Breaking the Supreme Court Deadlock: A New Approach to State Sovereign Immunity

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Twenty-seven of the last thirty-six Supreme Court decisions on state sovereign immunity have been decided by the barest of polarized majorities. Each side remains entrenched, with the four dissenting justices repeatedly refusing to succumb to stare decisis. This Article begins by establishing the existence of the deadlock, suggesting that its inevitable demise in favor of the dissenting justices’ view would produce undesirable results, and argues that it is therefore important to develop arguments that can lead to the deadlock’s demise via reason rather than a chance change in court membership. The Article also examines how justices and legal scholars have approached the deadlocked issue and argues why these approaches ultimately have been unpersuasive for either side of the debate, thus necessitating new arguments. Finally it parses the methods of reasoning the justices began to draw on in recent state-sovereign-immunity cases when they invoked Lochner v. New York: reasoning by analogy. Drawing on analogies to the direct-taxation and specific-jurisdiction doctrines, it develops the argument that state sovereign immunity best coheres with our system of American jurisprudence—and moreover eliminates the unpredictable possibility of a radical imposition on states due to a chance change in court membership—by a transition from its current formalist approach to one that employs a functional test that this Article introduces.
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I. INTRODUCTION

State sovereign immunity is the constitutional doctrine by which states of the American union are afforded near-absolute immunity from civil lawsuits unless they choose to waive it explicitly. Unlike an ordinary person, corporation, or municipality, a state may immunize itself from suits like those seeking damages for patent infringement\(^1\) or for violation of the Americans with Disabilities Act.\(^2\) In these cases, the state infringes a patent or unlawfully discriminates against a disabled person in demoting her. The state then pleads immunity at the outset of the suit and precludes courts from ever hearing the merits. Patentees and disabled state employees are left remediless, as are many other types of plaintiffs.

Defenders of state sovereign immunity describe its fairness given an expanded interpretation of the Commerce Clause,\(^3\) and its functional irrelevance in light of the doctrine’s myriad exceptions that provide plaintiffs with remedies.\(^4\) Opponents of the doctrine explain that plaintiffs are left remediless despite the doctrine’s exceptions,\(^5\) and that state sovereign immunity is inconsistent with the rule of law.\(^6\) Both sides claim alignment with the best interpretation of common-law and constitutional history, about which the scholarly literature abounds.\(^7\)

Over the past forty-five years, no one has analyzed the common-law and constitutional history of state sovereign immunity as adeptly as the Supreme Court justices themselves. Yet despite this careful attention to history, and the number of cases decided, the jurisprudence in this area has yet to achieve stability. The jurisprudence in this area is left in one of the Court’s longest-running deadlocks, leaving states to plan their affairs without the certainty attending a more stable constitutional doctrine. Although the doctrine seems

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stable because it has remained substantially unchanged for decades, the doctrine is anything but settled. The Court has decided twenty-seven of its last thirty-six decisions concerning state sovereign immunity by the barest of majorities, with each side continuing to maintain its entrenched view and the dissenters refusing to succumb to stare decisis, indeed claiming that stare decisis, viewed over the long run, is on their side. And as this Article discusses, state sovereign immunity ought to be settled, unlike other constitutional doctrines, and settled quickly to hedge the risk of states suddenly facing a hoard of lawsuits should one of the conservative justices become prematurely incapacitated during the Obama administration. In sum, this Article contends primarily that the doctrine is unsettled and that it ought to be settled soon. The alternative is unstable Supreme Court deadlock.

Instability exists in the sense that settling the doctrine is only a matter of time, but when the radical change to the dissenters’ view will occur is unpredictable. The consistent five-four split could flip-flop whenever the Court changes composition, which admittedly would be a surprise during the Obama administration, but not a surprise if one extends the time horizon only a little further. Absent such a flip-flop, the justices seem to sense a need to resolve the tension by making new arguments. Unfortunately, after forty-five years of polarized bare majority decisions, new arguments are running thin. Indeed, lately each side has resorted to accusing the other of following in the footsteps of *Lochner v. New York*, a case often understood to symbolize judicial activism. The most expedient way to settle the doctrine is for the justices to make new arguments because, as this Article discusses, the old arguments are not working. This Article aims to help the justices carry the argument forward, by examining a larger swathe of the Supreme Court’s institutional history with which to cohere a more principled doctrine of state sovereign immunity.

The Article lays out new arguments that justices could potentially use in the future to develop a more stable jurisprudence, by drawing on examples from the direct-taxation and specific-jurisdiction doctrines. These two constitutional doctrines are helpful in understanding the Court’s approach to state sovereign immunity and in presaging where that doctrine is headed. For example, the direct-taxation doctrine was overruled, in favor of a balancing test that lives today, for economic and pragmatic reasons that similarly indicate the future demise of state sovereign immunity’s absolutism. Moreover, the direct-taxation doctrine’s balancing factors had been in play all along, cloaked in absolutist garb, just as nascent balancing factors to the Court’s state-sovereign-immunity jurisprudence also have been apparent.

Another new analogy with which state sovereign immunity may be analyzed fruitfully is the specific-jurisdiction doctrine. State sovereign immunity, or any doctrine of immunity for that matter, is really a question of jurisdiction: does the court have the power to hear the case? Absent moral justifications for power,
which are not easily found, the ideals of fairness and efficiency found in the doctrine of specific jurisdiction necessitate a future balancing test for state sovereign immunity.

In sum, lessons from each of the two suggested doctrines indicate that recent state-sovereign-immunity cases reflect a last grasp to exalt an absolutist doctrine that will and ought to erode. Thus properly understood, this Article argues that the evolution of the doctrine of state sovereign immunity is immature and in need of developing functional balancing-test factors. In fashioning such factors, lessons can be drawn from factors foreshadowed in the Court’s jurisprudence in the area of state sovereign immunity, and defended in this Article by analogy to other Supreme Court doctrines. Unlike the today’s absolutist approach, which constrains judges more strictly, whether to the one side or the other, the Article argues that the proposed balancing approach would better promote flexibility, functionalism, minimalism, fairness, and efficiency.

Legal scholarship has not analyzed the persuasiveness, in the context of state sovereign immunity, of analogizing to other doctrines of federalism and jurisdiction. The analysis is intended to begin breaking a constitutional deadlock and achieving principled coherence with the rest of American jurisprudence.

The Article proceeds in four sections. Section II outlines the justices’ competing theories of state sovereign immunity and highlights pragmatic concerns with each. Section III explains the nature of the deadlock and argues that pragmatism requires breaking it soon. Section IV describes how justices and legal scholars have approached this deadlocked issue and argues that these approaches ultimately are unpersuasive for either side of the debate, thus necessitating new arguments. Section V develops new arguments from analogies to the direct-taxation and specific-jurisdiction doctrines, which indicate that state sovereign immunity best coheres with our system of American jurisprudence by a transition from its current formalist approach to one that employs a functional balancing test. The proposed balancing test provides a middle ground between the justices’ competing approaches. Although it may differ with the existing test only minimally in terms of case outcomes, it is simpler, functional, and more cost-beneficial. Ultimately the Article concludes that we should avoiding contentious invocations of *Lochner* and instead provide a more principled approach.

II. COMPETING THEORIES

A. EXISTING DOCTRINE

The Court is split between two competing views of state sovereign immunity. Under the first view, held by the five conservative justices, courts lack subject-matter jurisdiction over all types of suits against state governments, despite that the Eleventh Amendment by its terms bars only those suits against
state governments brought in federal court by diverse citizens. Thus suits limited by state sovereign immunity include not only federal diversity suits, but also diversity suits brought in state court and federal-question suits.

The majority also recognizes three exceptions in federal-question suits that are quite easily manipulable by adept litigators. One exception, which is also the most common way for a plaintiff to achieve relief against a state, is to sue a state official. This exception is derived from the case *Ex parte Young*. Under the *Ex parte Young* exception, officials may be sued for damages in their personal capacity for actions taken under color of state law even if the official has an indemnification agreement with the state government. When plaintiffs seek equitable relief such that monetary awards are sought from the state treasury, however, the defendant official is being sued in an official capacity. In such suits, the doctrine of state sovereign immunity bars relief that is “retrospective,” such as an injunction seeking back payments for wrongly denied welfare. But the doctrine does not bar relief that is “prospective,” such as an injunction requiring the state to comply with federal guidelines in the future, or an injunction requiring implementation of a desegregation plan. So theoretically the Court will rule to avert a future wrong but not remedy a past one. Unfortunately for the clarity of the doctrine, the distinction between prospective and retrospective relief is elusive. Both the approved implementation of a desegregation plan in *Milliken* and the condemned injunction seeking wrongly withheld welfare payments in *Edelman* sought money to be paid in the future to right a past wrong. On the one hand, prospective relief may be distinguished from retrospective relief by analogizing to these cases on their facts, with particular attention to the welfare and desegregation contexts. On the other hand, the distinction between prospective and retrospective relief is elusive because relief can always be characterized as one or the other given that *Ex parte Young* is not based on functional concerns.

