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Achieving Supreme Court Consensus: An Evolved Approach to State Sovereign Immunity

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I. INTRODUCTION

State sovereign immunity is the constitutional doctrine by which states are afforded nearly absolute immunity from civil lawsuits unless they choose to waive it explicitly. Unlike an ordinary person, corporation, or municipality, a state may immunize itself from suits

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seeking damages, for example, for patent infringement[1] or for violation of the Americans with Disabilities Act.[2] If the state infringes a patent or discriminatorily demotes a disabled person, it may then plead immunity at the outset of the resulting suit, precluding courts from ever hearing the merits. Patentees and disabled state employees, like many other types of plaintiffs, are left without a remedy.

Defenders of state sovereign immunity describe its fairness to states, given an expanded interpretation of the Commerce Clause,[3] and its irrelevance, given that plaintiffs can still find remedies either under one of the doctrine's myriad exceptions[4] or under state law.[5] Opponents of the doctrine explain that plaintiffs are left remediless despite the doctrine's exceptions,[6] that state-law alternatives are often unavailable,[7] and that state sovereign immunity is inconsistent with the rule of law.[8] Both sides claim alignment with the best interpretation of common-law and constitutional history.[9]

Over the past forty-five years, no one has analyzed the history of state sovereign immunity as adeptly as the Supreme Court justices. Yet despite this careful attention to history and the number of cases decided, the jurisprudence in this area remains unsettled, leaving states to plan their affairs without the certainty attending a more sta-

1. Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank, 527 U.S. 627 (1999).
2. Bd. of Trs. v. Garrett, 531 U.S. 356 (2001).
3. Richard A. Epstein, *The Federalism Decisions of Justices Rehnquist and O'Connor: Is Half a Loaf Enough?*, 58 STAN. L. REV. 1793 (2006).
4. Jesse H. Choper & John C. Yoo, *Who's Afraid of the Eleventh Amendment?: The Limited Impact of the Court's Sovereign Immunity Rulings*, 106 COLUM. L. REV. 213 (2006); John C. Jeffries, *The Right-Remedy Gap in Constitutional Law*, 109 YALE L.J. 87 (1999); John C. Jeffries, *In Praise of the Eleventh Amendment and Section 1983*, 84 VA. L. REV. 47, 81 (1998).
5. *See e.g.*, Alex Long, *State Anti-Discrimination Law as a Model for Amending the Americans with Disabilities Act*, 65 U. PITT. L. REV. 597 (2004); Joseph J. Shelton, *In the Wave of* Garrett*: State Law Alternatives to the Americans with Disabilities Act*, 52 CATH. U. L. REV. 837 (2003).
6. Mark R. Brown, *The Failure of Fault Under Section 1983: Municipal Liability for State Law Enforcement*, 84 CORNELL L. REV. 1503 (1999).
7. *See e.g.*, ROGER E. SCHECHTER & JOHN R. THOMAS, INTELLECTUAL PROPERTY: THE LAW OF COPYRIGHTS, PATENTS, AND TRADEMARKS 282 (West 2003) ("[S]ince the first Congress enacted the Patent Act of 1790, the patent law has been a wholly federal, statutory subject."); Charles C. Wong, *State Immunity Doctrine: Demoting the Patent System*, 53 ME. L. REV. 111 (2001); *see also* Ruth Colker & Adam Milani, *The Post-*Garrett *World: Insufficient State Protection Against Disability Discrimination*, 53 ALA. L. REV. 1075 (2002).
8. DONALD L. DOERNBERG, SOVEREIGN IMMUNITY OR THE RULE OF LAW: THE NEW FEDERALISM'S CHOICE (Carolina Academic Press 2005).
9. *See, e.g.,* MELVYN R. DURCHSLAG, STATE SOVEREIGN IMMUNITY: A REFERENCE GUIDE TO THE UNITED STATES CONSTITUTION 1–43 (Praeger 2002); John J. Gibbons, *The Eleventh Amendment and State Sovereign Immunity: A Reinterpretation*, 83 COLUM. L. REV. 1889 (1983); Louis L. Jaffe, *Suits Against Governments and Officers: Sovereign Immunity*, 77 HARV. L. REV. 1 (1963).

ble constitutional doctrine. The Court has decided twenty-seven of its last thirty-six state sovereign immunity cases by the barest of majorities, with each side maintaining its entrenched view. The dissenters refuse to succumb to stare decisis, claiming that stare decisis, viewed over the long run, is on their side. Should the consistent five-four split flip-flop, for example, if one of the conservative justices becomes prematurely incapacitated during the Obama administration, or if the Court otherwise changes composition by adding a liberal justice, states could face a sudden hoard of lawsuits. To hedge this risk, the justices ought to achieve consensus via persuasion, as Chief Justice Roberts has urged the court to do generally, rather than via a chance change in Court membership.[10]

Indeed, the justices sense a need to eliminate dissension by making new arguments. Unfortunately, after forty-five years of polarized, bare majority decisions, new arguments are running thin. Lately each side has resorted to accusing the other of following in the footsteps of *Lochner v. New York*, a case often understood to symbolize judicial activism.

The most expedient way to settle the doctrine is for the justices to make new arguments because, as this Article discusses, the old arguments are not working. This Article aims to help the justices carry the argument forward by examining a larger swathe of the Supreme Court's institutional history with which to cohere a more principled doctrine of state sovereign immunity.

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

The specific-jurisdiction doctrine serves as another analogy with which state sovereign immunity may be analyzed fruitfully. State sovereign immunity, like any doctrine of immunity, is really a ques-

10. *See* Associated Press, *Chief Justice Says His Goal Is More Consensus on Court*, N.Y. TIMES, May 26, 2006, at A16 (quoting Chief Justice John Roberts); *see also* Jed Handelsman Shugerman, *A Six-Three Rule: Reviving Consensus and Deference on the Supreme Court*, 37 GA. L. REV. 893, 896, 899–931 (2003) (recounting the Court's tradition of a commitment to consensus from John Marshall to the present).

tion of jurisdiction: does the court have the power to hear the case? Absent moral justifications for power, the ideals of fairness and efficiency found in the doctrine of specific jurisdiction necessitate a more transparent, less contentious test for state sovereign immunity.

In sum, lessons from the two suggested doctrines indicate that recent state sovereign immunity cases reflect a last grasp to exalt an eroding formalist doctrine. This Article argues that the evolution of the doctrine of state sovereign immunity is immature and in need of developing functional balancing-test factors. In fashioning such factors, lessons can be drawn from factors foreshadowed in the Court's state sovereign immunity jurisprudence and defended here by analogy to other Supreme Court doctrines. Unlike today's formalist approach, which constrains both camps of justices more strictly, this Article argues that the proposed approach would better promote flexibility, transparency, minimalism, fairness, and efficiency.

Legal scholarship has not analyzed the persuasiveness of analogizing state sovereign immunity to other doctrines of federalism and jurisdiction. This analysis seeks to achieve consensus on the Court and achieve a principled coherence with the rest of American jurisprudence.

The Article proceeds in four parts. Part II outlines the justices' competing theories of state sovereign immunity and highlights pragmatic concerns with each. Part III explains the nature of the Court's entrenched division and argues that pragmatism requires ending it through persuasion. Part IV describes how justices and legal scholars have approached evolving the state sovereign immunity doctrine and argues that these approaches ultimately are unpersuasive for either side of the debate, thus necessitating new arguments. Part V develops new arguments from analogies to the direct-taxation and specific-jurisdiction doctrines, which indicate that state sovereign immunity best coheres with our system of American jurisprudence by a transition from its current formalist approach to one that embraces functionalism, that is, is formulated with a view to its utilitarian purpose. The proposed test provides a middle ground between the justices' competing approaches. Although it may differ from the existing test only minimally in terms of case outcomes, it is simpler and more cost-beneficial. Ultimately the Article concludes that we should cultivate contentious invocations of *Lochner* to provide a more principled approach.

II. COMPETING THEORIES

A. Existing Doctrine

The Court is split between two competing views of state sovereign immunity. Under the first view, held by the five conservative justices, courts lack subject-matter jurisdiction over all types of suits against

state governments, despite that the Eleventh Amendment by its terms bars only those suits brought in federal court by diverse citizens.[11] Thus, suits limited by state sovereign immunity include not only federal diversity suits, but also diversity suits brought in state court[12] and federal-question suits.[13]

The majority also recognizes three exceptions in federal-question suits, which adept litigators can easily manipulate. In the most common exception, a plaintiff achieves relief against a state by suing a state official. This exception is derived from *Ex parte Young*.[14] Under the *Ex parte Young* exception, officials may be sued for damages in their personal capacities for actions taken under color of state law, even if the official has an indemnification agreement with the state government. When plaintiffs seek equitable relief such that monetary awards are sought from the state treasury, however, the defendant-official is being sued in an official capacity. In such suits, the doctrine of state sovereign immunity bars relief that is "retroactive," such as an injunction seeking back payments for wrongly denied welfare.[15] But the doctrine does not bar relief that is "prospective," such as an injunction requiring the state to comply with federal guidelines in the future,[16] or an injunction requiring implementation of a desegregation plan.[17] So theoretically the Court will rule to avert a future wrong, but not remedy a past one. Unfortunately for the clarity of the doctrine, the distinction between prospective and retroactive relief is elusive. Both the implementation of a desegregation plan approved in *Milliken v. Bradley* and the injunction seeking wrongly withheld welfare payments condemned in *Edelman v. Jordan* sought money to be paid in the future to right a past wrong. On the one hand, prospective relief may be distinguished from retroactive relief by analogizing to these cases on their facts, with particular attention to the welfare and desegregation contexts. On the other hand, the distinction between prospective and retroactive relief is elusive because relief can be characterized either way given that *Ex parte Young* is not based on functional concerns.

