

# Sovereign Immunity

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- Views expressed are those of the presenters and do not constitute legal advice.

# Roadmap

## Historic Origins

## Eleventh Amendment Immunity

- Who gets it?
- How is it waived or abrogated?
- The *Ex parte Young* exception

## Sovereign Immunity

- Two types: Suit & Liability
- The *ultra vires* doctrine

## Trivia and Prizes

# Historic Origins: England



“That the king can do no wrong is a necessary and fundamental principle of the English constitution. . . .  
**[N]o action will lie against the sovereign (for who shall command the king?)”**

- Sir William Blackstone, Commentaries on the Laws of England in Four Books, vol. 2 [1753], Book III, Chapter XVII



# Historic Origins: England

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“[T]he law ascribes to the king the attribute of sovereignty, or pre-eminence. . . . Hence it is, that **no suit or action can be brought against the king, even in civil matters, because no court can have jurisdiction over him.**”

- William Blackstone, Commentaries on the Laws of England in Four Books, vol. 1 [1753], Book I, Chapter VII

# Historic Origins: USA, Pre- Constitution

When the thirteen colonies declared independence in 1776, they became entitled to **“all the rights and powers of sovereign states.”** *McIlvaine v. Coxe’s Lessee*, 8 U.S. 209, 212 (1808).

**“It is inherent in the nature of sovereignty not to be amenable to the suit of an individual without its consent.”** The Federalist No. 81, at 481 (Alexander Hamilton, 1788).

**“The doctrine that a sovereign could not be sued without its consent was universal in the States when the Constitution was drafted and ratified.”** *Alden v. Maine*, 527 U.S. 706, 706 (1999).



# Historic Origins: Federalism

- “[T]he States entered the federal system with their sovereignty intact.” *Blatchford v. Native Village of Noatak*, 501 U.S. 775, 779 (1991).
- “[T]he States’ immunity from suit is a fundamental aspect of the sovereignty which the States enjoyed before the ratification of the Constitution, and which they retain today (either literally or by virtue of their admission into the Union upon an equal footing with the other States) except as altered by the plan of the Convention or certain constitutional Amendments.” *Alden v. Maine*, 527 U.S. 706, 713 (1999).

## Historic Origins: Eleventh Amendment

### “Eleventh Amendment” immunity?

- **Article III, § 2** of the Constitution provides that the federal judicial power extends, *inter alia*, to controversies “**between a State and Citizens of another State.**”
- ***Chisholm v. Georgia***, 2 U.S. 419, 420 (1793) (holding that Article III, § 2 authorized federal courts to exercise jurisdiction over suits brought by a citizen of one state against another state, thereby effectively abrogating the States’ sovereign immunity).
- The *Chisholm* decision “**created such a shock of surprise that the Eleventh Amendment was at once proposed and adopted.**” *Monaco v. Miss.*, 292 U.S. 313, 325 (1934).

## Historic Origins: Eleventh Amendment

- **“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.
- **“By its terms, the [Eleventh] Amendment does not apply. . . where a citizen sues his own State** (or an agency of that State).” *Sullivan v. Texas A&M Univ. Sys.*, 986 F.3d 593, 596 n.1 (5th Cir. 2021). **“Still, the Supreme Court has often used ‘Eleventh Amendment immunity’ as a synonym for the States’ broader constitutional sovereign immunity.”** *Id.*
- **“The phrase [‘Eleventh Amendment immunity’] is convenient shorthand but something of a misnomer, for the sovereign immunity of the States neither derives from, nor is limited by, the terms of the Eleventh Amendment.”** *Alden v. Maine*, 527 U.S. 706, 713 (1999).



## Historic Origins: Eleventh Amendment

“[T]he [Supreme] Court made clear in *Alden* that

1. “[T]here is no such thing as an Eleventh Amendment immunity separate and apart from state sovereign immunity,
2. “[T]hat a state’s **sovereign immunity from suit** is now and always has been **inherent** within its sovereignty, and
3. “[T]he Eleventh Amendment **did not create any new immunity** but merely overruled the Supreme Court's erroneous decision in *Chisholm v. Georgia*.”