Further muddling this *Ex parte Young* exception are three exceptions to the exception. State officers retain immunity for action taken in their official capacities on pendent state-law claims, for enforcing federal statutes that

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8 The Eleventh Amendment provides that “the judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against any one of the United States by citizens of another state or by citizens or subjects of any foreign state.”


10 *Hans v. Louisiana*, 134 U.S. 1, 21 (1890).


13 *Id.*


contain comprehensive enforcement mechanisms, and from suits to quiet title to submerged lands. And this third exception to the Ex parte Young exception may open the door to the Court finding other exceptions to Ex parte Young in situations where, as in Coeur d’Alene, relief would have a significant “impact” on state government.

A second exception to the bar on suits against state governments is that a state may consent to suit or waive its sovereign immunity, even when the case is within the text of the Eleventh Amendment, by bringing the suit itself, failing to raise an immunity defense, or removing a suit to federal court. A state may also waive immunity on the basis of non-litigation activity such as legislation, by delegated executive action, or by accepting from the federal government a “gratuity,” like approval of an interstate compact, or a “gift,” like a grant of funds, conditioned on consent. But a state maintains its immunity from suit in federal court notwithstanding its consent to suit in state court, consent to similar suits under state law, and mere participation in a federally regulated activity. There is a line-drawing problem between mere participation and acceptance of a gratuity, but the former may be indicated in case of a longstanding program whereas the latter may be indicated in the case of simple money transfers. The line might also be drawn by balancing the burden of being subject to suit against the benefit of participation.

Third on the list of exceptions, Congress may override state sovereign immunity by authorizing suits against state government under § 5 of the Fourteenth Amendment or the Bankruptcy Clause. There must be a clear statement both to subject a state to liability and to permit suit against a state in federal court. Congressional acts under § 5 of the Fourteenth Amendment must be in response to a pattern of constitutional violations on the part of the states, and must provide a congruent and proportional remedy, for example, by reaching no more broadly than intentional violations of due process for which there is no adequate state remedy. Such acts include, for example, the FMLA.

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16 Seminole Tribe. See also Sea Clammers; Schweiker.
18 Id. at 281.
21 Smith v. Reeves., 178 U.S. 436 (1900).
23 Fla. Prepaid, 527 U.S. 627.
and Title II of the ADA but do not include, for example, the Patent Remedy Act, ADEA, Education of the Handicapped Act, and Title I of the ADA. Congress probably has more latitude to abrogate immunity in statutes dealing with a type of discrimination that receives heightened scrutiny or a fundamental right, but as with the prior two exceptions, the line is anything but clear.

These are the major exceptions although there are others, including suits for tax refunds, suits for takings, suits brought by the US or another state on behalf of an individual, and suits in the court of another state.

B. THE DISSenting JUSTICES’ THEORY

The four liberal justices hold an alternative view of state sovereign immunity that reads the Eleventh Amendment as restricting only the diversity jurisdiction of the federal courts. They would overrule Supreme Court precedents beginning with Hans v. Louisiana, a case decided more than a century ago, which found that the Eleventh Amendment also restricts federal-question jurisdiction. The dissenting justices’ theory would greatly simplify the analysis by entirely eliminating immunity for federal-question suits. It would thus also eliminate for those suits the current doctrine’s muddled analytical issues, including the prospective-retrospective problem of official-capacity suits, the line-drawing problem between participation and acceptance of a gratuity for purposes of finding consent and waiver, and the problem of determining whether Congress has abrogated pursuant to the Fourteenth Amendment.

What the dissenting justices seem not to consider, however, is the effects of the transition they advocate. A sudden transition to their interpretation of the Eleventh Amendment would impose a radical burden on states. States would suddenly become liable for all types of suits, and unlike private companies of comparable sizes would lack the compliance departments, personnel, training and auditing processes, and technologies to avoid lawsuits by detecting and preventing noncompliance. But implementing a previously unnecessary robust compliance program takes much time and effort. It may be more fair or economical to states for the dissenting justices to require compliance not with a

29 Fla. Prepaid, 527 U.S. 627.
33 134 U.S. 1 (1890).
34 On the necessity of considering transition costs to new legal regimes, see Louis Kaplow, Legal Transitions: Is There an Ideal Way to Deal with the Non-Ideal World of Legal Change?, 13 J. Contemp. Legal Issues 161 (2003).
hoard of new laws, but with a minimal number of laws so as to enable the possibility of a smooth transition.

III. NECESSITY OF BREAKING THE DEADLOCK

The Court has decided twenty-seven of its last thirty-six decisions concerning state sovereign immunity by the barest of majorities. Decisions concerning economic substantive due process and direct taxation, for example, both of which also commanded a series of entrenched bare-majority decisions, eventually moved toward a consensus on the Court opposite to the previous bare majority. Consensus on the Court in favor of holding states accountable similarly may be inevitable, should the bare majority flip-flop only once. For once states have begun to be forced to comply with laws there will be less reason to let them off the hook.

Moreover, the many close cases can hardly give states repose. A clearer statement by the Supreme Court saying that states will always be free to disregard laws to which ordinary citizens are subject could encourage states to infringe more patents and demote more disabled people. If stronger states are the goal, as opposed to equal opportunity for individuals, then the Supreme Court should make that clear, but this is impossible as long as the dissenters maintain their entrenched view. Alternatively, if the Court will eventually decide in favor of holding states equally accountable, then states are left unprepared to improve their compliance with laws, because no state is going to implement an expensive compliance program without a clear mandate. Either way, it would thus be beneficial to have a clearer resolution of the state sovereign immunity issue than twenty-seven out of thirty-six bare-majority cases resulting in a baroque doctrine of complex exceptions.

State sovereign immunity is unlike other areas of law, where maintaining contentiousness may be desirable. For example, the doctrine concerning jurisdiction stripping is better left unresolved. Leaving in limbo Congress’ power

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to strip the Supreme Court of jurisdiction preserves a healthy balance between
two coequal branches of government. State sovereign immunity by contrast
cconcerns the balance between state and federal governments, which are not
coequal. Resolving state sovereign immunity thus will not necessarily sacrifice
the health of our governmental institutions.

Another doctrine better left unresolved, at least for now, is affirmative
action. Leaving this doctrine in limbo balances equality for all races with
reparations for mistakes of the past that continue to have ramifications for the
way many African-Americans start out today. And it allows for race-based
admissions formulas to be eliminated “as soon as practicable.” State sovereign
immunity also seeks to make reparations for past wrongs, in this case done to
states with other doctrines such as the expansion of the Commerce Clause. But
any resolution to the unstable doctrine of state sovereign immunity, even one
that favors absolute immunity for states, cannot undo the expansion of the
Commerce Clause.

Moreover, neither jurisdiction stripping nor affirmative action has
commanded a large series of bare-majority decisions, despite arguably greater
contentiousness than state sovereign immunity. With so much action in the
highest Court decided by a bare majority, states are left with a lack of certainty
and predictability with which they may adequately plan their affairs. States face
the possibility of a radical change to laws governing their behavior that may or
may not occur whenever the deadlock happens to break.

In each of the twenty-seven contested state-sovereign-immunity decisions,
over the past forty-five years, the justices remained divided over state sovereign
immunity and maintained their competing theories. Rather than succumbing to
the power of stare decisis, the dissenting justices time and again repeated
arguments from previous cases and sometimes even incorporated them. Indeed,
the dissenting justices have continued to claim that stare decisis favors their
theory whenever the majority expands state sovereign immunity. By contrast,
the majority continues to note that ultimately the polarization goes back as far as
Hans v. Louisiana, the first case to ratify the majority’s theory of state sovereign
immunity as a limitation on more than just diversity suits. Thus the dissenting
justices depart from stare decisis each time they try to return to the literal
interpretation of the Eleventh Amendment from which Hans departed.

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39 See, e.g., College Savings Bank, 527 U.S. at 694 (Breyer, J., dissenting) (describing the majority as
“seeking to justify the overruling of so clear a precedent”).
40 See, e.g., Welch, 483 U.S. at 486 (“The Court’s unanimous decision in Hans v. Louisiana firmly
established that the Eleventh Amendment embodies a broad constitutional principle of sovereign
immunity.”)
The only seven of thirty-six cases in the past forty-five years not decided by the barest of majorities reached narrow exceptions to the existing doctrine and indicated no departure from the Court’s deep division.\textsuperscript{41} Even in one of these cases, Justice Stevens wrote a concurring opinion to make clear that he reached the same result but by different reasoning inline with the dissenting bloc’s specific theory of state sovereign immunity.\textsuperscript{42} Neither side, and no justice, seems willing to budge.

