

## THE ELEVENTH AMENDMENT AND FEDERAL DISCOVERY: A NEW THREAT TO CIVIL RIGHTS LITIGATION

*Jennifer Lynch*\*

### Abstract

Lawyers for the State of California have argued recently in several federal civil rights cases that the state sovereign immunity doctrine bars all discovery issued to the state, its agencies, and its employees. While courts agree that sovereign immunity generally protects states from suit in federal court and that this immunity does not extend to state employees, it is unclear whether state sovereign immunity should apply at all to federal discovery, especially when discovery is a necessary part of a lawsuit against a state employee.

This Article is the first to analyze states' attempts to expand the sovereign immunity doctrine to block discovery in federal court. Few courts have yet addressed this issue. However, based on the Supreme Court's expansion of sovereign immunity and contraction of civil rights protections in the last few decades, it should prove a fertile area for analysis in the years to come.

This Article focuses on the states' use of this defense in prisoners' rights cases because the defense will likely have the broadest application in that context. State prisoners filed over 18,000 civil rights cases against state employees in the federal district courts between March 2007 and March 2008, and the yearly caseload continues to increase. Prisoners almost always represent themselves in civil rights cases, have little access to evidence, and are unlikely to be able to navigate the nuances of an Eleventh Amendment argument. For these reasons, they could suffer the worst. Yet, this issue is not limited to prisoners' rights cases. The state could raise this defense in any case in which a party seeks evidence from the state—whether the case itself is brought against a state employee or not.

In this Article, I compare tribal and federal sovereign immunity case law within the state sovereign immunity context. I then analyze three main rationales supporting state sovereign immunity. I argue there is an implied exception to the state sovereign immunity doctrine limiting its application to lawsuits rather than ancillary federal court processes such as discovery. I therefore conclude the states' sovereign immunity defense to discovery lacks foundation in either law or policy.

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\* Lecturer & Supervising Attorney, Samuelson Law, Technology & Public Policy Clinic, University of California, Berkeley, School of Law. I am grateful to Ty Alper, William Fernholz, and Aaron Burnstein for their comments and suggestions. This Article and my interest in this subject arose out of court briefs I wrote while representing several female prisoners pro bono in three civil rights lawsuits against prison officials employed by the State of California.

I. INTRODUCTION .....	205
II. OVERVIEW OF THE PROBLEM AND FOUR KEY CASES .....	207
A. Estate of Gonzalez v. Hickman .....	210
B. <i>Three Eastern District Prison Cases Succeeding         Gonzalez</i> .....	212
III. THE ELEVENTH AMENDMENT AND STATE SOVEREIGN IMMUNITY .....	214
A. <i>History and Ratification of the Eleventh         Amendment</i> .....	214
B. <i>Subsequent Case Law Extending the Eleventh         Amendment's Reach</i> .....	216
C. <i>Three Rationales for Why State Sovereign         Immunity is Broader than the Text of the         Eleventh Amendment</i> .....	217
D. <i>Sovereign Immunity is Not Unlimited</i> .....	221
1. Three Established Checks on State Sovereign Immunity .....	222
a. Sovereign Immunity Does Not Apply to Most Suits Against State Officers and Employees .....	222
b. Congress May Abrogate State Sovereign Immunity by Creating a Private Right of Action Against the States .....	224
c. States May Waive Their Immunity .....	225
2. A New Fourth Check: Sovereign Immunity Does Not Apply to Proceedings That Are Ancillary or Subordinate to the Main Suit.....	227
IV. TRIBAL AND FEDERAL SOVEREIGN IMMUNITY AND THEIR PARALLELS TO STATE SOVEREIGN IMMUNITY .....	231
A. <i>Tribal Sovereign Immunity</i> .....	232
B. <i>Federal Sovereign Immunity</i> .....	235
V. SOVEREIGN IMMUNITY AND FEDERAL DISCOVERY .....	236
A. <i>Sovereign Immunity and the Problem of         "Possession, Custody, or Control" in Two of the         Eastern District Prison Cases</i> .....	236
B. <i>The State Sovereign Immunity Defense Applied to         Discovery Requests</i> .....	241
C. <i>Tribal Sovereign Immunity and Discovery</i> .....	242
D. <i>Federal Sovereign Immunity and Discovery</i> .....	246

VI. APPLYING LESSONS LEARNED FROM THE TRIBAL AND FEDERAL IMMUNITY CASES AND THE THREE RATIONALES TO THE PROBLEM OF STATE SOVEREIGN IMMUNITY AND FEDERAL DISCOVERY .....	250
A. <i>Federal Sovereign Immunity Case Law from the Ninth and District of Columbia Circuits Is Most Persuasive in the State Sovereign Immunity Context</i> .....	250
B. <i>Two of the Three Rationales for State Sovereign Immunity Suggest it Does Not Apply to Subpoenas</i> .....	253
VII. CONCLUSION.....	256

## I. INTRODUCTION

In 2005, California state correctional officer, Manuel Gonzalez, was stabbed and killed by an inmate at the prison where he worked.<sup>1</sup> The inmate who killed him had a long history of violence against prison staff and other inmates and had been housed in a single cell in maximum security in one of California's highest security prisons.<sup>2</sup> He was admitted to the prison where Officer Gonzalez worked after being convicted of the attempted murder of a police officer and sentenced to seventy-five years.<sup>3</sup> Despite this history, prison authorities placed the inmate in the general population under the supervision of correctional officers like Officer Gonzalez, who were not issued protective vests.<sup>4</sup> Several months after the inmate arrived at the prison, Officer Gonzalez took the inmate out of his cell under the mistaken assumption that the inmate was influential among his peers and could ease racial tensions at the prison.<sup>5</sup> Instead, the inmate turned on him and stabbed him.<sup>6</sup> Officer Gonzalez died of his injuries shortly thereafter.<sup>7</sup>

After Officer Gonzalez' death, his relatives sued the prison warden and various other California state correctional employees and officials under 42 U.S.C. § 1983<sup>8</sup> for violating Officer Gonzalez' civil rights by improperly classifying the inmate and thus failing to protect Gonzalez

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1. Estate of Gonzales v. Hickman, No. ED CV 05-660 MMM (RCx), 2007 WL 3237727, at \*2 (C.D. Cal. May 30, 2007).

2. *Id.* at \*13-18. The decedent's last name is spelled variously by the courts and by his attorney as "Gonzales" or "Gonzalez." The majority of the opinions in this case use the spelling "Gonzalez," so I will use this spelling throughout this Article.

3. *Id.*

4. *Id.*

5. *Id.* at \*10.

6. *Id.* at \*2.

7. *Id.*

8. 42 U.S.C. § 1983 (2006).

from harm.<sup>9</sup> However, when the relatives tried to use a routine civil discovery request to obtain evidence from the state to show that the state defendants knew the inmate was a high security risk, the state refused to turn over documents. The state argued the Eleventh Amendment and the doctrine of state sovereign immunity protected it, its agencies, and its employees from all federal court discovery.<sup>10</sup> A federal district court agreed and denied the discovery request, preventing the plaintiffs from obtaining any evidence in the state's possession that would help them prove their case.<sup>11</sup>

California has since been using the *Gonzalez* opinion as a shield to try to block discovery requests in several unrelated civil rights lawsuits brought by state prisoners. The state's goal seems to be to convince federal judges that civil rights plaintiffs may not obtain discovery from any sources affiliated with the state—whether those are nonparty agencies or employees, or even the individual state employee defendants themselves. While it is settled that states generally enjoy immunity from suit in federal court,<sup>12</sup> state employees do not.<sup>13</sup> And it is not clear state sovereign immunity extends to federal discovery processes, especially when discovery is a necessary part of a lawsuit against a state employee to whom that immunity does not apply.

There are very few published opinions on the issue of state sovereign immunity and federal discovery. Only one case in any of the courts of appeals has addressed the issue,<sup>14</sup> but that case relies on questionable precedent<sup>15</sup> and has not been cited for the same proposition by any other court even though it is more than ten years old. No court other than *Gonzalez* has yet, on record, agreed with the state's position. However, one case with a favorable ruling for the civil rights plaintiffs is currently on appeal to the Ninth Circuit on this issue.<sup>16</sup>

This Article explores the state's argument that sovereign immunity

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9. *Estate of Gonzales*, 2007 WL 3237727, at \*1.

10. *Id.* at \*1.

11. *Estate of Gonzalez v. Hickman*, 466 F. Supp. 2d 1226 (E.D. Cal. 2006).

12. States may be sued in federal court in two situations: if they have explicitly waived their immunity, *see infra* Part III.D.1.c; *see, e.g.*, *Alden v. Maine*, 527 U.S. 706, 737 (1999), or if Congress, acting through its Amendment XIV, § 5 powers, abrogates state sovereign immunity, *see, e.g.*, *United States v. Georgia*, 546 U.S. 151, 158 (2006).

13. *See e.g.*, *Ex parte Young*, 209 U.S. 123, 159–60 (1908) (finding suits against state officers sued in their official capacities for injunctive relief are constitutionally cognizable); *Scheuer v. Rhodes*, 416 U.S. 232, 238 (1974) (finding suits against state officers sued in their individual capacities for damages do not invoke the protections of the Eleventh Amendment).

14. *In re Mo. Dep't of Natural Res.*, 105 F.3d 434, 435–46 (8th Cir. 1997).

15. *See infra* Part V.B.

16. Notice of Appeal, *Allen v. Woodford*, No. 05-1104 (E.D. Cal. Apr. 23, 2008); *Allen v. Woodford*, No. 08-16118 (9th Cir.). The Ninth Circuit, after hearing oral argument on October 7, 2009, deferred submission pending a proposed settlement by the parties. *See Order of USCA as to 228 Notice of Appeal, Allen v. Woodford*, No. 05-1104, (E.D. Cal Oct. 9, 2009).

protects it, its agencies and its employees from discovery in federal court and explores the possible ramifications of that argument on civil rights cases.<sup>17</sup> In Part II, I provide an overview of the state sovereign immunity problem and introduce four key cases in which it arose. In Part III, I discuss the Eleventh Amendment and the doctrine of state sovereign immunity and present and distill three rationales courts use to support the broad reach of the doctrine. In Part III, I also present a new implied exception to the sovereign immunity doctrine: that sovereign immunity is limited to lawsuits and similar adversarial proceedings and does not apply to ancillary processes of the federal courts such as discovery. In Part IV, I discuss parallels and distinctions between state sovereign immunity and the immunity of other sovereigns, including the federal and tribal governments. And in Part V, I explore the application of the various sovereign immunity principles to discovery processes, comparing the analysis in *Estate of Gonzalez* with key cases discussing the intersection of discovery and federal and tribal sovereign immunity.

I conclude in Part VII that the state's argument is incorrect legally because neither the text of the Eleventh Amendment nor subsequent Supreme Court jurisprudence suggests that state sovereign immunity extends beyond the scope of lawsuits or other adversarial proceedings to apply to the ancillary or incidental processes of a federal court such as discovery. In addition, I conclude that the state's position is incorrect from a policy perspective because it has the potential to undermine the entire field of civil rights litigation against state employees: If a civil rights plaintiff cannot obtain evidence in her case, she cannot prove her claims and therefore cannot pursue the case at all.

## II. OVERVIEW OF THE PROBLEM AND FOUR KEY CASES

The case law and scholarship on state sovereign immunity is so complicated and convoluted that its discussion is generally limited to constitutional law scholars and Supreme Court justices.<sup>18</sup> Yet lawyers

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17. Although this Article focuses on civil rights cases and specifically on several cases litigated in California, this issue affects cases outside of both the civil rights context and California. Any state could raise this defense in any federal civil case in which a party seeks to obtain discovery from the state, its agencies, or its employees. *See, e.g.*, *Arista Records LLC v. Does* 1-14, No. 7:08cv00205, 2008 WL 5350246, at \*3 (W.D. Va. Dec. 22, 2008) (addressing same issue in copyright lawsuit where subpoenas were issued to Virginia Tech); *Jackson v. AFSCME Local 196*, No. 3:07CV0471 (JHC), 2008 WL 1848900, at \*1-3 (D. Conn. Apr. 25, 2008) (addressing same issue as to labor relations).

18. Judge William A. Fletcher on the Ninth Circuit Court of Appeals once described the Eleventh Amendment as "one of the Constitution's most baffling provisions." William A. Fletcher, *A Historical Interpretation of the Eleventh Amendment: A Narrow Construction of an Affirmative Grant of Jurisdiction Rather than a Prohibition Against Jurisdiction*, 35 STAN. L. REV. 1033, 1033 (1983).

for the State of California (and perhaps other states)<sup>19</sup> are now arguing this doctrine should be used to bar discovery in civil rights actions brought against state employees. This argument is problematic from a legal standpoint for many reasons, which this Article will discuss in detail. However, this argument is also problematic from a public policy standpoint for two main reasons. First, if a state, its agencies, or its employees could block discovery with a sovereign immunity defense, it would undermine well-settled Supreme Court precedent that finds sovereign immunity does not extend to protect state employees.<sup>20</sup> By preventing a plaintiff from obtaining discovery from any source affiliated with the state (and if the plaintiff is suing a state employee, at least some of the evidence must lie within the possession of the employee or his employer state agency), it prevents her from pursuing her case to completion. It allows state employee defendants to bring in through the back door a sovereign immunity defense that they would never be able to rely on in the case itself.

The state's position is also problematic for a second reason: It has the potential to undermine the important and well-recognized remedial purposes of the federal civil rights statute, 42 U.S.C. § 1983,<sup>21</sup> because it would come up most often in the civil rights context.<sup>22</sup> California is currently wielding this complicated legal doctrine in civil rights cases brought by state prisoners who generally lack access to adequate or any legal representation. Although in the cases that will be discussed further in this Article all plaintiffs were represented by counsel,<sup>23</sup> most

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19. It is hard to determine if other states are using this argument as federal court orders addressing discovery issues are rarely published.

20. *See, e.g., Ex parte Young*, 209 U.S. 123, 159–60 (1908) (finding suits against state officers sued in their official capacities for injunctive relief are constitutionally cognizable); *Scheuer v. Rhodes*, 416 U.S. 232, 237–38 (1974) (finding suits for damages against state officers sued in their individual capacities do not invoke the protections of the Eleventh Amendment).

21. 42 U.S.C. § 1983 (2006).

22. *See, e.g., Rhodes*, 416 U.S. at 243 (stating Congress's intent in enacting § 1983 was "to enforce provisions of the Fourteenth Amendment against those who carry a badge of authority of a State and represent it in some capacity, whether they act in accordance with their authority or misuse it" (quoting *Monroe v. Pape*, 365 U.S. 167, 171–72 (1961))); *Monroe v. Pape*, 365 U.S. 167, 172 (1961) (holding that through 42 U.S.C. § 1983, Congress sought "to give a remedy to parties deprived of constitutional rights, privileges and immunities by an official's abuse of his position").

23. *See Allen v. Woodford*, 543 F. Supp. 2d 1138, 1139 (E.D. Cal. 2008); *Thomas v. Hickman*, No. 1:06-cv-00215-AWI-SMS, 2007 WL 4302974, at \*1 (E.D. Cal. Dec. 6, 2007); *Jett v. Penner*, No. 02-2036, 2007 WL 127790, at \*1 (E.D. Cal. Jan. 12, 2007). Mr. Lance Jett, the plaintiff in *Jett v. Penner*, first filed his case pro se. The magistrate judge assigned to his case denied his request for counsel and request for legal assistance (Doc. No. 22, May 15, 2003) and issued findings and a recommendation that the district court judge grant the defendants' motion for summary judgment (Doc. No. 46, Jan. 16, 2004). *See also* Doc. No. 53 (Mar. 20, 2004) (adopting the findings and recommendation in full, granting the summary judgment

prisoners cannot obtain counsel and thus must represent themselves in civil rights litigation.<sup>24</sup> Prisoners filed over 18,000 civil rights cases in the federal district courts in the twelve months preceding March 31, 2008, and the yearly caseload continues to increase.<sup>25</sup> In the Eastern District of California alone (where most of California's state prisons are located), nearly 50% of the court's caseload—over 1,800 cases in 2005—consists of prisoner-filed cases.<sup>26</sup> Of those, more than 1,000 were civil rights cases brought under the federal civil rights statute, 42 U.S.C. § 1983.<sup>27</sup> Because there are so many prisoner civil rights cases every year and because so many of those cases are brought pro se, the ramifications of an Eleventh Amendment immunity defense to discovery are broad; pro se prisoners are much less likely to be able to navigate the nuances of Eleventh Amendment jurisprudence than lawyers (who often have trouble themselves). And, while not all of these cases are meritorious, many cases raise grave issues that should not be buried through questionably meritorious discovery battles. Eastern District of California Magistrate Judge Kimberly Mueller notes that, of the nine prisoners' rights cases that survived summary judgment and for which she has sought counsel, "three alleged denial of constitutionally adequate medical care, one excessive force and denial of care, two denial of free exercise of religion, and one failure to protect in violation of the Eighth Amendment."<sup>28</sup> In fact, conditions are so dire in California prisons that a federal district court judge has ordered the state's entire prison medical system under receivership.<sup>29</sup>

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motion and terminating the case). It was not until Mr. Jett appealed his case to the Ninth Circuit and that court reversed the district court opinion and remanded the case (three and a half years after Mr. Jett first filed his case) that Mr. Jett received assistance from counsel. *Jett v. Penner*, 439 F.3d 1091, 1095–96 (9th Cir. 2006). The parties later settled the case after the judge denied the defendants' second motion for summary judgment. *See Jett v. Penner*, Case No. 02-2036, Doc. Nos. 153 (E.D. Cal. Nov. 9, 2007), 159 (E.D. Cal. Feb. 15, 2008).

24. *See* Kimberly J. Mueller, *Inmates' Civil Rights Cases and Appointment of Counsel*, SACRAMENTO LAWYER, May/June 2006. Ninety percent of prisoners whose cases survive summary judgment also represent themselves at trial. *Id.* Judge Mueller, citing 28 U.S.C. § 1915 (2006), notes "federal courts have no authority to require that an attorney accept appointment as an inmate civil rights plaintiff's counsel" and attorneys have little to no incentive to take these cases because fees, which are provided for under 42 U.S.C. § 1983 (2006), are not awarded until after trial or after appeal. Kimberly J. Mueller, *Inmates' Civil Rights Cases and Appointment of Counsel*, SACRAMENTO LAW., May/June 2006.

25. ADMIN. OFFICE OF THE U.S. COURTS, FEDERAL JUDICIAL CASELOAD STATISTICS: Mar. 31, 2008, tbl. C-2 (2008), available at <http://www.uscourts.gov/caseload2008/tables/C02Mar08.pdf>. Table C-2 from 2008 suggests that over 17,000 of these cases involved state rather than federal prison systems. *Id.* (noting 1,049 of the prisoner civil rights cases were brought against the United States, while 17,250 cases were private "Federal Question" cases).

26. Mueller, *supra* note 24.

27. *Id.*

28. *Id.*

29. *See* Jenifer Warren, *Judge Names Receiver to Fix Prison Health System*, L.A. TIMES,

The cases discussed below represent some of these egregious facts. The *Gonzalez* case alleged the prison improperly classified a known violent inmate, exposing Officer Gonzalez to grave risk of harm.<sup>30</sup> The three other cases, which I will call the “Eastern District Prison Cases,” allege improper medical care resulting in, variously, unnecessary surgeries, failure to perform surgery resulting in permanent disfigurement, extreme pain and loss of mobility, and loss of reproductive capacity.<sup>31</sup>

#### A. Estate of Gonzalez v. Hickman<sup>32</sup>

In *Estate of Gonzalez*, the Eastern District of California held that the Eleventh Amendment and state sovereign immunity protect state agencies from being compelled to respond to discovery subpoenas in federal court.<sup>33</sup> *Gonzalez* is the first published opinion on this issue.