*Meyers ex rel. Benzig v. Texas*, 410 F.3d 236, 251 (5th Cir. 2005).

# 11<sup>th</sup> Amend.: Who gets it?

1. The **State** itself. *Regents of the Univ. of Cal. v. Doe*, 519 U.S. 425, 429 (1997).
2. A **state agency or entity** deemed an “**alter ego**” or “**arm of the State.**” *Vogt v. Bd. of Comm’rs*, 294 F.3d 684, 688–89 (5th Cir. 2002).
  - The defendant must be “so closely connected to the State that the State itself is the ‘real, substantial party in interest.’” *Id.*
  - No bright-line test, but the Fifth Circuit uses six factors. *Id.* at 679.
3. A state official sued in their “**official capacity.**” *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 101–02 (1984).

# 11<sup>th</sup> Amend.: Who gets it?

**Six factors** to determine whether entity is an “**arm of the state**”:

- (1) whether state statutes and case law characterize the agency as an arm of the state;
- (2) the source of funds for the entity;
- (3) the degree of local autonomy the entity enjoys;
- (4) whether the entity is concerned primarily with local, as opposed to statewide, problems;
- (5) whether the entity has authority to sue and be sued in its own name; and
- (6) whether the entity has the right to hold and use property.

*Vogt v. Bd. of Comm’rs*, 294 F.3d 684, 689 (5th Cir. 2002).

“[T]he most **significant factor** in assessing an entity’s status is **whether a judgment** against it will be **paid with state funds.**”  
*Delahoussaye v. City of New Iberia*, 937 F.2d 144, 147–48 (5th Cir.1991).

# 11<sup>th</sup> Amend.: Ways to Overcome

- The State can lose its Eleventh Amendment immunity in federal court either (1) **by consenting to suit** or (2) through a **valid Congressional abrogation**.  
*Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 99 (1984).
- The *Ex parte Young* exception is a limited way to overcome Eleventh Amendment immunity.
- **Removing the case** from state court to federal court waives **immunity from suit**, but not liability.

# 11<sup>th</sup> Amend.: State Consent to Suit

- If the State is waiving its own immunity by “**consent[ing] to suit against it in federal court,**” such consent must be “**unequivocally expressed.**” *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 99 (1984).
- “**A state’s waiver of sovereign immunity in state court does not mean the state has waived Eleventh Amendment immunity in federal court.**” *Perez v. Region 20 Educ. Serv. Ctr.*, 307 F.3d 318, 332 (5th Cir. 2002).
- **Receipt of federal funds** may also be **explicitly conditioned** on waiving Eleventh Amendment immunity. *See Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 241 (1985) (holding the Rehabilitation Act did not contain express intent to abrogate Eleventh Amendment immunity in the Rehabilitation Act), *superseded by statute as stated in Lane v. Peña*, 518 U.S. 187, 198 (1996) (noting that Congress subsequently added the express intent previously missing from the statute).

# Sovereign Immunity: Two Aspects

- “[T]he Constitution permits and protects a state’s right to relinquish its immunity from suit while retaining its immunity from liability, or vice versa, but [] it does not require a state to do so.” *Meyers ex rel Benzig v. Texas*, 410 F.3d 236, 255 (5th Cir. 2005).
- “In Texas, [the sovereign] immunity doctrine has two aspects: (1) **immunity from suit** even when the sovereign's liability is not disputed and (2) **immunity from liability** even though the sovereign has consented to the suit.” *Rosenberg Dev. Corp. v. Imperial Performing Arts, Inc.*, 571 S.W.3d 738, 746 (Tex. 2019).

## Sovereign Immunity: Two Aspects

- “**Immunity from suit** recognizes the judiciary’s limited authority over its sovereign creator and thus implicates the courts’ **subject-matter jurisdiction** to resolve a dispute against the state.” *Rosenberg Dev. Corp. v. Imperial Performing Arts, Inc.*, 571 S.W.3d 738, 746 (Tex. 2019).
- “[**I**]mmunity from **liability** only protects the state from money judgments, is not jurisdictional, and must be raised as an **affirmative defense** rather than by jurisdictional plea.” *Id.*