The demise of the deadlock seems to be only a matter of time, given the intransigence of both sides, the continued return to the issue in the Supreme Court, and the desirability of resolving the issue more clearly one way or the other. The only question remaining is how the deadlock will break.

There are only three ways to break a Supreme Court deadlock. Most obviously, a change in the Court’s membership could change the count of votes one way or the other. This is unlikely to happen at least for awhile since the five conservative justices are unlikely to retire any time soon and the four liberal justices are likely to be replaced by like-minded justices during Obama’s administration.\textsuperscript{43} If, however, the Court does become more liberal in the next decade or two, which doesn’t seem far-fetched, or perhaps sooner should a conservative justice become unexpectedly unavailable, a flip-flop from 5-4 to 4-5 might eliminate the deadlocked problem. For then states may then conform their behavior accordingly, at which time a reversion would be unnecessary because compliance programs would already be in place. States thus risk suddenly facing a hoard of lawsuits, for example, should one of the majority justices become prematurely incapacitated during the Obama administration. This risk alone should motivate the justices to break the deadlock soon using one of the next two methods—so as to leave jurisprudence to reason, not chance.

A second way to break a Supreme Court deadlock is to change a justice’s mind using existing arguments, the most famous example being the “switch in

\textsuperscript{41} See Schacht, 524 U.S. at 381 (holding that a state waives its immunity by removing to federal court); Blatchford v. Native Village of Noatak and Circle Village, 501 U.S. 775 (1991) (finding state sovereign immunity applicable to suits brought by tribes); Nevada v. Hall, 440 U.S. 410 (1979) (finding state sovereign immunity inapplicable to suits brought by plaintiffs in a different state’s court under the Full Faith and Credit Clause); United States v. Georgia, 546 U.S. 151 (2006) (holding that Title II of the ADA abrogated state sovereign immunity with respect to suits brought for due process violations); Hibbs, 538 U.S. 721 (holding that the FMLA abrogated state sovereign immunity); Quern, 440 U.S. 332 (holding that the Civil Rights Act of 1871 did not abrogate state sovereign immunity); Employees v. Dept. of Pub. Health and Welfare, Missouri, 411 U.S. 279 (1973) (holding that the Fair Labor Standards Act abrogated state sovereign immunity); Milliken, 433 U.S. 267 (approving implementation of a state desegregation plan); Fitzpatrick, 427 U.S. 445 (holding that Congress may abrogate state sovereign immunity under § 5 of the Fourteenth Amendment).

\textsuperscript{42} See, e.g., Nevada v. Hibbs, 538 U.S. at 721 (Stevens, J., dissenting).

\textsuperscript{43} See, e.g., Barack Obama, The Audacity of Hope 11 (Vintage 2008) (“[I]f there was one impulse shared by all the Founders, it was a rejection of all forms of absolute authority.”).
time that saved nine.” But this is unlikely to happen here because the current justices are so invested in their positions. Indeed, recent opinions by both the majority and dissenting blocs often reason by citing to and incorporating their own previous opinions, stare decisis notwithstanding. Another sign that the justices are unlikely to be swayed is that unlike with *Lochner*, there is no court-packing pressure from the executive to encourage a justice’s change of mind. Executive pressure is absent because the debate over state sovereign immunity, while having important ramifications for ordinary Americans, has not polarized the nation in the same way that economic substantive due process once did. If a justice is going to switch sides, the impetus will be only from new well-reasoned arguments.

The third and final way to break a Supreme Court deadlock is to move the argument forward by providing new arguments. This seems the only way to persuade the existing justices because under the current arguments, provided next, no one is budging.

IV. EXISTING ARGUMENTS

A. FORMALIST ARGUMENTS

Justices agree that before the states ratified the Constitution, the original common-law doctrine of state sovereign immunity “stood as an absolute bar to suit against a State by one of its citizens, absent consent.” Where the justices diverge is over whether and how that doctrine was modified to the extent the states relinquished their sovereignty to the federal government by forming the United States. A key issue is whether Article III’s conferral of federal jurisdiction over suits “between a state and citizens of another state” and “between a state . . . and foreign citizens” was meant to override state sovereign immunity. A recounting of the ratification debates reveals that the framers disagreed on whether states could be sued in federal court without their consent. Thus,

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44 *I.e.*, Justice Own Roberts’s sudden jurisprudential shift in *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937), in response to President Franklin Roosevelt’s court reform bill.


46 US Const, art III, § 2.

47 *Seminole Tribe*, 517 U.S. at 142–43 (Souter, J., dissenting). Although this Article does not attempt to recount the justices’ and other scholars’ historical analyses, I note here that one available argument seems absent in these discussions. The opposing justices frequently cite to the Federalist to make their historical arguments, but nowhere do they cite to Federalist 46, which recognizes that individual rights trump those of the states: “[T]he ultimate authority, wherever the derivative may be found, resides in the people alone, and . . . will not depend merely on the comparative ambition or address of the different governments, [or on] whether either, or which of them, will be able to enlarge its sphere or jurisdiction at the expense of the other.”
formal arguments about the original meaning of Article III favor neither side of the debate.

Nor do arguments about the original meaning of the Eleventh Amendment decide the issue. The dissenting justices explain how “the history and structure” of the Eleventh Amendment supports their theory of state sovereign immunity, as do the majority justices. Reasonable justices arguing from original intent may disagree over whether the Eleventh Amendment bars only diversity suits, or extends also to federal-question suits.

Finally, formalist arguments about the necessity of following *Hans v. Louisiana* also end in a wash. The majority plausibly claims that *Hans* decided the issue two hundred years ago by decreeing that states are immune from not only diversity suits but also federal-question suits. Indeed, “the nation survived for nearly two centuries” with such immunity intact. But the dissenting justices also explain how *Hans* resorted to common-law principles to overrule the Constitution’s contrary text, and that a proper interpretation of the Constitution necessitates overruling a misguided decision. Indeed, the Court has shaken up federal lawmaking by overruling longstanding doctrines before.

Scholars have written piles of articles explaining why formalist arguments win the day for either side of the debate. Justices on each side frequently cite to these articles and provide their own reasoned formalist arguments. This Article does not enter this debate but hypothesizes that both sides have many convincing formalist arguments. Hence we must look elsewhere to resolve the debate.

**B. ** **Policy-Based or Functional Arguments**

Realizing that additional arguments are needed, justices and scholars have posed various policy-based or functional arguments for why state sovereign immunity is or is not desirable. These arguments examine the effects of state sovereign immunity from the perspective of the function that the doctrine is serving. As with the formalist arguments, none of these functional arguments is persuasive for either side of the debate.

One functional argument is that immunity is needed to preserve the dignity and solvency of the states. A rebuttal to this argument is that the dignity and solvency of states is not preserved under the *Ex parte Young* fiction, which holds

*Seminole Tribe*, 517 U.S. at at 110 (Souter, J., dissenting).

*Seminole Tribe*, 517 U.S. at 69–70.

*Seminole Tribe*, 517 U.S. at 71.

*Seminole Tribe*, 517 U.S. at 132 (Souter, J., dissenting).


*Hans*, 134 U.S. at 21 (discussing how state sovereign immunity is designed to confer on state legislatures “the power of judging what the honor and safety of the state may require.”)
states accountable in many instances by allowing suits against state officials with indemnity agreements with the state. If dignity and solvency are the paramount concerns, then a doctrine preserving them would always confer immunity, both for states and officials with indemnity agreements, except only in those instances where states waive immunity by consenting to suit. Even the majority has never argued for so broad a doctrine of state sovereign immunity. On the other hand, if dignity and solvency are not the paramount concern, then by definition there is no plausibility to arguments for the function of state sovereign immunity as conferring dignity on states and preserving their solvency. Given the existing doctrine, which grants immunity in some cases and denies it in others, dignity and solvency can be only partial concerns.

Professor Jeffries raises a different argument: that the doctrine is irrelevant in light of all the myriad exceptions, the *Ex parte Young* fiction being the prominent one among others. On this view, sovereign immunity “functionally” bars only a small ratio of damage actions, even if the process seems convoluted, and so there is no point in upsetting stare decisis by reforming the doctrine. But other studies rebut that plaintiffs are left remediless. Professor Brown explains, “State sovereign immunity, when combined with doctrinal devices such as qualified immunity and the policy or custom requirement of municipal liability, routinely leaves constitutional victims without redress.” Evidence from numerous recent cases also rebuts Professor Jeffries’s theory. The Court has often found in favor of otherwise lawbreaking states and dismissed the suits in question under the doctrine of state sovereign immunity.