The *Gonzalez* plaintiffs sued several state prison employees under § 1983.<sup>34</sup> During discovery, the plaintiffs issued subpoenas to the California Department of Corrections and Rehabilitation (CDCR), the state agency responsible for managing the state prison system.<sup>35</sup> The subpoenas sought documents and testimony regarding portions of the individual defendants’ employment and personnel files and information on the inmate who killed Mr. Gonzalez.<sup>36</sup> The CDCR refused to comply with the subpoenas, so the plaintiffs filed a motion to compel compliance in the United States District Court for the Eastern District of California.<sup>37</sup>

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Feb. 15, 2006, at B1 (noting that “court-appointed inspectors told Judge Henderson last summer that they saw few signs of progress in a system that on average kills one inmate—through neglect or malpractice—each week”); see also *Plata v. Schwarzenegger*, No. 01-1351, 2005 U.S. Dist. LEXIS 8878, at \*1, \*7 (N.D. Cal. May 10, 2005) (describing expert report on the state of the prison medical system produced three years after lawsuit was settled as “shocking” and noting experts “observed widespread evidence of medical malpractice and neglect” including finding thirty-four prisoner deaths “highly problematic, with multiple instances of incompetence, indifference, neglect, and even cruelty by medical staff”).

30. *Estate of Gonzales v. Hickman*, No. ED CV 05-660 MMM (RCx), 2007 WL 3237727, at \*1 (C.D. Cal. May 30, 2007).

31. See *infra* Part II.B.

32. 466 F. Supp. 2d 1226 (E.D. Cal. 2006).

33. *Id.* at 1229–30.

34. *Id.* at 1226–27.

35. *Estate of Gonzales v. Hickman*, No. S06-0095 MCE GGH, 2006 WL 3201069, at \*1 (E.D. Cal. Nov. 6, 2006).

36. *Id.*

37. *Id.*



The matter first came before Magistrate Judge Gregory G. Hollows, who held sovereign immunity applied to the subpoenas.<sup>38</sup> In so doing, he relied on a Ninth Circuit case, *United States v. James*,<sup>39</sup> that held tribal sovereign immunity barred subpoenas served by a criminal defendant to tribal entities.<sup>40</sup> Although *James* addressed tribal and not state immunity and was a criminal case, Judge Hollows still found the case “closely analogous” and felt bound to follow it.<sup>41</sup> However, he also found state sovereign immunity did not bar the subpoenas in the *Gonzalez* case for two reasons.<sup>42</sup> First, the state unequivocally waived its immunity through a state statute that allows state employees to respond to subpoenas.<sup>43</sup> Second, subpoenas were similar to injunctive relief, and therefore fit into the “*Ex Parte Young*” exception to sovereign immunity<sup>44</sup> discussed further in Part III.D.1.<sup>45</sup> Therefore, Judge Hollows granted the plaintiffs’ motion to compel.<sup>46</sup>

The state filed a motion for reconsideration with District Court Judge Morrison C. England, who found the magistrate judge’s opinion contrary to law and overturned the ruling.<sup>47</sup> In ruling on the motion, the district court never addressed the underlying questions of whether sovereign immunity applied to subpoenas in the first instance or whether a court should look to *tribal* sovereign immunity cases when analyzing a question of *state* sovereign immunity. It merely held that the two reasons for which the magistrate judge found sovereign immunity did not apply were both contrary to law: The California statute did not constitute an unequivocal waiver of immunity for a subpoena issued in federal court,<sup>48</sup> and *Ex Parte Young* did not apply because the underlying lawsuit sought damages rather than injunctive relief.<sup>49</sup> The court held that “Plaintiffs do not have a federal right to force the State to produce documents that, in a best case scenario, can only assist Plaintiffs in obtaining relief for a past wrong.”<sup>50</sup>

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38. *Id.* at \*2.

39. 980 F. 2d 1314 (9th Cir. 1992). In *James*, the United States government brought a criminal action against a tribal member who then issued a subpoena to a tribal agency seeking documents helpful to his case. For further discussion of *James*, see *infra* Part V.C.

40. *Gonzalez*, 2006 WL 3201069, at \*2.

41. *Id.* at \*1.

42. *Id.* at \*2–4.

43. *Id.* at \*2 (citing CAL. GOV’T CODE § 68097.1(b)).

44. *Id.* at \*3 (citing *Ex parte Young*, 209 U.S. 123 (1908)).

45. See *infra* Part III.D.1.a.

46. *Gonzalez*, 2006 WL 3201069, at \*6.

47. *Estate of Gonzalez v. Hickman*, 466 F. Supp. 2d 1226, 1229 (E.D. Cal. 2006).

48. *Id.* at 1228–29.

49. *Id.* at 1229.

50. *Id.* This statement is problematic because it conflates the relief sought in the litigation (damages for failure to prevent Mr. Gonzalez’s death) with the “relief” sought in response to the subpoenas and the motion to compel (documents necessary to prove the defendants failed to

### B. *Three Eastern District Prison Cases Succeeding Gonzalez*

Although a later proceeding in the *Gonzalez* case questioned the holding above,<sup>51</sup> the State of California relied on the opinion in fighting discovery requests in at least three subsequent federal civil rights cases brought in the Eastern District of California by inmates incarcerated in the California state prison system: *Allen v. Woodford*,<sup>52</sup> *Thomas v. Hickman*,<sup>53</sup> and *Jett v. Penner*<sup>54</sup> (collectively the “Eastern District Prison Cases”). In all three cases, the prisoners brought claims under § 1983 and the Eighth Amendment for cruel and unusual punishment arising out of improper medical care during their incarceration.<sup>55</sup> In *Allen* and *Thomas*, the female prisoners alleged they were subjected to unnecessary surgeries, causing severe pain, loss of mobility (in Ms. Allen and her co-plaintiffs’ cases) and loss of reproductive capability (in Ms. Thomas’ case).<sup>56</sup> They sued several state employees and officers

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prevent Mr. Gonzalez’s death).

51. See *Estate of Gonzalez v. Hickman*, No. ED CV 05-660 MMM (RCx), 2007 U.S. Dist. LEXIS 83702, at \*4 n.5 (C.D. Cal. Apr. 18, 2007). The *Gonzalez* case was first filed in the Central District of California in 2005. *Id.* at \*1–2. The plaintiffs issued subpoenas to the CDCR out of the Eastern District Court of California in 2006, resulting in the December 2006 decision denying the plaintiffs’ motion to compel, which is the subject of this Article. *Id.* at \*3–4. However, the plaintiffs later issued subpoenas to the custodians of records at the prisons out of the Central District of California. *Id.* at \*7. That court held that the state waived its immunity with respect to documents it provided to the defendants but not to the plaintiffs. *Id.* at \*21–24. In doing so, the court questioned the Eastern District court’s holding, noting that the proposition “that the State enjoys subpoena immunity under the *Eleventh Amendment* . . . appears tenuous at best.” *Id.* at \*4 n.5.

52. 544 F. Supp. 2d 1074, 1075 (E.D. Cal. 2008). Another case, *Scott v. Suryadevara*, was joined with the *Allen* case for discovery purposes because it involved similar facts. See Third Amended Complaint, *Scott v. Suryadevara*, No. 1:05-CV-01282-OWW-WMW-PC, 2007 WL 969232, at \*1–3 (E.D. Cal. Feb. 5, 2007).

53. No. CV F 06-0215 AWI SMS, 2008 WL 782476, at \*3 (E.D. Cal. Mar. 20, 2008).

54. No. Civ S-02-2036 GEB JFM P., 2007 WL 127790, at \*1 (E.D. Cal. Jan. 12, 2007). The state also argued the *Gonzalez* case applied in a fourth, non-prison case. See *Jones v. Tozzi*, No. CV-F-05-148 OWW/DLB, 2007 WL 1299795, at \*1 (E.D. Cal. Apr. 30, 2007). The opinion in *Jones* is similar to that of the other three cases, so this Article will not focus on it. It is difficult to tell how many times the State of California has relied on *Gonzalez* in other cases outside these four, because courts rarely publish opinions addressing discovery disputes.

55. See *Allen*, 543 F. Supp. 2d at 1140; *Thomas*, 2008 WL 782476, at \*1; *Jett*, 2007 WL 127790, at \*1.

56. Brenda Allen and the plaintiffs in the *Scott* case alleged the private doctor, under contract with the state prison system, unnecessarily removed their lymph nodes, muscle, tissue and skin under their arms as an invasive treatment for boils in their armpits. See Third Amended Complaint, *Scott v. Suryadevara*, 2007 WL 969232, at \*11 (E.D. Cal. Feb. 5, 2007); Third Amended Complaint, *Allen v. Woodford*, No. 1:05-cv-01104-OWW-NEW, at \*11 (E.D. Cal. Feb. 2, 2007). The plaintiffs in both *Allen* and *Scott* alleged that the private doctor had a financial incentive for performing unneeded surgeries on inmates, and they had evidence that the state defendants knew several years prior to the surgeries that there were many complaints

for their failure to prevent the improper surgeries, and sued several private parties, including the private doctors who performed the surgeries.<sup>57</sup> In *Jett*, the inmate alleged the defendants failed to treat him properly for a fractured thumb, resulting in loss of movement in his dominant hand and constant pain, and similarly sued state employee doctors and prison officials responsible for his care.<sup>58</sup> All cases were “individual capacity” suits against the state defendants, meaning the plaintiffs, similar to the *Gonzalez* case, sued the state employees for damages (rather than injunctive relief) for personal actions they took as individuals rather than as representatives of the state.<sup>59</sup>

The plaintiffs in each case served discovery requests for documents necessary to prove their cases on either the state defendants or nonparties such as the state employee custodians of records at the prisons where the plaintiffs were incarcerated.<sup>60</sup> In each of the three cases, the court held the plaintiffs were entitled to the documents, though for different reasons.<sup>61</sup> However, the State of California has

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about the private doctor. See Third Amended Complaint, *Scott v. Suryadevara*, 2007 WL 969232, at \*4 (E.D. Cal. Feb. 5, 2007); Third Amended Complaint, *Allen v. Woodford*, 2007 WL 969230, at \*4 (E.D. Cal. Feb. 5, 2007). Kelli Thomas alleged doctors removed her ovaries without her consent and without her knowledge that the surgery would result in her sterilization. Corrected First Amended Complaint, *Thomas v. Suryadevara*, No. 1:06-cv-00215-AWI-SMS, 2006 WL 3881260, at 5–7 (E.D. Cal. Nov. 9, 2006). Thomas was twenty-four at the time of the surgery. *Id.* at 5.

57. See Third Amended Complaint, *Scott v. Suryadevara*, 2007 WL 969232, at \*1–3 (E.D. Cal. Feb. 5, 2007); Third Amended Complaint, *Allen v. Woodford*, 2007 WL 969230, at \*1–3 (E.D. Cal. Feb. 5, 2007); Corrected First Amended Complaint, *Thomas v. Suryadevara*, 2006 WL 3881260 (E.D. Cal. Nov. 9, 2006).

58. *Jett*, 439 F.3d at 1093–95.

59. The distinction between suits against state employees acting in their individual or personal capacities versus official capacities can be quite confusing. In both cases, the employees are considered “state actors” (acting under color of state law) for purposes of the Fourteenth Amendment, and in both, the state actor is accused of depriving another of a federal right. However, in “official capacity suits,” the state actor is acting as an agent of the state (a stand-in for the state), and therefore if she left office her successor could stand in her place in the lawsuit. See *Hafer v. Melo*, 502 U.S. 21, 25 (1991). In contrast, in “individual capacity” suits, the plaintiff must prove the state actor was personally responsible for the alleged deprivation. *Id.* The other main difference between the two types of cases shows up in the relief available to the plaintiff. A plaintiff who sues a state officer in her official capacity may only receive prospective injunctive relief as a remedy, whereas damages are an available remedy for an individual capacity suit.

60. See *Allen*, 544 F. Supp. 2d at 1075; *Thomas*, 2008 WL 782476, at \*1; *Jett*, 2007 WL 127790, at \*1.

61. In *Jett*, the court relied on *United States v. James*, 980 F.2d 1314 (9th Cir. 1992), to find that the state waived its immunity as to documents it had already provided to the defendants but not to the plaintiff. 2007 WL 127790, at \*1–2. In *Thomas*, the court cited to *James* but allowed the subpoenas to proceed because they were issued to individuals rather than the state itself and because complying with the subpoenas would not “result in a judgment against the state that would be paid out of the state’s treasury.” 2007 WL 4302974, at \*2. Finally, in *Allen*,

challenged that ruling on appeal to the Ninth Circuit.

### III. THE ELEVENTH AMENDMENT AND STATE SOVEREIGN IMMUNITY

The Eleventh Amendment to the Constitution contains basic principles of the state sovereign immunity doctrine and states, “The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another State, or by citizens or subjects of any foreign State.”<sup>62</sup>

However, state sovereign immunity is not limited to the text of the amendment. The Supreme Court has held that “the sovereign immunity of the States neither derives from, nor is limited by, the terms of the Eleventh Amendment.”<sup>63</sup> Instead, immunity “is a fundamental aspect of the sovereignty which the States enjoyed before the ratification of the Constitution and which they retain today . . . except as altered by the plan of the Convention or certain constitutional Amendments.”<sup>64</sup> The Parts below will provide a brief introduction to the history of the state sovereign immunity doctrine and will discuss its bounds in more detail.<sup>65</sup>

#### A. History and Ratification of the Eleventh Amendment

The concept of state sovereign immunity precedes both the Eleventh Amendment and the drafting of the Constitution. It derives from English law and is based on the notion that, because God vested sovereignty in the King, “God’s sovereign agent on earth,”<sup>66</sup> “the King can do no

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the court allowed the subpoenas to proceed because it found a subpoena did not constitute a “lawsuit” for purposes of the Eleventh Amendment. 544 F. Supp. 2d at 1078–79. Separately, the court noted in dicta that it did not find *James* controlling because it did not involve Eleventh Amendment immunity. *Id.* at 1079.

62. U.S. CONST. amend. XI.

63. *Alden v. Maine*, 527 U.S. 706, 713 (1999). For this reason, the Court has said that the phrase “Eleventh Amendment immunity,” sometimes used in lieu of “state sovereign immunity” is “something of a misnomer.” *Id.*

64. *N. Ins. Co. v. Chatham County*, 547 U.S. 189, 193 (2006) (quoting *Alden*, 527 U.S. at 713).

65. For a more extensive analysis of the history of state sovereign immunity and the Eleventh Amendment, see CLYDE E. JACOBS, *THE ELEVENTH AMENDMENT AND SOVEREIGN IMMUNITY* (1972); 2 FRANCIS NEWTON THORPE, *THE CONSTITUTIONAL HISTORY OF THE UNITED STATES* 264–93 (Da Capo Press 1970) (1901); Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 *YALE L.J.* 1425 (1987) (discussing the history of sovereign immunity and the Eleventh Amendment); Fletcher, *supra* note 18, at 1033 (asserting the Eleventh Amendment did nothing to prohibit federal court jurisdiction); Rodolphe J.A. de Seife, *The King is Dead, Long Live the King! The Court-Created American Concept of Immunity: The Negation of Equality and Accountability Under Law*, 24 *HOFSTRA L. REV.* 981 (1996) (discussing the history of sovereign immunity and its obsolescence in modern American society).

66. Amar, *supra* note 65, at 1431.

wrong.”<sup>67</sup>

This basis for the state sovereign immunity doctrine seems antithetical to a nation without a king and that was formed and ruled by and for the people. In fact, although state sovereign immunity was a concept well known to the Constitution’s Framers (it was discussed during the Philadelphia Convention and in *The Federalist Papers*),<sup>68</sup> it was not included explicitly either in the body of the Constitution or in the later-ratified Bill of Rights. Instead, the text of Article III of the Constitution suggests the Constitution’s drafters did not intend for the states to be immune from suit:

The Judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties . . . *between a State and Citizens of another State* . . . and *between a State, or the Citizens thereof, and foreign States, Citizens or Subjects*.<sup>69</sup>

The states did not demand their sovereign status be codified in the Constitution until the Supreme Court held in several cases, culminating in 1793 with *Chisholm v. Georgia*,<sup>70</sup> that the Constitution provided federal courts with jurisdiction over suits against states.<sup>71</sup> Several versions of a constitutional amendment overturning *Chisholm* were proposed within days of the decision,<sup>72</sup> and the Eleventh Amendment was ratified in February 1795, only two years after the *Chisholm* opinion was handed down.<sup>73</sup> The text of the Eleventh Amendment, which suggests immunity is limited to cases brought by citizens of other

67. LAURENCE H. TRIBE, 1 *AMERICAN CONSTITUTIONAL LAW* 519 (3d ed. 2000).

68. See JACOBS, *supra* note 65, at 27–40. *But cf.* 2 THORPE, *supra* note 65, at 264–68 (discussing contemporary interpretations of federal judicial power and concluding “the framers of the Constitution did not intend to make it possible to ‘drag a sovereign State before a federal court’”). Thorpe cites to John Marshall’s speech at the Virginia Convention: “With respect to disputes between a State and the citizens of another State, its jurisdiction has been decried with unusual vehemence. I hope that no gentlemen will think that a State will be called at the bar of a federal court.” Thorpe also cites Alexander Hamilton in *Federalist Paper* No. 81:

It is inherent in the nature of sovereignty not to be amenable to the suit of an individual *without its own consent*. This is the general sense, and the general practice of mankind; and the exemption, as one of the attributes of sovereignty, is now enjoyed by the government of every State in the Union.

69. U.S. CONST. art. III, § 2 (emphasis added).

70. 2 U.S. 419 (1793).

71. *Id.*; see also JACOBS, *supra* note 65, at 43–47 (discussing other cases which held that the Constitution provided federal courts with jurisdiction over suits against states); de Seife, *supra* note 65, at 1012 (discussing other cases which held that the Constitution provided federal courts with jurisdiction over suits against states).

72. Fletcher, *supra* note 18, at 1058–59.

73. Fletcher, *supra* note 18, at 1059.

or foreign states, responded directly to the facts of the *Chisholm* case, and seems designed to limit the specific sections of federal court jurisdiction under Article III quoted above.<sup>74</sup> It is not clear from the text, however, that the drafters intended the Eleventh Amendment to extend beyond those specific sections.

B. *Subsequent Case Law Extending the Eleventh Amendment's Reach*

Beginning in 1890 with *Hans v. Louisiana*,<sup>75</sup> a case decided almost 100 years after the Eleventh Amendment's ratification, the Court began to extend sovereign immunity protection to various contexts outside the literal text of the amendment.<sup>76</sup> For example, the Court has held in several cases that Eleventh Amendment immunity is not limited to suits brought by private citizens of another state or a foreign state.<sup>77</sup> In *Hans*, the Supreme Court held that sovereign immunity barred a citizen from suing his own state.<sup>78</sup> In *Smith v. Reeves*,<sup>79</sup> the Court held that states are immune from suits brought by federal corporations.<sup>80</sup> In *Principality of Monaco v. Mississippi*,<sup>81</sup> the Court extended state sovereign immunity to suits brought by foreign nations.<sup>82</sup> And in *Blatchford v. Native Village of Noatak*,<sup>83</sup> the Court held sovereign immunity barred suits against states brought by Indian tribes.<sup>84</sup>

Other cases have extended the forum in which the Eleventh Amendment applies. Although the Eleventh Amendment only discusses "the judicial power of the United States,"<sup>85</sup> in *Alden v. Maine*,<sup>86</sup> the Court held states immune from suit on federal claims brought in state court.<sup>87</sup> And in *Federal Maritime Commission v. South Carolina State*

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74. See Fletcher, *supra* note 18, at 1060 (discussing the different proposed versions of the amendment and noting the final version was less restrictive than earlier versions and was tied to specific language of Article III). In *Chisholm*, the plaintiff, a resident of South Carolina, sued the State of Georgia for non-payment for goods supplied to the state during the Revolutionary War. *Chisholm*, 2 U.S. at 420. Georgia refused to appear in the case, claiming sovereign immunity protected it from suit. *Id.*

75. 134 U.S. 1 (1890).

76. *Id.*

77. See, e.g., *id.*

78. *Id.* at 20–21.

79. 178 U.S. 436 (1900).

80. *Id.* at 448–49.

81. 292 U.S. 313 (1934).

82. *Id.* at 325.

83. 501 U.S. 775 (1991).

84. *Id.* at 779–83.

85. U.S. CONST. amend. XI.

86. 527 U.S. 706 (1999).

87. *Id.* at 757.