Further muddling this *Ex parte Young* exception are three exceptions to the exception. State officers retain immunity for actions

11. The Eleventh Amendment provides that "the Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State or by Citizens or Subjects of any Foreign State." U.S. CONST. amend. XI.

12. Alden v. Maine, 527 U.S. 706 (1999).

13. Hans v. Louisiana, 134 U.S. 1 (1890).

14. 209 U.S. 123 (1908).

15. Edelman v. Jordan, 415 U.S. 651 (1974).

16. *Id.*

17. Milliken v. Bradley, 433 U.S. 267 (1977).

taken in their official capacities on pendent state-law claims,[18] for enforcing federal statutes that contain comprehensive enforcement mechanisms,[19] and from suits to quiet title of submerged lands.[20] Furthermore, this third exception to the *Ex parte Young* exception may open the door to the Court finding other exceptions to *Ex parte Young* in situations where, as in *Coeur d'Alene*, relief would have a significant "impact" on state government.[21]

In the second exception to the bar on suits against state governments, a state may consent to suit or waive its sovereign immunity by bringing the suit itself, failing to raise an immunity defense, or removing a suit to federal court.[22] A state may also waive immunity by legislation,[23] by delegated executive action, or by accepting from the federal government a "gratuity"— like approval of an interstate compact—or a "gift"— like a grant of funds, conditioned on consent.[24] But a state maintains its immunity from suit in federal court notwithstanding its consent to suit in state court,[25] consent to similar suits under state law,[26] or mere participation in a federally regulated activity.[27] There is a line-drawing problem between mere participation and acceptance of a gratuity, but the former may be indicated in the case of a longstanding program, whereas the latter may be indicated in the case of simple money transfers. The line might also be drawn by balancing the burden of being subject to suit against the benefit of participation.

Third on the list of exceptions, Congress may override state sovereign immunity by authorizing suits against state governments under section five of the Fourteenth Amendment[28] or under the Bankruptcy Clause.[29] There must be a clear statement both to subject a state to liability and to permit suit against a state in federal court.[30] Congressional acts under section five of the Fourteenth Amendment must be in response to a pattern of constitutional violations on the part of the states, and must provide a congruent and proportional remedy—for example, by addressing only intentional violations of due process for which there is no adequate state remedy. Such acts include the

18. Pennhurst State Sch. & Hosp. v. Halderman, 465 U.S. 89 (1984).
19. Seminole Tribe of Fla. v. Florida, 517 U.S. 44 (1996).
20. Idaho v. Coeur d'Alene Tribe of Idaho, 521 U.S. 261 (1997).
21. *Id.* at 281.
22. *See, e.g.,* Wis. Dep't of Corrs. v. Schacht, 524 U.S. 381 (1998).
23. *See, e.g.,* 745 ILL. COMP. STAT. ANN. 5 (2009).
24. Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Fund, 527 U.S. 666, 686–87 (1999).
25. Smith v. Reeves, 178 U.S. 436 (1900).
26. Alden v. Maine, 527 U.S. 706 (1999).
27. *Coll. Sav. Bank*, 527 U.S. at 686–87.
28. Fitzpatrick v. Bitzer, 427 U.S. 445 (1976).
29. Centr. Va. Cmty. Coll. v. Katz, 546 U.S. 356 (2006).
30. Quern v. Jordan, 440 U.S. 332 (1979).

FMLA[31] and Title II of the ADA,[32] but do not include the Patent Remedy Act,[33] ADEA,[34] Education of the Handicapped Act,[35] and Title I of the ADA.[36] Congress probably has more latitude to abrogate immunity in statutes dealing with a type of discrimination that receives heightened scrutiny or a fundamental right, but as with the prior two exceptions, the line is anything but clear.

Other exceptions supplement the major ones previously outlined, including suits for tax refunds, suits for takings, suits brought by the United States or another state on behalf of an individual, and suits in the court of another state.

B. The Dissenting Justices' Theory

The four liberal justices hold an alternative view of state sovereign immunity that focuses on reading the Eleventh Amendment as restricting only the diversity jurisdiction of the federal courts. They would overrule Supreme Court precedents beginning with *Hans v. Louisiana*,[37] a case decided more than a century ago, which found that states may also claim immunity in federal-jurisdiction suits. The dissenting justices' theory would greatly simplify the analysis by entirely eliminating immunity for federal-question suits. It would thus also eliminate for those suits the current doctrine's muddled analytical issues, including the prospective-retroactive problem of official-capacity suits, the line-drawing problem between participation and acceptance of a gratuity for purposes of finding consent and waiver, and the problem of determining whether Congress has abrogated state sovereign immunity under the Fourteenth Amendment.

What the dissenting justices seem not to consider, however, are the effects of the transition they advocate.[38] A sudden transition to their view of state sovereign immunity would impose a radical burden on states. The states would suddenly become liable for all types of federal suits and accompanying attorney fee-shifting provisions, and unlike private companies of comparable size, states would lack the compliance departments, personnel, technologies, and training and auditing processes used to avoid lawsuits by detecting and preventing

31. Nev. Dep't of Human Res. v. Hibbs, 538 U.S. 721 (2003).
32. United States v. Georgia, 546 U.S. 151 (2006); Tennessee v. Lane, 541 U.S. 509 (2004).
33. Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank, 527 U.S. 627 (1999).
34. Kimel v. Fla. Bd. of Regents, 528 U.S. 62 (2000).
35. Dellmuth v. Muth, 491 U.S. 223 (1989).
36. Bd. of Trs. v. Garrett, 531 U.S. 356 (2001).
37. 134 U.S. 1 (1890).
38. On the necessity of considering transition costs to new legal regimes, see Louis Kaplow, *Legal Transitions: Is There an Ideal Way to Deal with the Non-Ideal World of Legal Change?*, 13 J. CONTEMP. LEGAL ISSUES 161 (2003).

noncompliance. But implementing a previously unnecessary, robust compliance program takes much time and effort. It may be more fair or economical to states for the dissenting justices to require compliance not with a hoard of new laws, but with a minimal number of laws so as to enable the possibility of a smooth transition.

III. NECESSITY OF ACHIEVING CONSENSUS

The Court has decided twenty-seven of its last thirty-six decisions concerning state sovereign immunity by the barest of majorities.[39] In each of the twenty-seven contested state sovereign immunity decisions of the past forty-five years, the justices remained divided and maintained their competing theories. Rather than succumbing to the power of stare decisis, the dissenting justices repeatedly offered arguments from previous cases and sometimes even incorporated them. The dissenting justices have continued to claim that stare decisis favors their theory whenever the majority expands state sovereign immunity.[40] By contrast, the majority continually notes that the polarization ultimately goes back as far as *Hans v. Louisiana*, the first case to ratify the majority's theory of state sovereign immunity as a limitation on more than just diversity suits.[41] Thus, the dissenting justices depart from stare decisis each time they try to return to the limiting interpretation of the Eleventh Amendment from which *Hans* departed.

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39. Centr. Va. Cmty. Coll. v. Katz, 546 U.S. 356 (2006); Tennessee v. Lane, 541 U.S. 509 (2004); Fed. Mar. Comm'n v. S.C. State Ports Auth., 535 U.S. 743 (2002); *Garrett*, 531 U.S. 356; *Kimel*, 528 U.S. 62; Alden v. Maine, 527 U.S. 706 (1999); Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Fund, 527 U.S. 666 (1999); Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank, 527 U.S. 627 (1999); Idaho v. Coeur d'Alene Tribe of Idaho, 521 U.S. 261 (1997); Seminole Tribe of Fla. v. Florida, 517 U.S. 44 (1996); Hess v. Port Auth. Trans-Hudson Corp., 513 U.S. 30 (1994); Hilton v. S.C. Pub. Rys. Com'n, 502 U.S. 197 (1991); Hoffman v. Conn. Dep't of Income Maint., 492 U.S. 96 (1989); Pennsylvania v. Union Gas Co., 491 U.S. 1 (1989); *Dellmuth*, 491 U.S. 223; Will v. Mich. Dep't of State Police, 491 U.S. 58 (1989); Welch v. Tex. Dep't of Highways and Pub. Transp., 483 U.S. 468 (1987); Green v. Mansour, 474 U.S. 64 (1985); Atascadero State Hosp. v. Scanlon, 473 U.S. 234 (1985); Oneida County, N.Y. v. Oneida Indian Nation of N.Y. State, 470 U.S. 226 (1985); Pennhurst State Sch. & Hosp. v. Halderman, 465 U.S. 89 (1984); Hutto v. Finney, 437 U.S. 678 (1978); Edelman v. Jordan, 415 U.S. 651 (1974); Parden v. Terminal Ry. of Ala. State Docks Dep't, 377 U.S. 184 (1964). Also included in this statistic are cases that were reasoned if not decided by the barest of majorities. *See* Verizon Md., Inc. v. Pub. Serv. Com'n of Md., 535 U.S. 635 (2002); Raygor v. Regents of Univ. of Minn., 534 U.S. 533 (2002); Port Auth. Trans-Hudson Corp. v. Feeney, 495 U.S. 299 (1990).

40. *See, e.g.*, *Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. at 694 (Breyer, J., dissenting) (describing the majority as "seeking to justify the overruling of so clear a precedent").

41. *See, e.g.*, *Welch*, 483 U.S. at 486 ("The Court's unanimous decision in *Hans v. Louisiana* firmly established that the Eleventh Amendment embodies a broad constitutional principle of sovereign immunity.").

Only seven cases in the past forty-five years were *not* decided by the barest of majorities, and those reached narrow exceptions to the existing doctrine, indicating no departure from the Court's deep division.[42] Justice Stevens even wrote a concurring opinion in such a case to make clear that he reached the majority's result but by different reasoning inline with the dissenting bloc's specific theory of state sovereign immunity.[43] Neither side, and no justice, seems willing to budge.