Professor Epstein raises another functional argument: that state sovereign immunity is only fair from a classical liberal or libertarian perspective in light of an expanded interpretation of the Commerce Clause. On this theory, the expanded interpretation of the Commerce Clause has so deprived the states of their sovereignty over the regulation of economic affairs within their borders that granting them immunity as to their own economic affairs functions as a quid pro quo. There are two possible answers to this, one that argues

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56 See, e.g., *Alden* (labor violation); *College Savings Bank* (trademark infringement); *Florida Prepaid* (patent infringement); *Kimel* (age discrimination); *Garrett* (discrimination against the disabled).

theoretically from Professor Epstein’s libertarian perspective and another that the justices make themselves. First, as Epstein readily acknowledges, state sovereign immunity as a solution to maintaining the federalist balance increases state governmental power. From a libertarian perspective, it thus should be better to focus on reducing the federal government’s commerce power rather than increasing the power of state governments. Professor Epstein’s rebuttal here therefore must be an argument about method, not substance, not least because the substance of the current policy, which immunizes states when they infringe patents and trademarks, fails to achieve the “ideal position” that would “subject [states] to obligations when they take property without compensation.” As a libertarian, he must be taking the position that the best way to reduce governmental power is first to increase it. This was the same policy position of the protagonists in the libertarian favorite *Atlas Shrugged*, where the producers of the world went on strike and supported big-government views, so as to spur revolution and effect a libertarian ideal.

But surely there are equally plausible ways to achieve capitalist utopia without revolution. If Atlas shrugs, then the whole world, including children and otherwise impressionable people, falls down. Why not educate these innocents and motivate them toward one’s cause rather than abandoning them?

One way to educate individuals on the law is to work toward a system where the law that people understand is the law as it is. If states really are immune for their otherwise illegal acts, and if this is undesirable, then we should say so. And if today’s doctrine, with *Ex parte Young* and the other exceptions, is no different from the simple alternative that affords plaintiffs remedies, then we should work toward a solution that simplifies the doctrine for everyone. Epstein abandons both modes of developing the doctrine, throws up his hands, and says constitutional doctrine is already so muddled that we should muddle it further from a libertarian perspective on the theory that two libertarian wrongs make a right. Libertarians may plausibly take Professor Epstein’s view, but surely they may have a reasonable contrary view as to how to best hold states accountable.

Even if one disagrees with Professor Epstein’s libertarian perspective, it may be optimal from a policy perspective to hold states accountable rather than granting them sovereignty. The justices themselves divide on whether “the states surrendered their sovereignty . . . when they granted Congress the power to

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61 *See* Jules Coleman on rule of recognition and rule of identity.
regulate Commerce.” If they did surrender their sovereignty, then an expanded interpretation of the Commerce Clause breaks that deal and thus one may plausibly argue that Professor Epstein’s solution is at least fair if not optimal from a libertarian policy perspective. On the other hand, if the states never surrendered their sovereignty in exchange even for limited regulation of commerce, then maintaining their sovereignty in exchange for an expanded regulation of commerce is inconsistent. On this view, the theory of state sovereign immunity should evolve just as has the evolving conception of the Commerce Clause, in order to achieve the accompanying benefits. Reasonable people may disagree over whether the benefits outweigh the costs on either side, but the point is that even non-libertarians may find elimination of state sovereign immunity efficient even in the face of an expanded interpretation of the Commerce Clause. Ultimately Epstein’s functional argument is unconvincing because it does not weigh costs and benefits of existing doctrine.

A final functional argument holds that the existing doctrine is not and should not be based on functional concerns. As evidence, no function of state sovereign immunity is ever cited to resolve the line-drawing issues discussed in Section II above: the prospective-retrospective problem of official-capacity suits, the line-drawing problem between participation and acceptance of a gratuity for purposes of finding consent and waiver, and the problem of determining whether Congress has abrogated pursuant to the Fourteenth Amendment. On this view, the bright-line albeit complex exceptions are more certain than and hence preferable to an alternative test that would instead employ balancing. But the very fact that existing doctrine is not based on functional concerns also results in uncertainty in the doctrine’s application. In fact, a balancing test such as the newly proposed solution may produce more certainty because: (1) it is based on functional concerns, unlike non-functional balancing tests notorious for their open-ended, unpredictable results; and (2) it is facially simpler than trying to navigate through the existing doctrine’s many complex and often unpredictably applied exceptions. Moreover, balancing tests are used with success in the area of foreign sovereign immunity. Although some uncertainty in such cases indeed exists, the test succeeds because it moves away from absolute immunity. It is at least arguable that a new balancing test based on functional concerns would outperform the existing non-functional test.

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63 For an analysis of the costs and benefits of existing doctrine, see Section IV below.
64 See generally the myriad approaches states use to perform interest analysis and to resolve such issues in David P. Currie et al., Conflict of Laws 118–203 (West 7th ed 2006). See, e.g., Phillips v General Motors Corp, 995 P2d 1002, 1008–09 (Mont 2000); Wood Bros Homes, Inc v Walker Adjustment Bureau, 601 P2d 1369, 1372–73 (Colo 1979); Restatement (Second) of Conflict of Laws § 6 (1971).
65 In determining, for example, whether the “nature” of a foreign sovereign’s activity is sufficiently commercial to overcome an immunity defense. See Foreign Sovereign Immunity Act
C. COHERENCE WITH LOCHNER V. NEW YORK

The justices have begun to realize that formal and functional arguments are getting them nowhere. Hence each side has resorted recently to accusing the other side of following in the footsteps of Lochner v. New York, a case often understood to symbolize judicial activism. For example, the dissenters cite Lochner in describing the majority as “depriv[ing] Congress of necessary legislative flexibility.” The majority retorts, also citing Lochner, that the dissenters are trying to “impose a particular economic philosophy.”

These brief comparisons with Lochner are interesting because they inch toward an alternative mode of argumentation consisting of constructive interpretation. The interpretive argument looks to our legal system’s entire institutional history, including but not limited to areas of state sovereign immunity, to discover which legal rule regarding state sovereign immunity best coheres with that history. It begins to carry the argument forward, by examining a larger swathe of the Supreme Court’s institutional history with which to cohere a more principled doctrine of state sovereign immunity. This Article takes the same approach, in Section IV below, by analogizing to the direct-taxation and specific-jurisdiction doctrines in order to resolve the entrenched divide over state sovereign immunity. But I will start here with the interpretive arguments posed by the justices, which analogize to Lochner v. New York, and briefly conclude that each characterization of the other side has some truth but that neither invocation of Lochner is convincing as an argument for one’s theory of state sovereign immunity.

First, Lochner is commonly understood to signify judicial activism in pursuit of a particular philosophy. In the context of state sovereign immunity, both sides compete to impose a particular political philosophy—either statism or cosmopolitanism. Thus, invoking Lochner as an accusation that one or the other side is trying to “impose a particular economic philosophy” scores equally on both sides of the debate and ends the justices’ comparisons in a wash.

Second, the dissenters’ description of the majority as “depriv[ing] Congress of necessary legislative flexibility,” makes no attempt to explain why legislative flexibility is “necessary” in this context, as it has been determined to be in the

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198 U.S. 45 (1905).
68 Id. at 691.
70 I explain elsewhere how these competing philosophies are relevant to discussions of sovereign immunity. See Justin Donoho, Minimalist Interpretation of the Jurisdictional Immunities Convention, 9 Chi. J. Intl. L. 661, 678–79 (2009).
71 Id. at 691.
72 Coll. Sav. Bank, 527 U.S. at 702 (Breyer, J., dissenting).
context of economic substantive due process but not in any case where the
Court finds it necessary to overrule legislative acts as unconstitutional. To
illustrate, *Lochner* and its progeny might also be understood to signify an evolving
conception of neutrality, understood in the context of economic substantive due
process as “preservation of the existing distribution of wealth and entitlements
under the baseline of the common law.”73 In the context of state sovereign
immunity, neutrality might instead refer to preservation of the existing
distribution of power among individuals, states, and the federal government,
again “under the baseline of the common law.” On one view, the distribution of
power has evolved in the modern era toward an emphasis on individual rights.74
On another, the distribution of power has evolved toward emphasizing state
sovereignty.75 A settled concept of neutrality in the context of state sovereign
immunity is nowhere to be found, and indeed opposite views of it continue to
polarize the Court on what is “necessary.”

Perhaps more can be said about *Lochner* and the evolution of the doctrine of
economic substantive due process, particularly as they relate to state sovereign
immunity. This Article leaves that task for another day and instead analogizes
below to two other doctrines of the Court’s jurisprudence that provide good
focal points for analyzing state sovereign immunity.

This section briefly summarized the arguments justices and commentators
have made for and against state sovereign immunity, including formalist
arguments, functional arguments, and an interpretive argument analyzing
coherence with *Lochner v. New York*. None of these arguments has been able to
resolve the debate over state sovereign immunity. With repeated bare majority
decisions in the Supreme Court, the debate needs to be resolved soon via reason
rather than a chance change in Court membership that could produce
undesirable effects. The next section posits a new argument to spur conversation
and keep the development of the doctrine from halting in its deadlocked tracks.