*Ports Authority*,<sup>88</sup> the Court held that states cannot be named as defendants in federal administrative agency proceedings.<sup>89</sup> Similarly, in *Ex parte New York*, the Court held that, although textually, the Eleventh Amendment only discusses suits in law or equity, sovereign immunity is also a defense to suits in admiralty.<sup>90</sup>

Finally, several cases have extended the definition of what constitutes a “state” for purposes of sovereign immunity. Now, state agencies and entities that can be considered an “arm of the State” are also entitled to state sovereign immunity.<sup>91</sup>

Therefore, it is now well-settled that no private party may bring an action under federal law against a state directly or against an agency or department or “arm” of the state in any forum unless the state has waived its immunity or Congress has abrogated that immunity.<sup>92</sup> As the lower court stated in *South Carolina State Ports Authority v. Federal Maritime Commission*,<sup>93</sup> “The lesson from ‘the Constitution’s structure, its history, and the authoritative interpretations’ by the Supreme Court is unmistakable—an adversarial proceeding against a non-consenting state by a private party triggers sovereign immunity.”<sup>94</sup>

### C. Three Rationales for Why State Sovereign Immunity is Broader than the Text of the Eleventh Amendment

Courts have used three main rationales to explain or justify the broad reach of sovereign immunity: (1) an “originalist” rationale, that the framers never intended to abrogate an immunity that existed before the ratification of the Constitution; (2) a “pragmatic” rationale, that sovereign immunity is necessary to curb the impact a flood of potential litigation would have on the state’s treasury; and, more recently, (3) a

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88. 535 U.S. 743 (2002).

89. *Id.* at 769.

90. 256 U.S. 490, 497–500 (1921). *But cf.* *California v. Deep Sea Research, Inc.*, 523 U.S. 491, 504–05 (1998) (distinguishing *Ex parte New York* and stating the Court has jurisdiction in admiralty proceedings where the state does not have the res (e.g., a vessel involved in a property dispute) in its possession).

91. *See, e.g.*, *Hess v. Port Auth. Trans-Hudson Corp.*, 513 U.S. 30, 50 (1994) (“[W]here an agency is so structured that, as a practical matter, if the agency is to survive, a judgment must expend itself against state treasuries, common sense and the rationale of the Eleventh Amendment require that sovereign immunity attach to the agency.” (internal quotation marks omitted)); *Port Auth. Trans-Hudson Corp. v. Feeney*, 495 U.S. 299, 312–13 (1990) (Brennan, J., concurring); *Stoner v. Santa Clara County Office of Educ.*, 502 F.3d 1116, 1122–23 (9th Cir. 2007).

92. *See* William A. Fletcher, *The Eleventh Amendment: Unfinished Business*, 75 NOTRE DAME L. REV. 843, 857 (2000) (noting that after *Alden v. Maine*, “all nine Justices have abandoned any thought, or any pretense, that the text of the Eleventh Amendment matters”).

93. 243 F.3d 165, 172 (4th Cir. 2001), *rev’d on other grounds by* *Fed. Mar. Comm’n v. S.C. State Ports Auth.*, 535 U.S. 743 (2002).

94. *Id.* at 172 (*Alden v. Maine*, 527 U.S. 706, 713 (1999)).

“dignity” rationale that immunity from suit is necessary to protect the states from an “affront” to their dignity.<sup>95</sup>

Based in part on discussions of the federal judiciary power contemporaneous with the Constitution’s drafting, the originalist rationale concludes that sovereign immunity existed in its common law form before the country was founded and is therefore not limited to the text of the Eleventh Amendment.<sup>96</sup> The Supreme Court’s statement in *Alden v. Maine* best represents this rationale: “States’ immunity from suit is a fundamental aspect of the sovereignty which the States enjoyed before the ratification of the Constitution, and which they retain today.”<sup>97</sup>

The second justification, the pragmatic approach,<sup>98</sup> builds off the originalist rationale. Here, the courts look to pragmatic reasons for disallowing suits against the states. For example, in *Alden v. Maine*,<sup>99</sup> the Supreme Court noted that allowing suits for money damages might “threaten the financial integrity of the States”<sup>100</sup> and “would place

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95. I am certainly not the first to try to bring order to the confusing Supreme Court jurisprudence on state sovereign immunity. *See, e.g.*, Evan H. Caminker, *Judicial Solicitude for State Dignity*, 574 ANNALS AM. ACAD. POL. & SOC. SCI. 81 (2001) (examining the Supreme Court’s “dignitary justification” in upholding sovereign immunity); Andrew B. Coan, *Text as Truce: A Peace Proposal for the Supreme Court’s Costly War Over the Eleventh Amendment*, 74 FORDHAM L. REV. 2511 (2006); William A. Fletcher, *The Diversity Explanation of the Eleventh Amendment: A Reply to Critics*, 56 U. CHI. L. REV. 1261 (1989); Fletcher, *supra* note 18. Lauren K. Robel, *Sovereignty & Democracy: The States’ Obligations to Their Citizens Under Federal Statutory Law*, 78 IND. L.J. 543 (2003) (discussing the Supreme Court’s controversial sovereign immunity decisions, how states should make sovereign immunity waiver decisions, and what constraints states face in waiving sovereign immunity). I have used the terms “originalist,” “pragmatic,” and “dignity” as shorthands to try to group and describe the various arguments. Others have used similar terms. *See, e.g.*, Caminker, *supra* at 95 (calling the first two justifications “originalist” and “functionalist” and describing the “dignity” argument as either justificatory or “rhetorical flourish”).

96. *See, e.g.*, *Principality of Monaco v. Mississippi*, 292 U.S. 313, 322–26 (1934) (discussing debates at the Constitutional Convention); *see also* 2 THORPE, *supra* note 65, at 288–89. The originalist approach to Eleventh Amendment interpretation seems to go against accepted principles of statutory interpretation because it completely ignores the plain language of the Amendment itself. Justice Felix Frankfurter once noted ironically in discussing statutory interpretation that “only when legislative history is doubtful do you go to the statute.” Felix Frankfurter, *Some Reflections on the Reading of Statutes*, 47 COLUM. L. REV. 527, 543 (1947). The “originalist” approach to Eleventh Amendment analysis seems to take Justice Frankfurter’s statement at its word.

97. 527 U.S. 706, 713 (1999); *see also* *Hans v. Louisiana*, 134 U.S. 1, 18 (1890) (noting that the Constitution did not “raise up” any proceedings against the States that were “anomalous and unheard of when the Constitution was adopted” and holding that, despite the limited text of the Eleventh Amendment, a state cannot be sued in federal court by its own citizens).

98. As noted, Caminker calls this the “functionalist” justification. *See* Caminker, *supra* note 95, at 83.

99. 527 U.S. 706 (1999).

100. *Id.* at 750.



unwarranted strain on the States' ability to govern in accordance with the will of their citizens" because it would interfere with the states' capacity to allocate their own "scarce resources among competing needs and interests [which] lies at the heart of the political process."<sup>101</sup> This approach seems to be based at least in part on the belief that, at the time the Eleventh Amendment was ratified, the states had been devastated by the financial burden of fighting the Revolutionary War and that there was a real fear that if states could be subject to suit on Revolutionary War debts in the courts of the new federal government, this could bankrupt the states.<sup>102</sup> Thus, it is pragmatic to extend the Eleventh Amendment to other adversarial proceedings that would also implicate a state's treasury or its ability to choose how to allocate its own scarce resources, such as suits in state courts (as in *Alden*)<sup>103</sup> or federal agency actions (as in *South Carolina State Ports Authority*).<sup>104</sup>

In the past two decades the Court has increasingly relied on a third justification to support extending state sovereign immunity to contexts

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101. *Id.* at 750–51. One could argue that Hamilton's THE FEDERALIST NO. 81 also presents a pragmatic justification for state sovereign immunity:

To what purpose would it be to authorize suits against States, for the debts they owe? How could recoveries be enforced? It is evident that it could not be done without waging war against the contracting State; and to ascribe to the federal courts by mere implication, and in destruction of a preexisting right of the State governments, a power which would involve such a consequence, would be altogether forced and unwarrantable.

102. *See, e.g., Alden*, 527 U.S. at 750 ("It is indisputable that, at the time of the founding, many of the States could have been forced into insolvency but for their immunity from private suits for money damages."); *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 406 (1821) ("[A]t the adoption of the constitution, all the States were greatly indebted[] and[,] the apprehension that these debts might be prosecuted in the federal Courts, formed a very serious objection to that instrument."). This view has been called into question by at least one scholar who notes that, between the time the Constitution was ratified in 1787 and the date the Eleventh Amendment was ratified in 1794,

over two-thirds of the debts of the states had been assumed by the federal government, and the state governments, for the most part, were able and willing to meet their remaining obligations. . . . Moreover, during the 1790s and the ensuing decade, practically all of this indebtedness was discharged, partly out of state revenues and partly from federal credits, as wartime accounts between the states and the central government were settled.

JACOBS, *supra* note 65, at 69. *But cf.* 1 TRIBE, *supra* note 67, 521; de Seife, *supra* note 65, at 1024–25.

103. 527 U.S. at 712.

104. 535 U.S. 743, 748–50 (2002). This argument is difficult to justify because actions for prospective or equitable relief pursuant to the line of cases following *Ex parte Young*, discussed further in Part III.D.1, surely implicate a state's treasury and force a state to allocate its scarce funds in ways it may not have chosen through its own political process. Nevertheless, these cases are constitutionally cognizable.

outside the text of the Eleventh Amendment—what I call a “dignity” rationale. In this approach, the Court notes that protecting the states from adversary proceedings based on sovereign immunity serves the states’ “dignity interests” accorded to them as sovereigns independent from and coextensive with the federal government.<sup>105</sup> For example, in *Seminole Tribe of Florida v. Florida*, the Court noted the “Eleventh Amendment does not exist solely in order to preven[t] federal-court judgments that must be paid out of a State’s treasury, it also serves to avoid the indignity of subjecting a State to the coercive process of judicial tribunals at the instance of private parties.”<sup>106</sup> In *Alden*, the Court cited *Seminole Tribe* and reiterated that “[p]rivate suits against nonconsenting States . . . present the indignity of subjecting a State to the coercive process of judicial tribunals . . . regardless of the forum.”<sup>107</sup> Although the Court rejected the dignity rationale in *Cohens v. Virginia*,<sup>108</sup> one of its earliest cases addressing state sovereign immunity under the Eleventh Amendment, it now appears to have taken firm hold. In cases such as *Alden*<sup>109</sup> or *Seminole Tribe*<sup>110</sup> it still could be argued that the Court’s use of this dignity rationale was purely rhetorical support for the originalist or pragmatic rationales.<sup>111</sup> However, in 2002, the Court in *South Carolina State Ports Authority* seemed to

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105. See, e.g., *id.* at 760. Despite the fact that the Court has seemed to rely on this theory more in the last two decades, it is not new. In *In re Ayers*, the Court held “The very object and purpose of the 11th amendment were to prevent the indignity of subjecting a state to the coercive process of judicial tribunals at the instance of private parties.” 123 U.S. 443, 505 (1887). But, as early as 1946, scholars have taken issue with this rationale. See Joseph D. Block, *Suits Against Government Officers and the Sovereign Immunity Doctrine*, 59 HARV. L. REV. 1060, 1060–61 (1946) (“[T]he indignity of subjecting a government to judicial process at the instance of private parties seems to be an objection lacking in force, however substantial a consideration it might have been in the times when state and federal governments were less solidly established than they are now.”). And Justice Stevens has consistently dissented to opinions based on this rationale, noting it “is an ‘embarrassingly insufficient’ rationale for the rule [extending Eleventh Amendment sovereign immunity].” *Seminole Tribe v. Florida*, 517 U.S. 44, 97 (1996) (Stevens, J., dissenting) (citation omitted); see also *S.C. State Ports Auth.*, 535 U.S. at 770 (Stevens, J., dissenting); *Puerto Rico Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 151 (1993) (Stevens, J., dissenting).

106. *Seminole Tribe*, 517 U.S. at 58 (alteration in original) (internal quotations and citations omitted).

107. *Alden*, 527 U.S. at 749 (citing *Seminole Tribe*, 517 U.S. at 58) (internal quotations omitted).

108. 19 U.S. (6 Wheat.) 264, 406 (1821) (“[The Eleventh Amendment] does not comprehend controversies between two or more States, or between a State and a foreign State. The jurisdiction of the Court still extends to these cases: and in these a State may still be sued. *We must ascribe the amendment, then, to some other cause than the dignity of a State.*”) (emphasis added).

109. *Alden*, 527 U.S. at 715.

110. *Seminole Tribe*, 517 U.S. 44, 58 (1996).

111. See Caminker, *supra* note 95, at 83.

subordinate both arguments to the “dignity” rationale, holding, “The preeminent purpose of state sovereign immunity is to accord States the dignity that is consistent with their status as sovereign entities.”<sup>112</sup>

The dignity rationale will be important in the discovery context because, if taken to its extreme, it has the potential to undermine any action even tangentially involving the state.<sup>113</sup> The State of California’s attorneys have relied heavily on this rationale in fighting the discovery requests in the Eastern District Prison Cases discussed in this Article.<sup>114</sup>

#### D. Sovereign Immunity is Not Unlimited

Despite the language of the Supreme Court cases discussed above, sovereign immunity under the Eleventh Amendment “is not absolute,”<sup>115</sup> as the Supreme Court has limited its scope in several contexts. Three of these limitations are well-established. First, sovereign immunity does not extend to protect state employees if they are sued either in their official capacities for injunctive relief or in their individual capacities for money damages.<sup>116</sup> Second, Congress may abrogate the states’ sovereign immunity in limited circumstances. And third, states may waive their immunity. I propose a fourth limit: while sovereign immunity may apply as a direct defense to a suit or other adversarial proceeding brought against a state, it does not apply in proceedings ancillary or subordinate to the main suit, such as discovery requests issued to a state entity. Each of these limitations is discussed

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112. 535 U.S. 743, 760 (2002). The Supreme Court has consistently applied the dignity rationale even outside the state sovereign immunity context. In the 2008 term, the Court in *Republic of the Philippines v. Pimentel* noted that the Republic of the Philippines’ sovereign “dignity interests” prevented the district court from hearing an interpleader action involving the Republic. 128 S. Ct. 2180, 2189–90 (2008).

113. For further discussion, see *infra* Part VI.B.

114. See, e.g., Non-Parties’ Opposition to Plaintiff’s Motion to Compel Production of Documents, *Allen v. Woodford*, No. 1:05-CV-01104-OWW-GSA, 2008 WL 117906, at 6–11 (E.D. Cal. Jan. 2, 2008); Opposition to Plaintiff’s Motion to Compel Non-Parties to Produce Documents Pursuant to Subpoenas, *Thomas v. Hickman*, No. 06-00215, Docket No. 92, at 4 (E.D. Cal. May 29, 2007).

115. *Fla. Dep’t of State v. Treasure Salvors, Inc.*, 458 U.S. 670, 690 n.27 (1982).

116. See, e.g., *Ex parte Young*, 209 U.S. 123, 159–60 (1908); *Scheuer v. Rhodes*, 416 U.S. 232, 237 (1974). The Supreme Court and federal appellate courts have also refused to extend sovereign immunity to political subdivisions such as counties and municipalities or to state-created and quasi-governmental entities, such as private companies, that have contracts with the state or public corporations. See, e.g., *N. Ins. Co. v. Chatham County*, 547 U.S. 189 (2006) (holding state sovereign immunity does not extend to counties); *Fresenius Med. Care Cardiovascular Res. Inc. v. Puerto Rico*, 322 F.3d 56 (1st Cir. 2003) (holding that state sovereign immunity does not extend to public corporations); *del Campo v. Kennedy*, No. 07-15048, 2008 U.S. App. LEXIS 2559, \*11–12 (9th Cir. Feb. 6, 2008) (holding that state sovereign immunity does not extend to private entities under contract with the state).

below.<sup>117</sup>

### 1. Three Established Checks on State Sovereign Immunity

#### a. Sovereign Immunity Does Not Apply to Most Suits Against State Officers and Employees

In many early cases, the Supreme Court, in trying to find a remedy for private parties harmed by the states' actions, allowed plaintiffs to sue state officers and employees where sovereign immunity prevented the plaintiffs from suing the state directly.<sup>118</sup> The rationale for these early decisions is muddled but is, in general, based on an interpretation of federal court powers under the Constitution's Contract Clause.<sup>119</sup> This line of cases allowing suits to proceed against state officers culminated in a (somewhat) clear standard, enunciated in 1908 in *Ex Parte Young*, that state officials may be sued in their official capacities for injunctive relief where the court determines the official has been trying to enforce an unconstitutional state law.<sup>120</sup> In *Ex Parte Young*, the Court held that a state officer who tries to enforce such a law

comes into conflict with the superior authority of that Constitution, and he is in that case stripped of his official or representative character and is subjected in his person to the consequences of his individual conduct. The State has no power to impart to him any immunity from responsibility to the supreme authority of the United States.<sup>121</sup>

Without explicitly holding so, *Ex parte Young* attempted to harmonize the Eleventh Amendment with the substantive rights guaranteed by the later-ratified Fourteenth Amendment.<sup>122</sup> Its holding, that a state official acting in his capacity as an officer of the state is divested of any residual state immunity by virtue of his unconstitutional actions, reinforces and gives teeth to the prohibitions of the Fourteenth Amendment:

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117. The Court has carved out several other exceptions that are beyond the scope of this Article. For an overview, see 1 TRIBE, *supra* note 67, at 519–66.

118. *See, e.g.*, *Cunningham v. Macon R.R.*, 109 U.S. 446, 450–52 (1883); *Board of Liquidation v. McComb*, 92 U.S. 531, 541 (1876); *Davis v. Gray*, 83 U.S. 203, 220 (1873); *Osborn v. Bank of the United States*, 22 U.S. 738, 870 (1824); *United States v. Peters*, 9 U.S. 115 (1809).

119. *See* JACOBS, *supra* note 65, at 124.

120. 209 U.S. 123, 159–60 (1988).

121. *Id.*

122. *See* JACOBS, *supra* note 65, at 142–43.

No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.<sup>123</sup>

In the 1970s, the Supreme Court took its holding in *Ex Parte Young* a step further. In *Scheuer v. Rhodes*, decided in 1974, the Court reiterated that states may not immunize officers from suit in federal court<sup>124</sup> and held a private litigant may sue a state official or employee for damages for actions that employee took in his individual capacity.<sup>125</sup>

In between *Young* and *Scheuer*, the Court, in the 1961 case of *Monroe v. Pape*,<sup>126</sup> gave full weight to the civil rights protections first delineated in the Civil Rights Act (Ku Klux Klan Act) of 1871, which is now codified at 42 U.S.C. § 1983. The Civil Rights Act, also known as § 1983, allows individuals to sue state actors<sup>127</sup> in state or federal courts for acts that deprive them of “any rights, privileges, or immunities secured by the Constitution and laws.”<sup>128</sup> Section 1983 does not create a substantive right but instead lays out the procedures by which one may make a constitutional claim against a state actor. In *Monroe*, the Court held that Congress intended the Civil Rights Act “to give a remedy to parties deprived of constitutional rights, privileges and immunities by

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123. U.S. CONST. amend. XIV, § 1. In the years since *Ex parte Young* the Court has clarified (to some extent) that lawsuits against state officers in their official capacity may only proceed if the suit is for “prospective” relief. *See, e.g.*, *Edelman v. Jordan*, 415 U.S. 651, 663–67 (1974) (finding an award for monetary relief to welfare plaintiffs for wrongful denial of benefits was not prospective relief within the meaning of *Ex parte Young*); *Verizon Md., Inc. v. PSC*, 535 U.S. 635, 645 (2002) (noting “[i]n determining whether the doctrine of *Ex parte Young* avoids an Eleventh Amendment bar to suit, a court need only conduct a ‘straightforward inquiry into whether [the] complaint alleges an ongoing violation of federal law and seeks relief properly characterized as prospective.’” (citing *Idaho v. Coeur d’Alene Tribe of Idaho*, 521 U.S. 261, 296 (1997))).

124. 416 U.S. 232, 237 (1974) (citing *Ex parte Young*, 209 U.S. 123, 159–60 (1908)).