The many close cases can hardly give states repose, for they remain only one vote away from a sudden burden of defending many new types of federal suits. Yet no state is going to implement an expensive compliance program until it knows compliance is required.

State sovereign immunity is unlike other areas of law in which maintaining contentiousness may be desirable. For example, the jurisdiction stripping doctrine is better left unresolved. Leaving in limbo Congress' power to strip the Supreme Court of jurisdiction preserves a healthy balance between two coequal branches of government. State sovereign immunity, by contrast, concerns the balance between state and federal governments, which are not coequal.[44] Evolving state sovereign immunity thus will not necessarily sacrifice the health of our governmental institutions.

Another doctrine better left unresolved, at least for now, is affirmative action. Leaving this doctrine in limbo balances equality for all races with reparations for past mistakes that still impact the way African-Americans start out. It also allows for race-based admissions formulas to be eliminated "as soon as practicable."[45] Likewise, state sovereign immunity seeks to remedy past wrongs, namely those done to states through other doctrines, such as the expansion of the Com-

42. *See* United States v. Georgia, 546 U.S. 151 (2006) (holding that Title II of the ADA abrogated state sovereign immunity with respect to suits brought for due process violations); Nev. Dep't of Human Res. v. Hibbs, 538 U.S. 721 (2003) (holding that the FMLA abrogated state sovereign immunity); Wis. Dept. of Corrs. v. Schacht, 524 U.S. 381 (1998) (holding that a state waives its immunity by removing to federal court); Blatchford v. Native Vill. of Noatak and Circle Vill., 501 U.S. 775 (1991) (finding state sovereign immunity applicable to suits brought by tribes); Nevada v. Hall, 440 U.S. 410 (1979) (finding state sovereign immunity inapplicable to suits brought by plaintiffs in a different state's court under the Full Faith and Credit Clause); Quern v. Jordan, 440 U.S. 332 (1979) (holding that the Civil Rights Act of 1871 did not abrogate state sovereign immunity); Milliken v. Bradley, 433 U.S. 267 (1977) (approving implementation of a state desegregation plan); Fitzpatrick v. Bitzer, 427 U.S. 445 (1976) (holding that Congress may abrogate state sovereign immunity under section five of the Fourteenth Amendment); Employees v. Dep't of Pub. Health and Welfare, Mo., 411 U.S. 279 (1973) (holding that the Fair Labor Standards Act abrogated state sovereign immunity).

43. *See, e.g.*, *Hibbs*, 538 U.S. at 721 (Stevens, J., dissenting).

44. *See* discussion in *Eakin v. Raub*, 12 SERG. & RAWLE, 344–58 (Pa. 1825).

45. Grutter v. Bollinger, 539 U.S. 306, 343 (2003).

merce Clause.[46] But any resolution to state sovereign immunity, even one that favors absolute immunity for states, cannot undo the expansion of the Commerce Clause.

Neither jurisdiction stripping nor affirmative action has commanded a large series of bare-majority decisions, despite arguably greater contentiousness than state sovereign immunity. Repeated bare-majority decisions on state sovereign immunity by the highest court leave states with less predictability with which they may otherwise adequately plan their affairs.

The demise of the longstanding division seems only a matter of time, given the intransigence of both sides, the issue's continued return in the Supreme Court, and the desirability of resolving the issue more clearly one way or the other to hedge the aforementioned risk to states. The only question remaining is how the Court's division will change.

There are only three ways to move toward Supreme Court consensus. Most obviously, a change in the Court's membership could change the count of votes. This is unlikely to happen for awhile since the five conservative justices are unlikely to retire any time soon and the four liberal justices are likely to be replaced by like-minded justices during President Obama's administration.[47] If, however, the Court does become more liberal in the next decade or two, a flip-flop from 5-4 to 4-5 might eliminate the problem. For states may then conform their behavior accordingly, at which time a reversion would be unnecessary because compliance programs would already be in place. Indeed, once states are forced to beef up compliance programs, there will be less reason to let them off the hook. But states risk suddenly facing a hoard of lawsuits should, for example, one of the majority justices become prematurely incapacitated during the Obama administration. This risk alone should motivate the justices to achieve consensus soon using one of the other two methods so as to leave jurisprudence to reason, not chance.

A second way to move toward consensus is to change a justice's mind using existing arguments, the most famous example being the "switch in time that saved nine."[48] But this is unlikely to happen here because the current justices are so invested in their positions. Indeed, recent opinions by both the majority and dissenting blocs often reason by citing to and incorporating their own previous opinions, stare decisis notwithstanding. Another sign that the justices are unlikely to be swayed is that unlike with *Lochner*, there is no court-packing pressure

46. Epstein, *supra* note 3, at 1816.

47. *See, e.g.,* BARACK OBAMA, THE AUDACITY OF HOPE 93 (Vintage 2008) (2006) ("[I]f there was one impulse shared by all the Founders, it was a rejection of all forms of absolute authority.").

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

from the executive to encourage a justice's change of mind. Executive pressure is absent because the debate over state sovereign immunity, while having important ramifications for ordinary Americans, has not polarized the nation in the same way that economic substantive due process once did. If a justice is going to switch sides, the impetus will be only from *new* well-reasoned arguments.

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

IV. EXISTING ARGUMENTS

A. Formalist Arguments

The justices agree that before the states ratified the Constitution, the original common-law doctrine of state sovereign immunity "stood as an absolute bar to suit against a State by one of its citizens, absent consent."[49] Where the justices diverge is over whether and how that doctrine was modified to the extent the states relinquished their sovereignty to the federal government by forming the United States. A key issue is whether Article III's conferral of federal jurisdiction over suits "between a State and Citizens of another State" and "between a State . . . and foreign States"[50] was meant to override state sovereign immunity. A recounting of the ratification debates reveals that the Framers disagreed on whether states could be sued in federal court without their consent.[51] Thus, formal arguments about the original meaning of Article III favor neither side of the debate.

Nor do arguments about the original meaning of the Eleventh Amendment decide the issue. The dissenting justices, like the majority justices,[52] explain how "the history and structure" of the Eleventh Amendment supports their theory of state sovereign immunity.[53] Reasonable justices arguing from original intent may disagree over whether the Eleventh Amendment limits state sovereign immunity

49. *Employees v. Dep't of Pub. Health*, 411 U.S. at 288 (Marshall, J., concurring).
50. U.S. CONST art. III, § 2.
51. Seminole Tribe of Fla. v. Florida, 517 U.S. 44, 142–43 (1996) (Souter, J., dissenting). Although this Article does not attempt to recount the justices' and other scholars' historical analyses, I note here that one available argument seems absent in these discussions. The justices frequently cite to the THE FEDERALIST to make their historical arguments, but nowhere do they cite to THE FEDERALIST NO. 46 (James Madison), which recognizes that individual rights trump those of the states: "[T]he ultimate authority, wherever the derivative may be found, resides in the people alone; and . . . will not depend merely on the comparative ambition or address of the different governments, whether either, or which of them, will be able to enlarge its sphere of jurisdiction at the expense of the other."
52. *Seminole Tribe*, 517 U.S. at 69–70.
53. *Id.* at 110 (Souter, J., dissenting).

only to diversity suits, or permits also its extension to federal-question suits.

Finally, formalist arguments about the necessity of following *Hans v. Louisiana* also end in a wash. The majority plausibly claims that *Hans* decided the issue long ago by decreeing that states are immune from not only diversity suits, but also federal-question suits. "The nation survived for nearly two centuries" with such immunity intact.[54] But the dissenting justices also explain how *Hans* resorted to common-law principles to overrule the Constitution's contrary text, and that a proper interpretation of the Constitution necessitates overruling a misguided decision.[55] Indeed, the Court has shaken up federal lawmaking by overruling longstanding doctrines before.[56]

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

B. Functional or Policy-Based Arguments

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

One functional argument is that immunity is needed to preserve the dignity and solvency of the states.[57] A rebuttal to this argument is that the dignity and solvency of states is not preserved under the *Ex parte Young* fiction, which holds states accountable in many instances by allowing suits against state officials who have indemnity agreements with the state. If dignity and solvency are the paramount concerns, then a doctrine preserving them would always confer immunity, both for states and officials with indemnity agreements, except only in those instances where states waive immunity by consenting to suit. Even the majority has never argued for so broad a doctrine of state

54. *Id.* at 71.
55. *Id.* at 132 (Souter, J., dissenting).
56. *See, e.g.,* Brown v. Bd. of Educ., 347 U.S. 483 (1954); *see also* DAVID A. STRAUSS, THE LIVING CONSTITUTION 77–98 (Oxford Univ. Press 2010) (discussing *Brown*'s overruling of the separate but equal doctrine).
57. Hans v. Louisiana, 134 U.S. 1, 21 (1890) (discussing how state sovereign immunity is designed to confer on state legislatures "the power of judging what the honor and safety of the state may require").

sovereign immunity. On the other hand, if dignity and solvency are not the paramount concern, then by definition there is no plausibility to arguments for the function of state sovereign immunity as conferring dignity on states and preserving their solvency. Given the existing doctrine, which grants immunity in some cases and denies it in others, dignity and solvency can be only partial concerns.

Professor Jeffries raises a different argument, that the doctrine is irrelevant in light of all the myriad exceptions, the *Ex parte Young* fiction being the most prominent. On this view, sovereign immunity "functionally" bars only a small ratio of damage actions, even if the process seems convoluted, and so there is no point in upsetting stare decisis by reforming the doctrine.[58] But other studies rebut that plaintiffs are left remediless. Professor Brown explains, "Sovereign immunity, when combined with doctrinal devices such as qualified immunity and the policy or custom requirement of municipal liability, routinely leaves constitutional victims without redress."[59] Evidence from numerous recent cases also rebuts Professor Jeffries' theory. The Court has often found in favor of otherwise lawbreaking states and dismissed the suits in question under the doctrine of state sovereign immunity.[60]

Professor Epstein raises another functional argument, that state sovereign immunity is only fair from a classical liberal or libertarian perspective,[61] in light of an expanded interpretation of the Commerce Clause.[62] On this theory, the expanded interpretation of the Commerce Clause has so deprived the states of their sovereignty over the regulation of economic affairs within their borders, that granting them immunity as to their own economic affairs functions as a quid pro quo.