V. NEW ARGUMENTS

*The resolution of immunity questions inherently requires a balance between the evils
inevitable in any available alternative.*76

This section argues that a four-factor balancing test best coheres with the
institutional history of our legal system and moreover eliminates the instability
attending the Supreme Court’s current deadlock. The factors would be used to

76 Harlow v. Fitzgerald, 457 U.S. 800 (1982); see also Hans, 134 U.S. at 21 (assessing the “greater evils”
in the context of state sovereign immunity).
determine whether the balance of state and federal interests indicate that the particular type of cause of action should be allowed, and include (1) the potential for opening the door to a flood of frivolous litigation (I refer to this as the “federalism” factor); (2) the financial impact on the state (“financial impact”); (3) the fairness to the state in light of commerce-clause jurisprudence at the time of the Eleventh Amendment’s adoption (“fairness”); and (4) Congress’s clearly stated intent to abrogate state sovereign immunity (“public choice”).

This new theory of state sovereign immunity is provided here as a tentative conclusion based on new argumentation, which as posited above is required to resolve this deadlocked issue. In making this argument, this section seeks to make state sovereign immunity cohere with two other doctrines of American jurisprudence: the direct-taxation doctrine and the specific-jurisdiction doctrine. These doctrines provide an important subset of relevant case law, albeit a tiny one, and thus are provided merely as examples. Other doctrines not discussed in this Article may also assist the interpretive argument. The purpose of this section is to break the deadlock by taking an interpretive approach that the justices initiated by invoking *Lochner*, that is, by seeking a solution that best coheres with our legal system’s institutional history. The initiation of a deadlock-breaking interpretive approach, then, begins with the following arguments.

**A. COHERENCE WITH THE DIRECT-TAXATION DOCTRINE**

Neither the majority nor the dissenting justices’ competing theories of state sovereign immunity is consistent with the Court’s direct-taxation jurisprudence. Rather, this Article’s proposed balancing test is more consistent with that jurisprudence. The argument to support this conclusion proceeds in four sections. First, it gives background on the evolution of the direct-taxation doctrine. Second, it explains how the proposed balancing test makes explicit what the Court has been doing implicitly all along, as did the Court’s eventual overruling of the absolutist direct-taxation doctrine. Third, it argues that the proposed balancing test provides the flexibility required by the doctrine’s underlying evolving economic factors. The direct-taxation doctrine evolved for similar reasons, whereas the right to counsel, for example, provides a useful contrast. Finally, pragmatic reasons may have driven the Court to overrule the absolutist direct-taxation doctrine in favor of a functional balancing test. Similar reasons presage state sovereign immunity’s transition to a functional balancing test like the one this Article proposes.
1. Evolution of the Direct-Taxation Doctrine

Since Brown v. Maryland,77 “the Court has wound its way through a labyrinth of shifting, tortuous judicial interpretations and approaches concerning the extent to which the Commerce Clause limits state taxation of interstate and foreign commerce.”78 Before it had decided many state-taxation cases, for example, the Court held that states may enact regulations that are only “local and not national” in character, that is, that do not “admit only of one uniform system or plan of regulation.”79 In so doing, it achieved a compromise between Chief Justice Marshall’s and Chief Justice Taney’s competing approaches to the scope of the commerce power.80

Thus began an absolutist position on state taxation, whereby “interstate commerce cannot be taxed at all, even though the same amount of tax should be laid on [intrastate] commerce.”81 However, “the Court recognized from the outset that the Commerce Clause did not serve to invalidate all state taxation affecting interstate commerce.”82 Rather, in accordance with the direct-taxation doctrine, it would invalidate only “a direct tax on . . . interstate commerce,”83 whereas it would uphold a tax that was indirect, for example, in that it used gross receipts on interstate commerce, prorated for the local percentage of total railroad track, simply as a “means of ascertaining the value of the privilege conferred” on in-state property.84 This era of the direct-taxation doctrine, which the Court would later describe as “the old absolutism that proscribed all taxation formally levied upon interstate commerce,”85 generally fostered free trade and only a few taxes on interstate businesses, in the form of property taxes or taxes in lieu of property taxes.

Free trade began to give way to a wider view of the states’ power to tax interstate businesses, “perhaps out of a reluctance to thwart the states’ response” to the economic conditions of the Great Depression.86 The Court began to uphold taxes that were “reasonably designed to measure the state’s nexus with

77 23 U.S. 419 (1827).
80 Jerome R. Hellerstein and Walter Hellerstein, 1 State Taxation 4.06 (Revised 3d ed. 2007).
81 Robbins v. Shelby County, 120 U.S. 489, 497, 498–99 (1887) (invalidating a franchise tax on traveling salespeople without local property).
86 Hellerstein and Hellerstein, State and Local Taxation at 198 (cited in note 80).
the receipts, income, or property taxed, because interstate businesses were not to be relieved from shouldering “their just share of state tax burden.” State taxes were held invalid, however, if they risked multiple taxation from other states, or, in the Court’s current phraseology, were “internally inconsistent.”

Despite this development, the Court held to its formal, absolutist, free-trade approach regarding franchise taxes on businesses that were “exclusively interstate in character,” even on those businesses that owned in-state property. Seemingly incongruent with the expanded power of the state’s power to tax interstate businesses, the Court invalidated nondiscriminatory, fairly apportioned taxes merely because states verbally formulated them as franchise taxes rather than taxes in lieu of ad valorem property taxes. Yet the Court, after a change in membership, for the first time upheld a tax on an exclusively interstate business (that did not own in-state property) verbally formulated as a net income tax.

Just as Spector was incongruent with previous decisions, Northwestern States was incongruent with Spector. Both opinions prolonged the direct-taxation doctrine, with the various justices quibbling over which verbal formulations constituted direct versus indirect taxes. But Northwestern States marked the new ascendancy of state taxing powers and the repudiation of traditionally restrictive views of the Commerce Clause: tax receipts surged as states promptly reformulated their franchise taxes as direct net income taxes to avoid the barrier of Spector.

As the Court’s expansive view of state taxing powers became a practical reality, it confronted the logical inconsistency and by-then virtual irrelevance of Spector and explicitly overruled it by unanimous decision. In doing so, it rejected the formalistic direct-taxation doctrine perpetuated by Spector and codified a four-part balancing test that remains today. A state tax affecting interstate commerce is valid under the Commerce Clause if it applies to an activity with a substantial nexus to the state, is fairly apportioned, does not discriminate against interstate commerce, and is fairly related to state-provided services.

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87 Id. at 199.
92 Id. at 611 (Clark dissenting with two other justices).
93 Northwestern States Portland Cement Co. v. Minnesota, 358 U.S. 450 (1959). The three new members since Spector who swung the vote the other way in Northwestern States were William Brennan, Earl Warren, and John Marshall Harlan II.
94 Id. at 496 (Whitaker dissenting).
95 Hellerstein and Hellerstein, State and Local Taxation at 201–02 (cited in note 80).
97 Id. at 279.
Furthermore, the fair-apportionment requirement is satisfied if the tax is internally consistent, that is, does not risk multiple taxation from other states, and externally consistent, that is, reasonably reflects the in-state component of the interstate activity.\footnote{Goldberg v. Sweet, 488 U.S. 252, 261–65 (1989); Oklahoma v. Jefferson Lines, 514 U.S. 175, 184–96 (1995).}

2. Implicit Balancing Factors

Two puzzles about the direct-taxation doctrine are why the Court switched from absolutism to balancing and why it stayed with absolutism so long. One hypothesis is that the direct-taxation doctrine was never absolutist but rather discretionary balancing cloaked in absolutist garb until balancing factors could become apparent. The factors that compose the balancing test are not new and the Court recognized as much.\footnote{Complete Auto, 430 U.S. at 279 n 8.} For example, the Court had previously enunciated in clear terms the substantial nexus requirement in \textit{Northwestern States},\footnote{358 U.S. at 452.} the fair apportionment requirement in \textit{Central Greyhound},\footnote{334 U.S. at 663.} the nondiscrimination requirement as early as \textit{Cooley},\footnote{53 U.S. at 325–26 (Daniel concurring).} and the fair-relation requirement in \textit{Northwestern States}.\footnote{358 U.S. at 466 (Harlan concurring).} And long before enunciating the labels that would later form the balancing-test factors, the Court had considered the factors under different names.\footnote{See, e.g., the cases cited in id.} This hypothesis amounts to a recognition that the common law regarding constitutional limits on state taxation was so nascent that even the balancing factors had not yet crystallized.

The same may be true for the doctrine of state sovereign immunity, where absolutism tempered by myriad exceptions ends up achieving a balance.\footnote{Indeed, the Court has emphasized that its jurisprudence “illustrate[s] a careful balancing and accommodation of state interests” when determining the applicability of the doctrine’s formalistic exceptions. \textit{Coeur d’Alene}, 521 U.S. at 278.} Consider this evidence from state-sovereign-immunity cases that the proposed federalism, financial-impact, fairness, and public-choice factors have been presaged all along.