125. *Id.* at 238. The Court later limited the reach of *Ex parte Young* and *Scheuer* when it held in *Will v. Mich. Dep’t of State Police*, 491 U.S. 58, 71 (1989), that state officials may not be sued for damages under § 1983 for actions taken in their *official* capacities, because these officials are merely stand-ins for the state and are therefore not “persons” within the meaning of § 1983.

126. 365 U.S. 167 (1961).

127. “State actors” are those who act “under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia.” 42 U.S.C. § 1983. However, they need not be employed by the state. *See generally* *Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 220–21 (1970) (holding plaintiff could state a claim against a private party for violation of her civil rights pursuant to § 1983 if the private party acted in concert with state officials in violating her constitutional rights).

128. 42 U.S.C. § 1983 (1996).

an official's abuse of his position."<sup>129</sup> In allowing the case to proceed, the Court recognized three principal purposes of the Civil Rights Act. First, it overrode certain state laws; second, it provided a "remedy where state law was inadequate;" and third, it provided "a federal remedy where the state remedy, though adequate in theory[,] was not available in practice."<sup>130</sup>

In *Scheuer*, which succeeded *Monroe* by thirteen years, the Court acknowledged *Monroe* and noted that "[i]n some situations a damage remedy can be as effective a redress for the infringement of a constitutional right as injunctive relief might be in another."<sup>131</sup> The Court held that such an action, "seeking to impose individual and personal liability on the *named defendants* for . . . a deprivation of federal rights by these defendants under color of state law" was not barred by the Eleventh Amendment.<sup>132</sup> The holding in *Scheuer* has allowed many civil rights plaintiffs to sue state officers where those officers have violated a person's constitutional rights but injunctive relief is not an option (for example, in cases where the constitutional violations occurred in the past and are not ongoing). *Scheuer* is applicable to the Eastern District Prison Cases because the plaintiffs in those cases were not subject to ongoing harm—they alleged state employees violated their civil rights by subjecting them to improper and illegal medical care in the past, rather than on an ongoing basis, and therefore injunctive relief was not an available remedy.

#### b. Congress May Abrogate State Sovereign Immunity by Creating a Private Right of Action Against the States

Congress can abrogate sovereign immunity in a few limited contexts by passing laws that create a private right of action against the states.<sup>133</sup> However, it must do so "pursuant to a valid exercise of power" and

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129. 365 U.S. at 172.

130. *Id.* at 173–74.

131. 416 U.S. 232, 238 (1974).

132. *Id.* The Court, in *Hafer v. Melo*, 502 U.S. 21, 25–31 (1991), reiterated and attempted to clarify this holding and harmonize it with *Ex parte Young* and *Will v. Mich. Dep't of State Police*, 491 U.S. 58 (1989). The Court distinguished between suits for damages against a state officer for actions that officer took while acting in her official capacity (acting "under color of state law" for purposes of § 1983) and suits for damages where the officer is *sued* in her official capacity (i.e., not for specific actions she herself took against the plaintiff but for her role as an officer of the state). *Hafer*, 502 U.S. at 25–31. The Court reiterated that the Eleventh Amendment does not bar suits for damages against a state officer for actions that officer takes while *acting* in her "official capacity;" instead it bars lawsuits where the state officer is *sued* in her official capacity (and thus she is merely a stand-in for the state). *Id.* at 29–31.

133. *Fitzpatrick v. Bitzer*, 427 U.S. 445, 456 (1976) ("In [§ 5] Congress is expressly granted authority to enforce . . . the substantive provisions of the Fourteenth Amendment" by providing actions for money damages against the States.).

must have “unequivocally expressed its intent to abrogate the immunity.”<sup>134</sup> The Court has sharply constrained this power in the past few decades. Where once the Court held that Congress could create a private right of action under its Article I Interstate Commerce Clause powers,<sup>135</sup> the Court limited that power in *Seminole Tribe of Florida v. Florida*<sup>136</sup> to statutes passed pursuant to Congress’ Fourteenth Amendment, § 5 authority.<sup>137</sup>

Any legislation that attempts to abrogate immunity must be “unmistakably clear” in the actual text of the statute<sup>138</sup>—a general authorization to file a suit in the federal courts is not enough.<sup>139</sup>

### c. States May Waive Their Immunity

Even though the Supreme Court has strengthened its Eleventh Amendment jurisprudence in the last couple decades and has continued to limit Congress’ ability to create private rights of action for damages

134. *Green v. Mansour*, 474 U.S. 64, 68 (1985) (citation omitted).

135. *See Pennsylvania v. Union Gas Co.*, 491 U.S. 1, 23 (1989).

136. 517 U.S. 44, 73–74 (1996); *see also* MELVYN R. DURCHSLAG, *STATE SOVEREIGN IMMUNITY* 106 (2002) (noting that “it is probably fair to say that until *Seminole Tribe of Florida v. Florida* (1996), the Supreme Court assumed that Congress did possess the power to abrogate state sovereign immunity as a means of enforcing its legislative authorities under Article I, § 8”).

137. *See, e.g., United States v. Georgia*, 546 U.S. 151, 157–59 (2006) (Congress validly abrogated sovereign immunity by creating a private cause of action under Americans with Disabilities Act for damages against the states for conduct that violated the Fourteenth Amendment); *Nev. Dep’t of Human Res. v. Hibbs*, 538 U.S. 721, 724–26 (2005) (same as to the Family Medical Leave Act). *But cf. City of Boerne v. Flores*, 521 U.S. 507, 519–20, 531 (1997) (holding that valid § 5 legislation must show “a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end” and that Congress exceeded its § 5 enforcement powers in enacting the Religious Freedom Restoration Act because the act was “so out of proportion to a supposed remedial or preventive object that it cannot be understood as responsive to, or designed to prevent, unconstitutional behavior”). Recently, in *United States v. Georgia*, the Court clarified that claims must be for *actual* violations of the Fourteenth Amendment. 546 U.S. 151, 158–59 (2006) (emphasizing that state conduct must “*actually*” violate the Fourteenth Amendment). For further analysis of what legislation is “appropriate” under § 5, as well as a discussion of Congress’ Article I powers, *see generally* Joseph M. Pellicciotti & Michael J. Pellicciotti, *Sovereign Immunity & Congressionally Authorized Private Party Actions Against the States for Violation of Federal Law: A Consideration of the U.S. Supreme Court’s Decade Long Decisional Trek, 1996-2006*, 59 BAYLOR L. REV. 623 (2007).

138. *Dellmuth v. Muth*, 491 U.S. 223, 228, 230 (1989) (“Legislative history generally will be irrelevant to a judicial inquiry into whether Congress intended to abrogate the Eleventh Amendment. If Congress’ intention is ‘unmistakably clear in the language of the statute,’ recourse to legislative history will be unnecessary; if Congress’ intention is not unmistakably clear, recourse to legislative history will be futile, because by definition the rule [that “Congress’ intention is ‘unmistakably clear in the language of the statute,’”] will not be met.”) (quoting, in part, *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 242 (1985)).

139. *Atascadero State Hosp. v. Scanlon*, 473 U.S. at 246.

against states, states may still waive their own immunity and consent to be sued.<sup>140</sup> However, there are clear limitations on waiver. First, a state's waiver must be voluntary.<sup>141</sup> For example, if a state consents to be a party in a litigation, either by filing the suit, intervening in an existing suit, or removing a suit to federal court, it voluntarily waives its immunity by consenting to the court's jurisdiction.<sup>142</sup> But if the state consents to suit through statute, it "may prescribe the terms and conditions on which it consents to be sued, and the manner in which the suit shall be conducted."<sup>143</sup> It may also "withdraw its consent whenever it may suppose that justice to the public requires it."<sup>144</sup> Second, waiver must be unequivocal;<sup>145</sup> a state cannot "constructively" or "impliedly" waive its immunity.<sup>146</sup> Nor does a state waive its immunity for federal court jurisdiction merely by consenting to be sued in its own courts, by stating its intention to "sue and be sued," or by "authorizing suits

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140. *Alden v. Maine*, 527 U.S. 706, 737 (1999). Some scholars have argued waiver is the best hope for suits against the states. *See, e.g.*, Lauren K. Robel, *Sovereignty and Democracy: The States' Obligations to Their Citizens Under Federal Statutory Law*, 78 IND. L.J. 543 (2003) (exploring how states should make waiver decisions); Hien Ngoc Nguyen, Comment, *Under Construction: Fairness, Waiver, and Hypothetical Eleventh Amendment Jurisdiction*, 93 CAL. L. REV. 587 (2003) (discussing waiver and arguing the waiver doctrine is ripe for change).

141. *See, e.g.*, *Beers v. Arkansas*, 61 U.S. 527, 529 (1858) (noting the decision to waive immunity "is altogether voluntary on the part of the sovereignty" and a state may "withdraw its consent [to suit] whenever it may suppose that justice to the public requires it").

142. *Clark v. Barnard*, 108 U.S. 436, 447–48 (1883) (finding a state's "voluntary appearance" in federal court as an intervener avoids Eleventh Amendment inquiry); *Gunter v. Atlantic Coast Line R.R. Co.*, 200 U.S. 273, 284 (1906) ("[W]here a State voluntarily becomes a party to a cause and submits its rights for judicial determination, it will be bound thereby and cannot escape the result of its own voluntary act by invoking the prohibitions of the Eleventh Amendment."); *see also Lapidés v. Bd. of Regents*, 535 U.S. 613, 624 (2002) (holding that a state waives its immunity by removing a case to federal court when a state statute waives the state's immunity from suit in its own courts, even where that case involves money damages against the state). *Lapidés* notes that this part of the waiver rule is based on a theory of consistency and fairness and that to not find waiver in these situations "would permit States to achieve unfair tactical advantages [.]"*Id.* at 621 (citing *Wis. Dep't of Corr. v. Schacht*, 524 U.S. 381, 393–94, 398 (1998) (Kennedy, J., concurring)).

143. *Beers*, 61 U.S. at 529.

144. *Id.*

145. *Pennhurst State Sch. and Hosp. v. Halderman*, 465 U.S. 89, 99 (1984) (insisting the state's consent to suit must be "unequivocally expressed").

146. *See Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 679–81 (1999); *see also Edelman v. Jordan*, 415 U.S. 651, 673 (1974) ("The mere fact that a State participates in a program through which the Federal Government provides assistance for the operation by the State of a system of public aid is not sufficient to establish consent on the part of the State to be sued in the federal courts."); *TRIBE, supra* note 67, at 533 n.92 (noting that while state waiver is strictly construed, federal waiver of immunity, in contrast, is construed liberally (citing *Hoffman v. Conn. Dep't of Income Maint.*, 492 U.S. 96, 114 (1989) (Stevens, J., dissenting))).



against it “in any court of competent jurisdiction.”<sup>147</sup> And finally, a state does not waive its immunity by failing to assert it by a certain point in any litigation; immunity may be asserted at any time, even for the first time on appeal.<sup>148</sup>

## 2. A New Fourth Check: Sovereign Immunity Does Not Apply to Proceedings That Are Ancillary or Subordinate to the Main Suit

I propose a fourth check exists on state sovereign immunity that has not received much focus in academic circles or court cases, but is especially relevant to the issues addressed in this Article: A state may only raise a sovereign immunity defense when it is a party to a lawsuit or similar adversarial proceeding. If the state is not a party to the suit and is only brought into the case for an ancillary reason such as discovery, sovereign immunity is not a cognizable defense.

The text of the Eleventh Amendment itself sustains this theory because it limits state sovereign immunity to “any *suit* in law or equity, commenced or prosecuted against” one of the states.<sup>149</sup> Clyde Jacobs notes that the choice of the word “suit” rather than “case” or “controversy” (which are both terms used in Article III to define judicial power) and the limitation that the “suit” must be “prosecuted” indicates the framers intended to limit the reach of the Eleventh Amendment to actual lawsuits brought by an individual against a state.<sup>150</sup>

*The Federalist Papers* and discussions preceding the ratification of the Constitution (both of which the Supreme Court has relied upon in recent state sovereign immunity cases) support this interpretation. Alexander Hamilton stated in *Federalist Paper* 81, “It is inherent in the nature of sovereignty not to be amenable to *the suit of an individual* without its consent.”<sup>151</sup> And John Marshall stated at the Virginia

147. *Coll. Sav. Bank*, 527 U.S. at 676 (citing *Fla. Dep’t of Health and Rehab. Servs. v. Fla. Nursing Home Ass’n.*, 450 U.S. 147, 149–50 (1981) (per curiam)); see also CAL. GOV’T CODE § 68097.1(b). This statute was referenced in *Estate of Gonzalez v. Hickman* which the court found did *not* waive the state’s immunity for the purposes of a subpoena. 466 F. Supp. 2d 1226, 1227, 1229 (E.D. Cal. 2006).

148. *Halderman*, 465 U.S. at n.8 (“The limitation deprives federal courts of any jurisdiction to entertain such claims, and thus may be raised at any point in a proceeding.”); *Edelman*, 415 U.S. at 678 (noting that an Eleventh Amendment defense “need not be raised in the trial court[.]”). Although a state may raise immunity as a defense at any time, a court need not raise it sua sponte. See, e.g., *Patsy v. Bd. of Regents of the State of Fla.*, 457 U.S. 496, 516 n.19 (1982).

149. U.S. CONST. amend. XI (emphasis added).

150. JACOBS, *supra* note 65, at 93. Jacobs does not focus on the question of what a “suit” is for purposes of the Eleventh Amendment but instead discusses whether the Eleventh Amendment was intended to be limited to cases brought in federal court on diversity jurisdiction or whether the framers intended to include federal question cases. *Id.* at 93–97. For more on this topic, see TRIBE, *supra* note 67, at 529–34.

151. TRIBE, *supra* note 67, at 716, 719 (emphasis added).

Convention, in the context of the question of whether a state could be made a defendant in an action brought by a private party, “I hope that no gentlemen will think that a State will be called at the bar of a federal court.”<sup>152</sup> As the Supreme Court later noted in *Alden v. Maine*,<sup>153</sup> “the state conventions . . . made clear that they, like Hamilton, Madison, and Marshall, understood the Constitution as drafted to preserve the States’ immunity from private suits.”<sup>154</sup> As Justice Iredell famously dissented in *Chisholm v. Georgia*<sup>155</sup> (in which a citizen of South Carolina brought suit against the state of Georgia):

I believe there is no doubt that neither in the State now in question, nor in any other in the Union, any particular Legislative mode, *authorizing a compulsory suit for the recovery of money against a State*, was in being either when the Constitution was adopted, or at the time the judicial act was passed<sup>156</sup>

Later, in *Hans v. Louisiana*<sup>157</sup> when the Court extended sovereign immunity under the Eleventh Amendment to cover suits brought by a citizen against his own state in federal court, the Court noted, “The *suability of a State*, without its consent, was a thing unknown to the law. This has been so often laid down and acknowledged by courts and jurists that it is hardly necessary to be formally asserted.”<sup>158</sup>

The Court has defined the scope of a suit in several cases. In *Cohens v. Virginia*,<sup>159</sup> the defendants, who were convicted by a state court for selling lottery tickets, brought a writ of error in the Supreme Court.<sup>160</sup> While this case is best remembered for its holding that the Supreme Court has the right to review a state supreme court’s ruling when it raises federal constitutional issues, the Court also addressed Virginia’s

152. 2 THORPE, *supra* note 65, at 266; *see also id.* at 268 (concluding that the Constitution’s framers believed “that the Constitution guaranteed every State against being made defendant in any action that might be brought”).

153. 527 U.S. 706 (1999).

154. *Id.* at 718 (emphasis added).

155. 2 U.S. 419 (1793) (Iredell, J., dissenting).

156. *Id.* at 434–35 (emphasis added). Even Chief Justice Jay, writing as part of the majority in *Chisholm*, described the question before the Court as “Is a State *suable* by individual citizens of another State?” *Id.* at 469 (emphasis added).

157. 134 U.S. 1 (1890).

158. *Id.* at 16 (emphasis added).

159. 19 U.S. 264 (1821).

160. When a party brings a “writ of error,” it asks the judges of one court “to examine a record upon which a judgment was given in another Court, and, on such examination, to affirm or reverse the same according to law.” *Id.* at 409. *Cohens* is best remembered for its holding that the Supreme Court has the right to review a state supreme court’s ruling when that court’s decision raises federal constitutional issues.

claim the Eleventh Amendment protected it from being haled into the Supreme Court on the writ. In determining the Eleventh Amendment did not bar the writ, the Court noted that the Eleventh Amendment “extended to suits commenced or prosecuted by individuals” and defined a suit as “the prosecution, or pursuit, of some claim, demand, or request.”<sup>161</sup> Chief Justice Marshall continued: “To commence a suit, is to demand something by the institution of process in a Court of justice, and to prosecute the suit, is, according to the common acceptation of language, to continue that demand.”<sup>162</sup> A writ of error was not a suit because it did not compel the state to come before the court; instead it was the process by which the superior court reviewed the judgment of the inferior court. It was not a demand by the private party against the state and did not create an assertion of a claim against the state.<sup>163</sup>

Over 150 years later in *Dugan v. Rank*, the Court again looked at what constituted a “suit” for purposes of sovereign immunity and found it depended on the effect of the judgment sought.<sup>164</sup> The Court noted

The general rule is that a suit is against the sovereign if ‘the judgment sought would expend itself on the public treasury or domain, or interfere with the public administration,’ or if the effect of the judgment would be ‘to restrain the Government from acting, or to compel it to act.’<sup>165</sup>

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161. *Cohens*, 19 U.S. at 407.

162. *Id.* at 408.

163. *Id.* at 410–11. Justice Marshall noted that “writs of error, accompanied with citations, have uniformly issued for the removal of judgments in favour of the United States into a superior Court. . . . It has never been suggested, that such writ of error was a suit against the United States . . . .” *Id.* at 412. The Court held that the writ only constituted a “suit or action when it is to restore the party who obtains it to the possession of any thing which is withheld from him.” *Id.* at 409–10. It is “not [a suit] when its operation is entirely defensive,” such as in *Cohens*, where the state instituted the suit and the party bringing the writ of error was a defendant to that action. *Id.* at 410.

164. *Dugan v. Rank*, 372 U.S. 609, 620 (1963). The issue in *Dugan* was whether a case brought against several government officials was really a case against the sovereign—the United States. *Id.* at 617. However, it is still instructive in defining what constitutes a “suit.” While *Dugan* addressed federal sovereign immunity rather than state immunity, it has been cited in several state sovereign immunity cases. *See, e.g.*, *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 101 n.11 (1984); *Palomar Pomerado Health Sys. v. Belshe*, 180 F.3d 1104, 1108 (9th Cir. 1999); *Blaylock v. Schwinden*, 862 F.2d 1352, 1353 (9th Cir. 1988).

165. *Dugan*, 372 U.S. at 620 (quoting *Land v. Dollar*, 330 U.S. 731, 738 (1947); *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 704 (1949); *Ex parte New York*, 256 U.S. 490, 502 (1921)). *But cf.* *Boron Oil Co. v. Downie*, 873 F.2d 67, 71 (4th Cir. 1989) (citing *Dugan* and holding sovereign immunity applies to subpoenas because a subpoena “‘interfere[s] with the public administration’ and compels the federal agency to act in a manner different from that in which the agency would ordinarily choose to exercise its public function”).

Finally, in *Federal Maritime Commission v. South Carolina State Ports Authority*,<sup>166</sup> in which the Court held sovereign immunity barred a private party's complaint filed with the Federal Maritime Commission against the state port authority, the Court again, though somewhat indirectly, addressed what constitutes a "suit" for purposes of state sovereign immunity.<sup>167</sup> The Court held that a state's sovereign immunity protects it from federal administrative agency proceedings because such proceedings are so similar to a lawsuit filed in a court—for example, both are adversarial and presided over by a judge, and both begin with the filing of a complaint, to which the defendant must respond with an answer or motion to dismiss or face default judgment for failure to respond.<sup>168</sup>

In contrast, the Court has held that certain proceedings, while they may involve a state, do not invoke the Eleventh Amendment's protections because they are merely ancillary to the main lawsuit and do not impact the state's treasury. For example, in *Florida Department of State v. Treasure Salvors, Inc.*,<sup>169</sup> a plurality of the Court held sovereign immunity did not bar an arrest warrant brought by a private party in federal district court to secure property in the possession of the State of Florida.<sup>170</sup> The warrant proceeding was ancillary to an earlier suit brought to determine ownership of the property, and the state was not named as a party in that earlier suit.<sup>171</sup> The Court determined sovereign immunity did not apply to bar the warrant proceeding, in part because the warrant "sought possession of specific property[,] . . . did not seek any attachment of state funds and would impose no burden on the state treasury."<sup>172</sup> One could presume the plurality did not consider the arrest warrant to be a "lawsuit" for purposes of the Eleventh Amendment because the "warrant itself merely secure[d] possession of the property; its execution [did] not finally adjudicate the State's right to the artifacts."<sup>173</sup>

In an earlier case, *Hutto v. Finney*,<sup>174</sup> the Court also held the Eleventh Amendment did not apply to a proceeding it considered "ancillary" to a prospective order enforcing federal law.<sup>175</sup> In *Hutto*, the district court, after extensive factual findings, ordered officials at the Arkansas Department of Corrections several times to remedy

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166. 535 U.S. 743 (2002).