But as Epstein readily acknowledges, state sovereign immunity as a solution to maintaining the federalist balance increases state gov-

58. John C. Jeffries, *In Praise of the Eleventh Amendment and Section 1983*, *supra* note 4 at 81 (1998). *See also* Jesse H. Choper & John C. Yoo, *Who's Afraid of the Eleventh Amendment?: The Limited Impact of the Court's Sovereign Immunity Rulings*, 106 COLUM. L. REV. 213 (2006); John C. Jeffries, *The Right-Remedy Gap in Constitutional Law*, *supra* note 4 at 87 (1999).

59. Brown, *supra* note 6, at 1505.

60. *See, e.g.,* Bd. of Trs. v. Garrett, 531 U.S. 356 (2001) (discrimination against the disabled); Kimel v. Fla. Bd. of Regents, 528 U.S. 62 (2000) (age discrimination); Alden v. Maine, 527 U.S. 706 (1999) (labor violation); Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Fund, 527 U.S. 666 (1999) (trademark infringement); Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank, 527 U.S. 627 (1999) (patent infringement).

61. See Professor Epstein's characterization of himself as both a classical liberal and libertarian in Richard Epstein, *The Libertarian Manifesto*, FORBES.COM, Sept. 15, 2008, http://www.forbes.com/2008/09/15/libertarian-democractic-republican-oped-cx_re_09150epstein.html.

62. Epstein, *supra* note 3, at 1816.

ernmental power. From a libertarian perspective, it thus should be better to focus on reducing the federal government's commerce power rather than on increasing the power of state governments. Professor Epstein's rebuttal here must be an argument about method, not substance, because the substance of the current policy, which immunizes states when they infringe patents and trademarks, fails to achieve the "ideal position" that would "subject [states] to obligations when they take property without compensation."[63] As a libertarian, he must be taking the position that the best way to reduce governmental power is first to increase it. This was the same policy position of the protagonists in the libertarian favorite ATLAS SHRUGGED, where the producers of the world went on strike and supported big-government views, so as to spur revolution and effect a libertarian ideal.[64]

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

One way to educate individuals on the law is to work toward a system where the law that people understand is the law as it is. If states are immune for otherwise illegal acts, and if this is undesirable, then we should say so. And if today's doctrine, with *Ex parte Young* and the other exceptions, is no different from the simple alternative that affords plaintiffs remedies, then we should work toward a solution that simplifies the doctrine so that everyone can understand it.[65] Epstein abandons both modes of developing the doctrine, throws up his hands, and says constitutional doctrine is already so muddled that we should muddle it further from a libertarian perspective on the theory that two libertarian wrongs make a right. Libertarians may plausibly take Professor Epstein's view, but surely they may have a reasonable contrary view as to how to best hold states accountable. Ultimately Epstein's functional argument is unconvincing because it does not weigh costs and benefits of existing doctrine.[66]

A final functional argument holds that the existing doctrine is not and should not be based on functional concerns. As evidence, no function of state sovereign immunity is ever cited to resolve the issues discussed in Part II above: the prospective-retroactive problem of official-capacity suits, the line-drawing problem between participation and ac-

63. Interview with Richard A. Epstein (Feb. 3, 2009) (on file with author).
64. AYN RAND, ATLAS SHRUGGED (1957).
65. *See* Jules Coleman, *Incorporationism, Conventionality, and the Practical Difference Thesis*, *in* HART'S POSTSCRIPT: ESSAYS ON THE POSTSCRIPT TO CONCEPT OF LAW 139 (Jules Coleman, ed., Oxford 2001) (explaining how law's authority depends on the ability of people to identify it without recourse to complex reasoning).
66. For an analysis of the costs and benefits of existing doctrine, see Part IV *infra*.

ceptance of a gratuity for purposes of finding consent and waiver, and the problem of determining whether Congress has abrogated sovereign immunity under the Fourteenth Amendment. On this view, formalist exceptions are more certain—hence more preferable—than an alternative test that employs balancing.[67] But uncertainty results in the doctrine's application because existing doctrine is not based on functional concerns. In fact, a balancing test, such as the newly proposed solution, may produce more certainty because: (1) it is based on functional concerns, unlike non-functional balancing tests notorious for their open-ended, unpredictable results;[68] and (2) it is facially simpler than trying to navigate through the existing doctrine's many complex, manipulable, and often unpredictably applied exceptions. Moreover, balancing tests are used with success in the area of foreign sovereign immunity. Although some uncertainty in such cases exists,[69] the test succeeds because it achieves Congress' intent by moving away from absolute immunity. A new balancing test based on functional concerns would arguably outperform the existing non-functional test.

C. Coherence with *Lochner v. New York*

The justices have begun to realize that formal and functional arguments are getting them nowhere. Hence, each side has recently resorted to accusing the other side of following in the footsteps of *Lochner v. New York*,[70] a case often understood to symbolize judicial activism. For example, the dissenters cite *Lochner* to describe the majority as "depriv[ing] Congress of necessary legislative flexibility."[71] The majority retorts, also citing *Lochner*, that the dissenters are trying to "impose a particular economic philosophy."[72]

These brief comparisons with *Lochner* are interesting because they inch toward an alternative mode of argument consisting of constructive interpretation. The interpretive argument looks to our legal sys-

67. *Cf.* Hertz Corp. v. Fried, No. 08-1107, 2010 WL 605601, at *12 (U.S. Feb. 23, 2010) ("[C]ourts benefit from straightforward rules under which they can readily assure themselves of their power to hear a case.").

68. *See generally* the myriad approaches states use to perform interest analysis and to resolve such issues in DAVID P. CURRIE ET AL., CONFLICT OF LAWS 118–203 (West 7th ed. 2006). *See, e.g.,* Phillips v. Gen. Motors Corp., 995 P.2d 1002, 1008–09 (Mont. 2000); Wood Bros. Homes, Inc. v. Walker Adjustment Bureau, 601 P.2d 1369, 1372–73 (Colo. 1979); RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6 (1971).

69. In determining, for example, whether the "nature" of a foreign sovereign's activity is sufficiently commercial to overcome an immunity defense. *See* Foreign Sovereign Immunities Act of 1976, 28 U.S.C. §§ 1330, 1602–11 (1976).

70. 198 U.S. 45 (1905).

71. Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Fund, 527 U.S. 666, 701 (1999) (Breyer, J., dissenting).

72. *Id.* at 691.

tem's entire institutional history—including and beyond the area of state sovereign immunity—to discover which legal rule regarding state sovereign immunity best coheres with that history.[73] By examining a larger swathe of the Supreme Court's institutional history, it carries the argument forward and allows a more coherent, principled doctrine of state sovereign immunity to emerge. This Article takes the same approach in Part IV below, by analogizing to the direct-taxation and specific-jurisdiction doctrines to resolve the entrenched divide over state sovereign immunity. But I will start with the interpretive arguments posed by the justices, which analogize to *Lochner*, and briefly conclude that while each side's characterization of the other has some truth, neither invocation of *Lochner* decides the argument for one's theory of state sovereign immunity.

First, *Lochner* is commonly understood to signify judicial activism in pursuit of a particular philosophy. In the context of state sovereign immunity, both sides compete to impose a particular political philosophy—either statism or cosmopolitanism.[74] Thus, invoking *Lochner* as an accusation that the other side is trying to "impose a particular economic philosophy"[75] scores equally on both sides of the debate and ends the justices' comparisons in a wash.

Second, the dissenters' description of the majority as "depriv[ing] Congress of necessary legislative flexibility"[76] makes no attempt to explain why legislative flexibility is as "necessary" in this context as in the context of economic substantive due process. *Lochner* and its progeny might be understood to signify an evolving conception of neutrality, understood in the context of economic substantive due process as "preservation of the existing distribution of wealth and entitlements under the baseline of the common law."[77] In the context of state sovereign immunity, neutrality might instead refer, again "under the baseline of the common law," to preservation of the existing distribution of power among individuals, states, and the federal government. On one view, the distribution of power has evolved in the modern era toward an emphasis on individual rights.[78] On another, the distribution of power has evolved toward emphasizing state sovereignty.[79] A settled concept of neutrality in this context is nowhere to

73. *Cf.* RONALD DWORKIN, LAW'S EMPIRE (Harvard 1986).

74. I explain elsewhere how these competing philosophies are relevant to discussions of sovereign immunity. *See* Justin Donoho, *Minimalist Interpretation of the Jurisdictional Immunities Convention*, 9 CHI. J. INT'L. L. 661, 678–79 (2009).

75. *Coll. Sav. Bank*, 527 U.S. at 691.

76. *Id.* at 702 (Breyer, J., dissenting).

77. Cass R. Sunstein, Lochner*'s Legacy*, 87 COLUM. L. REV. 873, 875 (1987).

78. ROBERT G. MCCLOSKEY, THE AMERICAN SUPREME COURT 148–83 (Chicago 4th ed. 2005).

79. Epstein, *supra* note 3, at 1816.

be found, and opposing views of it continue to polarize the Court over what is "necessary."

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

This Part briefly summarized the arguments justices and commentators have made for and against state sovereign immunity, including formalist arguments, functional arguments, and an interpretive argument analyzing coherence with *Lochner v. New York*. None of these arguments has resolved the debate over state sovereign immunity. With repeated bare majority decisions in the Supreme Court, the debate should soon be resolved by reason rather than a chance change in Court membership, which could produce undesirable effects. The next Part posits a new argument to spur conversation and encourage the doctrine's development.

