling would be available in cases involving private parties.[149] The two decisions are in tension with each other and appear to approach the construction of the Title VII waiver of sovereign immunity from opposite starting points or presumptions.

The question thus remains whether the *Shaw* and *Irwin* decisions may be reconciled in a principled manner. The Supreme Court itself has yet to offer a theory of statutory construction that encompasses these contrasting results, which, as noted, arose in the context of the same statutory waiver of sovereign immunity. The only apparent distinction between *Shaw* and *Irwin* is that the former refused to expand the scope of the government's liability in damages, while the latter permitted the easing of the time limitations on filing suit. Thus, one could articulate a strict and narrow rule of statutory construction that applies to the substantive liability side of the sovereign immunity inquiry, while another more generous interpretive approach governs the procedural side.

C. The Interpretive Tension Perpetuated in Recent Decisions

In the fifteen years since *Irwin*, as it has addressed various statutory waivers of sovereign immunity, the Supreme Court has continued to demand clear and unequivocal textual evidence before expansively construing the scope of a statutory waiver — evidence the Court typically has found lacking.[150] Thus, the

148. *See supra* text accompanying notes 122-25.

149. *Irwin*, 498 U.S. at 93-96.

150. *See, e.g.*, Dep't of the Army v. Blue Fox, Inc., 525 U.S. 255, 261, 263 (1999) (stating that the Administrative Procedure Act, 5 U.S.C. § 702, must "be strictly construed, in terms of its scope, in favor of the sovereign" and thus holding that the statute did not permit assertion of an equitable lien by a subcontractor against funds held by the federal government which had been distributed to the prime contractor); Lane v. Pena, 518 U.S. 187, 192, 197 (1996) (stating that "a waiver of the Government's sovereign immunity will be strictly construed, in terms of its scope, in favor of the sovereign" and holding that government was not liable for compensatory damages under the Rehabilitation Act for employment discrimination on the basis of disability); Smith v. United States, 507 U.S. 197, 201-05 (1993) (holding that the United States had not clearly consented to tort liability for incidents occurring in Antarctica); United States v. Nordic Vill., Inc., 503 U.S. 30, 34 (1992) (stating that a waiver of sovereign immunity "'must be construed strictly in favor of the sovereign, and not enlarge[d] . . . beyond what the language requires'" and holding the government was not liable to bankruptcy trustee for funds transferred without authorization by the bankrupt estate to the Internal Revenue Service (alterations in original) (citations omitted)); Ardestani v. Immigration & Naturalization Serv., 502 U.S. 129, 137, 139 (1991) (stating that "a partial waiver of sovereign immunity . . . must

Shaw strict construction approach appears to predominate. However, unless and until *Irwin* has been either discarded by the Court as an anomalous opinion or placed by the Court into a separate procedural category, the resilience of *Irwin* reflects continuing tension about how to interpret statutes authorizing suit against the federal government. For a time, the Court appeared to be abandoning *Irwin*, as the Court declined to allow equitable tolling of other statutes of limitations in federal government cases.[151] Then recently, the Court revived *Irwin* as persuasive precedent for relaxing another procedural limitation under another statutory waiver of sovereign immunity.[152] Thus, *Irwin* remains with us and so does the analytical tension that it introduced.

For a period of time after *Irwin*, the Supreme Court appeared set on a course that limited *Irwin* as a precedent and seemed likely over time to confine it to its specific statutory context. In *United States v. Brockamp*,[153] the Court refused to permit equitable tolling of the statutory limitations period on filing claims for tax refunds, notwithstanding that the taxpayers involved had suffered disabilities that arguably excused their delay.[154] The Court distinguished *Irwin* by saying that the presumption that limitations periods for claims against the government may be equitably tolled applies only to ordinary limitations statutes that "use fairly simple language."[155] By contrast, the Internal Revenue Code "sets forth its limitations in a highly detailed technical manner, that, linguistically speaking, cannot easily be read as containing implicit exceptions."[156] The tax statute's "detail, its technical language, the iteration of the limitations in both procedural and substantive forms, and the explicit listing of exceptions, taken together, indicate to [the Court] that Congress did not intend courts to read other unmentioned, open-ended 'equitable' exceptions into the statute that it wrote."[157] Similarly, in *United States v. Beggerly*,[158] the Court held that equitable tolling is not available in a suit against the United States under the Quiet Title Act.[159] The Court observed that the Quiet Title Act provided an "unusually generous" twelve-year limitations period and that the statute already incorporated a form of tolling, by providing that the limitations

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be strictly construed in favor of the United States" and holding that the Equal Access to Justice Act, 5 U.S.C. § 504, did not permit award of attorney's fees for administrative deportation proceeding).