# Sovereign Immunity: Effect of Removal

- By **removing** a case to federal court, the State voluntarily **invokes its jurisdiction**. *Lapides v. Bd. of Regents of Univ. Sys. of Georgia*, 535 U.S. 613, 620 (2002).
  - *Lapides* does not address “a situation where the State’s underlying sovereign immunity from suit ha[d] not been waived or abrogated in state court.” *Id.*
- By **removing** a case to federal court, a Texas state defendant **waives only immunity from suit**, and may continue to assert immunity from liability even after removal. *Meyers ex rel. Benzig*, 410 F.3d 236, 255 (5th Cir. 2005); *Cephus v. Tex. Health & Human Servs. Comm’n*, 146 F. Supp.3d 818, 827–28 (S.D. Tex. 2015).



# Sovereign Immunity: UDJA

- The Uniform Declaratory Judgments Act (“UDJA”) provides a means by which a party may “obtain a declaration of rights, status, or other legal relations thereunder.” TEX. CIV. PRAC. & REM. CODE § 37.004(a).
- UDJA is “**merely a procedural device** for deciding cases already within a court’s jurisdiction.” *Tex. Ass’n of Bus. v. Tex. Air Control Bd.*, 852 S.W.2d 440, 444 (Tex. 1993).
- UDJA **waives sovereign immunity** for declaratory actions **challenging the constitutionality of a statute**. *Tex. Dep’t of Transp. v. Sefzik*, 355 S.W.3d 618, 621–22 (Tex. 2011).
- UDJA does **not waive** sovereign immunity for declaratory actions seeking a **declaration of rights**. *Id.*
- For a claim about rights (not a challenge to statute), the plaintiff must file an *ultra vires* action.

# Sovereign Immunity: *Ultra vires*



## Sovereign Immunity: *Ultra vires*

- Sovereign immunity does not bar an ***ultra vires*** suit **seeking prospective injunctive relief** against a state official **in their official capacity**. *City of El Paso v. Heinrich*, 284 S.W.3d 366, 372–73 (Tex. 2009).
- “To fall within this *ultra vires* exception, a suit . . . must allege, and ultimately prove, that the officer **acted without legal authority** or **failed to perform a purely ministerial act.**” *Id.* at 372.
- “[A]n *ultra vires* suit must lie against the allegedly responsible government actor in his official capacity, **not a nominal, apex representative** who has nothing to do with allegedly *ultra vires* actions.” *Hall v. McRaven*, 508 S.W.3d 232, 241 (Tex. 2017) .

# Sovereign Immunity: *Ultra vires*

- **Acting Without Legal Authority (1)**
  - “An *ultra vires* claim based on actions taken ‘without legal authority’ has two fundamental components: (1) authority giving the official some (but not absolute) discretion to act and (2) conduct outside of that authority.” *Hall v. McRaven*, 508 S.W.3d 232, 239 (Tex. 2017).
  - A government officers acts without legal authority if he exceeds the bounds of his granted authority or if his acts conflict with the law itself. *Houston Belt & Terminal Railway Co. v. City of Houston*, 487, S.W.3d 154, 158 (Tex. 2016).
  - “Although only exercises of absolute discretion are absolutely protected, whether a suit attacking an exercise of limited discretion will be barred is dependent upon the grant of authority at issue in any particular case.” *Id.* at 164.

# Sovereign Immunity: *Ultra vires*

- **Acting Without Legal Authority (2)**

- “An allegation that a government officer violated the Texas Constitution is an allegation that the officer acted *ultra vires*, that is, in conflict with the law constraining his discretion.” *Caleb v. Carranza*, 518 S.W.3d 537, 542 (Tex. App.—Houston [1st Dist.] 2017, no pet.).
- “Nevertheless, when a plaintiff sues to vindicate a constitutional right, ‘immunity from suit is not waived if the constitutional claims are facially invalid.’” *Id.* (quoting *Klumb v. Houston Mun. Emp. Pension Sys.*, 458 S.W.3d 1, 13 (Tex. 2015)); see also *Honors Acad., Inc. v. Tex. Educ. Agency*, 555 S.W.3d 54, 61 (Tex. 2018).