V. NEW ARGUMENTS

The resolution of immunity questions inherently requires a balance between the evils inevitable in any available alternative.[80]

This Part argues that a functional balancing test best coheres with the institutional history of our legal system and eliminates the instability attending the Supreme Court's entrenched division. Its factors would determine whether, by the balance of state and federal interests, a particular cause of action should be allowed. They include (1) the potential for opening the door to a flood of frivolous litigation (the "federalism" factor); (2) the financial impact on the state ("financial impact"); (3) the fairness to the state in light of Commerce-Clause jurisprudence at the time of the Eleventh Amendment's adoption ("fairness"); and (4) Congress's clearly stated intent to abrogate state sovereign immunity ("public choice").

This theory of state sovereign immunity is provided as a tentative conclusion based on new arguments, which, as posited above, are required to resolve this divided issue. The new arguments presented in this Part seek to make state sovereign immunity cohere with two other doctrines of American jurisprudence: the direct-taxation doctrine and the specific-jurisdiction doctrine. These doctrines provide a tiny, yet important, subset of relevant case law, and thus are provided merely as examples. Doctrines not discussed in this Article may also assist the interpretive argument. The purpose of this Part is to spawn

80. Harlow v. Fitzgerald, 457 U.S. 800, 813 (1982); *see also* Hans v. Louisiana, 134 U.S. 1, 21 (1890) (assessing the "greater evils" in the context of state sovereign immunity).

discussion by taking an interpretive approach that the justices initiated by invoking *Lochner*, that is, by seeking a solution that best coheres with our legal system's institutional history. The initiation of an interpretive approach, then, begins with the following arguments.

A. Coherence with the Direct-Taxation Doctrine

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

1. Evolution of the Direct-Taxation Doctrine

Since *Brown v. Maryland*,[81] "the Court has wound its way through a labyrinth of shifting, tortuous judicial interpretations and approaches concerning the extent to which the Commerce Clause limits state taxation of interstate and foreign commerce."[82] Before it had decided many state-taxation cases, for example, the Court held that states may enact regulations that are only "local and not national" in character, that is, do not "admit only of one uniform system, or plan of regulation."[83] In so doing, it achieved a compromise between Chief Justice Marshall's and Chief Justice Taney's competing approaches to the scope of the commerce power.[84]

Thus began an absolutist position on state taxation, whereby "interstate commerce cannot be taxed at all, even though the same amount of tax should be laid on [intrastate] commerce."[85] However,

81. 23 U.S. 554 (1827).
82. PAUL J. HARTMAN, FEDERAL LIMITATIONS ON STATE AND LOCAL TAXATION 53 (1981).
83. Cooley v. Bd. of Port Wardens, 53 U.S. 299, 319 (1852).
84. 1 JEROME R. HELLERSTEIN & WALTER HELLERSTEIN, STATE TAXATION ¶ 4.06 (Rev. 3d ed. 2007).
85. Robbins v. Shelby County Taxing Dist., 120 U.S. 489, 497 (1887) (invalidating a franchise tax on traveling salespeople without local property).

"the Court recognized from the outset that the Commerce Clause did not serve to invalidate *all* state taxation affecting interstate commerce."[86] Rather, in accordance with the direct-taxation doctrine, it would invalidate only "a direct tax on . . . interstate commerce,"[87] whereas it would uphold a tax that was indirect—for example, using gross receipts on interstate commerce, prorated for the local percentage of total railroad track, simply as a "means of ascertaining the value of the privilege conferred" on in-state property.[88] This era of the direct-taxation doctrine, which the Court would later describe as "the old absolutism that proscribed all taxation formally levied upon interstate commerce,"[89] generally fostered free trade and levied only a few taxes on interstate businesses, frequently in the form of property taxes.

Free trade gave way to a wider view of the states' power to tax interstate businesses, "perhaps out of a reluctance to thwart the states' response" to the economic conditions of the Great Depression.[90] The Court began to uphold taxes that were "reasonably designed to measure the state's nexus with the receipts, income, or property taxed,"[91] because interstate businesses were not to be relieved from shouldering "their just share of state tax burden."[92] State taxes were held invalid, however, if they risked multiple taxation from other states,[93] or, in the Court's current phraseology, were "internally inconsistent."[94]

Despite this development, the Court held in *Spector Motor Service, Inc. v. O'Connor* to its free-trade approach regarding franchise taxes on businesses that were "exclusively interstate in character" and even those that owned in-state property.[95] Seemingly incongruent with the expanded power of the state's power to tax interstate businesses, the Court invalidated nondiscriminatory, fairly apportioned taxes merely because states verbally formulated them as franchise taxes, rather than taxes in lieu of ad valorem property taxes.[96] Yet the Court, after a change in membership, upheld for the first time, in *Northwestern State Portland Cement Co. v. Minnesota*, a tax, verbally formulated as a net income tax, on an exclusively interstate business (that did *not*

86. JEROME R. HELLERSTEIN & WALTER HELLERSTEIN, STATE AND LOCAL TAXATION: CASES AND MATERIALS 197 (8th ed. 2005) (emphasis added).
87. N.J. Bell Tel. Co. v. New Jersey, 280 U.S. 338, 349 (1930).
88. Maine v. Grand Trunk Ry. Co., 142 U.S. 217, 229 (1891).
89. Okla. Tax Comm'n v. Jefferson Lines, 514 U.S. 175, 183 (1995).
90. HELLERSTEIN & HELLERSTEIN, *supra* note 86, at 198.
91. *Id.* at 199.
92. W. Live Stock v. Bureau of Revenue, 303 U.S. 250, 254 (1938).
93. Cent. Greyhound v. Mealey, 334 U.S. 653, 662 (1948); J.D. Adams Mfg. Co. v. Storen, 304 U.S. 307, 311 (1938).
94. *Jefferson Lines*, 514 U.S. at 192 n.6.
95. 340 U.S. 602, 609 (1951).
96. *Id.* at 611 (Clark, J., dissenting with two other justices).

own in-state property).[97] Just as *Spector* was incongruent with previous decisions, *Northwestern States* was incongruent with *Spector*.[98] Both opinions prolonged the direct-taxation doctrine, with justices quibbling over which verbal formulations constituted direct versus indirect taxes. But *Northwestern States* marked the new ascendancy of state taxing powers and the repudiation of traditionally restrictive views of the Commerce Clause: tax receipts surged as states promptly reformulated their franchise taxes as direct net income taxes to avoid the barrier of *Spector*.[99]

As the Court's expansive view of state taxing powers became a practical reality, it confronted the logical inconsistency and by-then virtual irrelevance of *Spector* and explicitly overruled it by unanimous decision in *Complete Auto Transit, Inc. v. Brady*.[100] In doing so, it rejected the formalistic direct-taxation doctrine perpetuated by *Spector* and codified a four-part balancing test that remains today. A state tax affecting interstate commerce is valid under the Commerce Clause if it (1) applies to an activity with a substantial nexus to the state, (2) is fairly apportioned, (3) does not discriminate against interstate commerce, and (4) is fairly related to state-provided services.[101] Furthermore, the fair-apportionment requirement is satisfied if the tax is both internally consistent, or does not risk multiple taxation from other states, and externally consistent, or reasonably reflects the in-state component of the interstate activity.[102]

2. Implicit Balancing Factors

The direct-taxation doctrine presents two puzzles: Why did the Court switch from absolutism to balancing? And why did it stay with absolutism so long? One hypothesis is that the direct-taxation doctrine was never absolutist, but rather discretionary balancing cloaked in absolutist garb until balancing factors could become apparent. The factors that compose the balancing test are not new, and the Court recognized as much.[103] For example, the Court had previously enunciated the substantial nexus requirement in *Northwestern States*,[104] the fair apportionment requirement in *Central Greyhound*,[105] the

97. 358 U.S. 450 (1959). The three new members since *Spector* who swung the vote the other way in *Northwestern States* were Justices William Brennan, Earl Warren, and John Marshall Harlan II.
98. *Id.* at 496 (Whittaker, J., dissenting).
99. HELLERSTEIN & HELLERSTEIN, *supra* note 86, at 201–02.
100. 430 U.S. 274, 288–89 (1977).
101. *Id.* at 279.
102. Okla. Tax Comm'n v. Jefferson Lines, 514 U.S. 175, 184–96 (1995); Goldberg v. Sweet, 488 U.S. 252, 261–65 (1989).
103. *Complete Auto.*, 430 U.S. at 279 n.8.
104. Nw. States Portland Cement Co. v. Minnesota, 358 U.S. 450, 452 (1959).
105. Central Greyhound Lines, Inc. v. Mealey, 334 U.S. 653, 663 (1948).

nondiscrimination requirement as early as *Cooley*,[106] and the fair-relation requirement in *Northwestern States*.[107] And long before enunciating the labels that would later form these factors, the Court had considered the factors under different names.[108] This hypothesis amounts to a recognition that the common law regarding constitutional limits on state taxation was so nascent that even the balancing factors had not yet crystallized.

The same may be true for the doctrine of state sovereign immunity, where absolutism tempered by myriad exceptions ends up achieving a balance. Indeed, the Court has emphasized that its state sovereign immunity jurisprudence "illustrate[s] a careful balancing and accommodation of state interests" when determining the applicability of the doctrine's formalist exceptions.[109] The Court has long hinted at the federalism, financial-impact, fairness, and public-choice factors in the proposed test. Consider the following evidence from state sovereign immunity cases.