The federalism factor, which considers the potential for opening the door to a flood of frivolous litigation in federal courts, was part of the Court’s rationale in creating the largest exception of the doctrine in \textit{Ex Parte Young}. As the Court concluded that plaintiffs can sue state officials if not states themselves, it emphasized that this would not upset the balance of federalism, stating, “There is nothing in the case before us that ought properly to breed hostility to the
customary operation of Federal courts of justice in cases of this character.”

The court explicitly made federalism one of its main concerns in developing the current doctrine.

The Court has also developed the current doctrine with an eye toward the financial-impact factor, which considers the financial impact on the state. In *Hans v. Louisiana*, the first case to codify the current theory, the Court emphasized the importance of the “safety of the state” in coming to the conclusion that financial instruments were not enforceable against the state’s treasury.

The Court also has discussed the fairness factor, which considers the fairness to the state in light of commerce-claim jurisprudence at the time of the Eleventh Amendment’s adoption. In *Hans*, the Court clearly discussed the idea of fairness in light of original understanding when it hypothesized an Eleventh Amendment that more clearly codified the dissenting justices’ diversity theory, and then asked, “[C]an we imagine that it would have been adopted by the states?”

Finally, the public-choice factor is already firmly established in today’s doctrine. Cases like *Fitzpatrick* and *Katz* establish that Congress’s intent to override immunity is sometimes dispositive, and *Quern* establishes that Congress must establish its intent via a clear statement.

The Court’s foreshadowing of each of these factors, by itself, does not warrant adoption of the balancing test. But it shows that a test embracing factors the Court has emphasized in the past would cohere with its previous jurisprudence.

3. Flexibility

State sovereign immunity shares another similarity to the direct-taxation doctrine: the need to maintain flexibility to vary output. Consider again the direct-taxation doctrine. It evolved from its beginnings in a laissez-faire era to an era more aptly characterized by the welfare state. Social services boomed, thereby increasing the demand for state tax revenues from D1 to D2. At the same time, large-scale industry boomed and modern transportation and communication reduced the economic importance of state lines, thereby increasing the supply of taxable interstate commerce from S1 to S2. Therefore, in the absence of legislation from Congress, the Court was able to sustain an increasing quantity of state taxes on interstate commerce without significantly increasing the price or burden of those taxes. See Figure 1:

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106 209 U.S. at 168.
107 134 U.S. at 21.
108 134 U.S. at 16.
It is no surprise, then, that “the history of state . . . taxation has been largely a story of growth, both in the magnitude of the revenues collected and in the variety of taxes imposed.” On this view, the direct-taxation doctrine developed flexible balancing factors, instead of crystallized rules, precisely to deal with this growth.

The history of state sovereign immunity is not a story of growth but one of volatility. Absolute immunity began to erode, beginning generally with *Ex Parte Young* in 1908 and occurring again, for example, with *Union Gas* in 1989 and *Katz* in 2006. But the general reduction reversed course, beginning in the 1970s with cases like *Employees v. Department of Public Welfare* and culminating with major expansions of state sovereign immunity in the 1990s, namely *Florida Seminole* and *Alden*. Indeed, a curve showing over time the number of types of cases that would leave plaintiffs remediless via state sovereign immunity might look like a rollercoaster. If the flexibility of a balancing test is needed to provide growth, it is needed even more to deal with volatility. The alternative is today’s patchwork over which no recent Court can achieve consensus.

Professor Jeffries suggests that current doctrine is not volatile but stable, essentially providing “a liability regime based on fault.” But plaintiffs are often left remediless even upon proof of fault by state officers. And even if Professor Jeffries is right, that plaintiffs have remedies in most cases, the doctrine is nevertheless volatile. To illustrate, consider the underlying economic factors of state sovereign immunity. The marginal societal benefits from immunity may decline from MB1 to MB2, for example, as the ratio of state to non-state jobs for disabled people increases. This is because if disabled people become more likely to work for state governments, then they will find increased

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109 Hellerstein and Hellerstein, 1 State Taxation at i (cited in note 82).
111 See notes 55–56 and accompanying text.
112 I describe the economic factors underlying state sovereign immunity in terms of marginal costs and benefits, rather than in terms of supply and demand as in the previous example, because the state has a monopoly on supplying its immunity. Only the state can be immune. Cf. Richard A. Posner, *Economic Analysis of Law* 273–78 (illustrating monopolists’ output in terms of marginal revenue and marginal cost).
benefits if state governments have no immunity from suits alleging discrimination. But the marginal benefits of immunity may increase from MB1 to MB3, for example, as suits of a given type threaten to bankrupt a state. Indeed, the marginal benefits of immunity are highly dependent on the type of case being brought. Thus the quantity of immunity supplied remains volatile for a given marginal cost MC. See Figure 2:

![Figure 2: Variable Benefits of State Sovereign Immunity](image)

To accommodate the varying underlying cost-benefit calculation, a regime of rigid rules likely will continue to develop myriad exceptions, as we see in the current doctrine today. Moreover, it will likely remain contentious, because the justices remain tied to formalistic arguments without considering underlying economics. By contrast, a balancing test that explicitly adopts cost-benefit-related factors retains the flexibility to accommodate economic concerns.

This is not to say that only balancing tests are generally appropriate to accommodate economic concerns. Rather, balancing tests are appropriate when output of the doctrine is subject to change, whereas rule-like regimes are appropriate when output is stable. Consider the right to counsel. By contrast to the direct taxation doctrine, the historical growth of the right to counsel has plateaued. This may be because the supply of criminal defense counsel per criminal defendant has declined or at best stayed the same, thus making costly, in the amount of P2 minus P1, further expansion of the right to counsel from Q1 to Q2. See Figure 3:

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Unlike the direct taxation doctrine, with which the Court struggled to maintain consistency while aiming at a moving target of growing taxes, the realities of cost have caused the right to counsel to reach equilibrium in quantity. With a stable target, the Court has been able to take aim by crystallizing precise rules that balance the needs of defendants with defense-attorney and judicial resources. What have emerged are many precise rules on when the right to counsel attaches, the *Gideon* rule that makes these rules applicable to state and federal defendants alike, and judicial discretion to appoint counsel—using balancing factors in the remaining classes of cases.

It is a familiar aspect of the common law that when judges “are called upon to say how far existing rules are to be extended or restricted, they must let the welfare of society fix the path, its direction, and its distance.” But society’s welfare—including its right to sue states, tax burden, and right to counsel—is often dictated by economic realities. Unlike the right to counsel, we cannot say that state sovereign immunity has plateaued due to economic forces, thus enabling us to crystallize rigid rules around a stable target. Rather, like the direct-taxation doctrine, the target is moving, and we need flexible balancing-factors to accommodate the move until underlying economic forces halt the volatility and enable rule crystallization.

The variable underlying economic factors of state sovereign immunity do not by themselves warrant adoption of the proposed balancing test. But they suggest the usefulness of the federalism, financial-impact, and public-choice factors, which all implicate costs and benefits to the public.

4. Functionalism and Minimalism

Finally, state sovereign immunity also shares with the direct-taxation doctrine the need to move minimally toward a functional solution. Consider once more the direct-taxation doctrine, which provided a grab bag of malleable

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115 Benjamin N. Cardozo, *The Nature of the Judicial Process* 66–67 (1921). See also, e.g., *Cooley*, 53 U.S. at 321 (exploring the “practical consequences” of the Court’s decision); *Robbins*, 120 U.S. at 497 (urging that the Court’s holding “will not . . . diminish resources”).
rules from which either side could choose. Without a functional test that asks why to uphold or overturn state taxes on interstate commerce, the justices enjoyed unlimited discretion when encountering hard cases under the formalistic direct-indirect distinction. Today’s balancing test, although it may provide the same open-ended discretion, at least increases transparency by forcing judges to explain the real reasons for their opinions rather than molding an elastic formal test to reasons that remain unspoken. A functional test thus increases transparency in courts’ calculations so as to foster empirical data gathering which could lead to eventual enumeration of additional precise rules.\textsuperscript{116}

The formalistic direct-indirect distinction compares to state sovereign immunity’s various formalistic exceptions, including the prospective-retrospective distinction, the line-drawing problem between participation and acceptance of a gratuity for purposes of finding consent and waiver, and the problem of determining whether Congress has abrogated pursuant to the Fourteenth Amendment. Adopting a functional balancing test would achieve the same transparency as the Court’s disposal of the direct-taxation doctrine in favor of the current balancing test.