# Sovereign Immunity: *Ultra vires*

- **Failing to Perform Ministerial Acts**

- “Ministerial acts are those where the law prescribes and defines the duties to be performed with such precision and certainty as to leave nothing to the exercise of discretion or judgment.” *City of Houston v. Houston Mun. Emp. Pension Sys.*, 549 S.W.3d 566, 576 (Tex. 2018) (quoting *Sw. Bell Tel., L.P. v. Emmett*, 459 S.W.3d 578, 587 (Tex. 2015)).
- “Conversely, discretionary acts are those that require the exercise of judgment and personal deliberation.” *Id.*
- “A writ of mandamus can be used to compel a public official to perform a ‘ministerial act,’ which, for purposes of mandamus, is an act where ‘the law clearly spells out the duty to be performed by the official with sufficient certainty that nothing is left to the exercise of discretion.’” *Id.* at 577 (quoting *Anderson v. City of Seven Points*, 806 S.W.2d 791, 793 (Tex. 1991)).

# Sovereign Immunity: *Ultra vires*

- **Permissible Relief**

- There is a fundamental difference between declaratory and injunctive claims regarding past violations and those seeking only to compel the government to follow the law in the future; the government is immune from the former but not the latter. *Heinrich*, 284 S.W.3d at 376.
- When a nonrecurring injury is past and the only plausible remedy is a monetary award, the *ultra vires* claim—even if pleaded as a claim for injunctive or declaratory relief—is barred. *City Houston v. Williams*, 216 S.W.3d 827, 829 (Tex. 2007); *In re Nestle USA, Inc.*, 359 S.W.3d 207, 212 (Tex. 2012) (“Retrospective monetary claims, even by way of mandamus or declaratory relief, are generally barred by immunity, absent legislative consent.”).
- But not everything with a fiscal impact implicates immunity. The question is whether it is prospective or retrospective. *Heinrich*, 284 S.W.3d at 375.

# Sovereign Immunity ≠ Governmental immunity

- **“Courts often use the terms sovereign immunity and governmental immunity interchangeably. However, they involve two distinct concepts.”** *Wichita Falls State Hosp. v. Taylor*, 106 S.W.3d 692, 694 n.3 (Tex. 2003).
- **Sovereign immunity protects** the State and “the various divisions of state government, including agencies, boards, hospitals, and universities.” *Id.*
- **“Governmental immunity . . .** protects political subdivisions of the State, including counties, cities, and school districts.” *Id.*
- Example of confusing conflation of “government immunity” (correct) and “sovereign immunity” (incorrect): *San Antonio Indep. Sch. Dist. v. McKinney*, 936 S.W.2d 279, 283 (Tex. 1996) (stating that “[c]ities and counties enjoy sovereign immunity” and “[t]he fact that a school district enjoys sovereign immunity does not mean that it is in effect the State for purposes of the Eleventh Amendment”).



# Governmental Immunity

- Sovereign immunity is one of the “attributes of sovereignty.” *Rosenberg Dev. Corp. v. Imperial Performing Arts, Inc.*, 571 S.W.3d 738, 746 (Tex. 2019).
- “Political subdivisions of the state—such as counties, cities, and school districts—are not sovereign entities, but under the governmental-immunity doctrine, they share the state’s immunity when performing governmental functions as the state’s agent.” *Id.*
- “Unlike the state, however, municipalities can exercise their broad powers in two different capacities: proprietary and governmental.” *Id.*
- “[N]o immunity exists for acts performed in a proprietary, non-governmental capacity.” *Id.* at 746–47 (internal quotations omitted)



# Individual Capacity Claims

- State official held *personally* liable
- Claim is based on the conduct of the individual
- The official can assert:
  - qualified immunity (to federal claims)
  - official immunity (to state claims)



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## Qualified Immunity (federal claims)

- Qualified immunity “shields government officials from liability when they are acting **within their discretionary authority** and their conduct does **not violate clearly established statutory or constitutional law** of which a reasonable person would have known.” *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982).
- “Put simply, qualified immunity **protects all but the plainly incompetent or those who knowingly violate the law.**” *Mullenix v. Luna*, 136 S. Ct. 305, 308 (2015) (internal quotation omitted).