The federalism factor, which considers the potential for opening the door to a flood of frivolous litigation in federal courts, was part of the Court's rationale in creating the largest exception of the doctrine in *Ex Parte Young*. As the Court concluded that plaintiffs can sue state officials if not states themselves, it emphasized that this would not upset the balance of federalism, stating, "There is nothing in the case before us that ought properly to breed hostility to the customary operation of Federal courts of justice in cases of this character."[110] The court explicitly made federalism one of its main concerns in developing the current doctrine.

The Court has also developed the current doctrine with an eye toward the financial-impact factor, which considers the financial impact on the state. In *Hans v. Louisiana*, the first case to codify the current theory, the Court emphasized the importance of the "safety of the state" in coming to the conclusion that financial instruments were not enforceable against the state's treasury.[111]

The Court also has discussed the fairness factor, which considers the fairness to the state in light of Commerce-Clause jurisprudence at the time of the Eleventh Amendment's adoption. In *Hans*, the Court discussed the idea of fairness in light of original understanding when it hypothesized an Eleventh Amendment that more clearly codified

106. Cooley v. Bd. of Wardens of Port of Phila., 53 U.S. 299, 325–26 (Daniel, J., concurring).

107. 358 U.S. at 466 (Harlan, J., concurring).

108. *See, e.g.*, *id*.

109. Idaho v. Coeur d'Alene Tribe of Idaho, 521 U.S. 261, 278 (1997).

110. *Ex parte* Young, 209 U.S. 123, 168 (1908).

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

the dissenting justices' diversity theory, and then asked, "[C]an we imagine that it would have been adopted by the states?"[112]

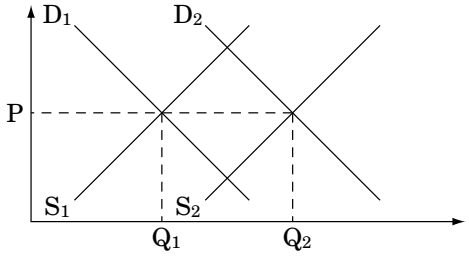
Finally, the public-choice factor is already firmly established in today's doctrine. Cases like *Fitzpatrick v. Bitzer*[113] and *Central Virginia Community College v. Katz*[114] establish that Congress' intent to override immunity is sometimes dispositive, and *Quern v. Jordan*[115] establishes that Congress must establish its intent via a clear statement.

The Court's foreshadowing of each of these factors, by itself, does not warrant adoption of the proposed test. But it shows that a test embracing factors the Court has emphasized in the past would cohere with its previous jurisprudence. In other words, a decision in favor of the proposed test would be just as authorized under stare decisis as *Complete Auto Transit* was in reformulating the direct-taxation doctrine.

3. Flexibility

State sovereign immunity shares another similarity with the direct-taxation doctrine: the need to maintain flexibility to vary output. Consider again the direct-taxation doctrine. It evolved from its beginnings in a laissez-faire era to an era more aptly characterized by the welfare state. Social services boomed, thereby increasing the demand for state tax revenues from D_1 to D_2, as shown in Figure 1. At the same time, large-scale industry boomed and modern transportation and communication reduced the economic importance of state lines, thereby increasing the supply of taxable interstate commerce from S_1 to S_2. Therefore, in the absence of legislation from Congress, the Court was able to sustain an increasing quantity of state taxes on interstate commerce without significantly increasing the price or burden of those taxes. See Figure 1:

Figure 1: Increase in State Taxes



112. *Id.* at 15.
113. 427 U.S. 445 (1976).
114. 546 U.S. 356 (2006).
115. 440 U.S. 332 (1979).

It is no surprise, then, that "the history of state . . . taxation has been largely a story of growth, both in the magnitude of the revenues collected and in the variety of taxes imposed."[116] On this view, the direct-taxation doctrine developed flexible balancing factors, instead of crystallized rules, precisely to deal with this growth.

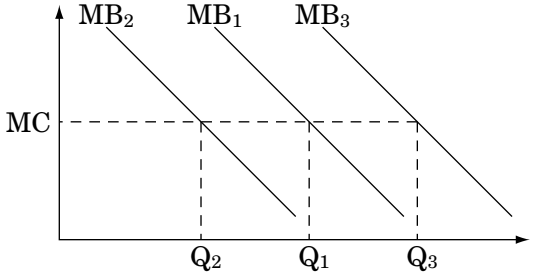
The history of state sovereign immunity is not a story of growth but one of volatility. Absolute immunity began to erode, beginning generally with *Ex Parte Young*[117] in 1908 and occurring again, for example, with *Pennsylvania v. Union Gas Co.*[118] in 1989 and *Katz* in 2006. But the general reduction reversed course, beginning in the 1970s with cases like *Employees of Department of Public Health and Welfare v. Missouri Public Health Department*[119] and culminating with major expansions of state sovereign immunity in the 1990s, namely *Seminole Tribe v. Florida*[120] and *Alden v. Maine.*[121] Indeed, a curve showing over time the number of types of cases that would leave plaintiffs remediless via state sovereign immunity might look like a rollercoaster. If the flexibility of a balancing test is needed to provide growth, it is needed even more to deal with volatility. The alternative is today's patchwork over which no recent Court can achieve consensus.

Professor Jeffries suggests that the current doctrine is not volatile but stable, essentially providing "a liability regime based on fault."[122] But plaintiffs are often left remediless even upon proof of fault by state officers.[123] And even if Professor Jeffries is right—that plaintiffs have remedies in most cases—the doctrine is nevertheless volatile. To illustrate, consider the underlying economic factors of state sovereign immunity.[124] As shown in Figure 2, the marginal societal benefits from immunity may decline from MB_1 to MB_2, for example, as the ratio of state to non-state jobs for disabled people increases. This is because if disabled people become more likely to work for state governments, then they will find increased benefits if state governments have no immunity from suits alleging discrimination. But the margi-

116. HELLERSTEIN & HELLERSTEIN, *supra* note 86, at i.
117. 209 U.S. 123 (1908).
118. 491 U.S. 1 (1989).
119. 411 U.S. 279 (1973).
120. 517 U.S. 44 (1996).
121. 527 U.S. 706 (1999).
122. Jeffries, *In Praise of the Eleventh Amendment and Section 1983*, *supra* note 4, at 68.
123. *See supra* notes 59–60 and accompanying text.
124. I describe the economic factors underlying state sovereign immunity in terms of marginal costs and benefits, rather than in terms of supply and demand as in the previous example, because the state has a monopoly on supplying its immunity. Only the state can be immune. *Cf.* RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 273–78 (6th ed. 2003) (illustrating monopolists' output in terms of marginal revenue and marginal cost).

nal benefits of immunity may increase from MB_1 to MB_3, for example, as suits of a given type threaten to bankrupt a state. Indeed, the marginal benefits of immunity are highly dependent on the type of case being brought. Thus, the quantity of immunity supplied remains volatile for a given marginal cost MC.

Figure 2: Variable Benefits of State Sovereign Immunity

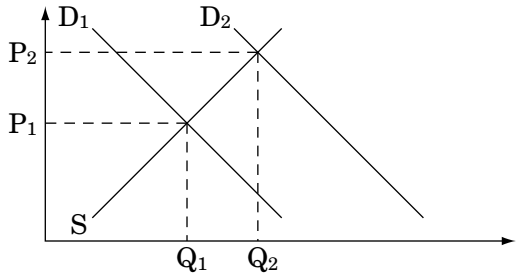


To accommodate the varying underlying cost-benefit calculation, a regime of rigid rules will likely continue to develop myriad exceptions, as we see in the current doctrine today. Moreover, it will likely remain contentious, because the justices remain tied to formalistic arguments without considering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

This is not to say that only balancing tests are generally appropriate to accommodate economic concerns. Rather, balancing tests are appropriate when output of the doctrine is subject to change, whereas rule-like regimes are appropriate when output is stable. Consider the right to counsel. By contrast to the direct-taxation doctrine, the historical growth of the right to counsel has plateaued. This may be because the supply of criminal defense counsel per criminal defendant has declined or at best stayed the same,[125] thus making costly, in the amount of P_2 minus P_1, further expansion of the right to counsel from Q_1 to Q_2. See Figure 3:

125. Between 1975 and 1993, the size of the criminal defense bar increased 87%, David Luban, *Are Criminal Defenders Different?*, 91 MICH. L. REV. 1729, 1732 (1993), while the annual number of serious violent crime and drug arrests approximately doubled. *See* Bureau of Justice Statistics Key Crime & Justice Facts at a Glance, http://www.ojp.usdoj.gov/bjs/glance.htm#Crime (last visited Nov 15, 2007).

Figure 3: Potential Increase in the Right to Counsel



Unlike the direct-taxation doctrine, with which the Court struggled to maintain consistency while aiming at a moving target of growing taxes, the realities of cost have caused the right to counsel to reach equilibrium in quantity. With a stable target, the Court has been able to take aim by crystallizing precise rules that balance the needs of defendants with defense attorney and judicial resources. What have emerged are many precise rules on when the right to counsel attaches, the *Gideon* rule that makes these rules applicable to state and federal defendants alike, and judicial discretion to appoint counsel—using balancing factors in the remaining classes of cases.[126]

It is a familiar aspect of the common law that when judges "are called upon to say how far existing rules are to be extended or restricted, they must let the welfare of society fix the path, its direction, and its distance."[127] But society's welfare—including its right to sue states, its tax burden, and its right to counsel—is often dictated by economic realities. Unlike the right to counsel, we cannot say that state sovereign immunity has plateaued due to economic forces, thus enabling us to crystallize rigid rules around a stable target. Rather, like the direct-taxation doctrine, the target is moving, and we need a flexible test to accommodate the move until underlying economic forces halt the volatility and enable rule crystallization.[128]

The variable underlying economic factors of state sovereign immunity do not by themselves warrant adoption of the proposed test. But they suggest the usefulness of the federalism, financial-impact, and

126. *See, e.g.*, Chewning v. Cunningham, 368 U.S. 443 (1962); Bute v. Illinois, 333 U.S. 640 (1948).