167. *Id.* at 756.

168. *Id.* at 756–60.

169. 458 U.S. 670 (1982).

170. *Id.* at 682.

171. *Id.* at 676.

172. *Id.* at 697–98.

173. *Id.* at 697.

174. 437 U.S. 678 (1978).

175. *Id.* at 691.

reprehensible conditions in the state prisons.<sup>176</sup> When the court found, several years later, that conditions at the prisons were actually *worse* than when it issued its prospective relief order, the court found bad faith and awarded attorneys fees against the state defendants.<sup>177</sup> The Supreme Court held that “the substantive protections of the Eleventh Amendment do not prevent an award of attorney’s fees” where “[t]he cost of compliance is ‘ancillary’ to the prospective order enforcing federal law,” even if the award had a compensatory effect.<sup>178</sup>

Thus, as the lower court stated in *Federal Maritime Commission*, if a proceeding “walks, talks, and squawks very much like a lawsuit”<sup>179</sup> — i.e., if it is adversarial, if it starts with a complaint, if it involves the prosecution of a claim or demand against the state directly or against its officers in certain circumstances, and if it seeks damages from the state treasury—then the Eleventh Amendment applies, and the proceeding may not be maintained against a state or its agencies. However, if a proceeding or action involving a state does not meet these factors—if it is ancillary to an adversarial proceeding and if it does not seek attachment of state funds—then sovereign immunity should not apply.<sup>180</sup>

#### IV. TRIBAL AND FEDERAL SOVEREIGN IMMUNITY AND THEIR PARALLELS TO STATE SOVEREIGN IMMUNITY

Neither the Ninth Circuit nor the Supreme Court has yet addressed how state sovereign immunity principles apply to discovery requests issued to a state, its agencies, or its officers. Perhaps for this reason, the courts in the Eastern District Prison Cases looked to and applied Ninth Circuit case law addressing tribal sovereign immunity.<sup>181</sup> Other courts have drawn parallels between federal and state sovereign immunity.<sup>182</sup>

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176. *Id.* at 680. The earlier cases seeking to improve conditions at the prisons were brought against state officials acting in their official capacities. In this context, generally the only remedies available to plaintiffs involve prospective injunctive relief; damages are barred by the Eleventh Amendment. *See Will v. Mich. Dep’t of State Police*, 491 U.S. 58, 64 n.5 (1989).

177. *Hutto*, 437 U.S. at 684–85.

178. *Id.* at 690, 692 (quoting *Edelman v. Jordan*, 415 U.S. 651, 668 (1974)); *see also Missouri v. Jenkins*, 491 U.S. 274, 278–82 (1989).

179. *S.C. State Ports Auth. v. Fed. Mar. Comm’n*, 243 F.3d 165, 174 (4th Cir. 2001), *aff’d* 535 U.S. 743.

180. This distinction will prove important later in Part V.A of this Article when I argue that discovery requests issued to state employees or state agencies are “ancillary” to an adversarial proceeding and thus are not “lawsuits” and not barred by sovereign immunity.

181. In *Estate of Gonzalez v. Hickman*, the court noted, but declined to follow, an earlier district court case within the Ninth Circuit that held that state sovereign immunity does not authorize a state government to refuse to provide discovery. No. S06-0095(MCE)(GGH), 2006 WL 3201069, at \*2 (E.D. Cal. Nov. 6, 2006) (citing *Laxalt v. C.K. McClatchy*, 109 F.R.D. 632 (D. Nev. 1986)).

182. *See, e.g., Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 101 n.11 (1984); *Cohens v. Virginia*, 19 (6 Wheat.) U.S. 264, 411–12 (1821); *Palomar Pomerado Health Sys. v.*

Two basic principles apply to each of the forms of sovereign immunity: (1) the government is immune from suit unless it waives its immunity, and (2) a private plaintiff may pursue an action against a government officer for injunctive relief. However, important distinctions among tribal, federal, and state sovereign immunity suggest that while cases addressing one type of immunity may be persuasive in cases addressing another, they should not have precedential weight. This Section will start to tease out the differences among the various forms of sovereign immunity and set the stage for the discussion in Part VI on the application of sovereign immunity principles to federal discovery.<sup>183</sup>

### A. Tribal Sovereign Immunity

Indian tribal forms of government existed prior to the creation of the United States government, and thus tribal sovereignty precedes the drafting of the Constitution.<sup>184</sup> An early Supreme Court case addressing tribal sovereignty, *Cherokee Nation v. Georgia*, classified tribes as “domestic dependent nations” whose “relation to the United States resembles that of a ward to his guardian.”<sup>185</sup> However, the Court later clarified in *Worcester v. Georgia*,<sup>186</sup> that this ward-guardian relationship between tribes and the United States does not strip the tribes of the right to self-government.<sup>187</sup> The Court noted, “The Indian nations had always been considered as distinct, independent political communities, retaining their original natural rights, as the undisputed possessors of the soil, from time immemorial[.]”<sup>188</sup> Once the federal government was created by the Constitution, Congress continued to recognize the tribes as independent sovereigns by passing “acts to regulate trade and intercourse with the Indians; which treat them as nations . . . [and] as distinct political communities, having territorial boundaries, within which their authority is exclusive.”<sup>189</sup>

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Belshe, 180 F.3d 1104, 1108 (9th Cir. 1999); *Blaylock v. Schwinden*, 862 F.2d 1352, 1353–54 (9th Cir. 1988).

183. Foreign sovereign immunity warrants its own set of federal statutes, see Foreign Sovereign Immunities Act, 28 U.S.C. §§ 1602–11 (2006), and is outside the scope of this Article.

184. “The present right of tribes to govern their members and territories flows from a preexisting sovereignty limited, but not abolished, by their inclusion within the territorial bounds of the United States.” COHEN’S HANDBOOK OF FEDERAL INDIAN LAW, § 6.02[1] (Nell Jessup Newton ed., 2005) [hereinafter COHEN’S HANDBOOK]. For a more in-depth review of tribal law, Cohen’s handbook is a good source.

185. *Cherokee Nation v. Georgia*, 30 U.S. 1, 17 (1831).

186. 31 U.S. 515 (1832).

187. *Id.* at 561.

188. *Id.* at 559.

189. *Id.* at 556–57.

Two sections in the Constitution address Indian tribes and reinforce the principle that they are sovereigns separate from the states and federal government. The Commerce Clause lays out Congress' legislative power to "regulate Commerce with foreign Nations, and among the several States, and *with the Indian Tribes*."<sup>190</sup> And Article I, Section 2 states that "Indians not taxed" are to be excluded from the number of "free Persons" used for determining representative apportionment.<sup>191</sup> Cohen's Handbook of Federal Indian Law notes that these two sections demonstrate the "historic notion of tribal independence" and that the United States has always considered Indians "citizens of distinct sovereigns."<sup>192</sup>

This understanding of the historic bases for tribal sovereignty is important to provide context for a discussion of a subset of that sovereignty: tribal sovereign immunity.<sup>193</sup> Similar to the states, tribes are immune from suit unless Congress has clearly abrogated that immunity or unless tribes waive their immunity.<sup>194</sup> Tribes and tribal entities or agencies may not be sued—either for governmental or commercial actions, on or off tribal land—if the entity being sued is an "arm of the tribe."<sup>195</sup> However, also similar to states, tribal sovereign immunity does not extend to individual members of a tribe<sup>196</sup> unless those members are tribal officials who are acting in their official capacity and within their official scope of authority.<sup>197</sup> The Supreme Court has consistently held that the rule of *Ex Parte Young* applies to tribal officials just as it does to state officials, so tribal immunity does not preclude actions against tribal officials when they are acting outside the scope of their authority.<sup>198</sup>

Courts often compare tribal sovereign immunity to state sovereign immunity.<sup>199</sup> Although parallels can be drawn between the two, the

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190. U.S. CONST. art. I, § 8, cl. 3 (emphasis added).

191. *Id.* § 2, cl. 3.

192. COHEN'S HANDBOOK, *supra* note 184, § 6.03[2][a].

193. *See Three Affiliated Tribes of the Fort Berthold Reservation v. Wold Eng'g, P. C.*, 476 U.S. 877, 890 (1986) ("The common law sovereign immunity possessed by the Tribe is a necessary corollary to Indian sovereignty and self-governance.").

194. *Kiowa Tribe of Okla. v. Mfg. Techs., Inc.*, 523 U.S. 751, 757–60 (1998).

195. *Allen v. Gold Country Casino*, 464 F.3d 1044, 1046–47 (9th Cir. 2006) (finding that when a casino is owned and operated by the tribe, it is immune from suit).

196. *Puyallup Tribe v. Dep't of Game of Wash.*, 433 U.S. 165, 171–72 (1977).

197. *Davis v. Littell*, 398 F.2d 83, 84–85 (9th Cir. 1968).

198. *See, e.g., Okla. Tax Comm'n v. Citizen Band Potawatomi Indian Tribe of Okla.*, 498 U.S. 505, 514 (1991); *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 59 (1978) (citing *Ex Parte Young* and holding, as an officer of the tribe, the petitioner was not protected by the tribe's sovereign immunity); *N. States Power Co. v. Prairie Island Mdewakanton Sioux Indian Cmty.*, 991 F.2d 458, 460 (8th Cir. 1993).

199. *See supra* note 198. Tribal sovereign immunity has also been compared to federal and foreign sovereign immunity. *See California v. Quechan Tribe of Indians*, 595 F.2d 1153, 1155

legal basis for each is distinct. While tribal immunity derives from the tribes' status as independent nations that pre-existed the United States and is based on principles derived from common law,<sup>200</sup> state sovereign immunity derives from both common law and the Eleventh Amendment. In addition, the Supreme Court has held that, unlike state sovereign immunity which seems mostly impervious to abrogation, "[t]he sovereignty that the Indian tribes retain . . . exists only at the sufferance of Congress and is subject to complete defeasance."<sup>201</sup> Further, the immunity possessed by Indian tribes is neither coextensive nor congruent with that of the states or the federal government.<sup>202</sup> In *Noatak v. Hoffman*,<sup>203</sup> the Ninth Circuit, in holding that state sovereign immunity did not apply to bar a suit brought by a tribe against the state of Alaska, stated that the tribes, "although not states, are like states in their presence within the United States as units of government."<sup>204</sup> However, the Supreme Court, in overruling the Ninth Circuit on appeal, clearly distinguished state sovereign immunity from tribal sovereign immunity.<sup>205</sup> The Court held that, while states surrendered their immunity against their sister states and the United States when they adopted the Constitution, this "constitutional compact" did not include any inherent surrender of immunity to the tribes because the tribes did not participate in the constitutional convention;<sup>206</sup> the tribes did not surrender their sovereignty to the states and neither did the states to the tribes.

Thus, although it may be appropriate to look to cases discussing tribal sovereign immunity for guidance in adjudicating state sovereign immunity issues, the legal and factual foundations supporting each are so different that tribal cases should not be controlling precedent in state cases.

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(9th Cir. 1979) (noting that the "sovereign immunity of Indian tribes is similar to the sovereign immunity of the United States"); see also *Kiowa Tribe*, 523 U.S. at 759 (drawing a parallel between tribal sovereign immunity and the immunity of foreign sovereigns). *But cf.* *Cherokee Nation v. Georgia*, 30 U.S. 1, 18 (1831) (holding explicitly that Indian tribes are not foreign states).

200. See *Martinez*, 436 U.S. at 58 ("Indian tribes have long been recognized as possessing the common-law immunity from suit traditionally enjoyed by sovereign powers.") (citations omitted).

201. *United States v. Wheeler*, 435 U.S. 313, 323 (1978).

202. *Blatchford v. Native Vill. of Noatak*, 501 U.S. 775, 785–86 (1991); see also *Three Affiliated Tribes of Fort Berthold Reservation v. Wold Eng'g, P. C.*, 476 U.S. 877, 890 (1986) ("[T]he Tribe's immunity is not congruent with that which the Federal Government, or the States, enjoy.").

203. 896 F.2d 1157 (9th Cir. 1990), *rev'd*, 501 U.S. 775 (1991).

204. *Id.* at 1163.

205. *Blatchford*, 501 U.S. at 782.

206. *Id.* at 781–82.



## B. Federal Sovereign Immunity

Federal sovereign immunity is similar to state and tribal sovereign immunity, and the Court often invokes precedents from one to legitimize decisions in another.<sup>207</sup> For example, in *Cohens v. Virginia*, a state sovereign immunity case, Justice Marshall relied on federal precedent and noted, “[t]he universally received opinion is, that no suit can be commenced or prosecuted against the United States.”<sup>208</sup>

As is true in the state and tribal sovereign immunity contexts, the federal government generally enjoys immunity from suit unless it has waived its immunity,<sup>209</sup> but immunity does not extend to federal officers sued in their official capacities for injunctive relief.<sup>210</sup> However, the foundations of federal sovereign immunity are different from those of state and tribal immunity.<sup>211</sup> First, unlike the other two, the Constitution never mentions or implies federal sovereign immunity.<sup>212</sup> Second, lawsuits brought in federal court against the federal government raise different legal issues from similar suits brought against states or tribes. In the former, the federal court faces separation of powers issues—how much authority should the judicial branch have to enact a judgment over either the executive or legislative branches. In contrast, state sovereign

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207. JACOBS, *supra* note 65, at 111; TRIBE, *supra* note 67, § 3-25, at 532.

208. *Cohens v. Virginia*, 19 (6 Wheat.) U.S. 264, 411–12 (1821).

209. *See, e.g.*, *FDIC v. Meyer*, 510 U.S. 471, 475 (1994) (“Absent a waiver, sovereign immunity shields the Federal Government and its agencies from suit.”).

210. *See Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 689–90 (1949); *United States v. Lee*, 106 U.S. 196, 196 (1882) (holding that a landowner could bring suit for injunctive relief against federal officials). Also, the Administrative Procedure Act, 5 U.S.C. § 702 (2006), allows the United States to be substituted in for a defendant federal officer in a suit for injunctive relief brought against the officer.

211. *Larson*, 337 U.S. at 708–09 (Frankfurter, J., dissenting) (noting parallels between state and federal sovereign immunity while recognizing that the sources for each are distinct); *see also* Joseph D. Block, *Suits Against Government Officers and the Sovereign Immunity Doctrine*, 59 HARV. L. REV. 1060, 1064–65 (1946) (distinguishing federal from state sovereign immunity and noting “[w]ith respect to suits against the Federal Government, it is wholly a judge-made doctrine, since there is nothing in the Constitution requiring it”).

212. The fact that the Constitution does not clearly mention or even imply federal sovereign immunity has not stopped courts from finding federal sovereign immunity inherent in the Constitution. Justice Frankfurter noted, in dissenting from a case which found sovereign immunity protected a state from suit where it had not clearly waived its immunity, that state and federal “immunity from suit without consent [are] embodied in the Constitution.” *Kennecott Copper Corp. v. State Tax Comm’n*, 327 U.S. 573, 580 (1946) (Frankfurter, J., dissenting). He also noted sovereign immunity “is an anachronistic survival of monarchical privilege, and runs counter to democratic notions of the moral responsibility of the State.” *Id.*; *see also* *Pennsylvania v. Union Gas Co.*, 491 U.S. 1, 34 (1989) (Scalia, J., dissenting) (arguing that because the Constitution does not state affirmatively that private individuals may sue the federal government for money damages, the government cannot be sued without its consent); *United States v. Mitchell*, 463 U.S. 206, 212 (1983) (“It is axiomatic that the United States may not be sued without its consent and that the existence of consent is a prerequisite for jurisdiction.”).

immunity in federal court raises federalism issues, and interpretations of tribal immunity may differ depending on a tribe's status vis-à-vis the federal government or vis-à-vis the states.

Additionally, the federal government has enacted several statutes waiving sovereign immunity for actions in tort,<sup>213</sup> contract,<sup>214</sup> and for injunctive relief,<sup>215</sup> and, unlike the states, the Court interprets these waivers broadly.<sup>216</sup> As well, 42 U.S.C. § 1983 does not apply to the federal government,<sup>217</sup> and Congress has not enacted a statute providing waiver for actions against federal officers for money damages arising out of constitutional violations. Instead, in 1971, the Supreme Court created a remedy in *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*,<sup>218</sup> though this case is controversial.<sup>219</sup>

Thus, while principles and case law in federal sovereign immunity cases are similar to those involving state sovereign immunity, as with tribal immunity precedent, the former cases should inform but not control the later.

## V. SOVEREIGN IMMUNITY AND FEDERAL DISCOVERY

In this Part, I first present in more detail the State of California's argument that sovereign immunity protects its employees and agencies from responding to discovery. I then explore several cases discussing the interaction of state, tribal, and federal sovereign immunity principles with discovery practices in federal court.

### A. *Sovereign Immunity and the Problem of "Possession, Custody, or Control" in Two of the Eastern District Prison Cases*

The State of California, through its agencies and employees, raised sovereign immunity as a defense to discovery in each of the Eastern

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213. See Federal Tort Claims Act, 28 U.S.C. § 2674 (2006).

214. See Tucker Act, 28 U.S.C. § 1491 (2006).

215. See Administrative Procedure Act, 5 U.S.C. § 702 (2006).

216. See *Hoffman v. Conn. Dep't of Income Maint.*, 492 U.S. 96, 114 (1989) (Stevens, J., dissenting). Justice Stevens noted that, unlike the narrow scope of waiver attributed to states, "[i]t is well settled that when the Federal Government waives its sovereign immunity, the scope of that waiver is construed liberally to effect its remedial purposes." *Id.*

217. See 42 U.S.C. § 1983 (2006).

218. 403 U.S. 388, 397 (1971).

219. A full discussion of the controversy surrounding the *Bivens* decision is beyond the scope of this article; however, several current Supreme Court Justices believe *Bivens* was wrongly decided because it creates a cause of action where none existed in the Constitution. Justices Scalia and Thomas have been particularly derisive toward the *Bivens* case. See *Corr. Servs. Corp. v. Malesko*, 534 U.S. 61, 75 (2001) (Scalia, J., concurring) ("*Bivens* is a relic of the heady days in which this Court assumed common-law powers to create causes of action."); *Wilkie v. Robbins*, 551 U.S. 537 (2007) (Thomas, J., concurring) ("*Bivens* and its progeny should be limited 'to the precise circumstances that they involved.'" *Id.* (citing *Malesko*)).

District Prison Cases.<sup>220</sup> The Federal Rules of Civil Procedure favor broad and full discovery in civil litigation and allow discovery of relevant evidence even if that evidence may not be admissible at trial.<sup>221</sup>

Parties may seek discovery from any other party to the lawsuit under Rules 26 and 34. Rule 26 requires certain initial disclosures,<sup>222</sup> and Rule 34 supplements Rule 26 by allowing a party to serve discovery requests on another party for “any designated documents or electronically stored information” or “tangible things” that are within the responding party’s “possession, custody or control.”<sup>223</sup> However, sometimes nonparties (individuals or organizations not party to the lawsuit) have information relevant to a case. Taking this into consideration, Rule 45, using language similar to Rule 34, allows parties to obtain discovery from nonparties via subpoena.<sup>224</sup>

In contesting the plaintiff’s discovery requests in two of the Eastern District Prison Cases, the State of California relied on a novel and perplexing twist to the sovereign immunity defense. When the civil rights plaintiffs in *Allen v. Woodford*<sup>225</sup> and *Thomas v. Hickman*<sup>226</sup> served routine Rule 34 discovery requests on state employee defendants for copies of documents (such as hospital contracts and doctor complaints) that were both relevant to their cases and of the type that would be within the defendants’ possession,<sup>227</sup> the defendants argued they had no “legal right to the documents” because the documents were

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220. See *Allen v. Woodford*, 544 F. Supp. 2d 1074 (E.D. Cal. 2008); *Thomas v. Hickman*, No. CV F 06-0215 AWI SMS, 2008 WL 782476 (E.D. Cal. Mar. 20, 2008).