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## Qualified Immunity (federal claims)

- A right is clearly established if the law **is clear in a particularized sense**, such that **a reasonable official would be put on notice** that her **conduct is unlawful** and violates the right in question. *Wernecke v. Garcia*, 591 F.3d 386, 392–93 (5th Cir. 2009).
- “[C]learly established law should not be defined at a high level of generality,” but must instead be “**particularized to the facts of the case.**” *White v. Pauly*, 137 S. Ct. 548, 552 (2017).
- “Otherwise, plaintiffs would be able to convert the rule of qualified immunity into a rule of virtually unqualified liability simply by alleging violation of extremely abstract rights.” *Id.*



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## Official Immunity (state claims)

- “Government employees are entitled to official immunity from suit arising from the performance of their **(1) discretionary duties** in **(2) good faith** as long as they are **(3) acting within the scope of their authority.**” *City of Lancaster v. Chambers*, 883 S.W.2d 650, 653 (Tex. 1994).
- Official immunity is necessary for public servants “**to act in the public interest with confidence** and without the hesitation that could arise from having their judgment continually questioned by extended litigation.” *Ballantyne v. Champion Builders, Inc.*, 144 S.W.3d 417, 427 (Tex. 2004).



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## Official Immunity (state claims)

### Official immunity applies when:

- The claim arises from the employee's "**discretionary act**," which means the act required personal deliberation, decision, or judgment;
- The act is performed in "**good faith**" if a reasonably prudent official under similar circumstances could have believed act was justified; and
- The act is **within the scope of the official's authority**, which means she is discharging the duties generally assigned to her; an employee's scope of authority extends to job duties to which the official has been assigned even if the official errs or acts unlawfully in completing the task.



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## Other Immunity Defenses

### ▶ **Prosecutorial Immunity**

- Applies to prosecutors and their assistance in the performance of prosecutorial functions
- Is not overcome by allegations that the prosecutor acted in bad faith

### ▶ **Judicial Immunity**

- Is only overcome when a judge performs non-judicial actions or when the actions are taken in a complete absence of all jurisdiction.
- Is not overcome when the judge is accused of acting corruptly or maliciously

### ▶ **Legislative Immunity**

- Attaches to all actions of local officials taken in the sphere of legitimate legislative activity

### ▶ **These immunities are absolute and preclude suit and liability**

- May be “quasi”—is generally based on the nature of the act at issue
- Bar all recovery and may cut off discovery (depositions, etc.)



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## Mike Leach v. Texas Tech University

- Mike Leach v. Texas Tech University, 99th District Court of Lubbock, TX
- Petition alleged violations of:
  1. Texas Whistleblower Act
  2. Breach of Contract
  3. Takings Clause of the Texas Constitution
  4. Fraud in the Inducement
  5. Negligent Misrepresentations
  6. Defamation
  7. Tortious Interference
  8. Conspiracy to (see 1-7)
- District Judge dismissed all causes of action, except for Breach of Contract
  - Judge ruled that TTU had waived its immunity by its conduct and actions, i.e. entered into a contract
  - "waived its immunity from suit by and through its conduct."





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## Mike Leach v. Texas Tech University

- Leach appealed to the 7th Court of Appeals of Texas
  - Leach v. Texas Tech University, No. 07-10-0247-CV
- Chief Justice Brian Quinn's opinion extensively lays out sovereign immunity in Texas
- "If the highest civil court in Texas truly means what it said, then the holding in State Street simply is wrong. If, on the other hand, there may still be instances akin to those in State Street warranting the application of waiver by conduct, then the Supreme Court's utterances about the legislature having the exclusive authority to waive sovereign immunity are inaccurate. In either case it is a matter for the Supreme Court (or Texas Legislature) to resolve, and we have no choice but to abide by their decision."
- The Supreme Court of Texas denied a hearing on the appeal with no comment
- As it stands today Texas is one of very few states that has sovereign immunity from suit and liability.
- The only way to sue the state of Texas is to request permission to do so from the Legislature.

# Trivia and Prizes!

What state was sued that led to the passage of the 11th Amendment?

# Trivia and Prizes!

Mike Leach alleged 8 causes of action in his petition, can anyone name two?

# Trivia and Prizes!

In what district court was the Leach v. TTU case heard in?