The Court’s overruling of the direct-taxation doctrine in \textit{Complete Auto} drastically changed the test to be applied. But since the new test’s balancing factors had been in implicit all along in the court’s old reasoning,\textsuperscript{117} the new test had minimal impact on court outcomes. Indeed, state taxation of interstate commerce continued to grow. Similarly, a new balancing test for state sovereign immunity may continue to be applied along the same polarized lines, with little change in substantive outcome. This lack of a significant change in outcome has the benefit of taking minimal steps toward whatever each justice’s ultimate goal might be, whether total statism, total cosmopolitanism, or somewhere in between.\textsuperscript{118} But at the same time, the new balancing test would provide a functional framework that would require judges to think about and explain why they grant immunity. This minimal step via a functional framework allowed for a more rational discourse than the direct-taxation doctrine and it could do the same for today’s doctrine of state sovereign immunity.

\textsuperscript{116} For an Article that looks to past jurisprudence under the revamped direct-taxation doctrine’s balancing test, in order to codify a simpler, more rule-like test, see Jesse H. Choper and Chung Yin, \textit{State Taxation and the Dormant Commerce Clause: The Object Measure Approach}, 1998 Sup. Ct. Rev. 193 (1998).

\textsuperscript{117} See Section IV.A.2 above.

B. COHERENCE WITH THE SPECIFIC-JURISDICTION DOCTRINE

The other doctrine that provides lessons for thinking about state sovereign immunity is the specific-jurisdiction doctrine. This doctrine’s jurisprudence is more consistent with this Article’s proposed balancing test than are the justices’ competing theories of state sovereign immunity. The argument to support this conclusion proceeds in three sections and takes a somewhat different approach than the prior discussion of the direct-taxation doctrine. First, this section describes the current state of the specific-jurisdiction doctrine and defends it as economically ideal contrary to various author’s claims. Second, it explains how the ideal of fairness found in the doctrine of specific jurisdiction supports the proposed balancing test. Finally, it finds the proposed balancing test similar to the specific-jurisdiction doctrine in terms of efficiency.

1. Economic Analysis of Specific Jurisdiction

Various authors would change the current American doctrine of specific jurisdiction as it applies domestically. To evaluate their claims, this section eschews philosophical analysis because no one has yet shined any “light on the foundations of jurisdiction”[119] except to say that “the foundation of jurisdiction is physical power.”[120] This section declines to provide moral justifications for physical power and instead uses economic analysis to evaluate doctrines by which courts fashion it in the form of specific jurisdiction.

In a nutshell, American courts[121] may exercise specific jurisdiction over an American defendant who (1) has purposefully availed himself of the forum state’s benefits and protections by establishing “minimum contacts,”[122] (2) has availed himself by streaming commerce into the forum state,[123] or (3) has focused effects in the forum state;[124] unless exercising jurisdiction would be “unreasonable or unfair,” an inquiry that analyzes the burden to the defendant, interests of the forum state, interest of the plaintiff, interest of the interstate judicial system in efficiency, and shared interest of the several states in furthering fundamental substantive social policies.[125]

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[120] *McDonald v Mabee*, 243 US 90, 91 (1917) (Holmes).
[121] State courts and federal district courts sitting in diversity in states with long-arm statutes empowering these courts to exercise jurisdiction over out-of-state defendants to the fullest extent permitted by the Fourteenth Amendment.
One might call this multifaceted test of today a “vertical approach” because it emphasizes “the relationship between a state and an individual over whom it exercises power.” Professor Spencer advocates for a vertical approach but also couples it with interest analysis. He impresses the forum state’s interests rather than treating them as merely one of Asahi’s five escape-hatch factors. He would have courts exercise specific jurisdiction “so long as the defendant has been given proper notice of the action and the state has a legitimate interest in the dispute,” with the measure of legitimacy limited only by the “limits of the state’s police power.” One problem with this approach is that it seems to employ circular reasoning. Spencer would define a court’s power with power. A more economic problem is that a state could simply declare its legitimate interest in being “a justice-administering state,” thus allowing jurisdiction in any state over any dispute. This extreme may exaggerate Spencer’s purpose but Spencer indeed aims for “an expansion of the jurisdictional reach of states beyond what the Court currently embraces.” His solution “gives the plaintiff a potentially very large choice of states to sue in” and is inefficient not necessarily because it enables forum shopping but rather because it excessively deters economic activity. “The fact that burden and inconvenience are concepts that are increasingly meaningless in modern times,” as Spencer put it, does not erase the existence of burden and inconvenience, whose increasingly meaningful effects under Spencer’s approach would be to deter businesses from operating in certain areas or industries or to deter them from forming altogether. Furthermore, any benefits Spencer’s solution might achieve in reducing “fact-specific” litigation over personal jurisdiction issues could be overshadowed by increased personal-jurisdiction litigation regarding the proper basis for police power. See the “rich and extensive body of jurisprudence regarding legitimate state interests and the scope of state police power,” which will continue to

127 Id. at 297–98.
129 Id. at 650–51.
131 Spencer, 73 U. Chi. L. Rev. at 661 (“A state has no legitimate interest in a dispute between nonresidents over injury inflicted and sustained elsewhere, unless they have consented to jurisdiction in the state.”).
132 Spencer, 73 U. Chi. L. Rev. at 669–70.
134 Spencer, 73 U. Chi. L. Rev. at 632.
135 Id. at 670.
136 Id. at 660.
extend and would perhaps raise a firestorm of litigation as it becomes newly applied to a new area of law.

Professor Stein abandons vertical approaches for a horizontal approach, in which “[t]he central issue is how assertion of jurisdiction would affect the authority of other concerned states.” Stein’s horizontal approach is also coupled with interest analysis, which strives for “regulatory precision” as a measure of legitimacy rather than for “legitimacy” per se as in Spencer’s vertical perspective. One cost of this approach is that achieving regulatory precision would increase the fact-specific litigation in the personal-jurisdiction phase of a dispute that Spencer postulates is already too costly. Another is that the approach would in fact result in imprecision, with business-deterrent externalities that would dwarf any benefits of eradicating other “unacceptable externalities” of the kind already eradicated by *World-Wide Volkswagen.* State interest analysis of the horizontal type is notorious in other contexts for producing wildly nonuniform and unpredictable results, not precision, especially in true-conflict situations or unprovided-for cases. Regulatory imprecision is further extended when elected state judges manipulate non-functional balancing tests to satisfy their constituents. The upshot is hardly the advancement of “an ex ante regulatory interest.”

Professor Citron also takes a horizontal interest-analysis-based approach and similarly fails to grapple with the imprecision such an approach implicates. Moreover, she renounces even the appearance of benefits by striving not for regulatory precision but for “reasonableness.” Citron’s reasonableness test not only contrasts with Stein’s regulatory-precision test thus belying the myriad nonuniform ways in which a court could practice governmental interest analysis, but also demonstrates intrinsic nonuniformity on its face.

Existing specific-jurisdiction doctrine, then, is ideal in several respects. First, it maximizes commercial productivity by achieving a balance between the competing costs of “extensive satellite litigation over what should be an


138 Stein, 98 Nw. U. L. Rev. at 412.

139 Spencer, 73 U. Chi. L. Rev. at 660.

140 Stein, 98 Nw. U. L. Rev. at 419.

141 See note 64.

142 Stein, 98 Nw. U. L. Rev. at 416.

uncomplicated preliminary issue” on the one hand, and an excessive number of foreign forums into which a defendant can be haled on the other.

Second, existing doctrine’s satellite litigation is small cause for concern. Courts require litigation in other prehearing scenarios of much more extensively factual issues that typically require expert economic testimony. Even so, the Federal Rules of Civil Procedure provide judges ample discretion to circumscribe the extent of discovery and of a hearing to determine preliminary issues. In any event, faced with more striking sources of inefficiency in the courtroom, satellite litigation over personal jurisdiction seems minor.