221. FED. R. CIV. P. 26(b)(1). (“Parties may obtain discovery regarding any matter, not privileged, that is relevant to the claim or defense of any party . . . Relevant information need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence.”).

222. FED. R. CIV. P. 26. Rule 26 requires, as part of the parties’ initial disclosures, that a party provide all other parties with “a copy of, or a description by category and location of, all documents, electronically stored information, and tangible things that are in the possession, custody, or control of the party and that the disclosing party may use to support its claims or defenses.” FED. R. CIV. P. 26(a)(1)(B).

223. FED. R. CIV. P. 34(a).

224. Rule 45 states that every subpoena shall “command each person to whom it is directed to attend and give testimony or to produce and permit inspection, copying, testing, or sampling of designated books, documents, electronically stored information, or tangible things in the possession, custody or control of that person.” FED. R. CIV. P. 45(a)(1)(C).

225. 544 F. Supp. 2d 1074 (E.D. Cal. 2008). Another case, *Scott v. Suryadevara*, was joined with the *Allen* case for discovery purposes because it involved similar facts. See Third Amended Complaint at ¶¶ 24–27, 2007 WL 969232 (E.D. Cal. Feb. 5, 2007) (No. 1:05-CV-01282-OWW-WMW-PC).

226. Case No. CV F 06-0215 AWI SMS, 2008 WL 782476 (E.D. Cal. Mar. 20, 2008).

227. See, e.g., *Allen v. Woodford*, 543 F. Supp. 2d 1138, 1140 (E.D. Cal. 2008); *Thomas v. Hickman*, No. 1:06-cv-00215-AWI-SMS, 2007 U.S. Dist. LEXIS 95796, at \*3–4 (E.D. Cal. Dec. 6, 2007).

owned by the state.<sup>228</sup> Therefore, the defendants claimed, they had no responsive documents within their “possession, custody or control.”<sup>229</sup> The plaintiffs then tried to get documents from alternate sources by serving Rule 45 subpoenas on nonparty state employees such as custodians of records at the prisons.<sup>230</sup> However, the nonparties also claimed they lacked any legal right to or control over the documents.<sup>231</sup> Instead, similar to the state defendants, they argued the documents were the property of the State of California and that compelling the State of California to turn over documents violated the Eleventh Amendment.<sup>232</sup>

Parties to litigation often fight over whether discovery is within their “possession, custody, or control.” Neither the Federal Rules nor their Advisory Committee Notes define these terms,<sup>233</sup> but in general parties

228. *Thomas*, 2007 U.S. Dist. LEXIS 95796, at \*32.

229. *See, e.g.*, Joint Statement re Discovery Disputes of Plaintiff at 4, *Allen v. Woodford*, Case No. 1:05-cv-1104-LJO-NEW, 2007 WL 309945 (E.D. Cal. Jan. 9, 2007).

230. After the defendants refused to comply with discovery requests, the court ordered them to identify non parties that would have responsive documents. *See id.* at \*7. The plaintiffs then served subpoenas on the nonparties identified by the defendants. *See Allen*, 543 F. Supp. 2d at 1139.

231. *See, e.g.*, *Allen v. Woodford*, Case No. 05-1104, Doc. No. 204 (“Non-Parties’ Opposition to Plaintiff’s Motion to Compel”) at 7 (E.D. Cal. Jan. 2, 2008). The State of California relied on *Estate of Gonzalez v. Hickman* for its argument that sovereign immunity applied to discovery issued to individuals, although the case did not address the issue because the court was only presented with the question of whether a state agency must respond to a subpoena. *See Estate of Gonzalez v. Hickman*, 466 F. Supp. 2d at 1226, 1227 (E.D. Cal. 2006) (noting that the *Gonzalez* plaintiff served subpoenas directly on the CDCR itself); *see also Gonzalez*, 2007 U.S. Dist. LEXIS 83702, at \*3, n.5 (C.D. Cal. Apr. 18, 2007) (citing *Allen v. Woodford*, No. CV F-05-1104 OWW LJO, 2007 WL 309945, \*3, and noting “[s]ubsequent magistrate judges in the Eastern District have questioned [*Gonzalez*’s] result, and limited the State’s subpoena immunity to subpoenas served directly on the State itself rather than on its employees.”).

232. *See, e.g.*, Non-Parties’ Opposition to Plaintiff’s Motion to Compel Production of Documents at 7, *Allen v. Woodford*, No. 1:05-cv-1104-OWW-GSA, (E.D. Cal. Jan. 2, 2008).

233. *But see* BLACK’S LAW DICTIONARY 1201 (8th ed. 2004) (defining “possession” as “[t]he fact of having or holding property in one’s power; the exercise of dominion over property. . . . The right under which one may exercise control over something to the exclusion of all others; the continuing exercise of a claim to the exclusive use of a material object”). *See also id.* at 412 (defining “custody” as “[t]he care and control of a thing or person for inspection, preservation, or security”). *Moore’s Federal Practice* lists several factors to be considered in determining whether a party has “possession or control” over items:

The use or purpose to which the materials were employed.

Whether the materials were generated, acquired, or maintained with the party’s assets.

Whether the party actually generated, acquired, or maintained the materials.

Whether the party determined the materials’ use, location, possession, or access.

do not contest whether they have “possession” or “custody” over materials because courts have held that “records which are normally kept in the business of the party . . . are presumed to exist [and thus be in the party’s possession or custody], absent a sworn denial.”<sup>234</sup> Some courts have even required employees to produce their employer’s records if they have the practical ability to obtain them.<sup>235</sup> As noted, the documents sought by the plaintiffs in *Allen* and *Hickman* were of the type the defendants or nonparties could be expected to keep in their possession or custody. Yet, despite these requirements, the *Allen* and *Hickman* defendants and nonparties argued they lacked “control” over the documents—that they lacked the *legal* ability to obtain them because the state legally owned the documents.<sup>236</sup>

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Who actually had access to and use of the materials.

The extent to which the materials serve the party’s interests.

Any formal or informal evidence of a transfer of ownership or title.

The ability of the party to the action to obtain the documents when it wants them.

Whether and to what degree the nonparty will receive the benefits of any award in the case.

The nonparty’s connection to the transaction at issue.

JAMES C. FRANCIS & ROBERT M. BLOOM, *MOORE’S FEDERAL PRACTICE* § 34.14[2][b] (2009).

234. *Norman v. Young*, 422 F.2d 470, 473 (10th Cir. 1970) (citing cases and holding default judgment ordered against defendants was proper sanction where defendants willfully failed to produce documents as ordered by the district court). Instead, parties contest whether, if they do not have a document in their possession or custody, they nevertheless have “control” over it. However, courts are generally clear that “control” over an item includes the legal ability to obtain the item, even if it is no longer in the actual possession of the party. *See* FRANCIS & BLOOM, *supra* note 233, § 34.14[2][b] nn. 15–17 (citations omitted) (citing cases supporting proposition that control over an item includes the legal ability to obtain the item); WILLIAM W. SCHWARZER, A. WALLACE TASHIMA, & JAMES M. WAGSTAFFE, *CAL. PRAC. GUIDE FED. CIV. PRO. BEFORE TRIAL* ch. 11(IV)-C [11:1826] (citations omitted) (same); *see also* Poole *ex rel. Elliott v. Textron, Inc.*, 192 F.R.D. 494, 500–01, 510–11 (D. Md. 2000) (noting “[i]t is well established that ‘control’ under Fed. R. Civ. P. 34 is to be broadly construed so that a party may be obligated to produce documents requested even though it may not actually possess the documents” and awarding sanctions where defendant failed to produce documents it gave to its attorney); *Mercy Catholic Med. Ctr. v. Thompson*, 380 F.3d 142, 160 (3d Cir. 2004); *Bank of N.Y. v. Meridien Bio Bank Tanz.*, 171 F.R.D. 135, 146 (S.D.N.Y. 1997) (“[D]ocuments are considered to be under a party’s control when that party has the right, authority, or *practical ability* to obtain the documents.”) (emphasis added).

235. *See, e.g., In re Flag Telecom Holdings, Ltd. Secs. Litig.*, 236 F.R.D. 177, 181 (S.D.N.Y. 2006).

236. *See* Order on Plaintiff’s Motion to Compel Documents from the Individual Defendants, *Allen v. Woodford*, No. 05-1104, 2007 WL 309945, at \*1 (E.D. Cal. Jan. 30, 2007) (“Defendants raise a late objection that discovery is not permitted on the CDCR Defendants in their individual capacities because they are not authorized by the State of California to obtain custody, possession or control of responsive documents.”); *Thomas v. Hickman*, No. CV F 06-

Other courts have rejected similar “possession, custody or control” arguments, though not where the party served with discovery asserted sovereign immunity. For example, in *Hamilton v. Kerik*,<sup>237</sup> another prisoner’s rights action, the court ordered defendant officers to answer interrogatories, rejecting their argument that any information requested “would be in the possession, custody, and control of New York State.”<sup>238</sup> Similarly, in another prisoner suit, *Kitchen v. Humphrey*,<sup>239</sup> a Georgia court, in sanctioning a prison warden for failing to provide responsive documents, noted that documents such as “personnel assignment information” including “duty rosters, move slips, reviews, payroll, personnel, and disciplinary reports” must be within the defendant warden’s “custody and control” because they are “essential to the orderly management of the prison; and are produced, utilized, and archived in the normal course of operations.”<sup>240</sup>

The state employees’ arguments in the Eastern District Prison Cases, if accepted, could prevent all access to documents essential to proving civil rights cases involving the state. Generally, in civil litigation, even if a party turns out not to have legal “control” over a document, the party seeking discovery may still be able to obtain the document through a subpoena issued to a nonparty who does have control. Yet, in the Eastern District Prison Cases, where the State of California was the employer for both the defendants and the nonparties, the state’s novel sovereign immunity defense based on lack of “control” over documents would bar *all* access to responsive documents. It raised the stakes much higher than in civil litigation between private parties because, if the plaintiffs could not get documents from defendants or the nonparties, there was no one else left to subpoena who, based on the state’s argument, would not be protected by sovereign immunity. Although the Eastern District Prison Case plaintiffs were suing individual defendants

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0215 AWI SMS, 2008 WL 782476, at \*3 (E.D. Cal. Mar. 20, 2008). It is questionable whether the defendants’ and non parties’ argument based solely on the “control” part of “possession, custody or control” is valid because it neglects to read the statute as a whole—it fails to recognize that the Rule, by using the disjunctive “or” requires production in three distinct instances, so that even if parties lack “control” over the documents, they should be required to disclose them as long as they still have either “possession” or “custody.” See *Bess v. Cate*, No. 2:07-cv-1989 JAM JFM, 2008 U.S. Dist. LEXIS 100253, at \*4 (E.D. Cal. Nov. 26, 2008) (“Since the requirement is in the disjunctive (‘possession, custody or control’), actual possession of a document is not required.” (citing *In re Bankers Trust Co.*, 61 F.3d 465, 469 (6th Cir. 1995))).

237. No. 01-CV-6934 GELHBP, 2002 WL 31834428 (S.D.N.Y. Dec. 17, 2002).

238. *Id.* at \*1–2.

239. No. 1:03-cv-008 (WLS), 2006 U.S. Dist. LEXIS 15128 (M.D. Ga. Mar. 31, 2006).

240. *Id.* at \*6–7. Plaintiffs in the Eastern District Prison Cases also sued prison wardens and served them with discovery requests for information similar to that sought in *Kitchen*. See *Allen v. Woodford*, 543 F. Supp. 2d 1138, 1140 (E.D. Cal. 2008); *Thomas v. Hickman*, No. 1:06-cv-00215-AWI-SMS, 2007 WL 4302974, at \*1 (E.D. Cal. Dec. 6, 2007).

who were not themselves protected from suit by sovereign immunity, the plaintiffs could not prove their cases if the state were able to block all discovery with a state sovereign immunity defense.

B. *The State Sovereign Immunity Defense Applied to Discovery Requests*

There are very few published opinions on the issue of state sovereign immunity and federal discovery requests, whether those requests are to defendants under Rule 34 or to nonparties via subpoena under Rule 45. Most courts seem to assume, without analysis, that sovereign immunity does not apply in these contexts.<sup>241</sup> Similarly, courts have concluded, again without much analysis, that sovereign immunity does not protect state custodians of records from complying with federal grand jury subpoenas.<sup>242</sup> Only one published case in any of the courts of appeals has addressed the application of state sovereign immunity to federal discovery practices. In *In re Missouri Department of Natural Resources*,<sup>243</sup> the Eighth Circuit held that the Missouri Department of Natural Resources must comply with subpoena requests, even after it was dismissed as a party from the case based on its sovereign immunity.<sup>244</sup> In doing so, the court stated that “[g]overnmental units are subject to the same discovery rules as other persons and entities having contact with the federal courts. There is simply no authority for the position that the Eleventh Amendment shields government entities from

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241. See, e.g., *Grine v. Coombs*, 214 F.R.D. 312, 342 (W.D. Pa. 2003) (dismissing claims against the Pennsylvania Department of Environmental Protection on Eleventh Amendment grounds but also recognizing that the “[p]laintiffs had other available means to pursue additional DEP documents, such as the ability to issue a subpoena duces tecum”); *Jackson v. Brinker*, 147 F.R.D. 189, 193, 205 (S.D. Ind. 1993) (holding that even though the Indiana Department of Corrections was immune from suit, it still had to respond to subpoenas). For examples where other available means exist, see, for example, *Arista Records LLC v. Does 1-14*, No. 08-00205, 2008 WL 5350246, \*3, n.4 (W.D. Va., Dec. 22, 2008) (citing copyright cases in which discovery was permitted against nonparty state colleges and universities . . . despite challenges (though none apparently raising sovereign immunity) by the educational institution or Doe defendants”).

242. See, e.g., *In re Witness Before the Special Grand Jury 2000-2*, 288 F.3d 289, 295 (7th Cir. 2002) (“[S]tate officials, including state lawyers, likewise enjoy no immunity [under the Eleventh Amendment] from disclosing relevant information [subject] to a federal grand jury [subpoena.]”); *In re Grand Jury Subpoena*, 198 F. Supp. 2d 1113, 1117 (D. Alaska 2002) (requiring custodians of records of the Alaska Department of Labor, Employment Security Division to comply with a federal grand jury subpoena); *In re Grand Jury Matter*, 762 F. Supp. 333, 336 (S.D. Fla. 1991) (requiring the Florida Department of Professional Regulation to comply with federal grand jury subpoena seeking records of patients who filed complaints about a physician with Department).

243. 105 F.3d 434, 436 (8th Cir. 1997).

244. *Id.* at 436.

discovery in federal court.”<sup>245</sup> However, this case has not been cited for the same proposition by any other court, even though it is more than ten years old, perhaps because it relies on questionable federal sovereign immunity precedent for its support.<sup>246</sup>

There are no appellate-level cases within the Ninth Circuit addressing state sovereign immunity and federal discovery practices. For this reason, both the State of California and the judge who issued the first order in *Estate of Gonzalez v. Hickman*<sup>247</sup> looked to Ninth Circuit cases addressing similar issues in the tribal sovereign immunity context.<sup>248</sup> Although both the state and the *Gonzalez* court assumed that tribal sovereign immunity case law was relevant and binding in the state sovereign immunity context,<sup>249</sup> I have presented several reasons why tribal sovereign immunity law should not be precedential in this area.<sup>250</sup> The court should have looked instead to separate circuit precedent addressing subpoenas issued to a federal agency and finding such subpoenas not barred by immunity principles,<sup>251</sup> but it did not explore this line of cases.<sup>252</sup> The following Parts explore both federal and tribal immunity in the discovery context. Then Part V.A compares and contrasts each to state immunity, ultimately concluding that federal sovereign immunity case law from the Ninth and District of Columbia Circuits is most persuasive in this area of law.

### C. Tribal Sovereign Immunity and Discovery

The Ninth Circuit has held in two cases that tribal sovereign immunity protects tribal entities from having to respond to court

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245. *Id.* (internal citations omitted).

246. Although the Eighth Circuit cited in its decision *United States v. Procter & Gamble Co.*, 356 U.S. 677, 681 (1958), which addressed federal sovereign immunity, *Procter & Gamble* was not really on point because it only addressed whether the federal government, when it is already a proper party to litigation, must comply with discovery requests. *Id.* at 679–84. The case did not address whether the government must comply with discovery if it has not previously availed itself of the court. *See id.*

247. No. S-06-0095 MCE GGH, 2006 WL 3201069, at \*1 (E.D. Cal. Nov. 6, 2006).

248. *Id.* at \*3–4 (citing *United States v. James*, 980 F.2d 1314, 1319–20 (9th Cir. 1992); *Bishop Paiute Tribe v. County of Inyo*, 291 F.3d 549, 558–60 (9th Cir. 2002)).

249. *Id.*

250. *See supra* Part IV.A.

251. *See, e.g.*, *Exxon Shipping Co. v. U.S. Dep’t of Interior*, 34 F.3d 774, 780 (9th Cir. 1994).

252. *See Estate of Gonzalez*, 2006 WL 3201069, at \*2 n.2. In some of the Eastern District Prison Cases, the State of California cited to federal sovereign immunity cases from the Second and Fourth Circuits. *See, e.g.*, *Non-Parties’ Opposition to Plaintiff’s Motion to Compel Production of Documents* at 7, 9, 10, *Allen v. Woodford*, No. 1:05-cv-01104-OWW-GSA, 2008 WL 117906 (E.D. Cal. Jan. 2, 2008); *Opposition to Plaintiff’s Motion to Compel Non-Parties to Produce Documents to Subpoenas* at 4, *Thomas v. Hickman*, Case No. 06-00215, Docket No. 92 (E.D. Cal. May 29, 2007).



processes such as a subpoena or a search warrant.<sup>253</sup> Some courts in other circuits have followed this reasoning, though others have declined to do so.<sup>254</sup> In *United States v. James*,<sup>255</sup> relied on by the court in *Estate of Gonzalez v. Hickman*, the Ninth Circuit held sovereign immunity protected a tribe from complying with subpoenas issued by a criminal defendant accused of rape on a tribal reservation to a tribal agency for documents relating to his accuser's drug and alcohol problem. The court recognized that this was an issue of first impression—prior cases only addressed tribal sovereign immunity where the tribe was a party to the lawsuit—and yet still held that “Indian tribes’ immunity from suit remains intact ‘absent express and unequivocal waiver of immunity by the tribe or abrogation of tribal immunity by Congress.’”<sup>256</sup> The court held the tribe’s immunity derived from its “status as a dependent domestic nation.”<sup>257</sup> And, although the court recognized that the tribe’s immunity does not extend to tribal members,<sup>258</sup> it still held without further analysis that the subpoena in question, issued specifically to the director of social services rather than the tribe or a tribal agency, was barred.

In 2002, the Ninth Circuit in *Bishop Paiute Tribe v. County of Inyo*<sup>259</sup> explicitly reaffirmed *James* (albeit under very different factual and legal contexts) and held sovereign immunity barred a county

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253. See *Bishop Paiute Tribe v. County of Inyo*, 291 F.3d 549, 557–60 (9th Cir. 2002); *United States v. James*, 980 F.2d 1314, 1319–20 (9th Cir. 1992).