151. *See infra* text accompanying notes 153-61.
152. *See infra* text accompanying notes 163-68.
153. 519 U.S. 347 (1997).
154. *Id.* at 350-52.
155. *Id.* at 350.
156. *Id.*
157. *Id.* at 352.
158. 524 U.S. 38 (1998).
159. *Id.* at 48-49.

period does not run until the plaintiff "knew or should have known of the claim of the United States" upon the property.[160] Accordingly, the Court held that equitable tolling was inconsistent with the text of the statute.[161]

Thus, while the *Irwin* tolling rule continued to apply to ordinary and simple limitations provisions that did little more than announce a time deadline, the Court appeared increasingly reluctant to give an expansive interpretation to *Irwin* and seemed quick to distinguish it in each successive case. The *Brockamp* decision — particularly in its description of equitable tolling as embracing "unmentioned, open-ended 'equitable' exceptions" — suggested that the Court was becoming less hospitable to equitable or expansive interpretations of waivers of sovereign immunity than when the *Irwin* decision was rendered.[162]

However, quite recently, *Irwin*'s more generous approach toward a statutory waiver of sovereign immunity, at least in the context of a procedural time requirement, has received renewed vitality. In *Scarborough v. Principi*,[163] the Supreme Court relied upon *Irwin* as instructive in another context that also involved a time limitation contained in a waiver of sovereign immunity, although it did not raise the question of equitable estoppel of that limitation.[164] In *Scarborough*, the Court held, over a dissent, that an otherwise-timely application for attorney's fees under the Equal Access to Justice Act[165] that did not contain the statutorily-required allegation that the government's position was not "substantially justified" may be amended to cure this defect after the thirty-day filing period had expired.[166] In so holding, the Court found the *Irwin* decision to be "enlightening on this issue," because that precedent recognized that limitation principles should apply to the federal government in the same way as to private parties.[167] The Court further said that "[o]nce Congress waives sovereign immunity, we observed [in *Irwin*], judicial application of a time prescription to suits against the Government, in the same way the prescription is applicable to private suits, 'amounts to little, if any, broadening

160. *Id.* at 48 (quoting Quiet Title Act, 28 U.S.C. § 2409a(g) (2000)).

161. *Id.* at 49.

162. *Irwin*, 519 U.S. at 352.

163. 541 U.S. 401 (2004).

164. *Id.* at 420-21.

165. 28 U.S.C. § 2412 (2000). On the Equal Access to Justice Act, see generally Gregory C. Sisk, *The Essentials of the Equal Access to Justice Act: Court Awards of Attorney's Fees for Unreasonable Government Conduct (Part One)*, 55 LA. L. REV. 217 (1994); Gregory C. Sisk, *The Essentials of the Equal Access to Justice Act: Court Awards of Attorney's Fees for Unreasonable Government Conduct (Part Two)*, 56 LA. L. REV. 1 (1995).

166. *Scarborough*, 541 U.S. at 423.

167. *Id.* at 420-21.

of the congressional waiver.'"[168] Justice Thomas, joined by Justice Scalia, in dissent, argued that the time limitation, including the requirement that the claimant timely set forth each of the required elements for the fee application, was "a condition on the United States' waiver of sovereign immunity," and thus was subject to the strict construction rule, citing *Shaw* and other precedents to that effect.[169]

Thus, the tension of interpretive attitude exists and persists in Supreme Court caselaw regarding the proper mode of construction for statutory waivers of sovereign immunity.

V. Conclusion

As Professor Laurence H. Tribe writes, "the doctrine of sovereign immunity is in no danger of falling out of official favor any time soon."[170] Indeed, in the nearly half a century since the landmark decisions in *Larson v. Domestic & Foreign Commerce Corp.*,[171] and *Malone v. Bowdoin*,[172] no member of the Supreme Court has directly challenged the continued existence of federal sovereign immunity as a basic doctrine, although not all jurists approach the doctrine in the same manner in every case.

While sovereign immunity persists as a foundational concept underlying all civil litigation with the federal government, the tensions created by the doctrine — the conflicting considerations of justice to an injured citizen and governmental effectiveness for the people collectively — persist as well. In recent decades, however, those concerns tend to find expression in congressional deliberations about statutory waivers of sovereign immunity and in sometimes contrasting judicial constructions of those enactments.[173] The Supreme Court and the lower federal courts continue to struggle with how to approach those statutes that lift — always in part and never in whole — the shield of sovereign immunity, seeking to give full force simultaneously to the statutory authorization of relief and to those limitations on relief that Congress saw fit to retain.

Congress has enacted statutory waivers of sovereign immunity that cover most substantive areas of law and apply to most situations in which a plaintiff would seek relief. Because of the doctrine of sovereign immunity, however, the federal government retains advantages and immunities not available to private

168. *Id.* at 421 (quoting Irwin v. Dep't of Veterans Affairs, 498 U.S. 89, 95 (1990)).
169. *Id.* at 425-27 (Thomas, J., dissenting).
170. 1 LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 3-25, at 520 (3d ed. 2000).
171. 337 U.S. 682 (1949); *see supra* Part II.D.
172. 369 U.S. 643 (1962); *see supra* Part II.E.
173. *See supra* Parts III.B, IV.

parties. Moreover, while the statutory waivers of sovereign immunity do create something of a broad network or tapestry of authorized judicial actions against the government, they do not cover everything and each individual waiver is subject to significant exceptions. Congress has responded to the problem of sovereign immunity, seeking to find the appropriate balance between allowing access to court relief and protecting important governmental policy operations from judicial intervention. With the basic doctrine of federal sovereign immunity having been capsulized in this article, an examination of how that balance has been struck for different types of claims and different areas of governmental activity is the subject for another day and forum.[174]

174. *See generally* SISK, *supra* note 105.