Third, existing doctrine provides clarity while retaining flexibility only where needed. Perhaps an independent, prestigious, authoritative agency could centrally prioritize all governmental regulation in accordance with comprehensive cost-benefit analysis, from which Congress could craft a more efficient or regulatively precise federalism including detailed jurisdictional rules. But absent this utopia, the ideal set of rules would at least be subject to less manipulation than a governmental interest-analysis or state-sovereignty-based standard. “Purposefulness,” “availment,” and “effects,” for example, are less subject to reasonable disagreement than “legitimate state interest” once some of the facts are in. Furthermore, productivity is encouraged ex ante when “the defendant cannot complain too bitterly if forced as a quid pro quo to defend himself in a forum that is not ideal from his standpoint.” When a defendant sees submission to a court’s jurisdiction as a quid pro quo, as opposed to a surprise that he cannot reasonably anticipate, he is undeterred from engaging in beneficial economic activity because he sees submission to the court as a fair and inevitable exchange. Purposeful availment provides this quid pro quo or subjective fairness, as do purpose, knowledge, or the extreme natures of a defendant’s stream of commerce, or of effects produced from the defendant’s harmful activities. Even when these conditions are satisfied, existing jurisprudence recognizes that in some situations jurisdiction may seem unfair. Here is where the flexibility of interest analysis is provided, as an exit strategy

144 Spencer, 73 U. Chi. L. Rev. at 617; see note 135 and accompanying text.
145 See note 133 and accompanying text.
146 For example, courts may require plaintiffs to establish loss causation in securities fraud cases at the class certification stage by a preponderance of the evidence after “some empirically-based showing.” Oscar Private Equity Investments v. Allegiance Telecom, Inc., 487 F.3d 261, 271 (5th Cir. 2007).
147 For a discussion on how to improve courtroom efficiency, see Posner, Economic Analysis of Law at 563–64 (cited in note 112).
149 Posner, Economic Analysis of Law at 675.
150 See note 123.
151 See Stein, 98 Nw. U. L. Rev. at 423–34 (describing how Calder may be construed much like Asahi, in that the question is left open as to whether purposefulness or knowledge of effects controls).
not as the game plan, for only in patently obvious situations should this be employed. Indeed, in *Asahi*, the “first (and only)” Supreme Court case to dismiss jurisdiction under the exit strategy,\(^{152}\) most if not all of the various flavors of interest analysis would have found jurisdiction unwarranted, even those vertical approaches that seek to expand jurisdiction.\(^{153}\) Although the same dismissal could be effected through forum non conveniens or venue mechanisms, constitutionalization solidifies the process and prevents judicial overreaching ex ante, thus assuring defendants and again encouraging productivity.

Finally, there is something to be said for the power of stare decisis with respect to a doctrine, unlike state sovereign immunity, which is stable. Despite the twists and turns of historical jurisprudence in this area\(^ {154}\) from which the authors seek to cherry-pick en route to their pet doctrines, and despite unsupported assertions that “as a constitutional doctrine whose contours remain imprecise, the law of personal jurisdiction has generated confusion and unpredictability,”\(^ {155}\) the law as it has come to rest today is precise, established, and different from the changes they propose. Yet “ready overruling of constitutional cases . . . reduces the stability of governmental institutions, denying the polity the benefit . . . of continuity.”\(^ {156}\)

2. Fairness

The doctrines of specific jurisdiction and state sovereign immunity both concern jurisdiction to adjudicate. As President of the International Court of Justice once noted about immunity in the related context of foreign sovereigns, “[T]his is really a question of jurisdiction, not of immunity.”\(^ {157}\) Indeed, both doctrines concern whether the plaintiff has the power to hale the defendant into court. Thus in the context of state sovereign immunity, just as in the specific-jurisdiction context, “fairness” as a measure of the doctrine’s worth will be treated as fairness to the defendant.

The economic analysis of specific jurisdiction above, finding the doctrine ideal, hinged on Judge Posner’s recognition that “the defendant cannot complain too bitterly if forced as a quid pro quo to defend himself in a forum that is not ideal from his standpoint.”\(^ {158}\) The discussion noted that the specific-jurisdiction

\(^{152}\) Id. at 427.

\(^{153}\) Spencer, 73 U. Chi. L. Rev. at 666–67.


\(^{155}\) Spencer, 73 U. Chi. L. Rev. at 617.


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doctrine is fair because “the defendant cannot complain too bitterly” in this context, when he purposely avails himself of the forum state, streams an extreme amount of commerce into the forum state, or produces harmful effects in the forum state.

In the context of state sovereign immunity, the defendant state cannot complain too bitterly if the action brought against it was permissible under the Commerce Clause, for example, when states agreed ratified the Eleventh Amendment. Indeed, codification of this factor in the proposed balancing test strikes a compromise between the dissenting justices’ total abandonment of immunity in federal-question suits and the majority justices’ insistence on incoherent formalism. If on the one hand, as the dissenting justices hold, the Eleventh Amendment represents a bar only on diversity suits, then the Eleventh Amendment is irrelevant to the analysis in federal-question suits. On this view, which the dissenters hold, states should never be immune from federal-question suits, regardless of any historical Commerce-Clause analysis. But surely this is too extreme. Adopting the dissenting justices’ theory would be an enormous change that could produce unexpected results if implemented immediately. Moreover, it ignores longstanding deference to state sovereignty as a counterpart to the Commerce Clause’s erosion of state power.

If on the other hand, as the majority holds, the Eleventh Amendment represents a broader principle of state sovereign immunity that includes immunity for federal-question suits, then we may think of the states that ratified the Eleventh Amendment as agreeing to sovereign immunity at a time when Congress had little power under the Commerce Clause. On this view, had the states envisioned Congress’ expanded commerce powers, they would have drafted an Eleventh Amendment whose text more clearly abrogated the dissenting justices’ position. Indeed, the states may well have explicitly engrained state sovereign immunity as a constitutional principle in all federal-question suits. But this also is too extreme. In fact today’s doctrine allows plaintiffs to seek remedies in some federal-question suits against states by suing state officials with indemnity agreements under *Ex parte Young*. Just because since *Ex parte Young*, the majority justices have wished to reverse course and expand state sovereign immunity—because, as Professor Epstein puts it, “[t]he system of dual sovereignty, which was the key to getting the Union off the ground, was undone by piling on the overriding of sovereign immunity atop the once unimagined scope of the Commerce Clause”159—does not render fair to states the expansion of state sovereign immunity by complicating further an already formalistic and incoherent doctrine. The proposed balancing test would simplify the doctrine and at the same time render explicit, through the fairness factor, what according to Professor Epstein may have been motivating the justices all

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along. Likewise, the financial-impact factor also accounts for fairness to state defendants, and ensures that “the defendant cannot complaint too bitterly” if the defendant is haled into court.

More generally, it is unfair to states to wonder if suddenly they will be facing a hoard of lawsuits should one of the majority justices become prematurely incapacitated during the Obama administration and presumably replaced by a liberal justice who would embrace the dissenters’ theory. Before that happens, it would be fairer to everyone—including the states—to simplify the doctrine by making it functional, thus enabling a more coherent doctrine within which the existing justices may more quickly achieve consensus by stating why rather than how they grant immunity. One way to do that is to employ a functional balancing test.

3. Efficiency

The economic analysis of specific jurisdiction also shows that a defendant who cannot complain too bitterly is undeterred from engaging in beneficial economic activity because he sees submission to the court as a fair and inevitable exchange. Thus efficiency in the specific-jurisdiction context equates with fairness.

But in the context of state sovereign immunity, efficiency equates with whatever doctrine we think will promote the most efficient government. As Professor Kaplow, explains, in crafting a transition policy from one legal regime to another, one should “consider when government policy is indeed optimal, how in particular it deviates from optimality when it is not, and how in turn transition policy would affect the choice of underlying substantive policies.”

On one view, the most efficient government is the smallest government. In this case a doctrine that eliminated state sovereign immunity would also eliminate the subsidized advantage that state governments enjoy over non-state actors, thus minimizing government, all else being equal including Commerce-Clause jurisprudence. On another view, the most efficient government is the one that prioritizes all government regulation in accordance with comprehensive cost-benefit analysis. In this case state sovereign immunity would always be appropriate because government by definition could do no wrong unfixable via self-regulation, in which case allowing litigation to proceed against governments would waste judicial resources. Between these utopias the justices must compromise. The functional balancing test will improve transparency of judicial decisionmaking over the existing formalistic doctrine, even if judicial outcomes

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160 Kaplow, 13 J. Contemp. Legal Issues at 190 (cited in note 34).
161 Id. at 1807.
162 See Breyer, Breaking the Vicious Circle at 59–72 (cited in note148).
remain the same. This alone will improve efficiency of judicial decisionmaking. The proposed test also may break the deadlock over state sovereign immunity, and thus enhance certainty and predictability for states wondering which direction the deadlock will turn when it inevitably breaks. In any event, we need new arguments to break the deadlock, because efficiency is enhanced by reducing the risk to states, as described above, of facing a hoard of lawsuits should the composition of the bare-majority flip-flop. Regardless of whether this Article’s proposed balancing test is the proper starting point for analysis, the time is now to make new arguments.

VI. Conclusion

This Article explained the nature of the Court’s deadlock over state sovereign immunity and argued that pragmatism requires breaking it soon. It described how justices and legal scholars have approached this deadlocked issue and argued that these approaches ultimately are unpersuasive for either side of the debate, thus necessitating new arguments. Finally it adopted a method the justices began in recent state-sovereign-immunity cases when they invoked *Lochner* by developing new arguments from analogies to the direct-taxation and specific-jurisdiction doctrines. In doing so, this Article concluded that state sovereign immunity best coheres with our system of American jurisprudence and best resolves the unpredictable possibility of a radical imposition on states due to a chance change in court membership by a transition from its current formalist approach to one that employs the functional test this Article introduced.

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