254. See *Catskill Dev., LLC v. Park Place Entm’t Corp.*, 206 F.R.D. 78, 86–88 (S.D.N.Y. 2002) (finding tribal sovereign immunity protected a tribe and its agencies from subpoena but also finding waiver applied to some parties). *But cf.* *Narragansett Indian Tribe v. Rhode Island*, 449 F.3d 16, 29–30 (1st Cir. 2006) (refusing to follow either *James* or *Bishop Paiute*); *United States v. Velarde*, 40 F. Supp. 2d 1314, 1315–16 (D.N.M. 1999) (finding balancing test appropriate and determining that the sovereign interests of the United States in enforcing the Major Crimes Act, 18 U.S.C. § 1153, and the court’s interests in protecting defendant’s constitutional rights of due process and a fair trial outweighed the tribe’s sovereign interests, in part because responding to the subpoena did not implicate the tribe’s treasury); *In re Long Visitor*, 523 F.2d 443, 446–47 (8th Cir. 1975) (finding tribal sovereign immunity does not protect a tribe from responding to a grand jury subpoena because federal jurisdiction over crimes committed on Indian reservations “inherently includes every aspect of federal criminal procedure applicable to the prosecution of such crimes”).

255. 980 F.2d 1314, 1319–20 (9th Cir. 1992).

256. *Id.* at 1319 (quoting *Burlington N. R.R. Co. v. Blackfoot Tribe*, 924 F.2d 899, 901 (9th Cir. 1991)).

257. *Id.* (citing *United States v. Wheeler*, 435 U.S. 313, 323 (1978)).

258. *Id.*

259. 291 F.3d 549, 554 (9th Cir. 2002), *vacated on other grounds by Inyo County v. Paiute-Shoshone Indians of the Bishop Cmty. of the Bishop Colony*, 538 U.S. 701 (2003). *James* addressed whether a subpoena issued in a federal criminal case to a tribal agency violated the tribe’s sovereign immunity. See *James*, 980 F.2d at 1319–20. *Bishop* was also brought in federal court, but it was a civil rights action, not a criminal case. See *Bishop*, 291 F.2d at 554. In *Bishop*, the court addressed whether the tribe’s sovereign immunity barred a county sheriff and district attorney from executing a search warrant on the tribe for tribal documents. *Id.*

sheriff's execution of a search warrant to seize tribal employee records as part of a welfare fraud investigation. The county sheriff and district attorney defendants argued the warrant did not "offend the tribe's status as a sovereign entity because it constituted only a 'customary inconvenience' that would accompany the service on any business," but the court cited to *James* to reiterate that the Indian tribe's status as sovereign distinguished it from other businesses.<sup>260</sup> The court held conclusively, "[a]bsent a waiver of sovereign immunity, tribes are immune from processes of the court."<sup>261</sup>

Although the court decided the case in the context of tribal sovereign immunity law and tribal law in general, the court also compared the tribe's interest in protecting its records from outsiders to those of the State of California or the federal government and relied in part on case law holding the United States was immune from subpoenas issued by a state court.<sup>262</sup>

Yet in both *Bishop Paiute* and *James*, the court held the defendants had other means to obtain the information they sought. The Ninth Circuit held that although that sovereign immunity barred the warrant or subpoena at issue, the parties seeking evidence could still obtain at least some of the information through alternate means<sup>263</sup> or through waiver.<sup>264</sup> This is an important theme running through tribal and federal cases. In each of the cases finding sovereign immunity barred discovery, the party seeking discovery had another way to obtain at least some of the information. As discussed further in Part V.A, this would not be true if the court adopted the State of California's "possession, custody, or control" theories in the Eastern District Prison Cases.

As noted, several other courts outside the Ninth Circuit have declined to follow *James* and *Bishop Paiute*, finding that other interests outweighed the tribe's sovereignty interest.<sup>265</sup> Even courts within the

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260. *Id.* at 557–58.

261. *Id.* at 557.

262. *Id.* at 560 n.3 (citing *Elko County Grand Jury v. Siminoe*, 109 F.3d 554, 556 (9th Cir. 1997) (denying enforcement of a state court subpoena to a federal employee)).

263. In *Bishop Paiute*, the court held the county officials could have issued a search warrant against individual tribal members rather than the tribe itself through the state's authority under 18 U.S.C. § 1162(a) (2006), which provides states with criminal jurisdiction over tribal members and crimes committed on reservations within the states' borders. 291 F.3d at 560–61.

264. In *James*, the court upheld subpoenas for all relevant documents held by another tribal agency, finding that agency waived its immunity when it provided some documents voluntarily to the prosecution. *See James*, 980 F.2d at 1320. The court held the tribe "cannot selectively provide documents and then hide behind a claim of sovereign immunity when the defense requests different documents from the same agency." *Id.* However, this waiver did not cross the line to other tribal agencies that had not provided documents to the government. *Id.*

265. *See United States v. Velarde*, 40 F. Supp. 2d 1314, 1316 (D.N.M. 1999).

Ninth Circuit have found reasons why *James* should not be controlling. For example, in *United States v. Snowden*,<sup>266</sup> the court denied a tribe's motion to quash a subpoena for a victim's counseling records because it found the defendant's "constitutional rights of due process, fair trial, confrontation, and compulsory process outweigh[ed] the [tribe's] claim of immunity."<sup>267</sup> The court stated that "*James* does not control because the defendant [in *James*] did not raise constitutional challenges to the claim of immunity."<sup>268</sup> Similarly, in *United States v. Juvenile Male 1*,<sup>269</sup> the court declined to follow *James* because *James* did not address constitutional challenges to the tribe's assertion of sovereign immunity such as the defendant's Sixth Amendment right "to be confronted with the witnesses against him; [and] to have compulsory process for obtaining witnesses in his favor."<sup>270</sup>

*James* and *Bishop* may also be questionable precedent, given dicta in a 1986 Supreme Court case, *Three Affiliated Tribes of Ft. Berthold Reservation v. Wold Engineering, P. C.*<sup>271</sup> In that case the Court, in holding that a state statute requiring a tribe to waive its sovereign immunity was preempted by federal Indian law, suggested that certain court processes, though they may affect tribal government, are not barred by sovereign immunity.<sup>272</sup> The Court stated,

not all conditions imposed [by a state] on access to state courts which potentially affect tribal immunity, and thus tribal self-government, are objectionable. For instance, even petitioner [tribe] concedes that its tribal immunity does not extend to protection from the normal processes of the state court in which it has filed suit.<sup>273</sup>

The Court also noted that the tribe admitted it was subject to "discovery proceedings and to proceedings that would insure a fair trial to the non-Indian defendants."<sup>274</sup> Although the Court discussed discovery in the context of tribes as parties to litigation who have already availed themselves of the court, rather than as nonparties,<sup>275</sup> this

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266. 879 F. Supp. 1054 (D. Or. 1995).

267. *Id.* at 1057.

268. *Id.*

269. 431 F. Supp. 2d 1012 (D. Ariz. 2006).

270. *Id.* at 1017–18 (internal citations omitted). The court also noted the incongruous effect its ruling would have on the Navajo tribe if it were to follow *James*. *Id.* at 1018. The tribe's borders overlap both the Ninth and Tenth Circuits, and a district court within the Tenth Circuit expressly declined to follow *James*. See *Velarde*, 40 F. Supp. 2d at 1315–16.

271. 476 U.S. 877 (1986).

272. *Id.* at 884.

273. *Id.* at 891.

274. *Id.*

275. *Id.*

dicta suggests discovery is something less than a lawsuit and that other interests, such as a fair trial, should be balanced against the tribe's sovereign interests in this context.

#### D. Federal Sovereign Immunity and Discovery

As discussed previously, federal sovereign immunity in federal court is based on different principles from state sovereign immunity in the same venue. When a state invokes a sovereign immunity defense in federal court, it raises federalism issues. However, when the federal government invokes a sovereign immunity defense in the same court, it raises separation of powers issues. Nevertheless, because courts often invoke precedent from one to legitimize decisions in the other,<sup>276</sup> and because several courts have addressed the intersection of federal immunity and discovery, federal sovereign immunity warrants discussion.

Appellate courts have addressed federal sovereign immunity in the discovery context to mixed results. The District of Columbia and Ninth Circuits have both held that the federal government is not immune from subpoenas, while the Second and Fourth Circuits have disagreed.

The D.C. Circuit, the first appellate court to face the issue, did so in three important cases. First, in *Northrop Corp. v. McDonnell Douglas Corp.*, the court noted that since at least 1965, it had “assumed the nonapplicability of sovereign immunity” to a subpoena directed at the government and stated, “we find no cause in the present case to upset a steady course of precedent by attempting to graft onto discovery law a broad doctrine of sovereign immunity.”<sup>277</sup> Next, in *Linder v. Calero-Portocarrero*,<sup>278</sup> a later case in which parents of an aid worker slain by contra soldiers in Nicaragua sought documents from various federal agencies, the court held nonparty subpoenas do not trigger sovereign immunity because subpoenas do not seek damages and because the federal government waived its immunity in the Administrative Procedure Act for actions “seeking relief other than money damages.”<sup>279</sup>

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276. See *supra* Part IV.B.

277. 751 F.2d 395, 398 n.2 (D.C. Cir. 1984). In *Northrop*, the court raised the issue of sovereign immunity sua sponte, after McDonnell Douglas issued discovery subpoenas to the Defense and State Departments, and requested supplemental briefing on the issue from the parties. In declining to find federal sovereign immunity barred the subpoenas at issue, it noted that, “[a]s far as the briefs and our independent research disclose, the issue has never been explicitly discussed in the opinion of any federal court.” *Id.* (emphasis added).

278. 251 F.3d 178 (D.C. Cir. 2001).

279. *Id.* at 181 (citing 5 U.S.C. § 702 (2006)). The Administrative Procedure Act states that federal courts may review claims against the federal government that seek “relief other than money damages” and that state “a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority.” 5 U.S.C. § 702 (2006). It

Finally, in *Yousuf v. Samantar*,<sup>280</sup> the court held the State Department was not immune from subpoenas issued by Somali nationals in their suit brought under the Torture Victim Protection Act.<sup>281</sup> The D.C. Circuit recognized that the federal government is not “exempt from the obligation of a nonparty to provide its evidence pursuant to subpoena” because “the Government is a ‘person’ subject to subpoena under Rule 45.”<sup>282</sup> The State Department had argued it was not a “person” subject to Rule 45,<sup>283</sup> but the court noted that there were only two situations at common law in which the government “was presumed not to be a ‘person’ bound by statute,” and Rule 45 fell into neither category.<sup>284</sup> First, the government did not have an “established prerogative” not to respond to subpoenas; in fact, the court noted, the government, in briefing a 1900 Supreme Court case, admitted “that records requested for a suit in which it was not a party ‘could be secured by a subpoena duces tecum to the head of the Treasury Department.’”<sup>285</sup> Second, applying Rule 45 to the government would not “work an obvious absurdity” (as, for example, applying a speeding law to a policeman pursuing a criminal) because the discovery rules were intended “to provide a ‘liberal opportunity for discovery,’”<sup>286</sup> and because other Rules of Civil Procedure have been interpreted as applying to the government.<sup>287</sup> Therefore, to find Rule 45 did *not* apply would be inconsistent and “would attribute a schizophrenic intent to the drafters” of the Federal Rules.<sup>288</sup>

The Ninth Circuit has also refused to find that sovereign immunity protects federal agencies from responding to subpoenas, though on slightly different grounds. In *Exxon Shipping Co. v. United States Department of Interior*,<sup>289</sup> a case arising out of the Valdez oil spill in

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also states that it does not affect “limitations on judicial review or the power or duty of the court to dismiss any action or deny relief on any other appropriate legal or equitable ground.” *Id.*

280. 451 F.3d 248 (D.C. Cir. 2006).

281. *Id.* at 250 (citing 28 U.S.C. § 1350 (2006)).

282. 451 F.3d at 254, 257 (holding “the term ‘person’ as used in the Federal Rules of Civil Procedure consistently means not only natural persons and business associations but also governments, including the United States”). The court in *Linder v. Calero-Portocarrero* raised but left open the question of whether the government is a “person” pursuant to Rule 45. 251 F.3d at 181–82.

283. *Yousuf*, 451 F.3d at 253 (arguing “statutes employing the [word ‘person’] are ordinarily construed to exclude” the sovereign) (citing *United States v. Cooper Corp.*, 312 U.S. 600, 604 (1941)).

284. *Id.* at 254 (citing *Nardone v. United States*, 302 U.S. 379, 283–84 (1937)).

285. *Id.* (quoting *United States ex. rel. Touhy v. Ragen*, 340 U.S. 462, 471–72 (1951) (Frankfurter, J., concurring)).

286. *Id.* (quoting *Conley v. Gibson*, 355 U.S. 41, 47 (1957)).

287. *Id.* at 256 (citations omitted).

288. *Id.* (citing *Marek v. Chesny*, 473 U.S. 1, 21 (1985)).

289. 34 F.3d 774 (9th Cir. 1994).

which Exxon sought discovery from the Interior Department, the court cited *Northrop v. McDonnell Douglas*, and concluded that applying sovereign immunity principles in discovery would result in the abdication of “judicial control over the evidence in a case . . . to the caprice of executive officers.”<sup>290</sup> The court also recognized the public’s right “to every man’s evidence” would be violated if the executive branch were able to refuse to comply with subpoenas.<sup>291</sup> And while the court acknowledged the government’s legitimate interest in not having to expend its limited employee resources on responding to discovery requests, the court noted that the Federal Rules of Civil Procedure and various privilege rules provided sufficient limitations on discovery to prevent an unnecessary expense of government resources.<sup>292</sup>

The Ninth Circuit and District of Columbia Circuit’s approaches to sovereign immunity and discovery are in line with early commentators to the Federal Rules of Civil Procedure such as Edson R. Sunderland, who noted in 1939 that “[n]o distinction is made in the federal discovery and deposition rules between private parties and the officers and agencies of government.”<sup>293</sup> Similarly, Raoul Berger and Abe Krash stated in 1950:

It has long been considered that all persons have a duty to produce relevant evidence, upon the assumption that the interest of the public in seeing that justice is done outweighs the right to privacy. The Rules have merely underscored that duty. . . . [T]he terms of the third party subpoena-deposition provisions are unqualified, and no considerations of policy can afford an exemption to the Government, though they might have some bearing upon the measure of the asserted privilege.<sup>294</sup>

However, other circuits have followed a different course. The Second Circuit, instead of assuming the non-applicability of sovereign immunity to discovery as the District of Columbia Circuit did in *Northrop*, has held consistently that sovereign immunity *does* apply to subpoenas issued to government agencies.<sup>295</sup> Specifically, the court has

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290. *Id.* (quoting *United States v. Reynolds*, 345 U.S. 1, 9–10 (1953)).

291. *Id.* (quoting *United States v. Bryan*, 339 U.S. 323, 331 (1950)).

292. *Id.* at 779–80 (citing FED. R. CIV. P. 26, 45; FED. R. EVID. 501).

293. Edson R. Sunderland, *Discovery Before Trial Under the New Federal Rules*, 15 TENN. L. REV. 737, 742 (1939).

294. Raoul Berger & Abe Krash, *Government Immunity From Discovery*, 59 YALE L.J. 1451, 1465–66 (1950).

295. See *EPA v. Gen. Elec., Co.*, 197 F.3d 592, 598–99 (2d Cir. 1999) (expressly rejecting the Ninth Circuit’s analysis and approach in *Exxon Shipping Co. v. U.S. Dep’t of Interior*, 34 F.3d 774 (9th Cir. 1994)); see also *SEC ex rel. Glotzer v. Martha Stewart, Living Omnimedia, Inc.*, 374 F.3d 184, 190 (2d Cir. 2004) (“Absent a waiver of sovereign immunity, a federal agency, as representative of the sovereign, cannot be ‘compelled . . . to act.’” (quoting *Gen. Elec.*, 197 F.3d at 597)).

held subpoenas are “judicial proceedings” against the government and therefore barred by sovereign immunity (absent waiver), because the result of a subpoena “could serve ‘to restrain the Government from acting, or to compel it to act.’”<sup>296</sup> However, the court also held the federal government expressly waived its immunity to a limited extent through the Administrative Procedure Act (APA) because the Act “specifically allows final agency actions to be reviewed by federal courts” in certain circumstances.<sup>297</sup> Therefore, a government’s refusal to respond to a subpoena, once that refusal can be considered a “final agency action,” is reviewable in federal court through a motion to compel.

The Fourth Circuit has taken a similar approach to the Second Circuit and held sovereign immunity applies to subpoenas issued to the federal government.<sup>298</sup> And, similar to the Second Circuit, the Fourth Circuit has explicitly rejected the Ninth Circuit’s approach in *Exxon* but has still held that the federal government waives its immunity to subpoenas through the APA.<sup>299</sup> Therefore, in both the Second and Fourth Circuits, the parties were still able, pursuant to procedures in the Administrative Procedures Act, to petition the court for review of the agency’s refusal to comply with the subpoena.<sup>300</sup>

Thus, although the circuits are divided on whether federal sovereign immunity applies to subpoenas in the first instance, all that have reached the issue have agreed that sovereign immunity does not fully bar a federal court from enforcing a subpoena to the federal government. However, as discussed below, the distinction among the

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296. *Gen. Elec.*, 197 F.3d at 597 (quoting *Dugan v. Rank*, 372 U.S. 609, 620 (1963)).

297. *Id.* at 598. For example, the court may review a “final agency action” if there is a claim “‘that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority,’ and the relief sought is other than money damages.” *Id.* (quoting 5 U.S.C. § 702 (2006)). There is some question after *GE* about what standard of review a court should apply to the government’s refusal to respond to a subpoena. See *EPA v. Gen. Elec. Co.*, 212 F.3d 689, 690 (2d Cir. 2000); *SEC ex rel. Glotzer*, 374 F.3d at 191.

298. See *Boron Oil Co. v. Downie*, 873 F.2d 67, 71 (4th Cir. 1989) (holding “subpoena proceedings fall within the protection of sovereign immunity even though they are technically against the federal employee and not against the sovereign”).

299. *COMSAT Corp. v. Nat’l Sci. Found.*, 190 F.3d 269, 277 (4th Cir. 1999) (holding that APA’s arbitrary and capricious standard of review applies).

300. See, e.g., *id.*; *Gen. Elec. Co.*, 197 F.3d at 599. The Second Circuit held that although sovereign immunity applied to subpoenas issued to federal agencies, the federal government waived its immunity through the Administrative Procedures Act which provides for federal court review of agency actions. *Id.* Therefore, a party may seek review of an agency’s refusal to respond to a subpoena through a motion to enforce the subpoena. *Id.* The court noted this approach “will maintain the appropriate balance between the interests of the government in conserving limited resources, maintaining necessary confidentiality and preventing interference with government functions, and the interests of suitors in discovering important information relevant to the prosecution or defense of private litigation.” *Id.*

cases is important in making parallels to subpoenas issued in federal court to state governments.

## VI. APPLYING LESSONS LEARNED FROM THE TRIBAL AND FEDERAL IMMUNITY CASES AND THE THREE RATIONALES TO THE PROBLEM OF STATE SOVEREIGN IMMUNITY AND FEDERAL DISCOVERY

### A. *Federal Sovereign Immunity Case Law from the Ninth and District of Columbia Circuits Is Most Persuasive in the State Sovereign Immunity Context*

The State of California, through the defendants and subpoenaed nonparties in *Gonzalez v. Hickman* and the Eastern District Prison Cases, has asserted that the Ninth Circuit tribal law cases and Fourth and Second Circuit federal sovereign immunity cases discussed above require a finding that sovereign immunity bars discovery served on all state employees and agencies.<sup>301</sup> The *Estate of Gonzalez v. Hickman* court found the tribal law cases precedential.<sup>302</sup> However, all of these cases are factually and legally distinct from the Eastern District Prison Cases in ways that make them poor precedent. In this Part, I argue that courts faced with a state sovereign immunity defense to discovery should look to the federal sovereign immunity cases from the Ninth and District of Columbia Circuits.