127. BENJAMIN N. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 66–67 (1921). *See also, e.g.*, Robbins v. Shelby County Taxing Dist., 120 U.S. 489, 497 (1887) (urging that the Court's holding "will not . . . diminish . . . resources"); Cooley v. Bd. of Wardens, 53 U.S. 299, 321 (1851) (exploring the "practical consequences" of the Court's decision).

128. *See also* Frederic M. Bloom, *Jurisdiction's Noble Lie*, 61 STAN. L. REV. 971, 976 (2009) (explaining generally how "jurisdictional flexibility can promote worthy objectives").

public-choice factors, which all implicate costs and benefits to the public.

4. Transparency and Minimalism

Finally, state sovereign immunity also shares with the direct-taxation doctrine the need to move minimally toward a transparent solution. Consider once more the direct-taxation doctrine, which provided a grab bag of malleable rules from which either side could choose. Without a functional test that asks *why* to uphold or overturn state taxes on interstate commerce, the justices enjoyed unlimited discretion when encountering hard cases under the formalist direct-indirect distinction. Today's reformulated test, although it may provide the same open-ended discretion, at least increases transparency by forcing judges to explain the real reasons for their opinions rather than molding an elastic formal test to reasons that remain unspoken. A functional test thus increases transparency in courts' calculations so as to foster empirical data gathering, which could lead to eventual enumeration of additional precise rules.[129]

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

The Court's overruling of the direct-taxation doctrine in *Complete Auto Transit*[130] drastically reformulated the test to be applied. But since the new test's balancing factors had been implicit all along in the court's old reasoning,[131] the new test had minimal impact on court outcomes. Indeed, state taxation of interstate commerce continued to grow. Similarly, a new test for state sovereign immunity may continue to be applied along the same polarized lines, with little change in substantive outcome. This lack of a significant change in outcome has the benefit of taking minimal steps toward whatever each justice's ultimate goal might be, whether total statism, total cosmopolitanism,

129. For an article that looks to past jurisprudence under the revamped direct-taxation doctrine's balancing test, in order to codify a simpler, more rule-like test, *see* Jesse H. Choper & Tung Yin, *State Taxation and the Dormant Commerce Clause: The Object-Measure Approach*, 1998 SUP. CT. REV. 193 (1998).

130. 430 U.S. 274 (1977).

131. *See supra* subsection IV.A.2.

or somewhere in between.[132] But at the same time, the proposed test would provide a framework that would require judges to think about and explain why they grant immunity. This step toward a transparent, minimalist framework allowed for a more rational discourse than did the direct-taxation doctrine and it could do the same for today's doctrine of state sovereign immunity.

B. Coherence with the Specific-Jurisdiction Doctrine

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

1. Economic Analysis of Specific Jurisdiction

Various authors would change the current American doctrine of specific jurisdiction as it applies domestically. To evaluate their claims, this section eschews philosophical analysis because no one has yet shined any "light on the foundations of jurisdiction"[133] except to say that "[t]he foundation of jurisdiction is physical power."[134] This section declines to provide moral justifications for physical power and instead uses economic analysis to evaluate doctrines by which courts fashion it in the form of specific jurisdiction.

In a nutshell, American courts[135] may exercise specific jurisdiction over an American defendant who (1) has purposefully availed himself of the forum state's benefits and protections by establishing "minimum contacts,"[136] (2) has availed himself by streaming commerce into

132. *Cf.* Cass R. Sunstein, *Burkean Minimalism*, 105 MICH. L. REV. 353, 353 (2006) (describing how minimalists "believe in rulings that are at once narrow and theoretically unambitious").

133. Lea Brilmayer, *Jurisdictional Due Process and Political Theory*, 39 U. FLA. L. REV. 293, 293 (1987).

134. McDonald v. Mabee, 243 U.S. 90, 91 (1917).

135. State courts and federal district courts sitting in diversity in states with long-arm statutes empowering these courts to exercise jurisdiction over out-of-state defendants to the fullest extent permitted by the Fourteenth Amendment.

136. Int'l Shoe Co. v. State of Wash., 326 U.S. 310, 316 (1945).

the forum state,[137] or (3) has focused effects in the forum state;[138] unless exercising jurisdiction would be "unreasonable or unfair," an inquiry that analyzes the burden to the defendant, interests of the forum state, interest of the plaintiff, interest of the interstate judicial system in efficiency, and "shared interest of the several states in furthering fundamental substantive social policies."[139]

One might call this multifaceted test of today a "vertical approach" because it emphasizes "the relationship between a state and an individual over whom it exercises power."[140] Professor Spencer advocates for a vertical approach but also couples it with interest analysis.[141] He impresses the forum state's interests rather than treating them as merely one of *Asahi*'s five escape-hatch factors. He would have courts exercise specific jurisdiction "so long as the defendant has been given proper notice of the action and the state has a legitimate interest in the dispute,"[142] with the measure of legitimacy limited only by the "limits of the state's police power."[143] One problem with this approach is that it seems to employ circular reasoning. Spencer would define a court's power with power. A more economic problem is that a state could simply declare its legitimate interest in being "a justice-administering state,"[144] thus allowing jurisdiction in any state over any dispute. This extreme may exaggerate Spencer's purpose,[145] but Spencer indeed aims for "an expansion of the jurisdictional reach of states beyond what the Court currently embraces."[146] His solution "gives the plaintiff a potentially very large choice of states to sue in,"[147] and is inefficient not necessarily because it enables forum shopping, but rather because it excessively deters economic activity. "[T]he fact that burden and inconvenience are concepts that are increasingly meaningless in modern times," as Spencer puts it,[148] does not erase the existence of burden and inconvenience, whose increasingly meaningful effects under Spencer's approach would be to deter businesses either

137. Asahi Metal Indust. Co. v. Superior Court of Cal., 480 U.S. 102 (1987) (leaving open whether to evaluate availment in stream-of-commerce cases by purposefulness, knowledge, or volume, value, and hazardousness of availment).
138. Calder v. Jones, 465 U.S. 783, 789 (1984).
139. *Asahi*, 480 U.S. at 113–16 (quoting World-Wide Volkswagen v. Woodson, 444 U.S. 286, 292 (1980)).
140. Brilmayer, *supra* note 133, at 295.
141. *Id.* at 297–98.
142. A. Benjamin Spencer, *Jurisdiction to Adjudicate: A Revised Analysis*, 73 U. CHI. L. REV. 617, 620 (2006).
143. *Id.* at 650–51.
144. *See, e.g.*, Milkovich v. Saari, 203 N.W.2d 408, 414 (Minn. 1973).
145. Spencer, *supra* note 142, at 661 ("A state has no legitimate interest in a dispute between nonresidents over injury inflicted and sustained elsewhere, unless they have consented to jurisdiction in the state.").
146. *Id.* at 669–70.
147. POSNER, *supra* note 124, at 673.
148. Spencer, *supra* note 142, at 632.

from operating in certain areas or industries or from forming altogether. Furthermore, any benefits Spencer's solution might achieve in reducing "fact-specific" litigation over personal-jurisdiction issues[149] could be overshadowed by increased personal-jurisdiction litigation regarding the proper basis for police power. See the "rich and extensive body of jurisprudence regarding legitimate state interests and the scope of state police power,"[150] which will continue to extend and would perhaps raise a firestorm of litigation as it becomes newly applied to a new area of law.

Professor Stein abandons vertical approaches for a horizontal approach, in which "the central issue [is] how assertion of jurisdiction would affect the authority of other concerned states."[151] Stein's horizontal approach is also coupled with interest analysis, which strives for "regulatory precision" as a measure of legitimacy[152] rather than for "legitimacy" per se[153] as in Spencer's vertical perspective. One cost of this approach is that achieving regulatory precision would increase the fact-specific litigation in the personal-jurisdiction phase of a dispute that Spencer postulates is already too costly. More troubling is that the approach would in fact result in imprecision, with business-deterrent externalities that would dwarf any benefits of eradicating other "unacceptable externalit[ies]" of the kind already eradicated by *World-Wide Volkswagen*.[154] State interest analysis of the horizontal type is notorious in other contexts for producing wildly nonuniform and unpredictable results, not precision, especially in true-conflict situations or unprovided-for cases.[155] Regulatory imprecision is further extended when elected state judges manipulate non-functional balancing tests to satisfy their constituents. The upshot is hardly the advancement of "an ex ante regulatory interest."[156]

Professor Citron also embraces horizontal interest analysis and similarly fails to grapple with the imprecision such an approach implicates. Moreover, she renounces even the appearance of benefits by striving not for regulatory precision but for "reasonableness."[157] Citron's reasonableness test not only contrasts with Stein's regulatory-precision test thus highlighting the myriad nonuniform ways in which

149. *Id.* at 670.
150. *Id.* at 660.
151. Allan R. Stein, *Personal Jurisdiction and the Internet: Seeing Due Process Through the Lens of Regulatory Precision*, 98 Nw. U. L. Rev. 411, 427 (2004).
152. *Id.* at 412.
153. Spencer, *supra* note 142, at 660.
154. Stein, *supra* note 151, at 419.
155. *See supra* note 68 and accompanying text.
156. Stein, *supra* note 151, at 416.
157. Danielle Keats Citron, *Minimum Contacts in a Borderless World: Voice Over Internet Protocol and the Coming Implosion of Personal Jurisdiction Theory*, 29 U.C. Davis L. Rev. 1481 (2006).

a court could practice governmental interest analysis, but also demonstrates intrinsic nonuniformity on its face.