The tribal cases are distinguishable for several reasons. First, and most obvious, both *United States v. James* and *Bishop Paiute* addressed tribal sovereignty, so it is questionable how reliable these cases are for deciding a state sovereign immunity issue.<sup>303</sup> The court in one of the Eastern District Prison Cases recognized the importance of this distinction.<sup>304</sup> Second, the cases stand on very different procedural footing—*James* was a criminal case, and *Bishop Paiute* involved a county-issued search warrant—so the Ninth Circuit had no opportunity to interpret the Federal Rules of Civil Procedure in either case. Third, and perhaps most important, in both *James* and *Bishop Paiute*, the parties seeking discovery had some other means to obtain it. In *James*, the Ninth Circuit held the tribe waived its immunity over documents it showed to one party but not the other,<sup>305</sup> and in *Bishop Paiute*, county officials could have obtained the documents through their Public Law

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301. See, e.g., Non-Parties' Opposition to Plaintiff's Motion to Compel Production of Documents, *Allen v. Woodford*, No. 05-01104, 2008 WL 117906 (E.D. Cal. Jan. 2, 2008); Opposition to Plaintiff's Motion to Compel Non-Parties to Produce Documents Pursuant to Subpoenas, *Thomas v. Hickman*, Case No. 06-00215, Docket No. 92 (E.D. Cal. May 29, 2007).

302. See 466 F. Supp. 2d 1226, 1228–29 (E.D. Cal. 2006).

303. See *supra* Part IV.A.

304. See *Allen v. Woodford*, 544 F. Supp. 2d 1074, 1079–80 (E.D. Cal. 2008).

305. *United States v. James*, 980 F.2d 1314, 1319 (9th Cir. 1992).



280 authority over individual tribal members (rather than through the tribe).<sup>306</sup> The State of California took a very different approach in the Eastern District Prison Cases, arguing that sovereign immunity blocks *all* discovery—party and nonparty. This would prevent plaintiffs from obtaining documents from any person or agency affiliated with the state and would result in a very different outcome from the one contemplated by the Ninth Circuit in the tribal cases. For these reasons, the tribal cases do not appear to map well to the factual and legal issues in the Eastern District Prison Cases.

The federal sovereign immunity cases from the Fourth and Second Circuits are distinguishable from the Eastern District Prison Cases for one of the same reasons as the tribal cases—fairness. Although the courts held sovereign immunity applied to subpoenas, they also held the government waived its immunity under the Administrative Procedure Act (APA). Therefore courts could review the government’s denial of access to discovery under administrative principles of review and perhaps find that denial arbitrary and capricious.<sup>307</sup> In other words, the parties seeking discovery were not completely foreclosed from obtaining it.

However, the Second and Fourth Circuit’s reasoning would not translate to the state sovereign immunity context because the APA does not apply to states, and state immunity waivers rarely apply in federal court. The State of California has relied on the Second and Fourth Circuit cases to argue that state sovereign immunity applies to bar all discovery and has argued that the state never waives its immunity.<sup>308</sup> But principles of fairness and the importance of litigant access to information counsel against adopting this approach. The federal sovereign immunity cases from the Ninth Circuit and District of Columbia Circuit do not present these problems. In *Exxon Shipping Co. v. United States Department of Interior*,<sup>309</sup> the court stated, “The government’s argument [that sovereign immunity barred subpoenas] would [] violate the fundamental principle that ‘the public . . . has a right to every man’s evidence’” and would be contrary to the Federal

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306. *Bishop Paiute Tribe v. County of Inyo*, 291 F.3d 549, 560 (9th Cir. 2002).

307. District courts within the Second and Fourth Circuits have both found the cases addressing federal sovereign immunity inapplicable to the question of whether state sovereign immunity protects a state agency or official from responding to discovery. *See, e.g.*, *Arista Records LLC v. Does 1-14*, No. 08-00205, 2008 WL 5350246, \*5 (W.D. Va., Dec. 22, 2008); *Jackson v. AFSCME Local 196*, No. 07-0471, 2008 WL 1848900 (D. Conn. Apr. 25, 2008).

308. *See, e.g.*, *Non-Parties’ Opposition to Plaintiff’s Motion to Compel Production of Documents*, *Allen v. Woodford*, No. 05-01104, 2008 WL 117906, (E.D. Cal. Jan. 2, 2008); *Opposition to Plaintiff’s Motion to Compel Non-Parties to Produce Documents Pursuant to Subpoenas at 4*, *Thomas v. Hickman*, Case No. 06-00215, Docket No. 92 (E.D. Cal. May 29, 2007).

309. 34 F.3d 774 (9th Cir. 1994).

Rules of Civil Procedure favoring full discovery.<sup>310</sup> The court held district courts should apply standard balancing tests under the Federal Rules, including determining how burdensome the discovery requests are and whether any evidentiary privileges apply.<sup>311</sup> There is no reason these same balancing tests would not work in the context of federal subpoenas issued to state agencies or employees.

The analysis from the District of Columbia cases (to which the Ninth Circuit cited with approval in *Exxon*<sup>312</sup>) also appears to be closely analogous for several reasons. First, as in *Yousuf v. Ali Samantar*, federal court discovery issued to a state employee or agency should not trigger sovereign immunity because the state is no less a “person” subject to subpoena under Rule 45 than the federal government.<sup>313</sup> Second, as in *Linder v. Calero-Portocarrero*, sovereign immunity should not apply because the subpoenas do not, on their own, impose damages against the state.<sup>314</sup>

Finally, neither *Exxon* nor the District of Columbia Circuit cases treated a subpoena in the first instance as a “lawsuit.”<sup>315</sup> This is consistent with my analysis above that sovereign immunity applies to lawsuits but not to court processes ancillary to the main suit.<sup>316</sup> A subpoena, which is not presumptively adversarial, which does not begin with a complaint, and which does not seek attachment of state funds, should not by its nature invoke the protections of sovereign immunity. A subpoena does not “walk[], talk[], [or] squawk[] very much like a

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310. *Id.* at 779 (quoting *United States v. Bryan*, 339 U.S. 323, 331 (1950)).

311. *Id.* at 780.

312. *Id.* at 778 (citing *Northrop Corp. v. McDonnell Douglas Corp.*, 751 F.2d 395, 398 n.2 (D.C. Cir. 1984)).

313. *See Yousuf v. Samantar*, 451 F.3d 248, 253–57 (D.C. Cir. 2006). In interpreting 42 U.S.C. § 1983, the Supreme Court has held that states and state officials acting in their official capacities are not “persons” within the meaning of § 1983. *See Will v. Mich. Dep’t of State Police*, 491 U.S. 58, 65–66 (1989). However, *Yousuf* distinguished *Will* and other cases by analyzing the term “person” in the context of the Federal Rules of Civil Procedure and noting the federal rules clearly do include the sovereign within the meaning of the term “person.” *Yousuf*, 451 F.3d at 254–57. Although all the Eastern District Prison Cases were brought under § 1983, it is more appropriate to interpret “person” as *Yousuf* did, under the main statute at issue—Rule 45—rather than under § 1983.

314. *See Linder v. Calero-Portocarrero*, 251 F.3d 178, 182–83 (D.C. Cir. 2001). The subpoenas in the Eastern District Prison Cases merely sought documents and things. *See, e.g., Allen v. Woodford*, 544 F. Supp. 2d 1074, 1075 (E.D. Cal. 2008). Although the plaintiffs sought damages from the defendants in the underlying lawsuits, the defendants who would be responsible for those damages were state employees acting in their individual capacities, rather than the state itself. *See, e.g., id.* at 1075–76.

315. Although none of the cases state this explicitly, the D.C. Circuit in *Linder v. Calero-Portocarrero*, 251 F.3d 178 (D.C. Cir. 2001), came close by holding that immunity does not apply to a subpoena because a subpoena does not involve damages, which are the most common remedies in a lawsuit.

316. *See supra* Part III.D.2.

lawsuit<sup>317</sup> and therefore sovereign immunity should not apply to it.

As noted by the Ninth Circuit in *Exxon*, to allow immunity to apply in the discovery context would result in the abdication of “judicial control over the evidence in a case . . . to the caprice of executive officers.”<sup>318</sup> This is no less important in subpoenas issued to capricious state executive officers than it is in subpoenas issued to federal officers. For each of the reasons discussed above, the Ninth and District of Columbia Circuit cases are the most persuasive and should apply in the state sovereign immunity context.

### B. Two of the Three Rationales for State Sovereign Immunity Suggest it Does Not Apply to Subpoenas

A finding that state sovereign immunity does not apply in the discovery context would be consistent with two of the three rationales for the broad reach of state sovereign immunity noted above.<sup>319</sup> Under the originalist rationale, there is nothing to indicate that the framers planned to include subpoenas within the framework of sovereign immunity when they drafted the Eleventh Amendment, despite the fact that subpoenas were often used at the time.<sup>320</sup> As noted in Part III.D.2, the language of the Eleventh Amendment and subsequent case law seems to make clear that sovereign immunity applies to lawsuits and adversarial proceedings, but not necessarily to the ancillary processes of a court such as a subpoena.<sup>321</sup> The District of Columbia Circuit Court of Appeals noted, after conducting its own independent research in a 1984 case, “the issue [of sovereign immunity applying to subpoenas] has never been explicitly discussed in the opinion of any federal court,” but courts “assume[] the nonapplicability of sovereign immunity” to a subpoena directed at the government.<sup>322</sup> The federal government itself admitted, in briefing a 1900 Supreme Court case, “that records

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317. S.C. State Ports Auth. v. Fed. Mar. Comm’n, 243 F.3d 165, 174 (4th Cir. 2001).

318. *Exxon*, 34 F.3d at 778 (citing *United States v. Reynolds*, 345 U.S. 1, 9–10 (1953)).

319. *See supra* Part III.C.

320. *See supra* Part III.A (discussing *Chisholm* case, which involved a lawsuit brought against a state, and not a subpoena, as basis for text of Eleventh Amendment). Several early Supreme Court cases explicitly mention subpoenas issued to states. *See, e.g.*, *Rhode Island v. Massachusetts*, 37 U.S. (1 Pet.) 657, 659 (1838) (issuing subpoena to State of Massachusetts); *New Jersey v. New York*, 30 U.S. (1 Pet.) 284, 290 (1831) (issuing subpoena to State of New York); *Huger v. South Carolina*, 3 U.S. (1 Dall.) 339, 339 (1797) (issuing subpoena to State of South Carolina).

321. *See supra* Part III.D.2. While a subpoena may constitute an inconvenience, it is merely a request for documents and information; it is not presumptively “adversarial” or adversarial in the first instance. It does not become adversarial until the subpoenaed party refuses to comply and the party issuing the subpoena is forced to file a motion to compel compliance.

322. *Northrop Corp. v. McDonnell Douglas Corp.*, 751 F.2d 395, 398 n.2 (D.C. Cir. 1984).

requested for a suit in which it was not a party ‘could be secured by a subpoena duces tecum to the head of the Treasury Department.’”<sup>323</sup> Because there is no evidence that the drafters of the Eleventh Amendment or the framers of the Constitution believed state (or federal) sovereign immunity encompassed discovery subpoenas, under an originalist rationale a state and its employees should not be able to refuse to respond to a subpoena on sovereign immunity grounds.

Finding sovereign immunity does not apply to subpoenas issued to state agencies and state employees also satisfies the pragmatic rationale for the doctrine. As I define the pragmatic rationale, it includes the practical reasons the Court has provided for extending Eleventh Amendment state sovereign immunity beyond the bounds of the text of the amendment. For example, the Court often observes sovereign immunity must be interpreted broadly to curb the impact a flood of potential litigation would have on the state’s treasury and to prevent an “unwarranted strain on the States’ ability to govern in accordance with the will of their citizens.”<sup>324</sup> However, finding sovereign immunity does not apply to subpoenas would not result in a flood of potential litigation (because it would not change a plaintiff’s inability to file a lawsuit against the state). It also would not overly impact the state’s treasury or result in excessive discovery because, as noted by the Ninth Circuit in *Exxon*, the Rules of Civil Procedure allow district courts to quash or modify subpoenas that would cause an “undue burden.”<sup>325</sup> In addition, the government could still rely on a full panoply of privilege rules to contest the subpoenas.<sup>326</sup> Finally, it would not overly impact the state’s treasury, first because any cost to the state in responding to the subpoena is ancillary to any potential judgment in the case and can be addressed through the processes listed in Rule 45(c),<sup>327</sup> and second, because where the state itself is not a defendant to a lawsuit, any recovery to a civil rights plaintiff in the case will come from the state actor sued, not from the state.<sup>328</sup>

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323. *Yousuf v. Samantar*, 451 F.3d 248, 254 (D.C. Cir. 2006) (citing *United States ex rel. Touhy v. Ragen*, 340 U.S. 462, 471–72 (1951) (Frankfurter, J., concurring)).

324. *See, e.g., Alden v. Maine*, 527 U.S. 706, 750–51 (1999).

325. *See Exxon Shipping Co. v. U.S. Dep’t of Interior*, 34 F.3d 774, 779 (9th Cir. 1994) (citing FED. R. CIV. P. 26(c), 45(c)(3)).

326. *Id.* at 780 (citing to cases on state secrets and qualified executive privilege).

327. *See Edelman v. Jordan*, 415 U.S. 651, 668 (1974) (noting that a remedy that has an “ancillary effect on the state treasury is . . . permissible and often an inevitable consequence of the principle announced in *Ex parte Young*”).

328. States may, through statute, indemnify their employees. *See, e.g., CAL. GOV. CODE* § 825 (West 2009). Although this then means the funds to satisfy any judgment technically would come from the state rather than the individual defendant, it does not change the basic principles underlying the case nor bestow immunity on the employee defendant. *See, e.g., Duckworth v. Franzen*, 780 F.2d 645, 651 (7th Cir. 1985) (“[I]t would be absurd if all a state

The pragmatic rationale would also support creating an appropriate balance between state government and private parties' rights under § 1983 case precedent and would harmonize the purpose of § 1983 with that of the federal discovery rules. Section 1983 was intended “to give a remedy to parties deprived of constitutional rights, privileges and immunities by an official’s abuse of his position”<sup>329</sup> by creating a federal private right of action against a state actor.<sup>330</sup> A main goal of the Federal Rules of Civil Procedure is to promote broad and full discovery in civil litigation. Finding that sovereign immunity does not apply to subpoenas would support both these purposes and the rights of a § 1983 plaintiff because it would allow the plaintiff to obtain a remedy for constitutional violations by using the federal discovery rules to fully litigate her case against the state actor who she alleges deprived her of her constitutional rights. It would not impact the state’s rights in any way contrary to § 1983 because it would not allow her to sue the state directly. In contrast, finding sovereign immunity *does* apply to subpoenas would undermine the purpose of both § 1983 and Rule 45 *and* the rights of the § 1983 plaintiff—if the state can refuse, on sovereign immunity grounds, to produce documents necessary for the § 1983 plaintiff to prove her case against a state actor, it would prevent the plaintiff from fully litigating her case and, by extension, obtaining a remedy for constitutional violations. Thus, the pragmatic rationale supports not applying sovereign immunity to subpoenas.

As noted above, in the past two decades, the Supreme Court has increasingly relied on a “dignity” rationale to support extending state sovereign immunity to contexts outside the text of the Eleventh Amendment, holding in *Federal Maritime Commission v. South Carolina State Ports Authority*,<sup>331</sup> “[T]he preeminent purpose of state sovereign immunity is to accord States the dignity that is consistent with their status as sovereign entities.”<sup>332</sup> The dignity rationale, if taken to its extreme, has the potential to undermine any action even tangentially involving the state.<sup>333</sup> It is, therefore, the biggest threat to an argument

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had to do to put its employees beyond the reach of section 1983 . . . was to promise to indemnify.”); *Demery v. Kupperman*, 735 F.2d 1139, 1147 (9th Cir. 1984) (quoting *Ronwin v. Shapiro*, 657 F.2d 1071, 1075 (9th Cir. 1981) (noting “the incongruity that would result if a state, ‘by creating a fund to compensate victims, has somehow extended immunity [to state employees] so as to deny payment to the class of intended beneficiaries’”)).

329. *Monroe v. Pape*, 365 U.S. 167, 172 (1961).

330. *Id.* at 173.

331. 535 U.S. 743 (2002).

332. *Id.* at 760.

333. The dignity rationale could easily become limitless because, unlike the other two rationales, it does not involve a test or distinction the courts could apply or advance a principle. Instead it uses circular reasoning to reinforce itself—because the states are powerful, they possess a certain “dignity” that makes them untouchable through the courts or the federal

against extending sovereign immunity to subpoenas, and it is far from clear that the Supreme Court would not rely on this rationale to bar subpoenas in § 1983 actions. However, as noted above, one of the earliest sovereign immunity cases clearly rejected this argument. In *Cohens v. Virginia*,<sup>334</sup> the Court noted, “We must ascribe the [Eleventh] amendment, then, to some other cause than the dignity of a State.”<sup>335</sup> Many scholars have also taken issue with this rationale, noting as early as 1946, “the indignity of subjecting a government to judicial process at the instance of private parties seems to be an objection lacking in force, however substantial a consideration it might have been in the times when state and federal governments were less solidly established than they are now.”<sup>336</sup>

These counterarguments to the “dignity” rationale—combined with the reasoning underlying the originalist and pragmatic rationales, the Ninth and District of Columbia Circuit’s federal sovereign immunity cases, and the case law supporting the argument that state sovereign immunity does not apply to ancillary court processes such as subpoenas—should outweigh the weight of recent Supreme Court “dignity” precedent.

## VII. CONCLUSION

The State of California, by arguing in the Eastern District Prison Cases that state employee defendants and subpoenaed nonparty state employees lack authority to produce documents and that sovereign immunity protects the state and its agencies from subpoenas, seems intent on hobbling civil rights cases before they begin. The state’s position—that, in essence, no discovery can be had in § 1983 actions brought against state employees—conflicts with the Federal Rules of Civil Procedure, which apply to all civil actions in federal court. Rule 26 states that “[p]arties may obtain discovery regarding any nonprivileged matter that is relevant to any party’s claim or defense”<sup>337</sup> and that no rule limits the Federal Rules to non-state actors. More

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government. While states can still choose to limit their power voluntarily (for example through waiver) the more untouchable they are, the more powerful they become, and the less incentive they have to limit themselves.

334. 19 U.S. (6 Wheat.) 264 (1821).

335. *Id.* at 406.

336. See Joseph J. Block, *Suits Against Government Officers and the Sovereign Immunity Doctrine*, 59 HARV. L. REV. 1060, 1060–61 (1946). Justice Stevens has consistently dissented to opinions based on the dignity rationale, noting it “is an ‘embarrassingly insufficient’ rationale for the rule [of extending Eleventh Amendment sovereign immunity].” *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 97 (1996) (Stevens, J., dissenting) (citing *Puerto Rico Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 151 (1993) (Stevens, J., dissenting)); see also *Fed. Mar. Comm’n v. S.C. State Ports Auth.*, 535 U.S. 743, 770 (2002) (Stevens, J., dissenting).

337. FED. R. CIV. P. 26(b)(1).

importantly, however, the state's position, if followed by other courts in the future, could prevent the prosecution of important § 1983 civil rights actions against state defendants. Without discovery, plaintiffs would not be able to prove the facts alleged in their cases if they brought their actions in federal court. And, while civil rights plaintiffs could try to pursue federal civil rights claims in state court,<sup>338</sup> this would create an anomalous situation where such plaintiffs are barred from pursuing federal claims under the Constitution in federal court.

The weight of case law interpreting state and federal sovereign immunity and the main rationales behind a broad application of state sovereign immunity do not support California's novel sovereign immunity arguments, and these arguments should not outweigh the important constitutional interests at issue in federal civil rights cases. As Peter Low and John Jeffries have noted, "[t]he stakes involved in interpreting the 11th [A]mendment are potentially very high. Virtually the entire class of modern civil rights litigation [plausibly] might be barred by an expansive reading of the immunity of states from suit in federal court."<sup>339</sup> Thus, district courts should not be swayed by the state's arguments or the Supreme Court's recent use of the "dignity" rationale, but should instead exercise their authority under the Federal Rules of Civil Procedure and Supreme Court precedent in § 1983 cases to compel state compliance with properly-executed subpoenas issued in these actions.

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338. State courts have concurrent jurisdiction over many federal claims, including federal civil rights claims, *see Cohens*, 19 U.S. (6 Wheat.) at 396–97, and many states have waived immunity in state court, *see, e.g.*, CAL. GOV. CODE § 68097.1 (West 2009).

339. PETER W. LOW & JOHN C. JEFFRIES, JR., *FEDERAL COURTS AND THE LAW OF FEDERAL-STATE RELATIONS* 814 (4th ed. 1998).