Existing specific-jurisdiction doctrine, then, is ideal in several respects. First, it maximizes commercial productivity by achieving a balance between the competing costs of "extensive satellite litigation over what should be an uncomplicated preliminary issue"[158] on the one hand, and an excessive number of foreign forums into which a defendant can be haled[159] on the other.

Second, existing doctrine's satellite litigation is small cause for concern. Courts require litigation in other prehearing scenarios of much more extensively factual issues that typically require expert economic testimony.[160] Even so, the *Federal Rules of Civil Procedure* provide judges ample discretion to circumscribe the extents of discovery and of a hearing to determine preliminary issues. In any event, faced with more striking sources of inefficiency in the courtroom,[161] satellite litigation over personal jurisdiction seems minor.

Third, existing doctrine provides clarity while retaining flexibility only where needed. Perhaps an independent, prestigious, authoritative agency could centrally prioritize all governmental regulation in accordance with comprehensive cost-benefit analysis,[162] from which Congress could craft a more efficient or regulatively precise federalism including detailed jurisdictional rules. But absent this utopia, the ideal set of rules would at least be subject to less manipulation than a governmental interest-analysis or state-sovereignty-based standard. "Purposefulness," "availment," and "effects," for example, are less subject to reasonable disagreement than "legitimate state interest" once some of the facts are in. Furthermore, productivity is encouraged ex ante when "the defendant cannot complain too bitterly if forced as a quid pro quo to defend himself in a forum that is not ideal from his standpoint."[163] When a defendant sees submission to a court's jurisdiction as a quid pro quo, as opposed to a surprise that he cannot reasonably anticipate, he is undeterred from engaging in beneficial

158. Spencer, *supra* note 142, at 617; *see supra* note 149 and accompanying text.
159. *See supra* note 147 and accompanying text.
160. For example, courts may require plaintiffs to establish loss causation in securities fraud cases at the class certification stage by a preponderance of the evidence after "some empirically-based showing." Oscar Private Equity Inv. v. Allegiance Telecom, Inc., 487 F.3d 261, 271 (5th Cir. 2007); *see also* Justin Donoho, *Insufficient Hedge-Fund Fraud Complaints and Misguided Motions to Dismiss*, 11 TRANSACTIONS: TENN. J. BUS. L. 161, 182–83 (2009) (concluding that complex economic data is becoming increasingly relevant in litigating motions to dismiss in federal courts).
161. For a discussion on how to improve courtroom efficiency, see POSNER, *supra* note 124, at 563–64.
162. *See* STEPHEN BREYER, BREAKING THE VICIOUS CIRCLE: TOWARD EFFECTIVE RISK REGULATION 59–72 (Harvard Univ. Press 1993).
163. POSNER, *supra* note 124, at 675.

economic activity because he sees submission to the court as a fair and inevitable exchange. Purposeful availment provides this quid pro quo or subjective fairness, as do purpose, knowledge, or the extreme natures of a defendant's stream of commerce,[164] or of effects produced from the defendant's harmful activities.[165] Even when these conditions are satisfied, existing jurisprudence recognizes that in some situations jurisdiction may seem unfair. Here is where the flexibility of interest analysis is provided, as an exit strategy not as the game plan, for only in patently obvious situations should this be employed. Indeed, in *Asahi*, the "first (and only)" Supreme Court case to dismiss jurisdiction under the exit strategy,[166] most if not all of the various flavors of interest analysis would have found jurisdiction unwarranted, even those vertical approaches that seek to expand jurisdiction.[167] Although the same dismissal could be effected through *forum non conveniens* or venue mechanisms, constitutionalization solidifies the process and prevents judicial overreaching ex ante, thus assuring defendants and again encouraging productivity.

Finally, there is something to be said for the power of stare decisis with respect to a doctrine, unlike state sovereign immunity, which is stable. Despite the twists and turns of historical jurisprudence in this area[168] from which the authors seek to cherry-pick en route to their pet doctrines, and despite unsupported assertions that "[a]s a constitutional doctrine whose contours remain imprecise, the law of personal jurisdiction has generated confusion . . . [a]nd unpredictability,"[169] the law as it has come to rest today is precise, established, and different from the changes they propose. Yet "[r]eady overruling of constitutional cases . . . reduces the stability of governmental institutions, denying the polity the benefit . . . of continuity."[170]

2. Fairness

The doctrines of specific jurisdiction and state sovereign immunity both concern jurisdiction to adjudicate. As the President of the International Court of Justice once noted about immunity in the related context of foreign sovereigns, "this is really a question of jurisdiction,

164. *See supra* note 137 and accompanying text.
165. *See* Stein, *supra* note 151, at 423–34 (describing how *Calder* may be construed much like *Asahi*, in that the question is left open as to whether purposefulness or knowledge of effects controls).
166. *Id.* at 427.
167. Spencer, *supra* note 142, at 666–67.
168. For an earlier history, see Harold L. Korn, *The Development of Judicial Jurisdiction in the United States: Part I*, 65 BROOK. L. REV. 935 (1999).
169. Spencer, *supra* note 142, at 617.
170. Frank H. Easterbrook, *Stability and Reliability in Judicial Decisions*, 73 CORNELL L. REV. 422, 430 (1988).

not of immunity."[171] Indeed, both doctrines concern whether the plaintiff has the power to hale the defendant into court. Thus, in the context of state sovereign immunity, just as in the specific-jurisdiction context, "fairness" as a measure of the doctrine's worth will be treated as fairness to the defendant.

The economic analysis of specific jurisdiction above, finding the doctrine ideal, hinged on Judge Posner's recognition that "the defendant cannot complain too bitterly if forced as a quid pro quo to defend himself in a forum that is not ideal from his standpoint."[172] The discussion noted that the specific-jurisdiction doctrine is fair because "the defendant cannot complain too bitterly" in this context, when he purposely avails himself of the forum state, streams an extreme amount of commerce into the forum state, or produces harmful effects in the forum state.

In the context of state sovereign immunity, the defendant state cannot complain too bitterly if the action brought against it was permissible under the Commerce Clause, for example, when the states ratified the Eleventh Amendment. Indeed, codification of this factor in the proposed balancing test strikes a compromise between the dissenting justices' total abandonment of immunity in federal-question suits and the majority justices' insistence on incoherent formalism.

If on the one hand, as the dissenting justices hold, the Eleventh Amendment limits state sovereign immunity only to diversity suits, then states should never be immune from federal-question suits, regardless of any historical Commerce-Clause analysis. But surely this is too extreme. Adopting the dissenting justices' theory would be an enormous change that could produce unexpected results if implemented immediately. Moreover, it ignores longstanding deference to state sovereignty as a counterpart to the Commerce Clause's erosion of state power.

If on the other hand, as the majority holds, the Eleventh Amendment allows for a broader principle of state sovereign immunity that includes immunity for federal-question suits, then we must recall that the states that ratified the Eleventh Amendment agreed to sovereign immunity at a time when Congress had little power under the Commerce Clause. On this view, had the states envisioned Congress' expanded commerce powers, they would have drafted an Eleventh Amendment whose text more clearly abrogated the dissenting justices' position. Indeed, the states may well have explicitly engrained state sovereign immunity as a constitutional principle in all federal-question suits. But this is also too extreme. Today's doctrine allows plaintiffs to seek remedies in some federal-question suits against states by

171. Rosalyn C. Higgins, *Certain Unresolved Aspects of the Law of State Immunity*, 29 NETH. INT'L L. REV. 265, 273 (1982).

172. POSNER, *supra* note 124, at 675.

suing state officials with indemnity agreements under *Ex parte Young*. Further expansion of state sovereign immunity is not rendered fair by complicating further an already formalist and incoherent doctrine, just so the majority justices can further reverse course from *Ex parte Young* and expand state sovereign immunity because, as Professor Epstein puts it, '[t]he system of dual sovereignty, which was the key to getting the Union off the ground, was undone by piling the overriding of sovereign immunity atop the once unimagined scope of the Commerce Clause."[173] The proposed test would simplify the doctrine and at the same time render explicit, through the fairness factor, what according to Professor Epstein may have been motivating the justices all along.

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

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

3. Efficiency

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

But in the context of state sovereign immunity, efficiency equates with whatever doctrine we think will promote the most efficient government. As Professor Kaplow explains, in crafting a transition policy from one legal regime to another, one should "consider when government policy is indeed optimal, how in particular it deviates from optimality when it is not, and how in turn transition policy would affect the choice of underlying substantive policies."[174] On one view, the most efficient government is the smallest government. In this case a doctrine that eliminated state sovereign immunity would also eliminate the subsidized advantage that state governments enjoy over non-

173. Richard A. Epstein, *supra* note 3, at 1816 (2006).
174. Kaplow, *supra* note 38, at 190.

state actors, thus minimizing government, all else being equal including Commerce Clause jurisprudence.[175] On another view, the most efficient government is the one that prioritizes all governmental regulation in accordance with comprehensive cost-benefit analysis.[176] In this case state sovereign immunity would always be appropriate because government by definition could do no wrong that could not be fixed through self-regulation, in which case allowing litigation to proceed against governments would waste judicial resources. Between these utopias the justices must compromise. The proposed test will improve transparency of judicial decision making over the existing formalistic doctrine, even if judicial outcomes remain the same. This alone will improve efficiency of judicial decision making.[177] The proposed test also may move the Supreme Court toward consensus over state sovereign immunity, and thus enhance certainty and predictability for states wondering in which direction the Court's division will inevitably turn. In any event, we need new arguments to achieve consensus, because efficiency is enhanced by reducing the risk to states, as described above, of facing a hoard of lawsuits should the composition of the bare majority flip-flop. Regardless of whether this Article's proposed test is the proper starting point for analysis, the time is now to make new arguments.

VI. CONCLUSION

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

175. Epstein, *supra* note 173, at 1807.
176. *See* BREYER, *supra* note 162, at 59–72.
177. Ronald Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1 (1960).